

Public Document Pack

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Venue Committee Room 1, Civic Offices, Merial Street,
Newcastle-under-Lyme, Staffordshire, ST5 2AG
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Finance, Resources and Partnerships Scrutiny Committee Supplementary Agenda

PART 1- OPEN AGENDA

- 3 Constitution Review Working Group - Contract Procedural Rules (Appendix 12). (Pages 3 - 36)

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1. **REVIEW OF THE CONSTITUTION**

Submitted by: Head of Business Improvement, Central Services and Partnerships
Head of Internal Audit & Monitoring Officer

Portfolios: Communications, Policy & Partnerships
Finance & Resources

Ward(s) affected: All

Purpose of the Report

To improve the effectiveness and usability of the Newcastle under Lyme Borough Council (NULBC) Constitution and to ensure that it is both up to date and legally compliant.

RECOMMENDATION:

That the Finance, Resources & Partnerships Scrutiny Committee reviews the updated version of Appendix 12 (Contract Procedural Rules) of the Constitution prior to consideration of Appendix 12 by Full Council.

Reasons

The updated Appendix 12 will improve the effectiveness and usability of the NULBC Constitution and to ensure that it is both up to date and legally compliant. It should also be noted that further changes are likely to be required to the Constitution after central government adopts the new 2014/24/EU Public Sector Directives scheduled for the autumn of 2014.

1. **Background**

- 1.1 The current Borough Council Constitution is based on the 'modular' Constitution issued in 2000 by the former Office of the Deputy Prime Minister. The modular constitution concept was introduced by central government in 2000 to provide draft model constitutions to local authorities around the new leadership models introduced by the Local Government Act 2000. The model was adapted in Newcastle to suit the particular arrangements of this Council at the time of the 2000 Act.
- 1.2 At the Transformation and Resources Committee meeting on 7th June 2010 it was resolved to set up a Member Working Group to review the existing Constitution. The initial purpose of the review was to improve the Constitution in order to enhance understanding of the Constitution and accessibility to its provisions amongst elected Members, Council officials and the general public through recommending amendments and the removal of unnecessary provisions.
- 1.3 On 16th May 2012, the Full Council resolved to adopt amendments to the Constitution as recommended by the Constitutional Review Working Group and also resolved that the Working Group should continue to review the Constitution on a rolling basis and that the Transformation and Resources Overview and Scrutiny Committee (now known as Finance, Resources and Partnerships Scrutiny Committee) should oversee this review process

- 1.4 As part of this ongoing review of the Constitution, the Council's Standing Orders in Relation to Contracts (Appendix 12 of the Constitution) have been examined. The Standing Orders document is currently split into three parts:

Part I – Extract from Statutes;

Part II – Standing Orders for the Regulation of the Proceedings of the Council and Committees; and

Part III – Standing Orders in Relation to Contracts.

Following initial discussions between the Borough Council's Business Improvement Manager, the Monitoring Officer and the Legal Practice Administrator, Standing Orders relating to Contracts have been reviewed.

- 1.5 As a result of this review, it was found that there was duplication in Parts I and II of information already in Constitution.
- 1.6 Following on from this review of Parts I and II, consideration was also given to Part III – Standing Orders in relation to Contracts – and it was agreed that these should be updated and renamed Contract Procedure Rules (Appendix 12) so as to align with the format of the current Constitution. Parts I and II would therefore be discarded.
- 1.7 In accordance with current best practice, Appendix 12 has now been updated and amended and a copy is attached as an appendix.

2. **Issues**

- 2.1 The Council's Constitution can be described as the set of rules that govern how the Council operates, how its decisions are made and the procedures it needs to follow in conducting its business.
- 2.2 Since its inception, the approach taken by the Constitutional Review Working Group has been to:
- (i) Remove obvious duplications;
 - (ii) Identify contradictions and remove those parts of the Constitution that do not accord with good practice or with the law;
 - (iii) Remove obsolete, inaccurate or unnecessary references to law and/or processes;
 - (iv) Change and update dates and time specific items;
 - (v) Use the up to date officer and committee structures and be clear and accurate about, for example, job titles;
 - (vi) Simplify wording and improve the indexing of the document;
 - (vii) Use flowcharts rather than narrative where appropriate and where necessary; and
 - (viii) Take best practice from a number of other constitutions of both local authorities and also other comparable organisations
- 2.3 Based on these review principles, it is therefore recommended that the updated version of Appendix 12 – Contract Procedure Rules, as outlined in this report – is adopted by the Borough Council and that the Constitution of the Borough Council is amended accordingly.

3. **Options Considered**

- 3.1 It is a legal requirement that the Council has a constitution that accords with the law.

3.2 Therefore, based on the points outlined in this report, it is recommended that the changes proposed to the Council's Standing Orders relating to Contract Procedure Rules are adopted by Full Council and that the Council's Constitution is amended accordingly.

3.3 No other options are recommended as part of this report, as to do so would potentially undermine the effectiveness of the Council's Constitution and the processes; procedures and frameworks contained within it.

4. **Proposal**

4.1 That the Borough Council adopts the amendments to Appendix 12 of the Constitution as outlined in this report.

5. **Reasons for Preferred Solution**

5.1 To improve the effectiveness and usability of the Borough Council's Constitution and to ensure that it is both up to date and legally compliant.

6. **Outcomes Linked to Sustainable Community Strategy and Corporate Priorities**

6.1 The Constitution is a codified document which governs the way in which the Council works.

6.2 These changes outlined in this report are intended to enable the general public, elected Members and Council officials to engage more effectively with the decision making processes of the Council and also to ensure that all processes undertaken by the Borough Council are lawful.

6.3 Improvements to these processes are a key part of the Council's corporate priority of becoming a Co-operative Council.

6.4 An effective constitution also contributes to the overall ethical wellbeing of the Council as a public organisation, and helps to engender a culture of high ethical standards, which the general public and the Council's key partners can have confidence in. This also contributes to the Council's corporate priority of becoming a Co-operative Council.

7. **Legal and Statutory Implications**

7.1 The Council is required by common law and statute (principally the Local Government Acts 1972 and 2000, and the Local Government and Housing Act 1989) to regulate its proceedings and to have an up to date constitution which is fit for purpose.

8. **Equality Impact Assessment**

8.1 Where either potential or actual impact on issues of equality and diversity have been identified it they have been addressed.

9. **Major Risks**

9.1 The major risk around this area of work is that failure to regularly review and update the Council's Constitution may mean that the document will become inaccessible; procedures will become inefficient; decisions will be vitiated for reason of unlawful procedure; and that a combination of these factors may lead to consequential damage to the reputation, finances and corporate/service objectives of the Council.

10. **Financial Implications**

10.1 No significant additional resources will be required in relation to the recommendations outlined in this report. The Constitution provides the framework and rules for ensuring value for money and links with the Council's financial regulations.

11. **Key Decision Information**

11.1 The Council's Constitution covers all decisions made by the Council and its elected Members. As a consequence, therefore, the provisions of the Constitution cover all the Borough's wards.

11.2 The majority of the provisions set out in the Constitution deal with non-Executive matters.

APPENDIX 12

CONTRACT PROCEDURE RULES

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1. INTRODUCTION

1.1 Procurement is the process by which the Council manages the acquisition of all its goods, services and works. It includes the identification of need, consideration of options, the actual procurement process and the subsequent management and review of the contracts.

1.2 These Contract Procedure Rules provide a corporate framework for the procurement of all goods, services and works for the Council. The Rules are designed to ensure that all procurement activity is conducted with openness, probity and accountability. Above all, the Rules are designed to ensure that the Council obtains value for money and the required level of quality and performance in all contracts that are let.

1.3 In these Rules, the following definitions apply:

Contract Means any form of contract, agreement or other arrangement for the supply of goods, services or work

Council Means the Borough Council of Newcastle-under-Lyme

Code of Practice Means the Council's Code of Practice for Procurement – this includes accompanying guidance

Services Includes all services which the Council purchases or obtains including advice, specialist consultancy work, agency staff, etc.

