

## Contract Procedure Rules

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## Introduction:

These Contract Procedure Rules, issued in accordance with S.35 Local Government Act 1972, are intended to promote good practice and public accountability.

Officers responsible for purchasing or disposal must comply with these Contract Procedure Rules (the Rules). Compliance is the best defence against any allegation that a procurement has been made incorrectly or fraudulently. These are minimum requirements and more detailed procedures may be appropriate for particular contracts. Where there is a requirement for communication to be in writing, this shall include e-mail and fax as well as hard copy. In summary you must:

- Comply with the Rules for all procurements and disposals except where explicitly exempted.
- Comply with the principles of Transparency, Proportionality, Equal Treatment and Non-Discrimination.
- Act with the highest standards of probity and integrity
- Take all necessary legal, financial and professional advice.
- Declare any personal financial interest or other conflict of interest.
- Conduct a Best Value review and appraise the procurement need.
- Comply with the Council's corporate aims, objectives and policies.
- Check if there is an existing Corporate Contract or Framework Agreement to use
- Ensure tender documents give a full, clear and accurate description of the work.
- Clearly specify the exclusion, evaluation, selection and award criteria and their weighting.
- Keep commercial information confidential.
- Notify unsuccessful bidders of why the decision was taken, the name of the successful bidder and the relative advantages of its bid, or of any decision not to award the contract.
- Complete a formal Contract or issue an Official Purchase Order before the supply, service or works begins.
- Assess the Contract Management skills available and identify any training needs and support required.
- Identify a contract manager with responsibility for ensuring the contract delivers as intended.
- Maintain proper Contract Management records..
- Undertake a post-contract review to monitor performance, how well it met the procurement need and the Value for Money.

The Rules are part of the Council's Constitution. They apply directly to every employee of the Council involved in any part of a procurement process. They apply equally to any partnership the Council may enter into and to contracts in respect of which the Council may nominate sub-contractors or suppliers.

The Rules must be followed by the Council, the Cabinet (including Cabinet Portfolio Holders) and by Agents, Consultants, including architects and engineers, and Public Private Partners, acting for or on behalf of the Council. These Rules apply to contracts involving the receipt of income as well as expenditure and to Concessions.

In accordance with the Constitution, the Chief Finance Officer may amend these Rules after consultation with the Head of Democracy & Governance and the Audit and Risk Managers.

If you are in doubt about whether these Rules apply to a contract or proposed contract, about their meaning or how to apply them, consult:-

- (a) Your Manager.
- (b) The Corporate Procurement Manager.
- (c) The Head of Democracy & Governance.
- (d) Chief Finance Officer
- (e) Internal Audit Service.

Procurement refers to the whole process relating to the purchase, acquisition or commissioning of Works, Supplies and Services. One definition is: Procurement is the business management function that ensures identification, sourcing, access and management of the external resources that an organisation needs or may need to fulfil its strategic objectives.

### **Contracts:**

Contracts are legally binding agreements and in English law they do not need to be in writing. In simple terms a contract is formed when an offer, to do or to supply something for another party, is accepted by the party to whom the offer was made. Contracts may be formed in writing, by word of mouth, or by performance. Care must be taken when communicating, verbally or in writing, with bidders. You must only enter into contracts on behalf of the Council where there is current budget provision.

### **Relevant Contracts:**

All Relevant Contracts must comply with these Rules, these include arrangements made by or on behalf of the Council for the:

- Supply of goods, materials or Services and the carrying out of Works
- Disposal of goods, materials, plant, vehicles or equipment
- Hire, Rental or Lease of goods, plant, vehicles or equipment
- Granting of Concession Contracts
- Delivery of Consultancy, Advisory and other Services, including but not limited to those related to the recruitment of staff, land and property transactions, legal, financial, construction and other consultancy services.

Relevant Contracts do not include:

- Contracts of Employment which make an individual a direct employee of the Authority. For the avoidance of doubt the Rules do apply to contracts with agencies or companies for the employment of staff.
- Acquisition and disposal of Land. For the avoidance of doubt the Rules do apply to advice and other services taken in relation to the disposal of land.

### **Officer Responsibilities:**

Officers responsible for purchasing or disposal must:

- Comply with these Rules, the Financial Procedural Rules, the Code of Conduct for employees, other Council policies and all UK and European Union legal requirements.
- Ensure that any Agents, Consultants and Partners acting for or on behalf of the Council comply with these Rules.

- Check if a suitable Corporate Contract exists before seeking to procure another contract; where a suitable Corporate Contract exists, this must be used unless there is a sound business case not to do so. In that event the reasons must be documented and approved by the relevant Head of Service.
- Consult the participating Councils in the shared service partnership on any opportunity to aggregate demand for more efficient procurement where a new procurement requirement is identified
- Consider Collaborative Procurement opportunities with other Authorities, particularly other Councils in Hertfordshire.
- Assess if a Contract may have the consequence that any employee of the Council or of a current service provider might be affected by any transfer of the work or undertaking. Officers must ensure that the implications of the Transfer of Undertaking (Protection of Employment) Regulations (TUPE) are assessed. The advice of the Head of Democracy & Governance must be sought in any case involving the TUPE Regulations before proceeding with the procurement.
- Assess if the Construction (Design and Management) Regulations 2007 (CDM), which places legal duties on those involved in construction work, apply.
- Consult with and receive the approval of Head of Corporate Strategy & Client Services for all ICT Hardware and Software procurements, including licences, printers, telephony and ICT accessories.
- Consult with and receive the approval of Head of HR for all procurements involving the recruitment, appointment or employment of agency, self employed or contract staff. Such contracts must also be recorded on the Contract Register.

