

FINANCE, AUDIT AND RISK COMMITTEE
13 DECEMBER 2018

PUBLIC DOCUMENT

TITLE OF REPORT: UPDATED CONTRACT PROCUREMENT RULES FOR 2018/19

REPORT OF THE LEGAL COMMERCIAL TEAM MANAGER

EXECUTIVE MEMBER: LYNDA NEEDHAM

COUNCIL PRIORITY: RESPONSIVE AND EFFICIENT

1. EXECUTIVE SUMMARY

1.1 This report sets out the proposed changes to the Contract Procurement Rules for review and referral that, in summary, seeks to make the following changes:

- Updates to reflect the restructure and corresponding changes in the Constitution;
- Provides a reporting line for potential breaches to line managers/ Senior Management Team
- A new subsection to section 14 which allows for retrospective approval on Single Tenders following certain requirements being met;
- Ensuring that subcontractors are paid within 30 days payment terms;
- Update to section 29 which give Service Directors authority to extend contracts up to 12 months to a maximum value of £100,000;
- Provisions on the use of consultants updated in line with audit recommendations.
- Update to section 22 to establish an approval process for waivers above the EU threshold and a new approval process for waivers below the OJEU threshold.

2. RECOMMENDATIONS

2.1 That Committee considers the proposed changes and recommends their adoption to Full Council.

3. REASONS FOR RECOMMENDATIONS

- 3.1 That the Contract Procurement Rules are part of the Constitution (under Section 20) and are revised and updated periodically as part of the Council's governance and procurement review processes, contributing to effective organisational internal control. In addition, the review and adoption of the Council's Contract Procurement Rules is a key action in the Council's Procurement Strategy.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The option of not updating the Contract Procurement Rules would increase the risk of the Council not adhering to the latest procurement legislation and best practise and inconsistencies with the remainder of the Constitution.

5. CONSULTATION WITH RELEVANT MEMBERS AND EXTERNAL ORGANISATIONS

- 5.1 This report and appendices are being presented to FAR Committee for consideration, prior to referral to Council.

6. FORWARD PLAN

- 6.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

7. BACKGROUND

- 7.1 The Contract Procurement Rules are reviewed on a periodic basis to ensure they remain relevant and appropriate to the Council's needs. This review has been conducted by the Contracts & Procurement Group, led by the Legal Commercial Team Manager, Procurement Officer and Service Director - Legal and Community. The Service Director – Resources, who had previous responsibility for this area has reviewed and agreed the proposed changes.
- 7.2 The Rules were last reviewed by Cabinet at its meeting on 22nd November 2016 and recommended to Council for approval of the current version of the Contract Procurement Rules. Full Council approved the current version of the Contract Procurement Rules on 24th November 2016. They were also updated following the Senior Management restructure as per the Delegated Decision taken on 31 May 2018¹, such changes being reported through to Council (and not objected to) on 18 July 2018²

¹ [Delegated Decision 31 5 18 on Constitutional Amendments , item 29](#)

² <https://democracy.north-herts.gov.uk/ieListDocuments.aspx?CId=136&MIId=2008&Ver=4>

8. RELEVANT CONSIDERATIONS

- 8.1. The revised Contract Procurement Rules (“procurement rules”) are provided at Appendix A, with all proposed changes shown as tracked changes. **In addition, a list of the changes is provided at Appendix B and the rules are referred to with the new numbering.** The very minor changes throughout the procurement rules are not referred to in Appendix B, for example very minor changes for consistency of reference etc. A summary of key changes within this new version are outlined below.

Procurement responsibility and changes:

- 8.2. Since the last revision of the procurement rules, the Service Director – Legal and Community is now responsible for procurement and the Council’s Legal Commercial Team Manager now line manages the Council’s Procurement Officer, as part of that team within Legal Services, with another potential half a contracts lawyer post (currently vacant). The new structure provides a single channel of communication between commissioning officers and the combined legal and procurement service. The procurement rules have been updated to reflect that support and guidance now only needs to be directed to legal services and that future revisions shall be the responsibility of the Service Director – Legal and Community.

Reporting line for potential breaches to line managers/ Senior Management Team (section 2.4):

- 8.3. The reporting line for breaches of the Rules has been set out under this section to provide clarity on the process in the event of an identified breach.

Retrospective approval (section 14):

- 8.4. Retrospective approval has been added to the provisions for Single Tenders. This will allow officers the opportunity to ensure compliance with procurement rules where a genuine oversight, on the rules correct application has been made. The new additions under section 14.3 and 14.8 set out the conditions which must be met in order for retrospective approval to be granted by the Service Directors of Legal and Community and Resources.

