

# FAREHAM

## BOROUGH COUNCIL

### Report to Audit and Governance Committee

**Date:** 23 September 2024

**Report of:** Assistant Director (Finance & ICT)

**Subject:** REVIEW OF PROCUREMENT AND CONTRACT PROCEDURE RULES

#### SUMMARY

This report outlines the key changes to, and the rationale, for a revision of the Procurement and Contract Procedure Rules, which has been triggered by the need to comply with The Procurement Act 2023.

#### RECOMMENDATION

It is RECOMMENDED that the Audit and Governance Committee:

- a) reviews and comments on the contents of this report;
- b) ask that Council endorse the revised Procurement and Contract Procedure Rules attached at Appendix 1 to be implemented on the same date that the Procurement Act 2023 goes live; and
- c) supports the request that Council grants delegated authority to the Assistant Director (Finance and ICT) to update the Appendices to the PCPRs as subsequent changes needed are identified.

## **INTRODUCTION**

1. This paper outlines the key changes to, and the rationale, for a revision of the Council's Procurement and Contract Procedure Rules.
2. This has been triggered by the introduction of new legislation, the Procurement Act 2023 which is due to go live on 26 October 2024. However, it is understood that this go live date could be postponed.
3. These changes will materially alter the procurement processes in place at the Council.
4. It is also anticipated that the changes could impact on resources, and these potential pinch points have been identified in the report.
5. It is recommended that the revised Procurement and Contract Procedure Rules replace the existing version on the date that the Procurement Act 2023 goes live. This is the 26 October 2024, unless there is a postponement announced by the UK Government.

## **BACKGROUND**

6. The main legislation in relation to procurement regulations which the Council must currently adhere to are the Public Contracts Regulations 2015 (PCRs).
7. Our local rules, known as the Procurement and Contract Procedure Rules (PCPRs) encompass both the PCRs and internal processes which must be followed. These had a major rewrite in July 2018 with minor updates since with the latest version being January 2024.
8. The PCPRs are built on the PCRs and the underlying Procurement Principles of transparency, equal treatment without discrimination, proportionality and mutual recognition.
9. Every Member, employee of the Council and anyone acting on the Council's behalf must comply with the PCPRs.
10. The PCPRs are part of the Council's Constitution as one of the 'stand-alone' supporting documents in Part 4.
11. The Procurement Act 2023 (PA23) received Royal Assent on 26 October 2023. Subsequent secondary legislation has been implemented and the PA23 will replace the PCRs from 28 October 2024.
12. In light of this, the PCPRs have been updated to encompass the changes in the PA23. This paper presents the key changes and implications to the Council.
13. There are some aspects of the PA23 which are expected to be introduced at later dates (Phase 2 and Phase 3). Specific detail about these is yet unknown. Therefore, it is anticipated that further revision to the PCPRs will be necessary.
14. The PA23 does not apply retrospectively. Any contract already in place will not

be subject to the requirements of the Act. Similarly, any procurements already commenced under the PCRs will continue to be bound by the 2015 Act, not the PA23.

## **CHANGES IN THE PA23 COMPARED TO PCRS**

15. There are several significant changes to procurement regulations due to the PA23. The underlying philosophy was to increase flexibility, increase transparency, remove barriers to entry and improve value for money delivery.
16. These changes are designed to encourage an approach where the whole lifecycle of goods/services/works are considered. This is underpinned by a move away from awarding based on the Most Economically Advantageous Tender (as per the PCRs), to awarding based on the Most Advantageous Tender (PA23).
17. This section outlines changes to the PCPRs which have been made to incorporate the PA23 regulations.

### **Additional powers for Ministers of the Crown**

18. As a result of lessons learned during the Covid-19 outbreak, the PA23 gives Ministers of the Crown the power to make regulations to allow direct award contracts to protect human, animal or plant life or health or to protect public order or safety.

### **Financial Thresholds**

19. There have been changes to the financial thresholds, over which procurements are considered “Covered Procurements” i.e. covered by the PA23. The current thresholds are found in Appendix H of the PCPRs. The lowest threshold is currently £213,477 for goods and services.
20. An additional threshold of over £5m (inc. VAT) has been introduced which triggers additional requirements as noted elsewhere in this paper.
21. The definition of the financial value of a contract has been changed. Previously it was based on 4-year expected spend. Under the PA23 the whole life of the contract now counts towards its Total Lifetime Value. This means contracts which previously would not have been captured by the PCRs, will now be captured by the PA23.
22. This is particularly relevant when a contract is evergreen (i.e. it auto renews). Many of our ICT contracts are of this kind, and under the interpretation of the PA23, they are deemed to be above threshold and so captured by that Act.
23. This is a material change to the demand on officer resources, however it may be future clarification around interpretation lessens the potential impact.

