

Internal Audit of Exceptions, Exemptions and Variations from the Contract Procedure Rules

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Public Sector Internal Audit Standards

Internal Audit of Contract Exceptions, Exemptions & Variations from the Contract Procedure Rules

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Purpose and Scope of Review

The purpose of the review was to provide assurance that contract exceptions, exemptions, and variations are authorised and used appropriately in line with Contract Procedure Rules (CPRs). It also provides assurance to the Council's Monitoring Officer, Section 151 Officer, senior management, and members, and is also a proactive counter-fraud review.

The review considered a sample of decisions taken over the last two financial years (2019/20 and 2020/21) and focused on the following areas:

1. Arrangements and procedures over the authorisation and use of exceptions, exemptions and variations from the CPRs.
2. Sample testing of 9 exception and 10 extension/variation decisions, out of a known population of 37 exceptions 35 extensions/variations. Testing focusing on the justification for the request, the advice given by both Legal and Procurement, how this was addressed, and the authorisation and decision making process.
3. Impact of Covid-19 on the use and prevalence of contract exceptions and extensions.
4. How the use of exceptions and extensions aligns with Corporate Priorities and achieves value for money.
5. The treatment of those contracts entirely exempt from the CPRs.

Background and Context

The Council operates a joint procurement service with Flintshire County Council, this review focused on decisions made by Denbighshire County Council only.

A review of Contract Management was concluded in January 2020. The action plan to address the contract management issues are pertinent to the themes raised in this report. See Appendix 2 for further details.

In the last year there have been changes to the Legal and Procurement team including the departure of the Legal and Procurement Operations Manager.

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Audit Opinion

The Council's Contract Procedure Rules (CPRs) clearly stipulate the criteria on which contract exceptions and variations may be granted and the associated approval requirements.

Awareness of the specific CPRs governing contract exceptions and exemptions and their application varies across services with heavy reliance placed on Procurement Business Partners. Overall, there was clear guidance and advice provided to the procuring service on actions required, any risk implications and compliance with both the CPRs and the primary legislation¹. While there were no instances of the request not being authorised, the rationale for not adhering to advice provided by both Legal and Procurement was not always clear, particularly in relation to approvals, and recording on the Council's electronic procurement system.² No explanation was recorded when legal advice was not being followed.

The area of greatest non-compliance was in relation to the approval requirements as set out in CPR 2.11 and 6.8 (see appendix 1). A general lack of awareness was a contributory cause of some of the breaches in relation to the approval and procedural requirements, particularly in relation to exceptions granted under "extreme urgency".³ For the higher value contracts which require Section 151 Officer and Monitoring Officer approval, evidence was not available to demonstrate this had been obtained at the time of granting the contract extensions despite legal advice. Strengthened oversight of approval decisions is necessary to improve accountability and to avoid further breaches.

The Proactis procurement system is not being used as required by the CPR provisions⁴. The failure to maintain a central record of contract exceptions and extensions and signed contracts is widespread across most services. A similar issue has been raised in the recent contract management review, with an action to roll out a contract management framework across services. A combination of lack of awareness and lack of decision

¹ Public Contract Regulations 2015

² CPR 2.11.4

³ CPR 2.9.3 (iii)

⁴ CPR 2.11.4 & 2.11.5 and 6.8

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making transparency following legal advice, has contributed to non-compliance with the CPRs. This increases the risk of poor procurement planning, performance monitoring and ineffective contract management.

Only one of the ten extension requests had not been subject to prior extensions. There were two instances of long running contracts being extended without ever being subject to a formal tendering exercise. The risk of challenge and regulatory compliance was brought to the attention of the relevant services. It is important that services can demonstrate fairness and transparency in procurement decision making. Greater clarity on the corporate risk appetite for regulatory non-compliance and adherence to CPRs is needed, particularly in relation to strategic projects and statutory services.

There was limited evidence that value for money (VFM) was appropriately considered in decision making. While this can be difficult to prove for contracts granted in “extreme urgency” or where a specialist contractor is required, there was little evidence to show that VFM was a consideration in the absence of supporting benchmarking.

