

## ASSEMBLY

24 February 2016

<b>Title:</b> Council Constitution - Amendments to the Contract Rules to Comply with Legislation and Other Minor Changes	
<b>Report of the Chief Executive</b>	
<b>Open Report</b>	<b>For Decision</b>
<b>Wards Affected:</b> All	<b>Key Decision:</b> No
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<b>Accountable Divisional Director:</b> Fiona Taylor, Director of Law and Governance and Monitoring Officer	
<b>Accountable Director:</b> Chris Naylor, Chief Executive	
<b>Summary:</b>  This report advises on a number of proposed updates to the Council's Constitution. The Contract Rules govern and control the procurement of goods, services and works by the Council and sit alongside the Financial Rules. These changes are required due to changes in Public Procurement law and therefore require the Constitution to be updated in order to comply with current legislation.  Other key updates include: <ul style="list-style-type: none"><li>• the revision of the Officer Scheme of Delegation to reflect the new senior management structure;</li><li>• the inclusion of provisions and rules for webcasting of Council meetings, which is due to begin later this year;</li><li>• proposed revisions to the deadline for Questions With Notice and the tightening of arrangements for the submission of Questions With Notice and Motions With Notice;</li><li>• the inclusion of wording to reflect the requirements of the Openness of Local Government Bodies Regulations 2014 in respect of the publication of executive decisions taken by officers under delegated authority;</li><li>• the inclusion of new requirements relating to Members' Disclosure and Barring Service checks.</li></ul>	

## **Recommendation(s)**

The Assembly is recommended to:

- (i) Note and approve the proposed revisions to the Contract Rules, as detailed in Appendix A to this report;
- (ii) Approve the delegation of responsibility for appointing Parent Governor representatives from the Assembly to the Corporate Director of Children's Services and note the other changes to the Officer Scheme of Delegation which reflect the current senior management structure, as detailed in Appendix C to the report;
- (iii) Approve the changes to the Protocol on Filming, Webcasting, Photography and the Use of Social Media at Council Meetings, as detailed in Appendix D to the report;
- (iv) Agree that the deadline for the submission of Questions With Notice be brought forward from midday Friday to midday Wednesday of the week before an Assembly meeting;
- (v) Agree that the processes for submitting Questions With Notice and Motions With Notice at the Assembly be amended and that, in future, any questions and/or motions are submitted either directly by the proposing Councillor or via the Group Secretary;
- (vi) Note the wording inserted in Part 2, Chapter 16 which reflects the Council's adherence to The Openness of Local Government Bodies Regulations 2014 in respect of the publication of details of all executive decisions taken by officers;
- (vii) Agree that Councillors be required to be subject to a Disclosure and Barring Service (DBS) check in accordance with the provisions of the Safeguarding Vulnerable Groups Act 2006 and Protection of Freedoms Act 2012 and note the inclusion of wording to that effect in the Councillors' Code of Conduct; and
- (viii) Note that the Monitoring Officer shall make all necessary procedural and/or incidental amendments to the Contract Rules and the Constitution in order to bring the revised Contract Rules into effect and ensure that they dovetail with the rest of the Constitution.

## **Reason(s)**

This report sets out proposed amendments to the Council's Contract and other Rules to:

- Ensure compliance with European and National legislation governing public sector procurement.
- Ensure a regulatory framework that reflects current procurement practice and changes in local government policy.
- Maximise the opportunities to assist as many local businesses as possible to obtain Council contracts.

