

Procurement and Contract Governance Rules: Waiver Procedure.

NOTE: This Procedure Note forms part of the Procurement and Contract Governance Rules and shall be read in conjunction with the Rules and any associated Procedure Notes

Background

1. This Procedure outlines the steps to be undertaken if the Procurement and Contract Governance Rules (the “Rules”) are not able to be followed for a specific reason.
2. Wherever possible compliance with the Rules should be the first consideration.
3. Where this is considered not possible then this Waiver Procedure is intended as a means of providing formal authorisation to Waiver from specific elements of the Procurement and Contract Governance Rules.
4. The approval of a Waiver does not remove the requirement for procurements to follow the Council’s formal decision-making processes.
5. Any Waiver granted for Above Threshold approves only the anticipated non-compliance with the Council’s Procurement and Contract Governance Rules and does not mitigate the risks associated with non-compliance with Public Sector Procurement Regulations (the “Regulations”), which should therefore be managed appropriately.
6. Wherever possible the seeking and authorisation of a Waiver should be done in a manner that avoids future follow up Waivers to be sought.

General

7. This intention of the Waiver Procedure is to:
 - i. Help to mitigate risks of challenge from third parties in how the Council procures Supplies, Services and / or Works.
 - ii. Improve transparency and probity in how decisions are made.
 - iii. Help to manage, control and mitigate other risks.
8. It should be noted having relevant contract management arrangements and / or forward plans in place identifying future needs will help to minimise the need for Waivers.
9. 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.
10. In all cases Waivers must be completed and authorised in advance of committing spend. Where this is not the case and commitments are put in place in advance of any authorisation under the Waiver Procedure then this shall be considered under Breach Procedure.
11. Suitable justification will be required when looking to Waiver the Rules.

12. Waivers shall be completed using the approved Waiver Form and submitted to Commercial and Procurement Services for approval and recording as a record of actions agreed.
13. When considering whether to apply for a Waiver to the Rules, sufficient time should be allowed relative to the complexity of the issue in order to enable necessary due diligence to review the request.
14. Waivers shall not be used to overcome poor planning of activities where compliance with the Rules would otherwise be possible.
15. It will be for the relevant Service to justify the need for a Waiver and demonstrate why the Rules (in whole or part) need to be waived. Justifiable grounds permitted for authorising a Waiver are as follows:
 - i. **Efficiency / expediency in relation to process:** Following the Rules in whole or part would not add value to the intended outcomes and would significantly impact the delivery of the Council Plan and priority outcomes. A Waiver would not compromise transparency and accountability.
 - ii. **Increased cost / loss of income:** Following the Rules in whole or part can be shown to likely result in increased costs or loss of opportunity.
 - iii. **Time constraints beyond the control of the Council:** Following the Rules in whole or part would create unreasonable time pressures to deliver outcomes required. In such cases this must not be through poor planning or lack of action by the Council to have created the time constraint.
 - iv. **Avoidance of 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.
 - v. **Request for noting for transparency as a formal Breach of the Rules:** Noting outcome of formal Breach investigation and seeking to note in line with Waiver Approval procedure.

Procedure and Approval

16. Prior to applying for a Waiver consideration shall be given to whether the Emergency Process applies, or the Negotiated Procedure is applicable (see the Rules).
17. Where it is considered that the Procurement and Contract Governance Rules cannot be followed for a specific reason the lead Officer within the Service area shall raise this with the relevant Head of Category within Commercial and Procurement Services.
18. Where it is considered that a Waiver to the Rules is appropriate then the lead Officer will be responsible for completing the Waiver Form from the intranet and sending to Commercial and Procurement Services for review, comment and where appropriate authorisation.
19. In completing the Waiver Form, the lead Officer shall be responsible for providing the relevant factual and supporting information.

20. Authorisation levels for Waivers are as follows:

Waiver value	Directorate / Service Area	Commercial and Procurement Authorisation
Under £5,000	No Waiver Form required	
Over £5,000 up to £100,000	Assistant Director or Head of Service (in line with the Scheme of Delegations)	Relevant Head of Category (Commercial and Procurement Services)
Over £100,000 to £200,000	Assistant Director	Interim Assistant Director (Commercial and Procurement Director)
Over £200,000 to £500k (revenue) or to £1million (capital)	Director	Director of Commercial and Procurement in conjunction with Executive Director of Corporate Services, Cabinet Member (Finance and Resources) and the relevant Directorate Cabinet Member

21. Note, any decision in relation to Waiver requests that is a Key Decision in line with the transparency code would require Cabinet approval via Cabinet Report. Note a Key Decision being:

A decision will be a “Key Decision” if:

It is an Executive decision relating to the discharge of an Executive function

AND is likely to result in the local authority incurring expenditure which is, or the making of savings which are, significant:

In the case of capital projects, if they involve entering into new commitments and/or making savings in excess of £1M; or

In the case of revenue projects, if they involve entering into new commitments and/or making new savings at the value of, or in excess of, £500,000 (gross value).

OR is significant in terms of its effect on communities living or working in an area comprising two or more Wards in the area of the local authority.

22. Likewise, through consultation with Cabinet Member (Finance) then the Cabinet Member can also request that any non-Key Decision Waiver is taken to Cabinet for approval.

