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To: County Council

Date: 7 November 2024

Subject: Update to Spending the Council's Money for the Procurement Act 2023

Executive Summary:

This paper sets out the substantive changes that are required to Spending the Council's Money as a result of the upcoming Procurement Act 2023 (the 'Act'). From **24 February 2025**, the Act will become the primary governing legislation for public procurement, applying to all contracting authorities in England, Wales and Northern Ireland. It will introduce the biggest change to public procurement in over 15 years.

The paper outlines the main ambitions of the new legislation, before detailing its key provisions and the changes proposed to Spending the Council's Money (SCM), the mandatory rules that anyone spending money on behalf of KCC must comply with. These changes would come into force on the 'go-live' date for the new legislation.

The proposed changes will help ensure the Council is compliant with the Act, addressing new requirements which relate to pre-procurement activity, tendering, social value and tackling barriers facing SMEs and VCSEs, excluding suppliers, and transparency throughout the Council's procurement and contract management.

With some discrete policy positions on how KCC will implement the legislation, the proposed changes to SCM also seek to position the Council to take advantage of the opportunities that the Act presents while mitigating the biggest challenges and risks.

The proposed changes, which have been subject to a comprehensive legal review, as well as internal scrutiny, demonstrate KCC's commitment to ensuring its key spending rules remain fit for purpose in a changing operating environment.

Preparation for the Act has been an important programme for KCC, which has been led by the Commercial and Procurement Division but with cross-Council support. Such collaboration has been evidenced on the review of Spending the Council's Money, and will continue to be crucial as wider preparations are progressed.

Recommendations:

Approve the substantive changes proposed to Spending the Council's Money, detailed in Sections 2 to 8 and available in full in the appended documents and as recommended by the Governance and Audit Committee on 9 October 2024.

1. Introduction

- 1.1 The Procurement Act 2023 (the 'Act') introduces a new set of regulations for public procurement that will apply to all contracting authorities in England, Wales, and Northern Ireland from the 'go-live' date of **24 February 2025**.
- 1.2 The new regulations represent a significant change to the way public bodies buy goods, services and works. They will replace current public procurement rules, including those set out in the Public Contracts Regulations (PCR) 2015.
- 1.3 The intention of the reforms is to create a simpler, more flexible procurement regime, encourage consideration of social value, and reduce the barriers facing SMEs and VCSEs wishing to access contracting opportunities. The regulations also intend to allow authorities to take action on suppliers posing unacceptable risks, while also embedding transparency throughout the commercial life cycle.
- 1.4 KCC's preparation for the Act commenced in April 2024 and a key activity has been the review of the Council's mandatory spending rules contained within Spending the Council's Money (SCM). This paper outlines the substantive changes required to SCM as a result of the legislation and to position KCC to take full advantage of the new regulations, while mitigating the associated risks.
- 1.5 Members should note that the new regulations were originally due to come into force on 28 October 2024. However, on 12 September 2024, it was confirmed that the 'go-live' date for the regulations would be slipped to 24 February 2025.
- 1.6 While no changes are expected to be made to the regulations themselves, Government will be using this extra time to prepare a new National Procurement Policy Statement (NPPS), which sets out the Government's priorities for procurement and that the new regulations will require authorities to take into account. This may require further minor changes to SCM.
- 1.7 On 9 October 2024, Governance and Audit Committee reviewed and supported the substantive changes that are proposed to SCM as a result of the new Act. The Committee recommended that County Council agree the changes as detailed in Sections 2 to 8 of this report and the appended documents.

Substantive Changes to Spending the Council's Money

2. Scope, Objectives, and Principles

- 2.1 As with the existing regulations, the Act will largely apply to the procurements of contracts with an estimated value above the UK public procurement thresholds. However, there are some key exceptions to the regulations. For example, contracts valued below those thresholds, Light Touch Contracts, and Concession Contracts, are only subject to a limited number of the provisions. Notably, the procurement of health care services is out-of-scope of the new Act and are instead subject to the separate Provider Selection Regime (PSR).
- 2.2 **SCM has been updated to differentiate between where the new regulations apply and where there are exceptions or, in the event that healthcare services are being procured, alternative rules need to be followed.**

Sections 10, 12, 15, and 16 of SCM, in particular, have been updated to highlight the exceptions, but the delineation is made throughout the document.