Works Includes all construction and repairs in respect of physical assets (buildings, etc.)

Strategic Procurement Team Means officers responsible for strategic procurement support (Business Improvement Manager and/or Business Improvement Officer Performance and Procurement)

Lead Officer The officer within the Council taking the lead on the procurement exercise

Chief Officer(s) Means (one of) the following:

Chief Executive
Executive Director (Operational Services)
Executive Director (Regeneration and Development)
Executive Director (Resources and Support Services)

who together as a group form the Council's Executive Management Team (EMT) and have responsibility for the day to day management of the Council and its officers

Section 151 Officer Is a statutory position under Section 151 of the Local Government Act 1972. The Executive Director (Resources and Support Services) currently holds this position

Monitoring Officer Is a statutory position under Section 5 of the Local Government and Housing Act 1989, as amended by

Schedule 5, paragraph 24 of the Local Government Act 2000. The Audit Manager currently holds this position and the Democratic Services Manager is the Deputy Monitoring Officer

Service	The relevant Service area within the Council
Head of Service	Means a senior manager with responsibility for the Service
Business Manager	Means a manager with responsibility for a business area within the Service
Authorised Officer	Means any officer who by the nature of his or her job, or as directed by a Head of Service or Business Manager, is authorised to place orders
Financial Regulations	Means the financial regulations issued by the Section 151 Officer and approved by the Council
International Financial Reporting Standards (IFRS)	Means a common global language for business affairs so that company accounts are understandable and comparable across international boundaries.
Rules	Means these Contract Procedure Rules
Cabinet	Means the part of the Council which is responsible for most day-to-day decisions
Constitution	This document sets out how the Council operates, how decisions are made and the procedures which are followed
Cabinet Portfolio Holder	Means a member of the Cabinet with a specific area of responsibility (known as a portfolio) to ensure greater accountability for the decisions taken by Cabinet.
TUPE	TUPE is an acronym for 'Transfer of Employment (Protection of Employment)' Regulations 2006 (amended in 2014). These Regulations preserve employees' terms and conditions when a business or undertaking (or part of one) is transferred to a new employer

1.4 These Rules apply to all contracts whereby the Council pays for goods, services or works. The Public Procurement Regulations do not apply to income based contracts (arrangements whereby the Council gets an income from a third party). However, it is good practice to always follow the principles of these Contract Procedure Rules when awarding such arrangements. Advice must always be sought from the Section 151 Officer when dealing with income based arrangements

1.5 All values referred to in these Rules are exclusive of VAT

1.6 Any dispute regarding interpretation of these Rules shall be referred to the Section 151 Officer for resolution

- 1.7 The Section 151 Officer shall undertake a formal review of the Rules on an annual basis
- 1.8 These Rules do not apply to:
- (a) Contracts of employment
 - (b) Contracts relating to interest in land
 - (c) The engagement of Counsel or other legal advisers; or
 - (d) Contracts relating to Treasury Management entered into by the Section 151 Officer in pursuance of the powers delegated to him under the Council's Constitution
- 1.9 Whereas the titles of Chief Officers are shown in these Rules, their nominees may undertake the responsibilities listed during their principal's absence provided they have written authority from the relevant Chief Officer to do so. This shall not be the case where statute law, or resolution of the Council, or a decision of the Council's Cabinet, requires otherwise.

2. COMPLIANCE WITH CONTRACT PROCEDURE RULES

- 2.1 The provisions contained in these Rules are subject to the statutory requirements of both the European Union and the United Kingdom Government. The letting and content of contracts shall conform to all statutory requirements and be subject to any over-riding directives of the European Union relating to contracts and procurement. This Rule cannot be waived since a failure to comply with European legislation may result in a legal challenge with consequent reputational and financial risk

In addition, where specific statutory procedures are prescribed for certain types of procurement or contract, then these procedures must be followed at all times. In any case where the Council approves, through a resolution of its Cabinet, to have separate Procedure Rules for particular types of contract, then such Rules (which must be prepared in consultation with the Chief Executive, the Section 151 Officer and the Monitoring Officer will take precedence over these Rules.

- 2.2 Subject to Rules 2.1 and 2.3, every contract for the supply of goods and services and for the execution of works made by or on behalf of the Council shall comply with these Rules, the Council's Financial Regulations and the Council's Procurement Strategy. All Council employees and organisations or companies engaged to act in any capacity to procure, manage or supervise a contract on behalf of the Council must be provided with a copy of (or access to) these Rules and comply with them

Any exception to this Rule may only be made with the written authority of a Chief Officer or the Monitoring Officer

- 2.3 A written record of any exception from the provisions of these Rules shall be made by a Chief Officer or his or her nominee and the Monitoring Officer. An 'exceptions form' must be completed for every instance where a Chief Officer approves an exception from these Rules. The form must adequately document the reasons for the exception and an electronic copy must be retained by the Service concerned. A copy of each completed form is automatically forwarded to the Chief Officer concerned, the Monitoring Officer, Internal Audit and the Strategic Procurement Team where a record of all exceptions is maintained. The Chief Officer concerned is responsible for keeping the appropriate Cabinet Portfolio Holder informed

- 2.4 All procurement activity must be undertaken with regard to high standards of probity and in accordance with the relevant sections of the Council's Constitution. All officers should manage procurement activity in a manner which avoids any conflicts of interest, and if any conflicts of interest do arise, these should be referred immediately to the Monitoring Officer, and recorded in the Register of Disclosures and Pecuniary Interests by Officers, which is kept in the office of the Legal Practice Administrator
- 2.5 The procurement of goods, services and works must comply with UK and European Union public procurement legislation where applicable. Where such legislation is applicable and any conflict with these Rules arises, EU Directives and/or UK legislation take precedence over these Rules. Current regulations require tenders to be advertised in the EU Journal where the value exceeds (as at January 2014 values):
- (a) £4,322,012 for works, and
 - (b) £172,140 for the purchase of goods and services

In estimating relevant values, officers shall have regard to the rules addressing aggregation. The estimated value payable over the life of the contract or, in instances where the total contract value is difficult to estimate, the approximate monthly value of the contract, multiplied by 48. Requirements must be calculated based on all Council spend (i.e. the corporate requirement rather than individual service needs) and must not be divided into two or more smaller purchases as this is in breach of the aggregation rules

Further detail in relation to aggregation can be found in the Public Contract Regulations 2006

- 2.6 Chief Officers are responsible for ensuring processes are in place to comply with these regulations within their own Service.
- 2.7 **Partnerships**

These Rules apply to any proposal for the Council to become involved in a joint venture or partnership, including the monitoring of any such arrangement

- (a) In relation to the Rules, a joint venture or partnership includes any arrangement involving one or more organisations in addition to the Council through which either a specific project or services within any of the functions of the Council are to be provided, and
 - (b) Provides a role for the Council or any of its Members or officers in whatever structure is used to deliver the project or services involved (such structures may include, but are not limited to, companies, trusts and management committees).
- 2.8 These Rules apply to any proposal for the Council to become involved in a joint venture or partnership, including the monitoring of any such arrangement
- (a) In relation to the Rules, a joint venture or partnership includes any arrangement involving one or more organisations in addition to the Council through which

either a specific project or services within any of the functions of the Council are to be provided; and

- (b) Provides a role for the Council or any of its Members or officers in whatever structure is used to deliver the project or services involved (such structures may include, but are not limited to, companies, trusts and management committees)
- 2.9 Before any consideration is given to the Council entering into a joint venture with the private sector or a strategic service delivery partnership with any external organisation and in particular before any detailed negotiations are entered into or before any contract is made or undertaking given by or on behalf of the Council in relation to a joint venture or partnership, the Chief Officer concerned must submit detailed information concerning the proposed joint venture or partnership to the Chief Executive. The Chief Executive will give consideration to the proposed joint venture in accordance with these Rules. On receipt of the detailed information above, the Chief Executive will liaise with the relevant Chief Officer(s) or his/her representative(s) to ensure that an appropriate project board is convened
- 2.10 Procurement processes for strategic partnerships and PFI projects must include, where relevant:
- a) The issue of an information memorandum to prospective bidders setting out the background to the project, the Council's objectives and an outline of the procurement process and timetable, with roles and responsibilities made clear (the drafting of which can be supported by the Strategic Procurement Team)
 - b) An invitation to bidders to demonstrate their track record in achieving value for money through effective use of their supply chain, including the use of small firms. This should continue to be examined as part of contract management
 - c) A requirement on bidders which must be included in their invitations to tender (or negotiate for partnerships) to submit optional, priced proposals for the delivery of specified social benefits which are relevant to the contract and add value to the community strategy.

