CONTRACTS CODE OF PRACTICE

1. Introduction

1.1 This Contract's Code of Practice is to be read in conjunction with the Contracts Rules and associated guidance notes. It is subject to all applicable United Kingdom and European Union legislation, orders and directives.

1.2 For ease of use, in all subsequent paragraphs of this Code, the number of the paragraph heading will relate to the relevant Contracts Rule.

1.3 The exclusion from the Rules of the employment of staff relates solely to those staff employed directly by the authority. In contrast, the employment of agency staff and consultants will normally fall within the remit of the Rules.

1.4 For self employed consultants in particular this may not be a clear cut issue. All such consultants are therefore required to complete an Employment questionnaire which is available from the Finance and Resources Department.

2. Contract Packaging and Tender Classification Values

2.1 There will be occasions when the assessment of the potential value of a contract is, of necessity a “best estimate”. If it transpires that the value was underestimated to such an extent that the incorrect procurement route was followed then this should be reported retrospectively to the Cabinet.

2.2 The Council’s policy on controlling the Capital Programme is relevant in this context in so far as it will require the contract to be packaged in a manner consistent with the original project brief and associated objectives.

2.3 The European Union Public Procurement Regulations only come into play when the total value of a contract is above the relevant threshold. The current thresholds as at 1 January 2008 are (a) for works contracts £3,497,313, (b) for supplies and/or services contracts £139,893. Corporate Procurement can advise on this issue and provide changes to amounts as required.

3. Exceptions to Tendering Requirements

3.1 (a) Given the wide range of types of minor purchases that may fall within Class A, no prescriptive rules will apply though officers may usefully refer to the guidelines on this issue.

(b) All quotations should be on letter headed notepaper from the companies concerned and should include a point of contact at the company. In this context faxes would be acceptable if they can be clearly identified as originating from a particular company.

3.2 Quotations must be dated and include sufficient detail to demonstrate that the quotations are being sought on a comparable basis for the same goods or
services.

3.3 The officer requesting the quotations should sign and date them on receipt. They should then be stored in a secure location and be made available for inspection.

4. Format and Key Conditions of Contracts and Tenders

4.1 All contracts entered into by the Council must include appropriate clauses, as set out in the Council's General Conditions of Contract, to deal with:

(a) European Union Standards or other international equivalent;

(b) Health and Safety at Work;

(c) Compliance with requirements of appropriate technical and professional bodies; and

(d) Equal Opportunities

4.2 Every invitation to tender must clearly indicate the character, shape, disposition and amount of the work or state the quality, quantity and description of the services, goods or materials to be supplied. The invitation must also contain a clear reference to the conditions of contract.

4.3 All tenders must indicate the contract period with the earliest and latest dates for commencement and the latest date for completion. Provision must be made in the tender document for commencement and completion to be stated by the tenderer within the range of dates shown.

4.4 All services and works contracts valued in excess of £100,000 must be formally signed and sealed by the Council and the contractor. The main advantage of sealing is the increased length of the limitation period for taking legal action. Sealing procedures also enable a general legal check on contract forms, insurance, etc.

4.5 Contracts for works or services where the value is less than £100,000 may be sealed at the discretion of the Chief Officer. In cases of doubt the Divisional Director of Legal and Democratic Services should be consulted.

4.6 Chief Officers are required to employ the most appropriate means of financial management and security in connection with contracts including:-

(a) financial and technical vetting either through an approved list or separate tendering procedures;

(b) contingency sums, retention and maintenance periods;

(c) liquidated damages;

(d) a bond or parent company guarantee;
The above arrangements should be applied in accordance with the type and size of the contract and contractor involved. When standard form contracts (including the Council’s general conditions of contract used in routine orders) include arrangements for (b) and (c) officers must consider the appropriate levels and instruct accordingly.

Chief Officers must give consideration to the issue of Bonds and/or parent company guarantees where:

(a) the contract is of a considerable size and/or the Council is uncertain about the credentials of a particular contractor or his capacity to sustain the contract; or

(b) there is a substantial parent company whose guarantee would be helpful.

