

## Part 4

### CONTRACT PROCEDURE RULES

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## 1. INTRODUCTION

### 1.1. BASIC PRINCIPLES

Contracts for the supply of works, goods, services and disposal of assets have a high profile in terms of public accountability. Not only does the public expect that the *Organisation* achieves best value from its procurement and contractual arrangements, but it also expects fair competition, the highest standards of honesty and integrity from those involved, and transparency in respect of all decisions made as part of this process.

Accordingly, all procurement or the disposal of assets carried out by the *Organisation* must:

- a. Achieve best value.
- b. Be consistent with the highest standards of integrity.
- c. Ensure fairness in allocating public contracts or disposal of assets.
- d. Comply with all legal requirements.
- e. Support the *Organisation's* corporate and departmental aims and policies.
- f. Comply with the *Organisation's* Procurement Strategy where there is a current one in place.

A contract is a legally enforceable agreement which gives rise to new rights and duties for those who agree to its terms. A contract is formed when the following key elements coincide:

- Offer.
- Acceptance.
- Consideration.
- Intention to create legal relations.
- Certainty of terms

This can include purchase orders, emails, letters and other forms where the above criteria are met.

### 1.2. OFFICER RESPONSIBILITIES

1.2.1. All officers responsible for purchasing or disposal must comply with these Contract Procedure Rules and the *Organisation's*:

- a. Financial Procedure Rules;
- b. Contract Manual;
- c. Code of Conduct; and
- d. all UK and European Union binding legal requirements.

Where there is a conflict between the *Organisation's* internal rules, codes and policies and these Contract Procedure Rules, then these Contract Procedure Rules will take precedence.

- 1.2.2. Officers must ensure that agents, consultants and contractual partners acting on the *Organisation's* behalf must also comply with the matters listed in 1.2.1.

### 1.3. MEMBERS RESPONSIBILITIES

Members should refer to the Code of Conduct at their *Organisation*. They should also have regard to the Councillor Protocol for Procurement Annexed to these Rules.

### 1.4. WHERE TO GET ADVICE

- 1.4.1. These Contract Procedures Rules are divided into two sections to cover the situations where the *Organisation* is acting either as a "purchaser" (when public procurement rules will apply) or as a "seller" or generating an income (when other regulatory requirements will apply).
- 1.4.2. *Officers* who are uncertain as to whether or not the Rules apply, or how the Rules apply, should seek advice from their *Procurement Team* and/or *Legal Services* at an early stage.

## 2. COMPLIANCE AND EXCEPTIONS

### 2.1. COMPLIANCE

Every contractual arrangement entered into by the *Organisation* shall comply with these Contract Procedure Rules unless an *exception* or *waiver* applies.

### 2.2. NON-COMPLIANCE

- 2.2.1. Any non-compliance with any of these Contract Procedure Rules must be notified to the *Chief Finance Officer* and the *Monitoring Officer* at the earliest opportunity.
- 2.2.2. Failure to adhere to these Contract Procedure Rules could result in disciplinary proceedings.
- 2.2.3. If these Contract Procedure Rules are not complied with, this will not invalidate any contract entered into by the *Organisation*, except where European or English law provides to the contrary.

### 2.3. EXCEPTIONS

- 2.3.1. These Rules do not apply to:
  - a. Public services contracts which are excluded from the application of the PCR 2015 under Regulation 10 (Specific exclusions for services contracts) and Regulation 12 (Public Contracts between entities within the public sector).
  - b. Public contracts excluded from the application of the UCR 2006 under Regulation 6 (General exclusion).
  - c. Contracts of employment making an individual a direct employee of the *Organisation*.
  - d. Contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immoveable property, or which concerns interests

in or rights over any of them (other than those situations covered by Section 2 of these Rules).

- e. Unconditional grants; for example, for community services. When deciding if a grant is subject to procurement rules, officers must consider the project as a whole. It is possible that an arrangement referred to as a grant could actually meet the definition of a contract set out in the PCR 2015. Whatever the nature of the grant, legal advice should always be sought when considering the making of a grant, to determine whether it is in fact a contract.
- f. In the case of Eastbourne Borough Council only contracts made to engage artists, orchestras, shows or similar events or attractions at the *EBC's* theatres and other such performance venues provided by the Council PROVIDED THAT the Senior Head of Tourism and Leisure consults the relevant *Cabinet Portfolio Holder* before agreeing to a contract for seasonal engagement of more than four weeks and that such services fall below the *Applicable Threshold Value* for *Schedule 3 Service Contracts*.

## 2.4. WAIVERS

### 2.4.1. Subject to paragraph 2.4.2:

- a. The *Cabinet* has power to waive any requirements within these *Rules* for specific projects, in which case its reasons for doing so shall be recorded in the Minutes of the *Cabinet* meeting;
- b. The *Accountable Officer* has power to waive any requirements within these Rules in cases of urgency, after consultation with the *Leader of the Council*. Any necessary resulting action must be reported to the next meeting of the *Cabinet*.
- c. The *Accountable Officer* has power to waive the requirement within these Rules that requires the use of *Constructionline* to select those to quote for Works contracts with a value above £25,000 and not exceeding £1,000,000.
- d. In cases of contracts above the *Applicable Threshold Level*, the *Accountable Officer* has power to waive any requirements within these Rules, so as to allow the use of the negotiated procedure without prior publication in the specific cases and circumstances laid down in Regulation 32 of the *PCR 2015*, after consultation with the *Leader of the Council*.
- e. In cases of contracts below the *Applicable Threshold Level*, the *Accountable Officer* has power to waive any requirements within these Rules, so as to allow negotiation with only one potential contractor without prior advertisement, requests for quotations or tenders where:
  - i. the circumstances are analogous to those set out in Regulation 32 of the *PCR 2015* for above the *Applicable Threshold Level* contracts;
  - ii. the contract is one to which Regulation 8 PCR 2015 (Specific exclusions in the field of electronic communication) applies;
  - iii. the contract is one to which Regulation 14 PCR 2015 (Research and development services) applies.

As a general principle, waivers should only be authorised where there are objectively demonstrable grounds for doing so.

