

REPORT TO	DATE OF MEETING
Governance Committee	25 th November 2015

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SUBJECT	PORTFOLIO	AUTHOR	ITEM
Contracts Procedure Rules (CPR's) & The 2015 Public Contracts Regulations	Finance & Resources	Janet Hinds	7

SUMMARY AND LINK TO CORPORATE PRIORITIES

New Public Contracts Regulations came in to force on 26th February 2015. These replace the previous 2006 Regulations and transpose into UK law the 2014 EU Public Contracts Directive.

In addition to implementing the EU Directive, the UK Government have also taken the opportunity to incorporate additional areas for below EU threshold procurements. These additional areas have arisen out of the Lord Young report and are aimed at improving access to procurement opportunities for small businesses.

This report identifies the updates required to the Council's Contracts Procedure Rules (CPR's) in order to comply with the 2015 Regulations and also suggests some additional practical updates in order to ensure the rules remain effective and fit for purpose, without being overly bureaucratic.

A copy of the current rules, adapted with tracked changes, in order to clearly show the proposed updates, is attached for consideration at Appendix 1.

The proposed changes, which are the subject of this report, have been considered by the Officer Governance Group, who are supportive of the changes.

This report links to the corporate priority of efficient, effective and exceptional Council.

RECOMMENDATIONS

That Governance Committee consider and comment on the revised draft Contracts Procedure Rules attached to this report at Appendix 1 and recommend their adoption.

DETAILS AND REASONING

1) 2015 Public Contracts Regulations

The 2015 Public Contracts Regulations came in to force on 26th February 2015. They replace the previous 2006 Regulations and transpose into UK law the 2014 EU Public Contracts Directive.

The Regulations and the Directive set out the legal framework for public procurement. Contracts Procedure Rules (CPR's) are the Council's own internal procurement rules which Officers must follow, and it is therefore necessary to review and update CPR's to take account of any changes required by the new 2015 Regulations.

In addition to implementing the new EU Directive, the UK Government has also taken the opportunity to incorporate a number of reforms for below EU threshold procurements. These reforms have arisen out of the Lord Young's recommendations in his report on "Growing your Business" (May 2013). The reforms are set out in Part 4 of the new Public Contracts Regulations and are aimed at improving access to procurement opportunities for small businesses.

The key reforms are:

- **Use of Pre-Qualification Questionnaires (Regulations 111 and 107)**

In below-threshold procurements (regulation 111)

A contracting authority may not include a pre-qualification stage in any procurement where the value is below the EU threshold for goods and services, currently £172,514 for local authorities. In practical terms, this means that a two stage restricted procedure using a Pre-Qualification Questionnaire (PQQ) as part of a Stage 1 pre-qualification/ shortlisting stage, is not permitted. However contracting authorities may ask questions in the tender documentation relating to a potential supplier provided that the questions are relevant to the subject matter of the procurement and proportionate.

In above-threshold contracts (regulation 107)

For procurements above these threshold values, a pre-qualification stage is permitted but Crown Commercial Service (CCS) statutory guidance on the new requirements relating to the use of PQQ's and the Qualitative selection of suppliers must be followed. The guidance includes a standardised set of core questions to be used in the supplier selection stage of the relevant procedure.

This reform is incorporated into the revised draft CPR's at Paragraph 13 (previous paragraph 17) which has been updated accordingly.

- **A requirement for contracting authorities to insert provisions in all public contracts to ensure prompt payment through the supply chain (Regulation 113)**

This reform has been incorporated into the Council's procurement procedures by the updating of the Council's various Model sets of Contract Conditions in conjunction with Legal Services. An amendment to CPR's is therefore not required for this particular reform.

- **Publishing contract opportunity advertisements and contract award information on the new Contracts Finder portal (regulations 106 and 110).**

Contracting authorities must ensure that when they advertise a new procurement opportunity above certain thresholds (£25,000 for local authorities), that the advert is placed on the national Contracts Finder portal. <https://www.gov.uk/contracts-finder>

This website must be used in addition to any local or regional portals currently being used. Authorities must also subsequently ensure that contract award information is placed on Contracts Finder once the contract is awarded.