Chief Officers in doubt as to the appropriate financial management and security arrangements should consult the Chief Financial Officer or the Chief Executive, who may from time to time give guidance on individual or general questions of financial management and security.

Officers should ensure that tender documents include information as to the contract requirements in respect of financial management and security.

Chief Officers should ensure that all tender documents and official orders for work or services include the following information:

(a) contract’s requirements in respect of insurance including the sum required by the Chief Financial Officer; and

(b) contractor’s duty to provide evidence of his insurance to the Council’s officers when requested.

In particular, before any Class C contract for work or services is approved for signature/sealing on behalf of the Council, officers should see:

(a) appropriate insurance policies covering the contractor against the risks referred to in Rule 5 to the sum required by the Chief Financial Officer; or

(b) where policies have previously been examined, or where otherwise appropriate in the officer’s discretion cover notes to the same effect as in (a) above; and

(c) evidence that the policy(s) contain a clause indemnifying the Council as principal against claims.

In respect of Class A or B contracts for works or services, officers should undertake the procedures set out in paragraph 4.3 above wherever appropriate.
5. Shortlisting of Suppliers to Tenderer

5.1 If partnership arrangements are being considered then they must be preceded by the selection and tender process outlined in these Rules. These arrangements require specific contract formats that must be tendered. It is not appropriate for a successful tenderer who has bid for traditional contracts to simply migrate into partnership arrangements.

5.2 If this procurement route is being considered, it is important that the potential benefits of any “partnering” arrangement are documented from the outset.

6. Approved Lists

6.1 Where an accredited agent or third party such as Constructionline or Exor is used to manage Approved Lists on the Council’s behalf, the Chief Officer must satisfy himself that the agent has appropriate vetting procedures are in place and that the Council retains the right to select who is to be invited to tender.

6.2 Approved Lists shall be maintained by officers or agents of the Council for services that are regularly used. Only one Approved List for an identical category of work or service needs to be maintained within the Council. Departments should, therefore, use other Departments’ Approved Lists when in force and appropriate. One Department should be identified as a lead user for each list. Before a list is created, disbanded or amended other Departments must be consulted. Copies of each departmental Approved List should be lodged with Corporate Procurement.

6.3 Chief Officers may compile new lists or add new contractors to an existing Approved List. They must, however, ensure that sufficient time is allowed for the obtaining and proper examination of the necessary technical and financial references before using the contractor.

6.4 Chief Officers may also, where circumstances warrant, delete contractors from an Approved List. Chief Officers may also, where there is reasonable cause for concern, suspend contractors from an Approved List. Before deletion or suspension however, Chief Officers must consult other Departments and satisfy themselves that the deletion is for a sound and valid reason. Decisions to remove or suspend contractors from an Approved List can be challenged and be subjected to judicial review. In view of this, deletion or suspension of contractors shall be done "positively" and the contractor advised accordingly.

6.5 If in doubt the Chief Officer should seek advice from legal services. However, contractors should not in any circumstances just "not be used" but remain on the Approved List.

6.6 Officers should also regularly review their Approved Lists. New Lists should be created when new services are required but also redundant lists should be disbanded when services are no longer required. Officers should be mindful as to the number of contractors available for inclusion on Approved Lists and that some services, which may start as a specialist nature, may after a time become commonplace and warrant an Approved List of their own.
6.7 Chief Officers must ensure that any new lists formed, old lists disbanded and contractors included or deleted are reported to the Cabinet within a twelve month period. Chief Officers must also ensure that where the contractor is suspended for a period greater than 12 months then this is also reported to the Cabinet. A Chief Officer may reinstate a suspended contractor within a 12 month period without reporting this to the Cabinet, but may not then re-suspend the contractor within a 24 month period without reporting to the Cabinet, as soon as practicable. Where a contractor is suspended by a Chief Officer this fact must be made known to other Chief Officers who will then cease to use the contractor until further notification is received. A Chief Officer may not suspend or delete a contractor from an Approved List if such deletion or suspension results in the list becoming so short as to be ineffective.