- 2.4.2. Where a proposed contract is subject to the provisions of a European Union procurement Directive or UK legislation then there will be no power to waive or

depart from the requirements of the mandatory provisions set out in that legislation.

- 2.4.3. Nothing in these *Rules* prevents the acceptance of a quote or tender, or requires a waiver, simply because less than the minimum number of quotations or tenders have been submitted in response to a procurement process, as long as at least the minimum number of entities were actually requested to quote or tender as required under the *Rules*.

### **3. AUTHORITY FOR THE CONTRACT**

- 3.1. Sufficient budget approval should be obtained before a procurement process is commenced. No contract for the supply of goods or services or for the execution of any work shall be entered into, nor any order given for such work unless the appropriate financial provision has been made in the capital or revenue estimates, except pursuant to a specific resolution of the *Organisation* or the *Cabinet*. (See also the Financial Procedure Rules).
- 3.2. The *Designated Officer* will be required to produce confirmation of the authorisation for the contractual arrangement before it is entered into. (see also the Scheme of Delegations to Officers).

## SECTION 1 PURCHASING

### 4. PRE-PROCUREMENT CONSIDERATIONS

*Officers* should appraise the purchase, in a matter commensurate with its complexity and value, taking into account any guidance in the Contract Manual.

It is important that *Officers* have considered the content of these *Rules* and the Contract Manual in advance of undertaking a procurement process to ensure that all the relevant issues have been taken into account and any internal consultation undertaken. There are obligations which impact on purchasing decisions beyond the procurement regulations which may need to be taken into account as appropriate, for example:

- The Public Services (Social Value) Act 2012: how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area.
- Local Government Act 1999: best value duty.
- Local Government Act 1988: non-commercial considerations.
- Application of TUPE and pension rules.
- ICT and potential data security issues.
- State Aid

Where *Officers* consider that it may be helpful in undertaking some early **pre market engagement** with potential contractors they should refer to the Contract Manual or *Legal Services* for assistance.

#### 4.1. TYPES OF CONTRACT

More detail can be found in the Contract Manual, but outlined below are the types of contract categories governed by the procurement regulations:

- Public Service Contract
- Public Works Contract
- Public Supply Contract
- Specialist Contracts
  - Design Contests
  - Subsidised Contracts Works and Services Contracts
  - Public Works Concession Contracts
  - Public Services Concession Contracts

- Framework Agreements
- Dynamic Purchasing Systems
- Innovation Partnership
- Utilities Contracts

#### 4.2. WHAT IS BEING PROCURED?

Officers planning a procurement process must consider what type of contract is being considered in order to understand and plan the application of these Rules. For many purchases this will be a straightforward matter, however, this can be a complex area in relation to some projects. Further guidance can be found in the Contracts Manual or *Legal Services* should be consulted. In summary, it is necessary to have considered the following questions to determine the procurement rules applicable:

- 4.2.1. If the transaction involves more than one element (e.g. it includes works and services), is the transaction capable of being structured as an indivisible whole? If so what is the main object of the contractual arrangements?
- 4.2.2. Alternatively, are the elements of a mixed contract capable of being structured as stand-alone transactions? If so what are the main objectives of each of the contractual arrangements?
- 4.2.3. Where there is only a single subject matter for the transaction, or if (with regard to 4.2.2) the elements of a mixed transaction can be taken as separate contracts, do they amount to public contracts or concessions under the procurement regime? If so what is the correct classification of each contract and which set of regulations apply? Do the procurement regulations in relation to Utilities apply?
- 4.2.4. If there is a public contract (including a concession or utilities contract), is it one that requires advertisement and competition under the regulations or are there exemptions that apply?
- 4.2.5. In any event is the contractual arrangement one to which the *Treaty* obligations apply? If so, is the opportunity of certain cross border interest and so will require some form of advertisement and competition?
- 4.2.6. Regardless of how the public procurement regulations apply, do these *Rules* apply? Are there any *exceptions* or does there need to be a *waiver*?

#### 5. PUBLIC SECTOR JOINT WORKING, USE OF CENTRAL PURCHASING ARRANGEMENTS AND FRAMEWORKS

- 5.1. In the event that recourse to a *central purchasing arrangement* or *framework agreement* is being considered or any form of joint working with other public sector bodies, then *Legal Services* must be consulted at an early stage. This is to ensure that the proposed arrangements have been established in accordance with the relevant procurement regulations and are available to be used by the *Organisation* in the way intended.
- 5.2. The *Organisation* fulfils its obligations under these Rules when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity.

The *Organisation* also fulfils its obligations where it acquires works, supplies or services by:

- a. using contracts awarded by the central purchasing body;
- b. using dynamic purchasing systems operated by the central purchasing body; or
- c. by using a *framework agreement* concluded by the central purchasing body offering the centralised purchasing activity.

5.3. Call-off contracts entered into under a *framework agreement* must be awarded under the terms set out in the *framework agreement*. These may include a mini-competition between those contractors on the framework or the award of a contract to one contractor without re-opening competition. Where the *framework agreement* terms for call-offs are complied with then competitive quotations or tenders are not required under these *Rules*.

5.4. Where the *Organisation* is procuring through joint working with other contracting authorities, the procurement must be compliant with these *Rules* or those of the lead authority. In so far as that is the case and the process followed is compliant with the public procurement regulations, then the process will be deemed to comply with these *Rules*.

5.5. It should be noted that *Constructionline* is not a framework agreement.

## 6. SUMMARY OF THRESHOLDS AND PROCEDURES REQUIRED

6.1. The estimated value of a contract should be calculated at the moment at which the procurement procedure is to be commenced. The Public Contract Regulations 2015 and Utilities Contracts Regulations 2006 contain detailed rules as to how the estimated value of a contract is calculated and when the value of one contract has to be aggregated with contracts awarded by the *Organisation* as a whole to see whether it is over the threshold for the Regulations to apply. Guidance is attached at Annexure 2 but further clarification should be sought from *Legal Services* or the *Procurement Team* if needed.

