

PART 7 - CONTRACT RULES

1. Introduction

- 1.1 These procedures represent the Council's contract rules and are designed to secure competition, quality and value for money in the award of contracts for the supply of goods, works or services.
- 1.2 The letting of contracts is subject to the Council's procurement strategy. That strategy involves the adoption of a risk based Gateway procurement process for all procurements where the anticipated contract term value is above £100,000.
- 1.3 The Monitoring Officer in consultation with the Cabinet will from time to time produce guidance on good practice in letting of contracts either generally or in the form of a procurement manual. All contracts shall be let and managed in accordance with this guidance. Full details of the Council's procurement strategy and the related procurement processes are set out in the Council's procurement manual.
- 1.4 Every Member of the Council and every officer and employee of the Council must comply with these contract rules.
- 1.5 Any third party (eg a consultant) who is engaged in the letting, management or supervision of a contract on behalf of the Council must comply with these contract rules as if s/he were an officer of the Council.
- 1.6 Subject to contract rule 15.2, these contract rules apply to all procurement decisions, regardless of the source of funding, or the status of the contractor (i.e. they apply equally to selection of both main contractors and nominated sub contractors or suppliers).
- 1.7 All procurement activity must be carried out not only in accordance with these contract rules but also in accordance with all relevant European and UK directives, law and regulation, the Council's financial regulations, the Council's procurement strategy and other relevant guidance. In the event of a conflict European and UK directives, law and regulation will take precedence over these rules.

2. Conduct of members and officers

- 2.1 These contract rules seek to safeguard members and officers from suggestions of impropriety and to ensure that contractors comply with Council policies and conditions.
- 2.2 Any member or officer involved in the letting of contracts is expected to seek best value for money and continuous improvement, and to behave in a demonstrably fair and even handed manner whatever the contract value. 'Value for Money' is the optimum combination of whole-life costs and quality to meet the Council's specified requirements.

- 2.3 Directors must ensure that these rules and the provisions and guidance (particularly that in the Council's procurement manual) relating to the award and management of contracts are properly understood and used in their directorates. To minimise risks to the Council and further ensure best value for money directors must ensure that all members of their staff involved in the procurement process undertake the Council's procurement training programme. The Council's Head of Procurement will be responsible for the provision of such training and fuller details of the training requirements and the courses to meet those requirements are set out in the Council's procurement manual.
- 2.4 Any officer who knowingly assembles or disassembles a scheme in order to avoid or diminish the requirements of these rules or otherwise disregards the provisions of these rules or the guidance in the procurement manual may be liable to disciplinary action.
- 2.5 Any Member or officer who has, or may appear to have, a conflict of interest, personal or prejudicial interest in the award or management of a contract must declare such interest to the relevant director and Monitoring Officer (in the case of Members). They must not take part in any decision-making or other process with regard to that contract, or seek to influence others in relation to it.
- 2.6 No member or officer shall take any personal or private benefit from any contract entered into by the Council.
- 2.7 No person shall, whether that person is employed by or is a member of the Council or thereafter unlawfully disclose or make any commercial use of any information of whatever kind or description which has been given to that person in confidence by the Council or by any officer or member of the Council, or where such confidential information has come to the knowledge of that person whilst engaged in the course of their employment, to any person who is not authorized or entitled to receive or make use of such information.
- 2.8 Any member or officer who believes there has been a breach of these contract rules should report the matter to the Monitoring Officer.

3. Financial provisions

- 3.1 No procurement shall be started and no order shall be placed or quotation or tender invited unless the Director acting reasonably believes that there is sufficient budgetary provision to permit the award of a contract.
- 3.2 In applying these rules the value shall be determined as the value of the contract over its entire contract term including any possible extension.

- 3.3 All proposed contracts above £100,000 shall be subject to the Risk Analysis process set out in the Council's procurement manual. This requirement will apply whether or not any of the other contract rules are waived.

Contracts less than £15,000

- 3.4 These rules do not oblige a director to seek quotations or tenders for contracts with a value of up to £15,000. This is subject to the overall duty to secure value for money.

