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**CHANGE TO CONTRACT PROCEDURE RULES**

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**Responsible Cabinet Member -  
Councillor Stephen Harker, Efficiency and Resources Portfolio**

**Responsible Director -  
Catherine Whitehead, Assistant Chief Executive**

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**SUMMARY REPORT**

**Purpose of the Report**

1. To update and amend the Contract Procedure Rules (CPR) to ensure that they help to support wider objectives; good practice; the delivery of budget reductions and legal compliance.

**Summary**

2. The current CPR, apart from minor updates, has not been reviewed since July 2010. There are a number of reasons why a review of the rules is required to bring them up to date:
  - (a) The Social Value Act has come into force and needs to be referenced in the CPR.
  - (b) A new EU Procurement Directive was approved by the European Parliament earlier this year. The Government has now laid regulations before Parliament which bring the Directive into UK law on 26 February 2015.
  - (c) Greater consideration needs to be given to the Council's aim to deliver more services in partnership with the third sector and to supporting the local economy and/or SME's where possible.
  - (d) The rules need to reflect improvements in practice and additional safeguards which have been implemented to help improve procurement and drive down costs such as the creation of the Procurement Board.
  - (e) There is a need to review the levels within the rules which have not been reviewed in line with inflation and to ensure that the processes do not build in

delays which affect the ability to procure effectively

## **Recommendation**

3. It is recommended Members approve the revised Contract Procedure Rules attached at **Appendix 1** which aim to:
  - (a) Incorporate the Social Value Act.
  - (b) Give effect to the regulations which introduce the European Directive into UK law.
  - (c) Give effect to co-production and support to the not for profit sector.
  - (d) Support procurement with local businesses and SMEs.
  - (e) Introduce rules in relation to agreeing the Price Quality/Split.
  - (f) Introduces rules in relation to setting the Contract Term
  - (g) Formalise the Procurement Board and its role.
  - (h) Change the levels at which one quote and three quotes must be obtained, and at which tendering must be carried out.
  - (i) Amend the rules in relation to waivers.
  - (j) Amend the rules in relation to Strategic Procurement Decisions.
4. Agree other changes to the Constitution and Rules which are consequential to the decisions outlined above

## **Reasons**

5. The recommendations are supported by the following reasons :-
  - (a) To give effect to new legislation
  - (b) To support efficiencies and reduce administration
  - (c) To support economic growth and building stronger communities through supporting local SMEs and the not-for-profit-sector.

**Catherine Whitehead**  
**Assistant Chief Executive**

## **Background Papers**

Public Contract Regulations 2015 SI No 102

Cath Whitehead : Extension 2306

S17 Crime and Disorder	There is no direct effect on Crime and Disorder
Health and Well Being	The changes will facilitate collaboration with voluntary and health sector through co-production.
Carbon Impact	There are no specific carbon impacts.
Diversity	There are no impacts for diversity.
Wards Affected	All wards are affected equally
Groups Affected	The changes support the not-for-profit-sector and SMEs.
Budget and Policy Framework	The report does not represent a change to the Budget or Policy Framework
Key Decision	This is not a key decision
Urgent Decision	This is not an urgent decision
One Darlington: Perfectly Placed	This report supports the key conditions of Economic Growth and Building Stronger Communities
Efficiency	This report supports further efficiencies through improved procurement practice and reduced administration.

## MAIN REPORT

### Legislative Changes

#### Social Value Act

6. The Social Value Act 2012 places a duty on the council to consider the social, economic and environmental wellbeing of the area when it carries out procurement. The legislation came into force in January 2013 and although some awareness raising of the legislation has been carried out there have to date been no changes to the procurement rules to draw officers attention to the duty and to put in place a process to ensure that the council is complying with this duty.
7. It is proposed that the rules would include the following clause:  
  
‘In line with the Public Services (Social Value) Act 2012, relevant procurements (of services over the current EU threshold) shall include consideration of the economic, social and environmental wellbeing of the area, how the Council might act with a view to securing improvement and whether to undertake any consultation in considering these improvements’.
8. Further information concerning social value, including reference to Government guidance could be incorporated into the CPR as an appendix.
9. It is also proposed that the Procurement Board (see para 26 (c)) could have a role in ensuring that officers have considered the duty when presenting items to the board.