#### **Officer Requirements:**

- Assess the most appropriate procurement route to achieve Best Value. Including in house provision, using an existing contract, external procurement, Partnering, collaborative procurement with other local authorities, public body or purchasing consortium or use of an existing Framework Agreement let by others.
- Prepare a pre-tender estimate of the value of the supplies, services or works.
- Set out a clearly defined Specification for the supply, services or works with reference where necessary to appropriate standards etc.
- Clearly set out the Terms and Conditions, or Conditions of Contract that are to apply to the proposed contract. These include any Special Conditions of Contract where a standard form of contract is used. An example of a standard form of contract is the NEC3 Suite of contracts which are the preferred form for relevant Works and Professional Services.
- Consider how SME's and / or the 3<sup>rd</sup> Sector could engage with the procurement.
- Define clear Evaluation (selection and award) Criteria and their weightings for each stage of the procurement process.
- Ensure there is appropriate approval or delegated authority for the expenditure and the procurement accords with the approved policy framework and scheme of delegation set out in the Constitution.
- Carry out appropriate credit checks and observe any requirements for a surety.
- Observe any Standstill or "Alcatel" period as appropriate for procurements above the EU Thresholds.

#### **Head of Service Responsibilities:**

Heads of Service must ensure that:

- their staff comply with their Officer responsibilities
- contract registers are up to date and that copies of all contract documents are kept safe and accessible. Electronic copies are acceptable for lower value contracts but an additional hard copy of all major contracts must be retained for safekeeping.
- any exemptions are recorded.
- contract records are retained in accordance with the Council's Document Retention policy.
- The Corporate Procurement Manager is informed of all contracts that are awarded and that copies of all procurement and contract information are made available.

### **Exemptions:**

- Acquisition or disposal of Land:

These Rules do not apply to the acquisition or disposal of Land except where a lease or licence is granted as a part of a principal contract for other Works, Supplies or Services.

- Unforeseeable emergency:

Where exemption from these Rules is unavoidable due to an unforeseeable emergency involving immediate risk to persons or property or likely to give rise to major or serious disruption to the Council's services, a Head of Service and the Managing Director may jointly approve an exemption. They must inform the relevant Portfolio Holder and make a report to the next Cabinet meeting on the action taken. Urgency caused by undue delay will not be a valid reason for an exemption.

- Exceptional Circumstances:

An exceptional exemption may be considered by the Managing Director in limited and unusual circumstances. This may, for example, apply where a key supplier has gone into Administration or Receivership. It applies where the event will involve significant risk to a key contract and is likely to give rise to a significant disruption to a Council service. In such an event a Head of Service and the Managing Director may jointly approve an exceptional exemption. This may, for example, be a single tender action or the use of a substitute contractor from the original tender responses to complete a contract or part of a contract. They must inform the relevant Portfolio Holder and make a report to the next Cabinet meeting on the action taken.

- Limited market:

A partial exemption may apply where a supply or service is only obtainable from a single or a very limited number of contractors. In such a case, evidence of the limited market must be provided, such as by public advertisement or detailed market research. A Head of Service and the Managing Director may jointly approve a partial exemption. They must inform the relevant Portfolio Holder and make a report to the next Cabinet meeting on the action taken.

- Prior approval:

Other than as specified above no exemption from these Rules shall be made unless prior approval has been granted at a Cabinet meeting.

Record of Exemptions – Heads of Service must ensure that full details of approved waivers and exemptions are recorded in a central register held by the Corporate Procurement manager on behalf of the MD.

### **E-Procurement:**

E-procurement systems simplify the tender process, reduce the bureaucratic burden for suppliers, make it easier to tender and improve smaller organisations' ability to bid.

All procurements above a value of £5,000 must be procured via the Council's e-procurement portal, unless a specific exception has been agreed by the Head of Service.

The portal, Supply Hertfordshire, serves all the Councils and other public sector organisations in Hertfordshire. It is designed to simplify the procurement process, to make the process more secure and auditable and to improve accessibility to procurement opportunities for potential suppliers. It is a focal point for all businesses, including SME's, who want to supply the public sector in Hertfordshire.

Opportunities should be openly and widely publicised. The portal enables links to the UK Government's "Contracts Finder" website and to the Official Journal of the European Union (OJEU) / Tenders Electronic Daily (TED). Officers may also place Adverts in the local press or specialist journals if appropriate in addition to that posted on the portal.

Advice on using the portal should be taken from the Corporate Procurement Manager.

### **Records:**

Contract records must be retained in accordance with the Council's Document retention policy and where relevant should include:

- Details of any exemptions granted
- Pre-procurement market testing / research
- The procurement route used
- Tender Adverts / Notices
- Pre Qualification Questionnaires (PQQ's) and expressions of interest received
- The evaluation criteria used and the evaluation record based on those criteria
- Credit checks and records of economic and financial standing
- Invitations to Tender and tender documentation
- Tenders received and tender records and registers
- Pre and post tender clarifications and, where relevant, records of dialogue and /or negotiation.
- The award criteria and the evaluation record based on those criteria
- Records of communications with the successful contractor
- Details of feedback offered and given to unsuccessful bidders
- Standstill / Alcatel letters
- Contract documents
- Contract Management records
- End of Contract Reviews

### **Approved or Standing Lists of Suppliers:**

The Council does not maintain Standing or Approved Lists of Contractors or Suppliers. Approved Lists cannot be used where EU Procedures apply.

Where recurrent transactions of a similar type are likely a suitable framework agreement, or term contract, should be used. The framework agreement must include terms for calling off supplies, services or works from the framework supplier(s). A Framework Agreement may be

with a single supplier or have three or more suppliers on the list. Additional suppliers cannot be subsequently added to a framework agreement.

A formal and approved register of pre-qualified Contractors and Consultants maintained by or on behalf of the public sector (e.g. Construction line) may be used for the selection of a shortlist where appropriate. Any contractors or consultants from such a register must be assessed against the selection criteria published for the procurement.

It is not acceptable to use a random selection facility as available on some of these registers as this is not a substitute for the proper evaluation and selection of contractors and consultants, against a set of pre determined evaluation criteria, despite the pre-qualification stage achieved by inclusion on the register.