<b>Estimated Value of the Contract (excluding VAT) Service and Supplies</b>	<b>Estimated Value of the Contract (excluding VAT) Works</b>	<b>Minimum Requirement</b>	<b>Advertisement</b>
Contracts Below £25,000  See Para. 8 for details	Contracts Below £25,000  See Para. 8 for details	Obligation to consider best value but no obligation to go out for a particular number of quotes. However	No requirement to advertise.

<b>Estimated Value of the Contract (excluding VAT)</b>  <b>Service and Supplies</b>	<b>Estimated Value of the Contract (excluding VAT)</b>  <b>Works</b>	<b>Minimum Requirement</b>	<b>Advertisement</b>
		consideration should always be given to whether three quotes should be sought. <i>Officer</i> discretion. Reason for direct award should be agreed with <i>Accountable Officer</i> and recorded by <i>Designated Officer</i> .	<b>IF</b> advertised then <b>NO</b> requirement to also advertise in <i>Contracts Finder</i> .
Contracts exceeding £25,000 and not exceeding £100,000  See Para. 9 for details	£25,000 and not exceeding £1,000,000  See Para. 9 for details	Seek minimum three written quotes.  Must use <i>constructionline</i> to select those to be invited to quote for Works contracts unless waiver given.	No requirement to advertise.  <b>IF</b> advertised then <b>MUST</b> also advertise in <i>Contracts Finder</i> .
Contracts exceeding £100,000 but under <i>Applicable Threshold Value</i> (EU)  See Para. 10 for details	Contracts exceeding £1,000,000 but under <i>Applicable Threshold Value</i> (EU)  See Para. 10 for details	Seek minimum four written tenders.  No pre-selection stage for services/supplies contracts (so number of contractors invited to tender cannot be limited in this way) but suitability questions can be asked.  Use of <i>constructionline</i> optional for PQQ process for works contracts.	Requirement to advertise in all cases.  Advertise in <i>Contracts Finder</i> in all cases.
Above <i>Applicable Threshold Value</i> (EU)	Above <i>Applicable Threshold Value</i> (EU)  See Para. 11 for	EU regulated process to be followed unless an <i>exception</i> or <i>waiver</i> applies. Consult <i>Legal</i>	Requirement to advertise in all cases.

<b>Estimated Value of the Contract (excluding VAT)</b> <b>Service and Supplies</b>	<b>Estimated Value of the Contract (excluding VAT)</b> <b>Works</b>	<b>Minimum Requirement</b>	<b>Advertisement</b>
See Para. 11 for details	details	<i>Services or Procurement Team.</i>	Advertise in <i>Contracts Finder</i> .
Where appropriate, any contractor properly nominated under section 20 of the Landlord and Tenant Act 1985 must also be invited to tender.			

## 7. SUMMARY OF ADVERTISEMENT RULES AND REQUIREMENTS

- 7.1. Where a proposed contract meets or exceeds European Union thresholds, (*Applicable Threshold Value*) a public contract notice or a Prior Indicative Notice (depending on the procedure) must be placed in the Official Journal of the European Union (OJEU) if and when required under the applicable Regulations
- 7.2. Any *national advert* should not be published until the OJEU advert has been published or after 48 hours of confirmation of receipt by OJEU of the notice.
- 7.3. Where procurement is commenced through a contract notice to the OJEU then the *Designated Officer* must also ensure that the contract is advertised on *Contracts Finder* within 24 hours of the time when the *Organisation* can publish a national advert (see above).
- 7.4. Where the *Organisation* chooses to advertise an opportunity to be awarded a below threshold contract (regardless of how specific that opportunity is) to which the Public Contracts Regulations 2015 would apply if it were above the *Applicable Threshold Value*, then if the estimated value of the contract opportunity is £25,000 or more, the *Designated Officer* must also advertise the opportunity through *Contracts Finder*. The information must be published in *Contracts Finder* within 24 hours of the time when it first advertises the award opportunity in any other way.
- 7.5. The contract is not 'advertised' for the purpose of triggering a requirement to advertise in *Contracts Finder* if the invitation to quote is only made available to a number of particular contractors who have been selected for that purpose either ad hoc or by virtue of their membership in some closed category such as a framework agreement.
- 7.6. *Officers* should also assess the need for wider advertisement in:
- a. relevant newspapers;
  - b. any national or trade journal applicable to the industry.

## **8. CONTRACTS BELOW £25,000**

- 8.1. The *Designated Officer* has an obligation to consider securing best value for these contracts, but is under no obligation to go out for a particular number of quotes. However consideration should always be given to whether three quotes should be sought.
- 8.2. Where a decision is taken not to seek multiple quotes in any particular situation then the reason for direct award should be agreed with *Accountable Officer* and recorded by the *Designated Officer*.

## **9. CONTRACTS EXCEEDING £25,000 AND NOT EXCEEDING £100,000 OR £1,000,000 FOR CONTRACTS FOR WORKS**

- 9.1. Where the appropriate *Designated Officer* estimates a contract is likely to fall within this category they shall, wherever practicable, obtain at least three competitive quotations in writing. Where practicable, at least one quote shall come from a local supplier.
- 9.2. It is not the intention that there should be any advertisement when obtaining quotations, but it should be noted that where the value of the contract is estimated to be £25,000 or more and the *Organisation* chooses to advertise then the requirements set out in paragraph 7.4 must be observed.
- 9.3. The procurement regulations provide that you cannot have pre-selection stage for a contract above £25,000 but below the *Applicable Threshold Value*. For this purpose only, the threshold that applies to works contracts is the same as for services/supplies contracts.
- 9.4. An invitation to supply a quotation shall, as a minimum, comprise the following information (which may, at the discretion of the *Designated Officer*, be bound within a composite letter):
  - a. Instructions for return.
  - b. The basis on which a quotation will be assessed and on which the winning quotation will be accepted.
  - c. Terms and conditions under which the works, goods or services are to be provided.
  - d. Specification of the works, goods or services to be provided.
  - e. Pricing schedule or similar from which the bid price can be readily ascertained.
  - f. A statement that the Council is under no obligation to accept any quotation.
- 9.5. The *Designated Officer* must keep a record of:
  - a. All contractors that were asked to provide a quotation