Contracts between £15,000 and £100,000

- 3.5 A minimum of three quotations shall be sought unless an exemption to this requirement or alternative means of procurement, which is set out in these rules, applies. This is subject to the overall duty both to comply with the spirit of the Council's procurement strategy and to secure value for money.
- 3.6 Although procurements with a value between £15,000 and £100,000 will not be required to undergo a full risk analysis and will not be subject to the Gateway process outlined in the Council's procurement manual, officers are encouraged to informally subject the procurement to a full risk analysis. In any case where the risk analysis identifies the risk of the procurement process as being either 'high' or 'medium', the procurement process shall then be subject to the appropriate Gateway procurement processes set out in the Council's procurement manual and a full tender exercise must be followed.

Contracts greater than £100,000

- 3.7 Subject to contract rule 5 below, relating to the compulsory use of framework agreements where these are in place, officers shall invite at least three written tenders from suitable persons or organisations unless there is only one supplier.
- 3.8 The procurement process shall be subject to the Gateway procurement process set out in the Council's procurement manual, unless, pursuant to contract rule 12 the Monitoring Officer agrees an exemption to this requirement.
- 3.9 The European Union will from time to time set contract values above which threshold EU procurement provisions must be followed. The current values are:
- (a) Service and supply contracts £[139,893]
 - (b) Works contracts £[3,497,313].

The Monitoring Officer is authorised to insert new figures in this contract rule 3.9 when the EU changes these figures without having to seek the prior approval of Council.

4. Tendering procedures

- 4.1 Except where an alternative method of procurement is authorised by these contract rules or by the Monitoring Officer the presumption shall be that either the open procedure as specified in contract rule 4.2, or the restricted procedure as specified in contract rule 4.3 shall be used. Full details of these procedures and the steps to be taken to comply with them are set out in the Council's procurement manual. The Public Contracts Regulations 2006 (the Regulations) must be complied with at all times.

The open procedure

- 4.2 This is a procedure leading to the award of a contract whereby all interested contractors must be invited to tender for the contract.

The restricted procedure

- 4.3 This is a two-stage procedure leading to the award of a contract whereby only contractors selected by the Council may submit tenders for the contract.

Pre-qualification questionnaires (PQQs)

- 4.4 Where the restricted procedure is used, PQQs must be issued to all persons responding to the notice in the Official Journal of the European Union. Tenders shall be invited from suitable contractors following evaluation of the responses to the PQQ. Evaluation shall be subject to and in accordance with the guidance in the Council's procurement manual.

The competitive dialogue procedure

- 4.5 This is a procedure in which any contractor may make a request to participate; and whereby the Council conducts a dialogue with the contractors participating in that procedure with the aim of developing one or more suitable alternative solutions capable of meeting its requirements and which is the basis upon which the contractors chosen by the Council are invited to tender. It is for use in the award of particularly complex contracts where there is a need for the Council to discuss all aspects of the proposed contract with contractors.
- 4.6 Where the relevant Director and the Monitoring Officer certify that a procurement relates to a particularly complex contract then competitive dialogue as permitted by the regulations may be used.

The negotiated procedure

- 4.7 This is a procedure leading to the award of a contract whereby the Council negotiates the terms of the Contract with one or more contractors selected by it.

4.8 The negotiated procedure with prior advertisement may be used where the relevant director and the Monitoring Officer certify that it is impractical to use the open, restricted or competitive dialogue procedures and any of the following circumstances apply:

- The procedure has been discontinued because irregular or inadequate tenders have been received, the terms of the proposed contract have not changed and all organisations that submitted tenders are invited to negotiate.
- Exceptionally where the nature of the contract is such that does not permit overall pricing.
- Where the service specifications cannot be defined with sufficient precision to permit the award of a contract using the open or restricted procedure.
- Where works are to be carried out for non-commercial research, testing or development.

5. Framework agreements (select lists)

5.1 For the purposes of these contract rules 'framework agreement' means an agreement with a supplier or suppliers where prices and terms are agreed for the provision of an estimated quantity of supplies, services or works without commitment until confirmed in a separate purchase order.