Approval process for waivers above and below EU thresholds (section 22):

- 8.5. The existing Rules do not have an approval process for waivers over the EU threshold and this has now been included. The process to approve waivers below the EU threshold has also been updated to allow approval by statutory officers.

30 days payment terms (section 27):

- 8.6. The Public Contracts Regulations 2015 necessitate that Public sector buyers must pay prime contractors (Tier 1 suppliers) within 30 days and must ensure that their prime contractor includes equivalent 30 day payment terms in any subcontracts through the supply chain. In view of this, an addition to procurement rules, which stipulates contracts with subcontractors shall have a 30 day payment term clause, has been added.

Extension of contracts up to 12 months (section 29);

- 8.7. Currently, Service Directors are authorised to extend contracts by up to a period of 3 months. Consultation with officers undertaking regular contract extensions found this time frame was far too restrictive and short to allow for new contract arrangements to be made. This report seeks an increase from 3 to 12 months, up to a contract value of £100k. The relevant Executive Member shall be authorised to extend contracts for a period over 12 months or over 100k as applicable. In all cases, an extension must be the best value option.

Audit recommendations and consultants (section 31 and section 32):

- 8.8. In line with audit recommendations, the requirements in the procurement rules on the use of consultants, has been strengthened and corporate guidance produced to assist officer responsible for appointing consultants. This area of the procurement rules has been updated to reflect this and to direct officers to the guidance now available.

9. LEGAL IMPLICATIONS

- 9.1 Under section 10.1.5 (g) of the Finance Audit and Risk Committee's terms of reference it has remit "*to maintain an overview of the council's constitution in respect of Contract Procurement Rules consider any major changes and make recommendations to Council for approval*".
- 9.2 Full Council adopts and changes the Constitution and documents such as the Contract Procurement Rules that are part of the Constitution.
- 9.3 The Council must comply with the Public Contracts Regulations 2015 for all procurements above the EU thresholds. Below these thresholds, the procedures to adopt are largely for the authority to decide; the 2015 Regulations introduced some limited controls on procurements below threshold as well as authority for the Cabinet Office to introduce statutory guidance for below threshold procurements.
- 9.4 The overriding principles of transparency, non-discrimination, mutual recognition and equal treatment apply to all procurements, where there is evidence of cross-border interest, irrespective of their value. Having a robust set of Contract Procurement Rules should ensure compliance with these obligations and reduce the risk of successful legal challenge to a procurement exercise.

- 9.5 Section 135 of the Local Government Act 1972 confirms that Councils must make standing orders with respect to the making of contracts. Section 37 of the Local Government Act 2000 confirms that a Council's constitution must contain its standing orders.

10. FINANCIAL IMPLICATIONS

- 10.1 These are procedural matters that have no direct financial impact upon the Council's revenue or capital budgets.

11. RISK IMPLICATIONS

- 11.1 Adoption of the proposed amendments will contribute to the Council's internal control environment and the management of risk.

12. EQUALITIES IMPLICATIONS

- 12.1 In line with the Public Sector Equality Duty, public bodies must, in the exercise of their functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 12.3 The Contract Procurement Rules in themselves do not generate equalities implications, however their application when considering specific procurements of goods and services, or works, must take full account of this legislation.

13. SOCIAL VALUE IMPLICATIONS

- 13.1 As the recommendations made in this report do not, in themselves, constitute a public service contract, the measurement of 'social value' as required by the Public Services (Social Value) Act 2012 need not be applied. However, the application of the Contract Procurement Rules must take full account of this requirement when procuring a public service contract within specified parameters as laid out in the Social Value Act. Social Value is one of several factors to be considered when purchasing goods and services, or entering into a works contract.

14. HUMAN RESOURCE IMPLICATIONS

- 14.1 There are no implications, other than confirming that relevant managers will receive training on the updated procurement rules, and the Procurement Officer shall provide updates at relevant team meetings during 2019.

15. APPENDICES

15.1 Appendix A – Draft amended Contract Procurement Rules.

15.2 Appendix B - Summary of Changes.

16. CONTACT OFFICERS

Gavin Ramtohal, Contracts and Procurement Solicitor, 01462 474578

Gavin.Ramtohal@north-herts.gov.uk

Jeanette Thompson, Service Director – Legal and Community, 01462 474370

jeanette.thompson@north-herts.gov.uk

Contributors:

Kirstie Wilson, Procurement Officer, 01462 474284

Kirstie.wilson@north-herts.gov.uk

Rachel Cooper, Controls, Risk & Performance Manager, 01462 474606

Rachel.cooper@north-herts.gov.uk

Ian Couper Service Director – Resources 01462 474243

ian.couper@north-herts.gov.uk

Human Resources

HRhelp@north-herts.gov.uk

17. BACKGROUND PAPERS

17.1 None.

APPENDIX A - Draft amended Contract Procurement Rules

See separate document.