3. NORMAL PROCEDURE

- 3.1 These Rules relate to three categories of procurement based on the estimated value of the contract:
- a) Up to £5,000
 - b) £5,001 to £30,000 (inclusive)
 - c) £30,001 £50,000 (inclusive)
 - d) In excess of £50,000
- 3.2 In all instances, goods, services or works must be obtained via appropriate existing approved arrangements where these exist. These include:
- a) In-house services (for example facilities management)
 - b) Established corporate contracts and approved arrangements

- c) For works (construction) related compliant frameworks where these are available for the Council to use

The following arrangements shall be used where it is considered that they provide value for money for the Council:

- d) Use of contracts which have been established by consortia of which are available to the Council (for example Yorkshire Purchasing Organisation (YPO); Eastern Shires Purchasing Organisation (ESPO) – both being part of the Pro5 consortia)
- e) Direct purchasing from YPO, ESPO (i.e. products available from the catalogue)
- f) Approved nationally negotiated contracts (for example those arranged by Crown Commercial Services (CCS))
- g) Approved e-Procurement solutions
- h) For low value purchases, purchasing cards can be used provided they are not used with the intention of undermining the use of approved or corporate contracts or as a method of circumventing aggregation rules

Information relating to the above arrangements will be published regularly on the Council's intranet

Where the Council has an in-house service, external companies should not be used for these services unless the Head of Service (responsible for the in-house service) confirms specifically that they are unable to meet requirements on that occasion

Use of Council contracts shall be mandatory for the supply of the goods/services included in the contract specification

- 3.3 Orders and payments for goods, services and works shall be undertaken in accordance with Financial Regulations. Orders must be placed, using approved Council systems, in advance of the receipt of the goods/services and orders must be coded to appropriate account codes
- 3.4 Where the supply is of a significantly higher than normal value for the existing arrangement in Rule 3.2 – for example for bulk purchases – the Authorised Officer should consult with the Strategic Procurement Team to determine whether special rates should be sought or whether an alternative procurement procedure may be required
- 3.5 Prior to inviting tenders or quotations, the Authorised Officer must:
 - a) Ensure that there is not another arrangement which must be used instead, as per paragraph 3.2 above, and
 - b) For contracts where there is evident risk, and for all contracts over £50,000, produce and maintain a documented risk log for the procurement process and for the eventual contractual relationship. As a minimum this should analyse all risks, identify how the risks will be managed, the responsible officer(s) and the review periods as per the Council's procurement risk log template

- c) Consider at the outset, through the use of the procurement risk log, any equality and diversity, social, environmental, economic, ethical, health and wellbeing and workforce implications in respect of the provision of supplies, services or works
- d) In support of the Public Services (Social Value) Act 2012, it should be considered at the outset, in the development of the procurement risk log, how the contract can improve the social, economic and environmental wellbeing of the Borough of Newcastle-under-Lyme, its citizens and businesses and this should be built into the contract where appropriate. The Service must be able to demonstrate that social value has been considered and, where applicable to the subject matter of the contract sought and achieved. The Service must also record that it considered whether it was appropriate to consult with stakeholders in respect of social value and the reasons for its decision
- e) Be satisfied that a specification (where appropriate), that will form the basis of the contract, has been prepared (the specification should be retained on the appropriate contract file held within the Service)
- f) Be satisfied that all key stakeholders have been identified and consulted, and their views represented in the procurement risk log, specification and contract documents
- g) Have prepared and documented an estimate of the whole life cost of the contract including (where appropriate) any maintenance and ongoing costs (the estimate should be retained on the appropriate contract file held within the Service)
- h) Ensure that all evaluation criteria (including sub-criteria) have been determined in advance, put into order of relative importance with weightings for each criteria and sub-criteria and published in the tender documentation
- i) Ensure that an appropriate procurement process is undertaken based on the whole life cost of the contract
- j) For all contracts, regardless of value, no person with a personal or financial interest in any of the bidders submitting proposals should be involved in evaluating quotations or tenders or involved in any way in influencing the decision as to which company is to be awarded the contract. A declaration of interest form must be completed by each officer involved in evaluating bids and held on file by the Lead Officer, where the Lead Officer is or forms part of the evaluation team the Monitoring Officer will be requested to hold declarations of interest on file
- k) Be satisfied that he or she has taken advice from the Strategic Procurement Team, Legal Services and Financial Services
- l) Be satisfied that he or she has the necessary authority to enter into the contract.

3.6 Before entering into a contract the Authorised Officer must:

- (a) Have undertaken a due diligence process to ensure the proposed contract is robust
- (b) Be satisfied about the technical capability of such proposed contractor

- (c) Ensure that these Rules and Financial Regulations have been complied with, and that the proposed contract represents value for money
 - (d) For all contracts that exceed £30,001 and/or where deemed appropriate, the Authorised Officer shall undertake appropriate checks to ensure that the proposed contractor has the financial and resource capacity (taking account of contract value and risk) to perform the contract (unless the contractor has already been subjected to a recent satisfactory financial check). Financial vetting shall be undertaken by Internal Audit, who will advise on what, if any, security should be provided by the contractor. Under no circumstances must a company be eliminated from a procurement process on the basis of a credit reference check
 - (e) The Chief Officer responsible for the contract must ensure that a suitably experienced and trained officer is identified to adequately manage the contract the Council enters into
- 3.7 In all instances, procurement shall be undertaken in accordance with the principles of Best Value, and in a manner that is non-discriminatory, transparent and fair
- 3.8 In instances where the Council's policy of payment settlement in 30 days will cause problems to a company or voluntary sector organisation, or early settlement will attract a discounted rate from the company, alternative settlement dates can be considered. Any company can request quicker payment terms by contacting the Council's relevant Authorised Officer
- Payment in advance may be required by small businesses, social enterprise or voluntary sector organisations but it must be used with care to:
- a) Ensure that the agreement with the organisation protects the Council as far as possible
 - b) Be satisfied that the risk is low and managed
 - c) Be satisfied that the small company, social enterprise or voluntary sector organisation has to incur costs in advance and that this will place it in a financially difficult position
 - d) Ensure that payments are charged to the appropriate financial year (*this is particularly important with an advance payment*)
- 3.9 The Council publishes on its website all items of expenditure on goods, services and works which exceed £500 in value. Prior to placing any order, officers must consider whether the expenditure can be justified. Orders must not be artificially split with the intention of bringing the value of each order below £500, or order less than is actually required
- 3.10 Contracts for goods, services and works shall be structured, where appropriate and within the legislative framework, to support and promote the policies and corporate priorities of the Council. In particular, where appropriate and subject to procurement law, officers should encourage and/or invite local suppliers to bid for Council contracts. Also, ensure that tenders are not framed in such way as to unnecessarily debar small and medium sized companies, the voluntary sector and social enterprises from bidding

- 3.11 Where available, tenders should be advertised on the regional procurement portal

NOTE: case law has established that, even when contract values fall below EU Procurement Directive thresholds (above which the full requirements of the Directives apply), contracting authorities must ensure a degree of contract advertising sufficient to ensure competition, to avoid discrimination on the grounds of nationality and allow the impartiality of procurement procedures to be reviewed. Advertising opportunities on the regional procurement portal supports compliance with this requirement