5.2 Directors must ensure that where a framework agreement, regardless of estimated value, is to be set up within their directorate, the Monitoring Officer and the Head of Procurement are notified at the earliest opportunity.

5.3 Where a framework agreement has been established by the Council for the supply of goods, works or services the presumption will be that those goods, works or services regardless of value will be procured through this agreement.

5.4 Framework agreements set up by other bodies can be used subject to their use being demonstrated to provide the best value for money to the Council through their submission and subsequent approval through the Gateway procedure, as detailed in the Council's procurement manual.

5.5 Officers must ensure that orders under framework agreements are placed using procedures set out in the relevant framework agreement documents.

5.6 A framework agreement cannot be established for longer than four years.

6. Forward procurement plan

- 6.1 The Head of Procurement will hold and maintain a Forward Procurement Plan containing details of procurements to be undertaking in a rolling 18-month programme. Directorates will review this plan monthly and advise the Head of Procurement of any necessary changes to the said Plan.

7. Contract documents

- 7.1 Subject to Contract Rule 7.2, unless the prior approval of the Monitoring Officer is obtained the Council's standard tender and contract documentation must be used.
- 7.2 National forms of Contract (e.g. Institute of Civil Engineers, National Housing Federation, Royal Institute of British Architects, etc.) may be used subject to any amendments to the said national forms being first agreed by the Monitoring Officer.

8. Procedures for dealing with tenders

- 8.1 Procedures for the receipt, opening, safe storage and return of tenders are fully set out in the Council's procurement manual.
- 8.2 The Council is not obliged to accept tenders received out of time and the presumption is that they will be rejected and returned to the sender.

9. Clarification of tenders and post tender negotiations

- 9.1 Following receipt of tenders contractors will normally only be given the opportunity to correct arithmetic errors. The Council can require final tenders, once received, to be clarified and fine tuned, provided that this does not involve changes to the basic features of the tender or call for tender variations which are likely to distort competition or have a discriminatory effect.
- 9.2 Post tender negotiations will not normally be permitted. The Monitoring Officer may in circumstances that s/he considers to be exceptional permit such negotiations. Where such permission is given any guidance or directions given by the Monitoring Officer must be followed.

10. Standstill period

- 10.1 Subject to the exceptions below, a minimum 10 days mandatory standstill period between communicating the award decision to all tenderers and contract conclusion shall be observed. The mandatory standstill period does not apply:
- to below threshold procurements

- to procurements outside the full scope of the procurement directives
- where single tendering takes place under contract rule 12.2.

10.2 Full details of the steps to be taken to comply with the requirement set out in contract rule 10.1 are set out in the Council's procurement manual.

11. Contract award

11.1 In any cases where the Gateway procurement process is not undertaken Directors shall have delegated authority to award contracts up to a value of £100,000.

11.2 In any cases where the Gateway procurement process is undertaken in respect of contracts up to a value of £100,000 and identifies the risk of the procurement process as being 'medium', the award of contracts will be made by the Officer Scrutiny Panel.

11.3 In any cases where the Gateway procurement process identifies the risk of the procurement process as being 'high' and for all contracts which exceed the following thresholds the award of contracts will be made by Cabinet or Council for non-executive contracts:

- Service and supply contracts of a value in excess of £250,000
- Works/construction contracts of a value in excess of £500,000

11.4 In any cases where the Gateway procurement process identifies the risk of the procurement process as being 'Medium' and for contracts within the following thresholds, the award of contracts will be made by the Officer Scrutiny Panel:

- Service and supply contracts of a value between £100,000 and £250,000
- Works/construction contracts of a value between £100,000 and £500,000

11.5 In any cases where the Gateway procurement process identifies the risk of the procurement process as being 'Low' and for contracts within the following thresholds, the award of contracts will be made by the relevant Director:

- Service and supply contracts of a value between £100,000 and £250,000
- Works/construction contracts of a value between £100,000 and £500,000

- 11.6 Each director will keep a record of contracts awarded under delegated authority and will on a monthly basis advise the Council's Head of Procurement of contracts awarded.
- 11.7 Contracts in excess of £250,000 in value or those of 'Medium' or 'High' risk shall be made under seal, otherwise directors and their nominees shall be authorised to sign contracts for sums less than that figure.

