CONTRACT GUIDANCE NOTES

These notes are cross referenced to each section of the Contracts Rules and should be read in conjunction with them.

1. Introduction

1.1 This section outlines the wider legal context of the Contracts Rules and specifies the type of transactions to which they are intended to be applied.

1.2 While contracts for the employment of individual staff are outside the remit of the Rules, when in-house services are exposed to external competition the Rules will be deemed to apply, including all aspects of the tendering regime.

1.3 Throughout the Rules, reference to the “Cabinet” acting in any way will assume that the timescales associated with the Call-In process have elapsed and that the opportunity to initiate this process has been given. The only exception to this interpretation concerns “emergency” actions undertaken under paragraph 17 of Article 1 of the Constitution which precludes the exercise of the Call-In process.

2. Agency Arrangements, Partnerships and Grants

2.1 The term "partnership" is applied to a variety of contexts in both the public and private sector. This section is concerned with public sector partnerships in which the Authority participates as a constituent participant or lead authority within a separate organisation.

2.2 The Contracts Rules recognise that these partnerships are effectively separate legal entities with their own rules which may on occasion take precedence over the Council’s rules when applied to the work of the partnership.

2.3 This section is not concerned with the development of partnering arrangements with private sector organisations which are covered in section 6 below.

3. Contract Packaging and Tender Classification Values

3.1 This section emphasises the duty of care of the Commissioning Chief Officer to plan the contracting process in order that the Council is able to procure the required services, works or supplies to the required quality, at the right time and at the best price. This duty exists irrespective of the type or value of contract and irrespective of whether a formal tender process is followed.

3.2 The manner in which this is achieved will vary with the nature of contract being let and the state of the marketplace. It is however possible to specify a number of basic questions that will need to be addressed for all contracting arrangements if this duty of care is to be met.
3.3. Is this a one off purchase? Is the need for the purchase or related needs likely to recur in the commissioning department or elsewhere in the Council?

3.4 If so, could a better or a more cost effective contract package be designed incorporating these areas? Alternatively does a tendered contract already exist within the Council that may be tapped into. Where corporate contracts already exist they must be used. All corporate contracts are detailed on the Procurement pages on the Intranet. Another option is that the required goods or services may available from one of the many public procurement bodies, such OGC Buying Solutions. If in doubt, please contact Corporate Procurement for information and advice.

3.5 Contracts for most construction and associated works should be procured through the Council’s Construction Framework Agreements. Further information can be obtained from the Divisional Director of Asset Management and Capital Delivery.

3.6 Other things to consider:-

3.6.1 Is the contract really required? Have any alternatives been considered? How does the proposed contract fit in with the Commissioning Chief Officer’s Service and corporate planning objectives and the wider timetable for Service Reviews? Is the duration of the proposed contract consistent with this timetable?

3.6.2 When was the contract specification last reviewed? Is every aspect of the contract still required, are new ones needed?

3.6.3 Could material benefits accrue from specifying longer contract durations? Contractors will invariably look to maximise profits over shorter term contracts which results in increased costs to the Council. Is the contract suitable for developing a partnership arrangement over an extended timescale? Could such arrangements be extended to include neighbouring authorities?

3.6.4 How does the proposed contracting framework allow continuous improvement to be demonstrated?

3.6.5 For Capital contracts is the duration and content of the contract consistent with the project’s original design brief and business needs analysis?

3.6.6 Is there any value in undertaking pre tender soundings with potential contractors on how best to package the contract? If potential contracts exceed EU Public Procurement thresholds then legal advice should be sought before this option is adopted.

3.7 Having determined how to package the contract the commissioning Chief Officer must then estimate the value of the contract and apply the rules specific to the relevant value band. The purchasing regime attached to each value band is discussed in more detail in the next section.
3.8 The estimate of value should be based on the total value of the contract over the duration of the contract even if this involves calculating value over more than one financial year.

3.9 Proposed contracts with an estimated value in excess of £400,000 must be reported to the Cabinet before tenders are invited. This will allow Members to ensure the contract is specified and packaged in a manner consistent with their objectives. This will also give Members the opportunity to decide whether they wish to become involved in the subsequent decision to award the contract.

