

Contract Standing Order Waivers

Governance and Audit Committee 8 March 2023

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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 second of the 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	Local CSO rules apply - At least one quote in advance - Consideration to be given to suitably qualified Thanet/Supplier/s, if available.
£10,000 - £99,999	Local CSO rules apply - At least three written quotes in advance, using the Council's Invitation to Quote documents or electronic method agreed with Procurement - Consideration to be given to suitably qualified Thanet/Supplier/s, if available. Published on Contracts Finder
£100,000 - £213,446	Local CSO rules apply - At least three written tenders in advance, using the council's Invitation to Tender documents with advertisement by public notice. Published on Contracts Finder, and the Kent Business Portal

£213,477 and above	PCR2015 & CSOs apply - Full competitive process using the Council's invitation to Tender documents following advertisement in the FTS for suppliers and Part A* services, to be Published on Find a Tender Services (FTS), Contracts Finder and the Kent Business Portal
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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 2022/2023:

Department / Directorate	No. Approved Waivers for 2022/23 - as at 16 February 2023.			No. Rejected Waivers for 2022/2023 as at 16 Feb 2023	Total no. of Waivers received for 2022/2023 as at 16 Feb 2023
	Below £100k	£100k and above	Total		
Chief Executive	6	0	6	0	6
Deputy Chief Executive	22	3	25	1	26
Corporate Governance	0	0	0	0	0
Operational Services	7	1	8	0	8
Total Number of Waivers	35	4	39	1	40

A detailed list of 2022/2023 Waivers can be seen in **Appendix 4**

The Council's CSOs are due to be refreshed in early 2023, 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, which should enable them to progress the requirement more quickly without having to undertake a full competitive process, for what would be considered low risk or low value requirements.

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 and Concessions Contracts Regulations 2016.

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 and Concessions Contracts Regulations 2016.

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 second of the 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	Local CSO rules apply - At least one quote in advance - Consideration to be given to suitably qualified Thanet/Supplier/s, if available.
£10,000 - £99,999	Local CSO rules apply - At least three written quotes in advance, using the Council's Invitation to Quote documents or electronic method agreed with Procurement - Consideration to be given to suitably qualified Thanet/Supplier/s, if available. Published on Contracts Finder
£100,000 - £213,446	Local CSO rules apply - At least three written tenders in advance, using the council's Invitation to Tender documents with advertisement by public notice. Published on Contracts Finder, and the Kent Business Portal
£213,477 and above	PCR2015 & CSOs apply - Full competitive process using the Council's Invitation to Tender documents following advertisement in the FTS for suppliers and Part A* services, Published on Find a Tender Services (FTS), Contracts Finder and the Kent Business Portal

Table 2: Works Contracts

Value	Procurement Method
Below £10,000	Local CSO rules apply - At least one quote in advance - Consideration to be given to suitably qualified Thanet/Supplier/s, if available.
£10,000 - £99,999	Local CSO rules apply - At least three written quotes in advance, using the Council's Invitation to Quote documents or electronic method agreed with Procurement - Consideration to be given to suitably qualified Thanet/Supplier/s, if available. Published on Contracts Finder

£100,000 - £5,336,936	Local CSO rules apply - At least three written tenders in advance, using the council's Invitation to Tender documents with advertisement by public notice. Published on Contracts Finder, and the Kent Business Portal
£5,336,937 and above	PCR2015 & CSOs apply - Full competitive process using the Council's Invitation to Tender documents following FTS advertisement

Table 3: Service/Works Concession Contracts

Value	Procurement Method
Below £10,000	Local CSO rules apply - At least one quote in advance - Consideration to be given to suitably qualified Thanet/Supplier/s, if available
£10,000 - £99,999.99	Local CSO rules apply - At least three written quotes in advance, sourced and receipted electronically using Council's e-procurement system - Consideration to be given to suitably qualified Thanet/Supplier/s, if available Published on Contracts Finder
£100,000 - £5,336,936	Local CSO rules apply - At least three written tenders in advance, using the council's e-procurement system with advertisement by public notice Published on Contracts Finder, and the Kent Business Portal
£5,336,937 and above	Concession Contracts Regulation 2016 (ccr2016) apply - full competitive process using the Council's e-procurement system following FTS advertisement Published on Find a Tender Service (FTS), 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 waiver 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. Other circumstances requiring a waiver could be where Legal advice has been sought for contracts of 100k and above and it has been determined that due to the nature of the agreement being used, it would not be best served for the contract or framework arrangement to be executed as a deed under the Council's common seal, or where a Tender Opening is not being undertaken due to the need for a direct award process.
- 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, note 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 2022/23

- 6.1. Table 3 below summarises the Council's approved Waivers for 2022/2023:

Table 3: Waivers 2022/23

Department / Directorate	No. Approved Waivers for 2022/23 - as at 16 February 2023.			No. Rejected Waivers for 2022/2023 as at 16 Feb 2023	Total no. of Waivers received for 2022/2023 as at 16 Feb 2023
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Chief Executive	6	0	6	0	6
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Corporate Governance	0	0	0	0	0
Operational Services	7	1	8	0	8
Total Number of Waivers	35	4	39	1	40

