

Report to Council

23 March 2021

Subject:	Amendments to the Council's Procurement and Contract Procedure Rules
Director:	Head of Finance Rebecca Maher
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1 Recommendations

- 1.1 That the revised Procurement and Contract Procedure Rules be approved, as follows:
 - 1.1.1 Suspension of rule 13 regarding contract extension to permit extension of contracts in circumstances where response to impact of Covid 19 has resulted in lack of resources to undertake procurement processes;
 - 1.1.2 Approval to make direct award of contracts below the thresholds set out in the Public Contracts Regulations 2015 in circumstances where response to impact of Covid 19 has resulted in lack of resources to undertake procurement processes;
 - 1.1.3 Incorporation of Cabinet Office advice regarding reserving contracts below the thresholds set out in the Public Contracts Regulations 2015 by geographical location or specified sectors;
- 1.2 That further to 1.1 above, the Chief Executive and the Section 151 Officer be authorised to approve the extension of existing contracts due to expire in 2021.



2 Reasons for Recommendations

- 2.1 The impact of the Covid 19 pandemic on Council resources has resulted in lack of availability of Council officers in either the service teams, the Procurement team, or both, to undertake all of the procurement process that are currently required.
- 2.2 It is important that appropriately qualified and experienced officers undertake procurement activities to ensure that the Council achieves best value for money from its contracts with external suppliers and also to ensure that the Council meets its obligations to comply with the provisions of the Public Contracts Regulations 2015.
- 2.3 In addition, there has been a negative impact on the ability of some suppliers to respond to calls for tenders. In these circumstances the Council can better secure value for money by negotiating the continuation of existing contracts that do offer value for money than in tendering to limited markets.
- 2.4 Central government recognised these pressures in the advice issued to public sector contracting authorities in the Cabinet Office Procurement Policy Note (PPN) 1/20. The advice given was that contracting authorities should seek to extend current contracts that are due to expire, and to make direct award of contracts below the thresholds set out in the Public Contracts Regulations 2015 (“contracts below threshold”) where value for money can be demonstrated. Any contract extensions should be made in compliance with PCR 2015 Regulations 72 and 32, which set out the circumstances in which contracts may be modified or negotiated with suppliers without prior publication of a contract notice.
- 2.5 The Council acted on this advice in March 2020 via emergency decision-making with amendments to its Contract Procedure Rules to facilitate the recommended action.
- 2.6 As the impact of the first wave of the Covid 19 pandemic receded, the amendments were withdrawn and/or allowed to expire at the end of the year.



- 2.7 The second and third wave of the Covid 19 pandemic and current lockdown conditions have brought the same pressures to bear on availability of resources to undertake procurement activity. This is exacerbated by the delay of re-procurement of some contracts in 2020, which are now added to the pressure on resources.
- 2.8 The Cabinet Office has issued further guidance in PPN 01/21 to advise public sector contracting authorities that they should continue to refer to the pressures of responding to the impact of Covid 19 as justification for utilising the provisions of PCR 2015 in extending existing contracts or making direct award of contracts below threshold.
- 2.9 Reserving Contracts Under Threshold
- 2.10 The Cabinet Office issued guidance in December 2020 with regard to increased freedoms that will apply to procurement of contracts under threshold following the United Kingdom withdrawal from the European Union.
- 2.11 The advice states that contracts under threshold may be reserved on the basis of geographical location of suppliers and/or on the basis of sector; with contracts potentially reserved to voluntary and community sector organisations and small and medium sized enterprises. The ability to reserve contracts over threshold does not apply, because contracts over threshold must be advertised in accordance with PCR 2015.

3 How does this deliver objectives of the Corporate Plan?

- 3.1 The proposed amendments to the Council's Contract Procedure Rules (please see Appendix 1) will facilitate all objectives of the Corporate Plan that are promoted by contracts let with external suppliers. In addition, they offer greater potential for Council engagement with the local supply chain.