4. Exceptions to Tendering Requirements

4.1 This section details the circumstances in which a formal tender process is not required. This section recognises that there is a cost attached to tendering that may not be recovered as a result of tendering small value contracts. This does not remove the responsibility of the commissioning Chief Officer to achieve good value for money on behalf of the Council. It is clearly in the interests of all officers procuring goods, services or works on behalf of the Council to ensure that they can account for purchasing decisions made outside of a formal tender framework. All decisions open to challenge and therefore must be justifiable.

4.2 Using the “emergency” provision to waive the requirement to tender must only be used in exceptional circumstances. The “emergency” should be a serious threat to life, health or property that could not have been reasonably foreseen. This waiver must not be used to avoid the administrative inconvenience of a tender process; urgency produced by poor procurement planning would not qualify for this waiver. Indeed there is no waiver in respect of urgent action given that the Cabinet now meets on a regular basis.

4.3 This issue is particularly relevant if the estimated contract value exceeds European thresholds. European law allows for only a very narrow range of circumstances to justify “emergency” action.

4.4 For category A contracts (up to £10,000) the commissioning Chief Officer should firstly ensure that the planned purchases will not recur in the near future. Reasonable steps should then be taken to test the market. These efforts should be proportionate to the size of the contract. For example, for items in excess of £1,000 it would be reasonable to secure telephone quotes. For small items of equipment, reference to brochures or catalogues may be sufficient.

4.5 For Category B contracts there is a mandatory requirement to secure written quotes. The reason for choosing a particular supplier should also be documented. The presumption is that the goods or services being purchased are relatively straightforward items that do not require detailed design briefs or technical specifications (e.g. purchase of equipment or hire of agency staff). Should detailed specifications be required then a formal tender process should be considered since this offers the best control framework within which to consider alternatives or variations to the brief.
4.6 Again the commissioning Chief Officer will retain a duty to package the contract in a manner that produces the best result for the Council.

5. **Format and Key Conditions of Contracts and Tenders**

5.1 This section identifies key features of both tenders and contract specifications that are required to protect the Council’s interest and prevent any legal challenges to the tender process. If the commissioning Chief Officer is in any doubt as to the content of tender specifications or any aspect of contract documentation s/he should consult the Divisional Director of Legal and Democratic Services or the Chief Financial Officer.

5.2 The precise form of each contract will clearly vary with the nature of the goods or services being purchased. For straightforward transactions, the Council’s general conditions of contract outlined on the back of orders should suffice. Under no circumstances should the supplier’s form of contract be used by default as these will favour the supplier at the expense of the Council; if the supplier’s contract is to be considered then legal advice must be sought.

5.3 A number of approved model forms of contract are detailed on the Procurement pages on the Intranet or alternatively contact Corporate Procurement for assistance.

5.4 The need to include clauses within the contract specification concerned with financial security (e.g. liquidated damages) need to be assessed in the context of the nature of the contract and the risks and costs associated with any future breakdown of that contract. Additional financial security required during the tender process (e.g. performance bonds and bankers’ guarantees) should not be applied automatically or indiscriminately. There is usually a cost associated with such provisions that is then built into the final tender price.

5.5 Contractors who present an unacceptable risk in terms of experience or financial standing should be excluded at shortlisting. An assessment of the standing or experience of the potential contractors will still then be required before any financial securities are specified.

6. **Shortlisting of Suppliers to Tender**

6.1 Deciding who to invite to tender, or perhaps more importantly who to exclude from tendering, can be fraught with difficulties and unsuccessful applicants now regularly challenge decisions. The overriding objective should be to ensure that contractors are selected to tender on merit as a result of a demonstrably open and transparent process.

6.2 Traditionally, there have been two basic methods for selecting potential tenderers: by shortlisting responses from an advertisement or by selecting from an approved list. A model set of criteria for assessing who to shortlist must be documented before any expressions of interest are sought. Criteria for admission to an approved list should be equally explicit.
6.3 **Advertisements** - Contracts of a value that exceed European procurement thresholds must be advertised in the Official Journal of the European Union (OJEU). Advertisements must be placed in accordance with the Code of Practice to ensure that the market is properly tested. Ideally, the advertisement should give a reasonable description of the main elements of the contract together with a broad indication of the criteria to be used to assess the responses. All OJEU Notices and contract advertisements must be published on the Council’s web site. Please refer to Corporate Procurement for assistance with this.

