

AUDIT COMMITTEE

Update and amendments to the Council's Contract Procedure Rules 30th January 2025

Report of the Monitoring Officer

PURPOSE OF REPORT

This report seeks to provide Members with an update on the changes required to the Council's Contract Procedure Rules in response to procurement legislation coming into effect in 2025.

This report is public

RECOMMENDATIONS

The Audit Committee is recommended to:

- (1) Approve the proposed changes to the Contract Procedure Rules.
- (2) Delegate to the Monitoring Officer to make any further necessary changes to the Contract Procedure Rules if required, to comply with subsequent Government guidance, policy and updated legislation following the implementation of the Procurement Act 2023.

1.0 Introduction

- 1.1 The Contract Procedure Rules (CPRs) are set out in Part 3 of the Council's Constitution and must be regularly reviewed and updated as part of the Council's governance process. This contributes to the Council's system of effective internal control.
- 1.2 The CPRs are intended to promote good procurement practice, public accountability and to deter corruption.
- 1.3 The proposed amendments reflect a significant update in line with the requirements of the Procurement Act 2023 (the Act) which received Royal Assent on 26 October 2023 and is scheduled to come into force on 24 February 2025. Once implemented, the Act will repeal the Public Contracts Regulations 2015 (PCRs), the Concessions Contracts Regulations 2016 and the Utilities Contracts Regulations 2016, to become the law that regulates procurement in the UK.
- 1.4 The proposed amendments incorporate detailed procedural guidance, and enhanced compliance and transparency measures. These changes aim to improve the efficiency, accountability, and effectiveness of the Council's

procurement activities.

- 1.5 The CPRs are also being updated to reflect The Health Care Services (Provider Selection Regime) Regulations 2023 which came into force on 1 January 2024 and applies to the Council when procuring health care services such as mental health services for staff.
- 1.6 Finally, the CPRs are being updated to reflect an internal audit recommendation to set out how contract variations should be dealt with .The recommendation included that all variations should be reviewed by Legal Services prior to the agreement of any variation.
- 1.7 The current CPRs (approved 2020) will remain in force until the Procurement Act 2023 takes effect. The proposed amendments to the CPRs are set out in tracked changes at Appendix 1, a clean version of this is set out at Appendix 2.

2.0 Procurement Act 2023 – Key updates

- 2.1 The Act aims to create a simpler and more transparent regime for public sector procurement that will deliver better value for money and reduce costs for suppliers and the public sector. Procurement procedures have been simplified and the Act introduces two procedures of competitive tendering: the open procedure and the competitive flexible procedure.
- 2.2 The open procedure is a single stage procedure, and all information is submitted by suppliers at the tender stage. This could be used for a known and simple requirement with a small market where there is no need to reduce the number of suppliers that are assessed.
- 2.3 The competitive flexible procedure provides the ability to design your own procurement process. The Council could use this procedure where its requirements are complex, and it would like to have formal engagement with suppliers during a negotiation or dialogue stage. The Council could also assess conditions of participation before inviting a tender submission to reduce the number of suppliers invited to participate.
- 2.4 The Act highlights a transparency by default position by introducing 17 procurement notices. Transparency will apply for the lifecycle of the procurement, for example, from planning procurement pipeline activity and conducting preliminary market engagement, reporting on supplier performance, contract modification and termination notices.
- 2.5 A new Central Digital Platform (CDP) will be introduced which consists of an enhanced version of Find a Tender and a new supplier information system. The platform will improve the quality and accessibility of commercial data for contracting authorities. It will give suppliers a single source to find tender opportunities and functionality that will allow them to register and submit basic business information without needing to duplicate this. This will reduce administration and duplication. This will make it easier to participate in procurements, particularly for SMEs, by submitting their basic business

information in one place. The notices will be published on the CDP via the Council's eSourcing platform, the Chest.

