

WIRRAL COUNCIL

CABINET

23 JUNE 2011

SUBJECT:	REVISION OF CONTRACT PROCEDURE RULE 16
WARD/S AFFECTED:	'ALL'
REPORT OF:	DIRECTOR OF LAW, HR AND ASSET MANAGEMENT
RESPONSIBLE PORTFOLIO HOLDER:	COUNCILLOR STEVE FOULKES, LEADER OF THE COUNCIL
KEY DECISION? <i>(Defined in paragraph 13.3 of Article 13 'Decision Making' in the Council's Constitution.)</i>	NO

1.0 EXECUTIVE SUMMARY

- 1.1 This report invites Cabinet to recommend to Council that it approves an additional Contract Procedure Rule 16A. This will ensure that significant variations to term contracts which may result in reduced value for money or diminished outcomes for local people are reported to Members.

2.0 RECOMMENDATION/S

- 2.1 That Council is recommended to revise the Council's Contract Procedure Rules by the inclusion of an additional Rule 16A in the form set out in paragraph 4.9 of this report.

3.0 REASON/S FOR RECOMMENDATION/S

- 3.1 To ensure that significant variations to term contracts which may result in reduced value for money or diminished outcomes for local people are reported to Members.

4.0 BACKGROUND AND KEY ISSUES

- 4.1 Over recent years the Council, like most local authorities in England, has increasingly become a commissioner of services, rather than a direct provider. Major contracts are in place with firms such as Biffa (for waste collection) and COLAS (following the Highways and Engineering Services Procurement Exercise ('HESPE')). Currently the Council is engaged in the Parks and Countryside Services Procurement Exercise ('PACSPE'). All these contracts must comply with the Contract Procedure Rules ('the CPRs') set out in Part 4 of the Council's Constitution. Indeed, Article 14.2 of the Constitution which is headed 'Contracts' stipulates that every contract made by the Council will comply with the CPRs, unless it conflicts with statutory requirements.

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- 4.2 Major contracts will often be highly complex and run for a number of years. Both these factors mean it is almost inevitable that there will need to be agreed variations to such contracts during the contract period. There is nothing inherently wrong with this. Indeed, quite the contrary. It makes no sense to continue inflexibly with a contract provision after changes in circumstances have occurred which render the term no longer fit for purpose. Equally, however, when Members approve the letting of a contract, they are entitled to expect that the contract will deliver the anticipated benefits at the expected price. In other words, that the promised value for money will be achieved. Where there are significant changes to contracts members are entitled to expect that they will be apprised of those variations. Within the CPRs, Rule 16 was intended to ensure this occurs. CPR 16 provides as follows:

16 Variation Orders and Extra Work Orders

16.1 The responsible Chief Officer shall record every Variation Order or extra works order immediately it is raised. If the issue of Variation Order(s) would at the date of the order cause the final contract price to exceed the original contract sum by more than £50,000 or 10%, whichever is the lower, the Chief Officer must immediately inform the Director of Finance. This rule applies to all contracts as defined in Contract Procedure Rule 4.1, including those based on an 'Agreed Maximum Price'.

16.2 If the supervising officer considers in his or her professional opinion that it is necessary for the works specified in a contract to be varied for technical reasons to ensure the successful delivery of the contract (for example; dealing with unforeseen ground conditions) , the officer shall be authorised to consent in writing to the necessary variations to the contract. He shall subsequently submit a written report to the next meeting of the Cabinet or relevant regulatory committee in order to explain the reasons for the action taken if the agreed variations are likely either singly or cumulatively to result in the contract price exceeding the tender total by a sum calculated as 10% of the tender total including contingencies or £50,000 whichever is lower.

16.3 Any other variations to a contract which are not technically necessary for the successful delivery of the contract for example variations which increase or enhance the approved scope of the contract, shall be in writing and shall require the prior approval of the relevant Cabinet portfolio holder or relevant regulatory committee after consideration of a written report but only if the supervising officer estimates that the variations are likely either singly or cumulatively with previous variations to result in an increase of expenditure of more than £20,000.

16.4 Where the contract sum fluctuates in accordance with an index linked to measure of inflation, the £50,000 or 10% relates to the original tender sum as adjusted under the terms of the contract.

16.5 Where the contract price includes a sum for contingencies, the limits in paragraph 16.1 shall relate to the total contract price inclusive of contingencies.