6.4 **Approved Lists** - may only be considered for contracts of a value below European thresholds. This is a traditional procurement route normally used in areas where there is a recurring activity or need to be met. The advantage of maintaining an approved list is that it removes the need to advertise and vet contractors every time a contract is let. Selection of contractors in rotation from the lists also protects officers from any accusations of favouritism.

6.5 However, proper management of the lists requires commitment of time and expertise; new contractors need to be considered for inclusion in the list and poor performers need to be suspended or removed. The market needs to be monitored as firms experience financial difficulties; take-overs and mergers need to be noted to ensure the same company is not invited to tender under two different guises. This can be time consuming and costly. In recent years, the burden has been eased by the employment of external agencies (e.g. Construction line) to maintain approved lists in some areas of work.

6.6 Approved lists will continue to be used because they retain some advantages; they do however tend to be all embracing rather than being tailored to specific job or client requirements. The development and acceptance of more modern procurement routes means that other methods may be more beneficial.

6.7 **Partnering Arrangements** - There is a cost for the Council and contractors in repeatedly tendering contracts for relatively short timescales. Longer term arrangements reduce the contractor's set up costs and associated risks and allow scope for value to be added in how the contract is developed. Longer term arrangements with suppliers may be considered within a partnership framework.

6.8 This approach is novel and potentially contentious, particularly with suppliers who effectively will not be allowed to bid for work. All partnership frameworks should therefore be referred to the Legal Services and Corporate Procurement sections and should be approved by the Cabinet.

6.9 The benefits of this approach must be evidentially based and reflected in measurable performance targets within the framework. Progress against these targets will need to be reported on a regular basis.

6.10 The framework clearly requires a different form of contract and an innovative approach from both the Council and the contractor. It should not be sufficient for a contractor to be successful in a traditional tender process and then to “migrate” into a partnering arrangement. The partnering agreement, from the standpoint of the Contracts Rules, must be subject to the same rules as any
other contract. The partnering arrangement itself should be awarded as a result of a tender process, not least to comply with European procurement legislation.

7. **Social Issues**

7.1 Relevant Social Issues should be considered before embarking upon the procurement process. This should involve consideration of sustainable objectives at the local and national level.

7.2 Social issues can legitimately be incorporated into the purchasing process. Community Benefits are an example.

7.3 They must be relevant to the subject of the contract.

7.4 Actions must be consistent with the Government’s procurement policy based on value for money.

7.5 Actions must be consistent with the EU Treaty and EU Public Procurement Directive.

7.6 Actions taken on sustainable development considerations can have implications in the shorter, medium and longer term. Therefore, it is essential that sustainable procurement is approached from a whole life cost perspective.

7.7 Regard should be had to the Guidance contained in the Office of Government Commerce Publication “Social Issues in Purchasing” February 2006.

8. **Tender Evaluation**

8.1 Traditionally, contracts have been let to the contractor who submitted the lowest price following a competitive tender. However in the wider context of Best Value the commissioning Chief Officer has a duty to secure the most economically advantageous solution; this involves taking into account other factors that may “add value” to a tender (e.g. qualitative factors, innovative approaches with ancillary “spin off” benefits)

8.2 The Contracts Rules now offer greater flexibility in considering factors other than price when awarding contracts. However, to maintain transparency and equity of treatment, it is crucial that the ground rules identified in the Rules are observed. The evaluation model must be clearly documented before the tender process begins and must include factors that, as far as is practicable, are measurable or at least evidenced from within the tender returns.

8.3 Officers must be mindful that moving away from price as the basis of selection may leave them and the Council open to formal challenge. Indeed the EU Public Procurement Rules now provide for a 10 day standstill period to allow this to happen. It is essential therefore to proceed with caution and to leave a documented trail recording how all decisions have been reached. The whole process must be demonstrably fair and even handed. Full details of the tender evaluation criteria must be included in the report to the Cabinet when
seeking approval to tender a contract with a value in excess of £400,000. Simple statements such as “40% price and 60% quality” are not acceptable.