- 3.12 All tenders must be advertised and, where appropriate, be available for download (where available) on a regional procurement portal. Contract award notices shall also be published on the website in a timely manner following contract award. For procurements less than £5,000, the use of Micro; Small to Medium Enterprises and/or a voluntary sector and/or social enterprise directory should be used, where appropriate, to source potential voluntary sector suppliers to invite to quote (www.socialenterprisewm.org; www.buyse.co.uk; www.seb2b.co.uk providing directories of social enterprises). In cases where a quotation process is deemed appropriate for a contract over £10,000, these should be placed on a regional procurement portal (if available). If this is not available, the 'My Tenders' website should be used for advertising contract opportunities
- 3.13 Where there are no arrangements in place as per 3.2 above, orders with a value of less than £5,000 should be placed with suppliers from the local area where possible, utilising an informal quotation process
- 3.14 All tenders advertised in the European Journal must be placed via an electronic system. Officers must ensure that entries into the Official Journal of the European Union (OJEU) fully comply with requirements/guidance on producing notices for the European Journal. This is available from the Strategic Procurement Team
- 3.15 All EU notices for non-routine procurement MUST be referred, in advance of sending to the OJEU, to the Strategic Procurement Team for advice on wording
- 3.16 All quotes and tenders must be undertaken using the Council's standard template documentation, unless prior approval has been obtained from the Section 151 Officer or the procurement is construction related, where JCT/JCI templates are able to be used.
- 3.17 Any project to develop a strategic service delivery partnership (which may or may not involve a transfer of staff to an external organisation) shall be undertaken in accordance with the best practice guidance issued by the Communities and Local Government or other relevant guidance

<http://mutuals.cabinetoffice.gov.uk/sites/default/files/documents/Public%20Service%20Mutuals%20next%20steps.pdf>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/83717/19284_Next_Generation_3rd_Online.pdf.

The Chief Executive must be notified prior to commencing any such initiative

- 3.18 Any project to develop a strategic service delivery partnership (which may or may not involve a transfer of staff to an external organisation) must be referred to the Council's Cabinet for:

- a) Initial approval to commence the project, and
 - b) Approval to award the contract which must be supported by a robust business case
- 3.19 Any project which involves significant risk including: staff transfer, significant implications across a number of service areas or significant potential for reputational or financial risk, must be managed in an appropriate manner using Council approved project management methodology and progress reports must be provided to the Executive Management Team at key milestones, these to be agreed with the relevant Chief Officer
- 3.20 Evaluation of tenders and quotations must be based on whole life costs, or total cost of ownership, including environmental, social and economic benefits where relevant to the contract
- 3.21 The Council will achieve employment and skills outcomes through procurement where relevant to the purpose of a contract. Where relevant to the subject matter of the contract, the bidders' approach to tackling unemployment and creating training and apprenticeship opportunities should be built into the procurement process
- 3.22 Where the Council will own an asset as a result of a contract, the asset has to be recorded in accordance with International Financial Reporting Standards (IFRS)
- 3.23 Where these situations arise, the Section 151 Officer must be contacted in the early stages of the procurement process in order to identify any IFRS implications and record them appropriately.

4. EXCEPTIONS TO CONTRACT PROCEDURE RULES

- 4.1 Subject to statutory requirements, tenders need not be invited in accordance with these Rules in the following cases:
- (a) In the case of the supply of goods:
 - (i) the goods or materials are proprietary articles and in the opinion of the appropriate Chief Officer no reasonably satisfactory alternative is available, or
 - (ii) the prices of goods or materials are wholly controlled by statutory bodies, trade organisations or Government Order and in the opinion of the appropriate Chief Officer no reasonable satisfactory alternative is available
 - (b) The work to be executed or the goods or services to be supplied are controlled by a statutory body
 - (c) The contract is for the execution of work or the supply of goods or services certified by the appropriate Chief Officer to be required so urgently as to preclude the invitation of tenders. The appropriate Cabinet Portfolio Holder shall be kept informed of such decisions

- (d) The purchase of a named or proprietary product required to be compatible with an existing installation as approved by the Authorised Officer
 - (e) Where the contract, subject to the approval of the Section 151 Officer relates to security work where the publication of documents or details in the tendering process could prejudice the security of the works to be done
 - (f) In any case of work to be executed or goods or services to be supplied the Authorised Officer, in consultation with the Section 151 Officer, decides that there can be no genuine competition
- 4.2 An 'exceptions form' (see Annex 1) must be completed for every instance where a Chief Officer approves an exception from these Rules for contracts with a total value of £5,000 or more, in accordance with 2.3 above
- 4.3 Nothing contained in the above exceptions exempts officers either from using the Council's internal services or from following established arrangements in accordance with Rule 3.2. Officers must ensure that the best possible balance of value for money and quality is obtained for the Council
- 4.4 Tenders need not be invited in accordance with these Rules where they have been undertaken by or on behalf of any consortium, collaboration or similar body, of which the Council is either a member or is able to access contracts for goods, services or works. Officers should ensure that any contracts let by such a consortium, collaboration or similar body are in accordance with UK and EU procurement directives and regulations and that the Council is legally able to access the arrangements. Advice should be sought from the Strategic Procurement Team
- 4.5 Where the Council acts as lead body on a consortium or collaborative arrangement, the procedures for tendering contained within these Rules shall be followed (including the delivery, opening and acceptance of tenders) unless those provisions are inconsistent with the method by which tenders are dealt with by the consortium, collaboration or other body concerned and are not detrimental to the Council
- 4.6 Where another body is acting on behalf of the Council, the Council is providing funding to another body to undertake a scheme or project or the Council is provided funding from another organisation, satisfactory processes must be put in place and followed. Advice must be sought from the Section 151 Officer
- 4.7 The budget required (both capital and revenue) over the lifetime of the goods/service/works being procured must be confirmed by the relevant budget holder prior to the commencement of any tender or quotation process

5. CONTRACTS UNDER £5,000

- 5.1 These rules, in general, do not apply to contracts of less than £5,000. However, Rules 3.2, 3.7, 3.8 and 3.9 and the following principles apply to all procurement activity, irrespective of value
- 5.2 Where Goods or Services are regularly required and arrangements illustrated in Rule 3.2 do not exist, these should be reported to the Section 151 Officer who will assess the need for appropriate arrangements to be put in place

- 5.3 Officers should order Goods and Services that are required through an arrangement illustrated in Rule 3.2. Unless otherwise approved by the relevant Chief Officer (for the in-house service), external businesses will not be used where the Council has its own in-house services

If a corporate contract cannot meet the reasonable needs of the Service, the Authorised Officer must inform the Section 151 Officer before using an alternative supplier

- 5.4 Procurement expenditure is monitored through the financial systems and a Service will be challenged on the use of non-contracted or inappropriate arrangements
- 5.5 It is good practice (for all but small value and routine purchases) to obtain a written quotation. All quotations to the value of £5,000 can be provided by way of an informal quotation i.e. the Authorised Officer obtaining electronic quotations and maintaining (electronic) file copies linked to the relevant procurement
- 5.6 The Authorised Officer (ICT) must be informed of any system or hardware related procurements, regardless of value.

6. CONTRACTS VALUED £5,000 TO £50,000 INCLUSIVE

- 6.1 Contracts that are estimated to be for amounts between £5,000 and £50,000 (inclusive) shall be let on a competitive basis, normally via a request for quotes, unless an arrangement under Rule 3.2 has already been established for the Goods, Services or Works required
- 6.2 A clear specification of requirements (identifying outputs or outcomes rather than inputs, unless there is a demonstrable need to specify inputs) should be produced and the Authorised Officer shall place the quotation on to (where available) a regional procurement portal. Where this is not available, the 'My Tenders' website should be used for advertising to support transparency and promotion of a competitive bidding process (in accordance with Rule 3.12)
- 6.3 A minimum of two (for contract values of £5,000 to £30,000) and three (for contract values of £30,001 to £50,000) companies shall be invited to submit a quotation through (where available) a regional procurement portal. Where this is not available the 'My Tenders' website) should be used for advertising to support transparency and promotion of a competitive bidding process
- 6.4 In every instance there shall be a record of the process which will include:
- (a) the officer(s) undertaking the procurement process and taking the decisions
 - (b) a copy of the specification and risk register (for contracts less than £50,000, a risk register is only required where there is evident risk)
 - (c) copies of all tenders or quotations
 - (d) copy of the evaluation process and reasons for the decisions as to acceptance or rejection for every tender
 - (e) the award letter

- (f) copy of the final contract
- (g) copy of the contract review and management process including the officer responsible for on-going contract management
- (h) a quotation profile which should be completed with details of the bid values and subsequent award information.

