

APPENDIX 12**CONTRACT PROCEDURE RULES****Document Control**

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Document Approvals

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Document Distribution

This document will be distributed to:

Executive Management Team
Cabinet
Heads of Service
Business Managers
Constitution and Member Support Working Group

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/Service Area 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.

Maverick Spend Refers to purchasing made outside of agreed contracts and the

councils contract procedural rules.

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.
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.
Supplier Contract Management System/website	The portal used by the council to publish contract notices, upload procurement documents, receive and respond to clarifications, receive bids and publish award notices.

- 1.4 These Rules apply to all contracts whereby the Council pays for goods, services or works. The Public Procurement Regulations or their equivalents 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 (or their nominee/s) 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 shall be 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 All procurement and spend activity shall comply with these Contract Procedural Rules, none compliance / Maverick spend, will be reported to the council's internal governance/monitoring committee (Statutory Officers Group) for action.
- 2.6 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 exceed those set (and reviewed) by the European Union on a two yearly basis.

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.

- 2.7 Chief Officers are responsible for ensuring processes are in place to comply with these regulations within their own Service.
- 2.8 **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).
- 2.9 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/value 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 to £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 published 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 only;
 - (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. 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 council's supplier contract management' website should be used for advertising / publishing 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 appropriate legislation.

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 Contract / 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. Whilst the council's supplier contract management website is available for use as part of routine purchases there is no formal requirement to utilise this process for quotations to the value of £5,000.
- 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 council's supplier contract management 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 council's supplier contract management 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 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.

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

- (a) selective tendering via open or
- (b) by way of a compliant framework agreement that the Council is authorised to use or a framework established itself (strategic procurement can support in reviewing compliance and/or the introduction of a council run framework);
- (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.

7.5 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 details 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;
- 7.6 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.
- 7.7 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.

7.8 **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 received via the council's supplier contract management website 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.

[Self Service facilities are available at the Customer Service Centres and support will be provided, if required.](#)

9.2 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.

9.3 Responses to Standard Selection Questionnaires (SSQs) and quotations are not deemed to be tenders and should be returned to the originating officer, electronically through the council's supplier contract management website. Submissions and responses in respect of negotiated procedure tenders and PFI projects must also be returned via the council's supplier contract management website.

10. **OPENING TENDERS**

- 10.1 Tenders received via the council's supplier contract management website shall be opened and recorded at one time and by one officer. Should the council require for any purposes 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 (or their nominated officer).
- 10.2 Should the council require for any purposes tenders to be submitted in hard copy format these must be opened by the same officer/s and at the same time as documents received via the council's supplier contract management website.
- 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 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

- 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 11.1 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 council's supplier contract management website. 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, late tenders having to be received in hard copy format as the council's supplier contract management website does not permit tender submissions after the date and time established in the portal.

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 Acceptance of tenders over £50,000 in value (whether payable by or to the Council) must be recorded in the minutes of the Cabinet or appropriate Committee¹.

13.2 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.

13.3 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, (where applicable) 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.

13.4 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.

13.5 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.

13.6 All tenderers must be notified in writing of their success/failure in the tender/quotation process. Notifications must be made using template letters which must be issued electronically via email for quotations of greater than £5,000.

13.7 It is important to notify companies as soon as possible after their elimination from a process. Therefore any company eliminated at the SSQ stage must be informed promptly

¹ This paragraph should be read in conjunction with: Part 2: Appendix 12; Section 13: para 13.2 (a to e) – relative to key decisions)

using the Council's agreed templates which can be found on the Council's intranet or made available from strategic procurement.

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 Connexus (the council's intranet) 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.

- 13.8 All contract awards must be recorded on the council's supplier contract management website and councils contract register, and must include the name of the winning tenderer, bid value and performance monitoring information.
- 13.9 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.

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- 14.5 Negotiation must not be undertaken following receipt of tenders where the tender was subject to the EU Procurement Directives (unless the contract notice published in OJEU specifically allows for such negotiation).
- 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";
 - (e) where it is determined that 'material change' occurs in line with regulation 72 of the Public Procurement Regulations (PCR) 2015.

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, examples include: YPO (Yorkshire Purchasing Organisation), ESPO (Eastern Shires Purchasing Organisation, CCS (Crown Commercial Service); Homes England.
- 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.

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- 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 are 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;
- 21.2 A payments register of all contracts in a form approved by the Section 151 Officer shall be maintained by the relevant Head of Service or their nominated 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.

21.3 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. RETENTION AND DISPOSAL REQUIREMENTS

24.1 The retention of contracting information inclusive of:

- (a) approved suppliers;
- (b) contracts award and monitoring;
- (c) contracts award and monitoring – under seal;
- (d) quotations;
- (e) product evaluation;
- (f) product information;
- (g) tendering policies;
- (h) tenders;
- (i) tendering for contracts to be signed under seal
- (j) unsuccessful bidders

will be held on file by the lead officer/s either electronically or in hard copy format in line with the retention periods, disposal processes and relevant authority as contained in the council's Records Retention & Disposal Schedule, published on the council's intranet.

25. FRAMEWORK AGREEMENTS

- 25.1 The Public Contract Regulations 2015 (Regulations) define a framework agreement as:
- “an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”

- 25.2 The framework agreement with relevant providers will set out the terms and conditions under which agreements for specific purchases (known as call-off contracts) can be made throughout the term of the agreement.
- 25.3 The term of the agreement will be no more than four years.
- 25.3 A framework agreement will not itself commit either party to purchase or supply, but the procurement to establish a framework agreement is subject to the EU procurement rules.
- 25.4 Where the value of the framework 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.
- 25.5 In establishing a framework officers should adopt/follow in principle the procurement procedures highlighted in section 8 above.
- 25.5 Further guidance in relation to framework agreements and a questions and answers section (produced by Crown Commercial Services) can be found at Annex 2.