### **Framework Agreements and Collaborative Procurements:**

A Framework Agreement is a contractual arrangement with one, three or more providers that set out terms and conditions under which specific purchases or call-off purchases or contracts can be made at any time throughout the term of the framework agreement. The term of a Framework Agreement should not exceed four years. A call off contract may be longer than four years and can exceed the term of and survive beyond the end date of the framework agreement.

Call-off or contracts formed under a Framework Agreements must be awarded in accordance with the procedure prescribed in the Framework Agreement. Where there is more than one provider under the framework it is usually necessary to hold a mini competition. The Council's Rules apply to a mini competition in the same manner as all other procurements.

Framework Agreements to which the Council has access may be let by another body e.g. the Government Procurement Service (GPS), another Local Authority (LA) or a consortium of LA's e.g. Eastern Shires Purchasing Organisation (ESPO).

Officers proposing to use a Framework Agreement must check that:

- The Framework Agreement has been let in full accordance with these Rules and where appropriate EU Regulations.
- The Council has the right to use the Framework Agreement.
- The procedures for call-offs or mini-competitions under the agreement accord with these Rules.

A Collaborative Procurement is a contractual arrangement with other parties e.g. other Local Authorities to jointly procure works, supplies or services.

Officers proposing to use a Framework Agreement must check that:

- The collaborative procurement contract has been let in full accordance with these Rules and where appropriate EU Regulations.
- The Council is a member of the collaboration or consortium and has the right to use the contract.
- The procedures for using the contract accord with these Rules.

Collaborative and Partnership arrangements are subject to all UK and EU procurement legislation and must follow the Council's Rules. If in doubt, Officers must seek the advice of the Corporate Procurement Manager.

## Competition Requirements:

The requirements relate to the Estimated Total Value of the procurement:

The Value of a Contract is the total value over the whole potential duration of the contract including any possible extension to the term of the contract. Where the duration is uncertain a minimum of four years shall be assumed. The value of a concession is the total potential gross income or other assessment of value to the contracting parties. If in doubt, Officers must seek the advice of the Chief Finance Officer.

## Minimum requirements:

Thresholds excl VAT	Minimum requirements
Less than £5,000	One written quotation demonstrating value for money through a combination of cost and quality. More than one quote is preferred and should be sought where appropriate.
£5,000 - £50,000	Advertise the requirement and invite at least three, and usually no more than six, written quotations or tenders demonstrating value for money through a combination of cost and quality.
Greater than £50,000 – EU Threshold	Advertise the requirement and, except where the Open procedure is used, invite Tenders from at least three and usually no more than six bidders.
Above EU Threshold	Advertise and follow EU Procedures and, except where the Open procedure is used, invite Tenders from at least five and usually no more than six bidders.

All tender opportunities should be advertised to comply with the principle of transparency.

Where it can be demonstrated that there are fewer suitably qualified bidders to meet the competition requirement, all suitably qualified Candidates must be invited. The Head of Service and the Corporate Procurement Manager must be consulted in such cases.

If more than one contractor is to be appointed, for example to a framework agreement or if a contract is split into Lots, the number of bidders invited to tender may be increased to more than six.

Contracts must not be disaggregated nor methods of calculating the Estimated Total Value used in order to undermine the intention and application of these Rules or the EU Regulations.

The normal procurement procedure to be used shall be the Restricted Procedure. Officers shall consult the Corporate Procurement Manager and / or the Head of Democracy & Governance if the Open or other procedures are proposed.

## Assets for Disposal:

Assets (excluding land) for disposal must be sent to public auction except where better Value for Money is likely to be obtained by inviting Quotations or Tenders. The method of disposal of surplus or obsolete stock, plant, vehicles and equipment or assets, other than land, must be formally agreed with the Chief Finance Officer.

## Providing Services to External Purchasers:

The Chief Finance Officer and Corporate Procurement Manager must be consulted where proposed contracts include supplies to or work for or on behalf of other organisations.

### **Appointment of Consultants:**

The procurement of Consultants, including solicitors, architects, engineers, surveyors and other professionals, must comply with these Rules. Any Consultant appointed who acts for or on behalf of the Council must also comply with these Rules. A written contract or appointment may be in the form of a formal letter, for values below £25,000, or by a contract of appointment. A standard Professional Services form of contract, such as that in the NEC3 Suite should be used where appropriate.

Records of consultancy contracts must be maintained in the same manner as all other contracts and shown on the Contract Register.

Consultants shall be required to provide evidence of, and maintain Professional Indemnity insurance to the satisfaction of the Council's Insurance Officer.

### **Pre-Procurement or Soft Market Testing and Research:**

Pre-procurement engagement is a range of activities to engage the market before starting a procurement process and may include a technical dialogue to inform a specification. Engaging with the market before starting the formal procurement process is best practice and helps to maximise value for money from the resulting procurement. (PPN04/12)

Officers should consider pre-procurement consultations with potential suppliers prior to the start of any part of the formal procurement process including a Tender Advert or Notice. Care must be taken not to prejudice the equal treatment of potential suppliers or to distort potential competition. Advice on pre-procurement strategies should be sought from the Corporate Procurement Manager.

### **Insurance:**

Insurance requirements must be clearly specified in the contract. The Council's Insurance Officer will advise on the minimum limits of indemnity required for each contract. Prior to entering into a contract Officers must require the contractor to produce current insurance certificates in respect of Employers' Liability and Public Liability risks and for Professional Indemnity where appropriate for such limits and for such periods as are specified by the Council's Insurance Officer. The Contractor must be required to produce up to date Insurance Certificates at each subsequent renewal date during the term of the contract.

### **Specifications, Standards and Evaluation Criteria:**

Specifications must set out the minimum required standards of technical and professional ability and reliability. Specifications must refer to relevant UK, EU or international standards which apply to the subject matter of the contract. The Head of Democracy & Governance must be consulted if it is proposed to use other than UK or EU standards.

