

## **Report to the Cabinet**

Meeting to be held on Thursday, 5 November 2020

### **Report of the Head of Service - Procurement**

#### **Part I**

Electoral Division affected:  
(All Divisions);

### **Request Approval to Extend Existing Contracts in Response to Covid 19**

(Appendix 'A' refers)

Contact for further information:

Paul Fairclough, Tel: (01772) 538206, Procurement Manager,  
paul.fairclough@lancashire.gov.uk

#### **Executive Summary**

Given the continued unprecedented circumstances brought about by the Covid 19 outbreak, the Procurement Service has undertaken a further review of contracts which would otherwise have commenced re-procurement work in the next 6 to 12 months, but resources in the service areas continues to be focussed on Covid related activity. Approval is sought to extend contracts.

This is deemed to be a Key Decision and the provisions of Standing Order C19 have been complied with.

#### **Recommendation**

Cabinet is asked to:

- (i) Approve the extension of the contracts as set out in this report and detailed in Appendix 'A'.
- (ii) Authorise Directors and Heads of Service to determine the length and number of extensions within the maximum scope permitted by this report.

#### **Background and Advice**

Given the unprecedented circumstances brought about by Covid-19 resources in the service areas and service providers continues to be focussed on Covid related activity. The main areas impacted in the context of this report are Adult Social Care and Public Health.

Service areas have been engaged in dealing with the Covid-19 pandemic response in Lancashire, dealing with outbreak management issues and also supporting

externally commissioned providers to operate safely within current constraints. As such there is minimal time across commissioning teams to support 'business as usual' commissioning and procurement. This will mean commissioning activity that would be commencing in the next 6 to 12 months in relation to contract review, redesign, consultation and procurement is not possible.

The Procurement Service has therefore undertaken a further review of contracts expiring that would otherwise have had this work underway in the next 6 to 12 months to support re-procurement.

Following discussions with the service areas concerned it is clear that this impacts on a number of contracts expiring in 2021, 2022 and 2023. Key contracts such as services for Telecare and Substance Misuse, whilst not expiring in the next year, require highly complex commissioning, procurement and mobilisation processes. This will need to take place in the dynamic health/social care environment, requiring interaction with the provider market (and often health partners) and work to re-procure would need to commence now.

Furthermore, the extensions requested are reflective of a concertina effect occurring due to the immediate disruption to the procurement of services, causing disruption to the schedule of procuring those services that would naturally have followed on.

Where the council has a need to maintain continuity for the delivery of goods, works and services, the council must generally procure contracts in accordance with the Public Contract Regulations 2015 (PCRs). Where the council, due to circumstances beyond its control, is unable to procure new contracts by undertaking a compliant tender exercise, the PCRs permit extension or modification of existing contracts if certain conditions are met. The most relevant provision of the PCRs in the circumstances is Regulation 72(1)(c).

Proposals for contracts expiring have therefore been considered in accordance with Cabinet Office Guidance (Procurement Policy Note 01/20 'Responding to COVID-19') and Regulation 72(1)(c) PCR.

Regulation 72(1)(c) sets out the following:

*Contracts ... may be modified without a new procurement procedure ... in any of the following cases:*

*(c) where all of the following conditions are fulfilled:*

- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;*
- (ii) the modification does not alter the overall nature of the contract;*
- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.*

This report identifies those contracts meeting the criteria for modification with the incumbent supplier. Further specific considerations in respect of certain contracts are dealt with in the "Legal" section below.

It is vital that in respect of those contracts the council:

- (a) limits any contract extension or other modification to what is absolutely necessary to address the circumstances of the continuing Covid-19 outbreak;
- (b) limits any contract extension or modification to fall within the boundaries of Regulation 72(1)(c) of the PCRs; and
- (c) keeps a written justification that satisfies the above conditions, with reference to the specific facts;
- (d) publishes a notice in the Official Journal of the European Union in respect of each extended contract confirming reliance upon this ground.

In respect of requirement (a) it must be acknowledged that this report sets out 24 month extensions to a number of the Public Health contracts listed, and two of those contracts could already have been extended until 2023 without any further intervention.

The proposals anticipate that circumstances in 2021 will permit the resumption of 'business as usual' commissioning and procurement cycles. Granting longer extensions to contracts at this stage recognises that unless substantial additional resources became available to undertake the same work in a shorter period of time there would not be capacity to concurrently commission and procure the breadth of services that would otherwise expire in parallel.

There is also the question of provider market capacity to respond to any consultation/procurement processes undertaken. In a number of cases providers have, since the commencement of the Covid-19 pandemic, delivered additional services, adapted the delivery of existing services or been prevented from performing elements of services. In a number of cases the pandemic continues to adversely affect their normal service delivery and bidding functions. In the event that the council undertook the procurement processes in Appendix 'A' sooner than proposed, it is possible that participation (and therefore competition) would be impacted, which risks a detrimental outcome for both the council and providers.

Utilising a contract extension period that could be perceived as at odds with requirement (a) may increase the risk of a legal challenge from competitor providers, who would otherwise have had the opportunity to bid for newly tendered contracts. The council must therefore be satisfied that the requested extension periods are justified in the circumstances, in that they are limited to what is absolutely necessary to address the circumstances of the Covid-19 pandemic. If necessary, the county council must be prepared to rely upon the justifications for the extensions as set out in this report and at Appendix 'A'.

Where an extension is requested in this report it is proposed that this is taken forward on the basis that the Director/Head of Service will be authorised to determine length and number of extensions within the maximum scope permitted by this report. In the event that the opportunity to procure services prior to the maximum extension period being reached is presented this is to be taken. Where additional permitted changes are required to contracts to ensure the continued effective of services delivery during the extension period this may be agreed with the service provider as part of the contract variation, subject to compliance with the principles

set out in Regulation 72(1)(c) PCR in respect of the modification not altering the overall nature of the contract. An example of such a case is the Telecare contract where any extension to the contract would need to include provision to support the upcoming digital migration of equipment.

The contracts concerned are detailed at Appendix 'A', the table below summarises the extensions by procurement category:

Category of spend	Value of maximum extension requested	Number of contracts	Average length of maximum extension requested
<i>Care and Public Health</i>	£42,923,335	16	15
<i>Corporate</i>	£500,000	1	12
	<b>£43,423,335</b>	<b>17</b>	<b>15</b>

## Consultations

Relevant heads of service and key operational staff have been consulted in drawing up the proposals included within this report.

## Implications:

This item has the following implications, as indicated:

## Risk management

## Legal

The relevant provisions of the Public Contract Regulations are set out in the body of this report. Subject to the county council complying with the prescribed limits for the proposed contract extensions/modifications, the requirements of Regulation 72(1)(c) generally and the Cabinet Office Guidance set out in Procurement Policy Note 01/20, the extension of contracts recommended in this report will be undertaken in a lawful manner.

In respect of the county council's Procurement Rules ("the Procurement Rules") the recommended extensions are outwith the provisions of those rules. Pursuant to paragraph 14.2 of the Procurement Rules, decisions taken contrary to the Procurement Rules must be taken by Cabinet.

## Financial

The estimated value of the contracts are set out above and individually at Appendix 'A'. The estimated contract values represent a maximum within which the council intends to operate, and services will be expected to operate the contracts within their agreed budget.

## List of Background Papers

Paper	Date	Contact/Tel
-------	------	-------------

None		
------	--	--

Reason for inclusion in Part II, if appropriate		
---	--	--

N/A		
-----	--	--