26. DYNAMIC PURCHASING SYSTEMS

- 26.1 The Dynamic Purchasing System (DPS) is a procedure available for contracts for works, services and goods commonly available on the market. As a procurement tool, it has some aspects that are similar to an electronic framework agreement, but where new suppliers can join at any time. However, it has its own specific set of requirements. It is to be run as a completely electronic process, and should be set up using the restricted procedure and some other conditions (as set out in Regulation 34 of the Public Contracts Regulations 2015).
- 26.2 Contracting authorities may set up a DPS. The DPS should be set up for identified types of requirement, which may be divided into categories of products, works or services.
- 26.3 The DPS is a two-stage process. First, in the initial setup stage, all suppliers² who meet the selection criteria and are not excluded must be admitted to the DPS. Contracting authorities must not impose any limit on the number of suppliers that may join a DPS. Unlike framework agreements, suppliers can also apply to join the DPS at any point during its lifetime. Individual contracts are awarded during the second stage. In this stage, the authority invites all suppliers on the DPS (or the relevant category within the DPS) to bid for the specific contract.
- 26.4 Guidance in relation to establishing a DPS and a questions and answers section (produced by Crown Commercial Services) can be found at Annex 3.

27 GENERAL DATA PROTECTION REGULATIONS (GDPR)

- 27.1 GDPR requires officers of the council to protect the privacy of all EU citizens and prevent data breaches.

² For convenience "supplier" is used in this note to include any economic operator

- 27.2 The lead officer/s will highlight in any pre-procurement dialogue with potential suppliers that the contract will be subject to GDPR and ensure bidders are both familiar with the legislation and of their obligations as the Processor.
- 27.3 In certain circumstances, the Controller is required to conduct a Data Protection Impact Assessment (“DPIA”) prior to any processing (see Article 35 of the GDPR). This may occur before the contract is entered into, and ideally the DPIA should be conducted as early on in the procurement as possible. In all cases advice should be sought from your Data Protection Officer as to whether a DPIA is required.
- 27.4 In procurements for contracts involving processing personal data to be awarded, due diligence should be undertaken to ensure suppliers can implement the appropriate technical and organisational measures to comply with GDPR and to ensure the protection of the rights of data subjects. Selection criteria should be used to assess suppliers’ human and technical resources to perform the contract to the appropriate standard and suppliers should be asked to provide proof by reference to the technical facilities and measures they have in place.
- 27.5 When evaluating responses, officers should consider undertaking due diligence and ensure they are satisfied the bidder can provide protective measures appropriate to the nature and risk of the processing. This should be relevant to the subject matter of the contract, and proportionate.
- 27.6 The lead officer will ensure the roles and responsibilities of the Controller and the Processor are set out clearly throughout contract delivery. The Controller must set out clear written instructions for the Processor on how the personal data should be processed, and these must be adhered to. If the Processor does not follow these written instructions, and determines the processing purpose or means of processing themselves, they will be in breach of contract, and the Processor may be considered to be a Controller in respect of that processing.
- 27.7 In drafting the specification of requirements linked to the procurement the lead officer will ensure that the following details are clearly established:
- the subject matter of the processing;
 - details of the duration of the processing;
 - the nature and purpose of the processing;
 - the type of personal data being processed;
 - the categories of the data subjects;
 - the obligations and the rights of the Controller;
 - that the Processor acts on the documented instructions of the Controller;
 - the requirement for the Processor to delete or return the personal data at the end of the provision of services;
 - a requirement for the Processor to implement appropriate technical and organisational measures; and
 - a right for the Controller to audit the Processor.
- 27.8 The lead officer will ensure that written instructions at least set out that the Processor must:
- process the personal data only on the documented instructions of the Controller;

- comply with security obligations equivalent to those imposed on the Controller (implementing a level of security for the personal data appropriate to the risk);
- ensure that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;
- only appoint Sub-processors with the Controller's prior specific or general written authorisation, and impose the same minimum terms imposed on it on the Sub-processor; and the original Processor will remain liable to the Controller for the Sub-processor's compliance. The Sub-processor must provide sufficient guarantees to implement appropriate technical and organisational measures to demonstrate compliance. In the case of general written authorisation, Processors must inform Controllers of intended changes in their Sub-processor arrangements;
- make available to the Controller all information necessary to demonstrate compliance with the obligations laid down in Article 28 GDPR and allow for and contribute to audits, including inspections, conducted by the Controller or another auditor mandated by the Controller - and the Processor shall immediately inform the controller if, in its opinion, an instruction infringes GDPR or other EU or member state data protection provisions;
- assist the Controller in carrying out its obligations with regard to requests by data subjects to exercise their rights under chapter III of the GDPR , noting different rights may apply depending on the specific legal basis for the processing activity (and should be clarified by the Controller up-front);
- assist the Controller in ensuring compliance with the obligations to implementing a level of security for the personal data appropriate to the risk, taking into account the nature of processing and the information available to the Processor;
- assist the Controller in ensuring compliance with the obligations to carry out Data Protection Impact Assessments, taking into account the nature of processing and the information available to the Processor; and
- notify the Controller without undue delay after becoming aware of a personal data breach.

27.9 At the award stage for procurements involving personal data processing, and particularly those for high risk processing, lead officers should ensure bidders are asked, at award stage, how the technical and organisational measures put in place (and set out at selection stage) meet the needs of the contract. For example, a model award question to ask bidders might be:-

Please provide details of the key data protection risks you foresee with this Contract and set out your proposals for dealing with those risks.