Tenders should be assessed on the basis of the Most Economically Advantageous Tender (MEAT), where Quality and Price considerations both apply. In minor or exceptional cases

bids may be invited on a lowest price (where payment is to be made by the Council) or highest price (if payment is to be received by the Council).

The Officer must define and publish appropriate Price and Quality Evaluation Criteria and their respective weightings.

Quality Evaluation (selection or award) criteria may include experience, technical merit, programme and delivery proposals, environmental matters, social value, added value, whole life costs, aesthetic and functional characteristics, health and safety, after-sales service and response, technical assistance, CV's of key staff, accreditations, approach to collaborative working or partnering with a Local Authority and any other relevant matters.

Evaluation Criteria must not include non-commercial considerations or geographical limits which might discriminate against suppliers from the EU. It is acceptable to require submissions to be in English and priced in Pounds.

Accreditations should be considered where appropriate and relevant but must not be a substitute for other checks and due diligence. These should not be required or assessed in a manner that may inadvertently disadvantage potential providers, for example, SMEs, public service mutuals or third sector organisations.

### **Financial Assessment and Vendor Capabilities:**

Financial assessment of potential providers should be undertaken in a manner that is proportionate, flexible and not overly-risk averse while ensuring taxpayer value and safety is protected and the relevant EU Procurement Law complied with. All potential providers, whatever their size or constitution, should be treated fairly and with equal diligence during the financial appraisal process. For example: no SMEs, public service mutuals or third sector organisations should be inadvertently disadvantaged by the financial assessment process (PPN 02/13)

Due diligence must be carried out to ensure that the vendor has the necessary skills, resources and abilities to undertake the work. The due diligence must be proportionate to the nature and scale of the work proposed.

### **Social Value:**

Social value is the consideration of how procurement might offer social, economic or environmental benefits to the community.

The Public Services (Social Value) Act 2012 applies to certain types of services contracts and framework agreements but it is good practice to consider these principles for all procurements. The requirement is to consider the economic, environmental and social benefits of the approach to the procurement before the process starts and to consider whether there is a need to consult on these issues.

The Act applies to the pre-procurement stage of contracts for services as that is where social value can be considered to greatest effect. This should inform the shape of the procurement approach and the design of the services required. It should enable a re-think of the outcomes and the types of services to be procured. (ref PPN 10/12)

The potential interest of Small and Medium Size Enterprises (SME's) and the 3<sup>rd</sup> Sector should be considered when assessing the shape of the procurement approach and the design of the Supplies or Services required. This may also include ways to cascade good practice down the supply chain.

Contracts should ensure that the principles of these Rules including the need for market testing and the provision of Value for Money is cascaded down the supply chain. The Council expects good practice to be in place to ensure a fair selection of sub-contractors, appropriate terms and conditions and prompt payment of monies due.

### **Past Performance:**

The Council is entitled to establish minimum standards for reliability based on past performance which must be met by potential bidders for public contracts (PPN09/12). To provide assurance about performance and protection for the taxpayer and recipients of the services, procurements should include minimum standards for reliability based on past performance.

It is good practice to request specified information, which may include certificates of performance, about past performance in the last 3 years to establish that:

- the principal contracts of those who would provide the goods and / or services have been satisfactorily performed in accordance with their terms; or
- where there is evidence that this has not occurred, that the reasons for failure will not recur if that bidder were to be awarded the relevant contract.
- A due diligence process can be carried out to assess the contractors understanding of contracting with the public sector and their approach to contracting / partnering with the Council where appropriate.

If the evaluation panel remains unsatisfied that the principal contracts of those who would provide the goods and / or services have been satisfactorily performed, it should exclude that bidder on the grounds that it has failed to meet the minimum standards of reliability set

### **Public Sector Equality Duty (PSED):**

Officers must ensure compliance with the Council's legal obligations under the Equality Act 2010 and its associated Public Sector Equality Duty with due regard to the three aims of the duty:

- Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- Advance equality of opportunity between people who share a protected characteristic and people who do not share it; and
- Foster good relations between people who share a protected characteristic and people who do not share it.

Officers must ensure that public goods and services are accessible to, and meet the diverse needs of all users to ensure that no one group is disadvantaged in accessing public goods and services. Procurements must meet the Fundamental principles of equal treatment, non-discrimination, transparency and proportionality (PPN09/12 and 01/13).

## **Invitations to Tender (ITT's) / Requests for Quotations (RFQ's):**

Pre-Qualification Questionnaires (PQQ's) are to be used where appropriate. The two key aims are to select a list of suitably competent and qualified bidders and to reduce the number of bidders to an appropriate and manageable number using pre-published evaluation criteria.

The criteria may include pass / fail mandatory and discretionary criteria. The evaluation should be solely based on a supplier's response. Where the capability of an individual(s) is essential to the delivery of the contract, for example, the provision of consultancy, CV's should be requested and assessed. PQQ's should not impose arbitrary minimum requirements which may have the unintended effect of barring new businesses from bidding.

Officers should undertake a financial check as part of the evaluation process but, in the spirit of encouraging supplier growth, should not rule out a supplier unless there is clear evidence that the supplier's financial position places public money or services at unacceptable risk. The Chief Finance Officer must be consulted in all cases of doubt.

The Notice or Advert and the Invitation to Tender shall state that late submission, of an Expressions of Interest or of a Tender will not be accepted. Submissions must be received by the due time and date. Any appeals for consideration of a late submission, due for example to a default by the Council, may only be considered by The Head of Democracy & Governance and / or the Corporate Procurement Manager.

Where late submissions are received, including by e-mail, other than via the procurement portal they shall be opened only by The Head of Democracy & Governance, or representative, or the Corporate Procurement Manager. No details of the late submission shall be disclosed.

An Invitation To Tender should set out full details of the Council's requirements. An ITT may allow the submission of Variant bids to allow for supplier innovation.