#### The New EU Directive

10. The new EU Public Procurement Directive came into force on 17 April 2014. From that date EU member states had two years to implement it into national law. The UK Government has drafted new Public Contract Regulations. These have been laid before Parliament and come into force on 26 February 2015 (in some limited exceptions, parts of the regulations come into force at a later date). The regulations go slightly beyond what is required from the EU directive (ie gold plating) and incorporate changes recommended by Lord Young to help small businesses.
11. The main changes arising from the new law are set out below:

#### Service Classifications

- (a) The current distinction between Part A services (which are subject to the full EU tendering rules) and Part B services (which are subject to only limited procedural requirements) is abolished. This change means that all procurements over threshold will have to comply with the full EU tendering requirements (save the exception below).

- (b) A new "simplified regime" light touch regime will apply for certain social and other services including social, health, cultural, legal, hotel, restaurant and catering services. This will apply to services with a contract value over €750k. With both health and social care services (areas of our biggest spend) being affected by this change this will have an impact on our procurement of these services.

## **Procedures**

- (a) While the open and restricted procedures are still standard a new Innovation Partnership procedure is introduced which is intended to help the development of an innovative product, service or works with the subsequent purchase of outcomes of such development. This could be helpful in areas such as waste disposal where delivery solutions will vary significantly between providers.
- (b) The use of Competitive Negotiated procedure is extended to allow it to be used on much wider grounds than at present.
- (c) Optional provisions available to Member States to use prior information notices (PIN) as a means to calling for competition and potentially reducing time limits.

## **Clarification**

- (a) Clarification is given on pre procurement consultation, confirming that this is lawful providing it is not discriminatory, does not create unfair advantage and is transparent.
- (b) Contracting authorities must base the award of all public contracts on the "most economically advantageous tender". Based on price/quality ratios and/or lifecycle costs.
- (c) Codification of case law on the in-house awards (*Teckal*) and inter-authority cooperation (*Hamburg*) exemptions.
- (d) There is specific provision for dealing with conflicts of interests.
- (e) Clarification about the circumstances in which contracts may be modified during their term (*Presstext*) and in which a contractual partner may be changed.

## **Technology, Ease of Access and SME Help**

- (a) Simplification of the selection stage by the introduction of a European Single Procurement Document (a self-declaration form that bidders can continually update). This will stand as preliminary evidence of satisfaction of selection criteria and confirmation that bidders do not fall within one of the grounds of exclusion. Only the winning bidder will have to verify information and this will

be done at a later stage of the procurement.

- (b) Limiting the proof of financial capability to twice the estimated contract value other than where can be objectively justified.
- (c) Mandatory eprocurement requirements, including the transmission, availability and submission of notices and documents.
- (d) A requirement for contracting authorities to explain reasons why it was decided not to split contracts into lots.
- (e) For spend of £25k or above, when advertising, it will be a requirement that adverts are placed on national contracts finder (with some exceptions for the use of frameworks, approved lists, seeking quotes from closed groups and direct awards).
- (f) The banning of pre-qualification questionnaires for below EU threshold procurements.

12. Our rules must reflect these changes as the law will override our existing rules if any challenge to our procurement arises. Officers carrying out procurement will need to have clarity about what process they are to follow to be legally compliant. This is best achieved by a single set of rules. The following amendments are therefore proposed to give effect to the directive.

- (a) Removal of reference to Part B services. Clarification of the new lighter touch simplified regime for social, health, cultural, legal, and catering services, with a contract value of €750k or above.
- (b) Inclusion of information about the new innovation partnership procedure and the revisions to the competitive negotiated procedure to allow it to be used on much wider grounds.
- (c) Clarification about the ability to use prior information notices (PIN) in order to call for competition and potentially to reduce time limits. This will be referenced to SME, and the third sector, with linkages made to the social value.
- (d) Specific reference to the ability to engage in pre tendering market consultation.
- (e) Additional details about the declaration and procedures applying to conflicts of interests.
- (f) Details of the revised procedures about selection (ie self-declaration forms and clarification of details post evaluation).
- (g) Limitations on financial capability to twice contact value, unless a greater amount is objectively justified.
- (h) Inclusion of the e procurement requirements.
- (i) Clarification about the use of lots and need to justify the non-use of lots
- (j) Details of the requirement to advertise all spend of £25k or above on national contracts finder (with some exceptions for the use of frameworks, approved lists, seeking quotes from closed groups and direct awards).
- (k) Details of the banning of pre-qualification questionnaires for below EU threshold procurements.