## **1. Introduction and Background**

- 1.1 A new Council Constitution was adopted by the Assembly at its meeting on 25 November 2014 (Minute 27 refers) and is kept under continual review by officers within the Law and Governance division.
- 1.2 Paragraph 2 of Part 7 of the Constitution establishes the rules for making amendments to the Constitution. In summary, the Assembly is responsible for approving all changes except for the following which may be implemented by the Monitoring Officer:
- changes to give effect to any decisions of the Council;
  - changes in the law;
  - minor amendments such as to correct errors; and
  - to ensure that the Constitution is maintained up-to-date.
- 1.3 The changes covered in this report are a mix of those requiring the Assembly's approval and those which may be implemented by the Monitoring Officer under that delegated authority. For transparency and clarity all changes are included in this report and its appendices.
- 1.4 The Contract Rules ("Rules") are intended to promote good purchasing practice and set out a framework for the procurement of goods, works and services in open and transparent processes, with a view to achieving best value, providing appropriate governance, ensuring public accountability and also deterring corruption.
- 1.5 In 2014, a new EU Directive was introduced throughout the EU which made significant changes to the existing law on procurement of public contracts within the EU. The Directive was transposed into UK law in February 2015 by the introduction of the Public Services Contract Regulations 2015 (the "Regulations"). The implementation of the new Regulations has necessitated a review of the Council's Contract Rules to ensure that the Rules are in keeping with the new legislation. Legal Services has undertaken a review of the Council's Contract Rules with a view to:
- i) updating them to take account of recent legislative changes and best practice; and
  - ii) ensuring they reflect changes in approach to procurement, thereby achieving benefits for local economic and social well being; and
  - iii) enhance governance to reduce risk of abuse.
- 1.6 After having prepared a working draft of the Rules, the draft amendments were then submitted to the Council's Procurement Board for review. This ensured that consultation with senior managers and service area stakeholders was conducted to gain their input. Comments and amendments from the Board have been incorporated to produce the final draft.

## **2. Summary of Proposed Changes to the Contract Rules**

- 2.1 Revisions to the Rules reflect recent changes in legislation, case law and guidance from the European Commission and the UK Government. The Public Contract Regulations 2015 have come into force and replace the Public Contract Regulations

2006. The Regulations implement the new EU public sector Procurement Directive 2014/24/EU. .

2.2 The review of Contract Standing Orders also provides the opportunity to improve clarity and readability and provide for additional flexibility whilst maintaining integrity of the procurement process. The revised Rules (with proposed amendments tracked) are set out in Appendix A.

2.3 A few key new introductions and changes to the Rules need special mention here:

#### 2.3.1 **Light Touch regime**

The Regulations have removed a distinction drawn under previous legislation between certain services which were subject to the full effect of the legislation (previously referred to as 'Part A services') and services which, when tendered, were subject to a limited sub-set of the applicable rules (previously referred to as 'Part B services'). Under the new Regulations, procurement of contracts above a specified threshold for certain identified services such as social, educational and health services will be subject to a "Light-Touch" regime. There is an OJEU advertising requirement and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000/£589,148). The Rules have been amended to reflect these changes.

#### 2.3.2 **Pre-Market engagement**

The Regulations require the Council to devote greater attention to pre-procurement activity (often referred to as pre-market engagement) with a view to achieving better outcomes from its procurements. The revised Rules reflect this obligation.

#### 2.3.3 **New procurement procedures**

The Regulations introduce two new procurement processes referred to as (1) the Competitive Procedure with Negotiation and (2) the Innovation Partnership. The Open, Restricted and Competitive Dialogue procedures remain, resulting in a total of five available procedures. The Rules are updated to reflect the availability of the new procedures.

#### 2.3.4 **Mandatory and Discretionary powers of exclusion**

The Council will now be subject to revised mandatory and discretionary obligations to exclude bidders in specified circumstances. For example, it is now mandatory for the Council to exclude from any procurement process any bidder convicted of offences relating to fraud, money laundering, tax evasion, child labour or terrorism. The Council can also exercise its discretion to exclude bidders who are guilty of professional misconduct or who have defaulted on other public service contracts.

These provisions entitle the Council to exclude any supplier which has for example committed a breach of the legislation that prohibits union member blacklisting unless it can demonstrate that it has taken appropriate remedial steps.