### **Routes to Market**

24. The number of routes to market for Covered Procurements has been reduced from six to two. There is an Open Procedure which is similar to PCRs. All other routes have been replaced by the Competitive Dialogue Procedure. This procedure permits the Council to design and utilise a procurement approach which will best achieve the desired outcome.
25. There is no change in the PCPRs for procurement exercises which are not Covered Procurements.
26. When designing a Competitive Dialogue Procedure, the Council must have regard to the seven Procurement Objectives as described in the PA23. These are found in Appendix N of the PCPRs.

### **Impact on SMEs**

27. The PA23 removes some barriers to SMEs. This includes preventing the Council from using the suppliers legal, financial or technical ability to remove them from a tender exercise. Tenders for works valued over £214,604 (inc. VAT), however, can still incorporate financial barriers where proportionate.
28. The centrally held Supplier Details Information (see below) should remove or reduce repetitive administrative burdens which disproportionately affect SMEs. It is likely that this central database will remove the requirement for suppliers to input their details on all procurement databases as they need to do now in order to receive tender adverts.
29. The PA23 describes seven Procurement Objectives, which the Council must have regard to. One of these includes “having regard to SMEs” by removing barriers which could prevent them from tendering.

### **Transparency requirements**

30. The PCRs expected certain transparency notice publications at key points in procuring a contract e.g. at contract award stage. For most procurements the requirement was to publish no notices, one or sometimes two. The PA23 describes seventeen different Transparency Notices, as listed in Appendix K of the PCPRs. It is likely that a few will never apply to the Council unless it were to change significantly in size/scope. However most (likely twelve) will apply.
31. Of note, these additional transparency requirements are triggered throughout the entire lifecycle of a contract from preliminary market engagement through to termination. This differs from those awarded under the PCRs which had no expectation of transparency notices after award, unless significant changes were made. Many of our existing contracts would likely be captured by this had they been awarded under the PA23, including the corporate cleaning contract and Fareham Live construction.
32. There is a new requirement that a copy of the agreed version of the contract, when the Total Lifetime Value is over £5m, is published within 30 days of entering into that contract. Redactions of commercially sensitive information are allowed. Examples of contracts which would likely be captured by this are the property

voids and responsive repairs contract, and larger scale developments such as Assheton Court.

33. Additional regular transparency requirements have also been introduced:
  - (a) Quarterly, the Council must publish a list of payments over £30,000 (inc. VAT), made under a contract. This is expected to be introduced in Phase 3, and full details are not known. Currently the council publishes all payments to suppliers over £500 under the Transparency Code requirements.
  - (b) Every six months, the Council must evidence its compliance in making payments to suppliers within 30 days of invoice. This is expected to be introduced in Phase 2, and full details are not known.
34. The additional transparency requirements are a material change to the demand on officer resources.

### **Central Digital Platform**

35. The PA23 introduces the requirement for a government maintained central digital platform. This will be introduced in phases, and ultimately will contain information such as:
  - (a) supplier details (to reduce administrative burden on suppliers)
  - (b) performance of suppliers against metrics (see below)
  - (c) the central Debarment List (see below)

### **Contractor performance**

36. New requirements are placed on the Council to publish KPIs for contracts where the Total Lifetime Value is above £5m. Annual performance against these KPIs is also published into the public domain.
37. In the event of poor performance by a supplier (the definition is within the act and includes aspects such as award of damages for breach of contract) the Council is obliged to publish details of the poor performance within 30 days following the ruling. This applies to all Covered Contracts (i.e. any which are covered by the act).

### **Debarment List**

38. The PA23 gives responsibility to Ministers of the Crown to create and maintain a publicly accessible Central Debarment List. They will add and remove suppliers to it. The aim is to prevent public funds being paid to suppliers who have acted in a way that is unacceptable. Examples of likely grounds for inclusion on the list are tax evasion, fraud, bribery, blackmail, money laundering, modern slavery and terrorism.
39. Once on the list:
  - (a) the supplier cannot be awarded a public contract, and the Procurement

Team will need to cross check the active list for each procurement;

- (b) if the supplier has previously been awarded a contract, procured under the PA23, the Council has implied rights for termination. There is no obligation to terminate.

### **Conflicts of Interest**

- 40. The PA23 introduces new requirements in relation to conflicts of interest. It identifies three categories: Actual, Possible and Perceived. A Conflicts Assessment must be carried out if any of the three exists.

### **Standstill Periods**

- 41. There is a change to standstill periods. A standstill period is a period of time during which unsuccessful tenderers can challenge a contract award. If they fail to do so in the allowed time, then cannot successfully challenge later.
- 42. Previously the standstill period ended at midnight on the 10<sup>th</sup> calendar day, commencing the day after the Council notified tenderers of the intent to award.
- 43. The PA23 mandates an 8 working day period commencing on the day that the Council submits the relevant transparency document(s). A longer period is permissible.
- 44. The option of a Voluntary Standstill Period is also introduced, which will prevent a successful challenge to a contract award if it is used correctly.