- 4.3 As part of the pre-planned work of the Council's External Auditors, they are undertaking a review of the operation and 'benefits realised' of the HESPE contract with COLAS. This work and officers' development of the PACSPE contract documentation has made it clear that CPR 16 is not really fit for purpose (in terms of ensuring Members are kept apprised of any changes in value for money, as opposed to changes in price) for contracts such as that with Biffa; or the HESPE contract; or the contemplated PACSPE contract. This is because all three contracts are 'term contracts'.
- 4.4 Term contracts are awarded on the basis of a fixed period of time (the 'term'). During the term a schedule of approved rates or prices will apply in relation to a large number of discrete activities. An example would be a fixed price for installing a new lighting column. Such contracts are likely to have within them mechanisms for dealing with inflation. This might be by reference to an agreed inflation index. Alternatively; the contract might be on the basis of 'cost plus', where the contractor will be paid a fixed sum, or percentage, on top of the cost actually incurred to undertake a given task.
- 4.5 Term contracts are managed by reference to an available annual budget. If the budget is reduced from that set for the previous year, then officers will instruct the contractor to undertake fewer tasks under the contract. To use the previous example of installing a new lighting column, if the Highways budget is reduced by 10 per cent and 50 columns were replaced last year; then only 45 lamps are likely to be installed this year. Such budgetary changes will be taken by Members and no issues of transparency arise: less money means a reduced level of service provision.
- 4.6 There is also another scenario; one where officers agree price variations within a contract. This might arise where there is an ambiguity, or error, in the contract specification and/or tender submission. In large, complex contracts, sometimes comprising thousands of individual items, this is unavoidable. If this results in a price increase, say a doubling in the sum to install a new lighting column, then the contract can be kept 'in budget' by halving the number of lamps replaced. As CPR 16 is drafted, this would not require the change to be reported to Members as the activity will be constrained within the approved budget. However, there has clearly been a markedly detrimental change in terms of value for money (the unit cost has doubled) and materially diminished outcome (a halving in the number of new lighting columns installed).
- 4.7 Historically, term contracts have been managed through effective monitoring and reporting of the approved budgets for the relevant works and services, in accordance with Financial Regulations; and any variations in costs have been absorbed within the approved budget. In essence, as long as the budget has been successfully managed, there has been no financial impact to report to Members under CPR 16. Whilst this may be technically correct, it is recommended that a more transparent approach is adopted in order that Members are given a fuller appreciation of cost changes which have proved necessary on these large and complex contracts.
- 4.8 Accordingly, Cabinet is invited to consider recommending Council to adopt an additional CPR (as CPR 16A) to address specifically cost variations within term

contracts. This will ensure that clear auditable records of variations are maintained; and that those variations with a significant financial impact (individually or cumulatively) over the term of the contract are reported to Cabinet. It is recommended that this should not apply to variations to schools contracts where those variations are instigated by the schools, whether for term contracts or other contracts.

- 4.9 Accordingly, it is recommended that Council be requested to adopt an additional CPR 16A in the following form:

16A Variations to Prices/Rates – Term Contracts

- 16A.1 Term Contracts (e.g. those in place for waste collection and highway maintenance) are awarded on the basis of a fixed period of time ('term'); utilising approved rates or prices to deliver services through approved budgets rather than an approved contract total.*
- 16A.2 The Chief Officer responsible for every term contract shall record in writing every change in the works or service information which results in a variation to the prices or rates (including the deletion or provision of new rates), immediately it is raised; recording the estimated financial impact of the variation over the life of the contract (the 'whole cost') based, where appropriate, on the latest complete year's quantities to assess future year's quantities. If the whole cost of the variation exceeds £50,000 or 10% of the estimated value of the contract over its term (whichever is the lesser); the Chief Officer must immediately inform the Director of Finance. This rule applies to all contracts as defined in Contract Procedure Rule 4.1, including those based on an 'Agreed Maximum Price'.*
- 16A.3 If the Supervising Officer considers in their professional opinion that it is necessary for the works or services information in a term contract to be varied for technical reasons to ensure the successful delivery of the contract (for example, unforeseen sub-surface or drainage conditions, or an omission or ambiguity in the contract), the officer shall be authorised to consent in writing to the necessary variations to the contract. He shall subsequently submit a written report to the next meeting of the Cabinet, or relevant regulatory committee, in order to explain the reasons for the action taken if the whole cost of the variation is likely to exceed £50,000 or 10% of the estimated value of the contract over its term (whichever is the lesser).*
- 16A.4 Any other variations to a term contract which are not technically necessary for the successful delivery of that contract (for example, variations which increase or enhance the approved scope of the contract (such as improved gritting routes, a modified park management plan or a change in the number of car parks)) shall be in writing and shall require the prior approval of the relevant Cabinet portfolio holder, or regulatory committee, after consideration of a written report; but only if the Supervising Officer estimates that the whole cost of the variation is likely to exceed £50,000 or 10% of the estimated value of the contract over its term (whichever is the lesser).*