27.10 The lead officer will build into contract management activities sufficient checks to ensure suppliers are meeting their obligations under GDPR as the Processor. These supplier assurance activities may include audits undertaken by the Controller or a third party auditor. If obligations are not being met, the lead officer will take urgent remedial action with the supplier to address issues and risks.

28. MODERN SLAVERY

28.1 As part of the Council's procurement, contracting and contract review processes with its suppliers and their supply chains, officers will endeavour to ensure that all suppliers address the requirements of the Modern Slavery Act 2015.

28.2 The lead officer will not select bidder(s) that have been prosecuted or served notice under the Modern Slavery Act, unless satisfied that appropriate remedial Action has been taken to prevent future occurrences/breaches.

28.3 The lead officer must ensure that bidders clearly complete Modern Slavery questions raised in the Invitation to Tender part II.

29. SAFEGUARDING

29.1 The UK Government has established a principle of delivering “Policy through Procurement”, meaning that the Government expects certain aspects of legislation to be delivered and enforced through Public Sector procurement and commissioning where applicable.

29.2 The Council is morally and legally responsible for:

- implementing its safeguarding policy and procedures;
- discharging its duty of care for children, young people and vulnerable adults,
- safeguarding the wellbeing of children, young people and vulnerable adults, and
- protecting children, young people and vulnerable adults from abuse and/or neglect when they are engaged in services organised and provided by the Council.

29.3 The lead officer must ensure any specific safeguarding requirements are outlined in the specification, which may also include any monitoring requirements. This should include any minimum safeguarding requirements (e.g. the need to have a Safeguarding Policy);

29.4 The lead officer if requesting a method statement will ask the bidder to outline how they (and their sub-contractors if relevant) will deliver the specification. If safeguarding is relevant to the service the method statements should ask the bidder to detail how it will meet its safeguarding responsibilities;

29.5 Conditions of Contract – for higher value requirements it may be appropriate to use the Council’s standard Terms and Conditions of Contract. These make provision for safeguarding and are available from the strategic procurement team.

28. OTHER REQUIREMENTS

28.1 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

28.2 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:

ANNEX 2

THE PUBLIC CONTRACTS REGULATIONS 2015

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THE UTILITIES CONTRACTS REGULATIONS 2016

GUIDANCE ON FRAMEWORK AGREEMENTS

(A Crown Commercial Services Publication)

Contents

Guidance on Framework Agreements

Overview:

- What are frameworks?
- What has changed (following the introduction of the Public Contracts Regulations 2015)?
- Why is this helpful / necessary?

Key Points:

- Identifying contract authorities in contract notices
- Call-offs and mini-competitions
- Award notices

FAQs

Overview

What are framework agreements?

The Public Contract Regulations 2015 (Regulations) define a framework agreement as:

“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”³

In other words, a framework agreement is a general phrase for agreements with providers that set out terms and conditions under which agreements for specific purchases (known as call-off contracts) can be made throughout the term of the agreement. In most cases a framework agreement will not itself commit either party to purchase or supply, but the procurement to establish a framework agreement is subject to the EU procurement rules.

What has changed - (following the introduction of the Public Contracts Regulations 2015)?

The key changes include the clarification of the rules on identifying the users of the framework agreement, increased flexibility in the rules on setting up and calling off multi-supplier framework agreements, and the requirement to publish award notices for call-offs on Contracts Finder.

Why is this helpful / necessary?

The new rules support the Government’s approach to making the process simpler and more transparent for business and contracting authorities.

Which rules do I need to refer to?

Regulation 33 on Framework Agreements

Regulation 108 (1)(b) publishing award notices for call-offs from framework agreements on Contracts Finder⁴

³ Regulation 33(2)

⁴ See Regulation 108 (1)(b) and Contract Finder Guidance

The provisions in Regulation 51 of the Utilities Contracts Regulations 2016 are less detailed than in the 2015 Public Contracts Regulations. They do, however, set out that the term of the framework agreement should not exceed 8 years and that contracts based on the framework agreement shall be awarded on the basis of objective rules and criteria.

Key Points

Identifying contract authorities in contract notices

The call for competition or invitation to confirm interest has to clearly identify the contracting authorities that can use the framework. The key is that economic operators from any Member State can easily identify who the users of the framework may be. The identification has to be either by name or by other means that makes them clearly identifiable. Where possible a link to a list of relevant authorities should be provided. However potential framework users may be identified by reference to a specific class of contracting authorities in a defined region that can be identified on the internet.

Call-offs and mini-competitions

Call-off contracts based on framework agreements may be longer than four years, and may extend beyond the expiry date of the framework (Recital 62 Public Procurement Directive).

For single provider framework agreements, call-offs are placed according to the terms and conditions laid out in the framework agreement.

Multi-supplier framework agreements can now comprise just two suppliers (previously minimum of three)

For multi-provider frameworks, there are now **three** potential ways to select the provider and place specific contracts: direct award; mini-competition; or a combination of both.

- i. **Direct award without re-opening competition.** If the framework agreement sets out all the terms governing the provision of the works, services and/or supplies concerned and all the objective conditions that are required to make a decision for award of the specific contract, then awarding the contract without re-opening competition amongst the parties to the framework agreement is possible. In this instance, the choice of provider must be based on the objective criteria laid out in the procurement documentation
- ii. **Mixture of direct award and mini-competition (New).** This route is available where the procurement documents for the framework agreement state that it may be used, and the framework agreement sets out all the terms governing the provision of the works, supplies and services concerned. The procurement documents for the framework agreement must set out objective criteria which will be used to determine whether a specific contract will be placed following a reopening of competition or directly on the terms set out in the framework agreement so it is clear and transparent for all users and suppliers. The procurement documents should also specify which terms may be subject to the re-opening of competition. For example a direct award could be for those suppliers allocated to provide goods to a specific region and the accompanying objective criteria for selecting to re-open competition could be:
 - a. the contract exceeds a set financial threshold;
 - b. the quantity of products required is over a certain level;
 - c. the contract has particularly complex requirements

- iii. **Mini-competitions.** When the framework agreement does not include all the terms governing the provision of the works, services and supplies concerned, the contracting authority must organise a 'mini-competition' between the providers which are party to the framework agreement.