- 2.3 Similar to the existing regulations, when awarding a contract under the Act, authorities will need to have regard to the principles of delivering value for money, acting with integrity, and transparency. However, there is a greater emphasis on realising wider public benefit through procurement, including delivering social value and opening up opportunities to SMEs and VCSEs.
- 2.4 The importance of securing wider public benefit through public procurement is expected to be emphasised in the new National Procurement Policy Statement, which Government will publish ahead of the new regulations coming into force.
- 2.5 **SCM has been updated to ensure the objectives of the regulations are reflected in the principles of SCM and the roles and responsibilities of anyone spending money behalf of KCC, Senior Officers, and the Commercial and Procurement Division (CPD).** Notably, Sections 3, 6, and 7 have been amended to align with the new regulatory objectives, and there are now appropriate references made to these objectives throughout the document.
- 2.6 As with existing public procurement regulations, the Procurement Act 2023 takes a VAT-inclusive approach to calculating and expressing contract values. **SCM has been updated to express all contract values as being inclusive of VAT, to better align with the regulatory position.**

3. Pre-procurement

- 3.1 The new legislation emphasises the importance of pre-procurement preparation, which involves activities such as preliminary market engagement, and developing requirements, award criteria and evaluation methodology. These activities are crucial for KCC to effectively understand and engage the market, develop procurement strategies, and plan procurement processes.
- 3.2 Section 16 of the Act sets out the requirements for preliminary market engagement, which is encouraged but not mandatory. Authorities must specify the purposes of such engagement (e.g., testing the feasibility of requirements, informing the market of procurement plans, or seeking market feedback). Authorities must ensure that no suppliers are advantaged by such engagement.
- 3.3 **Section 26 of SCM has been added to reflect the legal requirements around preliminary market engagement.** It also clarifies that Officers in Services will lead on such engagement, but the CPD will advise and support.
- 3.4 Section 21 of the Act covers the development of requirements, which must be sufficiently clear and specific and not break the rules on technical specifications as set out in Section 56 of the Act. These rules include not referring to particular designs, trademarks, or suppliers, unless it is appropriate to do so.
- 3.5 **Section 25 of SCM has been added to reflect obligations on specification design.** It also clarifies that Officers in Services are responsible for developing specifications, but the CPD will provide challenge and a commercial review.

- 3.6 Section 23 of the Act covers setting award criteria and evaluation methodology, which must be relevant, proportionate, clear, measurable, and specific. The Act also introduces a shift from identifying the 'Most Economically Advantageous Tender' to identifying the 'Most Advantageous Tender', which implies a more balanced consideration of both price and quality, including social value.
- 3.7 **Section 31 of SCM has been added to reflect the change in emphasis during tender evaluation, underlining that contracts should be awarded based on a balanced consideration of price and quality.** It also sets out that the award criteria and evaluation methodology should be developed in close consultation between Officers in Services and the CPD.
- 3.8 The changes proposed to SCM will support compliance with the provisions. However, the changes will also help to ensure the Council properly engages markets and KCC's approach to procurement is effectively planned from the outset. This will increase the prospect of achieving best value, while considering wider public benefit and the need to treat all suppliers fairly and equally.

4. Tendering

- 4.1 The new legislation simplifies the number of competitive tendering procedures available, removing much of the prescriptiveness in the current regulations, and providing authorities with greater flexibility to design their own procedures.
- 4.2 Section 20 of the Act outlines that authorities may use either a single-stage open tendering procedure or a multi-stage 'competitive flexible' procedure. The 'competitive flexible' procedure allows authorities to design their own procedure based on their objectives, local needs, and the nature of the market, as long as they comply with the principles and procedural requirements of the legislation.
- 4.3 **Section 29 of SCM has been added to set out the two competitive tendering procedures available to Officers.** Given the risks associated with designing a 'competitive flexible' procedure, Officers will be permitted to use two forms of this procedure that are similar to two already used. Alternative designs will require approval of the Commercial and Procurement Oversight Board.
- 4.4 Section 22 of the Act allows authorities to set out 'conditions of participation' to test the legal and financial capacity or technical ability of suppliers to deliver the contract. These conditions must be proportionate to the nature, complexity, and cost of the contract, and there are limitations on the type of accounts and insurance arrangements that authorities can request from suppliers.
- 4.5 **Section 30 of SCM has been updated to reference 'conditions of participation' instead of 'selection criteria' and to highlight the importance of proportionality when setting these conditions.** The requirement to use the Council's standardised Selection Questionnaire is retained, alongside the new requirement for Officers to refer to the Government Supplier Information System. Where it is leading the procurement, the CPD will lead on setting and assessing against the conditions of participation, working closely with Services.
- 4.6 **Sections 34 to 37 of SCM have also been updated to provide clarity on the rules and expectations for conducting tendering exercises,** such as using

the Council's standard Invitation to Tender documentation, responding to clarification questions, and managing the tenders received.