- b. The reasons why those particular contractors were selected to provide a quotation.
- 9.6. Where practicable, quotations shall be returned through the electronic tendering system of the *Organisation*. Where this is not possible contractors should be asked to provide quotations by a specified date in plain envelopes/packages which have been securely sealed and marked with the word "Quotation" followed by the contract or subject to which it relates. Telephone quotes are not to be considered. Email quotes may only be accepted if a separate email account is set up for the purpose of the quotation which cannot be accessed until after the deadline for return has passed.
- 9.7. Quotations should not be accessed or opened until after the deadline for return has passed. They should be opened in the presence of the *Designated Officer* plus one other *Officer*. The *Designated Officer* must record the following details on the Quotation Control Form or within the electronic tendering system:
- a. The name of the company.
  - b. The value of the quote.
  - c. The date the quote was received.
  - d. The form in which it was received from the company.
  - e. The recommendation as to which quote if any to accept.
- 9.8. The *Designated Officer* shall seek the written authority of the *Accountable Officer* to authorise the recommendation by the *Designated Officer*. All documents relating to the quotation exercise shall be provided to the *Accountable Officer* by the *Designated Officer*. The *Accountable Officer* shall certify the acceptance of the quote on the Quotation Control Form or within the electronic tendering system. The Quotation Control Form can be found in the Contract Manual.
- 9.9. A quotation may be accepted on the basis on which it was indicated in the invitation to quote that the winning quotation would be identified i.e. either:
- a. The lowest price quotation; or
  - b. The highest scoring quotation where evaluated against acceptance criteria previously disclosed to those participating in the competition.

No quotation which exceeds the approved budget provision shall be accepted until approval to further expenditure has been obtained.

## **10. CONTRACTS EXCEEDING £100,000, OR £1,000,000 IN CASE OF A CONTRACT FOR WORKS, BUT UNDER APPLICABLE THRESHOLD VALUE (EU)**

- 10.1. All tendering procedures from planning to contract award and signature must be undertaken in a manner so as to ensure:
- a. Sufficient time is given to plan and run the process;
  - b. Equal opportunity and equal treatment;
  - c. Openness and transparency;

- d. Probity; and
- e. Outcomes that deliver sustainability, efficiency and whole life costing.

10.2. Contract opportunities should be advertised by public notice, which may take the form of a notice or advertisement on a readily accessible website or other electronic media and/ or in the press, relevant trade journals or Official Journal of the EU (as appropriate). The *Designated Officer* may choose to place one or more public notices. Where the *Organisation* advertises an opportunity to be awarded at below *Applicable Threshold Value* (regardless of how specific that opportunity is) to which the Public Contracts Regulations 2015 would apply if it were above the *Applicable Threshold Value*, then if the estimated value of the contract opportunity is £25,000 or more, the *Designated Officer* must also advertise the opportunity through *Contracts Finder*. The information must be published in *Contracts Finder* within 24 hours of the time when it first advertises the award opportunity in any other way.

10.3. It should be noted that the procurement regulations provide that you cannot have pre-selection stage for a contract above £25,000 but below the *Applicable Threshold Value*. For this purpose only, the threshold that applies to works contracts is the same as for services/supplies contracts. It is possible to ask suitability questions and further guidance on this is in the Contract Manual.

10.4. Where a works contract is above the *Applicable Threshold Value* the pre-selection stage can use the Crown Commercial Services standard Pre Qualification Questionnaire or the industry-standard *PAS 91* for public contracts for Works. Constructionline PQQs are aligned to *PAS 91* and so can be used for this purpose.

10.5. The invitation to tender shall (unless otherwise agreed by *Legal Services*) state that no tender will be considered unless it is received by the date and time stipulated in the invitation to tender. No tender delivered in contravention of this clause shall be considered.

10.6. An invitation to tender shall (unless otherwise agreed by *Legal Services*), as a minimum, comprise the documents listed below:

- a. Form of tender, which must include a statement that the *Organisation* is under no obligation to accept any tender
- b. Certificate that the tender is bona fide
- c. Instructions to tenderers, including notification that where electronic means are not used that no tender will be considered unless it is enclosed in a sealed envelope or container which bears the word "Tender" followed by the subject to which it relates to but no other name or mark indicating the sender.
- d. Form of contract including contract conditions.
- e. Specification of the works, goods or services to be provided
- f. Bill of quantities or pricing schedule (as necessary)
- g. Award criteria for the selection of the successful tender.

## 11. ABOVE APPLICABLE THRESHOLD VALUE (EU) CONTRACTS

- 11.1. Whilst the rules set out in paragraph 10 above also apply to EU procurements, additional steps must also be taken in accordance with the law and relevant guidance. For this reason, additional time must be allowed at an early stage of project planning
- 11.2. Where the EU Procurement Rules apply, the *Accountable or Designated Officer* must consult with *Legal Services* in the very early stages of project planning, to determine the appropriate method of conducting the purchase and to ensure the correct procedures are followed.
- 11.3. Where EU Procurement Rules apply to a contract there are four main procedures available. These are the open, restricted, competitive dialogue procedures and competitive procedure with negotiation.
- 11.4. The *Accountable or Designated Officer* must consider the minimum time frames which apply to EU procurement projects and consult *Legal Services* at the outset.
- 11.5. Where the Public Contract Regulations 2015 or Utilities Contract Regulations 2006 require a prior indicative notice (PIN) or public contract notice to be placed in the Official Journal of the European Union (OJEU) then any *national advert* should not be published until the OJEU advert has been published or after 48 hours of confirmation of receipt by OJEU of the notice. Where a procurement exercise is commenced through a contract notice to the OJEU then the *Designated Officer* must also ensure that the contract is advertised on *Contracts Finder* within 24 hours of the time when the *Organisation* can publish a *national advert*.