- 2.6 The Act introduces greater scrutiny for assessing suppliers and this also applies to their sub-contractors, associated or connected persons that are participating in the procurement process with them. Suppliers will self-declare against the exclusion grounds on the CDP. The first step when assessing tenders is for the Council to assess suppliers against the mandatory and discretionary exclusion grounds that can lead to a supplier being an excluded or excludable supplier and also reviewing the debarment list.
- 2.7 An excluded supplier is one where a mandatory exclusion ground applies and the contracting authority considers the circumstances are continuing or likely to occur again. An excludable supplier is one where a discretionary exclusion ground applies and the circumstances are continuing or likely to occur again.
- 2.8 When evaluating tenders in an above threshold procurement process (the thresholds include VAT, for services and purchase of goods the threshold is currently £213,477 and £5,336,937 for works), the Council will need to check the debarment list. The debarment list is a published list of excluded or excludable suppliers that, following an investigation, a Minister of the Crown has made the decision to add their name to the debarment list. The decision to add a supplier to the list would be because the investigation found them to be unfit or potentially unfit to tender and be awarded public contracts because a mandatory or discretionary ground for exclusion applies and the circumstances giving rise to that ground are continuing or likely to occur again.
- 2.9 If the supplier is on the debarment list for a mandatory exclusion ground, the supplier must be excluded from the procurement process. If they are on the debarment list for a discretionary exclusion ground, then they may be excluded subject to the contracting authority's discretion.
- 2.10 Contract management for contracts above £5 million is set out in the Act and contracts of this value must have at least 3 Key Performance Indicators (KPIs). Performance must be reported against the KPIs annually. Copies of the contract must be published. The Act permits certain redactions.
- 2.11 The Act introduces implied payment terms for all public procurement contracts to include a 30-day payment term. This term extends to subcontracts. Contracting authorities are required to publish payment compliance notices every 6 months which will detail compliance with paying invoices within 30 days of receiving the invoice. The aim is to set standards when paying suppliers and promote prompt payment.

3.0 Proposal

- 3.1 The main changes to the CPRs to reflect the Procurement Act 2023 are outlined below:
- 3.2 **Basic Principles – Section 1** – This section has been updated to include the

new procurement objectives and duties introduced by the Act. The objectives are to deliver value for money, maximise public benefit, sharing information, acting and being seen to act with integrity, treating suppliers the same. The objectives also include not putting a supplier at an unfair advantage or disadvantage and having regard to SMEs and that they may face particular barriers, contracting authorities will need to consider whether such barriers can be reduced or removed.

- 3.3 **Officer Responsibilities – Section 2** – This covers guidance on conflicts of interest assessment and due diligence to be carried out on suppliers. For example, to declare all conflicts of interest including any personal financial interest in relation to any current procurement process which they may be directly involved with and take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement processes and manage those conflicts of interest throughout the procurement process from the planning stage to the end of the relevant contract's term.
- 3.4 **Relevant Contracts – Section 4** – This covers guidance on below threshold contracts, particularly the notices required.
- 3.5 **Procurement records – Section 7** – This section has been amended to reflect the need to record reasons which explain any material decisions relating to the award of a public contract and that the Act requires the decision to be kept for a minimum of 3 years from when the contract is entered into by the Council and the successful supplier.
- 3.6 **Competition Requirements for Purchases, Partnership Arrangements Frameworks, Concession contracts and Light- touch contracts – Section 8** – The proposed amendments set out how to calculate the estimated contract value in accordance with the Act, updates to the procurement procedures which includes the competitive tendering process for above threshold contracts, the introduction of open frameworks and dynamic markets under the Act.
- 3.7 The full scope of the Act does not apply to notifiable below threshold procurement, however, Part 6 of the Act applies and this includes: the duty to consider SMEs and how barriers can be reduced, publishing a tender notice when advertising the opportunity and implied payment terms.
- 3.8 **Preliminary Market Engagement – Section 9** – This covers guidance on preliminary market engagement applicable to above threshold contracts. This helps to ensure greater transparency in procurement. If preliminary market engagement is carried out as part of an above threshold procurement, a notice must be published.
- 3.9 **Standards and Award Criteria – Section 11** - This section includes guidance which reflects the move away from Most Economically Advantageous Tender (MEAT), and the move toward the more flexible award criteria of Most Advantageous Tender (MAT). This is the tender that a contracting authority considers both satisfies its requirement (this is new in the Act) and best satisfies the award criteria which can include both price and quality evaluation (as before). The aim in the change of terminology is to provide greater reassurance to contracting authorities that they can take a

broader view of what can be included in the evaluation of tenders in assessing value for money.