- 4.7 Section 50 of the Act requires authorities to communicate award decisions to suppliers (both successful and unsuccessful) and to issue assessment summaries, providing more detailed feedback to suppliers than currently.
- 4.8 **Section 40 of SCM has been updated to set out the requirement for Officers to communicate the outcome of the procurement to suppliers who tendered with feedback provided as required by the Act.** It is also set out that the CPD will lead this activity, working closely with Officers in Services.
- 4.9 Section 49 of the Act introduces the concept of an 'Open Framework', a scheme of Frameworks that can run for a longer period of time than a typical Framework and allows authorities to appoint new suppliers during the life of the scheme.
- 4.10 Sections 34 to 40 of the Act introduce Dynamic Markets, in some ways similar to Dynamic Purchasing Systems available under current regulations, but that offer flexibility as they are usable for a wider range of goods, services, or works.
- 4.11 **Section 15 of SCM has been updated to reference the availability of Open Frameworks and Dynamic Markets.** It also clarifies that the CPD will establish such arrangements on behalf of the Council, while Officers in Services will be responsible for calling off contracts from these arrangements.
- 4.12 These changes to SCM will ensure KCC complies with the new legal requirements, while mitigating the risks associated with the provisions and taking advantage of the new flexibilities to secure best value and innovation through procedures that utilise commercial skills.

5. Contract Management

- 5.1 The new legislation recognises that the important work does not stop once a contract is awarded, introducing several requirements for contract management.
- 5.2 Section 52 of the Act requires authorities to publish at least three KPIs for contracts valued at £5m or more and to report at least annually on the supplier's performance against those KPIs. Additionally, section 71 of the Act requires authorities to publish the details of supplier underperformance or breach of contract where it meets the criteria in the legislation.
- 5.3 **Section 43 of SCM has been added to incorporate the new requirements for managing supplier performance.** It clarifies that Officers in Services are responsible for monitoring supplier performance, with the CPD and Legal advising on the appropriate course of action in the event of poor performance and needing to be engaged ahead of publishing any details related to this.
- 5.4 Sections 67 to 70 of the Act require authorities to ensure that suppliers are promptly paid within 30 days of a valid, undisputed invoice (an obligation also placed on suppliers in relation to paying sub-contractors). KCC's compliance with these requirements and payments against contracts must be published.

- 5.5 **Section 44 of SCM has been added to reflect these payment obligations.** It also outlines that Officers may agree to earlier, discounted payments to suppliers as part of KCC's supplier incentive programme. The role of the CPD and Finance have been clarified in relation to the publication requirements.
- 5.6 Sections 74 and 75 of the Act allow authorities to make changes to contracts in certain circumstances, but require publication of the details of certain changes where they alter the value or the term of the contract to a prescribed degree.
- 5.7 **Section 45 of SCM has been updated to reflect the legal requirements for contract changes.** The CPD will also need to be engaged before changes to contracts valued above the UK public procurement thresholds. Section 10 provides clarity on who should be consulted on and authorise contract changes.
- 5.8 Sections 78 to 80 of the Act provide authorities with rights to terminate contracts in certain circumstances and required contract expiry details to be published.
- 5.9 **Section 46 of SCM has been added to incorporate the provisions relating to contract expiry and termination.** It also includes key considerations to be made ahead of contract exit, such as providing reasonable notice to the supplier and resolving outstanding issues. Officers are directed to engage the CPD, and Legal, ahead of contract exit, especially if early termination is considered.
- 5.10 The SCM changes proposed will support compliance with the above requirements. Further clarity on where the CPD are to be engaged will ensure the whole Council is supported to hold suppliers to account for poor performance, get the best value from contract changes, and mitigate the risks linked to the early termination of contracts, while helping KCC to meet its prompt payment obligations and new transparency requirements.