6.8 Before creating a new list, an advertisement should be published in at least two newspapers or journals, preferably and where appropriate at least one locally that might be read by persons undertaking such contracts. The advertisement is to clearly describe the purpose of the contract and the nature of the works envisaged. An appropriate period, not less than ten days, should be allowed for response. A copy of the advertisement may also be sent direct to persons known who may be interested.

7. Advertisements

7.1 It is a legal requirement that contracts which exceed EU Public Procurement Thresholds must be advertised in the Official Journal of the European Union (OJEU). Copies of all contract advertisements and/or OJEU notices must be also be published on the Council’s web site. Please refer to Corporate Procurement for assistance. If tender invitations are being sought through an advertisement rather than an approved list the procedures outlined in this Code of Practice shall be applied when placing the advertisement.

7.2 All invitations to tender should be preceded by a preliminary enquiry, by an officer knowledgeable of the contract requirements, to ascertain the contractor's interest and availability to tender. A written record of all such enquiries must be kept. Enquiries shall be made of contractors who are within the appropriate category and financial limits.

7.3 On the date indicated in the preliminary enquiry, all tender documents should be despatched to the tenderers replying in the affirmative.

8. Documentation of Selection Process

8.1 The basis for both shortlisting and rejecting tenderers should be documented. These decisions must be based on factors that relate explicitly to the contractor's ability to deliver the contract. If any other issues are to be considered then the legal section should be consulted before any final decisions are notified to the potential tenderers.

9. Tender Evaluation

9.1 The detailed model used for evaluating tenders must be documented before the tender process begins. It must not be changed during the tender process. The
model must be consistent with the broad indications of the factors to be used that is publicised in the documentation issued to contractors when invited.

9.2 The factors used in the evaluation process must be capable of being evidenced or assessed during the tender process either from the documentation submitted by contractors or from their presentations.

9.3 The tender evaluation must be documented and witnessed by at least one officer who is independent of the tender process. This document must be retained and kept available for inspection.

10. Administration of the Tender Process

10.1 Where an invitation to tender is required, every notice of such invitation shall state that no tender will be received except in a PLAIN SEALED envelope which shall bear the word "Tender" followed by the subject to which it relates, and the date and time by which it should be returned, but shall not bear any name or mark indicating the identity of the sender.

10.2 Tenders for contracts in excess of £200,000 should be returned to the Security Investigation Office, Room 111, Town Hall, Barking IG11 7LU for receipt and opening. In this context the Corporate Director of Finance and Resources will assume the responsibilities of the commissioning Chief Officer for administering the tender process.

10.3 All tenders must be opened at the same time and as soon as practicable after the closing time and date of the tender. Subject to the provisions of Rule 11.2, any tender received after the stipulated closing time and date will not be considered and should be returned to the tenderer with a letter recording this fact.

10.4 Tenders shall be opened and recorded and witnessed by two officers neither of whom shall have any involvement in the selection of contractors invited to tender or the subsequent tender evaluation. The commissioning Chief Officer will ensure that the officers opening the tenders are completely independent; they should not be employed in the same work area as that being addressed by the tender process.

10.5 A written record of the tenders invited, received, opened and retained and signed by the officers present, must be kept together with a note of any qualifications that a tenderer may have made that are immediately apparent.

10.6 All tender documents considered must be retained on file and should be kept available for future reference or inspection.