The above only applies to contracts which are openly "advertised" (i.e. public advert for any company to respond to), and does not therefore apply to quotations which are "invited" (i.e. by invitation only) in accordance with local Contracts Procedure Rule thresholds.

This reform is incorporated into the revised draft CPR's at Paragraphs 10, 11 and 24 which have been updated accordingly.

- **Statistical Returns (Previously CPR 38)**

Annual submission of above threshold statistical returns was a requirement of the 2006 Public Contracts Regulations (now superseded by the 2015 Regulations) and this paragraph has therefore been deleted.

- **Other Changes as a result of the updated Directive**

The new Directive introduces a host of reforms including additional new procedures, reduced timescales, removal of Part B Services and the introduction of a new light touch regime to name just a few. The existing CPR's provide an overview of the 2006 Regulation Procedures. However, it is considered more sensible to remove this overview, which cannot cover all of the requirements of the Regulations, and to require Officers who may be involved in an above threshold procurement to consult the Shared Procurement Team and Legal Services department prior to commencing any procurement which is subject to the Regulations.

This has been incorporated into the revised draft CPR's by removing the previous Paragraphs 13,14, 15 and 16 and updating Paragraphs 12, 19 23 and 26 accordingly.

2) Practical Updates

In addition to suggesting updates required to comply with the 2015 Regulations, this report also suggests the additional practical updates detailed below, in order to ensure the rules remain effective, clear, and fit for purpose, without being overly long and bureaucratic.

Contracts Procedure Rule 3

The current CPR 3 provides detailed requirements on officers' responsibilities in the event of any conflicts of interest and/or offers of gifts or hospitality. These areas are specifically covered by the recently refreshed Officers Code of Conduct. CPR 3 has therefore been updated to remove the detailed paragraphs and to refer to the Code of Conduct which must be complied with. This will ensure that there are no inconsistencies between the two documents.

Contracts Procedure Rule 8.2

Whilst working with Officers across the Authority a recurring issue has been identified with the application and interpretation of the aggregation rule for relatively low value procurements.

CPR's say:

8.2 Where the duration of a contract is for an indefinite period, or where its term cannot be defined, the contract value should be taken to be the estimated value of the contract over a period of four years.

The above is the mechanism for calculating contract values for the purposes of the Public Contracts Regulations and is sensible for higher value procurements but is not practical or proportionate for low value contracts. For example a £3000 per year rolling service agreement has

a contract value of £12,000 under the above rule. The intermediate value threshold in CPR's is £10,000, above which a formal procurement exercise through the Chest with a minimum of 3 quotes must be carried out.

In many cases, particularly for maintenance/ service / license agreements it is necessary or beneficial to use a specific provider for technical, warranty or quality reasons, and the cost of carrying out a procurement exercise in such low value instances is likely to outweigh any potential benefits and may result in increased costs.

It is recommended that the above rule 8.2 be extended to say:

This rule shall not apply to contracts with an indefinite period where the annual value is below £10,000. Such contracts shall be subject to an annual review.

Contracts Procedure Rule 8.3

CPR's say:

8.3 Circumstances may arise where a number of low value contracts for similar works/goods or services are given to one Contractor within a 12 month period. In this case, 12 months expenditure should be aggregated to determine which procedure should be followed. When the value of those contracts is aggregated the effect may be to move the total purchase from one value band to another. This may mean that a different procurement method has to be followed to comply with these rules, or it may be necessary to seek a waiver of these rules in such circumstances.

The above rule is also based on the mechanism for calculating Contract values under the Public Contracts Regulations but can also be impractical and disproportionate for relatively low value contracts.

Circumstances can occur where more than £10k is spent with a particular supplier on similar goods or services over 12 months but where it would be inappropriate, impractical and not cost effective to aggregate this volume in to an annual procurement exercise.

It may not be known at the beginning of the year exactly what the requirements will be. Consequently an aggregated procurement exercise at the start of the year may not be feasible or practical. In these circumstances it would be very difficult to specify a contract and a general framework/ blanket discount arrangement covering a wide variety of goods in the same general category for a specified contract period could lead to additional cost, and effect operational flexibility/ freedom to spot buy. Additionally the resources/ effort involved would not be cost effective.