### 2.3.5 Contract amendments

The circumstances in which the Council is permitted to vary its contracts without triggering a new procurement process have been defined. For example, the Council is permitted to vary a contract where the need for a modification has arisen due to circumstances which a diligent authority would not have envisaged when it let the contract and provided that the modification does not alter the nature of the contract and any increase in cost does not exceed 50% of the original contract value. It can also make modifications where the contract specifically envisages and expressly provides for amendment or where the modifications are not “substantial” (as defined).

### 2.3.6 SME participation

New measures have been introduced to facilitate the participation of SMEs by making it less costly for SME bidders to participate in low to medium value procurement exercises. These include:

- The requirement to publish on the Government’s contracts web portal “Contracts Finder” (a publicly accessible online resource detailing opportunities to bid for public sector contracts), details of any contract which the Council advertises where the value of the contract is £25,000 or more (net of VAT). The Rules now reflect this requirement and describe the steps officers will need to take in order to ensure compliance.
- Procurement processes with multiple stages (such as the Restricted Procedure which requires bidders to satisfy specified pre-qualification criteria) are no longer permitted for below-threshold contracts. The requirement now is to invite tenders from all contractors and suppliers that express an interest in a contract opportunity.
- The Council is now subject to a duty to justify any decision not to divide its contracts into lots (this provision seeks to enhance access for small and medium sized enterprise to public sector contracts);
- The requirement to insert provisions in all public contracts to ensure prompt payment through the supply chain.

2.3.7 The Regulations make provision for the following other amendments which, whilst of less significance, needed to be accounted for in the Rules:

- The Council is subject to a new duty to prevent conflicts of interest in connection with its procurement activity;
- The requirement to have all contract documentation finalised and available at the date of public advertisement of the contract opportunity.
- The Council will be subject to new record-keeping obligations in connection with certain procurement processes.

2.4 Further details on the above appear in Appendix B and the relevant tracked amendments are set out in Appendix A.

### **3. Summary of Other Proposed Minor Changes to the Constitution**

3.1 An explanation of the rationale for the main changes is set out below.

#### **Officer Scheme of Delegation (Part 3, Chapter 1 of the Constitution)**

3.2 Since May 2015 there have been a number of changes to the Council's senior management structure and to job titles which need to be reflected in the Scheme of Delegation and throughout the Constitution. With the exception of one new delegation to the Director of Children's Services which is referred to in more detail in paragraph 3.4 below, the changes to the Scheme of Delegation are merely to reflect the reallocation of existing delegations. A marked-up copy of the Officer Scheme of Delegation reflecting the changes to responsibilities is attached at Appendix C.

3.3 The changes to job titles and roles have been applied to all other relevant sections of the Constitution.

3.4 During the recent appointment process for the Secondary School Parent Governor representative on the Children's Services Select Committee, it was noted that the Parent Governor Representatives (England) Regulations 2001 stipulate that appointments must be made within one month of the announcement of the result of the election to the position. As this is not always practical within the meeting schedule of the Assembly, which is presently responsible for confirming such appointments, it is proposed that the Council's responsibilities under the Parent Governor Representatives (England) Regulations 2001 be delegated to the Corporate Director of Children's Services, who can deal with the appointments without delay and ensure full compliance with the regulations.

#### **Protocol on Filming etc. at Council Meetings (Part 5, Chapter 6)**

3.5 The current protocol already includes arrangements for filming at Council meetings, which were introduced in response to the Openness of Local Government Bodies Regulations 2014. Following the installation of webcasting facilities to the Council Chamber and Committee Room 2 at the Town Hall, Barking, the protocol has been updated to strengthen the rules and clarify arrangements for archiving of webcasts.

3.6 A marked-up copy of the proposed revisions to Part 5, Chapter 6 is set out at Appendix D.

#### **Questions With Notice Arrangements (Part 2, Chapter 4)**

3.7 Prior to the adoption of the new Constitution in November 2014, there were separate Leader's Questions and General Questions processes which had different deadlines.

3.8 Under the new Constitution, the processes were merged and a new deadline established of noon on the Friday of the week before the meeting. This was chosen as it was the median point between the two previous deadlines.

