



# **LONDON BOROUGH OF BRENT**

## **CONTRACT PROCUREMENT AND MANAGEMENT GUIDELINES**

# Contents

These Contract Procurement and Management Guidelines set out the requirements of legislation and the Council's own rules. You must ensure that you comply with these requirements in order to avoid the Council acting illegally. These requirements are identified by **shading** throughout the Guidelines. The Guidelines also provide important guidance that you should follow except in exceptional circumstances. Each Section is divided into two parts, an overview followed by detailed guidance. In order to assist you in finding your way around the guidelines each part in each section is numbered separately. This numbering is shown at the footer on each page.

<b><u>Topics</u></b>	<b><u>Section</u></b>	<b><u>Page</u></b>
Introduction	<b>Section 1</b>	2
Terminology		10
Useful contacts		13
<b>Legal and Regulatory Framework</b>	<b>Section 2</b>	
Overview	<b>Part 1</b>	1
Detail	<b>Part 2</b>	1
1. What is a Contract?		1
2. What is a Grant?		2
3. Are Service Level Agreements Contracts?		2
4. Special Types of Contracts		2
5. Legal Entities and Capacity		5
6. Powers to Contract		6
7. Constraints on Powers		7
8. Exercise of Powers in Brent		8
9. General Principles That Should Be Taken On Board In Letting All Contracts		12
10. Best Value		16
11. TUPE		17
12. Freedom of Information Act 2000		17
13. Contracts Exempt from Standing Orders		17
14. Contract value		18
15. Which Decisions in Relation to Contracts Cannot be Taken by Officers?		21
16. Split of functions		21

17.	Is award of a Contract an Executive function?	22
18.	Key Decisions	22
19.	Forward Plan	23
20.	Call in	23
21.	Decision Making - Reports	23
22.	Certification of Contracts	25

## **Procurement without Formal Tendering**

## **Section 3**

Overview	<b>Part 1</b>	1
Detail	<b>Part 2</b>	1
1.	Why Tender?	1
2.	Are There Any Circumstances When I May Not Need to Tender?	2
3.	What do I Need to Do If I am Not Required to Tender and Do not Decide to Tender Anyway?	4
4.	The Process of Obtaining Quotes	7
5.	Health and Safety Issues in Contracts Not Put Out to Tender	9
6.	Good Practice Tips	12
7.	Checklists	13

## **Formal Tendering**

## **Section 4**

Overview	<b>Part 1</b>	1
Detail	<b>Part 2</b>	1

## **What You Should Do In Preparation For a Tendering Process**

## **Section 4A**

1.	Consider Application of Standing Orders and Legislation	10
2.	Decide on the best tendering approach	12
3.	Assess the Market	15
4.	Undertake any Appropriate Consultation	16
5.	Resources and Budget	21
6.	Risk Management	24
7.	Workforce Issues	25
8.	Trade Union and Employee Involvement	26
9.	Equality and Diversity Issues	27
9A.	Environment and Sustainability Issues	28
10.	Prepare Project Plan	29

**Putting Together a Tender Pack****Section 4B**

1.	General	1
2.	Invitations to Tender	1
3.	Preparing A Specification	5
3.1	Introduction	5
3.2	What Is A Specification?	5
3.3	What Makes An Effective Specification?	5
3.4	Development Of The Specification	7
3.5	Defining Your Requirement	9
3.6	Addressing Equalities Issues	13
3.7	Health and Safety	14
3.7A	Environment and Sustainability	14
3.8	Freedom of Information and Information Generally	15
3.9	Specifying Performance Requirements	16
3.10	Charging Methods	17
3.11	Pricing Document	19
3.12	Discounts/Profit Sharing	20
3.13	Pricing Adjustments	20
3.14	Credit Arrangements	21
3.15	Contract Conditions/Specification Interaction	21
3.16	Set out below is an example layout of a specification	22
4.	Instructions to Tenderer	23
5.	Form of Tender	24
6.	Terms and Conditions	24
7.	Finalising Your Tender Pack	25

**The Tendering Process****Section 4C**

1.	Introduction	1
2.	Open Procedure/Single stage Tender	1
3.	Restricted Procedure/Two stage tender	3
4.	Competitive Dialogue Procedure	4
5.	Negotiated Procedure	4
6.	Shorter time limits	7
7.	Advertising	7
8.	Pre qualification questionnaire and shortlisting	10
9.	Dealing with issues before tenders are submitted	13
10.	Receipt and opening of tenders	13
11.	Evaluation of Tenders	14

13.	The Other Contracting Party	18
14.	Contract Award	19

## **Contract Management and Termination**

Overview

Detail

## **Section 5**

### **Part 1**

### **Part 2**

### **Contract Management**

1.	Introduction	1
2	Why Manage?	1
3	Monitoring Methods	2
4.	Monitoring Equal Opportunities Issues	8
5.	Monitoring Health & Safety	9
5A.	Monitoring Environmental Performance	10
6	Monitoring Compliance With The Code Of Practice On Workforce Matters	11
7.	Selecting Monitoring Method	11
8.	Contract Performance	12
9.	Managing Changes To The Contract	12
10.	Practical Hints For Managing The Contract	15

### **Default in Performance**

11.	General	15
12.	Default Payments	17
13.	Incentive Systems	17
14.	Resolving Disputes	18
15.	Termination Clauses	19
16.	Default in Race Equality Requirements	19

### **Planning for the End of Your Contract**

17.	Introduction	20
18.	Issues to Consider	20
19.	Premature Termination	22

## **Works Contracts using the JCT (Section 6 to follow)**

## **Section 6**

## APPENDICES

- 1 Legal Services Contracts Instruction Sheet
- 2 European Law
- 3 Grants and Contracts
- 4 Other Forms of Contracting
- 5 Extract from Part 4 of the Constitution
- 6 Best Value
- 7 TUPE Guidance for Managers
- 8 Key Decisions and the Forward Plan
- 9 Report Writing
- 10 Health and Safety Questions for Low Value Contracts
- 11 Checklists:
  - (a) What to Consider When Deciding Whether it is Necessary to Undertake a Tendering Exercise
  - (b) What to Look for When Considering Your Service Providers' Standard Terms and Conditions
  - (c) Terms and Conditions in Supplies Contracts
- 12 Equalities in Procurement
- 13 Capital and Revenue
- 14 Risk Management
- 15 Performance Bonds and Parent Company Guarantees
- 16 Indemnity and Insurance
- 17 Evaluation of Race Equality
- 18 Financial Assessment, Health and Safety Appraisal and Quality Assurance Appraisal
- 19 Pre Tender and Post Tender Negotiations
- 20 Guidance on Tender Receipt and Opening
- 21 Data Protection

22	Freedom Of Information Act 2000
23	Evaluation of responses to Pre-Qualification Questionnaires
24	Evaluation of tenders
25	Contract Standstill Period

## Precedents

- 1(a)** Authority to Tender Report Framework
- 1(b)** Award Report Framework
- 2(a)** Pre-Qualification Questionnaire (Long Form)
- 2(b)** Pre-Qualification Questionnaire (Short Form)
- 3** Covering Letter for Invitations to Tender
- 4(a)** Instructions to Tenderers (Services)
- 4(b)** Instructions to Tenderers (Supplies)
- 5** Form of Tender (Services and Supplies)
- 6(a)** Explanatory Note
- 6(b)** Performance Bond Undertaking
- 6(c)** Performance Bond
- 7(a)** Explanatory Note
- 7(b)** Parent Company Guarantee Undertaking
- 7(c)** Parent Company Guarantee
- 8** Service Contract (To Follow)
- 8(b)** Service Contract (2)
- 9** Acceptance letter
- 10** TUPE Precedents:
  - (a) Letter to individual staff about tender process
  - (b) Confidentiality undertaking
  - (c) Letter to Unions
  - (d) Letter to individual staff about transfer
  - (e) Meeting checklist following award
  - (f) Disclosure checklist for transfer on internalisation of service
- 11(a)** Letter to Successful Tenderer
- 11(b)** Letter to Unsuccessful Tenderer
- 11(c)** Letter to Unsuccessful Participant
- 11(d)** Letter Additional Debriefing
- 12** Contractor Workforce Profile Form



# **SECTION 1**

## **INTRODUCTION**

# INTRODUCTION

## Why Is Good Procurement Important?

Good procurement is important because it enables you to achieve clarity about what you and, where relevant, the ultimate customer, want/need and to obtain the best contractor/supplier to meet that need. Good procurement should also enable you to achieve the best balance between cost and quality/reliability of provision. In addition, a good procurement process will ensure transparency and probity in contract letting and result in legal compliance with no fear of challenge.

## What Are These Guidelines For?

The aim of these good practice guidelines is to assist you in achieving good procurement and the benefits that brings.

These guidelines are mainly intended as an aid to officers who have some background or previous involvement in tendering and purchasing processes. If you are going to use these guidelines to assist you in any procurement project, you should have received appropriate training and, particularly if this is your first project of this type, you should seek appropriate support (see Training and Support below).

## Scope of These Guidelines

These guidelines are primarily aimed at contracts which due to their value are required to be tendered under the Council's Standing Orders using traditional forms of procurement. However much of the content will be applicable to other forms of procurement and contracts below this amount (currently £139,893), especially good practice concerning specifications and monitoring, transfer of undertakings legislation (TUPE) and there is a section concerned solely with smaller contracts/purchasing. There is also an Appendix which contains some guidance in respect of grant arrangements.

Appendix 4 provides further information about framework agreements – these are agreements with contractors setting out terms and conditions under which specific purchases (call-offs) may be made throughout the life of the agreement. They are particularly useful where repeat purchases will be made but where the overall quantity of the supplies, services or works cannot accurately determined, e.g. for stationery.

As well as considering traditional methods of procurement, you should consider whether your objectives could be more readily achieved through working in partnership with the Council's local partners or potential suppliers. If you wish to enter into a partnership agreement or find that the processes described in these guidelines constrain your proposed approach please contact the Procurement Strategy team and Legal Services who will discuss with you whether an alternative

approach is lawful or whether your contract/transaction can be repackaged so that it is.

## **Standing Orders/Procurement Legislation**

These guidelines must be read in conjunction with Brent's Contract Standing Orders and Financial Regulations as well as any relevant guidance from Central Government.

It is important that you contact one of the Contract Lawyers within Legal Services before starting any substantial procurement project and that you contact the Procurement Strategy & Risk Management Unit. This early contact will help you ensure that your tendering approach and documentation comply with the Council's Standing Orders and current Procurement Legislation and that Legal Services and Procurement Strategy & Risk Management Unit are in a position to assist you at the appropriate time.

## **Decision Making Concerning Contracts**

Under the Council's Constitution, decision making concerning contracts is generally delegated to the relevant Service Area or Corporate Directors, who may authorise others to exercise their powers on their behalf. Any such authorisation should be in writing. In the case of High Value Contracts the Executive (or in limited cases, the General Purposes Committee) must approve the tendering process and other factors at the start of the procurement process and is responsible for agreeing the contract award. Details of this are set out in Contract Standing Orders in the Constitution and later on in these guidelines. High Value contracts are contracts for services or supplies valued at more than £500k over the lifetime of the contract or contracts for works valued at over £1m.

The Corporate Management Team agreed a council-wide approach to all procurement projects in December 2004. As a result the following procedures came into effect from 1<sup>st</sup> April 2005:

Details of all anticipated procurement of goods or services with a budget of £50,000 or above must be channelled through the Procurement and Risk Management (P&RM) team for initial assessment as to the required level of project management, support and advice. Procurement should be advised of anticipated procurement work at the very earliest stage, i.e. as soon as you become aware that there will be a need to procure goods or services or re-tender or renew a contract and well in advance of any requirement to publish mandatory procurement notices. After the initial assessment by the P&RM team (contact details provided below) where appropriate, and agreed by both parties, project support work will be carried out by P&RM team members or the Management Services Team. Information regarding the range of procurement services offered by the P&RM department is shown below. Project based work is chargeable but it is anticipated that taking a project based approach to procurement activities will result in a reduction in cost or enhanced contracted

service levels to the service area wherever possible. Taking a council-wide view of our procurement expenditure will also help service areas reap the benefits of economies of scale, enhance your contract monitoring and management opportunities and ensure that all of Brent's procurement complies with legislative requirements and best practice guidance. It is not possible to provide detailed figures relating to cost as this will vary considerably depending upon the size of the project and the level of procurement support. A projected cost of procurement support will be provided at the start of each project and discussed with the client. Hourly charges for support from Procurement & Risk Management, Legal Services, and Management Services are detailed in the following pages.

## **Training**

Internal training is provided, based on the contents of these guidelines. For further information on training, contact the Procurement Strategy & Risk Management Unit. .

## **SUPPORT FOR PROCUREMENT PROJECTS**

Support is available from a number of internal service units as detailed below.

### **Services provided by the Procurement Strategy & Risk Management Unit:**

#### **A) General Procurement advice**

- General procurement guidance regarding most suitable approach.
- Advice relating to financial regulations, standing orders, contract tendering.
- Troubleshooting.

#### **B) Medium Level Procurement Project Management**

- Discuss and agree on project brief, appropriate tendering approach and timetable.
- Produce a simple project plan, define stage boundaries, updating and co-ordinating actions as necessary.
- Help identify any problems/issues and assist in solving them.
- Undertake research and collection of information to inform the development of the specification.
- Liaise with Legal Services and arrange drafting of contract conditions, tendering instructions etc.
- Develop specification and consult.
- Draft OJEU Notice (if appropriate), adverts, questionnaire, letters etc.
- Place OJEU Notice if appropriate & advertise contract.
- Administer notification of interest from contractors, receive completed questionnaires.
- Facilitate evaluation of questionnaires, liaising with specialists.

- Design evaluation forms and facilitate Select List Panel – finalise Select List.
- Invite to tender.
- Facilitate tendering including dealing with queries.
- Design evaluation forms and facilitate Tender Evaluation Panel, define roles of panel members.
- Arrange and facilitate tender presentations/interviews where appropriate
- Maintain records and audit trail.
- Assist in developing monitoring/contract management approach.
- The Procurement & RM team can, if appropriate, assist in a variety of ways, from providing advice and guidance to “hands on” project management of a tendering process.

### C) Major Level Procurement Project Management

Some of the key activities in the management of a procurement project are shown below, broken down into project stages. All activities are undertaken by a project team comprising the key stakeholders, facilitated by procurement.

#### *Project Initiation*

- Define the outcome.
- Define critical success factors.
- Outline options and associated costs/benefits.
- Adopt processes or project management.
- Identify stakeholders.
- Define the project scope.
- Determine the project approach.
- Plan for management of risk.
- Plan for cost management.
- Identify dependencies with other projects.
- Produce a project plan.
- Develop SWOT analysis.
- Revisit scope.
- Define reporting arrangements.

#### *Running a Project*

- Drafting reports to Executive, placing required OJEU notices.
- Help with drafting specifications, contract terms and conditions.
- Agree team members and roles.
- Stage planning.
- Establish decision points (gateway review).
- Tender evaluation design and facilitation
- Implementing controls.

- Managing product delivery.
- Reporting against plans.
- Risk and incident management.
- Cost management.

#### *Closing a Project*

- Project reporting.
- Identify follow on actions.

#### *Project Review*

- Were anticipated benefits achieved?
- Identify barriers to success.
- Identify any additional achievements.
- Lessons learned.

#### D) Procurement Skills Development

- Project Management.
- Contract Management.
- Procurement Best Practice.

#### E) Expenditure Analysis

- Expenditure breakdown by service area.
- Identification of expenditure anomalies.
- Define areas of potential cost reduction.
- Eliminate areas of expenditure/supplier duplication.
- Provide trend analysis and expenditure forecast reports.

#### F) Market Research

- Service specific market knowledge.
- Industry best practice information.
- Private/public sector innovation.
- Public/Private sector benchmarking.
- Economic and market force analysis.

By utilising some or all of the services above you will free up resources, reduce overall procurement costs, raise procurement and contract management skills standards where required and contribute to service areas meeting their targets. In addition to informing the procurement team of any new projects please advise them of projects which are already underway – this will help in producing the first council-wide contracts register and forward contract plan.

Contact details:

Procurement Web Page: [Procurement & Risk Management](#)

Email: [corporate.procurement@brent.gov.uk](mailto:corporate.procurement@brent.gov.uk) (020) 8937 1626

The following hourly charges apply for procurement support and are effective from 1 April 2009:

Head of Procurement	£100
Deputy Head of Procurement	£90
Senior Category Manager	£80
Category Manager	£75
Procurement Consultant	£74
Procurement Analyst	£65
Procurement Officers	£45

Support from other officers:

## **Insurance**

Brent Insurance Management are a part of the Corporate Procurement Team and have responsibility for the day to day management of the Council's insurance arrangements which includes placing the external insurance covers, managing claims handling agents and external solicitors and managing internal self insurance cover. It is a one stop shop for all matters relating to insurance and is there to give advice on all matters concerning claims and insurance cover. Risk Management is also an important part of the remit and the Unit is there to advise on all matters relating to risk management including in relation to contracts.

Contact details:

Insurance Manager (020) 8937 1163

e.mail: [mailto:claims@brent.gov.uk](mailto:mailto:claims@brent.gov.uk)

Address: Room 5, Town Hall Annexe  
Forty Lane, Wembley Middlesex HA9 9HD

[Directions to Town Hall](#)

*Enquiries will receive a response within one working day.*

## **Legal Services**

Legal Services lawyers are available to assist you at all stages of the procurement process and it is particularly important that you contact them in respect of procurement of contracts valued at £139,893 or more either directly or through the Corporate Procurement Unit if you are seeking support from them. Legal Services

can assist with legal advice on your tendering approach and timetabling, preparing tender packs (including terms and conditions) and dealing with legal issues that arise during evaluation and award.

You must contact Legal Services in respect of contracts of £500k or more as they are required by Standing Orders to let you know if a legal representative will be on the evaluation panel and will need to be consulted on your report to members for approval of your process and eventual award of the contract. You must also consult them on any other reports you write to members about your contract or procurement process.

Legal Services is a Trading Unit and the following hourly charges apply from 1<sup>st</sup> April 2009

Head of Contracts Team	£101
Senior Contracts Lawyer	£99
Contracts Lawyer	£88

Please see Appendix 1 for a standard instruction form that can be used. Service standards are contained in the Service Level Agreement in place with each Service Area.

Please contact Commercial Legal team on (020) 8937 1329 if you need advice or assistance in respect of a contract or procurement process.

## **Management Services**

Management Services are part of the Council's Human Resources Unit and operate on a trading basis as the Council's internal Management Consultancy.

Consultancy Services' procurement support is for small/quick response assistance procurement projects (for contracts with a value of over £50,000 then the work must be referred to the Procurement Strategy & Risk Management Unit).. Services include:

- specification preparation.
- advertising tenders (but not OJEU Notices).
- co-ordination/administration of the tendering process; including drafting letters, answering queries etc.
- project management.
- tender evaluation design and facilitation.
- drafting committee reports.
- contract monitoring.

Management Services' current hourly charges are:



Senior Consultant	£75
Consultant	£60

Please contact Management Services on (020) 8937 6181 or email [Tim Flint](#) if you think you may need assistance.

### **Environmental Projects and Policy Team**

The Environmental Projects and Policy Team are part of the Environment and Culture Directorate and do not currently operate on a trading basis.

The procurement services on offer include:

- Advice on procurement options.
- The environmental assessment of draft contracts.
- Technical specification writing.
- The assessment of responses to the environmental PQQ questions.
- The assessment of tenders
- Contract monitoring.
- Environmental auditing.

Please contact: Environment Projects and Policy Officer on (020) 8937 5324

Head of Performance and Information (Environment) on (020) 8937 5305

## **TERMINOLOGY**

This section describes the meanings of certain key phrases used in these Guidelines.

### **What's Mandatory and What's Not**

These Guidelines set out the requirements of legislation and the Council's own rules. You must ensure that you comply with these requirements in order to avoid the Council acting illegally. These requirements are identified by **shading** throughout the Guidelines. The Guidelines also provide important guidance that you should follow except in exceptional circumstances.

### **Useful Terminology**

The **Aggregation** rules are part of the EU Regulations and are designed to prevent artificial packaging of contracts to avoid the application of those regulations.

The **Constitution** is a document adopted by Brent Council which sets out how the Council operates, how decisions are made and the procedures which are followed to ensure that these are efficient, transparent and accountable to local people.

The word **Contract** is used to refer to agreements which are legally enforceable. By comparison the word **Agreement** is used to refer to other types of agreements which are not legally enforceable. Examples of these are Grant Agreements and Service Level Agreements.

**Contract Notice** is used to describe the notice sent for publication in the Official Journal of the European Union (**OJEU**) to advertise contracts that are to be let under the **EU Regulations**. The notice was previously known as an **OJEC Notice** and is now also known as an **OJEU Notice**. The Contract Notice must include the relevant CPV references – see Appendix 2 Paragraph 6.8.

**The Council's Standing Orders** refers to all of Part 3 of the Constitution. This includes the Standing Orders relating to decision making by the Council, Standing Orders Relating to Staff and Contract Standing Orders.

**The Council** means the London Borough of Brent

**EU Regulations** mean the Public Contracts Regulations 2006 which implements the Public Procurement Directive 2004 of the European Parliament in the UK. The previously separate supply, works and services Regulations have been consolidated into a single set of Regulations. The aim was to simplify and modernise the Regulations to reflect current procurement methods (further background information on the EU Regulations is contained in Appendix 2).

**EU Legislation** is used more broadly to encompass not only the EU Regulations but also general Europe principles such as non-discrimination and transparency.

**Economic Operator** is a Services Provider, a Contractor or a Supplier. The Council will contract with a Services Provider for a public services contract, a Contractor for works contract or a Supplier for public supply contract. For purposes of the competitive dialogue procedure (to be discussed later), the term Candidates/Economic Operators will be used interchangeably.

The **Executive** is the part of the Council which is responsible for implementing the Council's Policy Framework and Budget. The Executive is made up of the Leader and nine councillors elected to the Executive by the Council.

The **General Purposes Committee** is the body which takes decisions about High Value Contracts which concern council functions for which the Executive is not responsible under the Constitution.

**Financial Regulations** are contained in Part 6 of the Constitution and set out the rules and procedure, which govern financial management and control within the Council.

The **Forward Plan** is a document prepared by the Democratic Services Manager on behalf of the Leader which contains details of all the matters likely to be the subject of Key Decisions to be taken by either the Executive or its Highways Committee or other committees or officers and may also include other important decision to be taken by the Council, its committees or officers over the next four months.

The term **Key Decision** is defined at [Section 2, Part 2, Paragraph 18](#)

**OJEU Notice** see [Contract Notice](#)

**Sustainability** is a term to describe the theory of working in ways that promote the needs of the economy, society and environment, without compromising one for the benefit of the other. The Economy is covered by best value, and ideas such as the most economically advantageous tender. Society is covered by equalities and diversity issues, health and safety, and contracts to meet the needs of the residents of Brent. The Environment is covered by the environmental assessment of medium and high level contracts and the inclusion of control and improvement measures.

The word **Tendering** is used throughout the Procurement Guidelines. In these Guidelines it refers to a process that is commenced by advertising in one local newspaper and one relevant trade journal or, in the case of contracts subject to the EU Regulations, the Official Journal of the European Union. Depending on the particular circumstances, the process followed then may be either a one stage (open procedure), two stage (restricted procedure) or negotiated.

**TUPE** refers to the Transfer of Undertakings (Protection of Employment) Regulations 1981 which is a domestic law that is based on a piece of EU legislation called the Acquired Rights Directive 1977. The Directive was revised in 1998 and a consolidated version adopted in 2001. The effect of TUPE is to preserve and protect

the employment rights of employees who are transferred from one employer to another. TUPE only applies when there is a transfer of an undertaking or part of an undertaking as a going concern.

A **PQQ** or **Pre Qualification Questionnaire** is the document used to assess whether the potential tenderers meet the Council's minimum requirements in terms of financial standing, technical capacity and technical expertise.

**USEFUL CONTACT NUMBERS** - Prefix (020) 8937**Legal Advice and Support**

Joint Head of Contracts Legal Team	1543
Joint Head of Contracts Legal Team	1378
Senior Contracts Lawyer	1542
Senior Employment Lawyer	4107
Senior Employment Lawyer	1311

**Procurement and Risk Management Consultancy Support**

Head of Procurement Strategy and Risk Management	1363
Deputy Head of Procurement	1281

**Management Services**

Senior Consultant	6181
Consultant	6180

**Insurance Advice**

Insurance Manager	1163
-------------------	------

**Financial Advice and Support**

Director of Finance and Corporate Resources	1424
---	------

**Health and Safety Advice**

Health & Safety Services Manager	5401
----------------------------------	------

**HR/TUPE Advice and Support**

Employee Relations Manager	1087
----------------------------	------

**Pensions Advice**

Pensions Manager	3157
------------------	------

# **SECTION 2**

## **LEGAL AND REGULATORY FRAMEWORK**

### **Part 1      Overview**

### **Part 2      Detail**

# LEGAL AND REGULATORY FRAMEWORK

## Part 1 - Overview

The purpose of this part is to provide a brief overview of Section 2 on the Legal and Regulatory Framework. You should consult the relevant paragraph(s) of the Section for further information and not rely solely on this overview.

### 1 What is the Arrangement?

When you are thinking about entering into any arrangement you need to consider what is the arrangement you are dealing with? It may be a contract (an enforceable agreement), a grant, a service level agreement or a partnering arrangement (which in these Guidelines we generally refer to as an agreement). Each has different advantages/disadvantages and responsibilities/liabilities [See Section 2, Part 2, paragraphs 1 to 4](#) for further information.

### 2 Powers to Enter into Contracts

It is also important to consider whether the parties to the contract or agreement are identifiable legal entities with the legal capacity to enter into the arrangements. This includes having the lawful power to do what the contract or arrangements set out, making sure that no restrictions and/or constraints apply and that the officer dealing with the matter has the proper authority to do so. [For High Value \(see below\) contracts the body with the proper authority will be the Executive or the General Purposes Committee, as applicable.](#) See [Section 2, Part 2, paragraphs 5 to 8](#) for further information.

### 3 General Principles

When letting all contracts you should take on board the following general principles and considerations:

- Transparency.
- Non-discrimination.
- Equal Treatment - Being fair.
- Good value for money (Best Value).
- Auditable Process - Keeping Records - limitation periods.
- Competent Contractor - Financial Standing.
- Contract value - [Aggregation](#).
- Terms and conditions.
- Risk - financial, legal, political, environment and insurance.
- Business Continuity planning

- Health and Safety.
- Environment and Sustainability.
- Staffing (are there any staff transferring from one contract to another - [TUPE](#))

See [Section 2, Part 2, Paragraphs 9 to 11](#) for further information.

#### **4 Exemptions from Standing Orders**

In a narrow set of circumstances some contracts may be exempt from the Council's Standing Orders (for example employment contracts and contracts relating to an interest in land). See [Section 2, Part 2, paragraph 13](#) for further information.

#### **5 Standing Orders, Rules and Regulations**

The Council's Standing Orders, Financial Regulations and the EU Regulations will apply to most contracts in varying degrees dependant on the value of the contract. For more information on valuing contracts see [Section 2, Part 2, paragraph 14](#).

The Council's Standing Orders set out three categories of contract value with different levels of competition in letting contracts:

- Low Value            between £20,000 and £156,442 - 3 quotes required and a record of the process.
- Medium Value        for services or supplies between £156,442 and £500,000 and for works between £150,000 and £1,000,000 there must be formal tendering (which must include advertising).
- High Value            for services or supplies exceeding £500,000 and for works exceeding £1,000,000 and PFI contracts there must be formal tendering (which must include advertising) and Executive or General Purposes Committee approval, as appropriate.