4 Context and Key Issues

- 4.1 The proposed amendments to the Council's Contract Procedure Rules with regard to rule 13 (please see Appendix 2 for the text of Rule 13) are intended to be on a temporary basis only. The time frame will be dictated by the requirement for resources to be directed toward responding to the impact of Covid 19 and the recovery of the supplier markets.
- 4.2 The proposed amendment to the Council's Contract Procedure Rules on the basis of the Cabinet Office advice regarding reserving contracts below threshold is intended to be a permanent change. This will enable the Council to reserve contracts on a regional basis and will offer greater opportunities in winning Council contracts to the local supply chain and local voluntary sector and community organisations.
- 4.3 A full review of the Council's Contract Procedure Rules will follow later in the year, pending the outcome of the current review of the Constitution that is underway. At that time, the amendments set out in this report will be reviewed and recommendations made as to their withdrawal.
- 4.4 The amendments referred to in this report are being reported to the Audit and Risk Assurance Committee for consideration on 18th March 2021.

5 Alternative Options

- 5.1 The Council could continue to operate without amendment of the Contract Procedure Rules. This would require re-procurement of all contracts due to expire in 2021, any contracts extended in 2020 for a 12-month period, and any new requirements for contracts under threshold in the context of the limitations set out in Section 2 above. It would also forego the opportunity to reserve below threshold contracts, which could have a negative impact on the local supply chain.



6 Implications

Resources:	There are no resources implications.
Legal and Governance:	<p>Regulation 32 of the Public Contracts Regulations 2015 permits negotiation of contractual arrangements with a supplier without prior publication of a Contract Notice in particular contexts, including urgency brought about by circumstances that a reasonable authority could not foresee.</p> <p>Cabinet Office guidance notes PPN 01/20 and 01/21 clarify that the impact of the Covid 19 pandemic constitute such circumstances. If the Council relies on Regulation 32 to make a direct award of contract with a value above the thresholds set out in the Regulations, a notice to that effect will be published to inform the market and the appropriate standstill period observed.</p> <p>Regulation 72 of the Public Contracts Regulations 2015 permits modification of an existing contract in particular contexts, including urgency brought about by circumstances that a reasonable authority could not foresee. Cabinet Office guidance notes PPN 01/20 and 01/21 clarify that the impact of the Covid 19 pandemic constitute such circumstances. If the Council relies on Regulation 72 to make modifications to an existing contract with a value above the thresholds set out in the Regulations, a notice to that effect will be published to inform the market and the appropriate standstill period observed.</p> <p>Contracts below threshold are not subject to the particular provisions of the Public Contracts Regulations 2015, although they remain subject to the requirement to be open and fair to all suppliers. In ensuring that all actions to extend a contract due to expire in 2021, or directly award below threshold contracts, are carried out in compliance with the provisions of Regulation 32 and 72, the Council will be able to demonstrate that it has met its obligations with regard to below threshold contracts.</p>



Risk:	It will be a requirement that any request to Chief Officers to approve the extension of a current contract or the direct award of a below threshold contract sets out the basis on which the proposed course of action is justified, identifies evidence that the Council is securing best value for money and includes a plan for future procurement activity.
Equality:	There are no equality implications of the proposed action.
Health and Wellbeing:	The proposed changes will enable greater responsiveness for Public Health and Adult Social Care services to meet the needs of Sandwell residents during the current Covid 19 pandemic.
Social Value	Terms and conditions of current contracts that are extended will continue to apply, including requirements for delivery of social value outcomes.

7. Appendices

Appendix 1 – Proposed changes to Contract Procedure Rules March 2021.

Appendix 2 – Rule 13 extracted from current SMBC Procurement and Contract Procedure Rules.