- 6.2. A comparison table of the number of Waivers across 2020/2021 to 2022/2023 can be seen in **Appendix 3**.
- 6.3. There have been 40 Waiver applications received as of 16 February 2023 for the 2022/2023 period. 39 waivers were approved and 1 rejected. The vast majority of Waiver applications are again under the 100K threshold. Even though the 2022/2023 report is not a complete year at 11.5 months, when compared to the 2021/2022 waiver figures, waiver applications have reduced in comparison to the previous year. This is again likely due to the reduction in Covid 19 pressures on Council services experienced over the previous years and the waivers therefore, necessary at the time. There appears to have been a rise in waiver applications received in relation to suppliers going into administration during the 2022/2023 period and therefore, this has led to the need for commissioning another supplier urgently via direct award and a waiver application to undertake the urgent works/services. Although not known for certain, this could potentially be considered related to the Covid 19 pressures on businesses from previous years. During these 2022/2023 Winter months there appears to have been an increase in urgent repairs needed to buildings, due to the bad weather experienced impacting already existing issues and therefore a need to expedite the repairs due to potential Health and Safety risks.
- 6.4. Other reasons for Waivers in 2022/2023 include suppliers not willing to accept or incorporate the Council's T&C's or where they may not be appropriate e.g. an ICT related contract. Carrying out a competitive process, however, not achieving the full three Quotes/Tenders required within CSOs, a limited market, a limited market due to the particular services, specialist skills required that cannot be delivered within current frameworks, unexpected interim cover needed urgently, unforeseen additional requirements identified as needed during the course of a contract, that could not have been known about at the outset of the contract and/or additional grant funding become available.
- 6.5. The 1 Waiver application rejected was on the basis of being non-compliant with CSOs and the Financial Procedure Rules (FPRs).
- 6.6. A detailed list of 2022/2023 Waivers can be seen in **Appendix 4** and a breakdown of Nature of Waiver Categories can be seen in **Appendix 5**.

7. Ongoing and 2023/2024 Objectives

- 7.1. The Council's CSOs are due to be refreshed in early 2023, 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. It had been anticipated that CSOs were to be refreshed prior to early 2023, however, due to the Corporate Restructure being undertaken, it was decided to postpone this until after the Corporate Restructure was completed.
- 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.
- 7.3. Since the last Waiver report update, a trial has been conducted of submitting a PIF with every waiver application. The reason for this is firstly, in order to determine whether a waiver may be required, the requirement and process that should be undertaken needs to be understood, alternative options explored, and the PIF will aid this. Secondly, the PIF is an integral tool to ensure all requirements that need to be considered and undertaken outside of a competitive procurement are still carried out, for example, checking sufficient budget is available, that GDPR advice has been requested, levels of Insurance cover required, VAT implications reconciled, Health and Safety considerations undertaken, Legal advice requested. Without this information being clarified, there is no certainty that all other requirements have been met and advice requested and considered to best protect the Council and mitigate additional risk. An example of this could be, where not using the correct Terms and Conditions for a particular contract requirement can lead to delays downstream in commencing or part way through a contract and increasing the risk of things going wrong. Including this information in one location, will also assist should this information be required later on during the contract term, by Legal or Procurement.
- 7.4. A full due diligence check is also currently being carried out for all waiver applications where the waiver is deemed justified. This consists of carrying out a financial appraisal to confirm the supplier can meet the Council's minimum financial requirements for a contract of that value or combined value where the supplier is delivering more than one contract for the Council. The due diligence also includes confirming the supplier has the appropriate level of insurance cover in place that the Council would need to mitigate the risk. Whilst it has been determined that this is an important and necessary requirement as part of the waiver process, there are circumstances where due to the nature of the waiver application, for example, extreme urgency due to Health and Safety reasons, carrying out the full due diligence checks and PIF completion may cause additional delays if further information is required to complete the check and therefore, it has been agreed that the Section 151 Officer has the authority to agree the full due diligence checks do not have to be carried out as part of the waiver process under Health and Safety or for specific Business Critical Reasons.

- 7.5. In addition to the training that is provided to new starters who will be purchasing on behalf of the Council, refresher training is also currently being undertaken by Officers throughout the Council on roles and responsibilities within the Procurement process and meeting CSO requirements, to create a clearer understanding of who is responsible for which elements of the process and what they are expected to do to fulfil that requirement, which should enable a smoother and more efficient process for all involved.
- 7.6. An additional tool is also being introduced in 2023 to have an internal contracts register in place, which should aid Officers in their planning of when their Procurements are due and the tasks that should be undertaken and completed prior to this. The tool will also aid Officers in some of the tasks that should be completed in the contract management process.

Contact Officer: *Chris Blundell, (Acting Deputy Chief Executive)*
Reporting to: *Colin Carmichael (Interim Chief Executive)*

List of Appendices:

Appendix 1 - CSO 12 Waivers extract
Appendix 2 - CSO Waiver Application
Appendix 3 - Comparison table of Waivers across 2020/2021 to 2022/2023
Appendix 4 - Detailed list of 2022/2023 Waivers
Appendix 5 - Category of Waiver 2022/2023

Corporate Consultation

Finance: *Not applicable*

Legal: *Sameera Khan (Interim Head of Legal and Monitoring Officer)*