The EU Regulations apply where the contract value exceeds the following thresholds:

Works [£3,927,260](#) or above

- Services (Parts A & B)        [£156,442](#) or above
- Supplies                        [£156,442](#) or above

See [Section 2, Part 2, paragraph 13](#) and Appendix 2 for further information on Standing Orders and EU Regulations.

#### **6 Decision Making**

One of the fundamental changes brought about by the legislation underlying the Constitution is the statutory split of functions between the Executive and the Council as a whole. Most education, social services and housing functions are the responsibility of



the Executive but environment functions are more mixed, some are the responsibility of the Executive and some are council side functions.

All decisions taken at a meeting of the Executive or its committee are treated as Key Decisions and therefore must be included on the [Forward Plan](#). Officers may also make Key Decisions and in these circumstances it is necessary to consider whether the decision is within the definition of a Key Decision in the Constitution. Further information on the decision making process and report writing is provided at [Section 2, Part 2, paragraphs 18 to 21](#).

# LEGAL AND REGULATORY FRAMEWORK

## Part 2 - Detail

### 1 What is a Contract?

- 1.1 A contract is an agreement which gives rise to obligations which may be enforced or are recognised by law. Therefore, a contract is enforceable through the courts. Contracts can be made both orally and in writing. However, it is always better to have contracts in writing so that all parties are certain of their rights and responsibilities.
- 1.2 There are at least six elements of a contract, which are inter-related. These are:
- (a) An offer to provide services and/or goods and/or works.
  - (b) An acceptance of the offer.
  - (c) The parties to the contract are legal entities and have the capacity to enter into a contract – for example a person (18 years old and over), a local authority or a company.
  - (d) The parties intend to create legal relations. In other words there is an expectation by the parties that they will be bound by the contract and either party may enforce it, for example, through the courts.
  - (e) There is certainty between the parties about the duties and obligations (terms and conditions) of the agreement.
  - (f) There is consideration. In other words something promised in exchange for the services and/or goods and/or works. This is frequently money.
- 1.3 Contracts covered by these guidelines may be for supplies, services or works or a combination of these. There are other kinds of contracts but these are not dealt with in these guidelines. It is important to remember that arrangements with consultants are generally contracts for services and are therefore subject to the requirements of Standing Orders and the EU Regulations.

## **2     What is a Grant?**

- 2.1 A grant is a sum of money provided for a particular purpose and/or as a gift. There is usually no consideration from the person/body being given the grant. This means that generally the person/body receiving the grant cannot enforce it through the courts.
- 2.2 A grant may have conditions on how it is spent and/or when the money must be spent by. Further, one of the key features of a grant is that in principle the person making the grant can decide to discontinue it at any time. There is no guarantee that the money will be available in future. Grant money may be used to fund a service and building work or supplies contract.
- 2.3 It is important to note that the distinctions between what is a grant and what is a contract may become blurred if extensive conditions are placed on the giving of grant money.
- 2.4 Please see Appendix 3 for further consideration of grants, how they differ from contracts and how you might move from one arrangement to the other.

## **3     Are Service Level Agreements Contracts?**

- 3.1 Service Level Agreements (SLAs) are internal agreements within one organisation/legal entity, for example agreements between different departments within the Council. These are not contracts as although the parties to the SLA may be separate service units they are still part of the Council and the Council cannot enter into a contract with itself. Sometimes documents described as SLA's are used in connection with the giving of grants.
- 3.2 SLAs are a useful way of setting out the level of service that is expected to be provided/received. However, it is important to remember that if a SLA is breached it is not possible to seek a remedy through the courts, since an organisation cannot sue itself and grant agreements are not generally enforceable in this way.
- 3.3 Contracts are sometimes wrongly described as SLA, but calling something an SLA does not take the contract outside the requirements of Standing Orders and the EU Regulations.

## **4     Special Types of Contracts**

- 4.1 These Guidelines are primarily focused on traditional methods of procurement i.e. tendering. Whilst this remains the most common method of procurement there is an increasing trend towards alternative approaches such as partnering.. If you wish to use any of these alternative approaches it is important that you contact Legal Services or the Procurement Strategy and Risk Management Unit for advice as early as possible. The description of the legal requirements in these Guidelines is a summary only. A more detailed analysis of the application of the EU Regulations to your transaction may reveal an alternative approach more in keeping with the process you had envisaged undertaking. It may also be that minor changes to your proposals will give you more flexibility under the EU Regulations.

### Partnering and Partnerships

- 4.2 In recent years there has been a lot more emphasis on working together with contractors in a more co-operative way to achieve a clearly defined and agreed set of mutual goals. This is often loosely termed as 'partnering'. One example of this has been the publication of the Egan Report entitled "Rethinking Construction" in 1998. However, the term partnering / partnerships does not just cover construction but also is used to cover a range of different relationships for example Private Finance Initiatives (PFIs), local authorities working together, traditional contracting, health and social services partnerships (not a legal partnership, see paragraphs 4.4 and 4.5). One of the main perceived advantages of such a relationship is the move away from an adversarial approach to contract management.
- 4.3 Partnering relationships are usually recorded in a formal agreement setting out the duties and responsibilities of each partner and usually contain an element of continuous improvement and sharing of risks and reward. This is not necessarily different from an ordinary contract as any contractual relationship works better where there is a degree of partnering between the Council and the service provider/supplier/contractor.
- 4.4 Care should be taken to distinguish between working with a service provider/supplier/contractor in a more co-operative way (i.e. partnering) and actually establishing a legal partnership (an arrangement whereby each partner is jointly and severally liable for the activities of the partnership). Local authorities are prohibited by law from participating in or forming such partnerships.

Quite often the word partnership is used very loosely to represent the working together relationship as opposed to the legal partnership. You

need to consider what is actually being created and/or being entered into as opposed to the name given to it. For further information please contact Legal Services or the Procurement Strategy and Risk Management Unit as early as possible.

- 4.5 Under Part 4 of the Council's Constitution Partnership Arrangements can only be entered into with the written approval of the Director of Finance and Corporate Resources. Under Standing Orders such arrangements must be contained in a formal written agreement. A Partnership Arrangement means an arrangement between Brent Council and one or more other bodies or persons to achieve objectives of the Council and at least one of the other parties which involves one or more of the following:

- Sharing of risk in relation to the subject matter of the arrangement.
- Joint planning and decision-making such as joint commissioning.
- Joint delivery of services.
- Sharing of resources.

but which is not a contract for the provision by one party to another of a supply, service or works in exchange for a fee or other consideration.

#### Public Private Partnerships (PPP)/ Private Finance Initiative (PFI)

- 4.6 The term PPP is used to describe any arrangement in which the public and private sectors work together to achieve particular objectives.

The Private Finance Initiative (PFI) is a form of PPP but is also, principally, a form of contracting or procurement, the hallmarks of which are:

- a long term service contract between a public sector body and private sector provider;
- the provision of capital assets, investment and services;
- unitary payments from the local authority which cover the assets, investment and the services;
- the allocation of risk to the party best able to manage and price it;
- service delivery measured against performance standards set out in an output specification;

- a payment mechanism which relates payment to the provider's performance of the contract;
  - an off balance sheet treatment for the local authority so that any investment delivered through the project does not count against borrowing consents; and
  - support from central government through PFI credits.
- 4.8 Arrangements which involve the deferred acquisition of assets over the life of the arrangements are classified as a credit arrangement under regulations. Primary legislation limits the Council's powers to enter into credit arrangements and sets out that the Council can only enter into credit arrangements if it has available an amount of credit cover equal to the initial cost of the arrangement. This can be quite onerous on the Council.
- 4.9 However, provided transactions are structured to be private finance transactions (as defined by regulation 16 of the Local Authorities (Capital Finance) Regulations 1997 (as amended)) and meet the requirements of regulation 40; i.e. provided such transactions are off the balance sheet of the Local Authority, the Authority does not need to find credit cover for the credit arrangement and the authority is in a position to apply to Central Government for PFI credits for funding for the capital element of the scheme. A PFI which is not given PA credits is known as a PPP arrangement.
- 4.10 Essentially, PPPs and PFIs are used as a way of unlocking private investment using partnership type arrangements between the private sector and the public sector to bridge the funding gap. Special documentation has been developed for these kinds of contracts – please contact Legal Services for further information.
- 4.11 The contractor will generally expect a contract certificate to be given by the Council in respect of the contract. Details concerning this process are set out at Section 2 Part 2 Paragraph 21.

## **5 Legal Entities and Capacity**

- 5.1 It is important that the correct formal and legal names of the parties are on the contract. The correct legal title of the Council is the Mayor and Burgesses of the London Borough of Brent.
- 5.2 An association or a partnership of different organisations is usually not a separate legal entity in its own right. It is likely in those circumstances that the individual persons involved in the association and/or partnership will be required to have their names on the contract

so it is clear who is responsible for ensuring compliance with the contract.

- 5.3 All those entering into contracts must have the capacity to do so. In the case of an individual, they must be at least 18 years old and of sound mind – in other words not suffering from a mental disorder that affects their capacity to reason. Further, where the legal entity entering into the contract has a corporate identity, for example a company, a local authority, a health care trust or a school, there needs to be a clear record of the authority of that corporate identity to enter into the agreement. For example, this could be minutes of decisions made by that body.
- 5.4 Information about how your contract titles and sealing/signing provisions should reflect the nature of the entity with which you are contracting is in [Section 4C, Part2, Paragraph 14](#).

## **6 Powers to Contract**

- 6.1 The Council is a creation of statute. This means that unlike an individual person who can do anything unless there is a law that prohibits it, the Council can only do what it is positively empowered to do by legislation and its activities are highly regulated.
- 6.2 As the Council can only do what it is permitted to do under statute, it is necessary to look at statutory sources for the power for the Council to enter into contracts. This could be from 'primary legislation' e.g. Local Government Act 2000 and from 'secondary legislation' e.g. Local Government Pension Scheme Regulations.
- 6.3 The following are examples of general powers that may be used in certain circumstances to enter into contracts:
- (a) Section 1(1) of the Local Government (Contracts) Act 1997:  
Power for local authorities to enter into contracts for the provision of assets, services or goods that are required for, or in connection with, the performance of any of their statutory functions.
  - (b) Section 111 of the Local Government Act 1972:  
'..to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions..' Note this cannot authorise any thing which is incidental to an incidental but must be incidental to a function which itself is empowered by legislation.

- (c) Section 2 of the Local Government Act 2000:  
This section confers a new power on local authorities to “do anything” which they consider is likely to achieve the promotion of the economic, social or environmental wellbeing of their area. The power is subject to limitations and must be exercised having regard to the Council's Community Strategy.

- 6.4 It is important to remember that generally the Council cannot delegate its functions to be carried out other than by officers or committees. There are limited exceptions in the case of other local authorities and joint committees and by virtue of Statutory Instruments made under the Deregulation and Contracting Out Act 1994. The exceptions under the Deregulation and Contracting Out Act 1994 include certain local education authority, council tax benefit, housing benefit, housing and homelessness functions.
- 6.5 In accordance with legislation, the Council imposes on itself specific rules and regulations in relation to contracting. These are contained in Financial Regulations and Contract Standing Orders which are contained in the Council's Constitution. Under the Local Government Act 1972 the Council is required to have Standing Orders which regulate the award of contracts for the supply of goods and materials or for the execution of the works. These Standing Orders must include provision for securing competition and for regulating the way in which tenders are invited.

## **7 Constraints on Powers**

- 7.1 As discussed above the Council's activities are highly regulated and as such there are a number of constraints on the way it enters into contracts.
- 7.2 The following are examples of the constraints on local authorities exercise of powers to contract:
  - (a) Contract Standing Orders.
  - (b) Financial Regulations.
  - (c) Capital Finance Regime. This should always be considered where the Council wants to get involved in capital transactions, companies where a local authority is likely to have a 20% or greater interest, leasing and/or credit arrangements (i.e. arrangements equivalent to borrowing/delayed payment).
  - (d) EU Regulations.
  - (e) Health and Safety Law and Regulations.



- (f) Specific Statutory Controls.
- (g) IT Technical Regulations (available on the Intranet).

## **8 Exercise of Powers in Brent**

- 8.1 Part 4 of the Constitution sets out the powers that are delegated to officers. A copy of an extract from Part 4 is attached at Appendix 5.

### **General Powers**

- 8.2 The following officers are delegated all powers necessary or desirable to enable them to effectively manage and operate their service area or unit or to carry out the roles and responsibilities required of them from time to time:

- Chief Executive.
- Director of Children and Families.
- Director of Housing and Community Care.
- Director of Policy and Regeneration.
- Director of Environment.
- Director of Finance and Corporate Resources.
- Director of Human Resources and Diversity.
- Director of Communications and Consultation.
- Borough Solicitor.

- 8.3 This general power is subject to the restrictions set out in paragraph 3 of Part 4 of the Constitution. These restrictions are also reproduced at Appendix 5. Officers cannot exercise their delegated powers if these restrictions apply.

### **Specific Powers**

- 8.4 The table at paragraph 2.5, Part 4 of the Constitution is an inclusive (not exclusive) list of example powers included in the delegation to the officers listed above. These example powers are subject to the specific restrictions listed next to each power in the table as well as to the general restrictions in paragraph 3 of Part 4. Below is the section of the table which is directly relevant to contracts and procurement. Essentially, this states that for High Value contracts (services or supplies above £500K and works above £1million) approval is required from the Executive, General Purposes of the Pension Fund Sub-Committee before commencing a tendering exercise for the award and to terminate the contract early. Officers have power to extend or vary contracts in certain circumstances - see the table below for details of this. Executive, General Purposes or Pension Fund Sub-Committee approval is required for any extensions or variations beyond those

described in the table. Whenever a change is made the change needs to be reflected in a change to the Contracts Register. If the contract is required to be certified (see [Section 2, Part 2, Paragraph 22](#)) member level approval will be required for the issuing of the certificate.

Power	Restriction
<p>3(a) to invite expressions of interest, agree shortlists, invite tenders, negotiate, award, enter into and terminate contracts, agreements, deeds or other transactions; to purchase supplies and services; to appoint external consultants; to make minor or consequential changes to any of the documents mentioned above which were previously agreed by the Executive or the Council or their committees or sub-committees.</p>	<p>(a) In the case of a contract, agreement, deed or transaction where the Council would be in receipt of works, services or supplies if the value of the contract, agreement, deed, transaction, supply, service, work or consultancy would or would be likely or is estimated at the commencement of any procurement process to exceed £500k in respect of services or supplies or £1million in respect of works, such value to be aggregated over the life of the contract (including any possible extension) then:-</p> <p>(i) no expressions of interest shall be invited without the prior approval of the Executive (or in the appropriate cases the General Purposes Committee or the Pension Fund Sub-Committee);</p> <p>(ii) no contract, agreement, deed or transaction shall be awarded, entered into or terminated without the prior approval of the Executive (or in appropriate cases the General Purposes Committee or the Pension Fund Sub-Committee); and</p> <p>(iii) shortlists may only be drawn up and tenders may</p>

	<p>only be evaluated in accordance with the basis of the evaluation criteria approved by the Executive (or in appropriate cases the General Purposes Committee or Pension Fund Sub-Committee) in accordance with Standing Orders 88 (b) and 89(vi)</p> <p>(b) admission agreements in respect of the pension fund may only be agreed by the Director of Finance and Corporate Resources and in accordance with criteria adopted by the General Purposes Committee or the Pension Fund Sub-Committee.</p>
3(b) to extend, vary or renegotiate novate or assign contracts, agreements, deeds or other transactions.	<p>(a) Provided that the extension or variation, novation or assignment would not be in breach of the European Procurement Legislation.</p> <p>(b) provided that the extension or variation, novation or assignment does not substantially alter the terms and conditions of the contract.</p> <p>(c) provided that there is sufficient existing budgetary provision.</p> <p>(d) if the extension goes beyond the period of extension provided for in the contract (if any) or is otherwise not in accordance with the extension provisions in the contract:</p> <p>(i) in the case of any contract, agreement, deed</p>

	<p>or other transaction with a life of not more than one year (including any possible extension provided for in the contract) the extension shall not exceed a period of six months; or</p> <p>(ii) in the case of any contract, agreement, deed or other transaction with a life of more than one year (including any possible extension provided for in the contract) the extension shall not exceed a period of one year.</p> <p>(e) provided that in the case of any variation (other than an extension):</p> <p>(i) the total value of the variation is less than £500k; and</p> <p>(ii) if the total value of the variation is more than £50k it is not more than 20% of the original contract value (calculated over the life of the contract including any extensions or possible extensions and adjusted in accordance with any price review mechanism provided for in the contract)</p> <p>(f) provided that in the case of any novation or assignment that the relevant Director is satisfied that the contractor to which the contract, agreement, deed or other transaction is to be</p>
--	---

	novated or assigned meets the Council's requirements for financial standing, health and safety standards and technical expertise.
--	---

## 9 **General Principles That Should Be Taken On Board In Letting All Contracts**

- 9.1 The Council is responsible for a lot of public money – in the multi millions. It makes decisions on a daily basis on how it spends that money in carrying out its duties and functions. One of the ways the Council carries out its duties and functions is by paying third party contractors to assist the Council. It is important when the Council lets any contract that does so in a way that the ordinary onlooker would consider to be fair and good value for money.
- 9.2 There are a number of general principles that officers must always apply to procurement which are taken from EU legislation, the Council's Contract Standing Orders and Financial Regulations. Some of the most important general principles, which tend to overlap, are as follows:
- **Transparency** – This is about being open in the way the contract is let. It involves keeping all contractors and potential contractors informed of all the relevant facts and circumstances and any changes in circumstances through the process of letting the contract.
  - **Non-discrimination** in selecting any contractor. This includes not unfairly discriminating against a potential contractor outside the Council's geographical area.
  - **Equal Treatment** – this involves treating all contractors and potential contractors equally when letting a contract, for example imposing the same set of standards on all contractors and not unfairly favouring a particular contractor or any in-house provider.
  - **Being Fair** – although self-explanatory this can be hard to define. You should always consider how a contractor would feel about a particular process. Have they been prejudiced in any way or might they reasonably fear that they have been?
  - **Good Value for Money** – best value. This does not just mean price but also includes commercial and non-commercial considerations relevant to the contract for example onerous terms and conditions and user group interests.

- **Auditable Process** - this involves keeping a paper trail of the whole process which should include notes of meetings, telephone calls, correspondence (emails as well as letters), minutes of meetings and decisions, reasons for decisions, contract and tender documents.
- **Keeping Records** - this involves retaining accounting documents, contracts and certificates for a minimum of 6 years. The relevant Service Area or Corporate Director must maintain a record of all contracts entered into on behalf of the Council by that Service Area and/or official orders for 6 years after the contract end date and for 12 years where the contract was made under seal. There is also a requirement to notify some contracts to the Procurement Strategy and Risk Management Unit for inclusion on the Corporate Contracts Register.
- **Competent Contractor** - before placing any contracts or orders for work to be undertaken you must be satisfied that the contractor is technically competent and can produce the work, supplies or services to the required quality and standard. To state the obvious, you should always check that the works supplies, or services provided are what you want and what was contracted for. In the case of supplies, no payment should be authorised before checking that you have actually received the specified goods.
- **Financial Standing** - before placing any contracts or orders for work to be undertaken you must be satisfied that the contractor has sufficient financial standing to carry out the work, supply the goods, provide the services. You need to look at this on a case by case basis. A services and/or works contract worth a lot of money or where money is paid in advance will require more security that the contractor has sufficient financial standing to fulfil the requirements under the contract e.g. a 5 year service contract or building contract will require more security than a contract for a one off purchase for example of specialist stationery. In the latter case, payment is made after satisfactory delivery and may require a lesser degree of scrutiny of the contractor's financial standing since the associated risk may be less.
- [Aggregation](#) - It is not acceptable to split orders or a contract into smaller parcels to avoid the application of

certain Standing Orders and Financial Regulations. It is also unlawful to split orders into small parcels to avoid the application of EU Regulations.

- **Terms and Conditions** - check they are suitable for your purpose. If you do not provide the terms and conditions, then you will be contracting to buy on terms implied at law, or more likely the contractor's terms and conditions. You may well find yourself at a disadvantage, particularly with respect to payment terms such as interest for late payment. It should be noted that many suppliers will only claim to supply under their terms and conditions. Remember you should always ensure that you review and take legal advice on the terms and conditions your supplier proposes before entering into a contract of any significant value or other particular importance.
- **Risk** - It is important when commencing a procurement exercise to consider any potential risks to the Council. The degree of risk involved will depend on the value and nature of the contract. Risks may include not only the financial risk to the Council but also considerations such as Health and Safety risks particular to the contract (see below) and whether what is to be undertaken is novel or unfamiliar.

When commencing a procurement exercise you need to give consideration to:

- (a) what is the risk to the Council if there is no contract in place?
- (b) what is the risk to the Council if the contractor/service provider/supplier goes into receivership/bankruptcy or does not perform the contract to a satisfactory level?
- (c) are there any special risks involved in the procurement process?

Risk assessment is an essential part of planning your procurement process and more detail is provided in [Section 4A, Part 2, Paragraph 6](#) below.

- **Business Continuity management** - this is the ongoing process of risk assessment and management with the purpose of ensuring that the essential business of the Council can continue if risks materialise. Risks could be from the external environment, such as power failure, or internal, such as system failure. For much of its essential

business the Council relies heavily on the use external contractors. Therefore, as part of its own business continuity planning, the Council must ensure that contractors providing essential services, works or supplies have equally robust business continuity arrangements. The procurement process for such contracts must include an examination of the tenderers own business continuity arrangements. Examples of the sorts of contract where business continuity management is likely to be required are waste collection, care services for people in residential accommodation, and telecommunications services.

### **Service Disruption and Service Continuity Plan**

**H5.1** The Contractor shall take reasonable care to ensure that in the execution of the Contract it does not disrupt the operations of the Council, its employees or any other contractor employed by the Council.

**H5.2** The Contractor shall immediately inform the Council of any actual or potential situations such as major power failure, fire, flood, staff illness, epidemic, loss of administrative building and/or Service provision area or premises, public transport or Service User transport failure or disruption, industrial action, whether such action be by their own employees or others, which affects or might affect its ability at any time to perform its obligations under the Contract.

**H5.3** The Contractor shall have a Service continuity plan, approved by the Contract Manager, which details the essential requirements to maintain its administration and Service provision over any period of crisis, emergency situation or loss of premises from where the Contract is administered or the Service provided.

**H5.4** The plan shall include details of essential staffing, communications, data, transportation etc., the contact details of key people and procedures to be followed in such instances to ensure that the delivery of the Services is continued and essential cover is maintained.

**H5.5** If the Contractor's proposals referred to in Condition H5.4 are proven to be insufficient or unacceptable by the Council when implemented, then the Council may make alternative arrangements for the care of the Service Users and levy any additional costs on the Contractor as necessary.

- **Health and Safety** - Under the Health and Safety at Work Act, it is the Council's duty as an employer and service provider to ensure that employees, service users and the



general public are not exposed to inadequately controlled risks to their health and safety from its activities. Specific considerations apply to health and safety during a formal tendering process and these are dealt with later. However, even where such a process is not being undertaken health and safety issues may well exist and need to be addressed. For further information see Section 5.

- **Data Protection** - The Data Protection Act 1998 sets out the data protection principles which govern the processing of data. Processing, in relation to information or data, means obtaining, recording or holding the information or data such as alteration, retrieval, disclosure or destruction. This covers both manual and computer data. So, for example, both the collection and destruction of application forms for Council Tax benefit and printouts of lists of residents are subject to data protection principles.
- The Council will generally retain responsibility as the data controller and must decide the purposes for which personal data are, or will be, processed and the way personal data are, or will be processed. The data processor is the person or body which processes data on behalf of the data controller and it is important that you ensure that any Organisation processing data on behalf of the Council complies with the requirements of the Act. Further information on Data Protection is contained in Appendix 21.
- **Environment and Sustainability** – Under the Environmental Protection Act 1990 (and various other legislation) the Council had a duty to undertake its activities in a manner that limits disturbance to, and pollution of, all the elements of the environment. Council policy also states that the Council will conduct its affairs with due regard to the environmental effects its actions may have. Good environmental performance may reduce risk (e.g. reduction of spills, pollution, noise from council works), manage costs (e.g. in some cases may result in lower waste disposal costs, efficient running costs, eliminating unnecessary materials) and help to support Health and Safety aims (e.g. management of fuel oil reduces fire and explosion risks). For further information see Section 4A, paragraph 9A.

## **10     Best Value**

- 10.1 Part 1 of the Local Government Act 1999 imposes a duty of best value on all local authorities requiring them to make arrangements to secure continuous improvement in the way in which they carry out their functions, having regard to a combination of economy, effectiveness and efficiency.
- 10.2 The 1999 Act requires the Council to review all its functions, publish annual plans showing past and projected performance and introduces a rigorous programme of audit and inspection. In addition, the Secretary of State has wide intervention powers in cases of serious failure and to make Orders and issue guidance.
- 10.3 Best Value is fundamental to the Council's provision and procurement of services and at the heart of providing and demonstrating that it provides the best possible value to taxpayers in accordance with its fiduciary duties.
- 10.4 Further details of Best Value and the newly introduced Comprehensive Performance Assessment are contained in Appendix 6.

## **11     TUPE**

- 11.1 The Transfer of Undertakings (Protection of Employment) Regulations 2006 give effect to the EC Acquired Rights Directive and to Government policy that uncertainty should be removed concerning whether TUPE applies upon an outsourcing or insourcing of services or a change of service provider. They are intended to protect an employee's employment in the event that an undertaking (which includes any trade or business) for which he or she works is transferred by the employer to a new owner or in the event of an outsourcing or insourcing of services or a change of service provider
- 11.2 TUPE applies to the transfer from one entity/person to another of an undertaking or a part of an undertaking situated, immediately before the transfer, in the United Kingdom. A transfer can take place by a series of two or more transactions. If certain conditions are met it also applies to situations where service activities are contracted out, re-tendered or contracted in. The effect of TUPE is that contracts of employment are automatically transferred with the business/activities to the transferee. Contracts of employment are treated as if they were originally made with the transferee. Employment is continuous.
- 11.3 Further guidance on TUPE is provided in Appendix 7.

## 12 **Freedom Of Information Act 2000**

The Freedom of Information Act 2000 applies to all of the Council's activities. The Act gives the public a general right of access to information held by public authorities. This includes information which the Council holds about its contractors and information which a contractor of the Council may hold on the Council's behalf. The general right of access is however subject to a number of exemptions which the Council can use to refuse disclosure of information. Although any of the exemptions could apply to the relationship between the Council and a contractor or the tendering process the two most relevant exemptions are likely to be Section 41, information which has been provided in confidence, and section 43 where the release of information is likely to prejudice someone's commercial interests. The commercial interest exemption is subject to a public interest test. The Freedom of Information Act and the likely exemptions in relation to contracts and procurement are discussed in detail in Appendix 22.

## 13 **Contracts Exempt from Standing Orders**

- 13.1 There are some categories of contract that are automatically exempt from the requirements of Standing Orders. These are set out in Standing Order 84, reproduced below, which identifies certain types of contracts as exempt from the requirements of Standing Orders.

### **83. Contracts exempt from Contract Standing Orders**

The following contracts are exempt from Contract Standing Orders:-

- (a) individual agency contracts for the provision of temporary staff;
- (b) employment contracts;
- (c) contracts relating to an interest in land.

- 13.2 This means you do not need to follow Standing Orders when selecting a temporary worker via an agency on an ad hoc basis. Nor do Standing Orders apply to choosing employees or to the purchase/sale/leasing of land, although there may be other relevant legal rules or Council procedures to be complied with.

## 14 **Contract Value**

- 14.1 Estimating the value of a contract you intend to let is a necessary step before you can decide which of the rules under Standing Orders will apply to your procurement process and whether the EU Regulations will also apply.
- 14.2 Standing Orders contain two provisions concerning the process of estimating contract value.