## 12. EXTENSIONS AND CHANGES TO EXISTING CONTRACTS

- 12.1. No variation and/or extension must be made to a contract without an agreed budget.
- 12.2. Variations and/or extensions to existing contracts will normally be permitted **only** where all of the following criteria are met:
- a) The variation and/or extension is not so materially different from the scope of the original contract that a new procurement exercise needs to be run having regard to the provisions in Regulation 72 of the Public Contracts Regulations 2015; and
  - b) Value for money can be demonstrated; and
  - c) The variation and/or extension is approved by *Legal Services*.
- 12.3. Delegated authority to authorise extensions and variations are as follows:
- a) any extension or variation to a contract resulting in an increase of more than 10% of its total value or duration, to a maximum value of £50,000, must be authorised by the relevant *Chief Officer*;
  - b) any extension or variation resulting in an increase of more than £50,000 must be authorised by the relevant *Cabinet Portfolio Holder*;

- c) where the extension or variation would lead to a significant change in the level of service or have cost implications for future years outside of the *Organisation's* overall budget framework, *Organisation* approval must be given.

12.4. In **exceptional** and/or **extremely urgent** circumstances, extensions may be granted by the *Chief Officer* after consultation with the *Leader of the Council*. Any necessary resulting action must be reported to the next meeting of the *Cabinet* and if necessary, *Council*.

12.5. Where any variation or extension results in a need for budget virement, this will be subject to the virement provisions in the *Financial Procedure Rules*.

### 13. RECEIPT AND OPENING OF TENDERS

13.1. *Officers* should ensure that contractors who may tender are aware of the rules relating to the tendering process set out.

13.2. A tender should only be considered if received in accordance with the *Organisation's* tendering protocols set out in the invitation to tender or where otherwise agreed in consultation with *Legal Services*.

13.3. Where not submitted electronically through the approved procurement portal, the *Accountable Officer* or his or her nominated officer will keep the tenders securely. Tenders, however received, must not be opened or accessed until expiry of the time limit for submission and the time appointed for their opening.

13.4. Tenders must be opened in a fair and secure fashion in the presence of the *Designated Officer* and at least one other *officer*. The presence may be virtual where the electronic approved procurement portal is used.

13.5. The *Designated Officer* must record the following tender details:

- a) The names of those present during the Tender opening
- b) The date and time the Tenders were opened
- c) The name and estimated value of the contract.
- d) The *Accountable Officer* instigating the contract.
- e) The closing date and time for tenders to be received.
- f) The name of each invited tenderer.
- g) The tender amount. In the event of the value of the tender being unclear e.g. dependent upon further calculation or based on a schedule of rates, the Tender amount should be recorded as "To be assessed".
- h) In the event that an invited tenderer fails to tender, the tender sum should be recorded as "No Tender Received".
- i) With regard to tenders received after the specified date and time, the tender sum should be recorded as "Received Late" with the actual date and time received.

13.6. The *Designated Officer* must retain a copy of each tender in accordance with the *Organisations* Document Retention & Disposal Schedule.

13.7. Where information or documentation to be submitted by a tenderer is or appears to be incomplete or erroneous, or where specific documents are missing, the

*Organisation* may request the tenders concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in compliance with the principles of equal treatment and transparency.

- 13.8. This will generally mean that a request must not in reality lead to the submission of a new tender. In particular it relates to the identification of any obvious errors, ambiguity and incompleteness which might prevent the *Organisation* from being able to undertake the evaluation process and in particular those which are capable of simple explanation and can be easily resolved.
- 13.9. A request for clarification should not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed.
- 13.10. A request for clarification of a tender should be made only after the *Organisation* has looked at all the tenders. Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected.
- 13.11. In addition, a request should relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications if the *Organisation* wishes to raise queries or reject the tender because of them.
- 13.12. The *Accountable Officer* must accept a tender on the basis on which it was indicated in the invitation to tender that the winning tender would be identified i.e. either:
- a) The lowest priced tender; or
  - b) The tender that scores highest when evaluated against the acceptance criteria previously set by the *Accountable Officer* and disclosed to those participating in the competition.
- 13.13. A tender that is not the lowest priced or highest scoring tender can only be accepted by the *Cabinet*, in respect of those functions that are the functions of *Cabinet*, after considering a report by the *Accountable Officer*.
- 13.14. Tenders exceeding the approved estimate may only be accepted once approval to further expenditure is obtained. This may be approved by the relevant budget holder within delegated limits. Otherwise, approval by *Cabinet* or *Council* in accordance with the Constitution is required.

## **14. CONTRACT AWARD**

- 14.1. *Designated Officers* or *Accountable Officers* have delegated authority to authorise contracts within their approved budget.
- 14.2. Contracts with a value greater than that allocated within the relevant budget must be authorised by *Cabinet*.
- 14.3. Any contract over £100,000 must be authorised by an *Accountable Officer* and executed as a deed or under seal. The Council seal is held by *Legal Services* and will

only be used once *Legal Services* receives the necessary authorisation from the *Accountable Officer* to bind the *Organisation* to the contract.

- 14.4. The award of a contract over £25,000 (including under a framework agreement) must be published in accordance with the Public Contracts Regulations 2015 and in *Contracts Finder*. Awards of contracts under the UCR 2006 must be published in accordance with those Regulations.

## 15. FINANCIAL CHECKS

- 15.1. In the case of contracts to be awarded which either have an estimated value in excess of £100,000, or where the *Accountable Officer* considers that the failure of the contractor to perform would result in a high risk to the *Organisation*, the *Accountable Officer* must request that the *Chief Finance Officer* carry out a financial status check on all applicants.
- 15.2. The financial status check will take into account the financial viability of the applicant, their ability to deliver the contract in financial terms and the current level of contractual relationship with the applicant.
- 15.3. The *Accountable Officer* may authorise a tender to be invited from a contractor whose financial status is not favourable, where to do so is necessary in order to secure a bid for the works, supplies or services and the risks associated with contract failure have been assessed and in his/her opinion are within acceptable limits. In such an event, the *Accountable Officer* must justify such a decision and maintain all records accordingly.
- 15.4. The financial checks will be carried out in compliance with the provisions of the Public Contracts Regulations 2015 (in particular Regulations 107 and 111 and associated guidance) depending on the value and type of public contract.