10.7 The tenderer who submitted the most favourable tender received shall be notified that their tender is under consideration. The unsuccessful tenderers shall be notified as soon as practicable. For contracts above the EU Public Procurement Thresholds there are prescribed minimum standstill periods that MUST elapse before any final commitment can be made to the successful tenderer. Information is detailed on the Procurement pages of the Intranet but for further assistance please contact Corporate Procurement.
10.8 The Chief Officer concerned shall invalidate, and note the reason why, any tender which has not been properly completed in all respects, and in particular:

(a) where it appears that the tenderer has broken Contracts Rules or this Code;

(b) where a tender offer is subject to any qualification, amendment or alteration which has not previously been approved by the Chief Officer concerned;

(c) any amendment to the tender price is received after the tenders have been opened, subject to paragraph 9 below;

(d) any tender from which the tender price has for some reason either been omitted or is otherwise not ascertainable;

(e) where a tenderer elects to withdraw for whatever reason;

(f) any tender received where there is evidence to suggest that the tenderers have been in collusion when submitting their tenders.

11. Alterations and Negotiation of Tenders

11.1 Negotiation

11.1.1 In cases where tenders exceed budgetary provision there may be a need for post tender negotiations.

11.1.2 Value for money should always be the key driver when awarding contracts therefore there may be a justifiable need to discuss the qualitative aspects of the tender submission. For example, the tender process may require the submission and discussion of method statements or may provide for alternative methods of service delivery to be considered.

11.1.3 This all adds considerably to the scope for post tender negotiations. In order to safeguard both Members and officers in all cases when tenders are being negotiated, the following procedures shall be adopted:-

(a) negotiation should take place on Council premises in normal working hours;

(b) meetings with contractors should be attended by at least two Council representatives of whom at least one should be technically qualified;

(c) minutes of meetings should be recorded and signed by all Members or officers attending; and

(d) negotiations should be based on or clearly derived from the original tender specification.
11.1.4 European legislation is restrictive in the extent to which tenders may be changed during a period of negotiation. Indeed post tender negotiations are substantially prohibited for contracts in excess of European thresholds let under restricted procedures.

11.1.5 Under no circumstances should negotiations fundamentally change the scope or content of the original tender. It is not acceptable to tender on one basis and award the contract on a different basis.

11.1.6 Where alternative specifications or conditions are allowed for within the tender documentation and such alternatives are submitted by tenderers, officers shall conduct any necessary negotiations in confidence in order to establish, so far as it may be possible, common criteria between tenders in order to ascertain the most advantageous offer for the Council.

11.1.7 In doing so, officers shall ensure that all tenderers have equal opportunity to consider the alternatives and are given the chance to make their offers in the light of such alternatives. Officers shall further ensure that no tenderer be given an opportunity to obtain an unfair advantage over competitors.

11.1.8 Where the most economically advantageous tender received and under consideration exceeds the necessary provision made in the Council's estimates, officers may negotiate. Such negotiating shall be with the first tenderer on the basis of an amended design and/or specification. If the negotiations are unsuccessful, negotiations may proceed with the second tenderer and, if these are unsuccessful, so on to the third and subsequent tenderers. Should all negotiations fail, new tenders shall be invited using redrafted tender documents to coincide with the amended design and/or specification.

11.1.9 Where negotiations relate to matters other than to a received tender (as described above) then prior Cabinet approval must be obtained.

11.1.10 The same principles shall apply with appropriate adjustments where the Council is selling goods or services.

11.1.11 Please remember that all decisions are subject to challenge and unsuccessful tenderers now regularly seek feedback and do challenge procurement decisions.

11.2 Adjustment of Errors

11.2.1 In all cases tenders and the priced bills of quantities (where appropriate) supporting the most economically advantageous tender under consideration shall be examined by the Chief Officer. If errors are detected the tenderer shall be given details of the errors and offered one of the alternatives described below:

(i) Alternative 1
Subject to (ii) below, if the examination reveals errors or a discrepancy between the prices in the bill and the tender figure, the tenderer shall be asked to confirm whether he/she stands by the tender price or withdraws the offer. If the tender is withdrawn the priced bill of the second tender shall be examined. Where the second tender reveals errors or discrepancies the tenderer shall be given a similar opportunity to confirm or withdraw and so on to the third and subsequent tenders.

