

# TONBRIDGE & MALLING BOROUGH COUNCIL

## CABINET

18 June 2008

### Report of the Acting Chief Solicitor and the Director of Finance

#### Part 1- Public

#### Matters for Recommendation to Council

### 1 REVIEW OF CONTRACTS PROCEDURE RULES

#### 1.1 Introduction

1.1.1 The Contracts Procedure Rules ("CPR") contained in Part 4 of the Constitution must be updated to implement the Public Contract Regulations. This work was required to be carried out by a number of district councils at the same time and so the possibility of joint working was considered. Funding became available from the Kent Improvement and Efficiency Partnership (KIEP) for this work to be carried out across Kent by external solicitors with local government and procurement experience.

#### 1.2 Process

- 1.2.1 The Procurement OSG oversaw the review of the rules and sought to update and modernise our procurement practices. In addition it sought to encourage standardisation of the CPR across Kent district authorities, wherever possible, to facilitate a consistent approach to procurement in Kent. This was seen as the first step in promoting partnership working in order to maximise joint procurement opportunities. The next stage in this process, which will be funded by KIEP monies, will be a joint review of Kent district conditions of contract.
- 1.2.2 The Council's Management Team has been fully briefed on the proposed changes to the Contracts Procedure Rules which result in minor consequential changes to the Financial Procedure Rules and fully endorse the proposed amendments.
- 1.2.3 As the Financial Procedure and Contracts Procedure Rules are contained in the Constitution they can only be changed following the procedure set out in Article 15 in Part 2 of the Constitution. The changes must be approved by full Council after consideration of a report from the Council's Monitoring Officer. In preparing the report, the Monitoring Officer is required amongst other things, to compare practices in this authority with that in other comparable authorities and national examples of best practice (where appropriate). He is also required to consult the Council's other statutory officers; the Head of Paid

Service and the Chief Financial Officer. This process has been undertaken and the three statutory officers have each endorsed the proposed new rules and other changes to the Delegations to Officer and the Financial Procedure Rules contained in the Constitution which are outlined in this report.

### 1.3 The Main changes to the Contracts Procedure Rules:

- 1.3.1 The new rules [**Annex 1**] will replace the existing rules in part 4 of the Constitution.
- 1.3.2 The rules will be supported by a purchasing guide for officers, which explains how the rules work in practice. Officers will be required to have regard to this guide when carrying out procurement.
- 1.3.3 The proposed rules do not tell officers how they should carry out procurement rather they cover the minimum requirements for tendering to deal with efficient use of resources and probity. They encourage best practice by ensuring there is proper planning of the procurement process. This will include allowing time for market testing where appropriate, drafting documents and obtaining executive approval as required
- 1.3.4 They also explicitly deal with the Public Contract Regulations and European law which apply to the selection of Contractors. Officers will therefore be more aware of what they can and cannot do within the European directives which represent a complex area of law.
- 1.3.5 Standard contract clauses are referred to in the rules for use in all contracts over the tendering threshold and standard terms and conditions which may be used for orders over £5,000 to ensure that the Council is adequately protected in all of its contracts. There is an exception for IT software licences and support agreements which are usually on the suppliers own terms. These must be approved by the relevant Chief Officer in consultation with the Information Technology Manager and the Chief Solicitor.
- 1.3.6 The responsibility of officers with regard to procurement is clearly set out with the Director having overall responsibility for procurement within their delegated powers but appointing suitably qualified responsible officers to carry out the procurement in practise
- 1.3.7 The rules explain how the value of a contract should be calculated for the purposes of applying the new CPR. The contract value is usually calculated over the entire life of the contract. (This means that if an officer wishes to procure a service contract which will last for 4 years which has an estimated annual cost of £30,000, this will be valued as a contract for £120,000.) The exception to this is for ongoing contracts which do not specify an end date. The new rules state that these contracts should be valued as if they were due to last for four years for the purposes of applying the CPR.
- 1.3.8 The thresholds for tendering have not been changed since the new Constitution was introduced. The proposal is to increase these to allow officers to get on

with routine procurement. The new rules propose a single quote up to £5,000, three competitive quotes up to £75,000 and three tenders between £75,000 and the EU services/supply threshold which is currently £139,893. Over this EU threshold a full EU tendering procedure will be followed for service/supply contracts. For works contracts the EU threshold is much higher at £3,497,313.

- 1.3.9 Chief Officers will be authorised to carry out procurement for works services and supply contracts and to award the contract provided there is an approved budget where the total contract value is below £139,893. Under the proposed rules Chief Officers would have delegated powers to purchase a new piece of equipment or software valued at say £135,000 without reference to members provided that they had an approved budget and complied with the CPR's. Similarly they could let a service contract lasting for 4 years valued at £30,000pa without recourse to members. They could if they wished ask members to take the decisions to proceed or to award such contracts if they believed they would be of particular interest to members.
- 1.3.10 The requirement to advertise all tenders in the local press has been removed. Officers are left to establish the best way to advertise their contract opportunity which can include electronic advertising either on the Council's own web-site which contains all of our contract opportunities for contracts valued at over £15,000 or other portals such as the SECE portal. This will achieve maximum flexibility and may result in cost savings if sufficient interest in the contract can be achieved by this type of advertising.
- 1.3.11 Members will need to approve the decision to advertise a contract opportunity and the process to be followed for service supply and works contracts which are valued at or over £139,893, in the majority of cases. The exception is for routine/simple lower value contracts, which will either be very close to the EU services/supply threshold or contracts which are subject to the aggregation rules which mean that lower value contracts which would not normally have to be EU advertised must be. Where the exception applies the Chief Executive in consultation with the Monitoring Officer has to carry out such tasks. The Purchasing Guide will explain this to officers. This was a provision which was inserted to ensure that lower value or routine simple procurement decisions can be taken under delegated authority, leaving the more important decisions for members.
- 1.3.12 The proposed rules remove the requirements on how to evaluate contractors to draw up a select list. This will facilitate the use of pre-qualification services such as Construction-line for non-EU procurement and consequent cost savings in carrying out evaluation of contractors. Construction-line is a database of relevant information on contractors performance, experience and health and safety records and financial standing which authorities are able to search free of charge to draw up a select list when they need work or services carried out.
- 1.3.13 Due to the constraints of complying with Cabinet and Advisory Board timetables the procurement process is often unnecessarily long and drawn out. It is becoming more frequent for the task of drawing up the select list to be

