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# **Report: Amendment to Procurement Contract Procedure Rules**

## **Appendix G – Procedural Note: Waivers**

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## Procedural Note – Waivers

**NOTE: This Procedural Note forms part of the Procedures and shall be read in conjunction with the Procedures and any associated Procedural Notes**

### Background

1. This Procedural Note outlines the steps to be undertaken where the Procedural are not able to be followed for a specific reason.
2. Where this is the case, this Waiver Procedural Note is intended as a means of providing formal authorisation for “waiver” from specific elements of the Procedures.
3. The approval of a Waiver does not remove the requirement for procurements to follow the Council’s formal decision-making processes.
4. Any Waiver granted over the UK procurement threshold approves only the anticipated non-compliance with the Council’s Procedures. It does not mitigate the risks associated with non-compliance with the UK Procurement Law and Regulations.
5. The principles of non-discrimination, equal treatment, transparency and proportionality are paramount in determining any application for a waiver.

### Overview of the process

#### General

6. This Procedural Note shall:
  - i. Help to mitigate risks of challenge from third parties in how the Council procures Supplies, Works and Services.
  - ii. Improve transparency and probity in how decisions are made.
  - iii. Help to manage, control and mitigate other risks.
7. Having relevant contract management arrangements and/or forward plans in place identifying future needs will help to minimise the need for Waivers.
8. In the majority of cases, Waivers shall only be considered for periods of 12 months or less. If arrangements are required beyond 12 months this shall be justified in the Waiver Form for consideration and will be subject to an annual review should the Waiver be approved.
9. In all cases Waivers shall be completed in advance of committing spend. Where this is not the case then the Procurement Manager shall be informed.
10. Where the Waiver relates to a significant and serious failure to comply with the Procedures then a breach of the Procedures shall be considered.
11. Every effort shall be taken to ensure that the details included and signed off within the Waiver

are accurate and sufficient for the intended purposes. If during the Waiver period there is any change, this should be updated as part of the recording process.

12. Waivers shall be completed using the most recent template which is available on the Intranet page.
13. Waivers should not be used to overcome poor planning of activities leading to the procurement.
14. Waivers shall only be granted on the following grounds:
  - i. **Increased cost / loss of income:** The Council will incur unforeseen, significant and avoidable costs or lose significant income that cannot be mitigated in compliance with the Procedures.
  - ii. **Limited markets:** The market is a monopoly or no competition is likely to be stimulated through a formal procurement process. There is a requirement to demonstrate that the market is limited and not able to be suitably stimulated to create competition within the Regulations. Justification may include market intelligence including soft market consultation although risk related to over OJEU contract values is significantly reduced where open competition has been sought and a Voluntary Transparency Notice (VTN) has been published. Further guidance is available in the Pre-Procurement Market Consultation Guidance.
  - iii. **Reputational damage:** Failure to act promptly would have a serious, damaging and long term impact on the reputation of the Council, that from a time perspective the Council cannot afford to be mitigated through a formal tendering process
  - iv. **Compliant Direct Award via a Framework or Dynamic Market:** In order to ensure that direct awards are suitably approved, captured and recorded, an Waiver will also be required for those procurements where a direct award is made via a framework.

## Procedure and Approval

15. The Responsible Officer within the Service shall be required to explore the suitability of the use of an Waiver, giving due consideration to:
  - i. Options and alternatives
  - ii. Risks, and associated mitigating actions
  - iii. The rationale for the Waiver and what will happen to avoid the need to seek further Waivers on expiry
16. The Responsible Officer shall complete the relevant up to date Waiver Approval Form and will send it to the Procurement Team for review and comment.
17. In completing the Waiver Form, the Responsible Officer shall be responsible for providing the relevant factual and supporting information.
18. On completion of the Waiver Form, the Responsible Officer seeks the appropriate authorisation sign off dependent on the value of the Waiver as explained below.

<b>Waiver value</b>	<b>Required Service approval signed in this order;</b>
<b>£25k and under</b>	No formal Waiver Form required (although Responsible Officer will be required to have suitable evidence to justify decision for audit / transparency purposes).
<b>Over £25k up to £100k</b>	Responsible Officer and Head of Service / SMB representative for the Service area Completed form to be forwarded to the Procurement Team to be logged on the Council's Waivers Register.
Between £100k and the UK Procurement threshold for <b>Goods and Services</b>  Between £100,000 and £499,999 for <b>Works.</b>	Head of Service / SMB member for the Service area, and Procurement Manager.
Over UK Procurement threshold for <b>Good and Services</b>  <b>£500,000</b> and over for <b>Works</b>	Director / SMB member for the Service area, Portfolio Holder and Procurement Manager

19. If the Procurement Manager considers the grounds for the Waiver not suitable then they shall seek to resolve this directly with the Responsible Officer/Head of Service, clearly stating what steps they consider necessary to either make the sign off appropriate or what alternative actions would need to be undertaken.
20. Where this cannot be resolved then the matter shall refer the matter to the Monitoring Officer and S151 Officer who shall consult with the Service Director, consider the financial , contractual and reputational risks associated with the proposed course of action set out in the waiver request.
21. In the event of a conflict between the Monitoring Officer and the Service Director, Finance and Procurement, the decision of the Monitoring Officer shall prevail.
22. Once signed off and approved all Waiver forms shall be forwarded to Procurement Team for retention and registration of relevant details on the Waiver Register.
23. Following approval of the Waiver by all required parties the Responsible Officer shall ensure that the resulting Contractual arrangements are put in place, this may include but not limited to:
  - i. Signed / sealed contract
  - ii. Contract management arrangements
  - iii. Specification
  - iv. Intention to award communications
  - v. Contract Variation
  - vi. Key performance indicators

## Reporting

24. Waivers (including those that are retrospective), are reported to Senior Management Board, the Portfolio Holders, Section 151 and Monitoring Officer on a quarterly basis.