- 3.10 **Notices - Section 10 - .** This covers the higher level of transparency required by the Act in procurement planning and notification to market. The Council will be required to publish an increased number of transparency notices. For example, a termination notice is required for above threshold procurement upon termination or expiry of the contract. The aim is to have a complete record available on the CDP of the procurement, contract, any changes, performance and expiry of the contract, all publicly available.
- 3.11 **Invitations to Tender and Quotations – Section 12** – This section sets out the new conditions of participation (previously selection criteria) that suppliers must satisfy in order to qualify to be awarded a contract following a competitive tendering procedure. This must relate to legal, financial or technical capacity of the supplier. For example, that the supplier has certain qualifications in order to provide the services or works required.
- 3.12 **Evaluation, Award of Contract and Debriefing of Candidates – Section 16** – Guidance has been added to reflect assessing suppliers including checking if they are an excluded or excludable supplier as defined in the Act. The guidance also sets out how suppliers should be notified of the outcome of the procurement process.
- 3.13 **Waivers – Section 17** – This section has been updated to reflect the circumstances in which a direct award would be permitted in accordance with the Act.
- 3.14 **Publishing Contract Information – Section 20** – The Act sets out that for contracts above £5million, at least 3 Key Performance Indicators (KPIs) must be set and performance against the KPIs published in a performance notice. A copy of the contract must also be published.
- 3.15 **Declaration of Interest – Section 23** – Guidance has been included to set out how to deal with conflicts of interest in accordance with the Act.
- 3.16 **Risk Assessment & Contingency Planning – Section 25** – This sets out that prior to commencing an above threshold procurement in accordance with the Act, the risk types need to be identified and any mitigating steps need to be considered.
- 3.17 **Modifications – Section 27** – **This is a new section added to reflect the audit recommendation that contract modifications be included in the CPRs.** This covers both making contract modifications (variations) under the existing public procurement legislation, the PCR and the Act.
- 3.18 **The Health Care Services (Provider Selection Regime) Regulations 2023 (PSR)** regulates how healthcare services are procured and will apply for health care services procured by the Council, for example counselling and physiotherapy. A new section relating to the PSR has been added to the

CPRs to reflect this regulation. This includes rules around how to procure healthcare services, the notices required, the direct award processes, the most suitable provider process and the competitive process.

3.19 In order to comply with subsequent Government guidance, policy and updated legislation following the implementation of the Act, the Monitoring Officer will make any further necessary changes to the CPRs if required.

4.0 Details of Consultation

4.1 The proposed changes have been recommended by external legal Counsel, Capsticks LLP and are supported by procurement.

5.0 Options and Options Analysis (including risk assessment)

	Option 1: Update the CPRs	Option 2: Do not update the CPRs
Advantages	Compliant with public procurement legislation and Provider Selection Regime Promotes good governance	None
Disadvantages	None	Not updating the CPRs would greatly increase the risk of non-compliant Procurement at the Council. Under section 135 of the Local Government Act 1972 a local authority is required to make standing orders for contacting of goods, works and services. In not updating the CPRs the Council would not have an up to date set of standing orders (CPRs) that are compliant with its statutory duties when spending public money.
Risks	None	This could leave the Council open to the risk of challenge for not complying with the procurement legislation. This could include a Court ordering that a contract be set aside, that the procurement process is suspended, an order that the procurement process be run again, and or an order for damages.

6.0 Officer Preferred Option (and comments)

6.1 Option 1 is preferred given that it will ensure the CPRs are compliant with public procurement legislation, the Provider Selection Regime, the audit

recommendation and compliance with the Local Government Act 1972 to have a set of up-to-date standing orders.

7.0 Conclusion

7.1 In conclusion, it is recommended that Option 1 is approved and that the Committee approves the proposed changes and recommends adoption of the updated CPRs.

RELATIONSHIP TO POLICY FRAMEWORK

Principle - An Inclusive and Prosperous Local Economy
Theme – Community Wealth Building & Deliver Effective Services
2.1 – social use of resources – Using our land, property, finance and procurement to benefit local communities and encouraging residents, businesses, organisations and anchor institutions to do the same.

CONCLUSION OF IMPACT ASSESSMENT

(including Health & Safety, Equality & Diversity, Human Rights, Community Safety, HR, Sustainability and Rural Proofing)

N/A

LEGAL IMPLICATIONS

These changes reflect the legislative changes to the public procurement regime

FINANCIAL IMPLICATIONS

The delivering of the new rules comes with no direct financial impact however it will create a training capacity for their introduction. This cost is expected to be minimal and can be managed from within existing budgets

OTHER RESOURCE IMPLICATIONS

None directly from this report

SECTION 151 OFFICER'S COMMENTS

The s151 Officer has been consulted and has no further comments to add.

MONITORING OFFICER'S COMMENTS

This report is in the name of the Monitoring Officer who will amend the Constitution if the updated CPR's are approved.

BACKGROUND PAPERS Appendices attached to the report:

- **Appendix 1: Contract Procedure Rules – Revised Version Tracked**

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Changes with proposed amendments

- **Appendix 2: Contract Procedure Rules – Clean copy**