16A.5 This Rule 16A and Rule 16 shall not apply in relation to variations to works or prices or rates (including the deletion or provision of new rates) for the provision of goods or services to schools where the variation is requested in writing by a school; but the Chief Officer responsible for every term contract relating to schools shall keep a written record of all such variations requested by schools.

- 4.10 To assist Members and officers in assessing the probable impact of introducing an additional CPR in the suggested form of CPR 16A, the Interim Head of Technical Services has undertaken a retrospective analysis of the effect it would have had if applied to the HESPE contract with Colas. This analysis has shown that there have been 50 variations ordered which have changed the contract prices since the HESPE contract commenced in April 2009. These variations range in value from an increase of £54.00; for a new rate for a belisha beacon flasher unit; to an increase of £855,000 for a change to address an ambiguity in the contract documents to allow the contestable works on street lighting to be achieved through a Tripartite Agreement.
- 4.11 The latter variation is an example that would be addressed by the proposed revision to the CPRs. In this case, whilst the overall cost of the service to the Council has reduced and the timescales for completing such works have improved significantly (both compared with the situation pre-HESPE), it has technically resulted in a significant increase in the costs payable under the contract. In addition this variation has had the effect of reducing the overall cost advantage of the Colas tender compared with those of the other tenderers. However, this variation (and the other agreed variations) still mean that the Colas tender was the most economically advantageous for the Council to accept.
- 4.12 Three further significant increases to date; assessed as being greater than £50,000 over the life of the contract are shown in Table 1:

Variation	Estimated cost over the contract term
Shared cost of a depot clerk for the purpose of extracting utility plans relating to highway maintenance works to be carried out.	£75,000
New item for filling of grit bins with salt from Council salt stocks	£92,000
Resolving an ambiguity in cold milling (planing) of pavements rates. This item, too, has no overall effect on the cost of the services, as the variation is offset by reduced use of other bill of quantities items.	£118,000

5.0 RELEVANT RISKS

- 5.1 If the recommended amendment to the CPRs is not adopted, then future variations to term contracts that may materially affect value for money and contract outcomes will only be reported to Members if the overall budget for the contract is significantly exceeded.

6.0 OTHER OPTIONS CONSIDERED

- 6.1 Legal Services and Procurement are currently undertaking a wider ranging review of all CPRs. The proposed new CPR 16A could be dealt with as part of that review. However, the Council's External Auditors have expressed their preference for this lacuna in the CPRs to be addressed as a matter of high priority. Accordingly, it is recommended to deal with this matter as a stand alone item.

7.0 CONSULTATION

- 7.1 As indicated, the views of the Council's External Auditors have been sought on this matter.

8.0 IMPLICATIONS FOR VOLUNTARY, COMMUNITY AND FAITH GROUPS

- 8.1 None

9.0 RESOURCE IMPLICATIONS: FINANCIAL; IT; STAFFING; AND ASSETS

- 9.1 The recommended addition of CPR 16A will result in significant variations to term contracts within budget being reported to Members.

10.0 LEGAL IMPLICATIONS

- 10.1 These are set out in the report.

11.0 EQUALITIES IMPLICATIONS

- 11.1 Significant variations to term contracts within budget may result in reduced outcomes for local people.

- 11.2 Equality Impact Assessment (EIA)

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|---------------------------------------|-----|
| (a) Is an EIA required? | No |
| (b) If 'yes', has one been completed? | N/A |

12.0 CARBON REDUCTION IMPLICATIONS

- 12.1 None.

13.0 PLANNING AND COMMUNITY SAFETY IMPLICATIONS

- 13.1 None

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APPENDICES

None.

REFERENCE MATERIAL

The Council's Contract Procedure Rules.

SUBJECT HISTORY (last 3 years)

Council Meeting	Date