8.4 It would be an advantage wherever practicable to include an independent input into the tender evaluation. For example, the evaluation could be completed or checked by staff who are not directly involved in the procurement process. Ideally, the same staff should not shortlist suppliers, evaluate tenders and subsequently manage the contracts.

9. Administration of the Tender Process

9.1 The overall credibility of the tender process requires the strict application of these Rules. They are designed to demonstrate that tenders have not been changed or interfered with in a corrupt manner that gives any particular contractor an unfair advantage.

9.2 On a number of occasions in the past, tenders have been received late and contractors have then made strenuous requests for them to be considered. Ensuring the tender arrives on time and at the correct office is the contractor’s responsibility. This includes a responsibility for the performance of agents acting on behalf of the contractor (e.g. the postal services or couriers). The starting point must always be that these requests will not normally be considered.

9.3 This decision may be reviewed if exceptional circumstances prevail for which the Council must accept some responsibility (e.g. if Council staff have inadvertently misdirected the tender). In all such cases the Divisional Director of Audit and Risk or his nominated representative should be consulted.

9.4 If there is more than one stage to the tender process, for example an initial bid and a “best and final” offer, then the rules outlined in this section must be applied to each stage of the process.

10. Alterations and Negotiation of Tenders

10.1 The introduction of factors other than price into tender evaluations will broaden the scope for post tender negotiations as qualitative factors and different approaches are explored and clarified with all tenderers. This section provides basic ground rules to protect officers from accusations of malpractice.

10.2 While not seeking to constrain innovative approaches, it is again important that officers should proceed with caution. For example, if contracts have been let within European “restricted” procedures, then the scope for changing tender specifications is extremely limited. European rules effectively prohibit post tender negotiations.

10.3 In any event the contract specification must not be so radically transformed in post tender negotiations that the authority is left vulnerable to the charge that it has tendered on one basis and let the contract on a different basis.
10.4 If fundamental changes to contract specifications are sought then officers must consider retendering the contract.

11. **Acceptance of Tenders and Award of Contracts**

11.1 These Rules give commissioning Chief Officers the responsibility in most cases for formally accepting tenders and awarding contracts. The Cabinet will assume this responsibility if any of the following conditions apply:

11.1.1 the contract proposes a partnering arrangement;

11.1.2 the contract is proposed to be awarded to a contractor who has not submitted the most economically advantageous solution, in accordance with the established tender evaluation criteria;

11.1.3 the Cabinet has chosen in advance to become involved in awarding contract (e.g. when notified of plans to let the contract);

11.1.4 in cases where the proposed award is not in line with the conditions agreed at the pre-tender approval stage.

12. **Contract Instructions and Certification**

12.1 These Rules place a responsibility on the commissioning Chief Officer to operate within approved financial estimates requiring Cabinet approval if they are to be exceeded by material amounts.

12.2 This places considerable emphasis on accurate financial forecasting and obliges cost overruns to be reported at the earliest reasonable opportunity. The documentation required to underpin variations also serves as a source of information when reporting projected overspends.

13. **Subcontractors**

13.1 There are two kinds of sub-contractor. A Nominated sub-contractor is specified by the Council as part of the overall contract documentation. If nominated sub-contractors are recruited from the private sector then the Contracts Rules will apply as they would for the main contractor.

13.2 A Domestic sub-contractor is chosen by the main contractor. This sub-contractor should be subject to the same technical and financial vetting as the main contractor. The commissioning Chief Officer should always retain, within the contract documentation, the requirement to be notified of the proposed use of such subcontractors and the right to veto their use.

14. **Action by Members**

14.1 This section reflects the legal position of Members of the Council in relation to contracts of any kind.
15. Reporting and Review of Contracts

15.1 The purpose of these Rules is to reinforce the accountability of commissioning Chief Officers by ensuring Members receive adequate information when awarding, extending or reviewing contracts. These reporting mechanisms assist Members in monitoring the application of schemes of delegation in so far as they apply to contracts.

15.2 Applied in a systematic way this level of reporting should allow lessons to be learnt across the Authority from both good and poor contracting arrangements.

15.3 All such reports must be reported as confidential items to protect the confidentiality of the tender process.

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