6.5 All procurements for £5,000 and over will be recorded on the Council's Contracts Register.

7. CONTRACTS OVER £50,000 – INVITATION TO TENDER

7.1 For contracts whose estimated value is expected to be greater than £50,000 (but under current EU Procurement Thresholds) for Work, Materials, Goods or Services, the contract will be recorded on the Council's Contracts Register and the following tender procedures shall be adopted

7.2 The tendering procedure should follow the relevant EU prescribed time limits. Where there is no prescribed procedure, a closing date of between fourteen (14) and twenty-eight (28) days from the placing of the notice shall be given for reply

7.3 After the closing date the prescribed number of contractors, or where there is no prescribed number at least four chosen by the Authorised Officer, must be invited to tender. Where less than four suitable contractors express an interest, all should be asked to tender

7.4 The invitation to tender shall state that no tender will be considered unless it is received by the date and time stipulated on the Invitation to Tender

7.5 Contractors must be chosen by one of the following methods:

- (a) selective tendering via open, restricted; or
- (b) by way of a compliant framework agreement that the Council is authorised to use
- (c) requesting tenders on behalf of a consortium, association or similar organisation of which the Council is a member following the rules of that organisation; or
- (d) requesting tenders under the instructions of another authority for which the Council is acting as agent; or
- (e) selecting a contractor from a list of contractors with a schedule of rates approved and selected by another authority for which the Council is acting as an agent

7.6 The invitation to tender must include details of the Council's requirements for the particular contract including:

- (a) a form of tender, instructions to tenderers including a procurement timetable, evaluation criteria, financial reference requests, insurance, business continuity

questionnaire, health and safety checklists, return label and draft contract terms approved by the Council's Legal Team (all tenders should have the facility to be submitted electronically);

- (b) A specification that describes clearly the Council's requirements in sufficient detail to enable the submission of competitive offers. The EU rules with regard to specification shall be followed and these are set out in the EU Codes of Practice;
 - (c) Pricing mechanism and instructions for completion and
 - (d) Whether the Council is of the view that TUPE will apply
 - (e) A requirement for tenderers to declare that the tender content, price or any other figure or particulars concerning the tender have not been disclosed by the tenderer to any other party (except where such a disclosure is made in confidence for a necessary purpose)
 - (f) A requirement for tenderers to complete fully and sign all tender documents including a form of tender and certificates relating to canvassing and non-collusion. Where tender documentation is sent electronically, if selected, the tenderer may be required to submit the relevant signed documentation through conventional means
 - (g) Notification that tenders are submitted to the Council on the basis that they are compiled at the tenderer's expense
 - (h) The invitation to tender or quotation must state that the Council is not bound to accept any quotation or tender
 - (i) The method by which any arithmetical errors discovered in the submitted tenders is to be dealt with, in particular whether the overall price prevails over the rates in the tender or vice versa
- 7.7 Except under the open procedure, all tenderers invited to tender or quote must be issued with the same information at the same time and subject to the same conditions. Any supplementary information must be given on the same basis
- 7.8 Where any public advertisement has not defined the award criteria, invitations to tender must state the award criteria in objective terms and where possible in descending order of importance.

7.9 **Single Tenders**

In exceptional circumstances, the relevant Chief Officer may decide that it is in the best interests of the Council:

- (a) that a single tender be invited for the execution of work from a contractor selected by it; or
- (b) that a contract be negotiated with a contractor currently engaged by the Council on the basis of rates and prices contained in an initial contract awarded by the Council following open competition

In any such case he/she may do so subject to setting out in writing the reasons for the decision which shall be kept centrally in the Service concerned. The appropriate Cabinet Portfolio Holder shall be kept informed, and a copy of the decision sent to the Cabinet

This provision cannot be used for contracts exceeding (in aggregate) the current EU thresholds.

8. CONTRACTS OVER EU THRESHOLDS

- 8.1 Where the value of the contract is likely to exceed the European threshold (taking account of the rules of aggregation), it must be tendered in accordance with the relevant European procurement directive and procurement regulations. The Authorised Officer should record, retaining a file note on the reasons for adopting the selected procurement route (i.e. open tender, restricted tender, competitive dialogue or negotiated procedure, accelerated procedure). The exception to this Rule is in cases where Goods, Services or Works can be obtained through a framework contract which has been established via the relevant EU procurement process (for example, Crown Commercial Service frameworks)

In estimating relevant values, officers shall have regard to the rules regarding aggregation (see Rule 2.5 above). Further detail in relation to aggregation can be found in the Public Contract Regulations 2006

- 8.2 Any decision to adopt the negotiated, competitive dialogue or accelerated procedure should first be referred to the Strategic Procurement Team and Section 151 Officer
- 8.3 The arrangements identified in Rule 3.2 shall be used provided the arrangement is clearly identified as relevant for high value contracts
- 8.4 When a restricted process is undertaken, a minimum of 5 companies will be shortlisted to submit tenders (where 5 suitable suppliers express an interest)
- 8.5 Standard template documentation must be used to structure tender processes and the documentation must be placed where available on the e-tender portal to allow any company to express an interest in bidding (in the case of the restricted or competitive dialogue procedures) or to complete an Invitation to Tender (in the case of an open procedure)
- 8.6 In every instance there shall be a record of the process which will include the following, plus any information that may be required for submitting annual reports to the Government or other agencies:
- (a) the officer(s) undertaking the procurement process and taking the decisions
 - (b) the rationale for the procurement route taken (including open or restricted procedure if above EU thresholds)
 - (c) a copy of the specification and risk register
 - (d) copies of all tenders and all associated correspondence/clarification obtained during the tender period
 - (e) a copy of the evaluation process and reasons for the decisions as to acceptance or rejection for every tender
 - (f) the award and unsuccessful letters
 - (g) a copy of the final contract

- (h) a copy of the contract review and management process including the officer responsible for on-going contract management

Tender award and unsuccessful letters must be in the approved template format and following the issue of these letters, any requests for further information or clarification must be dealt with promptly and a full audit trail must be kept of all such dialogue

All dialogue with bidders during the tender process must be dealt with using the e-tender regional portal to ensure that all bidders are provided with the same information at the same time in the process. Officers must not conduct separate dialogue using any other means with any company during the process without obtaining advice from the Strategic Procurement Team

- 8.7 In accordance with EC Procurement Directive 2004/18/EC, and subsequent amendments in the Public Procurement (Miscellaneous Amendments) Regulations 2011, any company responding to an EU tender shall be excluded from the tender process if it or its directors have been convicted of: conspiracy, corruption, bribery, fraud, money laundering, an offence in connection with the proceeds of criminal conduct or an offence in connection with the proceeds of drug trafficking. Any instances where a service has information relating to the above must contact the Audit Manager and Monitoring Officer for advice
- 8.8 Upon completion of the procurement process a formal contract award notice will be published in the Official Journal of the European Union (OJEU)

8.9 **Single Tenders**

In exceptional circumstances, the relevant Chief Officer may decide that it is in the best interests of the Council:

- (a) that a single tender be invited for the execution of work from a contractor selected by it; or
- (b) that a contract be negotiated with a contractor currently engaged by the Council on the basis of rates and prices contained in an initial contract awarded by the Council following open competition

In any such case he/she may do so subject to setting out in writing the reasons for the decision which shall be kept centrally in the Service concerned. The appropriate Cabinet Portfolio Holder shall be kept informed, and a copy of the decision sent to the Cabinet

This provision cannot be used for contracts exceeding (in aggregate) the current EU thresholds.