Award Notices

Contracting authorities must publish award notices for call-offs from framework agreements on Contracts Finder⁵.

FAQs

When do I have to advertise a framework in OJEU?

All framework agreements subject to Regulation 33 must be advertised in OJEU. Advertising would not be required if the call-off contracts to be awarded under the framework are exempt from the requirement to publish in OJEU – for example because the estimated maximum value of all call-offs under the framework agreement over its lifetime is below the relevant EU threshold⁶, or the procurements in question are covered by one of the exclusions set out in the Regulations. Where this is the case, Regulation 33 will not apply.

When assessing the total value of the framework, a required field in the OJEU Contract Notice, it is important that the estimate should include all the potential call-offs over the lifetime of the agreement that may be made by all contracting authorities that are permitted to use the framework, not just the intended call-offs by the contracting authority which is procuring the framework agreement.

How can my organisation set up a framework that can be used by other contracting authorities in our region?

Contracting authorities may set up and advertise framework agreements on behalf of other contracting authorities. This is particularly common in the case of contracting authorities that act as Central Purchasing Bodies (CPD). Where the EU rules have been followed by such CPDs, other contracting authorities may use the framework agreements as required so long as they have been covered in the call for competition or invitation to confirm interest. The identities of all the contracting authorities entitled to call-off under the terms of the framework agreement must be included in the procurement documentation. See Key Points above for more detail

The contracting authority using the framework agreement is responsible for awarding call-off agreements in a way which complies with the terms of the framework agreement.

What do I need to include in my OJEU Notice?

The Regulations stipulate what is required in the Contract Notice or PIN as a call for competition, and your portal provider may also include guidance on what is required on the

⁵ See Regulation 108 (1)(b) and Contract Finder Guidance

⁶ Regulation 5(8)

OJEU standard forms and notices. However the following will give you some idea of the information you need to consider and have at hand for completing the forms:

- consider how the identities of all the contracting authorities entitled to call-off under the terms of the framework agreement will be easily available for potential bidders.
- consider the length of term of the framework agreement. It will be a maximum of four years “save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement”⁷. You should therefore seek legal advice if you intend to conclude a framework agreement with a longer duration. It is worth considering, in any event, whether a framework agreement is necessarily the best vehicle for a longer term project.
- estimate the total value of the goods, works or services for which call-offs are to be placed and, so far as is possible, the value and frequency of the call-offs to be awarded under the agreement. This is necessary for providers to be able to gauge the likely values involved and to provide a figure for the framework overall which, as with other contracts, should not normally be exceeded without a new competition taking place.
- include the other information required by Annex V to the Directive and the relevant form.

My Authority has a requirement that could be met by a sheltered workshop type organisation. Can we do that for a framework?

Yes. Regulation 20 enables contracting authorities to reserve the right to participate in a public contract to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. The ability to reserve contracts in this way applies to framework agreements as well as to contracts generally. The OJEU call for competition, at the start of the procurement for the framework agreement, will need to make it clear that the framework is reserved for sheltered workshops (the term used for supported employment programs, factories and businesses in the EU Directive itself) under Article 20 of the Public Procurement Directive.

A framework I want to call-off from will expire in 6 months and I need to award the call-off for 2 years. Can I do that?

The length of call-offs under framework agreements are not specifically limited by the Regulations. The length of call-offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations. It may be the case that individual call-offs extend beyond the four-year term of the framework itself. However, this should not be done in order to circumvent the EU rules. For example, it might be difficult to justify a 12-month call-off, very near the end of the framework itself, where the normal pattern for the goods or services in question had been for such call-offs to last for just one month at a time.

Do I have to use a particular procedure to award a framework?

⁷ Regulation 33(3)

A framework agreement that is over the relevant threshold must be awarded in accordance with one of the procedures set out in the Regulations and the procurement documents. The OJEU call for competition must specify the procedure that will be used. The authority setting up the framework agreement should follow the rules for all phases of the procurement process covered by the Regulations.

Does having a framework mean we don't have to consider sustainability and other issues such as TUPE?

The use of framework agreements does not remove the obligation on contracting authorities to address issues such as TUPE, where they are relevant to the contract at the call-off stage.

How many providers do I have to have on a framework?

Framework agreements can be concluded with a single provider or with several providers, for the same goods, works or services, it all depends on the market and your procurement strategy. Unlike the previous rules, which required multiple-supplier frameworks to include at least three providers, it is now permissible to have just two providers. The framework agreement will establish the objective criteria that will apply under the framework, for call-off by direct award, mini-competition or a combination thereof.

Can a multi-provider framework include a term that allows a direct award call-off to one provider i.e. no mini-competition?

Yes. Where the terms laid down in the framework agreement set out all the terms governing the provision of the specific requirement, and the terms or procurement documents set out the objective conditions for determining which of the economic operators should perform the contract, the authority can award the call-off without reopening competition. The Regulations do not specify how this should be done, but the mechanism used should comply with general Treaty principles including transparency and non-discrimination.

Do the award criteria used for awarding the framework agreement have to be the same for mini-competitions?