3.9 The large number of questions that have been received for the last three Assembly meetings – 21 for 15 July 2015, 20 for 23 September 2015 and 23 for 2 December

2015 – has highlighted the difficulties in managing the administrative arrangements over a relatively short timescale and particularly with the deadline being at noon on a Friday.

- 3.10 Under the current arrangements once the deadline has passed the Director of Law and Governance carries out an assessment on behalf of the Chief Executive of all of the questions received to ensure that they meet the criteria as laid out in the Constitution. This will often involve having to go back to Councillors that have submitted questions to clarify aspects of the wording in order to be accepted. The process of validating questions can be time-consuming and often extends beyond the end of the normal working day. It is only when that process has been completed and the Chief Executive has signed off the final list of accepted questions that the final schedule of questions can be circulated. This has meant that the Members that are responsible for answering the questions have often been unable to discuss the issues raised with the relevant officers and compile their response until the new working week.
- 3.11 It is proposed, therefore, that the Questions With Notice deadline be brought forward to noon on the Wednesday of the week before the meeting (as was the case under the former Leader's Questions procedure).
- 3.12 A further proposed change relates to the procedure for submitting questions. Any Councillor may submit a maximum of two questions but that rule can be undermined as there are currently no restrictions on a Councillor submitting multiple questions but allocating them out to different colleagues to ask on that individual's behalf. It is acknowledged, however, that there will always be occasions where Councillors may be unable to submit a question(s) personally due to IT problems or commitments that prevent them from doing so.
- 3.13 To overcome both issues, it is proposed that the procedure be revised so that a Councillor submitting a question must do so either directly him/herself or via the Group Secretary.
- 3.14 The relevant extract from Part 2, Chapter 4 is set out at Appendix E showing the proposed revisions.

#### **Motions With Notice Arrangements (Part 2, Chapter 4)**

- 3.15 Along similar lines to the suggested change referred to in paragraphs 3.12 and 3.13 above, it is proposed that the procedure for submitting motions is also restricted to being either directly from the Councillor or via the Group Secretary. This change will have very little impact for members of the Labour Group as there are already established internal procedures within the Group for submitting motions but the amendment is nonetheless considered appropriate.

#### **Decision Making and the recording (publishing) of executive decisions by officers (Part 2, Chapter 16)**

- 3.15 The Openness of Local Government Bodies Regulations 2014 introduced a requirement for the 'recording' of executive decisions by officers. For the purposes of these regulations, the term 'recording' means publication on the Council's website. To ensure compliance with the regulations but to reduce the

administrative burden that these requirements could place on the Council, the “key decision” threshold of £200,000 has been applied. Applying the key decisions threshold also provides a much stronger platform for ensuring compliance with the regulations, as the only decisions that should fall within the requirements are:

- The approval of procurement processes and the award of contracts with a value between £200,000 and £500,000, the latter being the threshold of officer delegation relating to contracts.
- The implementation of a decision involving £200,000+ that has considered by the Cabinet or Health and Wellbeing Board and authority delegated to officers to implement.

3.16 It is proposed, therefore, that the ‘Decision Making’ chapter within the Constitution is updated with the insertion of a new paragraph 3.9 stating the following:

- “The Council shall publish details of all executive decisions taken by officers above the threshold of £200,000, in accordance with The Openness of Local Government Bodies Regulations 2014.”

#### **Disclosure and Barring Service (DBS) Checks for Councillors (Part 5, Chapter 1)**

3.17 In the light of a resolution passed by the Labour Group, a new requirement for councillors to be subject to a DBS check is proposed.

3.18 There will need to be detailed policies drawn up which specify the circumstances under which a councillor will be required to undergo a DBS check and the procedures to be followed in the event of there being a ‘positive’ DBS check. Once those policies have been produced and agreed the level of detail in the Constitution will need to be enhanced but, for the time being, it is proposed to make the following addition at paragraph 5.3 of Part 5, Chapter 1:

“With effect from February 2016, there will be a requirement for Councillors to be subject to a Disclosure and Barring Service (DBS) check in accordance with the provisions of the Safeguarding Vulnerable Groups Act 2006 and the Protection of Freedoms Act 2012. The DBS certificate must be provided to the Monitoring Officer within 28 days of the issue date.”