## Third sector/Co-production

13. The Health and Well Being Board approved a new approach to working with the third sector which encourages a joint development approach to new commissioning. Although the rules have not been accommodated to facilitate this approach the MDT six month pilot is short term which means it is of low value but alternative and more flexible approaches need to be explored to tailor our procurement to meet our wider objectives.
14. The not-for-profit-sector are not specifically mentioned within the existing rules and are therefore subject to the same rules as any other commercial providers. This does not support a co-production approach which promotes detailed discussions with providers before resources levels are identified and any specifications are arrived at. The Council is unable to vary the rules for contracts which are above the European Threshold and where compliance with European rules is mandatory however below that level there is scope to have alternative approaches provided that they incorporate an objective assessment which can demonstrate value for money.

- (a) Proposed change – for a new paragraph to be included concerning Co production and the Third Sector:

‘The Council recognises the need to work collaboratively and more flexibly with the third and voluntary sector in the delivery of services to the local community. This may require more innovative approaches and early dialogue with the third sector, service users and communities in transforming the design and delivery of services.

Consideration should be given to using procedures that encourage maximum participation (for instance not using PQQ’s unless necessary) and the splitting up of contracts into lots that may encourage wider participation.

Where appropriate the Council may include in its specification and award criteria, factors that may have relevance to locality such as the social and economic and environmental aspects of letting contracts.’

In cases where it can be demonstrated that the partners are contributing to a joint outcome rather than where the Council is purchasing services or where grants are awarded these are not procurements but as this can limit the Council’s ability to specify outcomes and performance manage results the rules can better define their scope in the introductory passages.

- (b) Further information concerning third sector and co-production will be developed as guidance.

## **Local Economy and SME**

15. Currently rule 55 mentions that consideration should be given to including local suppliers in quotation invitations for spend up to £75,000.

16. It is proposed that a new paragraph could be added as follows:

‘The Council recognises the importance of a thriving and sustainable economy and will seek to ensure, in compliance with EU law and the Social Value Act that all businesses, including local businesses and SME’s are aware of and encouraged to participate in tendering opportunities. Consideration should be given to using procedures that encourage maximum participation, including preliminary market consultation and the splitting up of contracts into lots that may encourage wider participation. While the Council cannot unfairly favour local suppliers, it is legitimate to give consideration in drawing up a specification to factors that may have relevance to locality. For example those which require service delivery to be within a certain timescale or location in order to be responsive to service need. It is also necessary for procurers to consider the social and economic and environmental aspects of letting contracts’.

17. It is further proposed that additional internal communications and discussions will take place with staff to encourage consideration of factors which will support local SMEs and to avoid situations where procurement approaches could place local suppliers at a disadvantage.

18. In every case procurement approaches will need to be balanced between the competing priorities of encouraging innovative delivery models, supporting economic growth and achieving value for money in purchasing. The rules and the way in which they are communicated and discussed with staff will play a role in helping to develop intelligent commissioning.

## **Supporting the Delivery of the MTFP**

### **Evaluation Criteria – the Price/Quality Split**

19. In order to ensure that the Council uses every pound wisely (the third condition), the tender process needs to deliver value for money and to identify either the cheapest, or the most economically advantageous tender. As part of any tender process it is a requirement to determine and specify the amount of points which will awarded on price and the amount on quality. It is usual to have minimum quality standards. There are some requirements for service providers to be independently accredited by regulatory bodies in some areas (ie CQC or OFSTED).

20. There are significant consequences if the balance between cost and quality is lost. A split of 80% on quality and only 20% on price is giving a message to a tenderer that evaluation is based on quality and cost is no object. The local authority should not be giving out this message. Where price forms a significant part of the evaluation through the scoring this encourages bidders to make stretching



submissions to deliver services at the best possible value.

