

Committee Name and Date of Committee Meeting

Audit Committee – 12 March 2024

Report Title

2024 Procurement Annual Update

Is this a Key Decision and has it been included on the Forward Plan?

No

Strategic Director Approving Submission of the Report

Judith Badger, Strategic Director of Finance and Customer Services

Report Author(s)

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Ward(s) Affected

Borough-Wide

Report Summary

This report seeks to provide an update on procurement activity undertaken in the last 12 months.

Recommendations

1. That Audit Committee note the content of the report.

List of Appendices Included

None

Background Papers

1. [Procurement Act 2023](#)
2. [Health Care Services \(Provider Selection Regime\) Regulations 2023](#)

Consideration by any other Council Committee, Scrutiny or Advisory Panel

N/A

Council Approval Required

No

Exempt from the Press and Public

No

2024 Procurement Annual Update

1. Background

- 1.1 The Council spends in excess of £350m per annum on a wide range of goods, works and services ranging from construction, transport and regeneration activity to commissioned care services for vulnerable children and adults through to business and professional services such as food, consultancy and ICT.
- 1.2 The role of the procurement function is to ensure this expenditure is made in compliance with procurement legislation (currently the Public Contracts Regulations 2015) and the Council's own Financial and Procurement Procedure Rules (FPPRs). To do this it is essential that there are robust procurement practices to ensure value for money is being achieved, ethical practices are being applied and the contracts the Council enters into are robust, deliver against key priorities and minimise risk.
- 1.3 The last annual update the Audit Committee was 14 March 2023. This report therefore seeks to provide an update for 2024.

2. Key Issues

2.1 Procurement Act 2023

- 2.1.1 The key significant issue to report since the update provided last year is in terms of progress relating to the regulatory reform. At the last update it was reported that the Procurement Bill was working its way through the parliamentary stages and was expected to receive Royal Assent in Spring 2023. This timeline was delayed by approximately 6 months, with Royal Assent being received in October 2023. The Procurement Bill is now here on in referred to as the Procurement Act 2023. This new Act will govern the regime the Council will be required to adhere to where procurement activity is above the relevant threshold¹. Some exclusions will still remain such as contracts referred to under the Light Touch Regime, where the full application of the legislation is not required, but at present it remains unclear as to which parts of the legislation are relevant or not. The formal implementation date for the Act is still to be confirmed but estimated as October 2024. Until such a date is confirmed the current regime still applies.
- 2.1.2 New objectives for public procurement have been included within the Procurement Act 2023, that must be at the forefront when services are considering procurement requirements ensuring their proper consideration:
 - Delivering value for money
 - Maximising public benefits – this could include collaboration and social value benefits.

¹ Thresholds as of 1 January 2024 (inclusive of VAT):

- Goods and Services: £214,904
- Works and Concessions: £5,372,609
- Social and Other Specific Services - Light Touch Regime: £663,540

- Sharing of information, acting with transparency by default
- Acting and being seen to act with Integrity.
- Treating suppliers the same (equal treatment)
- Ensuring no unfair advantage or disadvantage – providing more of an emphasis on conflicts of interest
- Duty to regard Small, Medium sized Enterprises (SMEs).

2.1.3 The changes from the current Public Contracts Regulations 2015 to the Procurement Act 2023 are significant. The changes move procurement activity away from what can be considered as a transactional function into a strategic space, with focus now being given across the entire procurement lifecycle (project inception and pre-procurement activity through to contract expiry) rather than just the procurement phase (tender process through to award of contract).

2.1.4 Summarised below are some of the key changes and challenges the Procurement Act 2023 brings.

2.1.5 **Pre Procurement Considerations**

(i) ***Early Supplier Engagement:*** Whilst early supplier engagement has always been considered as best practice, this will now be heavily encouraged as ways to seek innovative approaches, develop procurement procedures, influence evaluation criteria and seek the markets view on envisaged timelines for participation. A new procurement notice will be introduced (the Preliminary Market Engagement Notice). Whilst this notice is not mandatory, where one is not published, this will need to be explained in later Tender Notices.