12. Waiver of contract rules

12.1 The person or body authorised to award that contract can in consultation with the Monitoring Officer waive contract rules where it is considered to be in the best interests of the Council to do so provided that the waiver does not breach any EU or UK directive, statute or regulation.

12.2 Negotiations leading to the award of a contract can be entered into with one or more potential contractors without advertisement in the following exceptional circumstances:

- To invite to negotiate previous interested parties where the original process has been discontinued.
- Where there is a nil response to an advertisement provided that the original terms are not substantially altered for the negotiated procedure.
- Where for technical or artistic reasons or reasons connected with the protection of exclusive rights the contract can only be awarded to one economic entity.
- In a case of extreme urgency brought about by unforeseen circumstances, which are not attributable to Medway when there is insufficient time to secure quotations or tenders.
- Where supplies are acquired from a closing down sale in circumstances permitted by the Regulations.
- Where the contract is for replacement goods or installations and contacting with an alternative supplier to the supplier of the initial goods or installation would either result in incompatibility with existing goods or installations or lead to disproportionate technical difficulties in the operation and maintenance of existing goods or installations.
- Where the provision of services is reserved to the winner of a design contest as specified in the regulations.

- Where the Council has entered into a contract and additional works or services not exceeding 50% of the value of the original contract are needed through unforeseen circumstances and can not be separated from the original works or services without major inconvenience to Medway or are necessary for the later stages of performance of the contracts.]
 - Contract extensions permitted by the regulations.
 - In any other circumstances permitted by the regulations.
- 12.3 In the circumstances set out in contract rule 12.2 a director shall first seek the agreement of the Monitoring Officer to enter into the proposed contract. The Monitoring Officer shall report annually to Council on the number of contracts awarded under delegated powers following procedures set out in contract rule 12.1 and 12.2.
- 12.4 Where a potential extension to a contract has been specifically included in the contract, the director in consultation with the portfolio holder may authorise that extension regardless of its value provided both that there is budgetary provision and the extension has been demonstrated to offer best value for money to the Council through the submission and subsequent approval of a Gateway 4 contract management paper, as detailed in the Council's procurement manual.
- 13. Contract award without competition - exceptional circumstances**
- 13.1 A director shall have authority to award without competition a contract where a placement is sought for an individual with a registered care provider of their choice under the National Health Service and Community Care Act 1990, or where the particular needs of an individual (either an adult or a child) require a particular social care package, or where an individual has special educational needs which are only available from a particular provider in the opinion of the Director of Children and Adults. In each case a record of the reasons for the choice of provider will be maintained on the individual's case notes. A record of the annual cumulative expenditure with each provider will be maintained by each directorate and made available for audit.
- 13.2 A director shall, in relation to the appointment of a particular individual artiste (or a particular individual group of artistes) have authority to award without competition a contract where the value of each individual contract does not exceed £250,000.
- 13.3 The Assistant Director, Housing and Corporate Services, may engage a barrister without competition. The appointment will be made on the basis of which barrister is in the opinion of the Assistant Director, Housing and Corporate Services, best able to provide the necessary expertise and value for money. The Assistant Director, Housing and Corporate Services, will maintain a departmental record of the amounts of expenditure with external barristers.

14. Schools, joint procurements and Council services

- 14.1 School letting contracts under delegated budgets must either comply with these contract rules or alternatively adopt a local procedure, which provides for equivalent security and probity in the handling of tenders and compliance with legal requirements.

15. Joint procurements

- 15.1 Where the Council is working in partnership with another person or organisation then any procurement which is being undertaken in support of the aims of that partnership must either comply with these contract rules or comparable rules maintained by the partner organisation to ensure security and probity in handling tenders and compliance with legal requirements.
- 15.2 Where the Council is entering into a contract as agent for another public body or government department, these contract rules apply only in so far as they are consistent with the requirements of the body concerned.

16. Council services

- 16.1 Where the Council is providing works, supplies or services to another person or organisation the Council shall ensure it secures the best price reasonably obtainable.