delegated to officers in consultation with members for this reason. It is therefore proposed to remove the requirement for members to approve the select list in order to streamline the procurement process and to leave the more important decisions such as the award of higher value contracts to members.

- 1.3.14 The proposed new rules allow Chief Officers delegated authority to award a contract for services, supply or works which have a total value of less than £139,893 provided that there is an approved budget and the CPR's have been followed. The award decision on higher value contracts will be made by members subject to the same exception for simple or routine contracts mentioned at paragraph 1.3.10 above. This will ensure that members deal with the more important procurement decisions allowing officers to get on with routine or lower value procurement.
- 1.3.15 The procedure on waiver from the rules has been simplified so that there is a single process of applying to the Chief Executive, the Monitoring Officer and the Director of Finance. All decisions on waivers must take into account probity and best value/value for money principles. If a waiver is sought from the requirement to tender a contract above £75,000 this must be reported to members.
- 1.3.16 The proposed new rules provide for extensions to contracts valued at or over £75,000 to be approved by members. Chief Officers are able to extend contracts beneath this value under delegated powers provided that there is an approved budget and the CPR's have been followed.

#### **1.4 Other constitutional changes:**

- 1.4.1 The model produced by the external advisors did not neatly fit our own Constitution as other authorities have very detailed schemes of delegations to officers relating to procurement which sit outside of the procurement rules themselves. Our own delegations to officers are contained within the rules which are being replaced. It will therefore be necessary to make a number of consequential amendments to the Constitution and to have some local variations to the CPR for this authority.
- 1.4.2 The first of these changes relates to the delegations to Chief Officers at paragraph 1.1 of the Scheme of Delegations in Part 3 of the Constitution which will need now to specifically refer to procurement:

“Part 3 – Functions delegated to Officers

- 1.1 In order to be able to carry out its functions effectively, authority is granted to the following list of officers (subsequently referred to as Chief Officers) to act on behalf of the Council in relation to routine matters of management and administration of their own service areas; including procurement provided that it remains within an approved budget and is conducted in accordance with the Contract Procedure Rules.”

1.4.3 The second change is to add a new CO118 to Part 3 of the Constitution for Chief Officers:

“CO118 to carry out all tasks associated with the procurement of goods services and works provided that there is an approved budget for the contract/purchase and the procurement is carried out in accordance with the Contract Procedure Rules.”

1.4.4 Some minor consequential changes have been made to the Financial Procedure Rules to ensure that there is no overlap between these and the CPR. [Annex 2]

1.4.5 FPR have also been updated to reflect the use of the Council’s electronic ordering system and other consequential changes to financial management practise.

1.4.6 In addition the opportunity is being taken to update the limit on virements in rule 12.3 of the FPR as follows:

- Chief Officers may transfer up to £10,000 in a financial year between budgets relating to the same area of service activity;
- The Chief Executive in consultation with Management Team and the Director of Finance may transfer up to £25,000 relating to the same area of service activity; and
- The Executive may approve virements up to £50,000 which include transfers between different areas of service activity.

## **1.5 LEGAL IMPLICATIONS**

1.5.1 The Contract Procedure Rules are made under and in accordance with the requirements of Section 135 of the Local Government Act 1972. The rules must be followed in conducting procurement to ensure probity and efficient use of resources.

1.5.2 The CPR is required to be changed in order to fully implement EEC Directive 2004/18/EC and the Public Contracts Regulations 2006.

## **1.6 FINANCIAL AND VALUE FOR MONEY CONSIDERATIONS**

1.6.1 By streamlining and modernising the procurement process opportunities for cost savings may ensue. There is a need to ensure that the CPR’s are followed to ensure probity and value for money is achieved in letting local authority contracts.

## **1.7 RISK ASSESSMENT**

1.7.1 If the CPR’s are not updated there is a risk that procurement will not be in line with the consolidated procurement directive and the Public Contract Regulations and there may be a consequent challenge to our procedures.

## **1.8 POLICY CONSIDERATIONS**

1.8.1 The proposed new CPR is in line with the Procurement Strategy.

## 1.9 RECOMMENDATIONS

- 1.9.1 Members are asked to endorse the amendments to the Contracts Procedure Rules [**Annex 1**], the Financial Procedure Rules [**Annex 2**] and to the Schemes of Delegation to Officers in Part 3 of the Constitution which are recited at paragraphs 1.4.2 and 1.4.3 of the report which will then be reported by the Monitoring Officer to full Council for approval.

Background papers: TMBC Purchasing Guide

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