**90. Estimated contract value**

Chief Officers shall ensure that an estimated contract value is prepared and recorded prior to commencement of a tender exercise. Such estimate shall be calculated on the basis of the value of the contract over the entire contract period whether or not a one-off service, supply or work. Where a contract has no fixed term the value of the contract shall be calculated as if the term of that contract was 48 months.

**91. Small Lots**

The estimated value of contracts split into lots shall be calculated using the total value of all lots. Contracts must not be split into lots to avoid competitive tendering.

14.3 So, you must prepare and record the estimated value before you start your process. You look not at the annual value but at the value over the lifetime of the contract after allowing for any price increase mechanism in the contract. It is important to remember that the lifetime of a contract for this purpose includes any possible extensions allowed for under the contract. So, a contract for a period of 3 years with an option to extend for a further 3 years must be valued over a 6 year period. In situations where the Council and another entity e.g. health are jointly funding a contract, the value of that contract will be the total value of the contract. The value will not be limited to the liability of the Council. For example, if a contract valued at £1m over its lifetime is funded 50% by the Council and 50% by health, the value of this contract for the purposes of Standing Orders is £1m even though the Council's liability is £500,000.

14.4 The other point to note is that you are not allowed to cheat! You cannot divide the supply, work or service you require up into separate bundles in order that each bundle is below the threshold for particular rules to apply. This is the same principle as is reflected in the EU Regulations on aggregation, which is explained in Appendix 2. However, you will not be penalised if your estimate turns out to be accurate provided it was made in good faith and with reasonable care.

14.5 Under Standing Orders contracts are categorised as either Low Value, Medium Value or High Value.

<b>Low Value Contract</b>	A contract with an estimated value over the life of the contract (including any period of extensions anticipated by the contract) of between £20,000 and £139,893 over the term of the contract
<b>Medium Value Contract</b>	In the case of contracts for services or supplies a contract with an estimated value over the life of the contract (including any period of extension(s) anticipated by the contract) of between £139,893 and £500,000 or in the case of a contract for works a contract with an estimated value of between £150,000 and £1,000,000.
<b>High Value Contract</b>	In the case of contracts for supplies or services a contract with an estimated value over the life of the contract (including any period of extension(s) anticipated by the contract) of more than £500,000 or in the case of a contract for works a contract with an estimated value of more than £1,000,000 or a PFI contract.

14.6 Anything below £20,000 is covered by the requirements in Financial Regulations in respect of official orders and small contracts and the general requirements in Standing Orders 84(a) and 84(b). You should also consider whether other parts of Standing Orders may be applicable, in particular Standing Order 83 (see paragraph 12 above). The Financial Regulations are in Part 6 of the Constitution (and on the Intranet through the central/corporate governance/corporate standards/finance) and the relevant paragraph is 5.5.

14.7 Whether the EU Regulations apply also depends on the value of your contract. Different thresholds apply Services, Supplies and Works Contracts. These are detailed below:

<b>Works Contracts</b>	Works with an estimated value of <b>£3,497,313</b> above
<b>Services Contracts</b>	Part A and B Services <b>£139,893</b> or above
<b>Supplies Contracts</b>	Supplies contracts with a value of <b>£139,893</b> or above

14.8 Further detail on the EU Regulations is provided in Appendix 2.

## **15 Which Decisions in Relation to Contracts Cannot be Taken by Officers?**

- 15.1 There are certain decisions relating to contracts that cannot be taken by officers. As explained in [paragraph 8.4 above](#), these relate particularly to High Value Contracts. The Executive (or General Purposes Committee if the decision relates to a Council side function or the Pension Fund Sub-Committee) is required to approve the procurement process to be followed before it is started and also the award of the contract at the end of the process. In addition, approval from the Executive (or General Purposes Committee or the Pension Fund Sub-Committee if appropriate) is required to terminate early or extend a High Value Contract. If the contract is required to be certified (see Section 2 Part 2 Paragraph 21) member level approval will be required for the issuing of the certificate.
- 15.2 The Executive also needs to approve a call-off from a framework agreement set up by another authority or body that will exceed £500,000 in value.

### **Decision Making - Key Concepts**

## **16 Split of Functions**

- 16.1 One of the fundamental changes brought about by the legislation underlying the Constitution is the statutory split of functions between the Executive and the Council as a whole. The legislation reserves certain functions to the Council and its committees and allocates all other functions to the Executive. Broadly most education, social services and housing decisions are the responsibility of the Executive but environment functions are more mixed so be careful in that area.
- 16.2 The way the system as a whole works is basically as follows:
- The Executive (currently Labour group only) develops proposals for the budget and for a number of key policies in the “Policy Framework”.
  - The Overview Committee (councillors from all parties) assists in the development of policies.
  - The Full Council approves the budget and the policies in the Policy Framework.

- The Executive implement the budget and the policies in the Policy Framework and carries out all the functions allocated to it by statute.
- The Scrutiny Committee and its sub-committees call the Executive to account by reviewing its actions and in exceptional cases “calling in” decisions of the Executive before they are implemented.
- Council committees deal with regulatory functions e.g. planning and licensing and with some other functions which are not executive functions, such as staff terms and conditions.
- Officers support both the Executive and the Council, and its committees using delegated powers.

This is all set out in Regulations which are reflected in Part 4 of the Constitution.

## **17 Is Award of a Contract an Executive Function?**

- 17.1 This depends. Awarding a contract is not a function as such. The question, therefore, is does the contract relate to an executive function? This is likely to be the case most of the time. If not, then where these guidelines talk about reports to the Executive the report would be to the General Purposes Committee or the Pension Fund Sub-Committee instead and the requirements in relation to Key Decisions, the [Forward Plan](#) and call in would not apply.

## **18 Key Decisions**

- 18.1 The legislation underlying the new arrangements gives a lot of power to the Executive and allows it to meet in private (unlike Council committees) so the legislation includes rules designed to ensure that the most important decisions (unless confidential) are made in public.
- 18.2 This is done by requiring “Key Decisions” to be made in public and applying a number of other specific rules to them. What is a Key Decision is a matter partly of government prescription and partly local choice.
- 18.3 Under the Brent arrangements **all decisions taken by the Executive itself (or its Highways Committee) are treated as Key Decisions, whether or not those decisions would otherwise fall within the statutory definition of a Key Decision.**

18.4 Under the Brent Constitution, a decision by an officer will be a Key Decision if it relates to an executive function and is:

- (a) likely to have a significant impact on communities in one or more wards or electoral divisions; or
- (b) involves a decision to spend a significant part of the budget for the function concerned.

18.5 It is considered to be unlikely that decisions in respect of letting contracts which are not High Value (so going to the Executive anyway) will be Key Decisions. Further Guidance on Key Decisions is available at Appendix 8.

## 19 Forward Plan

19.1 The Democratic Services Manager on behalf of the Executive Leader is required to prepare a Forward Plan containing details of all the matters likely to be the subject of Key Decisions in the authority in the following four months. Any decision you want made by the Executive itself (or its Highways Committee), and any officer Key Decision will need to be in the plan. It is very important that you remember this because if your decision is not in the effective plan when you want to take it, you cannot proceed without jumping over hurdles. You may even have to wait until the next plan becomes effective before you can progress the matter if it is not urgent. The Forward Plan is updated and re-published every fortnight. A sample of a Forward Plan is in Appendix 8.

19.2 Each updated Forward Plan is produced at least 14 days prior to the first day upon which that Forward Plan will come into effect. So, if for example you want your report to go to an 18 January Executive meeting, you will have to be sure it is in the Forward Plan published on or before 3 January. The Leader holds a briefing session in advance of all Executive meetings (usually 10 days in advance) so in practice your report needs to be finalised in time for that meeting.

19.3 If you miss the Forward Plan there are procedures which you may be able to follow if there is an urgent need for a decision to be taken. You should contact either Legal Services or Democratic Services if you need advice on these procedures.

## 20 Call in

20.1 Once the Executive has considered a report the decision concerning it is included in a list of decisions published by the Democratic Services Manager. There is a period of five days from when the decision is



made during which the decision can be "called in" to be considered by the [Forward Plan](#) Select Committee (or in the case of Education matters the Life Long Learning Scrutiny Panel). If the decision on your contract is called in generally the Forward Plan Select Committee (or the Life Long Scrutiny Panel as the case may be) has to meet to discuss it within 15 days of the decision being made and **unless the decision is urgent you cannot implement it until after the Scrutiny meeting and any subsequent Executive meeting to reconsider the issue.** You should allow for this eventuality in your timetable although it will only rarely happen.

- 20.2 You should note that the call in procedure also applies to Key Decisions made by officers, although as noted above decisions by officers in the procurement process are unlikely to be Key Decisions.

## **21 Decision Making - Reports**

- 21.1 The first issue is, do you need one? There are lots of rules about what you have to do with reports if you have one but no actual requirement in law that you should have one. The Council's Standing Orders require there to be a report on contract matters in the case of High Value Contracts. A report ensures not only that all relevant material is before Members at the time the decision is made but also ensures that it can be demonstrated later that that was the case.
- 21.2 The position with officers is that very often there is no report. Officers make decisions constantly and not every decision they make needs a report. However, where an officer is making a Key Decision it is the wiser and safer course to ensure that there is a report. This is for the same reason as with Member reports but also because officer decision making takes place away from the public gaze and having a report ensures that the public (and indeed Members) know what is going on and why. Decisions which are not key (for example, most officer decisions on contracts) still need to have a clear audit trail and as a matter of good practice there should be, if not a formal report like a committee or executive report, then a clear record on the file or some other appropriate place of what decision was taken and why and what information was available and taken into account. These things can be very hard to remember and to evidence later on if not recorded in this way.
- 21.3 Where there is a requirement for a report to Members everything relevant should be in the report and this will vary between reports. However, legal and financial implications will almost always need to be included and so will staff matters. Contract Standing Orders specify

some specific pre-tender considerations to be included in reports on High value contracts:

- (i) the nature of the services, supplies or works contract to be tendered;
  - (ii) the estimated value;
  - (iii) the contract term;
  - (iv) the tender procedure to be adopted;
  - (v) the procurement timetable;
  - (vi) the evaluation criteria and process;
  - (vii) any business risks associated with entering the contract;
  - (viii) the Council's Best Value duties;
  - (ix) any staffing implications including [TUPE](#) and pensions;
- and
- (x) the relevant financial, legal and other considerations.

If the contract is required to be certified (see Section 2 Part 2 Paragraph 21) member level approval will be required for the issuing of the certificate.

- 21.4 Further detail on report writing is provided in Appendix 9 and precedent reports are in Precedents 1(a) and (b).

## **22 Certification of Contracts**

- 22.1 Section 1 of the Local Government (Contracts) Act 1997 provides that every statutory provision conferring or imposing a function on a local authority confers power on a local authority to enter into a contract with another person for the provision or making available of assets or services or both (whether or not together with goods) for the purposes of, or in connection with, the discharge of the functions by the local authority.
- 22.2 Section 2(1) of the Act provides that where a local authority is entering into a contract, the contract shall, if it is a certified contract, have effect (and be deemed always to have effect) as if the local authority had the powers to enter into it and exercised that power properly in entering into it. This is a safe harbour provision which has been introduced to provide comfort, particularly to funders under Private Finance Initiative and similar contracts, in view of past difficulties arising from the uncertainty of the legal powers of local authorities. The power to certify a contract under the Act does not just apply to the PFI arrangements and may be used for any contracts for the provision or making available of services for at least 5 years.

- 22.3 The effect of certification is that the contract is assumed to be within the powers of the Council and in the event that a court subsequently determines that it was not in fact within the powers of the Council, the Act will imply provisions for compensation to the contractor if appropriate terms have not been agreed between the parties.
- 22.4 It would not be normal for a routine contract to be certified under the 1997 Act, even if for 5 years or more, and such a certificate would normally only be requested on the context of a PFI or similarly complex contract.
- 22.5 In the event that a contract is to be certified, approval for the giving of the certificate (which must be signed by an individual officer with relevant delegated power) must be approved by the Executive before a commitment is made to sign the certificate. If a contract certificate is to be issued it must be issued within 6 weeks of the contract being entered into.

# **SECTION 3**

## **PROCUREMENT WITHOUT FORMAL TENDERING**

### **Part 1      Overview**

### **Part 2      Detail**

# PROCUREMENT WITHOUT FORMAL TENDERING

## Part 1 - Overview

The purpose of this part is to provide a brief overview of Section 3 on Procurement Without Tendering. You should consult the relevant paragraph(s) of the Section for further information and not rely solely on this overview.

### 1 Why Tender?

Tendering processes are used not only because in some cases they are required by law or the Council's Standing Orders but also because they may well be the best way to ensure best value.

The main benefits of a tendering exercise are that tenderers will submit their best value bid in an effort to secure the contract and the opportunity for corruption to compromise the process is minimised. See [Section 3, Part 2, Paragraphs 1.1 to 1.6](#) for further information on the reasons for tendering.

### 2 Circumstances When You May Not Need to Tender

There may be circumstances where you consider that there are very good reasons not to follow the Council's Standing Orders. In such cases, you can seek approval from the Executive or General Purposes Committee or Pension Fund Sub-Committee, as appropriate, that there are good operational and/or financial reasons for not following the Council's Standing Orders and/or Financial Regulations. If approval is granted certain parts of the Council's Standing Orders and/or Financial Regulations may be dispensed with. However, this is subject to the need to comply with domestic and/or European legislation and the requirement to still show good value for money. See [Section 3, Part 2, Paragraph 2](#) for further information.

Some categories of contracts are exempted from the full tendering requirements, although they are subject to the other requirements of the Council's Standing Orders. For example, Low Value contracts; where there is only one provider provided advice is sought from the Borough Solicitor and in the case of High Value Contracts approval is sought from the Executive; cases of urgency where there is immediate danger to life or limb or property; call-off from a framework; and individual personal services. See [Section 3, Part 2, Paragraphs 2.1 to 2.9](#) for further information on circumstances when you may not need to tender.

### 3 General Principles to Consider if not Tendering

If you are not required to tender and do not decide to tender anyway you still need to take on board the general principles (as detailed in [Section 2, Part 2, Paragraphs 9 to 11](#)), safeguard the Council's interest and limit the Council's liability and exposure to risk. You need to consider and address:

- The value of the contract/agreement
- Health and safety
- The environmental impact of the contract
- The extent to which members of the public are directly affected by the works, services or supplies
- Whether the contractor will be expected to process data covered by the Data Protection Act
- Any industry standard or certificate that may be relevant
- The legal identity of the potential contractor
- References for the potential contractor
- Whether the Council has used the contractor before
- What is included in the price

See [Section 3, Part 2, Paragraph 3](#) for further information on what issues to consider if you are not required to tender and do not decide to tender anyway.

# PROCUREMENT WITHOUT FORMAL TENDERING

## Part 2 – Detail

### 1 Why Tender?

- 1.1 A local authority has a duty to its council tax payers to ensure that it obtains value for money when expenditure is incurred. In nearly all cases, the best way of ensuring value for money in the procurement of works, goods or services is to invite tenders.
- 1.2 In many cases, a tendering process will be legally required to comply with the EU Regulations (see Appendix 2 for further information on the application of the Regulations).
- 1.3 However, tendering processes are not used only because in some cases they are required by the law or by Standing Orders but because they may well be the best way to ensure best value even when there is no legal requirement to tender.
- 1.4 The essential elements of a tendering process are that those invited to tender must submit their best offer in a sealed envelope (or by use of an appropriate e-tendering system) by a fixed deadline, not knowing who else will tender or what other tender prices will be. A process of this kind has two virtues:
  - (a) Each tenderer knows that the best method of securing the contract is to submit the best value bid that they can; and
  - (b) The opportunity for a corrupt tenderer or a corrupt officer to manipulate the process is minimised.
- 1.5 A properly conducted tender process therefore ensures propriety, as well as value for money. As well as protecting the Council against fraud, it protects officers against unfounded accusations of impropriety.
- 1.6 For these reasons, Standing Order 84(e) requires a tendering process to be undertaken for all contracts estimated to have a value of £139,893 or more over the term of the contract. There are exceptions in Standing Orders to this rule in cases of extreme urgency, and other specified circumstances. However, in these circumstances it needs to be recognised that in the absence of a tendering process the Council will not so easily be able to satisfy itself of the integrity of the contract award, and that it represents the best value that could have been obtained. Officers will need to consider carefully what alternative steps can be taken to achieve this. The general principles set out in [Section 2, Part 2, Paragraph 9](#) will always apply.

## 2 Are There Any Circumstances When I May Not Need to Tender?

### Good operational and/or financial reasons for not following Standing Orders

- 2.1 All contracts entered into by the Council for the provision of goods, services or works are covered by Standing Orders. As described in [Section 2, Part 2, Paragraph 13](#) some categories of contracts may be exempt. Even where this is not the case, where good operational and/or financial reasons can be demonstrated to Members (either the or Pension Fund Sub-Committee or General Purposes Committee depending upon the subject matter of the contract) Members may agree that some or all requirements of Standing Orders and/or Financial Regulations may be dispensed with in respect of the procurement of a particular contract. These reasons must be set out in a written report to be considered by Members. This is subject to compliance with all relevant domestic and European legislation. So, for example, Best Value duties must still be complied with in all cases. These provisions are contained in Standing Order 85 which is reproduced below.

#### **84. General Requirements**

- (a) Every contract entered into by the Council shall be entered into pursuant to or in connection with the Council's functions AND shall be procured in accordance with all relevant domestic and European legislation and unless for good operational and/or financial reasons the Executive (or, if appropriate, the General Purposes Committee agree otherwise with these Contract Standing Orders and the Council's Financial Regulations.)

- 2.2 The good financial and/or operational reasons will be something specific to the individual contract so it is not possible to give an exhaustive guide to what might be covered. However, by way of example, the sort of situation that these provisions might cover could be where the Council has received grant funding with a deadline by which the money must be spent and it is not possible to comply with the deadline if Standing Orders are complied with in full. Another example would be where contracts for similar or related services are expiring at different times and reaching agreements to align the contract end dates would enable arrangements for those services to be reconfigured or repackaged in the interests of better service provision or price.
- 2.3 The report to Members setting out the good operational and/or financial reasons would need to address the steps that were being taken to ensure that the Council was getting good value for money despite not following Standing Orders.



## Contracts not subject to full tendering requirements

- 2.4 Some categories of contract are exempted from the full tendering requirements, although they are subject to the other requirements of Standing Orders. These provisions are set out in Standing Order 87 reproduced below.

### **86. Contracts not subject to full tendering requirements**

- (a) Certain contracts as set out in this Standing Order listed below, are not subject to the full tendering requirements of these Contract Standing Orders but are subject to any other relevant parts thereof.
- (b) No formal tendering procedures apply to Low Value Contracts except that where the value of the proposed contract is likely to more than £20K in total then at least three written quotes must be sought and the quotes sought and/or obtained shall be recorded.
- (c) Contracts which are procured using the corporate Approved List in accordance with the rules prescribed pursuant to Standing Order 97 are not subject to full tendering requirements.
- (d) Subject to the proviso below no formal tendering procedures apply where contracts are called off under:
  - (i) a Framework Agreement established pursuant to these Standing Orders; or
  - (ii) a Framework Agreement established by another contracting authority , where call off under the Framework Agreement is recommended by the relevant Chief Officer PROVIDED that the Borough Solicitor has advised that participation in the Framework Agreement is legally permissible and that approval to participate has been obtained from the Director of Finance and Corporate Resources. Advice from the Borough Solicitor and approval to participate from the Director of Finance and Corporate Resources must be obtained each and every time a call off under another contracting authority's Framework Agreement is recommended by the relevant Chief Officer. Save that any high value contract may only be awarded on the approval of the Executive as required by paragraph 2.5 of Part 4 of the Constitution.
- (e) Subject to complying with any relevant parts of the European Procurement Legislation, Tenders need not be invited nor quotes sought:
  - (i) where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services, supplies or works may only be provided by a particular provider or where there is only one provider who would be able to provide the services, supplies or works required PROVIDED that advice is sought from the Borough Solicitor and in the case of High Value Contracts approval is sought from the Executive (or, if appropriate, the General Purposes Committee); or
  - (ii) in cases of extreme urgency where there is an immediate danger to life or limb or property and only to the extent necessary to procure services, supplies or works necessary to deal with the immediate urgent situation

PROVIDED that advice is sought from the Borough Solicitor; or

(iii) for contracts providing individual personal services such as individual care arrangements or individual special educational needs provision and for the avoidance of doubt this exemption does not apply to any framework agreements or call off contracts that will facilitate the award of individual contracts providing such personal services.

- 2.5 87(e) applies to contracts of all values except those covered by the EU Regulations.
- 2.6 87(e)(i) is designed to cover the kind of situation when there is no realistic market to be tested. For example, where there is a need for a compatible computer system and there is only one such system. Note the requirement for the approval of the Borough Solicitor and, if the contract is High Value, of the Executive (or General Purposes, depending on the subject matter of the contract).
- 2.7 87(e)(ii) is designed, for example, for emergency works to secure a school building after fire.
- 2.8 87(e)(iii) is concerned with arrangements for personal services for an individual and no tendering is required in respect of the package to be provided to an individual. However, where the package involves purchase pursuant to a general agreement with the provider not limited to the individual recipient of the service, the Standing Order makes clear that the general arrangement is not covered by the exemption from the requirement to tender. A "framework" or "call of" arrangement is one where an overarching contract exists for the provision of specific services, supplies or works on specified terms on an "as and when requested" basis. Under Standing Orders there is no need to tender for each individual provision under the overarching contract but the overarching contract itself is not covered by the exemption and the usual rules apply.
- 2.9 Under CSO 86 for Low Value contracts the minimum requirement is to seek at least three quotes. The quotes sought and those obtained must be recorded.

### **3 What do I Need to Do If I am Not Required to Tender and Do not Decide to Tender Anyway?**

- 3.1 Included at the end of this section are checklists summarising the requirements in Standing Orders and Financial Regulations for contracts below Low Value and Low Value Contracts. In assessing what is the best approach to take for:
  - (a) obtaining and gaining good value for money for the Council, and/or
  - (b) safe guarding the Council's interest, and/or
  - (c) limiting the Council's liability and exposure to risk.

you need to consider a variety of factors which are inter related. These include:

- What is the value of the contract/agreement? Generally, the greater the value the more rigorous your pre contract process should be as there is a greater potential risk to the Council. Even if the agreement is not for an amount of money there maybe other risks which require consideration. You need to consider what is the potential cost to the Council if something went wrong.
- Are there any issues in respect of Health and Safety law and regulation to be considered? See paragraph 5 below for further details.
- Will members of the public come into contact with the proposed services, works or supplies and therefore is there a potential risk to the public? An example is refurbishment works in a public library that will remain open to the public during the works. The more possible contact there is with members of the public the more rigorous your pre contract process should be.
- Will the Contractor be processing data subject to the Data Protection Act on behalf of the Council?
- If there is an industry standard or certificate you should check that any potential contractor meets that standard and has the relevant certificate.
- What is the legal title of the potential contractor?
- Does the potential contractor exist as a separate legal entity? If it is a company, you should check by searching the companies house website at [www.companies-house.gov.uk](http://www.companies-house.gov.uk). If there is potentially a large risk to the Council you should consider obtaining a full company search to obtain further details about the company. The extent of the search that you undertake will vary depending on the value and potential risks associated with the contract. If the potential contractor is a charity you could check whether it is a registered charity by checking the Charity Commission website at [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk).
- You may wish to consider asking potential contractors to provide references from companies or local authorities that the contractor has previously worked for. You could also call a couple of those references, clarify any issues of particular interest and make notes of those calls.

- Has the Council used the contractor before? If so, how did that contractor perform? Have any of the Council's neighbouring boroughs used that contractor before?
- What is included in the price? In other words are there a number of hidden costs and 'add-ons'?
- Are there any issues in respect of the environmental law or the Council's Environmental Policy or goals . How can you minimise environmental harm, risk or liability whilst contributing to continuous improvement? Can the contractor demonstrate sound management practices with regard to their impacts on the environment?
- Does TUPE apply?

### Contracts For a Value Less Than £20,000

- 3.2 You must take on board and apply the general principles set out in [Section 2, Part 2, Paragraph 9](#) and consider the issues highlighted in paragraph 3.1 above.
- 3.3 You do not have to follow a particular process but for contracts in this category **you do have to obtain best value** for your money by testing the market. One way to do this is to obtain quotes.
- 3.4 This means identifying a list of potential contractors (suppliers, service providers, works contractors) for the required contract who are able to provide to the required standard.
- 3.5 Identifying a list of potential suppliers may be carried out in many ways; thumbing through trade directories; checking suppliers catalogues, consulting specialist catalogues in libraries; consulting purchasing officer colleagues in Brent or other authorities, etc. You should consider whether it is appropriate to raise questions with the potential contractors about the way they would carry out the contract before putting them on your list of potential suppliers.
- 3.6 Administration systems should be set up to ensure fairness in selection of suppliers/contractors to give quotes and importantly to protect the officers concerned from any accusations of malpractice.
- 3.7 As stated in the general principles, **it is not acceptable to split orders/contracts into smaller parcels to artificially make the value less than £139,893 and therefore avoid tendering. It is also illegal to split orders into small parcels to avoid the application of the EU Regulations. If you intend to let several similar contracts within a given period e.g. over one or two years you should consider whether it is appropriate to aggregate them** and follow

the procedure appropriate to the total value of the aggregated contracts over their term (not the annual value). The larger your anticipated spend over the period, the more likely you will be able to obtain cost savings by [aggregation](#) and tendering.

- 3.8 **Officers must use official orders for works, services and goods to be supplied to the Council.** You should include terms and conditions within the official order. You may wish to take legal advice as to terms and conditions which would suit your particular circumstances. These should then be brought to the attention of the proposed supplier before the contract is awarded by the placing of the order, either during a telephone conversation which is noted at the time or, preferably, in a covering letter with the order. Official orders are not required for supply of gas, electricity, telephone or water supplies where there should be actual readings at least once a year. However for best practice management of these costs, it is best to have actual readings at least once a quarter.
- 3.9 **Official orders should be signed only by officers authorised by the appropriate manager. Any subsequent variation or amendment to an order shall be made only by staff authorised to sign orders and should be noted on the copy of the order.**

#### Contracts Valued As 'Low Value Contracts' ie Between £20,000 and £139,893

- 3.10 In addition to paragraphs 3.2 to 3.9 above, there is a specific requirement for **Low Value Contracts (i.e. valued between £20,000 and £139,893) in that at least three written quotes must be sought. The quotes sought and/or obtained must be recorded. Further guidance follows.**

## **4 The Process of Obtaining Quotes**

- 4.1 The requirement to seek at least three written quotes for Low Value Contracts, means **approaching at least three potential contractors for formal quotes. You must record this by making a written note on your file that you are seeking quotes and the method undertaken.** This may include correspondence from interested potential contractors. This approach would also be appropriate for below Low Value contracts.
- 4.2 You may want to consider giving the potential contractors a written invite to give quotes and you should normally do this for Low Value Contracts. It would be useful to have a return slip with that written invite which gives the potential contractor an opportunity to return the slip stating whether they are interested in giving a quote or not and if not why not.
- 4.3 If you do not get at least three responses you need to consider why that may have been the case. Every reasonable effort must be made to get at least three written quotes. However, if that is not possible so long as you have a written record of how you tried to obtain three written quotes and you have a written rationale as to why and how you think going ahead with a particular contractor is good value for money and appropriate in the circumstance this

should be sufficient. Where there are lots of potential contractors in the market it will be very hard to justify not actually getting three quotes if you only approach three in the first instance and one or more does not respond.