It is important that the procurement service is recognised as adding value in a supporting role, focusing on appropriate areas which can deliver maximum benefits. It would therefore be helpful to build some practical flexibility in to CPR's whilst maintaining appropriate control in order to ensure that any such flexibility is not inappropriately mis-used.

It is therefore recommended that the above rule 8.3 be clarified and extended as below:

- 8.3 *Circumstances may arise where a number of low value contracts of the same type, for regular, routine similar goods or services are given to one Contractor within a 12 month period. In this case, 12 months expenditure should be aggregated to determine which procedure should be followed. When the value of those contracts is aggregated the effect may be to move the total purchase from one value band to another. This may mean that a different procurement method has to be followed to comply with these rules, or it may be necessary to seek a waiver of these rules in such circumstances.*
- 8.3.1 *The requirement to aggregate under the circumstances described at 8.3 will not apply where The Authorised Officer identifies that the spend activity is:*
- (a) *unknown or unplanned and therefore cannot be specified at the commencement of the 12 months period or*
 - (b) *of a similar general category but is so varied that it would be impractical or difficult to specify, the aggregate annual value is less than £20,000, and a blanket discount arrangement, schedule of rates or other such general framework agreement would be impractical and lead to additional cost.*
- 8.3.2 *In any event, the Authorised Officer shall ensure that best value is achieved, make best use of the Council's purchasing power by aggregating where appropriate, undertake periodic review of the procurement decision, and keep appropriate records including the reason for any decision not to aggregate, throughout.*

Contract Procure Rule 5 - High Value Pre-Procurement Approvals

CPR's say

5. Who has authority to carry out procurement on behalf of the Council?
- 5.1 Any procurement carried out on behalf of the Council may only be undertaken by officers with the appropriate delegated authority to carry out such tasks as set out in the Council's Constitution. Officers with delegated authority may only authorise other officers who have the appropriate skills and knowledge appropriate to the task. Officers shall be informed by his/her Director/Service Head, in writing, of the extent of any delegated authority and any applicable financial thresholds for each procurement. These officers shall be known as Authorised Officers.
- 5.2 For all High Value procurements, prior approval of the proposed contract award procedure including the evaluation criteria to be applied shall be sought from the relevant member of the Senior Management Team. Additionally for all High Value Procurements above the EU threshold, and for any involving the transfer of staff, Authorised Officers must seek prior approval of the proposed contract award procedure, including the proposed evaluation criteria and weightings to be applied from Cabinet unless Cabinet have previously delegated that decision.

It has come to light whilst working collaboratively with other Councils that, in many instances, other authorities do not require formal approvals at pre-procurement stage, where budget provision is already approved and in place. Member approval is, in these instances, at contract award decision stage, with the procurement process in accordance with the provisions of CPR's e.g. formal Tenders, or use of a framework, with Authorised Officers using their professional and technical knowledge to determine the evaluation criteria and weightings. Further pre-procurement approval is seen to be an overly bureaucratic, duplicated step, which can cause delays.

This report proposes replacing the Cabinet pre-procurement approval stage underlined above, for above EU threshold procurements, where budget provision is already approved and in place with Executive Cabinet Portfolio Member approval as a delegated decision as detailed below. This streamlines the process but retains member involvement.

5. *Who has authority to carry out procurement on behalf of the Council?*

5.1 *Any procurement carried out on behalf of the Council may only be undertaken by officers with the appropriate delegated authority to carry out such tasks as set out in the Council's Constitution (Scheme of Delegation). Officers with delegated authority may only authorise other officers who have the appropriate skills and knowledge appropriate to the task. Officers shall be informed by his/her Director/Service Head, in writing, of the extent of any delegated authority and any applicable financial thresholds for each procurement. These officers shall be known as Authorised Officers.*

5.2 *Revenue Expenditure*

Subject to the provisions of Paragraph 5.5, Directors and their Authorised Officers may seek Tenders and Quotations in accordance with these Contracts Procedure Rules for any item of revenue expenditure for which budget provision has been made, and may accept such Tenders/ Quotations in accordance with these Contracts Procedure Rules, up to a total contract value of £75,000. Contract awards above £75,000 constitute a Key Decision and Cabinet Authority must be sought for such acceptance.