No. The award criteria used for mini-competitions need not be the same as those applied in the award of the framework agreement itself. The contracting authority should award the call-off to the provider which has submitted the best tender on the basis of the award criteria set out in the framework agreement focusing on the particular requirement. Contracting authorities must make it clear in the procurement documentation the criteria to be used for awarding call-off contracts.

Do we have to observe a standstill period before we enter into the framework agreement or after a mini-competition?

The standstill period applies when you set up a framework agreement. However, there is no mandatory standstill period for a call-off contract under a framework.

ANNEX 3

THE PUBLIC CONTRACTS REGULATIONS 2015

&

THE UTILITIES CONTRACTS REGULATIONS 2016

DYNAMIC PURCHASING SYSTEMS

(A Crown Commercial Services Publication)

OVERVIEW

What is the Dynamic Purchasing System?

The Dynamic Purchasing System (DPS) is a procedure available for contracts for works, services and goods commonly available on the market. As a procurement tool, it has some aspects that are similar to an electronic framework agreement, but where new suppliers can join at any time. However, it has its own specific set of requirements. It is to be run as a completely electronic process, and should be set up using the restricted procedure and some other conditions (as set out in Regulation 34 of the Public Contracts Regulations 2015).

Contracting authorities, including central purchasing bodies, may set up a DPS. The DPS should be set up for identified types of requirement, which may be divided into categories of products, works or services.

The DPS is a two-stage process. First, in the initial setup stage, all suppliers⁸ who meet the selection criteria and are not excluded must be admitted to the DPS. Contracting authorities must not impose any limit on the number of suppliers that may join a DPS. Unlike framework agreements, suppliers can also apply to join the DPS at any point during its lifetime. Individual contracts are awarded during the second stage. In this stage, the authority invites all suppliers on the DPS (or the relevant category within the DPS) to bid for the specific contract. The new directive and Regulations update the existing DPS rules, as discussed below.

Why is this helpful / necessary?

The DPS can streamline procurement for both suppliers and authorities; suppliers don't have to demonstrate suitability and capability every time they wish to compete for a public sector contract and the award of individual tenders can be quicker than under some other procedures. The DPS is more flexible in some respects than frameworks, particularly as suppliers may join it at any time during its period of validity, meaning that suppliers are not locked out for the duration as they are with traditional frameworks. However the DPS under the old rules was rather cumbersome, so it was little-used either in the UK or in other member States. The new rules provide additional flexibility.

What has changed?

The basic principles remain from the old DPS, but there are several significant changes. Suppliers no longer have to submit an "indicative tender" with their request to join the DPS. The old obligation for authorities to publish a further simplified advertisement in the OJEU each time they wish to award a contract under a DPS no longer applies. The default four-year limit on the duration of a DPS has been removed. These improvements make the DPS significantly more useable and useful.

Which rules do I need to refer to?

Regulation 34 of the PCR 2015 sets out the rules on Dynamic Purchasing Systems. Regulation 34(5) states that in order to procure under a DPS, contracting authorities should follow the rules of the restricted procedure, and subject to the provisions of clause 34.

⁸ For convenience "supplier" is used in this note to include any economic operator

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Therefore, Regulations that apply to the Restricted Procedure, and to procedures generally, apply to the DPS, except where regulation 34 specifically alters or dis-applies them.

The corresponding provision in the Utilities Contracts Regulations is Regulation 52. It should be noted that in Regulation 52 (25) – (27) covering means of proof, cross references are made to relevant provisions of the PCR 2015.

KEY POINTS

Stage 1: Establishing the DPS and adding additional suppliers

To set up a DPS, a contracting authority must place a call for competition in OJEU to make known the intention to establish a DPS, and suppliers must be allowed at least 30 days to respond. (As with other procedures, sub-central bodies may use a Prior Information Notice to make known their intention). This initial DPS set-up phase only covers the exclusion and selection criteria, as used in other procedures, and as set out in Regulations 57-64 of the PCR 2015. The OJEU contract notice should specify the nature of the requirements and the approximate quantities or values envisaged.

As with other procedures, the procurement documents should be made freely available electronically from the date of the advert. These procurement documents must remain available electronically throughout the duration of the DPS.

A DPS can be divided into categories of works services or goods, which are objectively defined on the basis of characteristics of the procurement to be undertaken under the category. The characteristics used to define a group may include size of contract or geographical area of contract delivery.

If the DPS is divided into categories, the selection requirements for each category should be appropriate to that category, and may vary between categories. In accordance with Regulation 59, suppliers should “self-certify” their compliance with the selection requirements, and confirm that none of the grounds for exclusion apply, in order to gain admittance to the DPS. Normally (subject to Regulation 59(8)), only suppliers who win contracts under the DPS should be expected to provide documentary evidence of their status (consistent with other procedures).

This is also subject to the requirement of Regulation 59(11), so authorities should not request supporting documents where they already hold them or can obtain relevant information from a national database. Where a supplier has already submitted documents under a previous contract (DPS or indeed otherwise) it should be asked to confirm these are still applicable, and only provide new documents as preceding ones expire, or circumstances change. Where CPBs set up DPSs It would be sensible for the CPB to hold information about the evidence submitted, and make this available to its own customers.

All suppliers who meet and pass the exclusion and selection criteria must be admitted to the DPS and/or the relevant categories within it.

Suppliers may join the DPS at any point during its validity if they satisfy the selection requirements, and none of the grounds for exclusion apply. The authority is required to evaluate these suppliers’ requests within 10 working days of receipt; this may be extended to 15 days if justified, for example, by the need to examine documents or to verify whether the selection criteria have been met (examination documents or other verification should not be the default, and only used if necessary for the proper conduct of the process; as noted as only the winning bidder should normally have to submit documents).