- 4.4 The amount of information about a potential contractor that you should expect to obtain in addition to their price and terms and conditions, will be related to the value of the contract and also the important and potential consequences of the subject matter.
- 4.5 For your protection the following procedure is recommended when quotations are invited:
- (a) Invite written quotations to be submitted in a plain, sealed envelope marked "Quotation for ...." (or through an appropriate e-tendering system). There should be no other mark on the outside of the envelope. At the time of inviting written quotations, enclose a copy of terms and conditions of purchase and/or engagement.
  - (b) Hold the envelope containing quotations somewhere safe until a time appointed for opening them.
  - (c) Arrange for at least two officers to be present at the opening of the envelopes or of the electronic tenders.
  - (d) Make a list of the opened quotations and have it signed by all officers present.
  - (e) Choose the best value for money supplier/contractor - choose on quality, price, delivery date etc. Consider negotiation of the specification.
  - (f) Send a letter of acceptance (with copy of the agreed specification if negotiation has taken place) and an official order with our terms and conditions to the supplier/contractor.
  - (g) The person who places the order should be a separate person from the person receiving and checking the delivery. (Financial Regulations requirement).
- 4.6 The written quotation, (or negotiated specification), letter of acceptance and the official order with the Council's terms and conditions will make up the contract, unless you decide that a more formal contract should be drawn up.
- 4.7 In general, any claim under a contract should be brought to Court within six years but this is twelve years for sealed contracts.
- 4.8 It is therefore good practice for all documents relating to these contracts to be kept in a safe place for at least six years (twelve, if sealed) following the completion of the contracted activity (i.e. if the contract is for two years, then

the six years runs from the end of the two year period, making eight years in all). You may wish to consider microfilming or scanning all the documents. Financial Regulations set out specific requirements for retaining contract documents. **These are:**

- contracts executed under seal must be retained for 12 years.
- contracts (including tender documents) not executed under seal must be retained for 6 years.
- documents relating to unsuccessful tenders must be retained for 6 years.

- . The effect of this is that you must retain not only the documents forming the contract (terms and conditions, specification), but also the unsuccessful quotes, any written decisions relating to those quotes etc.

- 4.9 Under Standing Orders any contract valued at £150,000 or more must be notified within one month to the Contract Register Officer in the Procurement Strategy and Risk Management Unit so that it can be added to the Contract Register. Under these guidelines, you are also required to notify Contract value between £50,000 and £149,999. Your notice should include the services, supplies or works to be provided; the contract value; contract term and where relevant any provisions for extension.

## **5 Health and Safety Issues in Contracts Not Put Out to Tender**

- 5.1 In some cases the Health & Safety risks to and duties of the Council will be just as significant in a contract not covered by the Council's requirement to tender as in contracts that are covered. Even a very low value contract may raise significant Health & Safety issues.
- 5.2 **The Council is required by Health and Safety Legislation to make a suitable and sufficient assessment of Health and Safety risks to its employees and other persons.** You should consider this in relation to any procurement exercise you are undertaking and where there is any development that is significant in terms of Health and Safety risks (for example, a significant reduction in staffing levels, introduction of new equipment or technology) and should ensure appropriate risk assessments are carried out and controls put into place.
- 5.3 There are circumstances in which the Council could be liable for the acts and omissions of its contractors and could be prosecuted under the Health and Safety at Work Act because of steps the Council has or has not taken. It is therefore important that in appropriate cases there is careful planning for the monitoring and review of contractors' protective measures. Often the best way to approach this will be for you to prepare your own risk assessment against which the risk assessment and safe work systems of contractors can be evaluated. Assistance with evaluation of contractor's risk assessments is available from the Health Safety and Licensing Unit.

- 5.4 Attached as Appendix 10 is a list of questions in relation to Health & Safety. This is provided to assist those entering into contracts not covered by the tendering requirement to ensure that they do ask appropriate Health and Safety questions in advance. The list is effectively a menu from which you should select questions appropriate to your particular transaction. It is not exhaustive. The Health Safety and Licensing Unit will be pleased to advise you on additional or alternative questions for particular contracts.
- 5.5 The assessment of the answers to the questionnaire should be undertaken by a competent person. For example, if you have asked for copies of contractors Health and Safety statements and are not yourself conversant with the requirements of the law in respect of the format and content of Health and Safety policy documents, you should ask the Health Safety and Licensing Unit to assess them for you.
- 5.6 In considering which questions need to be asked and what level of verification needs to be carried out, the following factors may be relevant. In deciding what is appropriate you should not rely simply on one factor but look at the overall position, taking into account all the factors in so far as they are relevant:
- 5.7 The factors are:
- Value of the contract - In general terms, and subject to the other factors identified below, for lower value contracts it will be reasonable to undertake a less detailed enquiry into Health and Safety issues appropriate to the Health and Safety risk. The best way to demonstrate this is to undertake a risk assessment.
  - Tendering is being dispensed with because of good operational and/or financial reasons (Standing Order 85(a)) or due to limitations in the market under Standing Order 85(c)(i) - If this is the case then it will almost certainly be the case that the same approach to Health and Safety should be taken as if a tendering process had been undertaken.
  - The content of the contract is such that Health & Safety is clearly important - This would apply for example, to the erection of structures in public places, or work for vulnerable clients. By way of specific example, a very minor contract involving the erection of scaffolding in a public place clearly raises significant Health & Safety issues even if the amount of money involved is very small.
  - Work will be carried out on Council premises where the Health & Safety of Council employees or service users might be affected. Again, in such a case a high degree of significance should be applied to Health and Safety issues.



- The contract would have been tendered if it were not for a particularly urgent situation under Standing Order 87(c)(ii) - As in the case of exceptions for good operational and/or financial reasons, it is highly likely that the same level of care should be taken over Health and Safety issues, in so far as that is possible in the particular circumstances of urgency.

5.8 When considering which questions from the list should be asked in a particular case, you should consider these and any other points relevant to the particular contract and record your reasons for the decision you make so you can justify it if the need to do so should later arise. Seek advice from the Health Safety & Licensing Unit if you are unsure.

5.9 You should ensure that contractors are informed of the Council's Whistleblowing Policy and of how a copy may be obtained. The policy is available through the Corporate Standards section of the Council's Corporate Governance website.

## **5A Environment and Sustainability in Contracts not put out to Tender**

5A.1 The level of environmental impact of a contract is not dependant on the value of the contract. It is dependant on how the proposal will interact with the environment, the sensitivity of any influenced environments, the damage potential of any resources or products used, and the way in which any work is conducted. For example, the constant supply of small amounts of pesticide, worth £10,000 a year, will have a greater environmental impact then the supply of agency staff at a value of £6million per year.

5A.2 It is recommended that all high and medium value contracts undergo an environmental impact screening and assessment process. ISO14001 certified parts of the Council must undergo this process to maintain compliance with their certification. ISO14001 requires the environmental impacts of all new and modified activities, such as contracting, to be identified, controlled, and mitigated wherever possible.

5A.3 Brent Council is committed to its Environmental Policy. This Policy commits the Council to 'Integrating environmental considerations into procurement, including contracts' where such considerations are relevant to the contract. Therefore, wherever possible and where consistent with best value principles, we must reduce or eliminate negative environmental impacts from our contracting and we should use any opportunities given to us to improve the environmental performance of the Council, which includes improving the environmental performance of those who work on behalf of the Council.

5A.4 Generally, if your contract involves any of the following, you may want to introduce some environmental control measures:

- the use of, and potential pollution from, gaseous emissions, liquids other than water, or solid wastes;

- alterations to transport infrastructure or the significant use of transport;
- alterations or influences to any flora or fauna and their habitats;
- landscaping and physical alterations to the built and natural environment;
- the sustained use of electricity, gas, water, or any other energy sources;
- the use or procurement of resources, either natural, or in the form of products; and
- the potential to influence or educate the residents of Brent.

5A.5 If any of these are elements of your contract, you are advised and encouraged to contact the Environmental Projects and Policy Team in Environment and Culture. The team has trained officers with experience in assessing contracts who can either do a free assessment of your contract and assist with the selection and management of the outcomes or can supply you with standard, legally approved, contract clauses for your final choice contractors to meet.

## 6. **Good Practice Tips**

6.1 The following good practice tips are designed to help you get the right goods and services in the right time to the right specification and at the right price.

### **The Right Goods**

- It is important that you communicate your requirements effectively to suppliers/contractors. Avoid jargon or abbreviations as this will avoid misunderstandings.
- Communicate very directly and specifically what you want from suppliers.

### **The Right Place - Delivery**

- It is well worth giving a bit of foresight and planning at the outset to decide where you want delivery actually made, the works/services to be carried out and ensure that this is specified at the outset rather than after the event when you are likely to be charged extra.
- **Note:** Consider having your deliveries to the point of use. This is useful from the point of view of handling/damage/theft issues.

## The Right Time

- It is worth establishing well in advance with the industry, (or for individual contractors) what the lead-in time is. There is no point seeking delivery of the works or service in a week if it takes six. It means that you can be realistic in your specification and will not be paying extra for "express" delivery. If for example you do need goods by a specific time and date e.g. food you must express this at the start. Legally this is referred to as making "time of the essence".

## The Right Specification

- Be clear what you want and set this out in writing.
- If a specification already exists it will usually be a good idea to use this as a basis for your specification.
- If you cannot use one that already exists you could write to three potential contractors and ask them to tell you about their machines/works/services and then by considering the options this presents you have the making of a specification.
- Ensure you are taking the right approach to packaging the contract, for example, can it be linked with another contract to make it more attractive or to make pricing more competitive?

## DON'T OVER SPECIFY

## The Right Price

- VALUE FOR MONEY IS PARAMOUNT.
- You must find a balance between cost, fitness for purpose, lifetime expectancy, delivery, service, technical/professional standards and value at end of life.

## 7 Checklists

7.1 Appendix 11 sets out three checklists which you may find useful in circumstances where no formal tendering exercise is undertaken:

- (a) Appendix 11(a) sets out the factors you should consider firstly in deciding whether or not to tender and what to consider if no tendering exercise is to be undertaken.
- (b) In contracts where no formal tendering exercise is undertaken you may find that the service provider wants you to contract on

their standard terms and conditions. In such circumstances, the most important thing is to read the terms and conditions carefully. Legal Services are available to provide you with advice on such terms and conditions. Another useful tool is Appendix 11(b) which sets out what to look for when considering your service providers standard terms and conditions.

- (c) Appendix 11(c) is a checklist of contract terms which should be covered in any supplies contracts. Further information on this is contained in [Section 4B, paragraphs 6.5 and 6.6.](#)

## **CHECKLIST FOR CONTRACTS BELOW LOW VALUE (BETWEEN £20,000)**

1. Must be satisfied that the Contractor:
  - Is technically competent.
  - Has sufficient financial standing to carry out the work.
  - Can produce works, services and goods to the quality required.(Fin Reg 5.5.4)
2. Use official orders for works, services and goods to be supplied to the Council. This is not required for supply of gas, electricity, telephone or water supplies where there should be actual readings at least once a year.  
(Fin Reg 5.5.1)
3. Managers should take appropriate steps to ensure value for money.  
(Fin Reg 5.5.1)
4. Official orders should be signed only by officers authorised by the appropriate manager.  
(Fin Reg 5.5.1)
5. A copy of the official order should be retained by the issuing unit.  
(Fin Reg 5.5.2)
6. Any subsequent variation or amendment to an order shall be made only by staff authorised to sign orders and should be noted on the copy of the order or otherwise formally recorded.  
(Fin Reg 5.5.2)
7. Must retain accounting documents and contracts certificates for a minimum of 6 years.  
(Fin Reg 9.3)
8. The relevant Service Area Director must maintain a record of all contracts entered into on behalf of the Council.  
(S.O. 103)

## **CHECKLIST FOR LOW VALUE CONTRACTS (BETWEEN £20,000 AND £139,893)**

1. Must be satisfied that the Contractor:
  - Is technically competent.
  - Has sufficient financial standing to carry out the work.
  - Can produce works, services and goods to the quality required.(Fin Reg 6.1.5)
2. Chief Officers must ensure in any contract procurement that it is:
  - Fair.
  - Transparent.
  - Auditable process.
  - All potential contractors are treated equally and fairly.(S.O. 84(b))
3. No formal tendering procedures apply. 3 written quotes must be sought. The quotes sought and/or obtained must be recorded.  
(S.O. 86(b))
4. Use official orders for works, services and goods to be supplied to the Council. This is not required for supply of gas, electricity, telephone or water supplies where there should be actual readings at least once a year.  
(Fin Reg 5.5.1)
5. Managers should take appropriate steps to ensure value for money.  
(Fin Reg 5.5.1)
6. Official orders should be signed only by officers authorised by the appropriate manager.  
(Fin Reg 5.5.2)
7. A copy of the official order should be retained by the issuing unit.  
(Fin Reg 5.5.2)
8. Any subsequent variation or amendment to an order shall be made only by staff authorised to sign orders and should be noted on the copy of the order.  
(Fin Reg 5.5.2)
9. Must retain accounting documents and contract certificates for a minimum of 6 years.  
(Fin Reg 9.3)
10. The relevant Service Area Director must maintain a record of all contracts entered into on behalf of the Council.  
(S.O. 103)

# **SECTION 4**

## **FORMAL TENDERING**

### **Part 1      Overview**

### **Part 2      Detail**

**WHAT SHOULD YOU DO IN  
PREPARATION FOR A TENDERING  
PROCESS**

**PUTTING TOGETHER A TENDER  
PACK**

**THE TENDERING PROCESS**

# FORMAL TENDERING

## Part 1 - Overview

The purpose of this part is to provide a brief overview of Section 4 on the tendering process. It covers preparing for your tendering process, preparing the necessary documentation, carrying out your tendering process and the awarding of contract. You should consult the relevant paragraph(s) of Section 4 for further information and not rely solely on this overview.

## WHAT YOU SHOULD DO IN PREPARATION FOR A TENDERING PROCESS

### 1 Consider Application of Standing Orders and Legislation

[Section 4A, paragraph 1](#) helps you to identify which rules in legislation and Contract Standing Orders apply to your procurement process.

The Council's Standing Orders require a tendering process to be undertaken for all contracts estimated to have a value of £139,893 or more over the term of the contract, including any possible extension, subject to specified exceptions.

The tendering process to be followed will depend on the nature and value of the contract you are letting. Included at the end of Section 4A is a flowchart that will be of assistance in identifying the applicable rules.

You will need to consider the application of:

- EU Regulations.
- [TUPE](#).
- Health and Safety legislation.
- Best Value.
- Any specific legislation which is relevant to your contract e.g. Environmental Legislation.

### 2 Decide on the Best Tendering Approach

You will need to consider what is your best approach to the tendering process. You may choose a single stage tendering process, a two stage tendering process or, in more limited circumstances, a negotiated process. Additionally you may consider whether e-tendering or an e-auction may be appropriate for your contract. You will also need to consider what evaluation criteria you will use.



### **3     Assess the Market**

Assessing the market through consultation with providers and others who have let similar contracts assists you in packaging your contract(s) to maximise competitive market response.

### **4     Resources and Budget**

#### Identify the Budget Requirements

This will include:

- The budget for the procurement process.
- The budget(s) for the contract both Capital and Revenue.
- The revenue implications of any Capital spend.

#### Identify the Source of Funds

This could include:

- The Council's Capital Programme.
- The Council's Revenue Budget.
- Government Grant.
- Section 106 money.
- Other external funding sources.

#### Identify any Conditions of Funding

This could include:

- The approval process for schemes in the Council's Capital Programme.
- The approval process for any revenue growth required.
- Grant conditions.
- Other conditions e.g. time limitations, consultation requirements, external approval, audit, planning permission.

#### Identify Other Resource Requirements

This could include:

- Availability of staffing resources to carry out the procurement and delivery of the scheme.
- Availability of (or access to) land required for the scheme.

### Identify the Resource Risks

This could include:

- How to deal with cost overruns / budget shortfalls.
- Timing problems.
- Contingency plans.
- Allowance for possible variations of the contract during its term.

## **5 Consultation**

### Links to Best Value

Where there has been a relevant Best Value review its recommendations should be taken into account and you should avoid duplicating consultation already undertaken.

## **6. Workforce Issues**

Local authorities are permitted to consider workforce matters such as terms and conditions in a TUPE transfer situation if there are local authority staff or ex-local authority staff likely to transfer likely to transfer or where they are directly relevant to the service to be provided insofar as is required to implement best value. There is statutory guidance to be considered concerning these issues.

## **7. Trade Union and Employee Involvement**

Where existing Council staff are likely to be affected by your procurement process you should consider and plan for the involvement of trade union representatives at an early stage of your process.

However, the tendering process as a whole must still be fair and transparent. It is therefore appropriate to involve trade union representatives at an early stage about the procurement process, the specification and on issues to be raised with tenderers in the tendering process, but not appropriate for them to be members of the evaluation panel. Post award, close involvement of the trade unions will be required under [TUPE](#) procedures. Further information is contained in Appendix 7.

## **8 Equality and Diversity Issues**

One of the issues you should consider at the outset of a procurement process is the relevance of the subject matter of the contract to the Council's duty to promote equal opportunities and promote good relations between people from different racial groups. These issues are particularly likely to be relevant to service contracts.

## **8A Environment and Sustainability Issues**

You should assess your contract for its impact on the environment when you are considering your need to tender for a product or a service. Where the impact on the environment is likely to be major and is directly relevant to the contract you should target this as a key contract concern and address it throughout.

## **9 Project Plan**

### **Why Have a Project Plan**

Spending the time initially planning your procurement process should mean you avoid delays and missed deadlines later on and enable you to ensure all the resources you need, including those to be provided by third parties, are available when you need them. Good project Management goes far beyond simply listing tasks and setting dates for completion though. A good project plan will clearly identify what the deliverables of the project are and have a proper method of reporting any deviations from this to the project sponsor. It will also contain a risk log, a communications plan, and have stage boundaries at which the project sponsor will review the progress to date and request remedial action where necessary.

### **What Should it Contain?**

The project plan should set out all the tasks that need to be completed throughout the tendering process, indicate the individual responsible for completing them and the date they must be completed by. You should keep the progress of the project under review so that you can make adjustments in good time and keep on track. There is an example of a project plan at [Section 4A, Paragraph 10.4](#) to assist you when completing the plan for your contract.

## **PUTTING TOGETHER A TENDER PACK**

## **10 Preparation of Tender Pack and Inviting Tenders**

There are a number of documents in a tender pack and it is important that you start preparing this pack early. This section provides advice on what documents should be included in the tender pack and how to seek advice from Legal Services.

Your tender pack will generally consist of:

1. Instructions to Tenderers
2. Form of Tender.
3. A Questionnaire to assess economic and financial standing and experience (where using a single stage or open process only).
4. Specification.
5. Pricing Document if separate from specification.
6. Terms and Conditions.
7. Any Appendices.
8. [TUPE](#) Pack (see Appendix 7 for further information).
9. Any drawings.
10. Covering letter.

11. Bond.
12. Bond Undertaking.
13. Parent Company Guarantee.
14. Parent Company Guarantee Undertaking.

Standing Order 98 set out specific requirements about what must be included in the Invitation to Tender Pack. A precedent covering letter for the pack is at Precedent 3.

## PREPARING A SPECIFICATION

### 11 General

The development of the specification is a very important part of the procurement process. It will be vital to the success of your procurement process that adequate time is allowed for the preparation of the specification. The amount of time required may be substantial and will depend upon the complexity of what is to be provided under the contract.

This section explains the purpose of the specification and gives guidance on how to write your specification, including matters to cover and how to structure the document.

### 12 What makes an Effective Specification?

A specification is a statement of needs to be satisfied by the procurement. The specification should be sufficiently precise so that the product or service provided will meet the need but not so explicit that it prevents or discourages the supplier from proposing innovative solutions (and hence better value for money). When completed the specification should give tenderers a clear idea of the future directions and aspirations of the Council. There should also be an element of continuous improvement wherever possible.

A Good Specification Should:

- (a) State your requirements clearly, concisely, logically and unambiguously.
- (b) State your requirements in output and outcome terms wherever possible.
- (c) Contain only the essential features of your requirements.
- (d) Comply with legal requirements.
- (e) State how contractor performance will be assessed and monitored.
- (f) Enable offered services to be evaluated against agreed criteria.
- (g) Be sufficiently flexible to meet your requirements now and over the term of the contract.

An example layout is at [paragraph 3.15 of Section 4B](#) on Preparing Your Specification.

### **13     Development of the Specification**

The foundations of a good specification are planning, research and analysis.

Steps to take:

- (a) Consult.
- (b) Review current service provision/challenge existing specification.
- (c) Consider the component parts of your requirement.
- (d) Consider quality standards.
- (e) Plan.
- (f) Ask a friend.

### **14     Defining Your Requirement**

This will cover functional and performance characteristics of the product or service, technical characteristics if necessary and the standards against which the contractors/suppliers will be assessed.

#### **Input Specification**

An input specification will include descriptions that tend to instruct the contractor how to provide the service and how to achieve the standards required. Input measures are relatively easy to monitor but they may not ensure that the overall service standard you had in mind will be achieved.

#### **Output Specification**

An output specification will include descriptions of the service that allow the contractor freedom to develop his/her own methods/approach. It will tend to concentrate on defining standards rather than how the service should be delivered. Output measures (if carried out correctly by the contractor) will increase the likelihood of your intended outcome being achieved.

Some examples of the way in which attributes can be written into output standards are given in this Section 4B.

### **15     Addressing the Duty to Promote Equality and Equalities Issues Generally**

The Council has various duties to promote equality of opportunity. There is also a corporate commitment in the Council's Single Equality Scheme to promote equality in respect of other areas of inequality as well. See Appendix 12 for further information. In defining your core requirements you should have in mind the equalities dimension and you should then consider what explicit requirements should be included in your Specification.

### **16     Charging Methods**

These may be in the specification or you may have your pricing document separately. There are a variety of ways of charging. The quantities and standards in the specification should only be finalised after consideration of methods of dealing with variations within the Contract so you are sure that a competitive position can be maintained for variations and fluctuations.

## **17 Contract Conditions/Specification Interaction**

Although the specification is generally produced as a separate document, it should not be developed or used in isolation from the contract conditions. Your specification should be in a fairly advanced state before lawyers can meaningfully progress the contract conditions.

Care should be taken to ensure that contract conditions do not contradict the specification (and vice-versa) and that there is no duplication.

## **18 Instructions to Tender**

This document sets out how tenderers should go about preparing and submitting their tender and contains rules about what information the tenderers can rely on without verifying it themselves. Generally tenderers are expected to verify information themselves. In appropriate cases the instructions include information about making a [TUPE](#) bid.

## **19 Form of Tender**

This is included in the Instructions to Tenderers and is designed to ensure that as soon as the Council accepts a particular tender there is a binding contract even if there is then a delay before a formal contract is executed.

## **20 Terms and Conditions**

These guidelines contain two precedent contracts at Precedents 8(a) and (b) and this Section contains guidance on when each should be used. These precedents are not intended to be used in all circumstances and Legal Services can provide advice on alternative precedents. Where Legal Services is to be instructed (which will generally be the case where you are carrying out a tender process) you need to ensure you have allowed adequate time for Legal Services to comment on your draft terms and conditions before you send tender packs out.

## **THE TENDERING PROCESSES**

## **21 Types of Processes**

These paragraphs provide you with an explanation of the open/single stage tender, the restricted/two stage tender and negotiated procedure. They also detail the minimum timetable either prescribed in Standing Orders or the EU Regulations.

## **22 Advertising**

If your contract is subject to the full application of the EU Regulations you must first advertise the contract in the Official Journal of the European Union ([OJEU](#)). The Procurement Strategy and Risk Management Unit can place this for you. You must also retain a copy of proof of despatch of your OJEU notice in your project file as evidence of the fact that this was placed before any other advert, in compliance with EU Regulations. If you do chose to advertise in publications other than OJEU your other advertisements must not contain additional information which you have not included in your OJEU notice. It is also a good practice to advertise the contract locally.

If your contract is not subject to full application of the EU Regulations you must advertise it in at least one local newspaper and one relevant trade journal. In the case of contracts which are not subject to the detailed rules in the EU Regulations, if the contract is one which it is likely potential tenderers in other member states would have an interest, you should ensure appropriately wide advertising to bring the contract to their attention in good time.

## **23     Pre Qualification Questionnaires and Shortlisting**

This section details what questions you can ask in a Pre Qualification Questionnaire and the method of evaluation.

## **24     Receipt and Opening of Tenders**

If your contract is a High Value Contract tenders must be returned to the Democratic Services Manager and opened by a representative of him or her and at least one other officer. Medium Value Contracts must be addressed to the relevant Chief Officer and opened by officers of appropriate seniority. It is important that the tender opening procedure is systematic and beyond reproach. For this reason, late tenders may only be accepted with the prior written approval of the Chief Executive or Monitoring Officer.

## **25     Evaluation of Tenders**

If a tender is qualified it should be rejected. Clarification is permissible but you should be careful to ensure that you do not allow a tenderer an opportunity to improve their bid.

When evaluating tenders it is important to remember general principles of transparency and equal treatment and ensure that records are kept of any communications with tenderers and any decisions made.

Standing Orders require all contracts to be evaluated and awarded on the basis of the most economically advantageous offer except in the case of works contracts where it has been determined that the lowest price was the appropriate criteria.

When evaluating tenders, you need to satisfy yourself that the contractor has the necessary skills and knowledge to carry out the job. As part of this you will need to assess the risks involved (see Appendix 14) including Health and Safety risks.

Your tender panel should include the officer with responsibility for the procurement process and other officers as necessary to properly evaluate all aspects of the tenders. In the case of High Value Contracts you should ensure that representatives of the Director of Finance and Corporate Resources and Borough Solicitor are invited to be part of the evaluation process.

Further tender evaluation guidance is contained in Appendix 24.

## **26     Tender Award**

If your contract is a High Value Contract you will need to obtain member approval to award the contract. In all other cases that decision can be made by an officer in your Service Area or Corporate Unit with the relevant delegated authority.

Once the decision has been made to award the contract the following steps must be taken:

- If the mandatory minimum 10 calendar day standstill period requirements apply (see Appendix 25), issue the successful tenderer(s) and unsuccessful tenderer(s) with written notification of the contract award decision and provide unsuccessful tenderers with additional debrief information on written request;
- Send acceptance letter to successful tenderers within 5 days of the end of the standstill period (if applicable) or the award decision if possible;
- Advise unsuccessful tenderers (if they have not already been advised in accordance with the standstill period requirements);
- Arrange for contract to be signed or sealed, as appropriate;
- Advise the Contract Registers Officer of required information regarding the contract; and
- Send contract award notice to [OJEU](#) where necessary.



## FORMAL TENDERING

### Part 2 - Detail

#### 4A WHAT YOU SHOULD DO IN PREPARATION FOR A TENDERING PROCESS

##### 1. Consider Application of Standing Orders and Legislation

###### Identifying whether Council Standing Orders and/or EU Regulations Apply

1.1 The Council's Standing Orders require a tendering process to be undertaken for all contracts estimated to have a value of £150,000 or more over the term of the contract, including any possible extension. There are exceptions to this which are set out in Sections 2 and 3. Section 3 also sets out the procedures to be followed where contracts are not subject to full tendering requirements.

1.2 Once you have established that you need to undertake a formal tendering exercise for the supplies, services or works that you wish to procure you need to identify the tendering process that must be followed to ensure compliance with the Council's Standing Orders and any relevant legislation, including EU Regulations where applicable. Remember that arrangements with consultants are contracts for services and therefore the same considerations apply to them.

1.3 The tendering process will depend on the value of the contract and the type of contract you are letting.

###### *Value of the Contract*

Estimating the value of the contract you intend to let is a necessary step before you can decide which rules under the Council's Standing Orders will apply to your tendering process and whether the EU Regulations will also apply. [Section 2, Part 2, Paragraph 14](#) sets out the relevant considerations for valuing a contract.

###### *The Type of Contract*

**In addition to estimating the value of the contract you intend to let** it is also necessary to establish what type of contract it is. The applicable rules in the Council's Standing Orders will vary depending on whether the contract is a contract for supplies, services or works and so will the applicability of the EU Regulations. An explanation of the different types of contracts is set out in Appendix 2.

