

Contract Standing Order Waivers

Governance and Audit Committee 29 November 2023

Report Author Chris Blundell, Director of Finance and Section 151 Officer

Portfolio Holder Cllr Rob Yates, Cabinet Member for Finance and Procurement

Status For Decision

Classification: Unrestricted

Key Decision No

Ward: All Wards

Executive Summary:

This is the fourth 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 without VAT.

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 - £177,897.99	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
£177,989.00 and above	PCR2015 & CSOs apply - Full competitive process using the Council's invitation to Tender documents following advertisement in the FTS for suppliers Published on Find a Tender Services (FTS), 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 £4,447,448.00 without VAT. The council is also able to utilise compliant purchasing schemes for direct awards and mini competition processes, as an alternative way to procuring, without advertising as a full open process.

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 can be waived under certain circumstances. For example:

- Where the work, supply or service is not subject to UK Public Contract Regulations 2015 and 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 July to November 2023/2024 (up to 9 November):

Department / Directorate	No. Approved Waivers for July to Nov 2023/24 - as at 9 November 2023.			No. Rejected Waivers for July to Nov as at 9 November 2023	Total no. of Waivers received for July to Nov as at 9 November 2023
	Below £100k	£100k and above	Total		
Chief Executive	0	0	0	0	0
Corporate Services	6	0	6	0	6
Environment	1	1	2	1	3
Place	4	0	4	6	10
Total Number of Waivers	11	1	12	7	19

A detailed list of July to November 2023/2024 Waivers can be seen in **Appendix 4**

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 fourth 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 and the council has a responsibility to ensure value for money is achieved.
- 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 are the minimum requirements all officers should follow, providing protection to the council, officers and members, and which 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 (<https://www.gov.uk/contracts-finder>), unless there is a clear justified need not to do so. Subsequent awards over this value must also be published. Contracts in excess of £100,000 are also published on the Kent Business Portal (www.kentbusinessportal.org.uk).
- 3.3. The tables below sets out the procurement route to be used depending on the value of the contract without VAT.

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 - £177,897.99	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
£177,898.00 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 - £4,447,447.99	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
£4,447,448.00 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 - £4,447,447.99	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
£4,447,448.00 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 Purchasing Schemes such as framework agreements, Dynamic Purchasing systems and other similar arrangements, such as the Government eMarketplace as an alternative and compliant route to procuring from the market.

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 council's CSOs in order to progress a purchase that is deemed in the best interest of the public or service for reasons such as, however, not limited to:

- Where a full competitive exercise is not able to be carried out for particular justifiable reasons,
- where a competitive process was carried out, however, 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 know as the Responsible Officer and reviewed by the service area's Head of Service and sets out the following:

- details of the department and lead officer, contract information, budget information, value to be waived, 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)
- Confirmation that the Responsible Officer has read and has reasonable understanding of CSOs
- 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 (£4,447,448 before VAT if applied at 20%) for works contracts and £213,447 (£177,898 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.
- 5.6. A comparison table of the number of Waivers across 2020/2021 to 2023/2024 (up to 9 November 2023) can be seen in **Appendix 3**.

6. Waivers in 2023/24 (July to November)

- 6.1. Table 3 below summarises the Council's approved Waivers for 2023/2024 (July to 9 November):

Table 3: Waivers 2023/24 (July to November)

Department / Directorate	No. Approved Waivers for July to Nov 2023/24 - as at 9 November 2023.			No. Rejected Waivers for July to Nov as at 9 November 2023	Total no. of Waivers received for July to Nov as at 9 November 2023
	Below £100k	£100k and above	Total		
Chief Executive	0	0	0	0	0
Corporate Services	6	0	6	0	6
Environment	1	1	2	1	3
Place	4	0	4	6	10
Total Number of Waivers	11	1	12	7	19

- 6.2. A comparison table of the number of Waivers for 2022/2023 (July to 9 November) and 2023/2024 (July to 9 November) can be seen in **Appendix 3**. This also includes the number of waivers approved in 2023/2024 up to 9 November 2023 and the previous years from 2020/2021.
- 6.3. It was announced in April 2023 that a new corporate structure was to be implemented and the final recruitment took place at the end of August 2023. As part of the new corporate structure, a Directorate structure of Place, Environment, Corporate Services was implemented replacing the previous structure of Operational Services, Deputy Chief Executive and the Corporate Governance. This has therefore been reflected in the July to November 2023 Report. Due to the complexities of the change in organisational structure it is not possible to directly compare to previous years figures.
- 6.4. There have been 19 Waiver applications received as of 9 November 2023 for the 2023/2024 July to November period. Of the waivers received only 12 were approved. The majority of Waiver applications continue to be under the 100K threshold and when compared to the same period of waiver figures in 2022/2023, they are very similar in number to those approved in the previous financial year. When comparing the total number of waivers received for 2023/2024 up to 9 November to the same period of time in 2022/2023 the number of waivers received is almost the same, however, the number of waivers approved is significantly less.
- 6.5. During this July to November period, reasons for waivers have included where the Council Standard Clauses have not been able to be used, limited markets; where only one supplier could provide the full requirements and the majority of Waivers approved were where it was considered that a direct award was in the best interests of the management of the service/Council; for cost saving reasons, complexities of the project or where the risk of not achieving the requirement by a specific deadline would significantly impact the Council's internal services.
- 6.6. Within the 7 Waiver applications rejected, these were on the basis of being considered non-compliant with CSOs and the Financial Procedure Rules (FPRs). Advice was given on how to mitigate the same circumstances occurring in the future.
- 6.7. A detailed list of 2023/2024 (including July to November) Waivers can be seen in **Appendix 4** and a breakdown of Nature of Waiver Categories can be seen in **Appendix 5**.