An Invitation To Dialogue should set out an overview of the Authority and its needs; a starting position from which the dialogue can commence and how the dialogue will be structured together with any rules that apply to the dialogue phase.

All Invitations to Tender shall include the following:

- (a) A Specification that describes the Council's requirements in sufficient detail to enable the submission of competitive offers.
- (b) The Terms and Conditions of Contract that shall apply.
- (c) A Certificate of Non- Collusion for tenderers to declare that they have not colluded with any other party nor disclosed details of their submission to any other party (except where such a disclosure is in confidence and necessary for the purposes of preparing their submission).
- (d) A Form of Tender in the prescribed format for bidders to sign and confirm their bid price.
- (e) An Equality and Diversity questionnaire.
- (f) Notification that bidders must disclose any actual or potential conflict of interest.
- (g) Notification that bidders are responsible for all their costs of preparing a submission and that no costs will be reimbursed by the Council.
- (h) Details of the Evaluation Criteria with their relevant weightings and the methodology for scoring those criteria.

- (i) That submissions must be made via the Council's e-procurement portal unless otherwise agreed.
- (j) Where submissions are made other than via the procurement portal, notification that no Tender will be considered unless it is in a sealed envelope or container which bears the word 'Tender' followed by the subject to which it relates, with no other name or mark indicating the sender.
- (k) The method by which any arithmetical errors discovered in the submitted Tenders are to be dealt with.
- (l) A statement that the council is not bound to accept the lowest or any Quotation or Tender.
- (m) Advice that the Authority is subject to the obligations of the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Government's transparency agenda and that the final decision on publication or disclosure of any information shall remain with the Council.
- (n) Advice that Credit checks and records of economic and financial standing may be sought.

All bidders invited to tender or quote must be issued with the same information at the same time and subject to the same conditions. This also applies to any supplementary information or clarification given during the tender period.

### **Nominated Sub-contractors and Suppliers:**

These Rules apply to nominated sub-contractors and suppliers. Officers should avoid the use of nominated sub-contractors and suppliers as far as practicable. If a nominated sub-contractor or supplier is to be considered Officers must take advice from the Head of Democracy & Governance.

The invitations to tender (ITT) for contracts involving Nomination must include a clause to require the parties to enter into contract on terms relevant to the indemnities and obligations of each party as required by the Head of Democracy & Governance.

### **Short listing:**

Where bidders are evaluated for short listing or for the award of a contract Officers must assess the financial and technical standards appropriate to the contract. Assessments must be made in accordance with the published Evaluation Criteria. This includes having regard to the Proportionality Rule in relation to the size and resources of a company relative to the value of the contract.

### **Submission, Receipt and Opening of Tenders or Quotations:**

Tender periods must be sufficient for bidders to prepare and submit proper bids consistent with the complexity of the contract requirements.

All Tenders must be returned via the procurement portal or, where that doesn't apply, to the Head of Democracy & Governance or the Corporate Procurement Manager.

All tenders for contracts estimated to be for £50,000 or more must be opened at one time and only in the presence of The Head of Democracy & Governance, or nominated officer, or the Corporate Procurement Manager and another Officer not below the grade of Principal Officer.

All tenders for contracts estimated to be below £50,000 must be opened at one time and only in the presence of the Head of Service, or their representative, or the Corporate Procurement Manager and another Officer in the same department not below the grade of Principal Officer.

The Officer nominated to receive the tenders shall be responsible for the safekeeping of Tenders until the appointed time of opening. Each Tender must be suitably recorded to verify the date and precise time it was received, adequately safeguarded against amendment of its contents. The procurement portal is compliant with this requirement.

The Officer nominated to receive the tenders must ensure that all Tenders are opened at the same time as soon as practicable after the period for their submission has ended. They must ensure that the Tender Record Form is completed and the bids recorded on the Tender Receipt Record Log.

### **Clarifications and Negotiations:**

Providing clarification during a tender period is permitted. It must not be in the form of any negotiation and must be made in writing to all bidders. Where any verbal discussion is entered into any clarification given must be confirmed in writing and copied to all bidders.

Where bidders do not want information shared with other bidders, as that might indicate a bidding strategy for example, they should be invited to withdraw their clarification question before any answer is given. If an answer is given it must be shared with all the other bidders.

Post tender negotiations, between submission of bids and contract award, must be avoided and are only to be conducted in exceptional cases. An exception may be where a Negotiated or Competitive Dialogue procedure has been used. In such cases the rules relating to the negotiations must be clearly set out in the tender documents and those negotiation rules must provide for:

- (i) The requirements of relevant EU Directives, UK legislation and good practice guidance.
- (ii) Written approval of the Head of Democracy & Governance or the Managing Director.
- (iii) The documentation sent out to prospective bidders stating that negotiation may take place and the basis upon which such negotiation would be held

Post-tender negotiation must only be conducted in accordance with the guidance issued by The Head of Democracy & Governance who, with the Corporate Procurement Manager, must be consulted wherever it is proposed to enter into post-tender negotiation.

The circumstances under which such negotiations may be considered are where:

- (i) High levels of innovation are required as part of the tender solution
- (ii) The new contract will involve radical changes from existing practices
- (iii) There are a number of alternative proposals or solutions that the Council is considering
- (iv) The specification has a number of alternative packages or elements
- (v) Variant bids are shown as acceptable in the Notice and negotiations relate to variant bids.

If post-tender negotiations are necessary then such negotiations shall only be undertaken with the preferred bidder who is identified as having submitted the Most Economically Advantageous Tender and after all unsuccessful bidders have been informed. During

negotiations tendered rates and prices shall only be adjusted in respect of a corresponding adjustment in the scope or quantity included in the Tender documents.

Negotiations must be conducted by a team of at least two Officers, one of whom must be from a service independent of that leading the negotiations. The independent representative can be a representative from another council if the tender is a collaborative procurement.

Officers appointed by the Head of Service to carry out any post-tender negotiations must ensure that they keep full and accurate records and minutes of all negotiation meetings and discussions and that any actions and outcomes are confirmed and agreed in writing by both parties.