## 16. CONTRACT TERMS

- 16.1. **Every contract that exceeds £100,000 in value or contains a potentially significant risk must be in writing in a form approved by *Legal Services*.**
- 16.2. Note: *Legal Services* may also determine the format of any contract for a lesser value.
- 16.3. Other than in exceptional circumstances, and where the written consent of *Legal Services* has first been obtained, all contracts must be concluded formally in writing **before** the supply of any goods, service or the commencement of any work. The issue of an award letter or letter of intent is not acceptable for this purpose.
- 16.4. Every contract must include details of:
- a) The works, goods or services to be provided, supplied or carried out;
  - b) The price to be paid, with a statement of discounts or deductions;

- c) The time or times within which the contract is to be performed;
- d) Where appropriate, provision for the payment of liquidated damages where the contractor fails to complete the contract within specified timescales;
- e) A clause empowering the *Organisation* to cancel the contract in circumstances of corruption and/ or collusion and to recover any loss resulting from such cancellation;
- f) A clause requiring appropriate insurance cover;
- g) Where appropriate a requirement for the provision of a bond, parent company guarantee or other sufficient security for due performance of the contract. Where the contract value exceeds £1,000,000 the contract shall contain such a provision unless the *Chief Finance Officer* determines otherwise;
- h) Specific provision as to sub contracting where appropriate;
- i) A clause enabling termination in accordance with Regulation 73 of the Public Contract Regulations 2015 if it is above the *Applicable Threshold Value*; and
- j) A clause containing suitable provisions (having regard to guidance issued by the Minister for the Cabinet Office) to comply with the requirements of Regulation 113 of the Public Contract Regulations 2015 in relation to the payment of undisputed invoices within 30 days to contractors and sub-contractors.

**16.5. The Safeguarding of Children and Vulnerable Adults and the relevance of other Council policies noted in the Corporate Procurement Policy.**

16.6. In any contract where a contractor or subcontractor will have contact with members of the public, the *Designated Officer* is responsible for ensuring that it is a condition of the contract that the contractor, or subcontractor, will comply with the *Organisation's* 'Safeguarding Children and Vulnerable Adults Policy'. The *Designated Officer* is responsible for ensuring that the contractor has a copy, or has access to a copy, of this policy.

16.7. These Rules must moreover be read in conjunction with the *Organisation's* Corporate Procurement Policy. This Policy provides details of those other *Organisation* policies (such as those relating to Equalities and other supplier responsibilities) which ensure that all procurement activity reflects the *Organisation's* corporate standards and objectives.

## **17. RECORDS**

17.1. The following records must be kept by the *Designated Officer*:

- a. forms of tender received from all tenderers
- b. all documentation from the three highest scoring tenderers until the end of the contract when the second and third tenderers documentation can be destroyed
- c. communication with unsuccessful tenderers
- d. the award criteria
- e. for above threshold contracts the information required for reporting and documenting in Regulation 84 of the Public Contracts Regulations 2015 including why an above threshold contract has not been divided into Lots. For below threshold contracts information may be required by the Cabinet office for reports to the Commission.

17.2. The documents detailed must be kept for at least six years after the end of the contract, or as specified by any Document Retention Policy approved by the *Organisation*.

## **SECTION 2 SELLING**

### **18. DISPOSAL OF INTERESTS IN LAND**

18.1. No sale or lease by the *Organisation* of land (where the value exceeds £50,000 or £25,000 if amenity land; or in the case of a lease, the estimated rent exceeds £25,000 per annum) shall be made except after auction or the invitation of tenders or expressions of interest following public advertisement, in at least one newspaper circulating in the *District* (or other appropriate means of advertising), unless specifically authorised by *Cabinet*. This shall not apply to the renewal of a lease made pursuant to the Landlord and Tenant Act 1954 or to the sale of *Organisation* dwellings under the right to buy scheme.

18.1A No sale or lease by Lewes District Council of land where the value exceeds limits referred to in Rule 18.1 above shall be made except after consulting with the Member(s) for the ward affected and, where the land falls within the area of a town or parish council, the clerk of that council.

18.2. The *Designated Officer* shall record the power under which land or an interest in land is disposed which is likely to be one of the following:

18.2.1 Local Government Act 1972 – Section 123 Disposal power in relation to land not held for planning or housing purposes

18.2.2 Town and Country Planning Act 1990 - Section 233 Disposal power in relation to land held for planning purposes

18.2.3 Housing Act 1985 – Section 32 Disposal power in relation to land held for purposes of Part II of the Housing Act 1985

18.3. The disposal of land or interests in land shall comply with the rules on State Aid.

18.4. Consideration should be given to the circumstances in which a public contract may be created through a disposal of land. *Legal Services* and/or guidance contained in the Contract Manual should be consulted.

### **19. DISPOSAL OF ASSETS**

19.1. Assets for disposal must be sent to public auction except where better value for money is likely to be obtained by inviting quotations or tenders. (These may be invited by advertising on the *Organisation's* internet site or other appropriate means of advertisement). Quotations or tenders will not be required where an expert valuation has confirmed that an alternative method of disposal (such as where there is a *Special Purchaser*) will secure market or above market value. The method of disposal of surplus or obsolete assets other than land must be formally agreed with the *Chief Finance Officer*.

### **20. INCOME GENERATING CONTRACTS**

20.1. The *Designated Officer* shall consult with *Legal Services* in relation to contracts where the *Organisation* is proposing to generate an income or receive a payment. Such contracts may include joint venture arrangements or concessions contracts. A concession contract may include contracts for the provision of works and services where the consideration under the contract includes the right to exploit the works or services to be provided. These may be governed by the public procurement rules.

20.2. Matters to consider will include:

- 20.2.1. Powers,
- 20.2.2. State aid,
- 20.2.3. Best value.

