

Contract Standing Order Waivers

Governance and Audit Committee 9 March 2022

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Portfolio Holder Cllr David Saunders, Cabinet Member for Finance

Status For Decision

Classification: Unrestricted

Key Decision No

Ward: All Wards

Executive Summary:

This is the first of what will be on-going regular update reports to the committee on the council's use of waivers to its Contract Standing Orders (CSOs).

The council's purchasing decisions and processes are important because the money involved is public money. The council's CSOs provide a structure within which purchasing decisions are made and implemented and contain the core obligations that all officers who are in a position of spending the Council's money must follow.

The table below sets out the procurement route to be used depending on the value of 'Goods, Supplies and Services' contracts.

Value	Procurement Method
Below £10,000	At least one quote in advance
£10,000-£24,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement
£25,000 - £99,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement Published on Contracts Finder
£100,000 - £213,446	At least three written tenders in advance, using the council's Invitation to Tender documents Published on Contracts Finder, and the Kent Business Portal
£213,477 and above	Full competitive process, to be published on Contracts Finder and the Kent Business Portal

The limits for 'Works' contracts are higher and full competitive tender processes are required for contract values above £5,336,936. The council is also able to utilise framework agreements as an alternative way to procuring, without advertising.

There is a general presumption in favour of competition and that contracts will be put out to competitive quote/tender when they are of an estimated value of £10,000 and above, however the requirement for the Council to conduct a competitive purchasing process more can be waived under certain circumstances. For example:

- Where the work, supply or service is required as a matter of urgency and a delay would be likely to lead to financial loss, personal injury or damage to property,
- Where the work is of a specialist nature and the supply market has been tested and found to be limited
- At the discretion of the relevant Director who may proceed in a manner most expedient to the efficient management of the service/Council with reasons recorded in writing.

For a full list of justified circumstances, please refer to **Appendix 1**.

The following table summarises the Council's approved Waivers for 2021/2022:

Department / Directorate	No. Approved Waivers for 2021/22 - as at 18 Sept 2022.			No. Rejected Waivers for 2021/202 as at 18 Sept 2022	Total no. of Waivers received for 2021/2022 as at 18 Sept 2022
	Below £100k	£100k and above	Total		
Chief Executive	7	1	8	0	8
Deputy Chief Executive	13	4	17	1	18
Corporate Governance	0	1	1	0	1
Operational Services	16	3	19	2	21
Total Number of Waivers	36	9	45	3	48

A detailed list of 2021/2022 Waivers can be seen in **Appendix 4**

The Council's CSOs are due to be refreshed shortly, which if approved, will include an increase to the value of works, supplies and services that are considered to be of quotation threshold, currently £10,000 and above. The new value would be £25,000 and will enable officers to seek one quote up to a value of £24,999.

Recommendation(s):

1. The committee notes the report

Corporate Implications

Financial and Value for Money

As detailed within the body of the report

Legal

Local Government procurement is governed by the Public Contracts Regulations 2015.

The Local Government (Transparency Requirements) (England) Regulations 2015 require additional contracting information to be published beyond the legislative requirements of the Public Contracts Regulations 2015.

Corporate

The overriding procurement policy requirement is that all public procurement must be based on value for money, defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”

Equality Act 2010 & Public Sector Equality Duty

Members are reminded of the requirement, under the Public Sector Equality Duty (section 149 of the Equality Act 2010) to have due regard to the aims of the Duty at the time the decision is taken. The aims of the Duty are: (i) eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, (ii) advance equality of opportunity between people who share a protected characteristic and people who do not share it, and (iii) foster good relations between people who share a protected characteristic and people who do not share it.

There are no equity and equalities implications arising directly from this report, but the Council needs to retain a strong focus and understanding on issues of diversity amongst the local community and ensure service delivery matches these.

Corporate Priorities

This report relates to the following corporate priorities: -

- Growth
- Environment
- Communities

1. Introduction

- 1.1. This is the first of what will be on-going regular update reports to the committee on the council's use of waivers to its Contract Standing Orders (CSOs). The purpose of the report is to provide the committee with oversight of the application of waivers to the council's contract standing orders have been raised, setting out the number of instances and the rationales for the decisions taken by officers.