6. Wider Public Benefit

- 6.1 The new legislation requires authorities to consider the wider public benefit that can be delivered through procurement, including the delivery of social value and reducing barriers facing SMEs and VCSEs. It introduces a number of provisions to ensure authorities consider these legislative priorities when contracting.
- 6.2 The importance of securing wider public benefit through public procurement is expected to be emphasised in the new National Procurement Policy Statement, which Government will publish ahead of the new regulations coming into force.
- 6.3 Section 18 of the Act introduces a new duty for authorities to consider lotting (i.e., splitting up) contracts prior to undertaking a procurement in order to make opportunities more accessible for smaller organisations. Where authorities choose not to lot contracts, they must record the rationale for this decision.
- 6.4 **Section 27 has been added into SCM to cover the duty to consider lotting.** Working with the CPD, Officers in Services will be required to consider lotting contracts prior to undertaking a procurement, considering whether this will make opportunities more accessible for smaller organisations and secure best value.

- 6.5 Beyond considering lotting, there are several references made within the new Act to the importance of taking a proportional approach to activity throughout the commercial life cycle and specific provisions that will be of benefit to smaller organisations and help ensure contracting opportunities are more accessible.
- 6.6 References have been incorporated throughout SCM to address the need to consider proportionality at the different stages of the commercial life cycle. **Sections 29 and 36 of SCM have been amended to make clear to Officers that they should consider the implications for SMEs and VCSEs when designing their tendering procedures and setting appropriate timeframes.**
- 6.7 Concerning securing social value through procurement, the new Act seeks to encourage this through a number of different provisions. For example, the shift in the new regulations to considering the 'Most Advantageous Tender' rather than 'Most *Economically* Advantageous Tender' intends to move authorities away from simply considering lowest price and factoring in a more balanced assessment of price and quality, including the social value to be delivered.
- 6.8 **Sections 31 and 37 of SCM have been updated to underline the importance of taking into account social value and sustainability when setting award criteria and evaluating tenders.** Sections 25 and 32 also direct Officers to reflect on these areas when developing specifications and KPIs.
- 6.9 As outlined elsewhere within this paper, SCM also now incorporates the legal obligations on KCC to publish details of upcoming contracting opportunities, to provide suppliers with assessment summaries, and to pay suppliers promptly. Adherence to these key requirements will support smaller organisations by providing early visibility of tenders, offering constructive feedback where they are unsuccessful to help improve future tenders, and supporting cash flow.
- 6.10 The changes proposed to SCM will help ensure KCC is compliant with the obligations outlined in this section, but they also go beyond the legal requirements in different respects to secure wider public benefit for Kent.

7. Exclusions

- 7.1 The new legislation will make it easier for authorities to exclude from procurements those suppliers who pose unacceptable risks to the Council.
- 7.2 Section 57 of the Procurement Act allows authorities to exclude suppliers from procurement processes where certain grounds known as mandatory and discretionary grounds apply. The application of exclusion grounds has been extended to a supplier's 'connected persons', 'associated persons' and sub-contractors. Alongside this, Government will be creating and managing a 'debarment list' of suppliers who must be excluded from public procurement.
- 7.3 Schedule 6 of the Act sees the strengthening of mandatory exclusion grounds to include corporate manslaughter, fraud, modern slavery, and tax offences. Schedule 7 of the Act also includes discretionary grounds for exclusion linked to labour market misconduct, environmental misconduct, and breach of contract and poor performance. Where a discretionary ground applies, the supplier must be given the opportunity to evidence 'self-cleaning'.

- 7.4 **Section 39 has been added into SCM to incorporate the exclusions provisions of the Act.** It also clarifies that the CPD will lead on the review, checks, and processes related to exclusions, where it leads the procurement (otherwise Officers in Services can lead on this). Regardless, the CPD and Legal must be consulted with prior to any exclusion being made.
- 7.5 The changes proposed to SCM with regards to exclusions will help ensure KCC is compliant with its associated obligations under the new Act. Additionally, the outlined role of the CPD and Legal in this process will mitigate the legal risks.