If post-tender negotiation results in a fundamental change to the specification or to the terms of a contract the contract must not be awarded. A fundamental change from the work tendered must be re-tendered. The advice of The Head of Democracy & Governance and the Corporate Procurement Manger must be sought before concluding any post-tender negotiations.

### **Evaluation, Selection, Award and Feedback:**

The confidentiality of Quotations, Tenders and the identity of bidders must be observed at all times. Information about one bidder or their response must not be given to another bidder except as provided in these Rules.

Evaluation and Moderation panels must comprise a minimum of two Officers. The procedures to be used by the panels, including the Interview panel if an interview stage is included in the process, must be set out in advance of the receipt of submissions.

If an Interview stage and / or a Best and Final Offer (BAFO) stage is included in the process the procedures for them must be clearly set out for bidders in the bid documents. The published arrangements cannot be revised post tender submission.

Contracts must be evaluated and awarded by the panels in accordance with the published Evaluation (selection and award) Criteria. Neither criteria nor weightings can be revised post tender submission.

Officers shall compare submitted Tender prices with any pre-tender estimates and examine and explain any discrepancies.

The arithmetic in compliant Tenders must be checked. If simple arithmetical errors are found they should be corrected and the bidder notified. The bidder must be given the opportunity to stand by or withdraw the corrected bid.

The Officer responsible for the evaluation panel and moderation must prepare a report setting out the reasons for the selection, having regard to the evaluation criteria, and the reasons for rejecting the unsuccessful tenders.

Where the Total Value is over £5,000, the Officer must notify all bidders at the same time of the intention to award the contract to the successful bidder.

Where the EU procedures apply, the Standstill or "Alcatel" period of at least ten days must be observed. The EU Regulations require a formal letter containing prescribed information to

give unsuccessful bidders time to challenge the decision before an award. If the decision is challenged the award of contract must not be made and the advice of The Head of Democracy & Governance and the Corporate Procurement Manager must be sought.

Where the Total Value is over £5,000 feedback shall be offered to all bidders and potential bidders including those not short listed at the PQQ stage. The advice of The Head of Democracy & Governance and / or the Corporate Procurement Manager should be sought although the feedback must include:

- How the Evaluation Criteria were scored for their submission
- The characteristics and relative advantages of those short listed. Details that could identify those short listed must not be disclosed.
- The name of the successful bidder
- The characteristics and relative advantages, including price, of the successful bidder

### **Avoiding Challenges:**

Challenges are increasing for public sector procurements with the most likely challenges being from unsuccessful bidders challenging the evaluation outcome. This risk of challenge should be reduced by:

- publishing the process and timings for issuing the ITT and supporting documentation, dealing with clarifications, receiving bids and placing contracts, and adhering to the process.
- making sure that evaluation criteria, sub-criteria and weightings, which are clearly linked to the work required, are all published in the ITT.
- using a clear and objective marking scheme (e.g. the reasons for awarding 6 points rather than 5 are clear to bidders and to evaluators)
- maintaining an audit trail during the process, to help explain why a bid was unsuccessful and to defend any challenges raised.

The key principles are that criteria must be reasonable, proportionate, transparent and relevant to the goods, works or services being procured. Objective criteria should be clear, verifiable and targeted with measurable outputs. Subjective criteria should clearly define the basis on which any value judgements would be based. All criteria must be fair and not involve any discrimination, including a level playing field for non-local bidders, to ensure compliance with the EU Directives.

### **Contracts:**

All Contracts must be in writing and held in accordance with these Rules and, irrespective of value, must clearly specify:

- what is to be done or provided (i.e. the Works, materials, Services, Supplies, matters or things to be done or provided)
- the provisions for payment (i.e. the price to be paid and when and details of any indexation)
- the time, or times, within which the contract is to be performed
- the provisions for the council to terminate the contract.

The Council's Official Purchase Order form, the Council's standard Terms and Conditions or a standard Form of Contract issued by a relevant professional body (e.g. NEC3) must be

used as appropriate. The form of contract must be approved by the Head of Democracy & Governance.

In addition, every Contract over £50,000 must also state clearly as a minimum:

- That the contractor may not assign or sub-contract without prior written consent
- Insurance requirements
- Health and Safety requirements
- Data Protection requirements
- Equality and Diversity requirements
- Freedom of Information Act and Environmental Information Regulations requirements
- TUPE requirements
- That those acting for or on behalf of the Council must comply with the council's Contract Procedure Rules
- A right of access to all relevant documentation and records of the contractor for monitoring and audit purposes.
- VAT and other tax requirements.
- The Requirements for a Bond and / or Parent Company Guarantee.
- Prevention of Corruption requirements.
- Any Indexation or Price variation details or if not variation of Rates or Prices applies.

The formal advice of the Head of Democracy & Governance must be sought for contracts where:

- The Total Value exceeds the EU Thresholds
- The Risk is outside acceptable parameters
- They involving leasing arrangements
- It is proposed to use a supplier's own Terms and Conditions of Contract
- They are complex in any other way.

#### **Indexation and price variation Clauses:**

The advice of the Chief Finance Officer must be sought on any indexation clauses and the indices to be used, e.g. RPI. Where an indexation clause is used consideration should be given to an efficiency factor, e.g. less 1% p.a., to encourage Best Value and continuous improvement during the term of the contract.

Price variation clauses should allow for any potential variation in the scope or scale of goods, works or services to be provided during the term of the contract. This may be in consequence of other factors e.g. a variation in the number of service users where another service has been outsourced.

#### **Forming of Contracts:**

Formal contracts must be formed for contracts with a value greater than £25,000. Below this threshold an Official Purchase Order may be placed but it must include full details of the supply, service or works to be delivered and the Terms and Conditions that apply to the Order.

Contracts must be in a form approved by the Head of Democracy & Governance. An industry standard may be used subject to the additional clauses being added to meet the requirements of these Rules and to protect the Council's interests.