## 21. PURCHASE OF INTERESTS IN LAND

21.1. The *Designated Officer* shall record the power under which land is purchased.

21.2. The purchase of land shall comply with the rules on State Aid.

## DEFINITIONS

### 22. DEFINITIONS

Word or Phrase	Meaning
<b>Accountable Officer</b>	For EBC and LDC this means the Chief Executive or Senior Head of Service responsible for the particular project. For EHL this means the Chief Executive or Managing Director as appointed by the Board.
<b>Applicable Threshold Value</b>	The threshold in relation to the estimated value of the contract as set out in the relevant procurement Directive above which an OJEU process must be followed. For the <i>Organisations</i> these are currently:  Works: £4,104,394  Supplies/Services: £164.176  Schedule 3 service contracts for social and other specific services: £589,148  These are reviewed every 2 years to convert the Euro figures in to GBP. The next update is due 1 January 2016. The GBP values can go down.
<b>Cabinet</b>	For EBC and LDC this is the Cabinet of the Council. For EHL this is (1) the Board of Directors appointed in accordance with the Articles and Memorandum of Association or (2) a Committee,

Word or Phrase	Meaning
	where the matter relates to a function delegated to that Committee in both cases after considering a report from one or more of the Executives.
<b>Cabinet Portfolio Holder</b>	For EBC/LDC the member of the Cabinet designated as the lead member for the relevant function or service and if none the Leader of the Cabinet. For EHL any of the Executives as appropriate to the matter being considered.
<b>central purchasing arrangement</b>	This is an arrangement involving a “central purchasing body”. A “central purchasing body” means a contracting authority which provides centralised purchasing activities and which may also provide ancillary purchasing activities. Contracting authorities may acquire supplies, services, or works through a central purchasing body offering a centralised purchasing activity.
<b>Chief Finance Officer</b>	For EBC and LDC the person designated as the responsible officer under section 151 of the Local Government Act 1972; for EHL the Director Finance and Corporate Services.
<b>Chief Officer</b>	For EBC and LDC these are the Chief Executive, the Deputy Chief Executive, the Directors, the Senior Heads, the Monitoring Officer and the Chief Finance Officer.  For EHL these are the Executives.
<b>Code of Conduct</b>	Employee and/or staff code of conduct or the Code of Conduct for Councillors, as applicable.
<b>Constructionline</b>	Constructionline is a national register of pre qualified local and national construction and construction related contractors and consultants. It is owned by Capita PLC and endorsed by the Department of Business Enterprise and Regulatory Reform (formerly the DTI). The Council uses this register as its selection method for construction related contracts. Firms or contractors who are not registered on Constructionline can apply to join it. Information on how to register, application rules and forms can be found at <a href="http://www.constructionline.co.uk">www.constructionline.co.uk</a>
<b>Contracts Finder</b>	Contracts Finder is an electronic procurement portal and is the responsibility of the Crown Commercial Service (CCS) and the new Contracts Finder portal can be found at <a href="http://www.gov.uk/contracts-finder">www.gov.uk/contracts-finder</a> . The Council has issued guidance notes on how to use the portal.

Word or Phrase	Meaning
<b>Council</b>	For EBC and LDC this is the Council meeting. For EHL this is the Board of Directors.
<b>Designated Officer</b>	The Officer designated by the Chief Officer to deal with the procurement process in question.
<b>District</b>	The administrative area of the Organisation
<b>EBC</b>	Eastbourne Borough Council.
<b>EHL</b>	Eastbourne Homes Limited.
<b>Exception or exception</b>	A circumstance set out in paragraph 2.3 (Exceptions) of the Contract Procedure Rules.
<b>Executives</b>	For EHL this means the Chief Executive or Managing Director and the Services Directors (being the Director of Finance and Corporate Services and the Director of Operations).
<b>Financial Procedure Rules</b>	For EBC/LDC these are the Financial Procedure Rule that form part of the Constitution. For EHL these are the Financial Regulations.
<b>Framework Agreement</b>	An agreement between one or more contracting authorities and one or more economic entities, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.
<b>LDC</b>	Lewes District Council.
<b>Leader of the Council</b>	For EBC and LDC this is the Leader of the Council as appointed under their respective Constitutions. For EHL this shall be the Chairman of the Board.
<b>Legal Services</b>	For LDC this means the Council's senior legal officer or a specialist lawyer in that officer's team; For EBC/EHL that means the Lawyer to the Council or a specialist lawyer in that officer's team.
<b>Monitoring Officer</b>	For EBC and LDC the person designated as the responsible officer under section 5 of the Local Government and Housing Act 1989; for EHL the Governance & Compliance Manager/Company Secretary.
<b>national advert</b>	An advertisement of the opportunity other than in OJEU.

Word or Phrase	Meaning
<b>Officer or Officers</b>	Any member of staff employed by the <i>Organisation</i> ; any person seconded to or made available to the <i>Organisation</i> ; any agent or consultant acting for the <i>Organisation</i> ; and in the case of EHL, any director of the company.
<b>Organisation</b>	Eastbourne Borough Council (“EBC”); Lewes District Council (“LDC”); Eastbourne Homes Limited (“EHL”).
<b>PAS 91</b>	PAS 91 is a standardised pre-qualification questionnaire which has been developed to reduce the need for suppliers to complete a variety of different pre-qualification questionnaires for different, and in some cases, the same clients. A copy is attached to the Contract Manual and can also be downloaded at: <a href="http://shop.bsigroup.com/en/Navigate-by/PAS/PAS-91-2013/">http://shop.bsigroup.com/en/Navigate-by/PAS/PAS-91-2013/</a>
<b>PCR 2015</b>	Public Contracts Regulations 2015
<b>Procurement Team</b>	The Officers (if any) with designated responsibility in the relevant <i>Organisation</i> for advising on procurement processes
<b>Rules</b>	The Contract Procedure Rules.
<b>Schedule 3 Service Contracts</b>	Contracts listed in Schedule 3 of the PCR 2015 for social and other specific services.
<b>Special Purchaser</b>	A particular buyer for whom a particular asset has special value (i.e. an amount that reflects particular attributes of an asset that are only of value to a <i>Special Purchaser</i> ) because of advantages arising from its ownership that would not be available to other buyers in a market.
<b>Treaty</b>	Treaty on the Functioning of the European Union
<b>UCR 2006</b>	Utilities Contracts Regulations 2006
<b>Waiver or waiver</b>	A circumstance set out in paragraph 2.4 (Waiver) of the Contract Procedure Rules.