## Appendix 1      Roles and responsibilities

Table 1 below highlights the respective roles and responsibilities of the signatories to the Waiver Approval Form.

SIGNATORIES	ROLES AND RESPONSIBILITIES
<b>Director</b>	<ul style="list-style-type: none"> <li>• Acknowledgement and acceptance of the existence and details as set out in the Waiver form.</li> <li>• Understanding the position as set out within the Waiver form and being satisfied that the recommendation is appropriate and that suitable due diligence has taken place in the development of the Waiver (and any supporting information). Where relevant this may also include challenging the position as outlined.</li> <li>• Taking ultimate accountability and ownership of the recommended course of action outlined in the Waiver.</li> </ul>
<b>Procurement Manager</b>	<ul style="list-style-type: none"> <li>• Providing relevant and proportional scrutiny and due diligence around the procedural matters.</li> <li>• Providing relevant, proportional and constructive challenge with respect to commercial matters related to the Waiver.</li> <li>• Providing relevant support and advice to the Responsible Officer to ensure the process and recommendation is appropriate and that risks are highlighted as part of the overall considerations.</li> <li>• Signing off the Waiver form alongside the other identified parties and in doing so enabling the recommended course of action to be implemented. The Head of Service – Legal and Democratic Services, may sign off the Waiver in the absence of the Procurement Manager.</li> <li>• Considering whether the Waiver is appropriate and whether suitable due diligence has taken place in the development of the Waiver (and any supporting information). Where relevant this may also include challenging the position as outlined.</li> <li>• Ensuring that the Waiver is in line with this Procedural Note and if not, highlighting this to the Section 151 Officer and Monitoring Officer including the reasons, value, and why this is the case.</li> </ul>

SIGNATORIES	ROLES AND RESPONSIBILITIES
<b>Portfolio Holder</b>	<ul style="list-style-type: none"> <li>• Maintaining a strategic overview of Waivers which have been signed off within their Portfolio.</li> <li>• Reviewing approved Waivers on a quarterly basis to ensure they are satisfied that suitable due diligence has taken place in the development of the Waivers. Where relevant this may also include challenging the position, and setting out recommendations to improve the overall process in the future.</li> <li>• Signatory on the Waiver Approval Form for contracts over the applicable UK Procurement threshold.</li> </ul>
<b>Procurement Team</b>	<ul style="list-style-type: none"> <li>• Scanning and storing the signed Waiver Forms electronically in a central file and sending a link to that file for the relevant Commercial Manager to attach any supporting information.</li> <li>• Recording the Waiver and relevant details on the central register.</li> <li>• Issuing 6 month reminders prior to expiry of signed off Waivers to the Responsible officer(s) around ensuring any necessary plans are in place (or being progressed) in time for the expiry (so as not to risk service failure or continuity of service).</li> <li>• Compiling and distributing of the Quarterly reports under the direction of the Procurement Manager</li> </ul>

SIGNATORIES	ROLES AND RESPONSIBILITIES
<b>Responsible Officer</b>	<ul style="list-style-type: none"> <li>• Ensuring the Waiver process is complied with and adhered to.</li> <li>• Obtaining and completing the latest version of the Waiver form and providing any necessary supporting evidence and information.</li> <li>• Clearly and concisely outlining the “what, why, when, who” in completing the Waiver form.</li> <li>• Taking ownership that the details put forward are relevant, accurate and factual.</li> <li>• Ensuring risks are identified, considered and any necessary mitigation measures put in place.</li> <li>• Openly considering and documenting the advantages / disadvantages of all relevant options and confirming that the recommendation put forward is the most appropriate way forward (considering all relevant information and advice sought).</li> <li>• Ensuring timely due diligence discussions have taken place and relevant advice has been sought with key stakeholders (e.g. the Procurement Team, Finance, Legal, Health and Safety, etc.) prior to seeking signatures of other key parties.</li> <li>• For over £50k Waivers ensuring that the Procurement Team is involved prior to obtaining signatories.</li> <li>• Ensuring plans are in place both to implement and adhere to the intended outcomes of the recommendation (this will include ensuring suitable plans are in place to formalise contractual matters arising from the Waiver sign off, plus plans outlined for the period following the Waiver expiry) at the point when any Waiver forms are ‘Signed Off’</li> <li>• Ensuring that all signed off Waivers are provided to Procurement Team for formal registration in a timely manner</li> </ul>
<b>Section 151/Monitoring Officer</b>	<ul style="list-style-type: none"> <li>• Reviewing any matters referred to them by the Procurement Manager with regards to Waivers considered outside of the recognised procedures and taking what actions they consider necessary.</li> <li>• On occasions acting as arbiter when Waivers are referred to them by the Procurement Manager.</li> </ul>