1.4 Once you have determined the value and type of contract you intend to let you can identify whether you need to comply with EU Regulations or whether you are just required to comply with the Council's Standing Orders. Included at the end of Section 4A is a flowchart that assists in

identifying which rules apply to a particular contract. **All contracts must comply with the Council's Financial Regulations.**

- 1.5 The following table sets out which sets of rules apply to the different types of contracts depending on their value.

WORKS CONTRACTS		SUPPLIES CONTRACTS		SERVICES CONTRACTS			
				PART A*		PART B*	
Less than £3,497,313	£3,497,313 or greater	less than £139,893	£139,893 or greater	less than £139,893	£139,893 or greater	less than £139,893	£139,893 or greater
Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders	Compliance with Council's Standing Orders
	+		+		+		+
	Full Compliance with EU Regulations for Works Contracts		Full Compliance with EU Regulations for Supplies Contracts		Full Compliance with EU Regulations for Services Contracts		Limited Compliance with EU Regulations for Services Contracts

\*Under the EU Regulations, services are divided into 2 categories. Category A services are subject to the full application of the EU Regulations. However, Category B services are only subject to limited application of the EU regulations. The different categories are discussed in Appendix 2.

#### Identifying the Application of any Other Relevant Legislation.

- 1.6 It is important that you establish whether you need to comply with any other legislation at this early stage so that compliance may be built into the tendering process where required. In particular you need to consider the following:

- Is TUPE legislation relevant to your contract? See [Section 2, Part 2, Paragraph 11](#).
- How does Health and Safety legislation apply to your contract? See [Section 3, Part 2, Paragraph 5](#).
- Is Best Value legislation relevant to your contract and/or is there a recent best value review which may be relevant? See [Section 2, Part 2, Paragraph 10](#).
- Is there any environment legislation which is relevant to your contract?

- Is there any specific legislation which is relevant to your contract? For example legislation that requires or empowers the Council to provide a particular service.

## 2 **Decide on the Best Tendering Approach**

- 2.1 Having identified compliance with the relevant Council Standing Orders, EU Regulations and any other relevant legislation you can now decide on the tendering approach you wish to use to procure the supplies, services or works you require.
- 2.2 The following table and discussion will assist you in identifying the tendering options which are available to you and the advantages and disadvantages of the different options.

### The Procurement Options

PROCUREMENT OPTIONS	
FULL APPLICATION OF EU REGULATIONS and COUNCIL STANDING ORDERS	COMPLIANCE WITH STANDING ORDERS ONLY and/or LIMITED APPLICATION OF EU REGULATIONS
(a) Open Procedure	(a) Single Stage Tender
(b) Restricted Procedure	(b) Two Stage Tender
(c) Negotiated Procedure*	(c) Negotiating the Contract (requires exemption from Standing Order requirements on tendering)
(d) Competitive Dialogue Procedure	

\* The Negotiated Procedure and Competitive Dialogue Procedure may only be used in limited circumstances. You must consult Legal Services and the Procurement Strategy and Risk Management Unit to see whether these options are available to you.

Standing Orders and the EU Regulations use different terminology for the various procurement procedures however, the processes are very similar.

#### *Open Procedure or Single Stage Tender*

- 2.3 Under this procedure you must advertise in a newspaper and trade journal or if EU Regulations are applicable, in OJEU ("OJEU Notice"). Any Economic Operator that is interested in the contract is entitled to tender for the contract in response to the advertisement. The selection (PQQ Stage – see below) and award processes, although separate and discrete, take place simultaneously.

Further information on the Open Procedure is provided in Appendix 2

However, this route is generally not recommended as due to the advent of the internet even a small advertisement in a local paper can be reproduced on a global website resulting in numerous tenders being submitted. However the open procedure may still be suitable where the market is known to be limited. There is an obligation for the Council to evaluate each one received.

### *Restricted Procedure or Two Stage Tender*

2.4 As with the Open Procedure you must advertise in a newspaper and trade journal or if EU Regulations are applicable in OJEU ("OJEU Notice"). However, the Restricted Procedure involves two separate stages:

- (1) Selection of suitable tenderers based on a [PQQ](#). This is sometimes called the expression of interest stage.
- (2) Evaluation of tenders from those tenderers invited to tender for the contract following stage (1).

Further information on the Restricted Procedure is provided in Appendix 2.

### *Negotiated Procedure*

2.5 The Negotiated Procedure may only be used in limited circumstances. If EU Regulations are applicable there are specific requirements which must be complied with. The Negotiated Procedure is where the terms of the contract are negotiated with one or more potential economic operators. There are in fact two negotiated procedures under the EU Regulations. One which is preceded by the prior publication of an [OJEU](#) notice and one which is not. Different rules govern when each of the procedures may be used. These circumstances are summarised in Appendix 2. However, the rules are complex and Legal Services must be consulted to advise on whether or not the negotiated procedure may be used for the tendering of a particular contract.

### *Competitive dialogue*

2.6 This procedure has been introduced by the EU Regulations and can be used for particularly complex contracts.

Competitive dialogue is a half way house between the Open and Restricted procedure on one hand and the competitive form of the Negotiated procedure on the other hand.

The Competitive Dialogue is for use where the nature of the contract is such that neither the open nor the restricted procedures would allow for an award of the proposed contract. This procedure is to be used for

awarding **complex contracts** where there is a need for the Council to discuss all aspects of the proposed contract with Economic Operators **who express an interest** to engage in the dialogue. The aim of the dialogue is to assist the Council to develop solutions/products that will be capable of meeting its needs. Once the solution is developed with Economic Operators, this will form the basis upon which Economic Operators who are invited would **submit their tenders**.

Like the negotiated procedure, the rules that govern the Competitive Dialogue Procedure are complex and Legal Services must be consulted to advise on whether or not the competitive dialogue may be used for the tendering of a particular contract.

### Advantages and Disadvantages of the Procurement Options

- 2.7 The advantage of the Open Procedure or Single Stage Tender is that it can be quicker than the Restricted Procedure or Two Stage Tender. However, if there are many responses to an advertisement or [OJEU](#) notice it can be an arduous task evaluating all of the tenders. This process may be particularly suitable where there are only a limited number of contractors in the market place that would be interested in the contract.
- 2.8 The advantage of the Restricted Procedure or Two Stage Tender is that the process enables you to eliminate unsuitable contractors at stage one therefore reducing the number of contractors that are invited to tender and accordingly the number of tenders that must be evaluated. Although this process may take longer than an Open Procedure or Single Stage Tender it may be of particular benefit when it is likely that there may be many contractors that will be interested in the contract. It should be remembered that there should be sufficient information given out by the Council at the pre-qualification stage to allow the tenderers to understand what qualities the Council is seeking in the Contractor it appoints. This will deter submissions from Contractors that do not have the requisite experience.
- [2.9](#) The Negotiated Procedure can be of advantage when it is difficult to specify the services, supplies or works required.
- 2.10 By using the Competitive Dialogue Procedure, the Council can benefit from the flexibility that this procedure allows and through negotiations with economic operators, the council will be in a better position to satisfy its requirements.

### E-tendering and E – Auctions

- 2.11 Having chosen which procurement procedure you wish to follow you should consider whether you would like to undertake the procedure by using electronic means. This could either be by electronic dispatch and receipt of tender documents (“E- tendering”) or by an online auction to determine the price element of a tender (E-Auction”).

- 2.12 Standing Order 101 and the EU Regulations set out specific rules which must be followed if e-tendering or an e-auction are undertaken. Specific guidance on e-tendering and e-auctions and the rules to be followed are contained in Appendix 26.

### Evaluation Criteria

- 2.13 You should also consider what evaluation criteria you will use. If your contract is for services or supplies Standing Order 104(b) requires you to use criteria that lead to the selection of the most economically advantageous tender (MEAT) i.e. a balance of price and quality. If your contract is for works you can choose to use the lowest price **criteria**. Where you follow the competitive dialogue procedure, you can only use the MEAT criteria.
- 2.14 It is important that you consider this at an early stage as where your contract is subject to the EU Regulations you must state the evaluation criteria in your [OJEU Notice](#) or invitation to tender.
- 2.15 Further guidance on evaluation is provided in Appendix 24.

## **3 Assess the Market**

- 3.1 You want to be sure that you have packaged your contract in a way that is likely to generate as much competition as possible. This means assessing the market through consultation with potential providers and perhaps also with representative bodies. You may find it useful to advertise for organisations interested in participating in a consultation exercise. Discussion with other authorities who may have tendered for similar services is likely to be particularly fruitful. There may also be appropriate professional bodies that you could contact. In this way you will be able, for example, to assess what would be a sensible period for your contract, whether a framework arrangement would be of interest to potential providers or contracting jointly with another Borough or whether allowing for the overall requirement to be split into lots would increase market response. Making use of CHAS (see Appendix 18) may also assist as CHAS has a facility to search by type which may help you build up a picture of the market.
- 3.2 You may be able to get assistance from a procurement analyst in the Corporate Procurement Unit with this exercise.
- 3.3 It is advisable to record details of all meetings/discussions, telephone conversations, with potential suppliers and care should be taken to consult several providers in order that the practice is not seen to be biased or anti-competitive. It is also important to remember that you are consulting on the packaging of the contract not seeking quotes.

- 3.4 If promotion of race equality or promotion of good race relations is relevant to your contract, include this as a factor when assessing the market, there may be some useful ideas out there. Consultation with agencies and voluntary organisations may also help you ensure your specification in due course covers the different needs of all potential service users. If there is a distinct element of the service for a particular minority group (for example, special meal requirements) you should consider whether that should be packaged separately, and whether there are alternative methods of providing the service that would more positively promote racial equality.
- 3.5 If you are considering conducting an E-auction or using e-tendering you should look into whether the particular market you are aiming at is suitable for such e-procurement as part of your market assessment. (see Appendix 26 for guidance).
- 3.6 Care should be exercised when undertaking any such exercise to respect confidentiality of information and not to gear your procurement exercise to particular providers as this may be regarded as anti competitive.

#### **4 Undertake any Appropriate Consultation**

- 4.1 Consultation should be undertaken at a sufficiently early stage so that comments and views put forward during consultation may be taken into account, as appropriate, when drafting the specification for the contract or in the way that you approach the packaging of or tendering for the contract. For example, if consultation has highlighted an aspect of delivery of a service that users of the service are unhappy with under a current contract it may be that you can respond to this in the drafting of the new specification.

#### **Who to Consult**

- 4.2 In some cases there will be a statutory requirement that certain bodies or people should be consulted. In such cases you must consult with those bodies or people. For example Regulation 8 of the Schools Forums (England) Regulations 2002 requires the Council to consult with the Schools Forum on contracts in certain circumstances and there are a number of specific consultation requirements in respect of housing matters.
- 4.3 Even where there is no statutory requirement to consult prior to tendering a contract you should consider carefully the extent to which you should consult with those who may have an interest in the contract you intend to let or who may be affected it. Sometimes this may mean consulting with specific individuals, for example users of a particular service especially where this has happened in the past and those affected might reasonably expect a similar consultation process to be undertaken this time.
- 4.4 When deciding on what consultation you should undertake you should consider whether it is appropriate to consult with an Area Consultative

Forum or any relevant Service User Forums established by the Council. Area Consultative Forums and Service User Forums are covered under Article 10 of the Council's Constitution and meet four times per year. If you plan to consult with one (or more) of the Forums you should contact the lead officer within the Council who is responsible for that particular forum in good time. Lead Officer details are available from the Consultation team which is part of the Communications and Consultation Unit.

- 4.5 Sometimes it may be appropriate to undertake broader consultation rather than consulting with specific groups or individuals. You should ensure that consultation is inclusive and reaches all groups and not just the more vocal users.

### How to Consult

- 4.6 The table at 4.13 below is taken from the Council's Best Value Tool Kit. It sets out a variety of methods for undertaking consultation.
- 4.7 The Council's Consultation Team which is part of the Communication and Consultation Unit will be able to provide you with guidance on undertaking consultation and advise you of any consultation currently being undertaken by the Council. The Brent Consultation Toolkit, a detailed guide to consultation, is available on the Council's Intranet on the Consultation homepage.
- 4.8 For particular guidance on consultation in relation to Best Value Reviews please see the Council's Best Value Toolkit, which is available from the Policy and Regeneration home page.
- 4.9 You should ensure your methods of consultation are inclusive. For example, relying on meetings for the consultation process may exclude those who are housebound or who have difficulties attending because of caring responsibilities. Where possible, arrange consultation in places where people traditionally meet, such as day-care centres, and supplement meetings with surveys. When arranging meetings, assess the likely audience and consider providing language support, signing support, large print, etc. if necessary.

### Internal Consultation

- 4.10 You should also consider what internal consultation you should undertake. For example, if you are letting a supply contract internal consultation with those who will use the goods will be important. There may be legal or financial issues raised by your project especially if you are taking a novel approach or intending to work in 'partnership' with another body and early consultation with Legal Services and/or Financial Services would be sensible in such cases. If the contract you are tendering impacts on the activities of another part of the Council, you may need to consult with officers in the relevant Units. You may also need to consult with Ward



Members or Lead Members if the contract impacts on a particular ward or is particularly relevant to a lead member's area of responsibility.

### Links to Best Value

- 4.11 In some cases extensive consultation with stakeholders within and outside the Council may already have taken place as part of a Best Value review and there is no need to repeat that exercise. When a contract is being tendered following a Best Value review it will be important to ensure that the findings of the review are taken fully into account at all stages. The review may have produced recommendations in respect of how a contract should be packaged, how it could be tendered to maximise responses and how it should be specified to best meet the needs of service users or the Council. You need to ensure your procurement process and the contract that you let will enable the Council to achieve the service improvements identified by the review.
- 4.12 Even where there is no specific Best Value review covering the contract you are procuring you should be mindful of the need to adhere to the Council's general duty to achieve best value as discussed earlier in Section 2 of these guidelines.
- 4.13 The following table sets out various methods for consultation.

METHOD	ADVANTAGES	DISADVANTAGES
<b>Publishing documents</b>	<ul style="list-style-type: none"> <li>Simple to organise</li> </ul>	<ul style="list-style-type: none"> <li>Can be expensive, dependent upon circulation list and length of document.</li> <li>Broader opinion is dependent upon willingness of consultees to distribute further.</li> <li>No opportunity to seek clarification.</li> <li>The audience is pre - selected. Weighty, jargon-full documents rarely elicit an enthusiastic response.</li> <li>Responses can be unstructured and difficult to analyse and reconcile.</li> <li>Relies on individuals' motivation to respond</li> </ul>

METHOD	ADVANTAGES	DISADVANTAGES
<b>Complaints procedure</b>	<ul style="list-style-type: none"> <li>• Should be in place in all service units.</li> <li>• Administration is a minimal cost.</li> </ul>	<ul style="list-style-type: none"> <li>• Negative, limited information – reacting to current service.</li> <li>• Usually involves those citizens already ‘empowered’.</li> <li>• Useless unless analysed and acted upon – especially in order to identify systems failures.</li> </ul>
<b>Public meetings</b>	<ul style="list-style-type: none"> <li>• Possible to explain issues.</li> <li>• Can meet with fairly large numbers of people.</li> <li>• Attracts individuals as well as group.</li> </ul>	<ul style="list-style-type: none"> <li>• How representative – self-selecting. Can intimidate even those who turn up.</li> <li>• Need to offer a mechanism for comment to all that attend, otherwise only the views of those who speak influence decisions.</li> </ul>
<b>Regular consultative meetings including Consultative Forums.</b> Area	<ul style="list-style-type: none"> <li>• Possible to explain issues.</li> <li>• Can meet with fairly large numbers.</li> <li>• Attracts individuals as well as group.</li> </ul>	<ul style="list-style-type: none"> <li>• How representative – self-selecting.</li> <li>• Can intimidate even those who turn up.</li> <li>• Need to offer a mechanism for comment to all who attend otherwise only the views of those who speak influence decisions.</li> </ul>

METHOD	ADVANTAGES	DISADVANTAGES
<b>Postal survey using structured questionnaire</b>	<ul style="list-style-type: none"> <li>• Relatively inexpensive.</li> <li>• If simply structured, simple to analyse and more likely to elicit responses.</li> <li>• Confidentiality more easy to maintain.</li> </ul>	<ul style="list-style-type: none"> <li>• Response rates are generally poor. Self-selection.</li> <li>• Difficult to guarantee integrity of sample.</li> <li>• Higher response rate only likely if simply constructed.</li> <li>• Over-simple structure limits the usefulness of information gathered.</li> <li>• Exploration of responses not possible.</li> <li>• Requires capacity to read and write – limitations re residents with disabilities.</li> </ul>
<b>Face-to-face/telephone survey using structured questionnaire</b>	<ul style="list-style-type: none"> <li>• If simply structured simple to analyse.</li> <li>• Sample robustness can be maintained.</li> <li>• High response rate can be ensured.</li> </ul>	<ul style="list-style-type: none"> <li>• Expensive – requires interviewers if not performed ‘in-house’.</li> <li>• Lack of anonymity.</li> </ul>
<b>Focus groups</b>	<ul style="list-style-type: none"> <li>• Help to explore the topic area from a particular resident perspective.</li> <li>• A broader perspective on service delivery.</li> <li>• More detailed, in-depth analysis of specific issues.</li> </ul>	<ul style="list-style-type: none"> <li>• Limited representativeness and thus scope for generalisation from the answers given.</li> <li>• Participants may have limited knowledge of the service being investigated.</li> </ul>

METHOD	ADVANTAGES	DISADVANTAGES
<b>Service user group / panel</b>	<ul style="list-style-type: none"> <li>• More detailed, in-depth analysis of specific issues.</li> <li>• Help to explore the service area from the perspective of the actual users of the service.</li> </ul>	<ul style="list-style-type: none"> <li>• Hands-on experience of a service from those who most know it.</li> <li>• Limited representativeness and thus scope for generalisation from the answers given.</li> </ul>
<b>Citizens' panel</b>	<ul style="list-style-type: none"> <li>• Improved response rates to postal questionnaires as a result of the agreed commitment of the participants re residents with disabilities.</li> <li>• Greater co-ordination of research activity.</li> <li>• Significant savings through this co-ordination – a number of services can be surveyed at the same time thus reducing overall costs.</li> </ul>	<ul style="list-style-type: none"> <li>• Exploration of responses not possible.</li> <li>• Require capacity to read and write – limitations.</li> <li>• Space for inclusion of questions is limited.</li> </ul>

## 5 **Resources and Budget**

### What Will You Need To Consider?

- 5.1 Before embarking on a procurement exercise you will need to ensure that you have the budget and other resources necessary for the contract you intend to enter into: for on-going contract management, for any future costs of any assets acquired or capital spent and for the procurement exercise itself. This means identifying what resources you need, where those resources are going to come from and when they are going to be available. You also need to consider what could happen during the course of your procurement exercise that might change your resource requirements and how you might deal with that situation.

### Identifying The Budget Requirement For The Contract Itself

- 5.2 Depending on the nature of the contract you are letting you may be going to incur capital and/or revenue expenditure in respect of the service, supplies or works you will receive.
- 5.3 Where you are letting a service contract you may well have good historical information as to likely cost based on the cost of an existing in-house service or the payments being made in respect of an external service. In addition, you should have the information from your

market assessment exercise. You should consider additional costs likely to be involved in any improvements you want to specify for the service and take into account any savings that may be achieved.

- 5.4 In the case of contracts for supplies, you may have information about previous purchases to use and again you should research the market to get a reasonable idea of likely cost.
- 5.5 In respect of works contracts you are likely to rely heavily on any consultants employed on the project, unless the project is very similar to work that has been undertaken previously. Your arrangements with those consultants should be sufficiently robust to ensure that if they give very poor advice in this area you have clear recourse to them.
- 5.6 It is important that this is a robust exercise so you have a good benchmark for tenders eventually received and do not find that they come in beyond your budget. If this exercise indicates that the budget you have been able to identify is not going to be enough for the level of service or quality of building or supply you hoped to obtain, you may need to change your specification to ensure that what you are seeking tenders for is actually affordable.
- 5.7 You will need to consider whether the expenditure that you are going to incur will be capital or revenue expenditure. Expenditure on works is generally capital expenditure but some expenditure on supplies may also be capital expenditure. Capital expenditure may well involve an on-going revenue cost that you need to allow for. Some additional information concerning this is contained in Appendix 13.
- 5.8 You should ensure that when you calculate the cost of your tender you consider the life cycle costs from the start of the contract and throughout its term, and encourage the potential contractors to do the same. This is important because some requirements have differing pay back periods that may cost more in the short term, but over the long term will actually be cheaper and save money. For example, you may specify reusable rather than disposable catering supplies which will be more expensive initially, but will be cheaper over time. Another example would be lighting management systems. Requiring technological solutions to energy use may be more expensive to set up, but will have a pay back time that needs to be considered. You would expect tender submissions for specifications with these types of clauses to come out cheaper, however, if the contract doesn't last as long as the payback period, the savings will not be felt during the relevant contract period.

### Identifying Sources of Funds

- 5.9 At an early stage you should consider whether there are sources of funds outside the Council that could be accessed to assist your project, for example, there may be grants available from central government or from Europe or other sources. Often these sources of funding will be time

limited and will have a number of conditions attached to them and you would need to consider how these would impact on your project. Generally there is an application process which will require time and resources to complete. A database known as "GRANTFINDER" containing details of a wide range of grant funding regimes. Contact Augusta Morton on ext. 3674 for assistance in accessing the database.

- 5.10 There may be money from "section 106" agreements that could be used for your project. These are agreements entered into by developers granted planning permission which include a commitment to providing funding for particular categories of expenditure, to resolve a planning issue or in pursuance of a planning policy. The purpose for which the money can be used will be specified in the individual agreement and will most often be for environmental schemes. Money is however also allocated quite often for school or housing related expenditure. There is a liaison officer in Planning Services who can give advice on the funding available.
- 5.11 Generally the main source of funding will be the Council's revenue budget or the capital programme, depending upon the nature of the expenditure you are planning to incur. You need to have planned sufficiently far ahead for your project to have been considered for the capital programme adopted at the start of the year. If you expect a contract you are going to let to require growth in your Unit's revenue budget, that needs to have been included in the budget planning process for the Council culminating in the setting of the overall Council budget in early March each year. Service Development Planning and Budget Guidelines are produced annually by Financial Services to govern this process. Where growth has not been allowed, savings for part way through the year from elsewhere to cover those revenue costs can be very difficult to find. More detailed information concerning the Council's capital approval process and the budget setting process are contained in Paragraphs 2 and 3 of the Council's Financial Regulations contained in Part 6 of the Constitution.

#### Availability of Land

- 5.12 If your project requires use of land you need to make sure that that land will be available when you need it. For example, your project may be dependant upon compulsory purchase of land and you will need to be realistic about when that land is going to be available and what costs you are going to incur.

#### Resources for the Procurement Process

- 5.13 The procurement process itself will involve allocation of existing staff resources to the project. If there is not sufficient existing staff capacity to carry out your project (either within your own area or within the Procurement Strategy and Risk Management Unit) you may need to involve external consultants and/or temporary staff. You will need to be sure you have the budget to fund these resources. It is important that this

is given careful thought to ensure that your procurement process does not falter or fail to achieve value for money because not enough time can be given to it.

- 5.14 In addition there will be the costs of legal support and the assistance of any internal consultants to be allowed for.
- 5.15 You will also need to allow for incidental costs such as printing and photocopying, hire of venues and provision of refreshments.

#### Identifying and Protecting against Resource Risks

- 5.16 You need to consider what may occur during your procurement process that might cause your resource estimate to be wrong and consider what contingency arrangements you could have in place. For example, the process may take longer than expected and cause additional costs or extra burdens on staff or you may find that tenders submitted are beyond your available budget. You should also consider what risks there are that costs may increase during the contract. For example, in a construction contract there may be variations to the contract which result in an increase in costs in excess of your original budget.
- 5.17 You should ensure that you also consider future budgetary cuts and ensure that separate component elements of the service are priced separately so that if you did have a budget cut you could simply delete certain aspects of the service from the contract with the appropriate reduction in the tender price. If they are not priced separately and you delete part of the service, contractors will try and claim compensation for the part of their overheads attributable to the deleted service.

### **6 Risk Assessment**

- 6.1 As part of your pre-tender consideration you should carry out a risk assessment in respect of the proposed contract. Attached as Appendix 14 is a risk assessment matrix to assist you in this process which is not confined to financial issues. In Appendix 15 is information about bonds and guarantees which you should also consider. Appendix 16 contains guidance on indemnities and insurance.
- 6.2 You should ensure that any significant risks you identify are drawn to the attention of the Executive or General Purposes Committee or the Pension Fund Sub-Committee if you report to them about the contract, for example because the contract is High Value. The risks identified should also be brought to the attention of Legal Services if they are assisting you with your terms and conditions so that these can be addressed in the contract documentation as far as possible.

## **7 Workforce Issues / Transfer of Undertakings (“TUPE”) (Services Contracts only)**

- 7.1 Guidance on TUPE appears in Appendix 7. This section below sets out further considerations where there could be a transfer of the Council’s employees or former employees.
- 7.2 It used to be the case that local authorities were prevented from taking “workforce matters” into account when tendering. Workforce issues for these purposes are “the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces”. Changes to legislation now enable local authorities to consider these issues where a TUPE transfer situation arises in connection with your contract (and issues relating to the workforce are relevant to that transfer) and/or where workforce issues are relevant to the achievement of best value in respect of the function to which the contract relates.
- 7.3 The Government has published new statutory guidance on Valuing the Workforce where either of both of these criteria apply. The guidance introduces a Code of Practice on Workforce Matters in Local Authority Service Contracts (“the Code”) which places new obligations on local authorities and service providers in relation to certain services contracts which involve a transfer of staff from the Local Authority to the service provider or in which staff originally transferred out from the Local Authority as a result of an outsourcing are [TUPE](#) transferred to a new provider under a re-tender of a contract.
- 7.4 The guidance is that the Code must be incorporated into all relevant Service Contracts advertised on or after 13 March 2003 save in exceptional cases. The basic intention of the new obligations is to provide better protection of terms and conditions for transferred staff, and fairness for new joiners taken on to work on service contracts beside transferred employees.
- 7.5 Where the Code is applied Local Authorities must also apply the principles set out in the cabinet office statement of practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. Basically this means that there is an expectation that staff will transfer, that [TUPE](#) should apply and that the terms of the business transfer must specially protect the pensions of transferees. Staff must continue to have access to the Local Government Pension Scheme (“LGPS”) or be offered an alternative good quality occupational pension scheme and there must be arrangements for handling staff accrued benefits. If this involves admission to the LGPS you need to clarify that the individual(s) concerned are employed by the contractor as in company group arrangements this is not always the case and you need to be sure the correct employer is party to the admission agreement.



- 7.6 You should therefore consider as part of preparing for your tendering process whether there are any Council or ex-Council employees engaged on the current service, and then whether this guidance applies to your contract and what the implications are if it does. Further information about this is contained in Appendix 7 which gives guidance on [TUPE](#). You should inform the Procurement Strategy and Risk Management Unit whether or not you have applied the Code if the guidance does apply as the Council has to make a statement about application of the Code in its Performance Plan.