(ii) Alternative 2

At the Chief Officer’s discretion a tenderer may be given the opportunity to amend or correct genuine errors. Should the tenderer elect to amend the tender by the correction of the errors and as a result the tender is no longer the most economically advantageous, the second tender shall be examined so that it can be considered for acceptance and so on to the third and subsequent tenders.

11.2.2 Any amendments correcting an error shall be made in writing by the tenderer and attached to the contract documentation.

11.2.3 If the tenderer elects not to amend the tender offer, an endorsement shall be added to the contract documents indicating that all rates or prices (excluding preliminaries, contingencies, prime cost and provisional sums) inserted by the tenderer shall be considered as adjusted in the same proportion as the corrected total of priced items exceeds or falls short of the original total for such items.

11.2.4 The endorsement shall be signed by the parties and form a part of the Contract.

12. Acceptance of Tenders and Award of Contracts

12.1 Where the most economically advantageous tenderer originally received elects to withdraw the tender (for whatever reason) this must be confirmed in writing by the tenderer or failing this, by the Chief Officer. The second original tender now becomes the most economically advantageous and can be dealt with as if it was the most economically advantageous originally received.

12.2 For contracts below £50,000 the commissioning Chief Officer will award the contract. Contracts over £50,000 will be awarded by the commissioning Chief Officer in consultation with the Chief Financial Officer. Where the proposed award of a contract is not in line with the conditions agreed by the Cabinet at the pre-tender approval stage and/or the tender evaluation criteria, or at its request, the Cabinet will formally award the contract.

12.3 All acceptance of tenders must be in writing. In cases where the Cabinet awards the contract then the acceptance must not be issued until the conclusion of the required call-in period after the Cabinet decision.

12.4 For contracts above the EU Public Procurement Thresholds there are prescribed minimum standstill periods that MUST elapse before any final commitment can be made to the successful tenderer. Information is detailed
on the Procurement pages of the Intranet but for further assistance please contact Corporate Procurement.

13. Allocation and Award of Contracts to More Than One Contractor

13.1 In cases where it is intended that more than one contractor will be used on identical work the following steps should be followed:

13.1.1 the results of the tender process shall be reported to the commissioning Chief Officer or the Cabinet, as appropriate

13.1.2 the additional costs of using contractors at prices other than the preferred tender should be identified together with the implications of giving the work solely to the preferred tenderer

13.1.3 the results of any subsequent negotiations should be reported back to the commissioning Chief Officer or the Cabinet, as appropriate, before any contractual commitments are made

14. Contract Instructions and Certification

14.1 No officer shall sign any contractual document which is not in a previously approved format except with the prior approval of the Chief Executive.

15. Sub-Contractors

15.1 The selection of a nominated sub-contractor must be done in accordance with Contracts Rules, in the same way as the selection of the main contractor. Officers must ensure that the conditions of contract appertaining to the main contractor are also enforced by the main contractor against the nominated sub-contractor.

15.2 Where a main contractor wishes to use a domestic sub-contractor, approval must first be sought from the officer and such approval must be given in writing. Care should be taken to ensure that any such domestic sub-contractor(s) are suitable in all respects and therefore are preferably chosen from the Council's Approved List. Chief Officers may, at their discretion, require similar references as those for contractors applying for inclusion on the Council's lists prior to agreeing for them to be nominated by the main contractor as a domestic sub-contractor. Further domestic sub-contractors must in all respects comply with the same conditions as the main contractor.

16. Reporting and Review of Contracts

16.1 Final Accounts for contracts in excess of £400,000 or indeed any other final account that Members may wish to see reported must include the following details as a minimum requirement;

16.2 An overview of the objectives of the contract and the extent to which they had been met

16.2.1 Planned start and finish dates
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<td>Reasons for any difference</td>
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<td>Reasons for any difference</td>
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(Contact Officer: Chief Financial Officer: Tel: 020 8227 2932)