21. A detailed specification is the best way of achieving quality in contracting and effective contract monitoring through a performance management framework. So that quality in delivery is achieved through the management of the contract after award rather than the evaluation process.
22. The following approaches are recommended as means of achieving quality in contracts in preference to price/quality split.
  - (a) 0 – 6 scoring criteria.
  - (b) The use of performance or outcomes based payments in all significant service contracts, which will be payable only when defined targets/quality standards are achieved. This will encourage the provider to take their own steps to ensure targets/quality standards are met throughout the contract.
  - (c) Contracts with appropriate termination/ suspension clauses to enable the council to take steps to change bidders while avoiding complex litigation.
  - (d) Engagement with service users/ questionnaires.
  - (e) Performance targets which are tightly managed.
  - (f) Rigorous challenge through the evaluation of claims made by tenderers in bid documentation.
23. The quality safeguards above ensure that quality is maintained as a continuous requirement throughout the lifetime of the contract for service provision.
24. In the construction area there are variations but the higher figure (ie 60/40, 70/30, 80/20) will be on price. The most common being 80/20.
25. In the social care sector a greater emphasis is placed on quality. However there is a need to ensure that there is still an emphasis on price. In particular any proposal with 80% on quality should be resisted as giving the wrong message to providers. It is recommended that 40% should be the lowest with any case in which the price is less than 50% being subject to a specific business case to the procurement board as to why this is appropriate and how value for money will be achieved.

## **Contract Term**

26. Every service is subject to the repeated requirement to achieve greater savings. For services which are subject to contract, the length of the contract may be such that the service levels required at the time of letting the contract are no longer appropriate. To give the greatest opportunity for service reductions contracts should be let with a balance between achieving value for money in the delivery and achieving necessary service reductions. The contract term is to be set at a length that takes into account of the possibility that the Council may need to withdraw from service provision including the area being contracted for. Consideration needs to be given to a contract length that will achieve value, give flexibility (for instance by including extension clauses in the contract) and avoid excessive lock in periods.
27. It is proposed that contracts for five years will be let on the basis of eg two years with potential for extension for a two or one year period up to a total of five years.

This may not be appropriate in cases where eg a large scale IT system is being implemented where the implementation may take a period of two years but may well be appropriate for service delivery contracts where there are alternative models of delivery or scope for service reductions.

## **Procurement Board**

28. In order to provide greater scrutiny about buying decisions and greater control on spend a Procurement Board was established in 2010. The Board meets fortnightly and considers quotations ( £5k and above and up to £75k) and tenders (£75k and over). It also considers non-competitive tenders under £75k which do not require tendering but are unable to comply the requirement to obtain three quotes. The Board also receives information on other procurement activity and considers how to improve and achieve value.
29. It is proposed that in order to formalise the current arrangements and incorporate the Procurement Board into the CPR, the rules are amended to include the role of the Board as set out below:
- (a) Consider exception reports on contracts where performance is poor or where serious issues have arisen. Challenge the approach of commissioning officers across the Council for the purpose of improving value and efficiency.
  - (b) Ensure that officers have considered their responsibilities in relation to SMEs, the not for profit sector and have addressed the duty in the Social Value Act before presenting to the Board
  - (c) Provide direction on the best approach to commissioning, procurement and contract management.
  - (d) Consider exception reports on contracts where performance is poor or where serious issues have arisen.
  - (e) Approve procurement activity on proposed spend of £10k and above, including on frameworks, quotes and tenders.
  - (f) Approve the award decisions of strategic procurements.
  - (g) Determine requests for contract extensions.
  - (h) Determine requests for waivers of CPR.
  - (i) Receive exemption reports submitted by Directors who have exercised powers under the emergency and urgency provisions.
30. The core membership of Procurement Board will be:
- Director of Neighbourhood Services and Resources (Chair)  
Assistant Director, Finance and Human Resources  
Head of Legal Services and/or Principal Lawyer, Commercial
31. Other Directors and AD's attend as appropriate. Decisions made by the procurement board are minuted and formal agendas for meetings are prepared. Decisions will be subject to the Council's wider decision making rules in relation to key decisions.