## **8 Trade Union and Employee Involvement**

- 8.1 Where existing Council staff are likely to be affected by your procurement process you should consider and plan for the involvement of trade union representatives at an early stage of your process.
- 8.2 Government guidance, to which the Council must have regard, emphasises that in tendering situations where outsourcing of part of the Council's functions is a possibility, the involvement of trade unions is an important matter at key stages of the procurement process. Trade Unions should be kept informed at all stages of the process. In this section and in Appendix 7 concerning [TUPE](#) this guidance has been taken into account.
- 8.3 However, it is important to achieve the correct balance between ensuring that trade unions as the proper representatives of employees who may be affected by a TUPE transfer are consulted about all stages of the process, and the need to ensure that the tendering process as a whole remains fair and transparent. On this basis there are a number of steps that can be taken to ensure that staffing considerations are properly fed into the tendering process but it is not considered appropriate for trade union representatives to sit on the panel carrying out the evaluation.
- 8.4 Trade Unions should be informed of the start of a tendering process, including where the service is already outsourced. In the early stages of a tendering process where a service is currently delivered in house representatives of the relevant trade unions should normally be invited to a meeting to discuss and comment on the procurement process. They should be consulted about the contract specification and their comments should be taken into account and considered before it is finalised.
- 8.5 An important element of evaluating tenders is the ability of a contractor to satisfy the Council in relation to various conditions relating to staffing and employment practice **where these are relevant to service delivery**. The trade unions views should be sought in relation to questions that it may be appropriate to ask of those tendering. Appropriate questions and issues that are raised by the trade unions should be included in the evaluation process. The evaluation panel should take such information into account, along with any staffing issues that have been raised with the tenderers, as part of the overall process of selection.

- 8.6 To ensure that the evaluation panel remains impartial and transparent the panel should be constituted of relevant officers responsible for the service. In some instances this may include individuals directly involved in service delivery, and relevant professionals, such as legal and financial officers, either as advisors or as members of the panel. Trade Union representatives should not be part of the evaluation panel but any issues that they have raised should be considered and taken into account as appropriate.
- 8.7 Before a final decision is made on award of the contract trade unions should be provided with a list of the shortlisted tenderers and given an opportunity to comment.
- 8.8 When a successful bidder has been identified, if there is to be a [TUPE](#) transfer, the procedures identified in Appendix 7 will regulate the consultation and information provision process between the Council and the trade unions from that point forward. If a TUPE transfer is a possible outcome of your procurement process you should ensure you allow appropriate time for this process in your planning.

## **9 Equality and Diversity Issues**

- 9.1 One of the issues you should consider at the outset of a procurement process is the relevance of the subject nature of the contract to the Council's duty to promote equal opportunities. For example, a contract for provision of meals on wheels is likely to have greater relevance to the duty than a refuse collection or payroll service. The greater the relevance to the duty the more importance you should attach to considering how the duty can be addressed at all stages of the procurement process (e.g. consultation evaluation) and in the eventual contract. When you review the existing service one of the questions you could be asking yourself is whether satisfaction levels or take up varies between ethnic groups and if so why. These issues are particularly likely to be relevant to service contract.
- 9.2 Section 6, Part 2, Schedule 11 on works contracts using the JCT contains guidance on when workforce issues related to diversity can be taken into account in relation to works contracts and this guidance is equally applicable to other types of contracts.
- 9.3 The Council's Procurement Policy includes requirements on ethnic monitoring to ensure compliance with the Race Relations (Amendment) Act 2000. You must ensure that your contract includes a requirement for the Contractor(s) to monitor the racial profile of its workforce undertaking the contract.
- 9.4 You should also ensure that the contract includes a requirement for the Contractor(s) to monitor the gender and disability profile of its workforce undertaking the contract, unless the requirement cannot be justified (see

para 9.5 below).

- 9.5 In requiring contractors to monitor gender and disability considerations about their workforce, you should ensure you consider the guidance in Schedule 11 (paragraph 10).
- 9.6 You should require the Contractor to provide you with the workforce profile monitoring information annually, at the end of each financial year, using the Council's Contract Workforce Profile Form (Precedent 12). A copy of the completed form should be forwarded to the Council's Corporate Diversity Team by the first week in May so that the information can be included in the Annual Workforce Monitoring Report.

## **9A Environmental and Sustainability Issues**

- 9A.1 One of the issues you should consider at the outset of a procurement process, during the options appraisal stage, is the relevance of the Council's Environmental Policy and responsibility as an environmental steward to your contract. The Policy covers a number of environmental issues important to Brent and you should carefully consider how your ideas can help address these environmental issues, and where it may have negative impacts on these issues.
- 9A.2 When it becomes apparent that your ideas for a contract are likely to have an impact on the environment, it is advisable to contact the Environmental Projects and Policy Team for expert assistance. The team will advise on environmentally preferable contract options and supply you with the information you need to know to be able to make an informed decision on which option to choose.
- 9A.3 Once the budget holder chooses an option the Environmental Projects and Policy Team subject to principles of best value and the EU Regulations, can develop technical specifications to control or improve the expected environmental impacts from the contract, the team can also evaluate PQQs and tenders. This is done after an initial screening to assess the significance of the environmental impact and ensure that environmental measures remain relevant to the subject of the contract.
- 9A.4 When assessing the significance of the environmental impacts potentially arising from the proposed contract the following will be considered:
  - the magnitude of the change to the environment in terms of spatial area, loss, permanence of change, flora, fauna, and human health impacts;
  - the value and length of the contract;
  - the ability of the contract to assist in meeting the Council's environmental aspirations, that is, the contract's

improvement potential;

- potential for cost savings;
- reducing environmental risk;
- compliance with environmental legislation.

9A.5 There is a selection of environmental management questions listed within the long version of the PQQ. Where the subject and nature of the contract will lead to a significant environmental impact, and where permissible under the EU Regulations, it is advisable to use these PQQ questions to screen potential contractors.

9A.6 If a contract is believed to have a significant environmental impact but this impact is not addressed within the contract, the budget holder will be expected to be able to justify their actions to the relevant Service Area or Corporate Director.

9A.7 Care needs to be taken in relation to contracts that are required to be tendered in accordance with the EU Regulations.

## **10 Prepare Project Plan**

### **Why Have a Project Plan**

10.1 Spending the time initially planning your procurement process should mean you avoid delays and missed deadlines later on. It will also enable you to identify areas where you will be relying on other people, or where there is a project team, people outside the team. You should liaise with them to ensure that your expectations of them are realistic, for example, they may already be committed to work for others at the time you are going to be relying on them to assist you. You will also be able to assess which tasks cannot be begun until others are completed and which can be carried out concurrently. This will enable you to make the best use of time during the process. You should always ensure you allow realistic amounts of time for tasks to be carried out by you and by others. Never rely on a best case scenario when planning, things never turn out like that. By planning ahead you may be able to identify particular activities at risk of delay for example the mandatory minimum 10 day standstill period (see Appendix 25), and may be able to ear mark additional staff or other resources to help out should the need arise.

### **What Should it Contain?**

10.2 The project plan should set out all the tasks that need to be completed throughout the tendering process, indicate the individual responsible for completing them and the date they must be completed by. Identifying key milestones around which to structure other tasks to be carried out can assist in the planning process.

- 10.3 In practice, your project plan should be a living document and not cast in stone as additional tasks and timing changes will have to be allowed for. You should keep the progress of the project under review so you can make adjustments in good time and keep on track. At the outset your plan may well provide in detail for pre-tender considerations and only in outline for later stages as the outcome of consultation etc will need to be taken into account before those later stages can be fully planned.
- 10.4 The following table is an example of a project plan to assist you when completing the plan for your contract. It is not intended to be an exhaustive list of tasks and you may well find that you need to enter more tasks on your plan which are relevant to your particular contract or further separate some of the tasks where more detail is required. In particular please note that the project plan assumes that you will be undertaking a traditional restricted (two stage) or open (single stage) tender process and does not take account of any additional or specific steps that you may need to undertake for e-tendering or an e-auction (see Appendix 26). The second column on the table refers you to the relevant section of these guidelines that gives guidance on the listed task. You may need a separate column for other resources required. Some guidance on timescales is included in the table. The key milestones for the process are in bold.
- 10.5 For some projects the PRINCE2 methodology may be appropriate. This method requires the author to complete documentation that can aid the smooth running of the project such as communications plan, a risk log, a list of outstanding issues, documentation to seek permission in situations where the outcome is likely to differ from that anticipated at the outset., and finally a set of 'lessons learned' during the project.

Task	Relevant section of guidelines	Target date	Individual Responsible
<u>Pre Tender Considerations</u>		The amount of time that you will need to allow for this stage will depend on the complexity of the service, supply, work concerned, the number of people affected by it who will need to be consulted and other specific factors. It is therefore very difficult to indicate a normal amount of time.	
Establish project team.			
Assess the market – consult Corporate Procurement Unit.	<a href="#">Section 4A, Paragraph 3</a>		

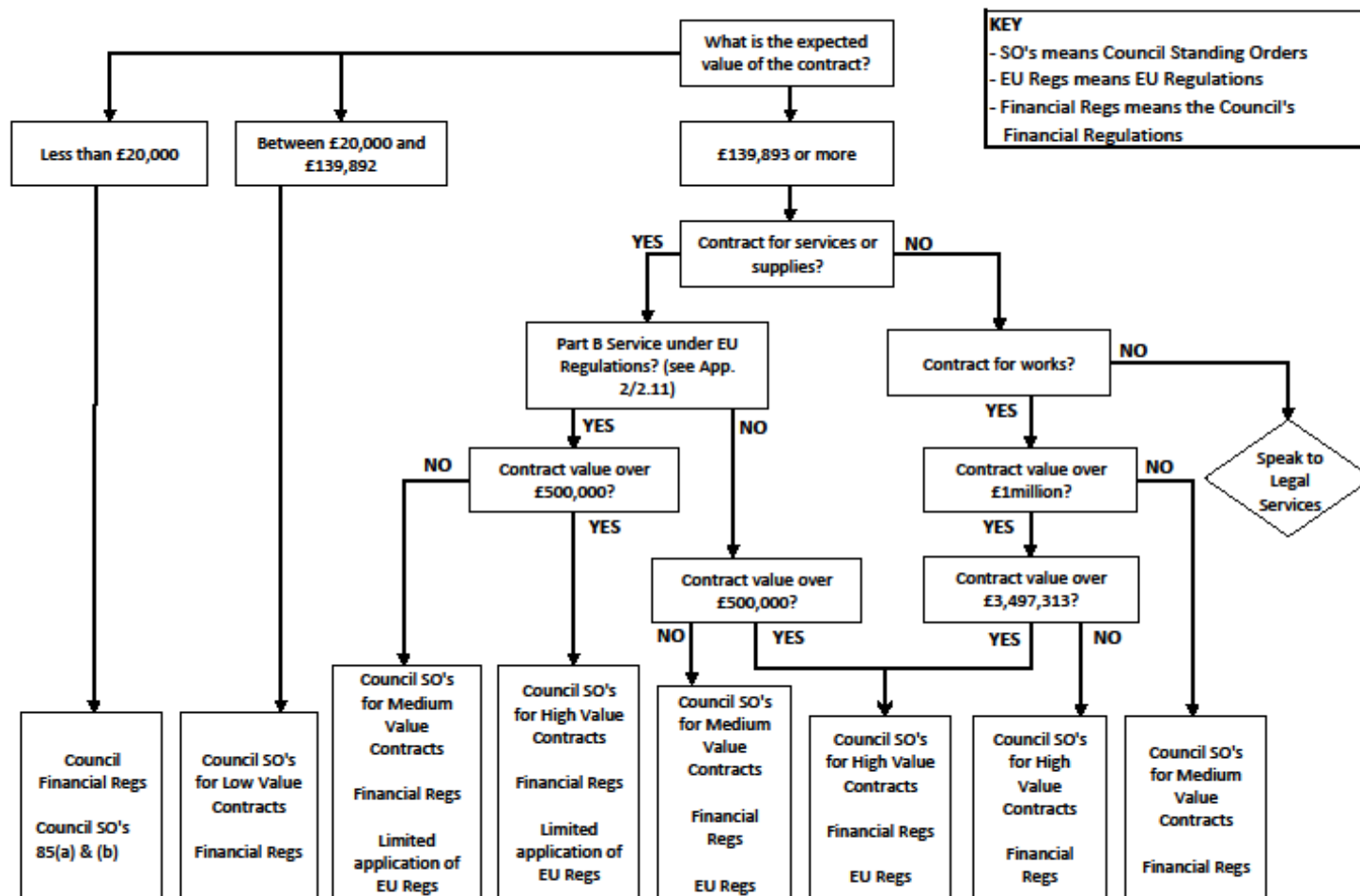
Task	Relevant section of guidelines	Target date	Individual Responsible
Identify application of legislation and Standing Orders – consult Legal Services.	<a href="#">Section 4A, Paragraph 1</a>		
Assess risk – for example – Health and Safety risks in respect of the project.	<a href="#">Section 4A, Part 2, Paragraph 6</a>		
Enter any Executive decisions required on the <a href="#">Forward Plan</a> .	<a href="#">Section 2, Part 2, Paragraph 19</a>		
Undertake any appropriate consultation.	<a href="#">Section 4A, paragraph 4</a>		
Identify and agree scope of any trade union and/or staff involvement in tendering process.	<a href="#">Section 4A Paragraph 8</a>		
Decide on best tendering approach – packaging of contracts and method of procurement.	<a href="#">Section 4A Paragraph 2</a>		
Ensure resources/budget are available for the project.	<a href="#">Section 4A Paragraph 5</a>		
Establish evaluation panel and advise of key dates.			
Draft shortlisting and evaluation criteria.	<a href="#">Section 4C, Paragraphs 9</a>		
Prepare and circulate report for Executive where Executive approval is required before inviting tenders and in other cases check that the officer with relevant delegated powers approves your intended process.	<a href="#">Section 2, Part 2, Para 8.4, Table 3(a)</a> and <a href="#">Section 2, Part 2, Para 21</a>		
<b>Executive meeting</b>		Due to the report clearance requirements and the statutory time limits you will need to allow about 23 days between drafting your report and getting a decision. More detail on the decision making process is contained in Section 2.	
<u><b>Tendering Process</b></u>			

Task	Relevant section of guidelines	Target date	Individual Responsible
<b>Prepare contract advertisement and advertise</b>	<a href="#">Section 4C, Paragraph 8</a>	If EU Regulations do not apply, you will probably need to allow at least 21 days for receipt of expressions of interest, or at least 30 days for tenders if you are using an open or single stage procedure. Get advice for EU requirements	
Prepare pack for expressions of interest – where using restricted or two stage tender process: <ul style="list-style-type: none"> <li>• <a href="#">PQQ</a></li> <li>• Specification Summary</li> <li>• Covering letter</li> </ul>	<a href="#">Section 4C, Paragraph 9</a>		
<b>Despatch packs for expressions of interest</b>			
Prepare tender pack <ul style="list-style-type: none"> <li>• Instructions to Tender.</li> <li>• Form of tender.</li> <li>• PQQ or equivalent (where using a single stage or open process).</li> <li>• Specification.</li> <li>• Pricing Document if separate.</li> <li>• Appendices.</li> <li>• Terms and Conditions.</li> <li>• <a href="#">TUPE</a> Pack.</li> <li>• Any drawings.</li> <li>• Covering letter.</li> </ul>	<a href="#">Section 4B</a>	(you will generally have made a start on these documents well before advertising).	
Hold tenderers seminar if appropriate to clarify issues.			
Expressions of interest returned - where using restricted or two stage tender process.			
Evaluation of expressions of interest - where using restricted or two stage tender process.	<a href="#">Section 4C, Paragraph 9</a>		
Evaluation panel meets to shortlist those invited to tender.			

Task	Relevant section of guidelines	Target date	Individual Responsible
<b>Invite Tenders</b>		Where EU Regulations do not apply you will probably need to allow at least 30 days for return of tenders if you are following the restricted or 2 stage procedure. If EU Regulations apply, get advice	
Write to contractors which were unsuccessful at shortlist stage.			
Deadline for tender submissions.			
Panel evaluation and shortlist for interview and/or site visits.			
Conduct interviews and/or site visits and make decision on preferred contractor.			
Prepare and circulate report for Executive where Executive approval is required for award of contract, in other cases report to the officer with appropriate delegated powers. If the contract is required to be certified (see Section 2 Part 2 Paragraph 21) member level approval will be required for the issuing of the certificate.	<a href="#">Section 2, Part 2, Para 8.4, Table 3(a)</a>	Due to the report clearance requirements and the statutory time limits you will need to allow about 25 days between drafting your report and getting a decision. More detail on the decision making process is contained in section 2.	
<b>Standstill Period Requirements</b>	<a href="#">Section 4C, Paragraph 14.3</a>	You need to remember that the standstill period does not begin until the day after written notification of the council's award decision has been issued to all tenderers and those who expressed an interest in tendering. Another important point is to remember to incorporate additional time for a possible extension to the minimum 10 calendar day period for public / non-working days etc (See Appendix 25).	



Task	Relevant section of guidelines	Target date	Individual Responsible
<b>Award contract</b>	<a href="#">Section 4C, Paragraph 14</a>	You need to remember to allow for a reasonable amount of lead in time for the new contract so you can be properly prepared and the contractor can carry out a due diligence exercise if it wishes in respect of the information you have provided and the service it is taking over. Also apply for any TUPE consultation requirements	
<u>Post tender</u>			
Inform all tenderers of outcome of tender process.	<a href="#">Section 4C, Paragraph 14.7</a>	Unless tenderers have already been notified of the outcome of the tender process in accordance with the standstill period requirements (see Appendix 25).	
Send award <a href="#">contract notice</a> to OJEU – where EU Regulations apply via the Corporate Procurement Unit).	<a href="#">Section 4C, Paragraph 14.12</a>	Within 48 days	
Inform Contract Register Officer.	<a href="#">Section 4C, Paragraph 14.10</a>		
Arrange for contract to be executed/signed.	<a href="#">Section 4C, Paragraph 14.8</a>		
Prepare for contract start date – lead in time for contractor.			
<b>Contract start date</b>			
Begin to monitor contract.	<a href="#">Section 5, Part 2, Paragraphs 1-10</a>		



## 4B PUTTING TOGETHER A TENDER PACK

### 1 General

1.1 Your tender pack will generally consist of:

- (a) Instructions to Tenderer.
- (b) Form of Tender.
- (c) Pre Qualification Questionnaire or equivalent where using a single stage or open process (see [Section 4A Paragraph 2](#) for information on this process).
- (d) Specification.
- (e) Pricing Document if separate from specification.
- (f) Terms and Conditions.
- (g) Any Appendices referred to elsewhere in the pack.
- (h) TUPE Pack (see Appendix 7 for further information).
- (i) Any drawings.
- (j) Covering letter.
- (k) Bond.
- (l) Bond Undertaking.
- (m) Parent Company Guarantee.
- (n) Parent Company Guarantee Undertaking.

It is important that you start preparing your tender pack early, particularly your specification which will set out how you wish the service, supplies or works to be provided. Guidance on this is contained in Paragraph 3 of this section.

1.2 If your contract is a High Value contract or is unusual or has particular risks you should seek advice from Legal Services on the terms and conditions to be used and you should seek advice from the Procurement Strategy and Risk Management Unit concerning your process and how to manage any risks. It will often be appropriate to seek advice in respect of the terms and conditions for medium value contracts. When seeking such advice you should send to Legal Services your draft instructions to tenderers, specification, pricing document, the Legal Services Instruction sheet in Appendix 1 and the documents referred to in the Instruction Sheet. Although Legal Services' primary focus will be the terms and conditions they will also check that the specification is legally correct and that all documents are consistent. The paragraphs below give further detail on the instructions to tenders, form of tender, terms and conditions and covering letter for the pack.

### 2 Invitations to Tender

2.1 If you have chosen an open process/one stage tender your advertisement would have sought tenders whereas in the case of the restricted procedure your advertisement would have sought expressions of interest. In the latter situation only those shortlisted

following evaluation of the pre qualification questionnaires are invited to tender. In either case, tenders are invited by sending a copy of the tender pack as detailed above. Guidance on determining evaluation criteria is contained in Appendix 2.

**2.2 Standing Order 98 sets out those matters which must be included in the Invitation to Tender.** In this context Invitation to Tender refers to the tender pack as described in Paragraph 1.1 above. **Standing Order 98 requires:**

1. a description of the services, supplies or works being procured. This would usually be contained in your covering letter, Instructions to Tenderers and Specification;
2. whether the Council is of the view that **TUPE** will apply. You should include this in your Instructions to Tenders;
3. the tender timetable including the tender return date and time, which must allow a reasonable period for applicants to prepare their tenders and comply with the timetable in the EU Regulations, if applicable. This should be included in the Invitation to Tenderers and your covering letter;
4. a specification and instructions on whether any variants are permissible. Instructions on variant bids would have been included in your **OJEU** notice (if applicable) and should be reiterated in the Instructions to Tenderers. You may also need to include an explanation in the Pricing Document if tenderers are to provide you with more than one set of prices;
5. the Council's terms and conditions of contract;
6. the evaluation criteria including any weightings.  
For contracts that are subject to EU Regulations, the weighting that is given to each of the criteria chosen to determine the MEAT must be stated in the tender documents. Where it is not possible to state the weightings, you must provide reasons. In the latter case, the criteria must be stated in descending order of importance;
7. pricing schedules, if appropriate, and instructions for completion;
8. whether the tenderer is required to price separately if the tenderer were required to offer a broadly comparable pension and/or parent company guarantee and/or a

**performance bond.** This could be included by way of a general statement in the Instructions to Tenderers and more detailed instructions in the relevant section of the Pricing Document;

9. **form and contents of method statement, if any, to be provided.** Any further information you wish to include could be in either or both the Instructions to Tenderers and the covering letter;
10. **whether, or not tenders are to be submitted electronically.** Include this in your Instructions to Tenderers and covering letter; and
11. **the rules and method for submitting tenders.** Include this in your instructions to Tenderers;
12. **Where tenders are to be received electronically, a requirement that tenderers submit a signed hard copy of the form of tender, undertakings or any other original documentation upon request.** This should be included in your Instructions to Tenderers. Appendix 26 sets out guidance on e-tendering;
13. **Whether or not an e-auction will be conducted.** Again this should be included in your Instructions to Tenderers and further guidance on e-auctions is contained in Appendix 26;
14. **any further information which will inform or assist applicants in preparing their tenders.** Any further information you wish to include could be in either or both the Instructions to Tenderers and the covering letter.

Except in the case of electronic tendering (see Appendix 26) the invitation to tender must also include a statement that no tender will be considered unless contained in a plain sealed envelope and endorsed "Tender" followed by the subject to which it relates. In addition, the invitation to tender must specify whether, and if so, the extent to which the terms of the contract or any part of it will be subject to negotiation between the parties. You would normally include a statement on these issues in the Instructions to Tenderers. As mentioned earlier, negotiation is only possible in limited circumstances.

- 2.3 **You must also ensure that a form of tender which complies with Standing Order 99 is included in the tender pack.** The required form of tender for works contracts is included in Section 6. The required form of tender for services and supplies is at Precedent 5. **Standing Order 99 requires that the form of tender include:**

- (a) a statement that the Council will not be bound to accept any tender;
- (b) a section where the tenderer shall state whether their tender is priced on the basis of TUPE applying or not;
- (c) except in the case of negotiated contracts, a statement that formal acceptance of the tender by the Council will, until such time as a written contract can be executed, bind the parties into a contractual relationship; and
- (d) except in the case of an e-auction the price and whether this would be different if the tenderer were to offer a comparable pension and/or a parent company guarantee and/or a performance bond.

2.4 In relation to the Council's duty under the Race Relations Act 1976 (as amended), the Commission for Racial Equality recommends that the invitation to tender include:

- (a) the Council's race equality scheme and equal opportunities policy;
- (b) if it is relevant to your contract, details of the Council's population broken down by ethnic group, age, housing tenure and distribution across the borough; and
- (c) any monitoring information about the effect of the current service provision on promoting racial equality.

2.5 If you wish to predetermine the number of organisations invited to tender, the EU Regulations require that you must intend to invite at least 5 and no more than 20 organisations. When using the negotiated procedure (with prior publication of a contract notice) and competitive dialogue procedures, the minimum number is 3. This range must be specified in the contract notice and must be sufficient to ensure genuine competition.

2.6 If less than 5 or 3 persons (as applicable) or bodies respond to your advert you must ensure that the number of contractors you actually invite to tender still ensures genuine competition.

The remaining paragraphs of this Section contain further details on:

- Preparing a specification.
- Instructions to Tenders.
- Form of Tender.
- Terms and Conditions.

### **3 Preparing a Specification**

#### **3.1 Introduction**

3.1.1 The development of the specification is a very important part of the procurement process. Not only will the specification define in words what must be provided over the term of the contract, it must anticipate future requirements and therefore, be flexible enough to allow for variation. The Specification must also contain the performance measures required for monitoring and control and a set of 'key performance indicators'. The KPIs are the method by which the achievement of outcomes sought will be measured (eg 97% of deliveries made within one day, 90% of rooms cleaned to a standard of 7/10, etc). Usually these are separate appendices of the specification. On many occasions the Contractor will be the first contact point for the Council's customers and it is important that the Council's values and priorities are reflected in the specification.

3.1.2 It will be vital to the success of your procurement process that adequate time is allowed for the research for and preparation of the specification. The amount of time may be substantial and will depend upon the complexity of what is to be provided under the contract.

3.1.3 This section explains the purpose of the specification and gives guidance on how to write your specification, including matters to cover and how to structure the document.

#### **3.2 What Is a Specification?**

A specification is a statement of needs to be satisfied by the procurement of resources. It defines what the purchaser wishes to buy and consequently what the supplier is expected to provide, whether this is a product or a service.

#### **3.3 What Makes an Effective Specification?**

3.3.1 The specification should be sufficiently tight so that the product or service provided will meet the need but not so explicit that it prevents or discourages the supplier from proposing innovative solutions (and hence better value for money). This way you get the best competitive response. The people currently providing the service, or managing those who do, are probably best placed to say what is required so you consult them in the development of the specification.

3.3.2 A good specification should:

- a) State your requirements clearly, concisely, logically and

unambiguously. This means you should use plain English, avoid jargon and acronyms, defining terms used where necessary. You should plan out your specification in outline first so you are clear what is to be covered and how it will fit together.

- b) State your requirements in output terms wherever possible. This means defining the function and/or level of performance that is required rather than stating how something is to be done, unless the "how" is vital. Sometimes it will be, for example, if there is a requirement for interoperability with an existing computer system. As these sort of technical requirements constrain the scope for potential contractors to find the best output and cost effective solution they should only be included where unavoidable. Specifying on a technical basis may also cause problems if what is supplied meets the specification but does not actually perform as you required.
- c) Contain only the essential features of your requirements but contain enough information for potential suppliers to decide how they will provide and cost their services. If detailed information has to be provided put it in Appendices wherever possible. If your specification is too big it is likely not to be referred to often enough.
- d) Comply with legal requirements (e.g. do not specify unnecessarily technical requirements that effectively discriminate in favour of or against particular suppliers or groups of suppliers).
- e) State how contractor performance will be assessed and monitored.
- f) Enable offered services to be evaluated against agreed criteria. Think about how you will evaluate compliance as you are writing as this should avoid you ending up with something too vague or ambiguous.
- g) Be sufficiently flexible to meet your requirements now and over the term of the contract.

### 3.3.3 It should not:

- a) Over-specify requirements.
- b) Specify working practices and equipment unnecessarily.



It must not:

- a) Contain features which discriminate between potential suppliers.
- b) Contain non-commercial considerations.
- c) Conflict with EU legislation where applicable.
- d) Specify brand names or use non European technical specifications.

3.3.4 You should specify and require the tenderers to price for every single variation that you predict might occur during the lifetime of the contract. For example if there are known legislative changes which the contractor will need to adjust the service in line with, you could seek the hourly rates for implementing the necessary changes. If there is likely to be a known one off project, you could seek a detailed project plan from the tenderers setting out their methodology and the resources they would utilise for the known potential variation. So, where you can predict variations you should tie tenderers down in their tenders as you are likely to get a better price at this stage than if you seek to vary the contract after it has been awarded.

3.3.5 An example layout is at paragraph 3.15. However, as the layout will depend on what works logically for the particular requirement you are specifying you should use this as a prompt not a pro-forma.