5.3 *Capital Expenditure.*

Subject to the provisions of Paragraph 5.5, Directors and their Authorised Officers may seek Tenders and Quotations in accordance with these Contracts Procedure Rules, the particulars of which are shown as approved in the Council's capital programme for the current financial year and which have also been approved/comply with any additional requirements of the Council's Financial Regulations. Directors and their Authorised Officers may accept Tenders / Quotations in accordance with these Contracts Procedure Rules and the Council's Financial Regulations up to a total contract value of £75,000. Contract awards above £75,000 constitute a Key Decision and Cabinet authority must be sought for such acceptance.

5.4 *Any procurement which involves the transfer of Council Staff shall be treated as if High Value (above £75,000) Procurement and as such Cabinet authority must be sought for such acceptance.*

5.5 *For all High Value Procurements above the EU threshold, prior approval of the proposed contract award procedure including the evaluation criteria and weightings to be applied, shall be sought from the relevant Executive Cabinet Portfolio Member as a delegated decision.*

The wording included at new proposed Paragraphs 5.2 and 5.3 is based on the Preston CC CPR wording, and is also similar to requirements in other authorities who have been consulted, but with the addition of Executive Member pre-procurement approval for above EU threshold procurements.

To support the above proposed process, an additional requirement has been added at Paragraph 7 (Pre-procurement procedure) for Authorised Officers to satisfy themselves that they have the necessary authority to deal with the procurement and that there is budget provision for the

procurement in accordance with the provisions of Rule 5.

Contract Procedure Rule 32 (Joint Procurement)

The above paragraph has been updated to be consistent and refer to the same approval requirements included above at CPR 5, unless the joint procurement requires a commitment at the outset, prior to any bids being invited. In this event, Cabinet approval must be sought prior to committing to the joint procurement where the Council's estimated contract value exceeds £75,000. CPR 32 has also been updated to recognise that joint procurement is also commonly referred to as collaborative procurement.

Contract Procedure Rule 37 – Disposing of Surplus Goods

The above paragraph has been simplified with outdated and conflicting text removed to ensure an appropriate competitive process is adopted unless it has been agreed by the Head of Service that the goods in question are to be disposed of to a charitable/not-for-profit organisation, or disposal arrangements have been agreed within the original contract for purchase.

Contract Procedure Rule 42 – Emergency Procedures

New paragraph 42 has been included to clarify the arrangements for an emergency decision.

A copy of the current Contracts Procedure Rules, adapted with tracked changes, in order to clearly show the proposed updates, including any other additional minor tidying / removal of duplication is attached for consideration at Appendix 1.

The proposed changes, which are the subject of this report, have been considered by the Officer Governance Group, who are supportive of the changes.

WIDER IMPLICATIONS

In the preparation of this report, consideration has been given to the impact of its proposals in all the areas listed below, and the table shows any implications in respect of each of these. The risk assessment which has been carried out forms part of the background papers to the report.

FINANCIAL	This review has been carried out to ensure that relevant, optimum processes and controls are in place and maintained in order to achieve overall best value in the procurement process
LEGAL	This review is necessary to ensure the requirements of the 2015 Public Contracts Regulations are caught and addressed by the Council's internal rules. Fit for Purpose Contracts Procedure Rules will help to ensure that the Council meets its legal obligations in the Procurement Process

RISK	There is significant risk around compliance and failure to achieve best value, if Contracts Procedure Rules are not fit for purpose or fully understood and embedded across the Council. This review aims to ensure that the rules are relevant, practical and fit for purpose.
THE IMPACT ON EQUALITY	CPR's address equality issues and require completion of an Equality Impact Assessment where a change in service provision is proposed.

OTHER (see below)	
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<i>Asset Management</i>	<i>Corporate Plans and Policies</i>	<i>Crime and Disorder</i>	<i>Efficiency Savings/Value for Money</i>
<i>Equality, Diversity and Community Cohesion</i>	<i>Freedom of Information/ Data Protection</i>	<i>Health and Safety</i>	<i>Health Inequalities</i>
<i>Human Rights Act 1998</i>	<i>Implementing Electronic Government</i>	<i>Staffing, Training and Development</i>	<i>Sustainability</i>

BACKGROUND DOCUMENTS

Current Contracts Procedure Rules

2015 Public Contracts Regulations (See link below)

<http://www.legislation.gov.uk/uksi/2015/102/contents/made>