8. Background Papers

Cabinet Office Procurement Policy Notes:

01/20 <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>

11/20 <https://www.gov.uk/government/publications/procurement-policy-note-1120-reserving-below-threshold-procurements>

01/21 <https://www.gov.uk/government/publications/procurement-policy-note-0121-procurement-in-an-emergency>



APPENDIX 1

PROPOSED UPDATES TO PROCUREMENT AND CONTRACT PROCEDURE RULES – March 2021

1. Reference within the Procurement and Contract Procedure Rules to the following Officers,
 - Chief Executive,
 - Chief Finance Officer,
 - Monitoring Officer,
 - Chief Legal Officer,
 - Chief Officers,
 - Procurement Service Manager,shall be taken to refer to any other officers nominated by the above.
2. Section 13 is suspended with regard to existing contracts that are due to expire during 2021 in circumstances where response to the Covid 19 crisis has resulted in Council Officers not being available to undertake the necessary re-procurement activity and/or lack of supplier availability. For these contracts an extension period may be applied, subject to agreement with the supplier and continued value for money. The length of any extension period should take into account market conditions and the availability of Council Officers to undertake a re-tender at the appropriate time: this should be determined in consultation with the Procurement Service Manager to ensure availability of resources to undertake a re-tender process.
3. For new contracts below the threshold for supplies and services set out in the Public Contracts Regulations 2015 (PCR 2015) (see 6 below for thresholds), a direct contract award may be made in circumstances where there is lack of availability of staff to undertake a quotation/tender process as a result of response to the Covid19 crisis and/or lack of response from the market, provided that value for money can be demonstrated and subject to budget holder approval. A report must be submitted to Statutory Officer Group for approval of the contract award setting out the circumstances and demonstrating that value for money is being achieved.
4. New contracts may be commenced once the contract award and terms and conditions are confirmed in writing; confirmation may be by reference to tender documentation.
5. In accordance with Cabinet Office guidance regarding procurement following the withdrawal of the United Kingdom from the European Union (Procurement Policy Note 11/20) contracts with a value below the thresholds set out in the Public Contracts Regulations 2015 may be reserved either or both by geographic location or sector. Where there is an intention to reserve a tender, the Procurement Service Manager must be consulted before proceeding.



- a. Contracts reserved by geographic location may be reserved to the United Kingdom market, or to localised markets such as West Midlands.
- b. Contracts reserved by sector may be reserved to voluntary and community sector organisations or to small and medium sized enterprises.
- c. In the event that a contract is reserved, the report seeking authorisation to let the contract must demonstrate how value for money has been achieved and how knowledge that the reserved market can meet the requirement has been obtained.

6.
Summary of Threshold Levels from 1st January 2020

The Public Contracts Regulations

Supplies & Services	£189,330
Works	£4,733,252
Light Touch Regime for Services	£663,540
Small lots	
Supplies and services	£70,778
Works	£884,720

The Concession Contracts Regulations

Concession contracts £4,733,252



Appendix 2

Rule 13 of current Contract Procedure Rules

13 Contract Extensions

- 13.1 Following compliance with instructions on permitted contracting periods for goods, services and works specified in Rule 10, negotiations may only be undertaken to extend contracts provided that the following requirements are met:
- a) provision was made in the original advertisement and documentation that it may be subject to an extension – this includes where more than one extension of the contract has been included in the original advertisement;
 - b) benchmarking with similar organizations has been undertaken to prove that the contract continues to provide value for money;
 - c) the contract has been monitored and no concerns have been raised with regard to the level of service/quality of goods supplied or sufficient mechanisms, such as a robust improvement plan, are in place that ensure that any identified issues will be resolved;
 - d) any price increases are in accordance with the relevant contractual provision (e.g. in line with an appropriate published index) and as permitted under EU Procurement Regulations;
 - e) The appropriate Chief Officer and the Procurement Services Manager are satisfied that no better terms could be obtained by competitive tendering or that the nature or urgency of the work makes it desirable that the same Contractor is employed. Comments of the Chief Officer and the Procurement Services Manager are to be kept on the contract file;
 - f) The Legal Services Manager has been consulted to ensure that the extension does not result in a material change to the Contract; and
 - g) No variations are being made.
 - h) Evidence of these requirements being met must be recorded



13.2 The approval to extend any contract should be confirmed in writing by the appropriate Chief Officer and Procurement Services Manager. If provision to extend the contract was not included in the original advertisement and documentation, and the extension to the contract means that the total contract value is over £250,000, then Cabinet authority is required to extend the contract.

1.3