9. **RECEIPT AND CUSTODY**

- 9.1 No tender will be considered unless it is either:
 - (a) Received via the e-tender system specifically set up for the purpose of receipt of the said tender. Receipt of bids through the system is preferred and bidders will be encouraged to submit electronically where possible

OR

- (b) Contained in a plain envelope which shall be securely sealed and shall bear the word 'TENDER' followed by the subject to which the tender relates and the number of the tender concerned, but shall not bear any distinguishing matter or mark to indicate the identity of the sender. Prospective tenderers shall be notified accordingly.
- 9.2 Subject to 9.1(b), tenders where the estimated value exceeds £50,000 shall immediately on receipt be consecutively numbered and remain in the custody of the Customer and ICT Business Manager until the time appointed for opening. Any officer receiving tenders shall indicate on the envelope the date and time of its receipt by him or her
- 9.3 Quotations, where the estimated cost does not exceed £50,000, may be addressed impersonally to the appropriate Chief Officer. In all cases such tenders shall remain in the custody of the Chief Officer to whom they are addressed until the time appointed for opening. The Chief Officer shall ensure that procedures are in place for recording date of receipt, opening and safe storage of such tenders
- 9.4 All tenders sought on behalf of external agencies where these are to be named as client under a subsequent contract may be addressed and opened in accordance with the procedure rules, regulations and written requirements of such external agency
- 9.5 Responses to Pre-qualification Questionnaires (PQQs) and quotations are not deemed to be tenders and should be returned to the originating officer, either via hard copy or electronically through the e-tender portal. Submissions and responses in respect of negotiated procedure tenders and PFI projects must also be returned via the e-tender portal.

10. OPENING TENDERS

- 10.1 Tenders received via e-tender shall be opened and recorded at one time and by one officer. Tenders received in hard copy format shall be opened and recorded by not less than two officers designated for that purpose by the Monitoring Officer
- 10.2 Tenders submitted in hard copy must be opened by the same officers and at the same time as documents received via the e-tender portal
- 10.3 In respect of tenders with a value in excess of £50,000, any Member of the Council who so wishes may be present at the opening. Internal Audit also has the right to attend any tender opening
- 10.4 Where external agencies contribute to the overall funding of a project, representatives of such agencies are permitted to attend at the opening of tenders. They are allowed to make a note of the tenders and to also receive a copy of the subsequent written report on tenders received, provided that such representatives agree to observe commercial confidentiality and be bound by the confidentiality requirements of the Local Government Act 1972, as amended.

11. LATE TENDERS

Classification: NULBC UNCLASSIFIED

- 11.1 Where a tender is submitted in competition and is received after the specified time then it shall be disqualified. Any such tender should be returned promptly to the tenderer who should be notified accordingly. The tender envelope may be opened to ascertain the name and address of the tenderer concerned
- 11.2 The only exception to Rule 10.1 where a late tender may be considered is if none of the other tenders received have been opened and no tenders have been received via the e-tender portal. The officer responsible for the opening of tenders must keep a record of the date and time of receipt of late tenders and the circumstances resulting in their acceptance.

12. ALTERATIONS

- 12.1 An external tender can be amended after it has been received and before it has been accepted only in order to correct an arithmetical error or other discrepancy made in good faith, subject to the following:
- (a) The tenderer shall be given details of the error or discrepancy found during the examination of the tender and shall be given the opportunity of confirming the tender without amendment or withdrawing the tender;
- OR
- (b) Amending the tender to correct genuine arithmetical errors provided that in this case, apart from these arithmetical errors, no other adjustment, revision or qualification is made. In this case written confirmation should be requested from the tenderer as to the error or discrepancy and confirming what the corrected entry should be
- 12.2 The appropriate Chief Officer must keep a record of all amendments made under this Rule and a copy of the record shall be sent to the Monitoring Officer.

13. ACCEPTANCE

- 13.1 Contracts shall be evaluated and awarded in accordance with the evaluation criteria issued with the tender documentation. Only those tenders that comply with the evaluation criteria shall be considered for acceptance
- 13.2 Tenders must be accepted on the basis of the "most economically advantageous" tender. The winning bidder will be determined by using the criteria and process communicated to bidders in the tender documentation
- (a) For clarity, whole-life costs should be assessed when determining the most economically advantageous tender. In the case of capital works this includes taking into account the revenue impact of capital projects over a reasonable life for the asset (for example a slight increase in capital cost, such as energy management features, will reduce running costs)
- (b) In the case of PFI projects, financial evaluation and acceptance will be on the basis of the agreed financial model and all other relevant documents used during the process to determine the most economically advantageous tender

- (c) In the case of tenders or quotes below the EU threshold and where two or more tenders or quotations provide the same level of quality at the same quoted cost, environmental considerations (transport, packaging, etc.) may be used to determine the successful bid if they are relevant to the contract. Prior to the award of the contract, a due diligence process must be carried out for all high risk/high value contracts to ensure the preferred bid is bona fide and that it is fully understood what the Council will receive and what payment is to be made
- 13.3 A tenderer who submits a qualified or conditional tender shall be given the opportunity to withdraw the qualification or condition without amendment to the tender. If the tenderer fails to do so, the tender must be rejected unless it is dealt with as an alteration in accordance with Rule 12.1
- 13.4 Prior to final contract award, the contractor must provide evidence of adequate insurance cover for public and employers' liability and professional indemnity insurance (where applicable) and produce such evidence during the life of the contract at the reasonable request of the Authorised Officer
- 13.5 All tenderers must be notified in writing of their success/failure in the tender process. Notifications must be made using template letters which must be issued electronically through the e-tender portal where the project was advertised on e-tender or via email for quotations of less than £5,000
- 13.6 It is important to notify companies as soon as possible after their elimination from a process. Therefore any company eliminated at the PQQ stage must be informed promptly using the Council's agreed templates which can be found on the Council's intranet.

For all procurements covered by EU Directives, a minimum of 10 calendar days (where notification is made electronically) mandatory standstill period is required between the communication of the notification of the award decision and contract conclusion, with day one being the day after the award decision is issued, via the e-tender portal or alternatively by email. The standstill period must end on a weekday (excluding bank holidays). This notification must be in the Council's agreed template which can be found on the procurement hub of e-voice and should be sent to all companies that remain in the process. This is to allow companies an opportunity to challenge the decision. The notification of the award decision, based on the most economically advantageous tender, must contain:

- (a) the award criteria;
- (b) the score the tender obtained against those award criteria;
- (c) the score the winning tenderer obtained;
- (d) the name of the winning tenderer;
- (e) the characteristics and relative advantages of the winning tender;
- (f) precise details of standstill period (i.e. key dates)

NOTE: Where notification is not issued electronically or is followed up by posted notification, the standstill period must be no less than 15 calendar days

- 13.7 All contracts must be recorded on the e-tender portal, and must include the name of the winning tenderer, bid value and performance monitoring information.