8. Acting with Integrity and Transparency

- 8.1 Running through the new regulations is the common thread of transparency, which is an expectation throughout the commercial life cycle. Under the Act, the Council will be required to publish notices of certain upcoming commercial activity to a newly established Government Central Digital Platform.
- 8.2 For individual procurement projects, the notice requirements will include planned procurement notices (where we wish to provide early notice of a contracting opportunity); pre-market engagement notices (where such engagement is carried out); tender notices (ahead of undertaking a procurement), contract award notices (prior to entering a contract); and contract details notices (after entering into a contract with a supplier).
- 8.3 During contract management, as has been indicated elsewhere in this paper, there will be a legal obligation on the Council to publish notices detailing certain contract changes, the performance of suppliers on contracts valued above £5m, underperformance on contracts, and payment compliance information.
- 8.4 Separate notice requirements will apply when establishing Framework Agreements and Dynamic Markets. Limited notice requirements will also apply when calling off from these arrangements and on below threshold contracts.
- 8.5 **SCM has been updated throughout to include reference to the new transparency requirements that apply through the commercial life cycle.** It clarifies that the CPD will lead on the publication of the notices, although Officers in Services must provide information in a complete and timely manner.
- 8.6 Section 93 of the Act requires authorities to publish details of their procurement pipeline, covering contract opportunities at a value of £2m or more and expected to be awarded in the next 18 months. This requirement will create better visibility of procurement plans and allow suppliers to better plan for bids.
- 8.7 **Section 8 of SCM has been updated to reflect the new requirement to publish procurement pipelines.** It also goes beyond the legal requirements, by committing to publish opportunities above the UK public procurement threshold for goods and services, which is below the £2m requirement stipulated in the new legislation, and will support smaller organisations.
- 8.8 Part 5 of the Act provides clearer guidance on how and when to undertake conflicts of interest assessments, ensuring greater focus and consistency when

dealing with and recording conflicts of interest. Authorities must prepare a conflicts assessment for each procurement and publicly confirm that this has been carried out, revised as necessary throughout the commercial lifecycle.

- 8.9 **Section 22 of SCM has been updated to reflect the new requirements for carrying out conflicts assessments.** It details that Officers must take all reasonable steps to identify and mitigate actual or perceived conflicts of interest that may arise in relation to a procurement from the outset of the process. Officers in Services will create and manage conflicts assessments and must keep these under review, consulting with and seeking sign off from the CPD.
- 8.10 These transparency provisions will have a resource implication, particularly for the CPD and potentially open up greater opportunity for legal challenge. However, they may also reduce supplier enquiries, encourage competition, help ensure contracting opportunities more accessible to SMEs and VCSEs, and build even greater public trust in KCC's procurement and contracting activity.

9. Conclusion

- 9.1 The Procurement Act 2023 represents the biggest change in over 15 years to how public bodies buy goods, services, and works.
- 9.2 These reforms, and the amendments proposed to SCM, have the potential to deliver several benefits to KCC, its supply base, and residents. These opportunities include greater flexibility to design competitive procedures suited to our local needs and to enable us to secure best value, wider public benefit, as well as tailoring processes to reduce barriers facing SMEs and VCSEs.
- 9.3 With a strengthening of the provisions around contract management and the exclusions regime, the changes may also motivate improved supplier performance, while providing the Council with additional protection against those suppliers posing an unacceptable risk to KCC. Furthermore, the emphasis on transparency throughout the commercial life cycle may also build further trust with residents and suppliers around use of the Kent pound.
- 9.4 While updating SCM is a key component of preparing KCC for the reforms, and ensuring we are compliant from the 'go-live' date, wider preparatory work is being progressed and will continue. This includes developing detailed guidance for Officers, extending training opportunities, and engaging on the changes across KCC and with our key provider sectors ahead of 24 February 2025.

10. Recommendations

Approve the substantive changes proposed to Spending the Council's Money, detailed in Sections 2 to 8 and available in full in the appended documents and as recommended by the Governance and Audit Committee on 9 October 2024.

11. Financial implications

- 11.1 The new transparency rules will have resource implications with KCC having to publish up to 15 notices for each procurement and in contract management. These are pressures that are shared with and have been expressed by many other public sector bodies subject to the new regulations. Government have undertaken a New Burdens Assessment for the Act, but have determined that these pressures will balance with the benefits of the new regulations.
- 11.2 The Council is working internally and with its e-procurement systems provider to automate the information and publication process linked to the new transparency requirements and to mitigate their impact, as far as possible.

12. Legal implications

- 12.1 A transition period, during which procurements and contracts already underway or concluded under the previous legislation will continue to be subject to those regulations, will see KCC having to work with multiple procurement regulations (the PCR 2015, the new Act, and the separate regime for healthcare services).
- 12.2 As with any legislation, there will be a period of uncertainty until the new procurement regulations are tried and tested, case law develops, and further secondary legislation and guidance is published. During this time, there is a risk of wrongful application or misinterpretation of the regulations and challenge.
- 12.3 The Council is mitigating these risks with the wider preparatory work described, particularly updating and communicating Spending the Council's Money, guidance for staff, and extending training and development opportunities.

13. Further Information

[Procurement Act 2023](#)

[The Procurement Regulations 2024](#)

[Transforming Public Procurement Knowledge Drops](#)

[Update to SCM – Governance and Audit Committee \(9 October 2024\)](#)

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