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Contracting authorities may provide for award of contracts under a DPS on the basis of updated electronic catalogues, provided that the authority establishes the technical specification and format for the catalogue; supplier's requests to participate should be accompanied by a catalogue.

Stage 2: Awarding specific contracts using the DPS

Once the DPS is set up, an authority may award specific contracts using a DPS that they are entitled to use by inviting all suppliers admitted to the relevant category to bid, in accordance with regulation 54. As with a framework, the award criteria to be used for the award of individual contracts are to be set out in the original contract notice⁹. These criteria may be "formulated more precisely" for specific contracts, as set out in the invitation to tender for the specific contract.

The award process and permissible award criteria are consistent with those for other procedures; the minimum timescale for return of tenders is 10 days. Where the contracting authority is a sub-central body, this time limit can be reduced by mutual agreement between the contracting authority and all suppliers in the relevant DPS / category.

The authority may choose to require that tenders for a specific contract comprise or include electronic catalogues, adapted to the specific requirement, in which case the authority should have asked the suppliers request to participate to be accompanied by a catalogue as mentioned above.

There is no obligation to undertake a "standstill" period, although there may be some benefits in doing so (see under FAQ section below).

The DPS is to be undertaken as a wholly electronic procedure, in accordance with Regulation 22 (1) to (7) and (11) to (20). Unlike other procedures there is no derogation to postpone the electronic requirements, so this requirement is in force from the date of the new Regulations. However where authorities already use an e-procurement solution it may well be that this can be used or adapted for a DPS; authorities may wish to discuss with their e-procurement solution or service provider. The requirement for an electronic procedure does not prevent "human" evaluation of tenders received under a DPS.

There is no requirement to submit any form of award notice to OJEU following the setting up of the DPS, or when new suppliers are added to the DPS. There *is* a requirement to publish contract award notices (which must be sent to the Publications Office within 30 days of award) for specific contracts awarded under the DPS. However, authorities can choose to group DPS contract award notices on a quarterly basis, which must be sent within 30 days (after) the end of each quarter. Authorities should also abide by the requirements for publication on Contracts Finder about contracts awarded, as explained under Procurement Policy Note 03/15;

See <https://www.gov.uk/government/publications/procurement-policy-note-0315-reforms-to-make-public-procurement-more-accessible-to-smes>

A DPS may be set up by central purchasing bodies, to undertake centralised purchases by the CPB itself, and / or for the CPB's "customers" to compete contracts.

Frequently Asked Questions

General nature and use of DPS

⁹ Or in the invitation to confirm interest where a Prior Information Notice was used for the original advertisement.

Q. The DPS is to be used for “commonly used purchases...generally available on the market”. What does this mean?

The rules do not specify how this should be interpreted. It is likely to depend on the specific type of goods, works or services covered by the DPS. The DPS will normally be suitable for largely “off-the-shelf” requirements which can be closely specified in advance. One-off, or heavily bespoke and / or highly complex requirements are unlikely to be suitable

Q. Are there any restrictions on the number or type of category into which a DPS may be divided?

No restrictions are specified in the rules; the regulations require that categories are objectively defined on the basis of the characteristics of the procurement to be undertaken. The rules state that these characteristics may include the maximum size of contract or geographical area of contract performance. However other characteristics are not excluded, for example the nature or scope of the deliverables might be appropriate. The authority will have to make its decision based on the specifics of its requirements. Early market engagement may be helpful in identifying suitable categories. Of course categories will need to ensure compliance with Treaty principles; so it would not be permissible to have different categories for different sizes or geographical locations of *suppliers*.

Q. Is there a time limit on how long a DPS can operate? And is there any flexibility?

The “period of validity” must be stated on the original OJEU notice; but the Regulations indicate that the period can be later amended (extended, shortened, terminated) subject to notification on the relevant OJEU standard form. This provides useful flexibility if the authority’s circumstances change, or developments in technology, markets, etc. mean the DPS as originally set-up outlives its usefulness. There is now no specific maximum duration of a DPS. Any changes to the period of validity of a DPS should comply with relevant Treaty principles.

Q. What is a suitable duration for a DPS?

The authority must make its own decision based on its needs and understanding of the market. Early market engagement should help provide insights. A longer-running DPS will reduce the need to re-compete, but if it is too long the DPS may become obsolete if the authority’s circumstances or markets change. As noted above the authority may be able to lengthen or shorten the duration if necessary.

Q. Does the DPS encourage SME access to public contracts?

As with all procedures, the suitability for SMEs depends more on the authority’s procurement decisions than the particular rules which apply to the process. However the DPS has some features which can potentially encourage SMEs. The selection stage is potentially less onerous, as the supplier only has to complete this stage on entry to the DPS (and thereafter periodically reconfirm its status) instead of having to do so separately for all procurements. As the DPS is open to suppliers throughout its duration, new start-ups, or businesses that wish to expand into new public sector markets, will not be frozen out of the market.

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The division of DPS into categories by type of requirement, size of contract, or geographical place of delivery, could be arranged to ensure that niche suppliers and SMEs have maximum opportunity to compete.

Q. Is it permissible to have different terms and conditions for contracts under different categories of a DPS?

The rules do not govern the terms of the contracts awarded under a DPS. It would not be contrary to the rules to have different terms and conditions for contracts awarded under different categories of a DPS provided these complied with the Treaty principles of transparency, equal treatment and proportionality. There should be objective reasons why different terms and conditions are appropriate for different categories. The terms and conditions should be appropriate to contract for “commonly use purchases... available on the market” (so contracts designed for large bespoke requirements, for example, would not be appropriate).

In all cases the intended terms and conditions should be included within the procurement documents made available when the DPS is first advertised.