There were no examples of contracts which are fully exempt from the CPRs identified during the review. Awareness raising is required to ensure that such contracts are identified, recorded and monitored as such, including contracts with land development agreements. Clarity is needed on the roles and responsibilities for recording and monitoring these contracts.

While there were some positive elements to the review, due to the concerns over non-compliance across a number of areas we provide a low assurance rating overall.

Low Assurance ●

Significant weaknesses in management of risks and/or control that put achievement of objectives at risk

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Action Plan

Issue 1 –Understanding of the Contract Procedure Rules requires improvement.

Understanding of the CPRs amongst procuring services requires further improvement to ensure ongoing compliance. - Major Risk ●

This issue has also been raised in the Contract Management Review.

Underlying weaknesses as follows:

- Non-compliance with approval requirements for contract exceptions granted under “extreme urgency” criteria.
- Unclear that a formal contract is required for contracts above £25,000 in value.
- Using incorrect report templates for contract exceptions and variations.
- Incorrect application of the exception criteria.
- Unclear that the contract exemption provisions are fully understood.
- Unclear how land development agreement contracts are being recorded and monitored.

The CPRs are due for review which provides an opportunity to consider the guidance and clarity required in addition to the “quick guide to procurement” which currently exists in draft form. A relaunch of guidance and review of procurement processes and documentation may assist with corporate awareness raising.

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| Agreed action | Responsibility | Deadline |
|--|----------------------|------------|
| 1.1 Presentation (awareness for new managers and refresher) to be delivered by all Procurement Business Partners at various DMG (or equivalent); and whole Service meetings where appropriate. | Procurement Manager | 31/03/2022 |
| 1.2 Procurement Business Partners to support Services on improved awareness and understanding of CPRs and highlight at service management meetings areas of noncompliance or poor practice. | Procurement Manager. | 31/03/2022 |
| 1.3 Quick Guide (already produced) to be used as a starting point in any presentation Amend the Quick Guide if necessary to give greater clarity on sequence of legal/procurement comments in advance of Authorised Signatories. Utilise LINC and other methods to highlight good practices. | Procurement Manager | 31/03/2022 |
| 1.4 Variation Form – to be amended to include a section asking if previous variations have been sought and attaching copies of such signed variations; amend to reflect sequence of legal/procurement comments. | Procurement Manager | 31/03/2022 |

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Issue 2 – Decision making transparency and accountability in response to legal advice requires strengthening

Legal Services provide advice and recommendations in response to contract exception and variation requests. There were some instances where the authorised approver, chose not to abide by the recommendations, but did not record a justification or explanation for their decision. It was not evident that procedural guidance and advice was consistently followed prior to contract commencement. This compromises transparency and accountability for decision making.- Major Risk ●

Examples of weaknesses found include:

- Not obtaining requisite approval for large value contracts from Section 151 Officer and Monitoring Officer.
- Not recording contracts and decision making on Proactis.
- Risk of breaching Public Contract Regulations on further contract extensions.
- Not obtaining relevant insurance certificates.
- Not demonstrating value for money particularly for contracts awarded under Welsh Government grant funding.

| Agreed action | Responsibility | Deadline |
|--|------------------------|------------|
| 2.1 Revise Exception and Variation Forms so both include a comment box that the Head of Service provides their rationale for not following advice. Escalation Flowchart to be included requiring the relevant procuring manager to approach their Head of Service to complete the rationale section. | Procurement Manager | 31/03/2022 |
| 2.2 Review Task List in both Exception and Variation Form for service to commit to actioning advice such as checking insurance provision and any legal steps flagged (e.g. parent co guarantees or pen testing certificates) | Procurement Manager | 31/03/2022 |
| 2.3 Legal Advice to be categorised as High, Medium or Low Risk. High risk to be peer reviewed by another colleague in legal services for a second opinion. | Legal Services Manager | 31/03/2022 |

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Issue 3 – Proactis is not being used as required to record and monitor contract exceptions, exemptions and variations/extensions.