### 3.4 Development of the Specification

3.4.1 The foundations of a good specification are planning, research and analysis. Sometimes you will be starting off with an existing specification and sometimes you will have a blank sheet. Both situations have their opportunities and challenges. It can be very difficult to get started, especially if you have not prepared specifications before and do not have a current example, from the Council or elsewhere, to start from. The sooner you get started the better, even if the document you initially circulate is very outline.

#### 3.4.2 Steps to take:

##### (a) Consult

To ensure the best possible specification, consultation with providers and service users should be undertaken at a very early stage, well before the advertisement. Guidance on consultation is set out in [Section 4A, paragraph 4](#). The extent of consultation which is appropriate will depend on factors such as complexity of

the service, risk attaching to the contractor or impact on residents. It is a good idea to try and define your requirements at least in outline before consulting potential providers so that you do not run the risk of letting the market shape your expectation too early on.

- (d) Review current service provision/challenge the existing specification

What has and has not worked with your existing specification, or with existing provision where there is no specification? What useful monitoring information do you have? Have you had to make variations during the life of an existing contract and should those now be included in the base documents? What is in your current specification which is no longer needed? What technological advances have there been that could be taken advantage of making it possible to specify improved outputs? What changes have there been in Council policy or legislation that may affect the specification?

- (e) Consider the component parts of your requirement

It may be appropriate to split an overall requirement into sections within the specification, for example:

- Where the service is detailed and covers several areas it may require splitting down for clarification and ease of use of the specification.
- Different types of work may be involved, for example, installation and maintenance.
- Different charging/monitoring situations may apply e.g. project type work.
- Items such as site preparation or training which are separable from the main requirement.

- (f) Consider quality standards

In order to avoid discrimination on grounds of origin of a particular Member State and to ensure all economic operators are treated on equal terms, the EU Regulations require that when specifying, brand names and other references that would have the effect of favouring or eliminating particular providers, products or services, this should be avoided. . Where you refer to a British Standard you must add the words "or equivalent".

Environmental issues can also be reflected in specifications. Example: for Works contracts, the Council could specify that the construction methods or techniques should be environmentally friendly, in line with either general or specific regulations.

This requirement applies to all contracts. Update any existing references that have become out of date. Are any certificates required?

(e) Consider Customer Care Standards

The Council is proud of its high customer care standards and is keen to ensure that all its contractors and sub-contractors who deal with the public on the Council's behalf adhere to the same standards. Consequently, wording such as the following (which is recommended by the Customer Services Steering group) should be included in Contracts (normally in the specification) with relevant contractors:

"The Contractor shall adhere to the Council's customer care standards set out in this agreement or in the document entitled "Corporate Customer Care - Policy Statement and Standards" as updated from time to time and published on the Council's Intranet.

Where there is an inconsistency between the customer care standards set out in this specification and those in the Council's Corporate Customer Care Policy and Standards those in this specification shall apply unless otherwise agreed."

(f) Plan

Plan your specification in outline and then write your draft and consult widely on it. This may include consultation with employees and Unions where provision is currently in house.

(g) Ask a friend

Once you think you have finished, get someone else who is less familiar than you with what is required to see whether they find your specification clear.

### 3.5 Defining Your Requirement

3.5.1 This will cover functional and performance characteristics of the product or service and technical characteristics if necessary and the

standards against which the contractors/suppliers will be assessed. As discussed earlier it is preferable to write your specification based on outputs or outcomes rather than inputs.

### 3.5.2 What is the difference between an 'Input' and an 'Output' Specification

#### *Input Specification*

An input specification will include descriptions that tend to instruct the contractor how to provide the service and how to achieve the standards required. It will tend to concentrate on methods/frequencies and may define standards in the following way:-

- Grass to be cut 26 times per annum.
- Car park to be swept weekly.
- Lift to be cleaned daily.
- Playgrounds to be inspected weekly (for safety).

Input measures are relatively easy to monitor - they are either carried out or not - but they may not ensure that the overall service standard you had in mind will be achieved. For instance:-

- i) A lift cleaned daily could be dirty again within an hour and stay that way until the next day.
- ii) A car park swept weekly; may not require a complete sweep some weeks but may require extra attention during other weeks (due to more use/vandalism/wind-swept rubbish etc.)

#### *Output Specification*

An output specification will include descriptions of the service that allow the contractor freedom to develop his/her own methods/approach.

It will tend to concentrate on defining standards rather than how the service should be delivered. Standards may be defined in the following way:-

- Grass to be kept within a height of 25mm-75mm.
- Car park to be kept clean - any accumulation of litter/rubbish to be cleared within 4 hours of appearing.
- Lift to be kept clean - any litter/rubbish to be cleared within 2 hours of appearing.
- Playgrounds to be monitored for safety - equipment faults to be reported within 4 hours of occurring.

Output measures (if carried out correctly by the contractor) will increase the likelihood of your intended outcome being achieved.

Note that in most situations output standards will be backed up by inputs i.e. the contractor's tendered work-plan or method statements which will set out how the contractor intends to deliver the service. However, output standards will take priority over any scheduled inputs from the work-plan or method statements so that if the contractor has planned to clean a building twice a week and the required "output" standard is not being achieved (once the contract starts) the contractor must react quickly to the situation by improving "inputs" and ensuring that output standards are achieved.

### 3.5.3 Standards can apply to such areas as:-

- a) Quality of product/service.
- b) Quantity produced.
- c) Response times.
- d) Accuracy levels.
- e) Attitude to customer/client (see 3.4.2 (e) above).
- f) Availability of information/advice.
- g) Qualifications/experience of staff.

To be effective, standards must be measurable. When setting standards you should identify the method of monitoring to ensure the standards you are setting are measurable. Recognised product standards or quality and environmental management systems can be a useful element of this.

### 3.5.4 Some examples of the way in which quality attributes can be written into output standards are given below. These have been defined in a way which:

- is designed to facilitate monitoring.
- recognises that services will not be delivered to standard on every single occasion.

Accuracy	there shall be no more than x% incorrect entries in every y no. documents completed
Availability	the system shall be available on-line at points a, b and c during the hours of x to y for the processing of all transactions listed in Appendix A

Capacity	a minimum of x no. applications shall be processed per y weeks a minimum of x no. cases shall be cleared within a period of y months								
Clarity	advice shall be stated clearly and in plain English according to the principles laid down in.....								
Reliability	there shall be no more than x no. of breaks in service lasting more than y minutes per month								
Responsiveness	voids shall be inspected within x days of the termination of tenancy  the service shall be provided within the following maximum response times:  <table> <tr> <td>emergencies</td><td>x hours</td></tr> <tr> <td>urgency</td><td>x hours</td></tr> <tr> <td>normal</td><td>x days</td></tr> <tr> <td>non-priority</td><td>x days</td></tr> </table> on not less than x% of occasions in a month	emergencies	x hours	urgency	x hours	normal	x days	non-priority	x days
emergencies	x hours								
urgency	x hours								
normal	x days								
non-priority	x days								
Timeliness	progress reports shall be delivered on the first working day of each month  the information shall be delivered to the Council no later than x weeks before the statutory deadlines for...								

3.5.5 Where specifications are based on outputs, the contractor's tendered method statement will assume major importance since it is here that they will have to demonstrate how the specified outputs will be achieved. For this reason appropriate elements of the method statement may need to be incorporated into the contract. Caution needs to be exercised here though as incorporation of method statements may be an acceptance of the supplier's solution and if it turns out that the method once put into practice does not achieve the required output scope for redress may have been reduced.

3.5.6 Input measures are relatively easy to monitor but they may not ensure that you meet your original aim in purchasing the service (e.g. the grass may be cut frequently but not to an acceptable length). Output measures give the provider the freedom to determine how much input (e.g. staff time) is required, and within specified limits, the method to be used. Specifying an input measure may increase costs by unnecessarily requiring a contractor to operate in a manner not consistent with industry practice or the contractor's existing systems.

3.5.7 The preferred approach for Brent contracts is output measures/standards as these are more likely to meet your desired aim, but they MAY mean a risk of reduced performance quality unless the contract is monitored effectively. Adequate monitoring mechanisms will be vital in the contract as will proactive monitoring after contract award. Guidance on contract monitoring is provided in Section 5.

### 3.6 Addressing Equalities Issues

3.6.1 When identifying any equalities dimensions of different services, activities or products to be included in the specification, it may help to consider the following questions

- (i) Is the service accessible? For example in terms of:
  - physical access.
  - economic access.
  - specialist equipment.
  - availability of specific language skills.
  - large print and colour scheming.
  - safety and security.
  - provision of crèche facilities.
  - scheduling of meetings.
- (ii) Is the service appropriate to the needs of different user groups? For example with respect to:
  - dietary requirements.
  - needs for privacy.
- (iii) Is there clear information about the service, distributed in places where it will reach "target" groups, produced in appropriate languages and for people with visual impairment?

3.6.2 With certain types of contracts, the standards of behaviour the authority expects in all dealings with the public and in particular in difficult situations and the need to deal sensitively with a range of people will need to be integrated into specifications. Tenderers should be asked to show how they will ensure their staff will meet these requirements. With certain types of contracts (e.g. residential care) the following statement may be appropriate:

"In making any decision with respect to a Customer, the Contractor shall give due consideration to the Customer's gender, sexual orientation, religion, racial origin, cultural and linguistic background, and any disability, in accordance with the requirements in this Specification."

3.6.3 It may be appropriate to set targets for take up of services by groups

known not to be making the use of services to which they are entitled.

3.6.4 Specific requirements for a system for dealing with complaints in this area will generally be appropriate.

### 3.7 Health And Safety

3.7.1 It is important that your specification clearly addresses the way in which the contract must be performed in order to meet the Council's legal obligations in relation to Health and Safety. Relevant issues include:

- what should or should not be worked on/used;
- personal protective equipment to be used and who will provide it';
- working procedures, including any permits-to-work;
- the number of people needed to do the job; and
- reporting of accidents and safekeeping of records and plans.

3.7.2 Further information on health and safety considerations can be found in the Health and Safety Corporate Standards on the intranet at Central/Corporate Governance/Corporate Standards/Health and Safety.

3.7.3 You should ensure that contractors are informed of the Council's Whistleblowing Policy and of how a copy may be obtained. The policy is available through the Corporate Standards section of the Council's Corporate Governance website.

### 3.7A Environment and Sustainability

3.7A1 As discussed in Section 4A, Paragraph 9A the contract should be assessed for its environmental impact where such issues are relevant to the contract. Following such assessment you should consider how to control or improve any environmental impact when drafting your specification. If any environmental issue cannot be improved at this point in time, provision could be made in the specification for the impact to be managed and for it to be improved in the future.

3.7A2 When addressing environmental issues it is best to specify outcomes rather than inputs. This is because technological solutions to environmental problems constantly develop and improve. It is therefore best to leave it up to the contractor to decide on the most appropriate method.

3.7A3 If an environmental projects and policy officer was involved in the assessment of your contract, they will be able to assist in the development of appropriate contract clauses and performance requirements.



### 3.8 Freedom of Information and Information Generally

- 3.8.1 You should address the types of information you require contractors to provide to you during the life of the contract in your specification. This may include reports and information relating to the contractor's performance under the contract, information or data which the contractor holds on behalf of the Council in carrying out the contract and any specific reports you may require about the service. You should also state the required response times for the provision of requested information and frequency of any regular reports. If you are unable to specify types of information then you should include a "catch-all" requirement that the contractor provide all information relating to the contract as requested from time to time as soon as reasonably possible. The more specific you can be the less you will find yourself paying for work the tenderers think they might have to do which, in fact, they are not called upon for during the contract.
- 3.8.2 You need to consider how you will pay the contractor for the provision of information you require and cover this in the Specification. For example: you may require the contractor to provide for this generally in the contract price or contractors may price separately for the provision of specific reports. You will need to consider which option will be the most cost effective for your particular contract. For example, if you are able to give the tenderer some good information on past levels of requests you may want them to give an inclusive price so you have certainty. If you do not have any information which will help the tenderer gauge the likely cost, requiring them to produce an inclusive figure and not allowing them to charge individual request may mean they include a larger than necessary sum in their price, to be on the safe side.
- 3.8.3 There may be circumstances where you require information from your contractor in order for the Council to respond to a request for information under the Freedom of Information Act 2000 (FOI Act) (see Appendix 22). You need to think carefully about how you cover this situation in your specification. If you include a general requirement for the contractor to provide you with requested information relating to the contract then any information you require to respond to a request under the FOI Act would generally fall within that requirement. Payment to the contractor for such information would be in accordance with how you ask tenderers to price for the provision of information. In many cases the provision of information will be included in the overall contract price.
- 3.8.4 You may also consider including in your specification a general requirement for your contractor to provide all reasonable assistance to the Council in respect of FOI Act requests and prescribe minimum response times for the provision of information in relation to a FOI Act request to ensure the Council meets its obligations under the FOI Act.

- 3.8.5 Your specification should also set out what your contractor is required to do if it receives a FOI Act request directly as a result of being a contractor of the Council.

### 3.9 Specifying Performance Requirements

- 3.9.1 Once you have determined the outputs required you need to consider how the contractor's performance will be assessed during the life of the contract. In order to do this, your specification needs to set performance targets against which you can identify whether the contractor is providing the services as required, below the required standard or above the required standard.

- 3.9.2 You will usually need performance targets to cover all aspects of a service arrangement including:

- (a) completeness.
- (b) availability.
- (c) capacity.
- (d) reliability.
- (e) flexibility.
- (f) timeliness.
- (g) responsiveness.
- (h) security.
- (i) standards.
- (j) usability.
- (k) accuracy.
- (l) auditability.
- (m) satisfaction.

- 3.9.3 When setting targets covering these areas remember that the Council has a duty under Best Value to ensure continuous improvement. This requirement should be reflected in the targets that you set for contractors. However, remember that the targets you set will affect the prices that are tendered.

- 3.9.4 Good performance targets will be SMART: Specific, Measurable, Achievable, Relevant and Timed:

- (a) **Specific**  
Clear unambiguous and easy to understand by those who are required to achieve them.
- (b) **Measurable**  
There is no point setting a target for which success cannot be gauged by referring to a specific measure or measures.
- (c) **Achievable**

Expressing specific aims that can realistically be achieved with some effort.

- (d) Relevant  
The targets should be relevant to what the Council is trying to achieve through the provision of the service.
- (e) Timed  
There should be a set timescale for achieving a target. Open ended targets may not encourage focused effort on improving performance.

3.9.5 Once you have established a list of performance targets it is also necessary to consider how you will measure performance against these targets. Possible methods of measurement include:

- (a) Binary Assessment  
This is a simple "yes/no" criteria. For example, is a certain target being achieved?
- (b) Numerical Assessment  
Some service aspects are measurable numerically such as capacity, throughput, transaction volumes and accuracy.
- (c) The Baseline  
A baseline is information on the existing level at which service is being delivered and performance measures may be linked to this. For example, one of the targets may be increased customer satisfaction and this could be measured by a percentage increase above the baseline each year.

### 3.10 Charging Methods

3.10.1 These may be in the specification or you may have your pricing document separately.

- (a) Types of charging methods include:-

- (i) Bills of Quantity

The work to be done is quantified by the user. The provider inserts the rate for each task to be performed. Subsequent variations in service can be valued using the same rates.

- (ii) Schedules of Rates

The work is not quantified. The provider is required to state the rate for each task to be performed.

(iii) Lump Sum

The work is not quantified, nor are the rates for each task stated. The provider is required to quote a lump sum (fixed price) to provide the service for a given period.

(iv) Dayworks

The user specifies an input rate (usually rate per hour/day). Often used to price immeasurable work, or one-off jobs.

(b) Examples, based on payment of creditors might be:

Bill of Quantity - 600 invoices processed per annum at £1.20 per invoice processed.

Schedule of Rates - Cost per invoice processed - £1.20.

Lump Sum - Total cost of processing payments of creditors - £720 per annum.

Dayworks - Cost per hour to process invoices - £20.

3.10.2 Specifications for certain services must be supported by suitable accurate inventories and lists. Any underestimates will mean that contractors bid on a false basis and may lead to costly variation orders when errors are recognised. Depending on how variations are treated, the work may not end up being carried out by the most cost-effective contractor; a losing tenderer with lower variation prices might have been cheaper.

3.10.3 Quantities and standards in the specification should only be finalised after consideration of methods of dealing with variations within the contract so you are sure that a competitive position can be maintained for variations and fluctuations. The sort of arrangements likely to be in place are:

(a) "Day to Day" Contract Variances

Options for dealing with payment for workload fluctuations within the contract period include the following:-

(i) The inclusion of a contract clause which allows for variance of overall workload to certain limits (e.g.

10% increase or reduction over a year) without any alteration to the agreed overall tender price.

- (ii) Use of the tendered schedule of rates to calculate payment/deduction for measured and specified changes in contract workload.
  - (iii) A combination of the two.
  - (iv) A change control procedure.
- (b) Re-negotiation of overall contract workload

Thought should be given to a possible situation where, during a contract you may wish to reduce the workload considerably. For example:-

- the service or part of the service is no longer required.
- changed customer needs/requirements are identified.
- budget reductions are imposed on the service.

In many cases complete Council "flexibility" will be appropriate and a clause will be included in the contract which will allow the Council to alter the required level of service/contract workload to any extent (usually with a stipulated period of notice to the Contractor).

3.10.4 With other contracts, some "guarantee" of workload levels continuous throughout the contract period may be necessary in order to attract tenders providing value for money. In this situation the following (or similar) approach may be considered when developing the specification/ contract:-

Contractors are asked to tender for a specified minimum level of service provision. This minimum level will not be affected by budget cuts etc. during the contract period.

A "menu" of additional/increased service provision is also priced by the Contractor and is then available for you or others in the Council.

3.10.5 How variation and fluctuation is covered in the contract will be important when you are finalising your specification.

### 3.11 Pricing Documents

3.11.1 Pricing documents need to be unambiguous and easy to understand. For example if a schedule of rates varies according to the level of activity make sure that the ranges do not overlap e.g.

Activity level	Price
1 – 2000	£a
2001 – 4000	£b
4001 – 6000	£c
6001 and above	£d

3.11.2 Also make it clear how the total price is to be calculated e.g. if the activity level is 5,000 units are all units to be priced at price c or is the pricing to be incremental i.e.

2000 @ £a  
the next 2000 @ £b  
the next 1000 @ £c

3.11.3 If there is a possibility that the potential contractors could misinterpret the pricing instructions provide a worked example.

3.11.4 When you receive the completed pricing documents you will need to have a model which will allow you to arrive at the estimated total contract price. For example, in the case of a schedule of rates contract the model will need to multiply the prices bid by the estimated activity for each item.

### 3.12 Discounts/Profit Sharing

3.12.1 If you are tendering a number of contracts you may ask potential contractors to indicate in their tender what discounts if any they would be prepared to offer for the award of two or more contracts. Alternatively you may invite them to price separately for permitted combinations of services.

3.12.2 In the case of service contracts it may be appropriate to ask potential contractors to indicate in their tender what level of profit share if any they would be prepared to offer the Council. This is most commonly used in contracts where the contractor receives income from the public e.g. leisure centres and allows the Council to share in any windfall profits. If the Contractor is being asked to tender a profit share it is essential that the contract conditions require the Contractor to provide audited accounts for the purpose of establishing the profit to be shared.

### 3.13 Pricing Adjustments

3.13.1 You should try to ensure that the Contract delivers continuous improvements throughout its life. As part of this the Contractor should be able to reduce certain elements of the cost structure on an annual basis and reflect this in the charges paid by the Council. The applicability of this method should be established as part of the research phase. Examples of where the Contractor has achieved

continuous improvement leading to cost reductions could also come from part of the selection and evaluation process.

3.13.2 Where this cannot be achieved, it may be appropriate to (for example because of increases in labour and raw material costs) for the price of service contracts to be uplifted annually by reference to an appropriate index or a weighted average of a number of indexes. During the specification stage you will need to give careful consideration to which index or indexes are to be used and which will be acceptable to potential contractors. For example it is normal practice for refuse collection contracts to be linked to a weighted average of a number of civil engineering indexes for labour, plant and equipment and fuel commonly referred to as the Baxter indexes. For other contracts adjusting in line with the retail price index may be acceptable or perhaps nationally agreed pay awards but whatever index is chosen it is important that the index is clearly defined as is the base date and the dates on which the adjustment is to be applied. For example, if the retail price index is to be used you need to specify if it is the RPIY all items index or the RPIX (excluding mortgage interest) index that is to be used. For the avoidance of doubt it is also worthwhile providing an example of how the adjustment is to be calculated. It should be remembered that if the wage rate goes up by 3% but labour only represents half of the suppliers' costs then the increase borne by the Council should be no more than 1 ½%.

### 3.14 Credit Arrangements

In considering the payment mechanism for the contract you need to be aware that any attempt to defray costs beyond the year in which the service is provided potentially constitutes a credit arrangement and requires credit approval. Before tendering on this basis you will need to seek legal advice that the proposed arrangement is not a credit arrangement or if it is seek advice from Brent Financial Services that the necessary credit cover is in place.

### 3.15 Contract Conditions/Specification Interaction

3.15.1 Although the specification is generally produced as a separate document, it should not be developed or used in isolation from the contract conditions.

3.15.2 There will be considerable inter-action between the conditions and the specification and to a certain extent the requirements of the specification may dictate what is needed in the contract conditions. For this reason your specification needs to be in a fairly advanced state before lawyers can meaningfully progress the contract conditions.

3.15.3 Care should be taken to ensure that contract conditions do not contradict the specification (and vice-versa) and that there is no duplication. A common mistake is to use different defined terms.

3.15.4 You may find that certain areas could be covered either in the conditions or in the specification - this is not always critical but as a general rule if there is anything which it is vital that the contractor complies with this should probably be a contract condition. However, bear in mind that the specification may be more of a user's document on a day to day basis. If you read through the standard conditions at Precedent 8 this gives a good idea of the types of matters that are normally covered.

3.16. Set out below is an example layout of a specification

1. Title.
2. Summary/purpose of contract.
3. List of contents.
4. Introduction to the organisation, including objectives of the Council and/or your Unit that are relevant to this contract.
5. Definitions/Glossary.
6. Documents referred to (such as Standards) and precedence of documents.
7. Relevant background information. For example, the current service/facilities strategy for the service, relevant policies currently in place, current IS/IT, relevant future developments or plans and details of stakeholders.
8. Limiting factors, such as physical space, Health and Safety requirements, noise or working hour restrictions and compatibility.
9. Outline of scope of service/supply being procured.
10. Specific services or products to be provided.
11. Requirements to be met (outputs, performance, standards).
12. Continuous Improvement.
13. Possible extensions of scope.
14. Future development requirements.
15. Requirements/constraints for service management/customer liaison (such as provision of information).



16. Monitoring approach.

17. Appendices.

#### **4 Instructions To Tenderers**

4.1 Instructions to Tenderers to be used for services and supplies contracts are at Precedent 4 including ones suitable for use with e-tendering or e-auctions. Please contact the Procurement Strategy and Risk Management Unit or Legal Services for advice on suitable documentation if you are undertaking an electronic process.

4.2 The Instructions serve a number of purposes, they:

- explain to tenderers how to go about preparing and submitting their tenders.
- explain how questions from tenderers will be handled.
- establish that the Council expects tenderers to verify information contained in the tender pack, except where they are expressly told they can rely on the information given without verifying it. If there is particular information that you specifically do expect tenderers to rely on, for example because it is something they cannot independently establish but is likely to mean they tender at a lower price, you should include this information in a schedule at the outset as provided for in the Instructions.
- establish evaluation criteria and procedure..
- contain warranties (promises) from the tenderers that will be effective if they submit a tender. These relate to the accuracy of their tender, their capacity to carry out the contract and confirmation that they have not relied on any representations given by the Council unless expressly told that they can.

Footnote guidance is provided in the document as to which options to chose to suit your purposes where options are given.

4.3 A precedent Instructions to Tenderers for works projects can be found in Section 6, Schedule 3. Guidance on this document is also found in Section 6.

#### **5 Form of Tender**

5.1 The Council's required Form of Tender is at Precedent 5 for services and supplies and Section 6, Schedule 4 for works. **This must be used for all tendering exercises**. When this Form of Tender is submitted by a

tenderer an acceptance letter from the Council is sufficient to form a binding contract even if some time elapses before a formal contract document is signed. This protects the Council from post award uncertainty and prevents tenderers from seeking to obtain concessions from the Council once they know they are the successful tenderer. Where an electronic tendering exercise (see Appendix 26) has been undertaken you should obtain a hard copy of the signed form of tender prior to contract award. The Form of Tender provides for the price for the bond (if an undertaking to provide one is required) to be separately identified. Further information about the issue of whether a bond should be required is in Appendix 15.

## 6 **Terms and Conditions**

- 6.1 Precedent 8 is a precedent service contract suitable for most service contract arrangements which are not highly specialist or technical. It is not suitable for use in specialist projects including for example, IT or consultancy services. In addition, these contracts may not be suitable where you are looking to work in partnership with an organisation rather than contract for provision for a service. If you are uncertain whether Precedent 8 is suitable contact Legal Services. (precedent 8 to follow).
- 6.2 Sometimes you may need a simpler form of contract for a low value contract or for one of a lower value than that. If you need a suitable precedent please contact Legal Services. [Section 2, Part 2, Paragraph 4](#) contains information about situations where special forms of contract may be more appropriate.
- 6.3 IT Technical Standards prescribe standards that apply whenever the operation of computer systems or the maintenance and processing of data, owned by the authority are contracted out to an internal service provider or to an external contractor. This includes specific provisions as to matters to be covered in the terms and conditions of these contracts. The Standards are available on the Intranet at Corporate/Information Technology/IT Standards.
- 6.4 Where the processing or control of personal data is an integral part of your contract it is important that the contract addresses the specific requirements under the Data Protection Act 1998. The Act distinguishes between Data Processors who do not exercise control over the way in which personal data they handle is processed and Data Controllers who do. Information on the issues to consider are contained in Appendix 21.
- 6.5 A precedent contract for supplies has not been included in these guidelines. However a checklist of the types of clauses and issues which should be addressed in a supply contract is included in Appendix 11(c). This checklist may be useful when checking a supplier's standard terms and conditions or as a base for drafting a supply

contract.

- 6.6 Legal Services is able to provide advice on supply contracts and to draft suitable terms and conditions for particular contracts. In addition there may well be an industry standard supply contract that is suitable for the supplies you are procuring.
- 6.7 Legal Services generally aim to provide draft terms and conditions within seven days of receiving all necessary information. However, various factors may mean that it will not be possible for Legal Services to provide full advice within this period. These include:
- (a) The complexity of your contract including any novel approach to procuring the works, services or supplies.
  - (b) The status of your specification. If at all possible you should endeavour to provide Legal Services with a final draft of your specification.
  - (c) The extent to which your proposed terms and conditions differ from the standard documents in these guidelines.
  - (d) Other work commitments. In order to minimise the effect of this you should inform Legal Services as early as possible as to when you are likely to have the contract documents ready. In addition, if you require advice urgently you should endeavour to ensure that you are available to meet with Legal Services at short notice.

## **7 Finalising Your Tender Pack**

- 7.1 It is very important that your final pack is coherent and does not contain documents that are contradictory. For example, the wording used in your specification should be consistent with the terms and conditions. There is often benefit in getting some one else to check through the pack for you at the end when you think it is finished.