### **Framework Agreements**

- 45. There are several changes to the establishing of, and ongoing management of Framework Agreements. This includes the ability for some frameworks to last 8 years instead of the currently allowed 4 years.
- 46. The details are outside the scope of this paper; however officers will be expected to work closely with the Procurement Team and the legal team in order to ensure the rules are adhered to.

### **OTHER LOCAL CHANGES TO THE PCPRS**

- 47. Other changes to the PCPRs have been introduced in this revision outside of the need to comply with the new legislation. This is either to reduce the risk of confusion, streamline procedures or to remove ambiguity.

### **Introduction of the term Senior Service Lead**

- 48. There was ambiguity around decision makers as some service areas had "Heads of Service" whilst others had "Managers". A new generic title, Senior Service Lead, has been introduced and Appendix J of the PCPRs lists the posts captured

by this definition.

### **Significant Purchases**

49. The PCPRs require additional actions for significant purchases. This definition has been changed to align to the PA23 financial thresholds and is now defined as:

*purchases under a Senior Service Lead which:*

- *are a new and complex purchase for the service;*
- *or are organisationally sensitive;*
- *or are over the “Significant Value Threshold” which is defined as:*
- *any single purchase greater than or equal to Threshold A.*
- *or any continuous spend with a supplier (Lifetime Contract Value) expected to be greater than or equal to Threshold A.*

*The thresholds above are the aggregate spend with that supplier for the Senior Service Lead*

Note: Threshold A is currently £213,477 inc. VAT and is set by central Government. Revisions to thresholds will be updated in Appendix H of the PCPRs.

### **Total purchase value with a supplier**

50. This definition has been changed to align with the definition of Lifetime Contract Value in the PA23.

### **Annual reporting requirement**

51. The requirements around the Annual Reporting have been updated to reflect the new officer structure and now read:

*An annual report to SLT and the Audit & Governance Committee should be produced providing information in relation to compliance with these Rules. Any significant finding arising from this review should be discussed with senior managers as appropriate,*

- *This should include a summary of the different routes to market used for significant purchases and the results of the audit testing.*
- *This report will also serve as a source of assurance to the Chief Executive’s Assurance Group and the Annual Governance Statement presented to the Audit and Governance Committee.*

### **Signing of contracts**

52. Only Senior Service Leads, or members of Senior leadership Team can commit the Council to:

- agreements which tie the Council into expenditure (e.g. maintenance);

- agreements which tie the Council into a set of terms and conditions (e.g. grant award);
- contracts awarded through a tender process.

### **Material Potential Adverse Financial Consequence**

53. Some contracts, for example council housing tenancy agreements, are exempt from the above requirements.
54. A new requirement has been added so that if by signing such a contract, it could expose the Council to a material potential adverse financial consequence, the officer must first liaise with either a Deputy Section 151 Officer or the Section 151 Officer.

### **Contract management**

55. There are several additional requirements in relation to contract management. These include:
  - the requirement for the procurement team to maintain a Central Register of all contracts entered into via a procurement process. This will capture details such as the named contract manager, expiry date, contract value, whether it is a Covered Contract and KPIs;
  - the requirement that on an annual basis, the procurement team must contact the contract managers on the central register, to ensure the register is kept up to date in terms of the responsible officer for each contract;
  - expectations on the use of variation orders, including record keeping;
  - a list of details which contract managers are expected to hand-over to an incoming contract manager;
  - a statement that our preference is to use digital contracts and signatures where possible.

### **COMMUNICATION AND TRAINING**

56. A communication plan is being developed to disseminate the changes to appropriate officers throughout the organisation. This is likely to include:
  - Briefing to the Senior Leadership team (completed)
  - messages on the Councils intranet leading up to the change;
  - detailed training targeted at officers with contract management responsibilities;
  - updating both the Procurement Officer Guide and the Procurement and Contract Procedure Rules Supporting Document;
  - video training.



## **RISK ASSESSMENT**

57. There are no significant risk considerations in relation to this report.
58. By adopting the PA23 and updating the PCPRs to be introduced coincidentally with the date the PA23 goes live, 26 October 2024, the Council will remain compliant with current legislation.

## **CONCLUSION**

59. Members are asked to note the contents of this report and consider the updated PCPRs as found in Appendix 1.

## **Appendices**

Appendix 1 - Updated Procurement and Contract Procedure Rules (with changes highlighted)

**Background Papers:** None

### **Reference Papers:**

Report to Audit and Governance Committee 18 July 2018 – Procurement and Contract Procedure Rules

The Public Contracts Regulations 2015

The Procurement Act 2023

### **Enquiries:**

For further information on this report please contact Richard Guyver. (Tel: 01329 824621 )