- 13.8 Upon completion, a formal contract award notice must be published in the Official Journal of the EU

14. NEGOTIATIONS FOLLOWING RECEIPT OF TENDERS

- 14.1 This Rule applies to all tenders
- 14.2 In all tenders, it is essential that the principles of probity, fairness and equal treatment are applied. Therefore negotiation following receipt of tenders or quotations is only permissible in limited circumstances in order to address minor issues since inappropriate negotiation may expose the Council to risk of challenge. The Section 151 Officer must be consulted before any negotiation is undertaken
- 14.3 Any negotiations shall be conducted on behalf of the Council by at least two appropriate officers and at least one must be from the Service concerned (Head of Service & Business Manager and/or an officer from Strategic Procurement). The Section 151 Officer shall be invited to send a representative to the negotiation meetings. A full written record shall be kept of the results of the negotiations, approved by the Chief Officer or his or her nominee personally, retained on a central file in the Service concerned and a copy sent to the Section 151 Officer. The appropriate Cabinet Portfolio Holder must also be kept informed
- 14.4 Should the tender be of a nature where there is likely to be a requirement for discussion regarding the proposals, specification and/or pricing model, the Competitive Dialogue process may provide the most appropriate procurement process
- 14.5 Negotiation must not be undertaken following receipt of tenders where the tender was subject to the EU Procurement Directives.
- 14.6 Should there be a need for any reason to amend the Council's requirements / specification (value engineer) all providers submitting a tender shall be informed and given the opportunity to re-submit their proposal. Should any of the following arise this will require a new procurement:
- (a) amendments that could have resulted in a different outcome in the procurement;
 - (b) amendments that shift the economic balance of the contract in favour of the contractor. For example, a price increase could fall into this category;
 - (c) amendments which extend the scope of the contract considerably, such as a substantial increase in the duration or extension of the subject matter of the contract;
 - (d) where a new contractor replaces the original contractor, other than where this is allowed i.e. "if an event or set of circumstances occurs which a contracting authority acting "diligently" could not have foreseen",

15. NOMINATED/NAMED SUB-CONTRACTORS AND SUPPLIERS

- 15.1 It is recommended that contracts are awarded to a single entity or lead contractor, who in turn will take contractual responsibility for the performance (and risks) the contractor will ensure that the insurances for any sub-contractors are equal to the minimum required by the Council. This responsibility lies with the contractor for all

sub-contractors in their supply-chain. This reduces the risk of the Council becoming party to disputes between contractors

16. ENGAGEMENT OF CONSULTANTS

- 16.1 Approval must be obtained from the appropriate Cabinet Portfolio Holder and the Chief Officer before engaging any consultant, consultancy firm or adviser.
- 16.2 An Authorised Officer may only appoint external consultants or advisors providing professional or consulting services if such Services are not available within the Council or if Council officers providing them do not have the resources to meet the needs of the Service. Where such Services are available in-house, the authorised officer must consult with the Chief Officer or Head of Service before taking any decision to make an external appointment
- 16.3 Consideration should always be given to using approved frameworks, for example, established by YPO, ESPO, the Crown Commercial Service or the Homes and Communities Agency
- 16.4 External consultants and technical officers engaged to supervise contracts must follow these Rules as applicable and their contracts for Services must state this requirement
- 16.5 Procurement plans and/or tenders prepared by external consultants on behalf of the Council must be referred to the Strategic Procurement Team for approval and advice
- 16.6 All contracts for external consultants and advisors shall explicitly require that the consultants or advisors provide without delay any or all documents and records maintained by them relating to the services provided at the request of the Authorised Officer, and lodge all such documents and records with the appropriate officer at the end of the contract
- 16.7 The Authorised Officer shall ensure that any consultant working for the Council has appropriate indemnity insurance
- 16.8 Any consultant used by the Council shall be appointed in accordance with these Procedural Rules. Where the Council uses consultants to act on its behalf in relation to any procurement, then the Chief Officer shall ensure that the consultant/s carry out any procurement in accordance with these Procedural Rules and using the Council's standard terms and conditions of contract in any procurement that the consultant carries out. No consultant shall make any decision on whether to award a contract or who a contract should be awarded to. The Chief Officer shall ensure that the consultant's performance is monitored.
- 16.9 Where the engagement of a consultant is required to support a procurement process or related project, the consultant should sign an appropriately drafted confidentiality agreement and be bound by the confidentiality requirements of the Local Government Act 1972, as amended.

17. CONTRACT CONDITIONS

- 17.1 Every contract which exceeds £30,000 in value, and in any other case where the Monitoring Officer so decides, shall be in writing in a form approved by the Legal Services team. Most contracts under £50,000 are not required to be executed under seal. Contracts where the total value is expected to exceed £50,000 must be sealed. In relation to IT contracts, those involving leasing arrangements where it is proposed to use a supplier's own terms and high risk and/or long-term contracts, advice should be sought from the Legal Services team via its email address at instructionsforlegal@newcastle-staffs.gov.uk. All written contracts shall specify:
- (a) The Work, Goods, or Services to be provided or undertaken (including any appropriate output or technical specifications); and (unless in the case of an annual contract where the following information is not available);
 - (b) Full detail of all prices to be paid, detailing the frequency and method of calculation (if relevant) with a statement of discounts or other deductions; and
 - (c) The period or times within which the contract is to be performed
- 17.2 For contracts with an estimated value in excess of £50,000 for the execution of Works or for the supply of Goods or Services by a particular date or series of dates, the Authorised Officer shall assess the need to include provision for liquidated damages based on advice from the Legal Services team. Liquidated damages should only be included if they can be genuinely pre-estimated and are agreed with the contractor
- 17.3 Every written contract must contain a clause to secure that if the contractor fails to comply with its contractual obligations in whole or in part, or commits a fundamental breach of the contract, the Council may, without prejudice to any other remedy available to it:
- (a) Terminate the contract, either wholly or to the extent of such default
 - (b) Complete the contract either itself or through another contractor or agent to make good the default
 - (c) Recover from the contractor any additional costs incurred in completing the contract to the original specification
- 17.4 The contract should require that if one or more sums of money is to be received by the Council, the contractor responsible for the payment of such sum or sums must pay interest in respect of late payment at the rate stated in the contract from the date when payment is due until the date when payment is received
- 17.5 It shall be a requirement that in the performance of the contract, the contractor must comply with the Equality Act 2010 including where relevant the Council's Public Sector Equality Duty, and shall provide the Council with information on request in relation to its compliance
- 17.6 In the performance of the contract, the contractor must comply with the requirements of the Health and Safety at Work etc. Act 1974 and of any other relevant Acts, Regulations or Orders pertaining to health and safety
- 17.7 Contractors discharging Council functions must comply with the duty of Best Value under the Local Government Act 1999 (as amended)

- 17.8 All Goods, Services and Works must comply with any relevant European Union standards or specifications, code of practice, British Standard Specifications or Codes of Practice or European Union equivalents current at the date of the tender
- 17.9 Every contract over £50,000 for the execution of work or the supply of goods or services must include a clause in respect of the prevention of bribery
- 17.10 In every written contract for the execution of work or the supply of goods or services the following or equivalent clauses shall be inserted:
- "The Supplier shall not assign, novate, sub-contract or otherwise dispose of this Agreement or any part thereof without the previous consent in writing of the Council such consent not to be unreasonably withheld."
- This clause may be amended to meet the requirements of a specific contract but only following consultation with the Council's Legal Services team
- 17.11 Contracts shall contain details of relevant performance criteria, targets, standards and information on how the contract will be monitored, reviewed and managed by the Council. Benchmarking and/or price reduction clauses must be included, where appropriate, in contracts
- 17.12 All tenders and contracts must contain a notice relating to the Freedom of Information Act and a schedule that clearly identifies those sections or clauses that are commercially confidential within the terms of the Freedom of Information Act
- 17.13 If a contract is for the provision of business critical Services or supplies, officers may need to include clauses to the effect that the contractor maintains adequate business continuity processes in order to minimise the Council's exposure to risk
- 17.14 Other contractual conditions shall be included as required within these Rules, the Code of Practice or as directed by the Legal Services team

18. EXTENDING EXISTING CONTRACTS

- 18.1 Prior to extending a contract, the Authorised Officer must ensure that an options appraisal is undertaken to determine if it is in the interest of the Council to extend the current arrangement
- 18.2 The Authorised Officer, after consultation with the appropriate Chief Officer, may extend a contract subject to the extension being within the scope of the original scheme
- 18.3 Extensions to capital project contracts that will fall outside the scope of the original tender or scheme must go to the Cabinet for approval. This does not apply to operational contracts for goods and services that are not key decisions (i.e. where annual or periodic contracts are to be extended). The definition of a key decision is set out in Part 2; Section 13 subsection 13.2 of the Council's Constitution. In such cases the Authorised Officer or the Cabinet must, before taking the decision, consider tendering or negotiating the additional work, and ensure that any additional required funding is secured. In addition to obtaining approval to extend the contract, approval to increase the budget available for the project must be

obtained in all cases where the increased contract amount would cause an overspending against the existing budget. Also, if the contract extension fundamentally or significantly changes the nature of the project, this should be reported to Members before an extension is agreed. A written record of the decision with reasons should be approved and retained by the Chief Officer concerned or his or her nominee and the record must be retained on a central file in the relevant Service. A copy should also be sent to the Monitoring Officer