Procurement decision making and the granting of contract exceptions, exemptions and extensions/variations is rarely being recorded on Proactis. This can lead to poor procurement planning, ineffective contract management and potential fraud – Major Risk ●

Responsibility rests with the procuring service to ensure variation and exception forms are recorded on Proactis once approval has been granted. Awareness of this requirement varies, with services often assuming it is the responsibility of the Procurement Team. In only one instance was the signed report saved. Further, in relation to another significant contract, the extension form was only signed four months after the commencement of the contract.

The CPRs also require services to record the signed contract on Proactis, similarly there was no evidence that this requirement was being met (*this was raised as part of our Contract Management review*). There were two significant contracts, recently extended where the signed contract was unable to be found, and in another instance the signed contract was submitted after the contract had commenced.

CPR 2.8 sets out the narrow criteria for contracts deemed exempt from the CPRs. It is not clear how contracts with development agreements in relation to land disposals and acquisitions are being recorded and monitored.

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| Agreed action | Responsibility | Deadline |
|---|--|-------------------|
| <p>3.1 Report to SLT highlighting the weakness identified in respect of non-compliance with CPRs with a view to SLT reviewing arrangements in their own services to ensure that:</p> <ul style="list-style-type: none"> - All contracts and variation/exception request forms are recorded on the Proactis contract management module or other suitable systems (until a decision is taken to replace it); - Signed contracts are obtained for all contracts over £25,000 and held on the Proactis system (or suitable approved contract management system); - Contract management activity and start and end date is recorded in the contract management module within Proactis, or other method as agreed corporately; - Ensure that contract risks are considered within the procurement and contract monitoring activity. Also, that significant risks are captured on the service risk register. | <p>Head of Legal, HR & Democratic Services</p> | <p>30/11/2021</p> |
| <p>3.2 Ensure staff involved with managing contracts are suitably trained. Training will be rolled out across the council to all staff who are involved in contract management and delivered in two parts:</p> <ol style="list-style-type: none"> 1. Proactis Contract Management module 2. Contract management principles (to explore the use of e-learning). | <p>All Heads of Service with co-operation from:</p> <ol style="list-style-type: none"> 1. Procurement Manager in respect of Proactis 2. Proposed new 'Contract Management Group' (or equivalent) in respect of Contract Management Principles. | <p>31/12/2022</p> |
| <p>3.3 Quick Guide</p> <ul style="list-style-type: none"> - Proactis Quick Guide to be developed/ reviewed which includes use of Proactis in respect of contract management <p>Use of LINC to raise awareness.</p> | <p>Procurement Manager</p> | <p>30/01/2022</p> |

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| <p>3.3 Procurement Business Partners to support Services on awareness of contract management from commencement of procurement activity and the use of Proactis to support services plan their commissioning and procurement cycles. Highlighting at service management meetings areas of noncompliance or poor practice, and importance of keeping Proactis updated in order to ensure key dates are generated and not missed etc.</p> | <p>Procurement Manager</p> | <p>31/03/2022</p> |
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Issue 4 – Procurement Planning and Culture

Poor procurement planning is a contributory cause of ongoing contract extensions being granted without a formal tendering process. This poses a risk to achieving value for money and supporting local businesses -

Major Risk ●

Capacity pressures and the Covid-19 pandemic were also cited as reasons for not undertaking a formal bid process, particularly to ensure the ongoing provision of a vital service. There were instances where the service had sought to use the pandemic as a justification for extending the contract, but Procurement had noted that previous reminders had been sent regarding the expiry of the existing contract.

Extending long running contracts is not conducive to demonstrating value for money, supporting the local economy and ensuring ongoing quality of service.

| Agreed action | Responsibility | Deadline |
|---|--|------------|
| 4.1 All Heads of Service to ensure the Procurement Business Partner is invited to quarterly DMG/DMT meeting as a standing item quarterly item. | All Heads of Service | 31/12/2021 |
| 4.2 Procurement FWP to be complied by each Service to include existing and horizon scanning of projects and activities. | All Heads of Service | 31/03/2022 |
| 4.3 Procurement Business Partners to support Service/teams in developing FWP in order to reduce the number of exceptions and extensions of contracts. This will include forwarding an updated list of Contracts registered on Proactis to the relevant Head of Service in advance of the DMG meeting and to seek confirmation from DMG that the list is accurate. | Procurement Manager and all Procurement Business Partners. | 31/03/2022 |
| 4.4 Head of Legal, HR and Democratic Services to report to CET with a range of KPIs to enable CET oversight and monitoring of corporate compliance with CPRs. | Head of Legal, HR and Democratic Services | 01/11/2022 |