Appendix B – Summary of changes

Rule	Description of change
Part 1 flowchart	Contact legal only. This reflects the restructure
Rule 2.4	Reflects Council policy on misconduct and introduces a reporting function for the Monitoring Officer
Rule 2.7	Reflects the restructure
Rule 2.9	Reflects the restructure
Rule 3.1	Cross references the list of exemptions in Rule 3.4
Rule 3.4	Mirrors the exemptions listed in the Contract Procurement Rules 2015. For example, legal representation is exempt under the Regulations in recognition of the need to act quickly to mitigate risk.
Rule 3.8	Reflects the restructure and clarifies that Officers only need to contact legal for both contract and procurement service
Rule 3.9	Reflects the restructure
Rule 4.3	Reflects the requirements of the Council Employee Conflicts of Interest Policy
Rule 4.8	Now includes reference to the Members Gift and Hospitality with regard to the exercise of their functions under the Rules
Rule 4.9	Confirms the process for recording interests in contracts
Rule 4.10	Correct reference to the Whistleblowing policy
Rule 5.1.2	Amended to reflect terminology in the regulations
Rule 5.6	Reflects the restructure
Table A on pages 238 & 239	Reflects the restructure and also makes contract signing more practical. For most of the Council's services, the start dates can not be pushed back if the contract has not been signed. For works contracts, we can usually push back the start date and contract signing mitigate specific risks which we should require before contract start. For example, sealing the contract as a deed provides a 12 year limitation period which is helpful due to issues relating to discovery of latent defects. Construction contracts have a higher risk of

	dispute due to the nature of the works. For works contracts, officers typically require crucial post contract completion documents such as collateral warranties.
Rule 7.2	Reflects the restructure
Rule 7.3	Reflects the restructure
Rule 7.8	Reflects the restructure
Rule 7.12	Reference to decision notice template included
Rule 8.4.2	Pre qualification Questionnaire has been replaced by Selection Questionnaires
Rule 8.5.1	Reflects the restructure
Rule 8.7	Reflects the restructure
Rule 9.3	Reflects the restructure
Rule 10	Pre qualification Questionnaire has been replaced by Selection Questionnaires and to reflect the restructure
Rule 11	Reflects the restructure
Rule 14	Reflects the restructure
Rule 14.3	New process for retrospective approval for single tenders below EU thresholds. The rule contains specific criteria to ensure that statutory officers would apply similar checks and balances to a request prior to award of contract. In the event that a contract is awarded without obtaining approval it is in the interests of the Council to have in place a process that can legitimise the award of contract and protect the Council from challenge.
Rule 14.8	New process for retrospective approval for single tenders above EU thresholds. The rule contains specific criteria to ensure that statutory officers would apply similar checks and balances to a request prior to award of contract. In the event that a contract is awarded without obtaining approval it is in the interests of the Council to have in place a process that can legitimise the award of contract and protect the Council from challenge.
Rule 14.9	New reference to the requirement for publishing a decision notice
Rule 15.3	Reflects the restructure

Rule 16.1	Reflects the restructure
Rule 18	Reflects the restructure
Rule 19	Reflects the restructure
Rule 20.2	For consistency with Table A
Rule 20.3	For consistency with Table A. Insertion of a notification process for contracts not able to be signed prior to contract commencement.
Rule 22.2	Introduces an approval process for waivers above the EU threshold with discretion to refer to Cabinet. Currently there is no approval process in place
Rule 22.3	Introduces an approval process at officer level with discretion to refer to Cabinet. This should enables decisions to be made without automatic referral to Cabinet
Rule 27.3	Introduces a payment clause for subcontractors
Rule 28.4	Reflects the restructure
Rule 29.2	Permits a Service Director to approve a contract extension up to 12 months or a maximum value of 100k. Contracts are rarely extended up to 3 months and therefore this rule was not practical. A short term extension to facilitate a retender or make alternative arrangements can be up to 12 months. Consultation with the Service Director – Resources and relevant Executive Member is required as a check and balance to ensure budgetary control
Rule 29.3	Permits the relevant Executive Member to approve a contract extension of more than 12 months or over 100k. Approval of the Service Director – Resources is required in consultation with the Executive Member for IT and Finance. This ensures an appropriate check and balance on budgetary control.
Rule 31.5 to 31.9 Rule 32	<p>These have been deleted as the issues are covered in guidance and moved to section 32 where reporting on project details is more appropriate.</p> <p>In line with audit recommendations, the requirements in the procurement rules on the use of consultants, has been strengthened</p>

	and corporate guidance produced to assist officer responsible for appointing consultants
Definitions and key contacts	General updating