## 1. ANNEXURE ONE: COUNCILLOR PROTOCOL FOR PROCUREMENT

# COUNCILLOR PROTOCOL FOR PROCUREMENT

## Introduction

- 1** The Council's governance arrangements provide for procurement to be managed in accordance with Contract Procedure Rules, and for Councillors to be guided in their work by the Protocol on Member/Officer Relations and the Code of Conduct for Members of the Council. The Code of Conduct for Members includes the need for Councillors to register their interests in any contract with the Council, but in other respects these documents make only limited reference to the role of Councillors in the specialist area of procurement.
- 2** This protocol is to guide Councillors in procurement procedures and to minimise the risk of any non compliance with UK and EU legislation.

## Best Practice Guidance

- 3** A Councillor must not arrange or participate in any meeting or other form of communication with tenderers or potential tenderers for Council contracts that has not been arranged by Council officers.
- 4** A Councillor who is or will be involved in the process that leads to the award of any Council contract must not discuss the matter if they are approached by or on behalf of anyone interested in obtaining that contract.
- 5** A Councillor, who is a representative of an organisation that tenders or quotes for Council work, may not take part in the process that leads to the award of any contract in that area of service or be involved in the subsequent administration of that contract.
- 6** If a Councillor is a representative of an organisation that tenders or quotes for Council work, the organisation can only be awarded Council work through a process of open competition under Contract Procedure Rules.
- 7** The Council will not seek tenders or quotes from an organisation, or place work with an organisation using a schedule of rates or any call off arrangement, if a Councillor who is the Cabinet Member for that area of the Council's service is a representative of that organisation.
- 8** A Councillor must not seek to influence the procurement decisions of officers or do anything that compromises or is likely to compromise the impartiality of officers.
- 9** A Councillor must not pressurise any officer to change his/her professional opinion on procurement issues or give direct instructions to officers.

- 10** A Councillor must not take a proactive part to represent or in any other way advocate on behalf of any tenderer or contractor.
- 11** Any Councillor, who is a representative of an organisation that tenders or quotes for Council work, must declare that interest in the Register of Interests.
- 12** Confidential information relating to any tender, tenderer or prospective tenderer must remain confidential, and a Councillor must ensure that no confidential information is disclosed to unauthorised persons or organisations.

A breach of the above guidance may constitute, depending on the circumstances, a breach of the Code of Conduct for Members.

## 2. ANNEXURE TWO: GUIDANCE ON CALCULATING ESTIMATED CONTRACT VALUE

### The Calculation

Calculation of the estimated value of a contract must be based on the total amount payable (excluding VAT). This has to be undertaken at the moment at which the call for competition is sent, or if no call for competition then at the moment at which the *Organisation* intends to commence an alternative process to select suppliers e.g. by seeking quotations.

The choice of method used to calculate the estimated value must not be made with the intention of excluding it from the public procurement regulations.

A procurement exercise must not be subdivided with the effect of preventing it from falling within the public procurement regulations unless justified by objective reasons.

The rules require that where there are separate operational units within the *Organisation*, the total estimated value of the works, supplies or services for all those units is taken into account when calculating the estimated value. This means the majority of procurements undertaken will need to take account of the overall *Organisation* spend.

However where a unit is independently responsible for its procurement or certain categories of its procurement, the values may be estimated at the level of the unit in question. This will apply where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal. A subdivision is not justified where the *Organisation* merely organises a procurement exercise in a decentralised way.

The value must be estimated by the *Organisation* including:

- any form of option in relation to the contract (e.g. where there is an option to include possible additional services)
- any renewals that are provided for in the contract
- any prizes or payments to candidates or tenderers
- any payments that will be made by third parties to the supplier as a result of undertaking the contract

- in the case of insurance services, the premium payable and other forms of remuneration
- in the case of banking and other financial services, the fees, commissions payable, interest and other forms of remuneration
- in the case of design contracts, the fees, commissions payable and other forms of remuneration
- where the contract is or may be divided into lots, account has to be taken of the total estimated value of those lots
- in relation to framework agreements and dynamic purchasing systems, the value to be taken into consideration is the total for all the contracts envisaged during the term of the framework agreement or system
- in relation to innovation partnerships, the value to be considered is the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the supplies and services or works to be developed and procured at the end of the envisaged partnership
- in the case of works contracts, the calculation shall include both the cost of the work and the total estimated supplies and services that are made available to the contractor by the *Organisation* where they are necessary for executing the works

### **Specific Rules for Supply Contracts**

In relation to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value is:

- in the case of fixed-term contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract, or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
- in the case of public contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

### **Specific Rules for Services Contracts**

In relation to service contracts which do not indicate a total price, the basis for calculating the estimated contract value is:

- in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;

- in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

### **Aggregation Rules for Supplies and Services**

In the case of supplies and services contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated value of every contract must be based on one of the following:

- the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract; or
- the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

For this purpose, the notion of similar supplies means products which are intended for identical or similar uses, such as supplies of a range of foods or of various items of office furniture. Typically, a supplier active in the field concerned would be likely to carry such supplies as part of his normal product range. So for example the *Organisation* will need a certain amount of printer paper over the year, and it knows from the previous year it spent over the Applicable Threshold Value for that supply. This means that even if it wanted to buy one packet at a time, that single purchase would have to be treated as an above threshold purchase subject to the full procurement rules. The same concept applies to services contracts.

### **Lots and Small Lots**

Where the contract is or may be divided into lots and the total value of those lots exceeds the Applicable Threshold Value then the full (OJEU) procurement rules apply to awarding a contract for each lot.

The *Organisation* may however award contracts for individual lots without applying the full procurement procedures (but under its own CPRs) provided the estimated value of the lot concerned is less than:

- £62,842 for supplies or services
- £785,530 for works

Provided the aggregate value of the lots awarded does not exceed 20% of the aggregate value of all the lots into which the proposed work, services or supplies has been divided.