2. Background

- 2.1. The council's purchasing decisions and processes are important because the money involved is public money.
- 2.2. The council's CSOs provide a structure within which purchasing decisions are made and implemented and contain the core obligations that all officers who are in a position of spending the Council's money must follow. CSOs provide guidance and protection to both officers and members, form part of the Council's Constitution.
- 2.3. CSOs apply to all contracts the council enters with the following exceptions:
- Employment contracts
 - Acquisition or rental of land, buildings or other property
 - Arbitration or conciliation
 - Retention of legal councils and appointment of expert witnesses in legal proceedings
 - Service Level Agreements setting out funding arrangement to voluntary bodies

3. General Principles Applying to All Contracts

- 3.1. There is a general presumption in favour of competition and that contracts will be put out to competitive quote/tender when they are of an estimated value of £10,000 and above. This is to ensure that the Council uses its resources efficiently, purchases quality goods, services and works, safeguards its reputation from any implication of dishonesty or corruption and is able to demonstrate principles of sustainability, efficiency, whole life costing and cost savings.
- 3.2. All contract opportunities with a value over £25,000 and above must be published on the government's 'Contracts Finder' portal. Subsequent awards over this value must also be published. Contracts in excess of £100,000 are also published on the Kent Business Portal.
- 3.3. The tables below sets out the procurement route to be used depending on the value of the contract.

Table 1: Goods, Supplies and Services contracts

Value	Procurement Method
Below £10,000	At least one quote in advance
£10,000-£24,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement
£25,000 - £99,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement Published on Contracts Finder
£100,000 - £213,446	At least three written tenders in advance, using the council's Invitation to Tender documents Published on Contracts Finder, and the Kent Business Portal
£213,477 and above	Full competitive process, to be published on Contracts Finder and the Kent Business Portal

Table 2: Works Contracts

Value	Procurement Method
Below £10,000	At least one quote in advance
£10,000-£24,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement
£25,000 - £99,999	At least three written quotes in advance using the council's Invitation to Quote documents or electronic method agreed with procurement Published on Contracts Finder
£100,000 - £5,336,936	At least three written tenders in advance, using the council's Invitation to Tender documents Published on Contracts Finder, and the Kent Business Portal
£5,336,937 and above	Full competitive process, to be published on Contracts Finder and the Kent Business Portal

- 3.4. The council is also able to utilise framework agreements as an alternative way to procuring, without advertising.

3.5. As a minimum, all contracts of a value of £10,000 or more shall include clauses which set out:

- The works, supplies (goods), services, material, matters or things to be carried out or supplied
- Specify the price to be paid, the estimated price or the basis on which the price is to be calculated
- The time within which the contract is to be performed
- Quality requirements and/or standards which must be met
- Requirements on the contractor to hold and maintain appropriate insurance
- Adequate contract management and audit provisions
- What happens in the event that the contractor fails to comply with its contractual obligations (in whole or in part)
- A duty on the contractor to comply with all relevant legislative requirements and discharge of obligations under said legislation.

4. Waivers

4.1. The requirement for the Council to conduct a competitive purchasing process for contracts of £10,000 or more can be waived under certain circumstances.

4.2. This arises where officers request to waive some of the CSOs in order to progress a purchase that is deemed in the best interest of the public or service for reasons such as, where a full competitive exercise is not able to be carried out, where a competitive process was carried out but less than three Quote/Tenders were achieved, in order to progress the award of a contract the Council's T&C are not able to be used.

4.3. CSO 12 sets out the provisions under which a waiver must be complied with, ensuring a clear decision has been made, for what reason and by whom. For example:

- where contracts are below Public Contract Regulations 2015 (PCR) threshold and the work, supply or service is required as a matter of urgency and a delay would be likely to lead to financial loss, personal injury or damage to property,
- Where the work is of a specialist nature, the skill of the contractor is of primary importance, and the supply market has been tested and found to be limited
- At the discretion of the relevant Director who may proceed in a manner most expedient to the efficient management of the service/Council with reasons recorded in writing.