- 18.4 If the original contract was subject to the EU procurement regulations, the contract can only be extended within the parameters identified in the original EU contract notice, or if the notice explicitly contained provision for extension
- 18.5 If the contract was not subject to the EU procurement regulations, any extension must not take the total value of the contract above the EU thresholds
- 18.6 If the contract was awarded as a framework agreement, the total framework period, including any extensions, cannot exceed four years except in exceptional circumstances relating to the subject of the framework agreement. For example, a longer duration could be justified in order to ensure effective competition if four years would not be sufficient to provide return on investment
- 18.7 The length of call-offs under a framework agreement should not last for more than four years. The length of call-offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations. However, individual call-offs from the framework can extend beyond the end date of the framework itself
- 18.8 When negotiating a contract extension the Authorised Officer must make every effort to negotiate improved contract terms with regard to the cost and quality of the goods, services and works being delivered through the contract. The terms agreed must be confirmed in writing and the Contracts Register must be updated accordingly to show the extended contract period.

19. CANCELLATION OR DETERMINATION

- 19.1 In every written contract a clause shall be inserted to ensure that the Council shall be entitled to cancel the contract, and to recover from the contractor the amount of any loss resulting from such cancellation, if the contractor or its employees or agents (with or without its knowledge):
 - (a) does anything improper to influence the Council to award the contractor any contract; and/or
 - (b) commits an offence under the Bribery Act 2010 in connection with the contract or under Section 117 of the Local Government Act 1972.

NOTE: The provisions of the Bribery Act that came into force into 2010 now means that the Council may commit the following offences:

Section 1 – bribing another person
Section 2 – offences relating to being bribed; and
Section 6 – bribing a foreign public official

If the Council commits any of these offences, then senior officers (defined under S.14 of the Act as a director, manager secretary or other similar officer in the case of a body corporate can be held personally liable and may be subject to 10 years' imprisonment. In addition, Section 7 of the Act creates a new offence of failing to prevent bribery, which again relates to the Council and in this instance the Council could find itself liable to an unlimited fine.

20. SIGNATURE OF CONTRACTS

- 20.1 Every contract that exceeds £50,000 must be sealed on behalf of the Council. Contracts below £50,000 can be signed by the appropriate Chief Officer or their authorised officer
- 20.2 All contracts must be concluded before the supply, service or construction work begins, except in exceptional circumstances, and then only with the written consent of the Monitoring Officer. An award letter is insufficient.
- 20.3 **The Authorised Officer responsible for securing signature of the contract must ensure that the person signing for the other contracting party has authority to bind it.**

21. REGISTERS OF CONTRACTS

- 21.1 The Strategic Procurement Team shall keep:
- (a) a Contracts Register setting down details of contracts awarded in the preceding twelve months, together with details of those contracts above £50,000
 - (b) A copy of the Contracts Register will be published on the Council's website
 - (c) A payments register of all contracts in a form approved by the Section 151 Officer. The payments register may be maintained electronically. The Register shall for each contract, specify the name of the contractor, the works to be executed or the Goods to be supplied and the contract value. The Register shall contain a record of all payments made individually and cumulatively to contractors and sub-contractors
- 21.2 Approval can be sought from the Section 151 Officer by a Chief Officer or Head of Service where it is more appropriate to monitor contracts against approved expenditure budgets where applicable. Officers monitoring these budgets must ensure that the relevant statutory requirements are adhered to and that contract values do not exceed EU thresholds for competitive tendering.

22. SEALING

- 22.1 Where contracts are sealed as a deed the Common Seal of the Council shall be affixed to the contract and witnessed by a Council Member of the Cabinet and by an authorised signatory

- 22.2 Every Council sealing will be consecutively numbered, recorded and signed by the person witnessing the seal. The seal must not be affixed without the authority of Cabinet or of a Chief Officer acting under delegated powers. A contract must be sealed where:
- (a) The Council wishes to enforce the contract for more than six years after its end; or
 - (b) The price paid or received under the contract is a nominal price and does not reflect the value of the Goods or Services; or
 - (c) Where there is any doubt about the authority of the person signing for the other contracting party; or
 - (d) Where the total value is expected to exceed £50,000.

23. BONDS AND PARENT COMPANY GUARANTEES

- 23.1 For contracts over £50,000, a performance bond may be required if considered appropriate by the relevant Authorised Officer, the Section 151 Officer or other appropriate Chief Officer. The decision will be based on the risks associated with the contract, for example:
- (a) The value of the contract,
 - (b) The type of goods / services / works being procured,
 - (c) The payment profile for the contract,
 - (d) The financial strength of the company,
 - (e) Affordability and proportionality

The security required may be a performance bond or some other form of financial or performance guarantee. Affordability and proportionality must always be taken into consideration when deciding whether some form of financial security is appropriate and required.

- 23.2 For contracts over £100,000 the contractor must provide a bond from a source approved by the relevant Authorised Officer for completing the contract except where the relevant Authorised Officer in consultation with the Monitoring Officer decides that this is not necessary, after receipt of a completed risk analysis inclusive of a business continuity questionnaire
- 23.3 At the discretion of the relevant Authorised Officer, a cash sum can be held in the place of a bond, either as a direct payment or set off against initial invoices received by the Council from the provider. Approval for this shall be requested in writing by the relevant Authorised Officer and details of which, when agreed with the Monitoring Officer, forwarded to the Section 151 Officer
- 23.4 Where it is proposed to make stage or other payments in advance of receiving the whole of the subject matter of the contract and there is concern about the stability of the contractor, a bond shall be required regardless of the contract value
- 23.5 A parent company guarantee is necessary when the contractor is a subsidiary of a parent company and:

- (a) The total value exceeds £100,000; or
- (b) Award is based on evaluation of the parent company; or
- (c) There is some concern about the stability of the contractor.

23.6 Where a bond is required the tender documents must contain provision for this cost to be identified separately

23.7 If the contract period covers a number of years the Authorised Officer shall determine after consultation with the Monitoring Officer and the Section 151 Officer whether or not the bond is to be calculated by reference to the total contract sum over the duration of the contract or by reference to the annual value of the contract

23.8 As stages of the contract are completed the value of the bond can be reduced at the discretion of the Authorised Officer with the approval of the Monitoring Officer

24. OTHER REQUIREMENTS

24.1 The Authorised Officer must consult with the Section 151 Officer prior to entering into any lease or credit arrangement which has a capital cost or implications. The cost must first be approved for inclusion in the Capital Programme

24.2 The Authorised Officer must inform the Section 151 Officer immediately of any claims (or anticipated claims) by or against contractors that are the subject of dispute between the Council and the contractor.

ANNEX 1

EXCEPTIONS TO CONTRACT PROCEDURE RULES

This 'exceptions form' must be completed for every instance where a Chief Officer approves an exception from these Rules for contracts with a total value of £5,000 or more, in accordance with 2.3 above (The form must adequately document the reasons for the exception and an electronic copy must be retained by the Service concerned. A copy of each completed form is automatically forwarded to the Chief Officer concerned, the Monitoring Officer, Internal Audit and the Strategic Procurement Team where a record of all exceptions is maintained). The Chief Officer concerned is responsible for keeping the appropriate Cabinet Portfolio Holder informed

Title of Contract:	Contract Value:
Date:	
Description of Good or Service:	
Reason why the exception is being sought:	
Responsible Officer:	
Approved (Chief Officer):	Date:

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