(ii) ***Pipeline Publishing Requirements:*** As the Council spends >£100m per annum, there will be a requirement to publish pipelines of future procurement opportunities (minimum 18 months – ideally 3-5 years) at the start of each financial year (as a minimum). Work is already ongoing by the procurement team to develop the template for the notice following guidance submitted by central government, however Services will need to effectively forward plan to ensure opportunities are appropriately published.

2.1.6 **Changes to Procurement Procedures and Routes to Market**

(i) The current Regulations have available 5 procurement procedures for use. The new Act will reduce this number down to 2. The Open Procedure will be retained and will mirror its current form, and a new procedure the Competitive Flexible Procedure will be introduced.

(ii) ***Competitive Flexible Procedure:*** This new procedure is considered to be a *Design Your Own* type of procedure. IT will be a multistage procedure that allows for stages of negotiation and dialogue to be conducted, providing increased freedom and flexibility. However, it is important to note that increased freedom and flexibility comes with increased levels of risk and this is not a procedure that will be able to run quickly (at least not at the outset) as care and consideration will need to be given to ensure the process is sufficiently described in the tender documentation to eliminate the risk of challenge.

2.1.7

- (i) **Changes to Assessment and Award**
New Requirements Prior to Awarding Contracts: Significant changes are to be introduced to the way feedback is provided to suppliers. Under the current regime feedback is provided to unsuccessful bidders by providing the supplier with an assessment of their bid, the scores of the winning bidder and then the Council's assessment of the characteristics and relative advantages of the winning bidder.
- (ii) In the new regime assessment summaries are to be provided to each supplier along with a full copy of the successful supplier's assessment summary. Whilst this removes the requirement for the Council to produce the characteristics and relative advantages of the winning bidder, this will now be left for the unsuccessful bidder to determine themselves. This will require detailed and concise assessment summaries to be produced to limit the number of potential complaints / challenges that could be received as a result.
- (iii) Once the assessment summaries have been issued, a new mandatory Contract Award Notice is required for publication, and this notice will now be what triggers the commencement of the standstill period (not the issuing of the letters as is currently the practice). In addition, the standstill period has been altered from 10 calendar days to 8 working days.
- (iv) ***New Publishing Requirements Following the Award of Contract:*** As is detailed within the current regime once the contract has been entered into a notice needs to be published within 30 days. The name of this notice has changed from Contract Award Notice to Contract Detail Notice.
- (v) However, in addition to the above, for contracts £5m+ the Act will also now require the Council to publish a redacted copy of the contract and details of 3 Key Performance Indicators (KPIs) that will be used in the management of the contract, those that are the most material to the performance of the core contractual obligations.

2.1.8

- (i) **Contract Management and Governance**
Modification, Performance and Termination: More detailed provisions have been included within the Procurement Act regarding contract management and performance, with the aim of improving contract management practice across the public sector.
- (ii) Whilst the provisions around when contract amendments are permissible are not significantly changing, there will now be a requirement to publish contract change notices and a redacted copy of the modified contract.
- (iii) As referred to above, for contracts over £5m, details of 3 KPI's are to be published. During the term of the contract, there is an expectation that these KPIs are monitored and recorded, and the performance information is published annually via a new Contract Performance notice.
- (iv) New mandatory Contract Termination notices are to be introduced. These are required for all contracts irrespective of whether the contract has expired naturally, or it has been terminated early. Where a supplier has breached contract, and this has resulted in termination of the contract, the

award of damages or a settlement between the supplier and contracting authority must be included in this notice.

2.1.9

(i) **Planning for the Changes**

A briefing session has taken place with the Strategic Leadership Team to inform them of the planned changes, and a further presentation is due to be given at one of the next Wider Leadership Sessions to engage and raise awareness with the wider management cohort of the organisation (Assistant Directors and Heads of Service) of the high-level proposed changes to come.