4.4. For a full list of justified circumstances, please refer to **Appendix 1**.

5. Waiver Application Process

- 5.1. The waiver application is completed by the lead contracting officer (typically the service manager/budget holder) and sets out the following:
- details of the department and lead officer, contract information, budget information, CSOs being waived
 - business reasons for the application waiver (economical, technical, operational)
 - evidence to demonstrate probity and value for money (selection process, market competition, benchmarking exercises)
 - Signature of four separate officers of the Council; Lead Officer, Corporate Director, Procurement Manager and Section 151 Officer.
- 5.2. A copy of the Waiver Application can be seen in **Appendix 2**.
- 5.3. CSOs should only be waived in exceptional circumstances and only be waived in advance. Retrospective waivers will not be approved by the section 151 officer and the spend will be recorded as non-compliant with CSO in such instances.
- 5.4. Furthermore, not CSOs cannot be waived in all instances. For example where the value exceeds the Public Contract Regulations 2015 threshold, which is currently £5,336,937 (£4,447,447 before VAT if applied at 20%) for works contracts and £213,447 (£170,782 before VAT if applied at 20%) for goods and services contracts.
- 5.5. Lack of planning in providing insufficient time available to carry out a full procurement exercise or when going out to Quote/Tender would cause administrative, procedural burdens or a short delay to progress, would also not be considered justified reasons for waiving CSOs.

6. Waivers in 2021/22

6.1. Table 3 below summarises the Council's approved Waivers for 2021/2022:

Table 3: Waivers 2021/22

Department / Directorate	No. Approved Waivers for 2021/22 - as at 18 Sept 2022.			No. Rejected Waivers for 2021/2022 as at 18 Sept 2022	Total no. of Waivers received for 2021/2022 as at 18 Sept 2022
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Corporate Governance	0	1	1	0	1
Operational Services	16	3	19	2	21
Total Number of Waivers	36	9	45	3	48

6.2. A comparison table of the number of Waivers across 2019/2020 to 2021/2022 can be seen in **Appendix 3**.

6.3. There have been 48 Waiver applications received as of 18 September 2022 for the 2021/2022 period. 45 waivers were approved and 3 rejected. The vast majority of Waiver applications are under the 100K threshold. Waiver applications have reduced in comparison to the previous year. This is likely due to the reduction in Covid 19 pressures on Council services. In contrast, there has been a rise in waiver applications received in relation to additional funding received by the Council, that was either not known or could not have been guaranteed at the time of the contract opportunities being advertised. Similarly, waiver applications have been requested due to funding deadlines imposed, which has meant the Council will lose funding if the contract has not been awarded, started or completed by the funding deadline.

6.4. Other reasons for Waivers in 2021/2022 include suppliers not willing to accept or incorporate the Council's T&C's, carrying out a competitive process, however, not achieving the full three Quotes/Tenders required within CSOs, a limited market, a limited market due continued knock on effect of Covid 19 pressures on particular services, specialist skills required that cannot be delivered within current frameworks, unexpected interim cover needed urgently.

- 6.5. The 3 Waiver applications that were rejected were on the basis of one being retrospective and two were rejected on the basis of being non-compliant with CSOs and the Financial Procedure Rules (FPRs).
- 6.6. A detailed list of 2021/2022 Waivers can be seen in **Appendix 4**.

7. 2022/2023 Objectives

- 7.1. The Council's CSOs are due to be refreshed shortly, which if approved, will include an increase to the value of works, supplies and services that are considered to be of quotation threshold, currently £10,000 and above. The new value would be £25,000 and will enable officers to seek one quote up to a value of £24,999. A waiver will therefore no longer be required to waive a competitive process below this value at CSO 6.6. Other CSOs will still apply however, and waivers may still be required below this value depending on the nature of the CSO that applies, for example, when not using the Council's T&C.
- 7.2. Updated CSOs training in the form of induction training and digital e-learning which includes a progress report. This will help ensure a greater understanding of CSOs; how and why these should be followed, the use of waivers, and an improvement to contract management, helping to mitigate the need for unnecessary waivers.

Contact Officer: *Chris Blundell, Director of Finance*
Reporting to: *Madeline Homer (Chief Executive)*

List of Appendices:

Appendix 1 - CSO 12 Waivers extract
Appendix 2 - CSO Waiver Application
Appendix 3 - Comparison table of Waivers across 2019/2020 to 2021/2022
Appendix 4 - Detailed list of 2021/2022 Waivers

Corporate Consultation

Finance: *Not applicable*
Legal: *Estelle Culligan (Director of Law and Democracy)*