Every contract must specify the work, goods, supplies and services to be provided, the price and charging basis including any indexation, and the time in which the contract is to be performed.

### **Extension of contracts:**

A Contract may be cumulatively extended by up to 50% of the initial contract value. The revised total value of a contract initially let below the EU Threshold must not exceed that Threshold value. The Head of Service, for contract extensions up to £25,000, and jointly with the Managing Director for greater values, may approve a contract extension. They must inform the relevant Portfolio Holder and, for values greater than £25,000, make a report to the next Cabinet meeting on the action taken.

### **Contract Formalities:**

Contracts not under Seal, including Purchase Orders, shall be completed as follows, subject to the relevant Scheme of Delegation:

Up to £50,000 - Signature by any one of the following: Head of Service or authorised representative; Head of Democracy & Governance; Managing Director; Chief Finance Officer.

Above £50,000 (Excluding Sealing) Signature by any two of the following: Head of Service; Head of Democracy & Governance; Managing Director; Chief Finance Officer.

Where risk and high value are relevant contracts should be under Seal subject to the advice of the Head of Democracy & Governance.

All contracts must be concluded formally in writing before the Supply, Service or Work begins, except in exceptional circumstances, and then only with the written consent of the Head of Democracy & Governance or Managing Director. An award letter or an intention to award letter is insufficient.

The Officer responsible for securing signature of the contract must ensure that the person(s) signing for the other contracting party has / have authority to bind it.

All contracts for the purchase of motor vehicles or mechanical plant irrespective of value must be in writing and must be signed by the Head of Service and at least one of the following: the Managing Director; the Chief Finance Officer; the Head of Democracy & Governance (or their authorised representatives).

### **Sealing:**

A contract must be sealed where:

- The council may wish to enforce the contract more than six years after its end
- The contract is valued at more than £150,000

Where contracts are completed by each side adding their formal seal, such contracts shall be signed by the Head of Democracy & Governance or authorised nominee.

Every Council sealing will be consecutively numbered, recorded and signed. The seal must not be affixed without the proof that the appropriate authority to enter the contract has been obtained under the scheme of delegation.

### **Contract Surety:**

The Officer must consult the Chief Finance Officer about the need for a Parent Company Guarantee (PCG) where a bidder is a subsidiary of a parent company and:

- The Total Value exceeds £150,000, or
- The award is based on the evaluation of the parent company, or
- There is some concern about the stability of the bidder.

The Officer must consult the Chief Finance Officer about the need for a Bond where:

- The Total Value exceeds £1,000,000, or
- It is proposed to make stage or other payments in advance of receiving the whole of the subject matter of the contract and there is concern about the stability of the bidder.

Where a Bond is required it shall normally be for a sum equal to 10% of the total contract sum. The decision of the Chief Finance Officer on the need for a PCG and / or the need for and the size of a Bond is final.

### **Remedies for non-performance:**

Contracts must include provisions for remedies in the event of non-performance including liquidated damages, other financial deductions and termination of the contract.

Every Contract which exceeds £50,000 in value and is for the execution of Works, shall provide for liquidated damages to be paid by the Contractor in respect of any delay in performing such work. This shall not apply where the Chief Finance Officer determines that such remedy is not appropriate for a particular contract.

### **Prevention of Corruption:**

Everyone involved in a procurement process as employees or for or on behalf of the Council must comply with the Code of Conduct on the prevention of corruption. They must not invite or accept any gift, inducement or reward in respect of the evaluation, award or performance of any contract.

Any offer of a gift, inducement or reward must be declared whether or not it was accepted. High standards of conduct and probity are required. Corrupt behaviour is a criminal offence and may lead to dismissal.

Cartels are a potential concern and are a breach of competition law. They can influence the price paid for goods and services by the Council. Any suspicions about such activities must be reported to the Head of Democracy & Governance and the Chief Finance Officer.

The following clause must be put in every written Council contract:

“The Council may terminate this contract and recover all its loss if the Contractor, its employees or anyone acting on the Contractor’s behalf do any of the following things: (a) offer, give or agree to give to anyone any inducement or reward in respect of this or any other Council contract (even if the Contractor does not know what has been done), or (b) commit an offence under the Bribery Act 2010 or shall have given any fee or reward the receipt of which is an offence under Section 117(2) of the Local Government Act 1972, or (c) commit any fraud in connection with this or any other Council contract whether alone or in conjunction with Council members, contractors or employees. Any clause limiting the Contractor’s liability shall not apply to this clause.”

### **Declaration of Interests:**

If it comes to the knowledge of a Councillor, an Employee of the authority or anyone acting as an Agent for or on behalf of the Authority that a contract in which he or she has a personal interest has been awarded or is proposed to be entered into by the council, he or she shall immediately give written notice to the Head of Democracy & Governance.

The Head of Democracy & Governance shall maintain a record of all declarations of interests notified by Councillors and Officers.

The Head of Democracy & Governance will ensure that every councillor signs and receives a copy of the Council’s code of conduct for councillors.

### **Contract Management:**

All contracts must have a named contract manager, nominated by the Head of Service, for the entire duration of the contract.

The Head of Service must keep under review the skills and experience required and available for the good management of the contract.

### **Risk Assessment and Contingency Planning:**

Where the risk and financial value of the Contract is deemed appropriate, including all those above the EU Thresholds, contract managers must:

- prepare a Business Case
- undertake appropriate Risk Assessments
- maintain a Risk Register during the contract period
- ensure that mitigation and contingency measures are in place
- manage the contract in accordance with best practice
- have regard to end of contract reviews of other similar contracts

### **Contract Monitoring, Evaluation and Review:**

All contracts with a value above the EU Thresholds, or which are High Risk, should have a formal monthly or quarterly review with the contractor.