3.19 Details of all the amendments referred to above as well as other minor changes are included at Appendix F for Members’ information.

#### **4. Options Appraisal**

4.1 The 2015 Regulations have become part of UK law and their provisions are binding on the Council. As such the Council is obliged to comply with the Regulations and there are no options to opt out. The amendments to the Rules are necessary to implement the provisions of the Regulations.



## 5. Consultation

- 5.1 The draft Rules were initially revised and drafted by Legal Services. The draft amendments have since been the subject of consultation and scrutiny by Procurement and other commissioning officers and have been endorsed by the Council's Procurement Board.

## 6. Financial Implications

Implications completed by: Kathy Freeman, Divisional Director of Finance

- 6.1 There are no direct financial implications arising from this report. The contract rules will operate in conjunction with the Council's standing orders and financial regulations.

## 7. Legal Implications

Implications completed by: Eldred Taylor-Camara, Legal Group Manager

- 7.1 The Council may only contract with external parties within the legal framework for local authority procurement. The purchase of goods, services and works by the Council as a public sector body is regulated by the Council's Contract Rules (as required by S135 of the Local Government Act 1972), the general duty to obtain Best Value (Local Government Act 1999), the Public Contracts Regulations 2015, and also the European Treaty principles of transparency, proportionality, non-discrimination of providers in member states and equality of treatment.
- 7.2 Any significant changes to the Constitution other than minor administrative ones or to reflect changes in the law need to be agreed by Assembly. Assembly is therefore being asked to make all necessary amendments to the Contract Rules in order to ensure their provisions reflect changes in the law and best practice and that the Rules dovetail with the rest of the Constitution.
- 7.3 Following approval by Assembly, the Council's Constitution (which reflects and summarises the current Rules) will need to be updated by the Chief Executive/Monitoring Officer to reflect the new Contract Rules.
- 7.4 The Contract Rules review has been conducted by the Council's Legal Services team in conjunction with Corporate Procurement and in consultation with the Procurement Board.

## 8. Other Implications

- 8.1 **Risk Management** - Improved and updated Contract Rules reflect current law and best practice. The involvement of the Procurement Board in the procurement process for higher value contracts will help better manage and reduce risks in procurements.
- 8.2 **Contractual Issues** - The Contract Rules prescribe in detail how the Council should procure and contract with its contractors, consultants and suppliers.

- 8.3 **Staffing Issues** - Awareness and understanding of the new Rules and the accountabilities across the Council is important. The launch of the new Contract Rules will be supported by:
- Publication on the intranet;
  - Publication in hard copy format;
  - Training events for officers;
  - Introduction and awareness briefings;
  - Departmental updates as required;
  - Continued dialogue with organisations representing local businesses.
- 8.4 **Customer Impact** - The Rules do not conflict with any Equality and Diversity laws. The proposed new Rules reflect requirements under the EU Regulations which address equality, openness and fairness.
- 8.5 **Property / Asset Issues** - Specific provisions appear in the Council's Constitution prescribing rules for the disposal and acquisition of property.

#### **Background Papers Used in the Preparation of the Report:**

- Council's Constitution (<http://modern.gov.barking-dagenham.gov.uk/ieListMeetings.aspx?CId=626&Year=0&Info=1>).

#### **List of appendices:**

- **Appendix A** - Draft Revised Contract Rules
- **Appendix B** - Table of Revisions to Revised Contract Rules
- **Appendix C** - Revised Officer Scheme of Delegation (Chapter 1)
- **Appendix D** - Draft revised Protocol on Filming, Webcasting etc. at Council Meetings
- **Appendix E** - Draft revised procedures relating to Questions With Notice and Motions With Notice
- **Appendix F** - Full schedule of amendments