

**INFORMATION REPORT ON WAIVERS TO CONTRACT PROCEDURE RULES**

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**1. Purpose**

- (a) To provide information on the process for waiving Contract Procedure Rules.
- (b) To provide historical data on waivers granted
- (c) To provide details of the guidance provided.

**2. Context**

- 2.1 The Contract Procedure Rules (CPRs) were last updated in 2013, with the final version being considered by Constitution Commission, Audit Committee and Cabinet Procurement Committee (CPC) before their final agreement at August Council. These rules allow for an exemption under the following circumstances:

“Without limitation, special circumstances are where there is:

- An unforeseen and real risk of harm to individuals; or
- Excessive and significant damage to the Council’s services, finances or reputation has occurred or could potentially occur.

For the avoidance of any doubt the failure to properly plan timescales to comply with Rules and / or EU Procurement Regulations is not special circumstances. “

- 2.2 Under those approved rules the S151 Officer has authority to approve situations where the rules (ie the Constitution) can be waived. All waivers granted are reported to CPC on a quarterly basis and this oversight has given rise for the requirement for the lead Cabinet Member to be involved in reviewing all waivers over £100K.

**3. Summary information on waivers granted**

- 3.1 There have been 90 waivers granted for a total value of £11,128,176 since April 2011. A breakdown by year is shown below:

Audit Committee- April 2014\_Waivers

Period	Number	Total value of waivers
April 2011 to March 2012	15	£1,141,377
April 2012 to March 2013	32	£2,136,737
April 2013 to 14/3/2014	43	£7,850,062

- 3.2 Whilst the above table at face value shows an increase of waivers it should be recognised that the trend could be more probably caused by an increased visibility of such instances arising from the introduction of the improved regime of governance within both procurement and also the purchase to pay side many contracts which may have previously been awarded with no oversight or tracking.
- 3.3 The Council's S151 officer considers waivers in the context of advice from the Council's procurement officers and a number of waivers are rejected in the light of this advice. Where waivers are initially rejected, it is normally the case that further work is required to substantiate the need for a waiver or consider an alternate route to meet their requirement..
- 3.4 The increased measures and processes implemented across Finance and Procurement have ensured that a greater number of officers are ensuring they are fully compliant with all relevant financial and procurement procedure rules and this partly explains the increase
- 3.5 Additionally the value and volume of waivers has to be set against the wider context of the value and volume of contracts awarded by adherence to the CPRs. This is shown below:

Period	Total value of contracts awarded	Total number of contracts awarded	Waivers as a % by value	Waivers as a % by volume
April 11 to March 12	£647,775,252	417	0.2	4
April 12 to March 13	£114,439,585	253	2	13
April 13 to March 14	£246,465,520	255	3	17

- 3.6 It is also worth highlighting that the increase in value of waivers in 13/14 includes the specific decision by Cabinet Procurement Committee to approve waivers in respect of works to the Highways and Footpaths and the requirement to secure the longer term maintenance of the ICT system for Children’s Care. Refusal of these waivers would have caused excessive and significant damage to the Council’s reputation and could have caused unforeseen harm to vulnerable young people in our care. Although those procurements were ‘waivers’ the involvement and agreement by CPC is an illustration of improved transparency and governance.
- 3.7 As waivers may be requested for a large number of reasons it is difficult to provide a comprehensive analysis, however a list of all waivers with full details is available to members. It has been possible to categorise them on a high level- see below:.

Reason	Number	Value
An unforeseen and real risk of harm to individuals	1	£26600
Excessive and significant damage to the Council’s services, finances or reputation has occurred or could potentially occur.	78	£9,784,062
Both of the above	11	£1,317,514

- 3.8 There can be no single approach to the use of waivers due to the need for a flexible, responsive and appropriate response to each requirement the Council has. Every waiver request must be supported by full details as to why the CPRs cannot be followed and must have the support of the relevant Corporate Director and Lead Cabinet Member (if over £100K)
- 3.9 In light of the scrutiny of waivers by Corporate Directors and elected Members officers often approach the Procurement team for advice before submitting a waiver form and this has resulted in them reviewing their strategy and often opting for full compliance with CPRs

#### 4. Revised guidance on the use of waivers

- 4.1 Following concerns raised by the CPC on the increase in waivers revised guidance has been prepared for officers and this has been circulated to all senior managers. This additional guidance is shown in Annexe A to this report.

## 5. **Conclusion**

Waivers as reported above are therefore subject to much greater governance and scrutiny since the introduction of the new CPR's in 2013 and despite waivers in essence representing a variation from approved process, such variation is sometimes needed and is now subject to sensitive scrutiny.

**Policy guidance on waivers to Contract Procedure Rules (Jan 2014)**

The relevant section from the contract procedure rules is set out below. Everyone undertaking procurement (of any value) is advised to read the contract procedure rules. The waiver provisions are clear. In relation to waivers below £100k some Council members have expressed concerns that the waiver process may not always be used for the right reasons. For example an improper purpose would be:

- The procurement process is thought to be too burdensome.
- We do not think there is a market out there.
- This supplier has been doing it for years and is really good.
- We forgot to do it earlier.
- The timeline slipped

However there are good business reasons why a waiver might be sought. These include:

- There is an opportunity to consolidate various contracts and it is necessary for some to come to end so the terms can be aligned.
- There is legislative uncertainty and it makes sense to await government proposals
- There is organisational uncertainty e.g. there is a service reorganisation which could lead to service reconfiguration.
- The funding has only been agreed at the last minute and is time limited.
- External factors change the nature/timing of the procurement.

There will of course be others. However the principle should be that a waiver is something sought for sound operational reasons, not to get a service out of a tight spot. It is likely members will want an explanation for any waivers falling into this category. If the S151 officer is compelled to afford a waiver in order to maintain essential services in circumstances caused by delay it is likely, at the very least, to draw adverse comment.

## **21 Exemption**

21.1 In exceptional circumstances it may not be possible to comply with these Rules. Variation from these rules is permitted where:

### 21.1.1 Written report

A written report will be prepared by the relevant Head of Service/AD or Corporate Director and submitted to the HoSP specifying the special circumstances justifying the exemption. Without limitation, special circumstances are where there is:

- a. an unforeseen and real risk of harm to individuals ; or
- b. excessive and significant damage to the Council's services, finances or reputation has occurred or could potentially occur.

For the avoidance of any doubt the failure to properly plan timescales to comply with Rules and / or EU Procurement Regulations is not special circumstances.

The written report will detail the specific provisions within the Rules, from which exemption is sought, reasons for seeking the exemption and how relevant risks arising from those variations will be mitigated and managed.

### 21.1.2 Approval

Approval to waive Rules above £100,000 will only be granted with the agreement of the S151 Officer in consultation with the relevant lead Cabinet Member following advice of the Head of Strategic Procurement and where required the AD Law and Governance. Where the value of the waiver is below £100,000 then the lead Cabinet members shall be advised.. The final decision rests with the S151 Officer.

Copies of all waivers and supporting information will be retained by the relevant officer and the Corporate Procurement Team for a period of 6 years. A quarterly report of all waivers granted will be presented to Cabinet Procurement Committee by the Head of Strategic Procurement for their information and consideration.

### 21.1.3 Council Reports

A formal report will be prepared quarterly to the Cabinet Procurement Committee. That report will set out the specific rationale for waiving the Rules and will also append a summary of the previous instances where Rules were waived.

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