

Proposed Changes to Constitution – Financial and Contract Procedure Rules

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| Final Decision-Maker | Council |
| Lead Head of Service/Lead Director | Mark Green, Director of Finance and Business Improvement |
| Lead Officer and Report Author | Georgia Hawkes, Head of Commissioning and Business Improvement |
| Classification | Public |
| Wards affected | None |

Executive Summary

This report seeks approval for changes to the Contract Procedure Rules, in order to simplify them, improve compliance and manage procurement risk. The changes also give rise to a small number of consequential changes to the Financial Procedure Rules.

This report makes the following recommendations to this Committee:

1. Accept the revised wording and incorporation of flow charts into the Financial and Contract Procedure Rules as detailed in Appendices 1 and 2.
2. Agree to increase the level for sealing of contracts to £1 million for non-construction projects.
3. Remove the requirement for a procurement risk assessment at £10,000.
4. Agree to the increased emphasis on contract formulation and signing before commencement of service.
5. Delegate authority to the Head of Mid Kent Legal Partnership to incorporate appropriate changes to the Constitution to effect the required changes and/or to reflect legislative requirements prior to Council approval.

Timetable

| Meeting | Date |
|---------------------|--------------|
| Democracy Committee | 2 July 2018 |
| Council | 18 July 2018 |

Proposed Changes to Constitution – Financial and Contract Procedure Rules

1. INTRODUCTION AND BACKGROUND

- 1.1 A review of procurement by Internal Audit has identified some compliance issues and problems with services not following the correct procurement processes. As part of the management response, the Council has commissioned a procurement consultant to review the Contract Procedure Rules.
- 1.2 As part of this review, it was recognised that the current regulations and processes were more complicated than necessary and that poor compliance was largely due to lack of awareness rather than malicious avoidance. It became clear that the parts of the Council's Constitution that relate to procurement and contracts ought to be made easier to understand. Accordingly a number of changes are proposed at Appendix 2 which make the Council's Constitution easier to understand and more concise, including replacing some wording with flowcharts and removing any duplication.
- 1.3 A Purchasing Guide has been prepared by the procurement consultant and the Procurement team. This is designed to provide easy step by step guidance for officers and contains some of the content in the current Contract Procedure Rules which is guidance rather than rules. Training on the procurement processes in the Guide has been undertaken with key officers across the Council and has been received positively.
- 1.4 A few additional changes to the Constitution are proposed, as follows.
 - **Change the levels at which contracts are required to be sealed** - Currently all contracts over £75,000 in value are required to be sealed. The proposal is that this level is retained for construction contracts. However, for other contracts this requirement adds no value as it simply increases the defects liability period from 6 years to 12 years. It is therefore proposed that the requirement for sealing is increased to £1 million, with officers signing below this level in accordance with the authorised approval list. If the Head of Mid Kent Legal Services deems a non-construction contract below the proposed £1 million threshold requires execution as a deed, this contract may require execution under seal.
 - **Emphasise the need for contracts to be signed or sealed before commencement of works or a service** – This is made clear in flowcharts A, B and C. Currently it is possible for contracts not to be agreed before the contractor starts undertaking works or delivering a service to or on behalf of the Council, which puts the Council at risk. There is also a requirement in the new Contract Procedure Rules for a Procurement Plan to be completed, which ensures Legal Services are always consulted and are involved where necessary on procurements over £75,000 before tenders are advertised, rather than after.

- **Remove the need for a risk assessment for all procurements over £10,000** – The current requirement for a risk assessment for all procurements over £10,000 has not been widely understood or applied across the organisation. In practice, a risk assessment adds little value for smaller procurements. Flow Chart C for procurements over £75,000 requires a Procurement Plan to be completed by the officer undertaking the procurement. The Procurement Plan incorporates a risk assessment and other important areas for consideration e.g. the route to market, type of contract required etc. This must be signed off by the Head of Commissioning and Business Improvement before any procurement can begin. Therefore, the proposed changes ensure that the highest risk contracts in terms of size and cost will always have a high quality risk assessment. In addition, the Purchasing Guide contains a requirement for officers to undertake a risk assessment on any contracts below £75,000 that involve a substantial risk to the Council.
- **Remove reference to submission and opening of paper tenders** – It is proposed that the wording that refers to dealing with paper tenders is removed as all tenders over £75,000 should be received electronically via the portal.

1.5 The new compulsory Procurement Plan ensures Legal Services are involved as required in formulation of contracts above £75,000. The Council already uses standard contracts, but the Legal Services and Procurement teams are currently reviewing the standard contracts to see if they need to be updated, as well as working on guidance for services on how to use standard contracts and an explanation of when contracts under £75,000 need to be referred to Legal. This will be added to the Purchasing Guide.

2. AVAILABLE OPTIONS

- 2.1 **Do nothing** – this will not address the issues identified by Internal Audit and the same behaviours may continue, which puts the Council at risk and does not deliver best value. The only advantage of this option is that no work would be required.
- 2.2 **Keep existing Finance & Contracts Procedure Rules and deliver training** – this does not address the root problem of the Contract Procedure Rules not being as clear as they could be. It also does not give the opportunity to use a risk based approach to procurement, which could deliver more appropriate, easier to use processes. It could be argued that officers may be more familiar with the existing Procedure Rules and training should be developed to ensure this is the case. However, the internal audit report suggests that officers in Services are not aware of the current Procedure Rules.
- 2.3 **Update Finance and Contract Procedure Rules, Purchasing Guide, Intranet and deliver supporting training** - this option allows the Council to completely review existing Procedure Rules removing duplication, simplifying and moving to a risk based approach.