(ii)

There are still a lot of unknowns in relation to how the Act will operate in practice. The Act will be underpinned by further secondary legislation (“Regulations”) and at the time of writing these Regulations have not been released. It is anticipated that some of these information will start to be received towards the end of March 2024.

(iii)

In addition, detailed training is also not yet available for practitioners. Cabinet Office have committed to 4 levels of training:

- **Knowledge Drops:** short YouTube videos that introduce the concepts of the changes in the Legislation. These videos were made available December 2023.
- **eLearning:** 10 modules of eLearning will be made available and can be accessed by unlimited numbers of officers. It is expected that procurement practitioners complete the accreditation at the end of the training. This eLearning won’t teach individuals how to undertake procurement but will be more focussed on the changes between the current and new regime. No firm date has been given as to when this training will be made available but expected end of March 2024.
- **Deep Dives:** a limited number of places per authority (estimated 3) are available for an in depth 3-day training session on the new Act, to create Super Users within each organisation. Officers will not be able to commence Deep Dive training until they have concluded the eLearning and accreditation referred to above. It is expected that this training will commence May time, however this training will be delivered over a 58-week period, so unless the Council can secure places on the training early, there is a risk that the new legislation commences before the Council has received the full training offer.
- **Communities of Practice:** Once the new regime is implemented networks/Communities of Practice are to be established to encourage knowledge sharing, best practice etc.

(iv)

Until the above secondary legislation and training has been received, it is difficult for early work to commence in terms of updating the Council procurement procedure rules, tender templates and formally training the wider organisation.

(v)

However, in readiness for the changes to come, the Procurement Team, as referred to above are continuing to progress work in development of the procurement pipeline. As part of this work the team are starting to identify

projects that are planned for tender around October 2024 that might be affected by the new regime.

- (vi) In addition, given the new transparency requirements from a Contract Management perspective the Procurement Team are developing a Contract Management dashboard for Services across the Council to populate which will provide the details of the top 3 KPIs being used in contracts (initially £5m+), and the performance against these. This dashboard is to be trialled in the coming weeks to iron out issues with its use ahead of being legally required to publish such information.
- (vii) Work is ongoing within the regional procurement forum (known as SPG) regarding the actions we can collectively undertake together to share information with our supply base on the forthcoming changes – and options are being explored to use the e-tendering platform YORtender as a mechanism for doing this.
- (viii) Significant resource is required to plan and implement the changes required across the organisation wide. This implementation needs to be balanced with current work and activity.
- (ix) Effective implementation will require significant cultural and behavioural changes across the organisation, with an awareness that this will require Council wide collaboration as this isn't something the procurement team can implement and deliver in isolation.
- (x) Following the implementation date, due care and consideration will be required as for a period of time it will be expected that the Procurement Team will be required to oversee 2 versions of legislation, as procurements commenced prior to implementation will continue under the current Public Contracts Regulation 2015, and after implementation in accordance with the Procurement Act 2023.

2.2 Provider Selection Regime

2.2.1 In addition to the new legislation referred to above at Section 2.1, a further piece of legislation came into effect from 1 January 2024, The Health Care Services (Provider Selection Regime) Regulations 2023 ("PSR"). The PSR has removed procurement activity in relation to health care services totally from the current Public Contracts Regulations 2015 and the future Procurement Act 2023 and created its own legislative landscape for these Services. Those contracts that fall within the scope of PSR will be defined by the use of Common Procurement Vocabulary (CPV) codes. If a contract is to fall within the scope of PSR, this legislation will apply irrespective of value.

2.2.2 The main objectives of this new legislation were to create:

- A flexible and proportionate process for selecting providers of health care services (so that all decisions can be made with a view to securing the needs of the people who use the services, improving the quality of the services, and improving the efficiency in the provision of the services)

- The capability for greater integration and collaboration across the system, while ensuring that all decisions about how health care is arranged are made transparently.
- Opportunities to reduce bureaucracy and cost associated with the current rules.