## **Streamlining the Process of Procurement**

32. Officer time, at a cost to the Council, is spent in carrying out procurement including drawing up specifications, seeking quotes and tenders and carrying out evaluation. At times the cost of carrying out the work can outweigh the cost savings achieved by the process. It remains a legal requirement and good practice to carry out procurement in accordance with rules. It is however prudent to review the rules from time to time to ensure that they are not overly bureaucratic or impeding service delivery. An exercise has been carried out with senior managers to identify the key improvements that they would like to be reflected in any revised rules. The advantage of higher levels is that it reduces the number of instances in which formal tendering needs to take place and also for lower cost purchases the number for which quotes are required.

## **Procurement Levels**

33. One factor is the levels at which the various procurements processes kick in. The CPR have been revised several times but over the last 15 years the levels have not been reviewed. Reducing the level reduces the workload for officers but has a corresponding risk to achieving best value through direct purchases with suppliers.
34. The changes that are proposed are set out below with the current level in brackets:
- (a) Purchases up to £9,999 (£5,000) - one quote
  - (b) Purchases of £10,000 (£5,001) up to £99,999 (£75,000) - 3 quotes (and for contracts of £25,000 and above, if being advertised a requirement to advertise on contracts finder)
  - (c) Purchases of £100,000 and above (£75,001) up to EU threshold – open tender
  - (d) Purchases over EU threshold – OJEU compliant open tender

## **Waiver of Contract Procedure Rules**

35. The current rules provide that in appropriate cases where a formal tendering process is required but is either not possible or not appropriate provided always that value for money can still be achieved, the Council can waive Contract Procedure Rules to allow a direct procurement but this decision currently rests with full Council. As there are only five Ordinary Council meetings per year there are delays in cases where waiving of rules is appropriate. The proposal is that decisions to waive are delegated to the Procurement Board and reported to Cabinet.
36. It is suggested that criteria for waivers is set out in the CPR as follows:
- (a) Applications for waivers of CPR must be made to the Procurement Board. Waivers of CPR will only be allowed for sub EU Threshold contracts after full consideration is given to the following:
    - i. The contact value and the length of the proposed contract.

- ii. What steps have been taken to satisfy that the best value duty has been complied with (for instance quotations, market testing).
- iii. The extent to which there are good reasons why it is not possible to undergo a competitive process (for instance, pressing need or urgency, where further work is required before going to market, where only a short contract extension is needed, or the lack of an available market).
- iv. Whether the new contract is intended to be a stop gap prior to undergoing a competitive process.
- v. The availability of compliant alternatives to direct awards, such as frameworks.
- vi. Any other reason that is being given by the commissioning area.

(b) It is anticipated that waivers will be exceptions rather than routine. The use of waivers must be reported back to Cabinet.

### **Strategic Procurements**

37. The Procurement Rules provide a process for identifying those procurements which because of the value or significance of the contract require greater scrutiny. These are classified through a set of criteria by Cabinet as Strategic Procurements. These procurements require a procurement plan to be set out and approved by Cabinet. At the current time after the evaluation the contract award decision is also made by Cabinet. In practice the officers carry out the evaluation and present the findings to Cabinet in a summary report to make the decision. It is proposed that the formal decision is taken by officers but as above with waivers is reported to Cabinet to provide oversight of the decisions made.

38. The greatest opportunity to influence the procurement process is in the development of the procurement plan. It is at the planning stage that the price/quality split, the contract terms and the specification are prepared. For Cabinet to exert influence over the procurement process there is the opportunity for the plan to include greater detail and be subject to fuller scrutiny.

### **Implementation Plan**

39. This report seeks Members' support for the changes which concern executive functions subject to final approval by full Council. The Contract Procedure Rules form part of the Constitution and it is therefore Council's responsibility to approve the changes to the rules but some of the functions described are Executive functions and therefore require a decision of Cabinet.

### **Consultation**

40. Although there is ongoing consultation with providers and discussions with the not-for-profit and small business sector there has been no formal consultation on the

detail of the rules outside the authority.