Throughout a contract period the Contract Manager must monitor:

- Contractor’s performance

- Compliance with the Specification
- Compliance with the Programme
- Contract costs and Value for Money requirements
- Health and Safety compliance and Risk Management.
- The Project Plan
- Client's resourcing of the contract

At the end of a contract period the Contract Manager must ensure:

- That all required Works, Supplies and Services have been completed
- The Final Account has been completed
- An End of Contract Review on the standard template has been completed

### **Late Payment Regulations:**

The Late Payment of Commercial Debts Regulations 2013 requires public authorities to pay within 30 calendar days following receipt of the invoice. Simple interest is calculated equal to the sum of the Bank of England reference rate plus at least eight percentage points. The creditor is also entitled to a fixed charge of £40, £70 or £100 depending on the size of the debt (under £1,000, under £10,000, and higher), plus additional reasonable costs incurred.

As a public authority the Council, if a debt is not paid within the deadline, is obliged to automatically pay the outstanding amount that includes, daily interest for every day the payment is late based on 8 percentage points above the Bank of England's reference rate plus the fixed amount, depending on the size of the unpaid debt. The onus is on the Officer to pay a supplier on time and the supplier is not obliged to remind you that payment is outstanding.

Officers should include a clause in their contracts that requires prime contractors to pay their suppliers within 30 days to cascade good practice in public procurement supply chains.

### **VAT**

To avoid potential VAT loss and to enable the recovery of VAT officers must ensure that VAT invoices are sent and addressed directly to the Council. Officers must avoid situations where a 3rd party receives the taxable supply that the Council subsequently pays where the supporting evidence from a 3rd party shows their payee details. A failure to recover VAT is an unnecessary and additional budget pressure and is a cost to the project / spending department.

### **EU Procurement Rules:**

EU Procurement Rules apply where the value of a contract exceeds the relevant threshold. These thresholds are reviewed from time to time by the EU. Up to date figures and advice on which threshold applies can be confirmed by the Corporate Procurement Manager. The relevant thresholds will be published on the Council's intranet under Procurement.

EU Rules define the classification of "Supply", "Service" and "Works" contracts. Where a contract covers more than one classification it is usually classified according to its predominant purpose.

EU Rules define how the value of a contract is assessed for the purposes of the EU Thresholds. The various EU procurement procedures include some defined timescales which are mandatory. These include minimum times for the receipt of requests to tender and for receipt of tenders.

The OJEU Notice must be submitted in the prescribed form and be published in the Official Journal of the European Union (OJEU). The Corporate Procurement Manager can advise on the application of the EU Rules.

Four procurement procedures are available for OJEU procurements regulated by the Public Contracts Regulations 2006:

### **Open procedure**

All interested parties can submit a tender in response to the OJEU Notice. Tenders can be clarified following receipt but changes to the tender and any negotiations are not permitted. The open procedure is unlikely to be appropriate where there is any complexity or if a high number of bids might be received.

### **Restricted procedure**

Interested parties can submit an expression of interest in response to the OJEU Notice. A short listing exercise is carried out using a Pre Qualification Questionnaire (PQQ). Only those meeting the published evaluation criteria can be invited to tender. A minimum of five suppliers must be invited to tender unless fewer suitable candidates have met the criteria and there is sufficient number to ensure genuine competition. Tenders can be clarified following receipt with finalisation of contract terms but changes to the tender and any negotiations are not permitted.

### **Competitive Dialogue**

Interested parties can submit an expression of interest in response to the OJEU Notice. A short listing exercise is carried out using a Pre Qualification Questionnaire (PQQ). Only those meeting the published evaluation criteria can be invited to dialogue. A minimum of three suppliers must be invited to dialogue unless fewer suitable candidates have met the criteria and there is sufficient number to ensure genuine competition, i.e. at least two.

The authority enters into a dialogue with bidders to develop one or more suitable solutions. Care is needed to ensure that all tenderers are treated equally. The number of bidders can be reduced in stages if that intention was in the OJEU Notice or Invitation To Dialogue. When the dialogue phase is concluded final tenders are invited. These are evaluated on pre-specified award criteria which must be based on the most economically advantageous tender, not just price. Final tenders can be clarified following receipt with finalisation of contract terms but further changes to the tender and further negotiations are not permitted.

The UK Government has a presumption against the use of the competitive dialogue procedure. The competitive dialogue procedure is designed to be used for particularly complex contracts. It should only be used after extensive pre-market engagement with

current and potential suppliers and if the authority is unable to identify the technical means of delivering its requirement and / or the legal / financial make-up of the project.

Projects for which competitive dialogue might be suitable include those with:

- an iterative design element, such as construction or economic infrastructure;
- a private finance element or other form of public private partnership;
- a requirement for some form of planning permission;
- a complex commercial arrangement, such as joint ventures and mutuals.

**Negotiated procedure:**

Interested parties may express an interest in tendering and the authority will select potential bidders with whom to negotiate. A minimum of three suppliers must be invited to dialogue unless fewer suitable candidates have met the criteria and there is sufficient number to ensure genuine competition, i.e. at least two.

The Public Contracts Regulations 2006 state that the negotiated procedure may only be used where: another procedure has failed to produce any acceptable tenders; exceptionally where prior overall pricing is not possible; in the case of Services, where specifications cannot be established with sufficient precision; or for certain research and development related works contracts. The UK Government guidance is that the negotiated procedure should only be used in rare circumstances.

**Version Control Information:**

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Document Owner	Head of Democracy & Governance	Carol Chen
Document Manager	Corporate Procurement Manager	Howard Hughes
Review	Annual review due:	July 2014
<b>Version Control</b>	<b>Details</b>	<b>Date</b>
v 1.0 – 4.0	Drafts for consultation	
v 5.0	Approved at Full Council	24 July 2013
v 6.0	Amendment page 4 re HR	Sept 2013
v 7.2	Amendments: Page 4 CDM Page 5 Record of Exemptions Page 20 End of Contract actions Page 21 VAT Page 23 Version Control information added	December 2013