23. If the grounds for the Waiver are not considered appropriate, then Commercial and Procurement Services shall seek to resolve this directly with the relevant service Directorate setting out what steps they consider necessary to either make the sign-off appropriate or what alternative actions would need to be undertaken.

24. The Director (Commercial and Procurement) can refer Waivers to Procurement Board

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for further consideration.

25. Once signed off and approved within the Service, forms shall be forwarded to Commercial and Procurement Services for the final signature(s) and for retention and registration of relevant details on the Waiver Register.
26. Where a Waiver is approved by all required parties the Responsible Officer shall ensure that the resulting Contractual arrangements are put in place, including but not limited to:
 - i. Signed / sealed contract on Council Terms and Conditions (any departure from this must include Legal Services input)
 - ii. Specification, delivery proposals & agreed pricing
 - iii. Intention to award communications / Relevant Notices to comply with the Regulations
 - iv. Contract management arrangements and Key Performance Indicators
27. The signed contract / agreement must be uploaded to the Council contract register. If this is not done it will stop any associated orders / payments being made to the supplier(s) and also expose the Council to unnecessary risks in delivery of the requirements.

Amendments to an approved Waiver

28. Where an amendment is required to a signed and approved Waiver Form, the following procedures shall be followed:
 - a) For minor amendments to a signed Waiver, the original signed Waiver Form can be updated to reflect the change and shall be approved by the original signatories to the Waiver. This may be supported by e-mails to support the rationale for the change.
 - b) Where the change is considered material and beyond what could be reasonably deemed a minor amendment then a new Waiver Form shall be completed and approved in accordance with the requirements outlined above.

Reporting

29. Summary of Waivers are to be reported on a quarterly basis to:
 - a. Individual Directorate Management Teams (Assurance)
 - b. Corporate Leadership Team
 - c. Cabinet Member (Finance and Resources) and
 - d. Resources Overview and Scrutiny Committee.

WAIVER FORM

PROJECT / CONTRACT TITLE	
PROJECT / CONTRACT REFERENCE NUMBER	
DESCRIPTION OF CONTRACT (GOODS / SERVICES PROVIDED)	
SUPPLIER (where relevant)	
CONTRACT PERIOD	
VALUE (£/p)	
FUNDING SOURCE	
DIRECTORATE	
SERVICE AREA	
SERVICE LEAD	
DIRECTOR/ INTERIM DIRECTOR (COMMERCIAL & PROCUREMENT)	
HEAD OF SERVICE	

Please indicate the justification for a Waiver to the Procurement and Contract Rules	
i. Efficiency / expediency in relation to process: Following the Rules in whole or part would not add value to the intended outcomes and would significantly impact the delivery of the Council Plan and priority outcomes. A Waiver would not compromise transparency and accountability.	
ii. Increased cost / loss of income: Following the Rules in whole or part would likely result in increased costs or loss of opportunity.	
iii. Time constraints beyond the control of the Council: Following the Rules in whole or part would create unreasonable time pressures to deliver outcomes required. In such cases this must not be through poor planning or lack of action by the Council to have created the time constraint.	
iv. Avoidance of 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.	

v. Request for noting for transparency as a formal Breach of the Rules: Noting outcome of formal Breach investigation and seeking to note in line with Waiver Approval procedure.		
Please provide details on reasons for applying for a Waiver		
If related to a breach please state: <ol style="list-style-type: none"> 1) The circumstances around why this occurred and 2) Any action to be taken to ensure that compliance with the Rules is improved moving forward (i.e. advice given, training provided, performance management undertaken, engaging Commercial and Procurement Services as soon as a demand is identified, improved forward planning, etc.) 		
Which part(s) of the Procurement and Contract Governance Rules are being sought to be waived?		
What implications, risk(s) or consequences would apply if a Waiver is not approved?		
What longer terms plans are in place to ensure compliant contractual arrangements will be established prior to the end of the contract awarded under Waiver?		
Other Comments		
DECLARATIONS I (the undersigned) declare that I have no conflicts of interest which would otherwise prevent my signature to this Waiver.		
Directorate Service Lead		Date
Commercial and Procurement Services Comments		

Name / Title		Date	
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AUTHORISATIONS			
Over £5,000 up to £100,000	Comment (if required)	Signature	Date
Assistant Director or Head of Service (in line with the Scheme of Delegations)			
Relevant Head of Category (Commercial and Procurement Services)			

Over £100,000 to £200,000	Comment (if required)	Signature	Date
Assistant Director (Directorate)			
Interim Assistant Director (Commercial and Procurement Director)			

Over £200,000 to £500k (revenue) or to £1million (capital)**	Comment (if required)	Signature	Date
Director (Directorate)			
Directorate Cabinet Member(s)			
Richard Brooks, Executive Director of Corporate Services			
John Coyne, Director of Commercial and Procurement			
Cllr Karen McCarthy, Cabinet Member – Finance and Resources			

**** Above these levels and/ or Key Decision and/ or where deemed required by the Cabinet Member formal sign off is required at Cabinet.**

- Officers to obtain the Directorate signature and then send waivers / breaches form to

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the relevant Head of Category i.e. Richard Tibbatts, Mike Smith, Amandeep Weichers for investigation and approval.

- Relevant Head of Category to clear (sign if required) and send to the DPR Inbox (dpr@birmingham.gov.uk) to be logged and obtain necessary signatures

Please ensure the completed form is send to DPR@birmingham.gov.uk