3. PREFERRED OPTION AND REASONS FOR RECOMMENDATIONS

3.1 Option 2.3 is the preferred option because it will deliver improved risk based procurement including delivering better value, reducing the Legal team involvement (through standardisation), simpler processes and clearer controls. It also addresses some of the issues that are delaying award or putting the Council at risk because work is starting before contracts are in place.

4. RISK

4.1 The risks associated with this proposal, including the risks if the Council does not act as recommended, have been considered in line with the Council's Risk Management Framework. We are satisfied that the risks associated are within the Council's risk appetite and will be managed as per the Policy. The table below shows the risk before and after proposed changes.

| Before Change to Contract Procedure Rules | | | |
|---|--------|------------|-------|
| Risk | Impact | Likelihood | Grade |
| Failure of Service to comply with Contract Standing Orders | 3 | 4 | 12 |
| Unclear approval levels/process | 3 | 3 | 9 |
| Contract not fully signed/sealed before commencement of service | 4 | 4 | 16 |
| Procurement is successfully challenged by unsuccessful supplier | 5 | 2 | 10 |
| After Change to Contract Procedure Rules | | | |
| | Impact | Likelihood | Grade |
| Failure of Service to comply with Contract Standing Orders | 3 | 1 | 3 |
| Unclear approval levels/process | 3 | 1 | 3 |
| Contract not fully signed/sealed before commencement of service | 4 | 2 | 8 |
| Procurement is successfully challenged by unsuccessful supplier | 5 | 1 | 6 |

- 4.2 In addition to the training already provided to key purchasing officers, there will be an ongoing programme of procurement training to ensure that all appropriate officers understand and comply with the required procurement processes. Guidance on contract formation will be added to the Purchasing Guide and will form part of this training. This will ensure that officers fully understand how contracts need to be prepared using standard contracts, and when contracts need to be referred to Legal. The proposed threshold for sealing of non-construction contracts is much higher than the current threshold, but the new process set out in Flow Chart C ensures that officers undertaking procurements over £75,000 will consider the contract and Legal Services involvement as part of the Procurement Plan, which has to be signed off by the Head of Business Improvement before any procurement can commence. The Procurement team will ensure the Legal Services team is involved in contract formation before the tender as appropriate, including for non-construction contracts below £1 million that do not require execution under seal when this is required.

5. CONSULTATION RESULTS AND PREVIOUS COMMITTEE FEEDBACK

- 5.1 These changes have been discussed at the Wider Leadership Team (24.4.18) and the Corporate Leadership Team (19.6.18), both groups being in support of the proposals.
- 5.2 This report is now going to Democracy Committee prior to going to Council.

6. NEXT STEPS: COMMUNICATION AND IMPLEMENTATION OF THE DECISION

6.1 Training has already started with a clear message that some of the elements will not be implemented until approval for change has been given by the Council. The Purchasing Guide will be updated and further communication will be issued if the recommendations of this report are accepted.

7. CROSS-CUTTING ISSUES AND IMPLICATIONS

| Issue | Implications | Sign-off |
|---------------------------------------|---|--|
| Impact on Corporate Priorities | We do not expect the recommendations will by themselves materially affect achievement of corporate priorities. However, they will support the Council’s overall achievement of its aims as set out in section 3 | Georgia Hawkes |
| Risk Management | Already covered in the risk section | Georgia Hawkes |
| Financial | The proposed changes to the Financial and Contract Procedure Rules have no direct financial implications, but are expected to lead to improved compliance and better procurement outcomes. | Section 151 Officer & Finance Team |
| Staffing | We will deliver the recommendations with our current staffing. | Georgia Hawkes |
| Legal | Accepting the recommendations must meet the requirements of the Public Contracts Regulations 2015. The recommendations propose a variation to the financial thresholds relevant to how goods and services will be procured by the Council. The variations will need to properly reflect how works will be commissioned. Failure to incorporate appropriate contract standing orders and other relevant changes to the Constitution to reflect how the | Patricia Narebor, Head of Mid Kent Legal Partnership |

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| | <p>Council actually undertakes these services may place the Council in breach of the 2015 Regulations and related legislation.</p> <p>Acting on the recommendations is within the terms of reference for the Democracy Committee as set out in the Council's Constitution and in accordance with the Local Government Act 1972, section 135 which requires a local authority to make standing orders with respect to how contracts are made.</p> | |
| Privacy and Data Protection | These changes do not affect any data held by the Council. | Georgia Hawkes |
| Equalities | The recommendations do not propose a change in service therefore will not require an equalities impact assessment | Equalities and Corporate Policy Officer |
| Crime and Disorder | The recommendation will have a no impact on Crime and Disorder. | Georgia Hawkes |
| Procurement | On accepting the recommendations, the Council will then follow the new proposed processes. | Georgia Hawkes & Section 151 Officer] |

8. REPORT APPENDICES

The following documents are to be published with this report and form part of the report:

- Appendix 1: Proposed changes to Financial and Contract Procedure Rules
 - Appendix 2: Proposed new Contract Procedure Rules
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