7. Ongoing Objectives

In June, the Council's 'Head of Finance, Procurement, Risk commissioned a Procurement Process Review. The purpose of this review was to look at whether the process can be streamlined to meet the ever changing needs, priorities and of the whole organisation, ensuring documents remain fit for purpose, robust processes remain in place compliant with PCR2015 and CCR2016, market changes are taken into consideration when considering thresholds, the identification of any gaps that may exist and resources available to fulfil

requirements. The review has been undertaken by an independent party who engaged with the key stakeholders from across the organisation responsible for commissioning contracts. Engagement on the waiver process was part of this and would be subject to recommendations following the review, which would be considered and incorporated into the waiver process and as part of the Council's refresh of CSOs. **The outcome of this review is also being considered as part of the Council's review of its arrangements for project management.**

The previous report advised that the Council's CSOs were due to be refreshed in 2023, which if approved, may include an increase to the value of works, supplies and services that are considered to be of quotation threshold, currently £10,000 and above. It had been anticipated the new threshold value would be £25,000 and will enable officers to seek one quote up to a value of £24,999, which should enable procurements more quickly without having to undertake a full competitive process, for what would be considered lower risk or low value requirements. Should an increase in thresholds be recommended and approved as part of the CSOs refresh, a waiver would no longer be required to waive a competitive process below that agreed value at CSO 6.6.

- 7.1. One of the other amendments being considered that may assist the Council streamline its internal processes is the amendment to wording surrounding the Standard Clauses inclusion for Purchasing Schemes (Frameworks). There are a number of Frameworks the Council uses, which do not allow provision for additional Terms and Conditions to be applied. In these circumstances the Council would not be able to include its own Standard Clauses and comply with its own CSOs requirements, without waiving this requirement. In consultation with Procurement and Legal, where the Council is prevented from including its own standard Clauses within a Framework Agreement, it has been proposed to amend the CSOs wording to acknowledge this as a valid circumstance outside of the Council's control and would therefore, not require a Waiver to be submitted.
- 7.2. The [Procurement Act 2023](#) has just received royal assent and will be coming into force in October 2024. It is anticipated a full revision of the CSOs would be required to support the new Procurement Regulations. Whilst an initial training session has been attended by the Procurement Manager and Section 151 Officer on what the Council may expect to be introduced in the new Public Contract Regulations, the full guidance has not yet been made available to the Council. The Legal Team are also in the process of seeking available training sessions now the Bill has been passed and will both work together to ensure the Council continues to be prepared for the change in regulations and the impact on the Council's processes. Further updates will be provided when more information becomes available and how this could affect the Waiver application process.
- 7.3. In Previous updates, it has been reported that full due diligence checks are also continuing to be carried out for all **waiver applications where** the waiver is deemed justified, to best protect the Council. These checks consist 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. This approach was reviewed again in September 2023 by the Director of Corporate Services and Section 151

Officer, the Head of Finance, Procurement and Risk and the Procurement Manager (Operations) to ensure the level of due diligence checks continue to meet the Council's current requirements and it was deemed the approach continues to be appropriate for the majority of waivers received. Where the nature of the circumstances, however, requires extreme urgency for business critical circumstances, such as Health and Safety reasons, and carrying out the full due diligence checks and PIF completion may cause additional delays, a decision would continue to be taken by the Section 151 Officer as to whether the full due diligence checks will be required.

- 7.4. CSOs training and refresher training has continued to be undertaken to 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. Part of the training is on the Waiver application process and understanding that waivers are for exceptional circumstances only once all compliant options have been considered. As noted in the previous report to this committee, waiver applications continue to be received supported by evidence and the Procurement Initiation Form at the outset now, which greatly assists with processing the waiver applications in a smooth and timely manner.
- 7.5. Training of Officers will also need to be refreshed as part of the CSOs refresh and again ready for when the new Procurement Act comes into force. It is anticipated that this will be undertaken as part of a training programme being introduced to ensure that all officers who are in a position of spending the Council's money are identified and all training requirements are met.

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 2023/2024
- Appendix 4 - Detailed list of 2023/2024 Waivers (April to 9 November)
- Appendix 5 - Category of Waivers 2023/2024 (April to November)

Corporate Consultation

Finance: *Not applicable*

Legal: *Ingrid Brown (Head of Legal and Democracy & Monitoring Officer)*