Q. Can suppliers be required to sign-up to the standard contractual terms and conditions of the authority setting up the DPS as part of the initial application process?

The authority can make clear that suppliers will be required to accept the terms and conditions of the authority setting up the DPS when bidding for contracts under the DPS.

Q. Does the “standstill” period apply to setting up the DPS?

There is no obligation to hold a standstill before admitting suppliers and commencing the DPS. And as suppliers may apply (or reapply if previously not accepted) at any time during the currency of the DPS, a standstill at initial set up-would be of little value.
Suppliers joining a DPS

Q. Do suppliers need to submit an “indicative tender” with their initial application?

No; this requirement in the old rules has been removed from the new DPS.

Q. If a DPS is divided into categories, may a supplier apply for more than one category?

Yes, a supplier may apply for as many categories as it wishes.

Q, Can we limit the number of suppliers on the DPS or in any categories under the DPS?

No; any and all suppliers who pass the exclusion criteria and meet the selection criteria must be admitted to the DPS [category].

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Q. Can we set the selection criteria at a high level, intended to limit the number of successful applicants?

No. The selection criteria and pass marks should be proportionate and objectively justifiable according to the requirements to be delivered in the DPS / category. Unnecessary or overly-onerous requirements meant to limit the number of suppliers would breach proportionality and equal treatment, would be likely to discourage SMEs, and would tend to reduce competition.

Q. Is it permissible to have different selection criteria for different categories under the DPS?

Yes; where a dynamic purchasing system is divided into categories; the contracting authority should apply selection criteria that are proportionate and relevant to the characteristics of the category concerned.

It is possible that a supplier could pass the selection stage for, and be admitted to, one or several categories but not to others.

Q. If a supplier fails the exclusion or selection stage, can it reapply later?

Yes.

If the supplier had failed the exclusion stage, it could reapply if the mandatory or discretionary exclusionary periods had ended, or if the supplier had self-cleaned.

If the supplier did not meet selection criteria, it could reapply if its circumstances changed, for example if it had newly available skills, experience, or if something else which would change its answers to the selection criteria had occurred.

Q. If a supplier is admitted, is it obliged to bid for any contracts procured under the DPS?

No.

Q. Can a supplier be deselected from a DPS?

A supplier's initial admission to the DPS should normally be based on self-certification that it passes the exclusion criteria and meets the selection requirements. In similar manner to other procedures, the winning bidder for a contract under a DPS should be asked to provide confirmatory evidence before award of contract (unless previously submitted as discussed above). Please see separate guidance on "selection and award" for further information on those rules.

If a supplier ceases to meet the original exclusion or selection criteria during the course of the DPS it is likely that it could be excluded (indeed if it fails one of the mandatory exclusion grounds the authority will be *required* to remove the supplier).

The frequency of updates is for the authority to decide, but at least an annual update might be appropriate. Authorities could also require suppliers to confirm that their exclusion and selection status is not changed before the award of each contract.

It would *not* be permissible to remove or exclude a supplier from a DPS because the supplier had not chosen to bid for any contracts under the DPS, or because the supplier had bid but was unsuccessful in all its bids.

Q. Can a supplier be excluded for poor performance on contracts under the DPS?

Poor performance on prior public or utilities contracts which have led to contract termination, damages or other comparable sanctions are now grounds for discretionary exclusion. (Regulation 57(8)(g)). Therefore poor performance on previous contracts under the DPS which had led to sanctions could be used to exclude the supplier from the same, and other, DPSs in future.

As with any other exclusion for poor performance, this must be based on objective failings which led to sanctions; subjective assessment of a supplier's attitude, aptitude, etc. must not be used.

If a DPS is set up by a CPB for use by other contracting authorities, the decision on whether to exclude a supplier should rest with the CPB.

Q. Can a supplier be deselected from one or more categories but not others?

In principle, yes, if the supplier ceases to meet the selection criteria for some categories but remains compliant with all the criteria for other categories.

If a supplier breaches a mandatory exclusion ground during the course of the DPS, he must of course be excluded from the whole DPS. And most of the discretionary exclusion grounds are unlikely to be category-specific.

However, if a supplier had evinced poor performance in contracts under some categories but not others, although it would be permissible to exclude it from the whole DPS, depending on the case, it might be more proportionate and appropriate to only remove it from the problematic categories.

Authorities will need to make their own case-specific judgements, and treat all suppliers equally.

Q. How long do we have to complete the assessment of new applicants?

Regulation 34(16) states that contracting authorities must finalise their evaluation of new applicants (i.e. applications which are received during the period of validity of the DPS) within 10 days of receipt. This may be prolonged to 15 working days in individual cases where this can be justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met. Contracting authorities are under a clear duty to meet these timescales, and should ensure that systems and resources are in place to meet them.

These rules also apply to the initial evaluation of applicants when the DPS is set up. However, as long as the invitation to tender for the first specific contract under the Dynamic Purchasing System has not been sent, the period may be extended provided that no invitation to tender is issued during the extended evaluation period. If initial evaluation of tenders takes additional time, it is therefore possible to delay the start of the DPS to provide further time for evaluation of applicants.

Individual contract award under a DPS

Q. Do I have to run a competition for every requirement under a DPS? Or can the DPS be used for “direct awards”, perhaps for low-value contracts?

The rules state that each requirement under a DPS must be competed; all suppliers under the DPS or the relevant category must be invited to bid. “Single tender” is not permitted (unless only one eligible supplier has applied for the category), and there is no derogation for low-value contracts.