Appendix 1 – Contract Procedure Rules- Approval Authority Provisions

CPR 2.11 Authority to approve exceptions

2.11.1 An exception based on one or more of the reasons listed in CPR 2.9 or 2.10 may be granted in the following manner:

- i. Up to £250,000: By the manager of the team where the procurement activity is taking place, providing they have authority to approve spend to the estimated contract value. If they do not have authority to spend then by the Head of Service where the procurement activity is taking place;
- ii. £250,001 to £1,000,000: By agreement in writing from Head of Service where the procurement activity is taking place, the Section 151 Officer, and the Monitoring Officer – recorded on the Procurement Exceptions Report detailed in CPR 2.11.4. Any of these individuals can refer the decision to Cabinet where they consider there are relevant issues pertaining to the procurement activity such that it should be considered as a key decision under the Cabinet Members scheme of delegation

2.11.2 Such authority to approve shall not apply in cases of extreme urgency (CPR 2.9.3 (iii) and 2.9.3 (xv)). In this circumstance the relevant Head of Service can approve the exception.

6.8 Authority to decide contract terminations and substantial variations

6.8.1 Every contract termination or substantial variation (as detailed in CPR 6.7.3) must be authorised in writing and issued before the termination or variation is actioned.

Authorisation levels are as follows:

- i. Up to £250,000: By the manager of the team where the procurement activity is taking place, providing they have authority to approve spend to the estimated contract value. If they do not have authority to spend then by the Head of Service where the procurement activity is taking place;
- ii. £250,001 to £1,000,000: By agreement in writing from Head of Service where the procurement activity is taking place, the Section 151 Officer, and the Monitoring Officer.

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Any of these individuals can refer the decision to Cabinet where they consider there are relevant issues pertaining to the contract variation such that it should be considered as a key decision under the Cabinet Members scheme of delegation;

iii. £1,000,001 to £2,000,000: by the relevant Cabinet Member through the scheme of delegation detailed in the Council's constitution, which will also require the agreement from the Head of Service where the procurement activity is taking place, the Section 151 Officer, and the Monitoring Officer. The Cabinet Member, or any of the other offices detailed above, can refer the decision to Cabinet where they consider there are relevant issues pertaining to the contract variation such that it should be considered as a key decision under the Cabinet Members scheme of delegation;

iv. £2,000,001 and over: by Cabinet.

Contract values should be based on the cumulative total (i.e. including any previous variations or extensions) and in all cases, a report must be provided and attached to the contract file on the council's electronic procurement system detailing the reasons for the variation or extension.

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Appendix 2 – Assurance Ratings Definitions

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| High Assurance ● | Risk and controls well managed and objectives are being achieved |
| Medium Assurance ● | Minor weaknesses in management of risks and/or objectives but no risk to achievement of objectives |
| Low Assurance ● | Significant weaknesses in management of risks and/or control that put achievement of objectives at risk |
| No Assurance ● | Fundamental weaknesses in management of risks and/or controls that will lead to failure to achieve objectives |

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Report Recipients

- Chief Executive
- Corporate Director: Communities
- Head of Legal, HR & Democratic Services
- Legal Services Manager
- Procurement Manager
- Head of Finance & Property/S151 Officer
- Corporate Executive Team
- Senior Leadership Team
- Strategic Planning & Performance Officer
- Scrutiny Coordinator
- Chair-Performance Scrutiny Committee
- Leader & Lead Member for the Economy & Corporate Governance
- Lead Member for Finance, Performance & Strategic Assets
- Governance & Audit Committee

Internal Audit Team

Maeve Puleston-Jones, Senior Auditor

maeve.puleston-jones@denbighshire.gov.uk

Key Dates

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| Review commenced | July 2021 |
| Review completed | August 2021 |
| Reported to Governance & Audit Committee | 24 November 2021 |
| Proposed date for first follow up review | June 2022 |