2.2.3 When procuring health services 3 different selection processes will be available:

- Direct award process (options A – C).
- Most suitable provider process.
- Competitive process.

2.2.4 The Procurement Team have undertaken some initial assessments and the main contracts that appear to fall within the scope of PSR are Public Health Contracts (Sexual Health Services, Drug & Alcohol rehabilitation services, 0-19 services).

2.2.5 These contracts have been re-procured over the last couple of years, and therefore there is no significant immediate impact being felt by the implementation of PSR. Collaborative working between procurement, legal and commissioners in public health is ongoing to ensure a shared understanding of this new legislation.

2.3 Ethical Procurement Policy

2.3.1 Following the introduction of the Council's Ethical Procurement Policy in 2020, this has been updated and refreshed to bring it up to date with the Council's current position. Updates included:

- Removal of references to the EU Treaty following the UK's exit from the European Union.
- Updates to the Council's actions regarding support to the Charter for Sustainable British Steel.
- Removing reference to the previous Safeguarding Policy and acknowledging the new Safeguarding Protocol.
- Removing reference to the previous Equality and Diversity Policy and acknowledging the new Equality, Diversity and Inclusion Strategy.
- Documenting that the Council is now accredited with the Real Living Wage Foundation.
- Including the new Council Motion to declare a Nature Crisis.
- Including the new Council motion relating to Fair Tax.
- Updates under the case study section.

2.3.2 This update / refresh is now scheduled to take place on an annual basis.

3. Options considered and recommended proposal

3.1 No options have been considered, as this is an update report in activity that has taken place, rather than recommended future proposals.

4. Consultation on proposal

- 4.1 Briefings have been provided to the Strategic Leadership Team (SLT) to raise the concerns around the changes to the legislation and to engage early to make sure Strategic Officers are sighted on changes that directorates / services will need to consider moving forward.

5. Timetable and Accountability for Implementing this Decision

- 5.1 This report is for Audit Committee information and noting, therefore it is not anticipated there will be a decision requiring implementation. It is important however to restate some of the key timescales referred to at section 2 above that will be imposed on the Council.

- First phase of secondary legislation to be released: March 2024
- eLearning made available: March 2024
- Deep Dive Training made available: April 2024
- Estimated go live date: October 2024

6. Financial and Procurement Advice and Implications

- 6.1 All associated procurement implications are detailed in the main body of this report.

- 6.2 There are no direct financial implications arising from this procurement update report.

7. Legal Advice and Implications

- 7.1 The work undertaken by the Corporate Procurement Team and the measures implemented as set out in this report, are consistent with relevant procurement Regulations and best practice in relation to procurement. This in turn lessens the likelihood of legal challenge in respect of procurement activity and contract management.

- 7.2 The Council's Legal Services are working alongside the Procurement Team to understand and prepare the Council for the implementation in respect of the changes to the legislation referred to within this report.

8. Human Resources Advice and Implications

- 8.1 HR & OD colleagues will continue to work with Procurement to review staff engagement and learning activity to ensure they are effective in raising awareness.

9. Implications for Children and Young People and Vulnerable Adults

- 9.1 As an update report there are no direct implications for Children and Young People and Vulnerable Adults.

10. Equalities and Human Rights Advice and Implications

10.1 As an update report there are no direct implications aligned to Equalities and Human Rights.

11. Implications for CO₂ Emissions and Climate Change

11.1 As an update report there are no direct implication linked to CO₂ Emissions and Climate Change.

12. Implications for Partners

12.1 As an update report there are no implications for Partners.

13. Risks and Mitigation

13.1 It is important that the new Procurement regime is effectively implemented, as failure to procure in compliance with the Act, could results in legal challenges for the Council, which if the Courts did not rule in favour of the Council could have financial and reputational impact.

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This report is published on the Council's [website](#).