This reflects the nature of the DPS; admission to the system only requires suppliers to demonstrate their suitability, ability, and capability to deliver the type of requirement in the DPS or category. (There is no requirement to submit any type of tender as part of the application for admission). Therefore the decision on the best value-for-money offering can only be decided at the tender stage for each individual requirement, and equal treatment requires that all suppliers on the DPS [category] have the opportunity to bid.

The European Commission regards impermissible direct awards as the worst type of breach of the procurement rules and Treaty principles, and would probably take legal action, particularly if there was systemic use of direct awards under a DPS. Aggrieved suppliers would also be able to take action under the Remedies rules.

The 10-day minimum for return of tenders (including if applicable completion of a catalogue) in a competition under a DPS is substantially shorter than the total procurement process-time for the other procedures under the directive. As the DPS is intended for commonly used purchases generally available on the market, and must be an electronic process, it should normally be possible to readily undertake a competition.

Q. If we cannot limit the number of suppliers on the DPS or in any category, how will we effectively resource and undertake competitions for individual contracts?

The DPS is no more onerous than the open procedure for individual contracts; in fact it will be easier, as authorities will only have to examine tenders and not assess supplier’s exclusion and selection status for every contract (although they may need to receive the supporting documents as confirmation, as discussed above). Authorities will also know how many suppliers are on the DPS [category] at any given point, so they will know the maximum number of potential responses in advance. As the DPS is for works, goods and services commonly available on the market, it may be possible in many cases to run relatively straightforward award evaluation criteria, which will help to keep resource requirements in check.

As with any procurement, contracting authorities should adopt the “Lean” approach. This will include early market engagement to understand the supplier base and the potential for the market to meet the authority’s needs. This will help the authority to decide the best division into categories. Focused categories may help limit the number of suppliers who apply for each category.

Authorities, including CPBs and authorities with access to DPSs and frameworks put in place by CPBs, will wish to consider the relative merits of DPSs, frameworks, and individual separate procurements, depending on the specific requirements and circumstances.

Q. Does the standstill period apply to contracts under the DPS?

The standstill period is not obligatory for individual contracts awarded under a DPS.

Q. Is there a clear requirement to provide a debrief report for unsuccessful bidders for individual contracts under a DPS?

The requirement for a “notice of decision” as required in the rules for most procedures is specifically **not** obligatory for award of contracts under a DPS. However authorities are not prohibited from either proactively providing feedback or offering to provide feedback on request, and CCS regards provision of feedback as being good practice. Where an authority provides or offers feedback it should treat all suppliers equally, make known its intention to do so in advance, and abide by good practice on providing feedback, as when providing feedback under procedures where it *is* obligatory.

Q. May individual contracts “overhang” the duration of the DPS itself?

This is not specifically covered in the rules, and given the flexibility of DPS duration, need not be a concern. However, the new rules specifically allow “overhang” in frameworks, and there is no reason to consider that proportionate overhang would be impermissible in DPS. As with all procedures, the DPS should not be used in a way which will distort or prevent competition.

Electronic processes and DPS

Q. The DPS must be a wholly electronic process; what does this mean?

The provision of Regulation 22, covering electronic communications, apply to the use of the DPS from the entry into force of the Regulations, and Regulation 34(2) states that a DPS must be a ‘completely electronic process.’ The derogation to postpone electronic communications does **not** apply to the DPS. Authorities which wish to use the DPS will therefore need to ensure that they have access to suitable IT systems which enable compliance with Regulation 22, (including the technical and security requirements in Regulation 22 (16)). As noted above, however, existing e-procurement solutions and services may be useable or adaptable for the DPS, as the requirements and processes are similar in principle to those in other procedures under the rules.

The specific derogations in Regulation 22 (8) to (10) for oral communication do not apply. As the DPS is for works, goods and services commonly available on the market, it is unlikely that the derogations for physical models, special formats or office equipment, or specific security requirements in Regulation 22(2) to (7), will normally be pertinent, although they apply where relevant. As mentioned activities not involving communication between the parties, such as tender evaluation, do not have to be electronic, although there is no prohibition on use of electronic evaluation tools.

Q. Can electronic auctions be used for the award of contracts under a DPS?

Yes, the rules explicitly allow the use of e-auctions in the award of contracts under a DPS, provided that the subject matter is suitable (including a requirement that the technical specification can be established with precision). All the other rules applicable to e-auctions also apply; see Regulation 35.

Electronic catalogues and DPS

Q. Can catalogues be used in the DPS?

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Yes, the authority may choose to allow or require the submission of electronic catalogues. These should meet the requirements for electronic communication in Regulation 22 and the provisions on e-catalogues in Regulation 36.

As with all use of catalogues under the public procurement rules, suppliers should not simply submit their general catalogues but should adapt the format and content to the specific requirements of the DPS.

Contracting authorities may require economic operators to submit an electronic catalogue as part of tender for a specific contract under a DPS. Authorities may also ask for submission of a catalogue with the initial request to participate. Please see separate guidance on e-communications for further details of the use of e-catalogues.

Q. If the request to participate in the DPS is accompanied by a catalogue, what should that catalogue contain?

The rules do not specify what the catalogue should contain. It should comply with the technical specifications and format specified by the authority, (having regard to Government policy on open standards), and the format and content are likely to depend on the nature of the works, goods or services to be procured. As it is not an indicative tender it is unlikely that it would need to contain detailed pricing information. Specific details of works, services or products and prices for each specific requirement will be completed at tender stage.

Q. If suppliers have recently completed catalogues can these be used for additional contracts, without further updating, and without going to tender again?

There is no provision to do so under the rules. The rules envisage that each supplier will be advised every time an authority wishes to award a tender, and invited to complete / update its catalogue and confirm whether it wishes to participate. In practice, in some cases, it may be that the supplier will be able to simply confirm that a previous catalogue still stands unchanged.