## 4C THE TENDERING PROCESS

### 1 Introduction

- 1.1 Now that you have completed your preparation and chosen which tendering approach you are going to follow, this section will provide you with an explanation of the tendering process and the stages to be involved. Included at the end of this section are two checklists that summarise the requirements in Standing Orders and Financial Regulations for Medium Value and High Value Contracts.
- 1.2 The tendering process will vary depending on which tendering approach you have chosen to follow. Detail of the advantages and disadvantages of the different tendering approaches are provided in [Section 4A Paragraphs 2.1-2.15](#). In summary, the options are:

PROCUREMENT OPTIONS	
FULL APPLICATION OF EU REGULATIONS and COUNCIL STANDING ORDERS	COMPLIANCE WITH STANDING ORDERS ONLY and/or LIMITED APPLICATION OF EU REGULATIONS
(a) Open Procedure	(a) Single Stage Tender
(b) Restricted Procedure	(b) Two Stage Tender
(c) Negotiated Procedure*	(c) Negotiating your contract (requires an exemption from the tendering requirements of Standing Orders)
(d) Competitive Dialogue*	

\*The Negotiated and Competitive Dialogue Procedures may only be used in limited circumstances. You must consult Legal Services to see whether these options are available to you.

### 2 Open Procedure/Single Stage Tender

- 2.1 The open procedure and single stage tender are essentially the same with "open procedure" being the terminology used in the EU Regulations and "single stage tender" being the terminology used in Standing Orders.
- 2.2 In both procedures any contractor with an interest in the contract is automatically entitled to tender in response to the advertisement. In the case of the EU procedure this is done by lodging a "[contract notice](#)"

with the Official Journal of the European Community (OJEU). There is no intermediate shortlisting stage. The factors that would be considered in determining whether a contractor qualifies for short listing will still be considered but as part of a single evaluation exercise.

- 2.3 If the EU Regulations apply in full the timescales for the open procedure is imposed by the Regulations. However, if the contract is subject to only partial application of the EU Regulations and Standing Orders there is more flexibility. Further information on when the EU Regulations apply and the minimum timescales involved are provided in Appendix 2.

For contracts subject to the full application of the EU Regulations the minimum timetable is:

Days	Activity
52 days	from the date of despatch of the <a href="#">contract notice</a> to the deadline for submission of tenders
36 days and in any event not less than 22 days	from the date of despatch of the <a href="#">contract notice</a> to the deadline for submission of tenders where a Prior Information Notice (PIN) is issued
45 days	from the date of despatch of the <a href="#">contract notice</a> to the deadline for submission of tenders for electronic notice in SIMAP format
40 days	for electronic tender documentation available as soon as the contract notice is placed
6 days	Issue tender pack within six days of receiving a request
10 days	Mandatory standstill period
48 days	deadline for sending the contract award notice to the Official Journal of the European Union following award of the contract

For contracts not subject to the EU Regulations or subject to only partial application of the Regulations, Standing Order 97(b) requires you to normally allow not less than 21 days for submission of tenders after the date that the advertisement for the contract was first published.

### 3 **Restricted Procedure/Two Stage Tender**

3.1 The restricted procedure is a two stage process and therefore you may see these terms used interchangeably. Restricted procedure is the terminology from the EU Regulations and two stage tender is the terminology used in Standing Orders.

3.2 The two stages in the tender process are:

- Selection of suitable tenderers based on a pre qualification questionnaire.
- Evaluation of tenders from those tenderers invited to tender for the contract following stage 1.

Where your contract is subject to the full application of the EU Regulations (see Appendix 2 for more information the minimum timescales for the restricted process are as follows:

Days	Activity
37 days	from despatch of the <a href="#">contract notice</a> to the deadline for submission of requests to participate
30 days	from despatch of the <a href="#">contract notice</a> to the deadline for submission of requests to participate for electronic notice in SIMAP format
15 days	for restricted accelerated where permitted by the EU Regulations; minimum time for receipt of requests to participate from the time the notice is sent (10 days for electronic notice in SIMAP format)
40 days	from despatch of the invitation to tender to the deadline for submission of tenders
36 days and not less than 26 days	from despatch of the invitation to tender to the deadline for submission of tenders if PIN is issued  (both can be reduced by 5 days for

10days	electronic tender documentation) from despatch of the invitation to tender to the deadline for submission of tenders for restricted accelerated
10 days	Mandatory standstill
48 days	deadline for sending the contract award notice to the Official Journal of the European Union following award of the contract

If your contract is not subject to the EU Regulations or subject to partial application only, under Standing Order 97(c) you should normally allow at least 21 days for submission of pre qualification questionnaires. As good practice, you should use the EU Regulation time limits for return of tenders as a guide for the time limit you set.

#### 4. **Competitive Dialogue Procedure**

- 4.1 This is a procedure that allows the Council to discuss all aspects (conduct a dialogue) of a proposed contract with economic operators who express an interest following publication of a contract notice to engage in the dialogue. The aim of the dialogue is to assist the Council to develop solutions/products that will be capable of meeting its needs. Once the solution is developed with economic operators, the dialogue is closed and the solution/product identified will form the basis upon which economic operators are invited to submit their tenders. The Council then proceeds to select the most economically advantageous bid.
- 4.2 The Competitive Dialogue Procedure may only be used in limited circumstances. You should contact Legal Services for advice on whether this process is an option for your procurement. More information on this procedure is contained in Appendix 2.

#### 5 **Negotiated Procedure**

- 5.1 The negotiated procedure allows the Council to negotiate both the technical specification and conditions of contract with potential contractors. Under the EU Regulations, there are two types of negotiated procedures - one where the contract is advertised in advance in [OJEU](#) and one where the contract is not advertised in advance. The negotiated procedure can be particularly useful in complex contracts or where innovation is required but it can only be

used in very limited circumstances – where dialogue with tenders is considered necessary you should consider the Competitive Dialogue Procedure. You should contact Legal Services to find out whether it is possible for you to use this process.

- 5.2 If you have received advice from Legal Services that it is appropriate to use the negotiated procedure for your contract the following summarises the timescales specified in the EU Regulations. If the EU Regulations do not apply you will need to allow at least 21 days before the submission of expressions of interest in accordance with Standing Order 97(c).



### Negotiated Procedure with Publication of a [Contract Notice](#)

Where a contract notice is published the required timetable is:

<b>Days</b>	<b>Activity</b>
37 days	from despatch of the contract notice to the deadline for receipt of requests to be selected to negotiate
30 days	from despatch of the contract notice to the deadline for receipt of requests to be selected to negotiate for electronic notice in SIMAP format
14 days	where compliance with 37 day timeframe is rendered impractical for reasons of urgency (subject to clearance from legal)
10 days	where compliance with 37 day timeframe is rendered impractical for reasons of urgency (subject to clearance from legal) for electronic notice
10 days	Mandatory standstill period
48 days	deadline for sending the contract award notice to the Official Journal of the European Union following award of the contract

### Negotiated Procedure without Publication of a Contract Notice

Where a contract notice is not published the EU Regulations require submission of the contract award notice within 48 days of award of the contract.

5.3 Given that the intention of the negotiated procedure is to allow for a dialogue between the Council and the bidders, you will note that there is no prescribed time limit for the negotiation in either case.

5.4 In the case of advertised negotiated contracts not subject to the EU Regulations or subject only to partial application, Standing Order 97(c) will apply as this is a two stage process. As detailed above, this requires you to allow normally 21 days from publication of the advert to submission of the pre qualification questionnaire.

## 6 Competitive Dialogue Procedure

- 6.1 This is a procedure that allows the Council to discuss all aspects (conduct a dialogue) of a proposed contract with economic operators who express an interest following publication of a contract notice to engage in the dialogue. The aim of the dialogue is to assist the Council to develop solutions/products that will be capable of meeting its needs. Once the solution is developed with economic operators, the dialogue is closed and the solution/product identified will form the basis upon which economic operators are invited to submit their tenders. The Council then proceeds to select the most economically advantageous bid.

## 7. Shorter Time Limits

- 7.1 As set out in the tables above, the EU Regulations do provide for shorter timescales in cases of urgency. However, the rules are very restrictive on when you can use these provisions and you should consult Legal Services for advice.
- 7.2 As can be seen from the above tables, where you give full electronic access to tender documents, you are able to reduce the timescales by 5 days. You must remember to indicate the internet address where those documents will be made available in your OJEU notice.
- 7.3 There is also provision for shorter time limits where a Prior Information Notice (PIN) which covers your contract has been published in [OJEU](#). In the case of works contracts exceeding the threshold for application of the EU Regulations, the PIN should be published as soon as the Council has approved the planning of the works. In the case of services and supplies contracts exceeding the threshold in the EU Regulations, PIN's are to be published at the beginning of the financial year indicating procurement plans for each product or category of service.
- 7.4 The purpose of a PIN is to generate interest in the market place at an early stage.
- 7.5 The Procurement Unit co-ordinates publication of PIN's.

## 8. Advertising

- 8.1 Before placing your advert (often referred to as inviting expressions of interest (two stage) or tenders (one stage)) you should check you have the necessary authority to begin your procurement process.

- If your contract is High Value you will need to seek approval from the Executive (or General Purposes Committee if your contract relates to a Council side function (or the Pension Fund Sub-Committee if it relates to the pension scheme) before you commence your tendering process. For detail on what is a High Value Contract see [Section 2, Part 2, Paragraph 14.5](#) of these Guidelines. A precedent report for this purpose is provided at Precedent 1(a). If your contract is not a High Value Contract you should ensure that an officer in your service area with the relevant delegated authority approves your tender process.

## 8.2 *Full Application of the EU Regulations*

8.2.1 If the EU Regulations apply in full, it is mandatory to advertise the contract in OJEU. This should be done by the Strategic Procurement and Risk Management Unit and notices will be checked by Legal Services.

8.2.2 The contract notice, as placed in [OJEU](#), will define the scope of your procurement process. Therefore it is extremely important that the information provided in the notice is accurate. You should check the advert as it is published against the version you submitted. If your contract is a high value contract or is complicated or in some way outside the norm it is recommended that you seek advice from Legal Services before submitting the contract notice to [OJEU](#). This will reduce the risk of subsequently discovering that your contract notice does not allow for the type of contract you envisaged. For example, it is important that your OJEU notice addresses issues such as:

- (a) whether you intend to award more than one contract or divide the contract into lots;
- (b) whether you intend to appoint more than one provider;
- (c) whether the contract will be a framework agreement;
- (d) the contract period, including any provision for extension; and
- (e) the evaluation criteria you wish to use (though sometimes this can be included in the invitation to tender);
- (f) Whether you intend to hold an e-auction

8.2.3 Even if you have advertised in [OJEU](#), it is good practice to also advertise the contract locally except in cases where this is clearly unlikely to come to the attention of any additional potential tenderers. As a guideline, for contracts that are not subject to the full application of the EU Regulations Standing Orders require the contract to be advertised in at least one local newspaper and one relevant trade journal. This will be particularly important if there is likely to interest from local organisations which might not regularly check OJEU, for example, where there are smaller lots included in your contract. You should also consider your target market and the Council's duties under the Race Relations Act 1976 (as amended). Detail on this is provided in paragraph 6.3.2 below.

### 8.3 *Partial Application of the EU Regulations and Application of Standing Orders*

8.3.1 Where the EU Regulations do not apply in full, Standing Order 97 requires contracts to be advertised in at least one local newspaper and at least one relevant trade journal. The advert must state:

- (a) the nature of the contract being tendered for; and
- (b) the last date when expressions of interest (2 stage) or tenders (one stage) (as the case may be) will be accepted.

The advert may also state the estimated value of the contract. Standing Order 97 states that normally not less than 21 days should be allowed for submission of expressions of interest or tenders.

8.3.2 If you are intending to hold an e-auction or to conduct the tender process through e-tendering (See Appendix 26) you should state this in your advert so potential tenderers are aware of the process from the outset.

8.3.3 In deciding where to advertise the contract you should consider your target market. What trade journal and local newspaper is your target market likely to read? You must also consider the Council's duty under the Race Relations Act 1976 (as amended) to eliminate unlawful racial discrimination and promote equal opportunities. This applies to the Council when exercising all its functions including contracting. In line with this duty, when advertising your contract you may wish to consider taking additional steps such as:

- (a) advertising in media used by ethnic minority businesses; and

- (b) undertaking targeted mail shots to small businesses.

8.3.4 Even if the EU Regulations do not apply you may still choose to advertise in [OJEU](#). If this is the case you should note that once you have advertised in OJEU you must follow the Regulations in their entirety. This includes complying with the procurement timetable set out in the Regulations. The Procurement Policy and Risk Management Unit has access to software provided by BiP they have a “competitive notice” that can be used even if you are not using OJEU and which will be circulated to their subscribers free of charge.

8.3.5 If you wish to predetermine the number of persons or bodies invited to tender, the EU Regulations require that you must intend to invite at least 5 and no more than 20 persons or bodies. This range must be specified in the [contract notice](#) and must be sufficient to ensure genuine competition.

If less than 5 persons or bodies respond to your advert you must ensure that the number of contractors you actually invite to tender still ensures genuine competition.

## **9 Pre Qualification Questionnaires and Short listing**

9.1 When carrying out a two stage or restricted process you will undertake short listing as part of your procurement process. The purpose of this process is to ensure that only person or bodies who meet certain minimum criteria in terms of financial standing and technical capability are invited to tender for the contract.

9.2 This is done by requiring all bodies or persons who have responded to the advert to complete a pre qualification questionnaire (PQQ). You should do this by sending to interested bodies or persons the [PQQ](#), a summary of your specification and information about the Council together with a covering letter. You may also find it useful to hold an information seminar for organisations interested in your contract. This will enable organisations to find out more about your contract before submitting the [PQQ](#).

9.3 In many situations there is a scarcity of good Contractors. It is therefore important to produce high quality accompanying information that ‘sells’ the Council as being the type of organisation that the Contractor really wants to do business with. Often Contractors have limited resources to submit tender bids so they will choose to bid for those that look most attractive. The Procurement and Risk Management Unit can offer advice here.

9.4 Two standard pre qualification questionnaires are attached at Precedent 2, a long form and a short form. You will see that these broadly cover the following areas:

- (a) Contract and Administrative information.
- (b) Business Probity.
- (c) Economic and Financial Standing.
- (d) Ability and Technical Capacity.

9.5 You will need to decide which to use in each particular case. Both cover the same broad topics (except that the short form does not cover equality issues or Health and Safety and Environment) but the short form asks for less detailed information in a number of areas, for example, in relation to company details and connections with Brent Council. As a rule of thumb you would be unlikely to use the short form for a supplier or service contract valued at £139,893 or more. Where you are going to ask questions relating to Health and Safety you should use the long form OR add the Health and Safety questions into the short form if for other reasons you want to use that form.

9.6 You should note that if your contract is subject to the full application of the EU Regulations, the Regulations restrict the short listing criteria that can be used. The permitted criteria are:

- (a) Criteria for rejection of contractors e.g. absence of relevant convictions, bankruptcy, professional misconduct, corruption etc;
- (b) Economic and financial standing;
- (c) Technical or professional ability.

9.7 The Regulations detail the information that can be sought from organisations under each of the above categories. There is, however, scope to supplement or clarify this information. Further detail is provided on the short listing criteria at Appendix 2, paragraph 4. As a general principle you should not be short listing on criteria which are not relevant to your contract. However, where your contract is subject to the full application of the EU Regulations, the Regulations are such that you can only shortlist on questions on Health and Safety equality and environment issues if they are relevant to a provider's technical capacity and ability to deliver the contract. Health and safety will be relevant in most works and services contracts and may also be relevant in certain supplies contracts. Equality issues will be particularly relevant in contracts where the successful contractor will have direct contact with members of the public.

- 9.8 The Health and Safety questions in the [PQQ](#) are those produced by the Contractors Health and Safety Scheme (CHAS) and include questions which are directly relevant to your contract and general health and safety issues. Accordingly, it is important that before the PQQ is sent out to organisations who have expressed an interest in your contract an exercise is undertaken to identify the questions which fall into each of those categories. Only questions which are directly relevant to the contract in question can be used for short listing purposes. Tenderers should not be required to answer the other questions or provide documents not directly relevant to your contract but should be invited to do so if they want to be assessed for CHAS. Further information on CHAS can be found in Appendix 18.
- 9.9 Where it is **relevant to the contract and for the purposes of achieving best value**, the Council is able to ask questions in relation to racial equality in addition to the six approved questions set out in Circular 8/88. In relation to equality, you should evaluate the [PQQ](#) in order to assess how contractors have taken steps to achieve equality in their employment practices and whether they can meet the equality requirements in the contract. Appendix 17 provides guidance on evaluation of the six approved questions.
- 9.10 You may also evaluate against environmental criteria **provided that these are directly related to the subject matter of the contract**. However it is important to note that you may not shortlist on environmental criteria if you are procuring a supply contract.
- 9.11 The Precedent PQQs at Precedent 2 include guidance notes in square brackets on which questions can be asked in which circumstances. These notes must be removed before the PQQ is sent to organisations for completion.
- 9.12 **Evaluation of the pre qualification questionnaire must be carried out in a fair and transparent manner.** In order to evaluate the questionnaire you will need to involve colleagues with expertise in finance, Health and Safety (where applicable), equality issues (where applicable) and of course with expertise in the subject matter of the contract. The outcome of this evaluation will then be used to create a shortlist of bodies or persons who will be invited to tender for the contract.
- 9.13 Guidance on financial assessment and quality assurance appraisal is contained in Appendix 18. Further general guidance on the evaluation of the pre-qualification questionnaire and a model score sheet are contained in Appendix 23.
- 9.14 If you are using a single stage or open procedure you will consider these issues as part of the overall evaluation.



- 9.15 You should now despatch your tender pack to those you have short listed. Guidance on preparing your tender pack is in Section 4B.

## **10 Dealing with Issues before Submission of Tenders**

- 10.1 From the time that you issue invitations to tender till the date that tenders are required to be submitted you may receive a number of requests for clarification or further information. You should consider carefully how to deal with these requests and ensure that you act at all times in a fair and transparent manner. Guidance on responding to such requests is contained in Appendix 19.
- 10.2 The Council's standard Instructions to Tenderers allow queries to be made either in writing or by telephone. If you receive a query by telephone, it is important that you record the query in writing and respond to the telephone query in the same way as you do to any written queries.
- 10.3 As a result of the queries that you receive from tenderers you may decide that you wish to make amendments to the tender documents. The Instructions to Tenderers specify that the Council may consider any difficulty or request for clarification raised by any tenderer in relation to any of the tender documents and may issue general guidance or waive or amend any provision of the Tender Documents. It is important to note that any such guidance, waiver or amendment must be circulated in writing to all tenderers and is only binding on the Council if made in writing and signed by the Borough Solicitor or his or her deputy.
- 10.4 If there are significant changes you think should be made to the tender documentation you should consider reissuing a revised tender pack to ALL tenderers before tenders are submitted.
- 10.5 Guidance on dealing with any issues that may arise during this period relating to TUPE is provided in Appendix 7.

## **11 Receipt and Opening of Tenders**

- 11.1 As detailed above, both your advert and instructions to Tenderers will have specified the last date and time for return of tenders. You are only permitted to accept tenders after this time and date in special circumstances and only with the prior written approval of the Chief Executive or the Monitoring Officer and provided that the other tenders have not been opened. If the Chief Executive or the Monitoring Officer



do agree to you accepting a late tender you must keep that consent with your record of tenders received.

In all other circumstances, late tenders should be opened only for the purposes of identifying the sender and you must return the tender to them immediately.

- 11.2 Standing Orders specify the procedure for receipt and opening of tenders. This is at Standing Order 101. Except in the case of electronic tendering which is dealt with separately (see Appendix 26), High Value Contracts (services or supplies contracts valued at £500,000 or more and works contracts valued at £1m or more) must be addressed to the Democratic Services Manager and Medium Value Contracts (services or supplies contracts valued between £139,893 and £500,000 and works contracts valued between £150,000 and £1m) must be addressed to the relevant Chief Officer. You will need to include details of who tenders should be addressed to in the invitation to tender. In order to ensure tenders are returned to the right place, it is a good idea to send tenderers a pre addressed label for returning their tenders.

- 11.3 Except in the case of electronic tendering High Value Contracts must be opened and tender details recorded by an authorised representative of the Democratic Services Manager and at least one other officer. For other contracts Chief Officers must ensure that tenders are opened by officers of appropriate seniority. In all cases there is an overriding obligation to ensure that the tender opening process is fair, equal and ensures probity. Guidance on the procedure for receipt and opening of tenders is provided in Appendix 20.

## 12 **Evaluation of Tenders**

- 12.1 There are two types of evaluation methodology specified in the EU Regulations:

- (a) Assessment of most economically advantageous tender; and
- (b) lowest price.

Standing Order 104(b) requires you to use the most economically advantageous criteria unless the contract is a works contract in which case you can use the lowest price criteria. [Section 4A, Part 2, Paragraphs 2.13](#) and Appendix 2 provide further information on these two methods.

- 12.2 Some of the tenders you receive may be qualified meaning that the tender is subject to some form of qualification. For example, a tenderer may state that its tender is conditional on a certain change in the terms

and conditions. If you are not using the negotiated procedure it is not permissible to enter into a dialogue with the tenderer and therefore the tender should be rejected. You should consider carefully whether a tender is qualified and therefore should be rejected or whether it is a matter of seeking further clarification. Further clarification is permitted but you should take care to ensure that you do not allow one tenderer an opportunity to improve their tender.

- 12.3 Keep in mind the general principles set out in Section 2 of these guidelines such as transparency and equal treatment. In practical terms this means that any points of clarification or the Council's response to any questions from tenderers should be circulated to all tenderers. In addition, you should ensure that records are kept of all communication with tenderers and scoring/decisions at the evaluation panel.
- 12.4 Regardless of whether your contract is subject to the EU Regulations or not, Standing Order 104(b) will apply. This requires tenders for all contracts to be evaluated and awarded on the basis of the most economically advantageous offer except in the case of works contract where you can decide that lowest price is the appropriate criteria.
- 12.5 If your contract is subject to the EU Regulations you will have specified in your [contract notice](#) whether the award criteria is lowest price or most economically advantageous offer. If you chose the most economically advantageous offer you would have also specified your criteria for assessing this. The criteria that you can use are regulated by the Regulations. See Appendix 2 for further detail of these criteria. If you have decided in advance the weighting of criteria then you should include this in the tender documents. You can include them in the Contract Notice but this will mean you cannot change the weighting in the tender documents should you have a change of mind for any reason.
- 12.6 It is usual practice for tenders to be evaluated by a panel of Council officers. The role of the evaluation panel is to evaluate tenders in line with the evaluation criteria identified in the invitation to tenderers. A panel approach ensures the process is transparent, fair and involves officers with the necessary expertise. The make up of your tender panel should generally be the officer responsible for the procurement process and other officers with expertise in the subject matter of the contract. You may also wish to include officers with other professional expertise such as finance and legal either as part of the panel or as advisors to the panel. In the case of High Value Contracts, you must invite representatives from legal and finance to either be part of the panel or advise the panel. It is up to legal and finance whether they consider it necessary to be involved in this way.

- 12.7 If equality issues have been included in the evaluation criteria you will need to consider who will evaluate any aspects of the tenders relating to this and what training or guidance officers may need to undertake this role. The basic principles of evaluation are equally applicable to evaluation of equality requirements.
- 12.8 If environmental issues have been included in the evaluation criteria, the Environmental Projects and Policy Team in Environment and Culture can assist with evaluation. The basic principles of evaluation are equally applicable to evaluation of environmental requirements.
- 12.9 As part of your evaluation process you may request a presentation from tenderers. The purpose of such a presentation is to obtain confirmation and clarification of the written tender. You should be careful that you do not allow tenderers to use the presentation as a forum for changing their tenders. You may also wish to undertake a site visit to inspect work undertaken by tenderers on existing contracts. Generally speaking if any tenderers are interviewed or have a sit visit, all should.
- 12.10 If your contract involves the processing of data in terms of the Data Protection Act 1998, the Council should only award a contract to an organisation which is able to show that it can act as a data processor with sufficient security and organisational measures. The Council should consider the organisations role as data processor in the light of the following factors:
- (a) the state of technological developments at the time;
  - (b) the cost of implementing necessary security measures;
  - (c) the level of security that is appropriate taking into account the nature of the data to be protected and the harm that may result from a breach; and
  - (d) the reliability, training and organisation of staff having access to the data.

### A Practical Guide to Evaluating Tenders

- 12.11 In light of the above principles, the following is an example of how you may wish to go about evaluating tenders:
- (a) Copies of the tenders should be photocopied and distributed to all members of the panel to read before the panel meets collectively. It is usual to request copies on CD which facilitates distribution. At this stage it is useful to provide members of the panel with marking sheets which provide examples of what the tenders should cover for each evaluation criterion and ask panel members to consider the good and bad points in each tender and also

what is not covered in each tender. In order to avoid members of the panel developing pre conceptions at this stage it is preferable if the panel only makes notes rather than attempting to score each tender.

- (b) Once all members of the panel have individually considered each tender as above, the panel should meet collectively to discuss the tenders. At this stage the panel will be considering the good and bad points in each tender and also anything that is not addressed in each tender. On the basis of this discussion the panel should then allocate preliminary scores for each of the evaluation criterion.
- (c) This process will then enable the panel to identify which tenderers it needs to interview in order to clarify tenders and the questions it wishes to ask tenderers during that interview. It is a good idea to advise tenderers in advance of the issues to be addressed in the interview. It is not normally appropriate to interview tenderers at this stage unless all tenderers are given the opportunity of an interview.
- (d) At the same time as you invite tenderers to attend an interview it is also a good idea to seek references. This will ensure that you receive the references in good time for the panel to consider them when allocating final scores. You should ensure that you obtain at least two references for each tenderer.
- (e) During the interview remember that the purpose of this process is to confirm and clarify the tender submission. It is not an opportunity for tenderers to change their tenders.
- (f) Following the interview, the panel should meet again to review the preliminary scores taking into account the presentations at the interview and the references for each tenderer. At this stage final scores should be allocated for each criterion and inserted into the panel's scoring grid. These final scores will need to be adjusted to take account of any weightings which may have been allocated to the criteria.
- (g) Finally, it is important that records are kept of the panel's discussions, the scoring grid and a note of each tenderers interview. It is important that if the Council is challenged

it is able to explain the reasons for the Evaluation Panel's decisions.

### 13 The Other Contracting Party

#### 13.1 Limited Company

The company's full name must be inserted in the final contract and used in award reports. The only part of the name which may be abbreviated is the word "Limited" which can be written as "Limited", "Ltd" or "ltd". The rest of the name must be set out in full.

Although this should be checked when tenders are first returned you should also, at this stage, check the invitation to tender letter and the Form of Tender to make certain that the name of the contractor remains exactly the same on each. Any slight deviation in the names used could be a simple clerical error or it could be something fundamental like a different company in the same group of companies. If there are any differences then this must be taken up with the tenderer to find out the reason.

If in doubt about the response, take legal advice.

In the case of limited companies, the address to be inserted must be their Registered Office.

#### 13.2 "Trading as"

The company may actually have a different trading name to its company name. This must by law be clear on the company's headed note paper.

If a company called A N Other Ltd has a trading name of "Bright Sparks" it would be written on the contract as "A N Other Limited trading as Bright Sparks" not the other way around. The Form of Tender should also use this description.

Some businesses call themselves "Company" or "Co." whereas they aren't actually a limited company. The vast majority of true "limited" companies are required by legislation to have the word "Limited" on their headed paper or in their name. If the word "limited" is not on the headed paper or in the name (for example in the Form of Tender) then it may not be a limited company. Check with the company to find out.

If not a limited company it may be a partnership, a sole trader or an unincorporated association or something else.

### 13.3 Public Limited Company

These are limited companies whose shares are quoted on the stock market as opposed to limited companies which are privately owned and not quoted. These are usually identified by the abbreviation “Plc” at the end of their name.

The same principles apply to these as well as limited companies. The only difference is that “Plc” instead of “limited” etc appears at the end of the name.

### 13.4 Partnerships and Sole Traders

Although both of these usually have a trading name contracts must be executed in the name of the sole trader or at least 2 of the partners “trading as [Partnership Name]”

For partnerships, at least 2 partners (any two) are required to execute a contract to legally bind the partnership. The partners don’t usually sign in the partnership name but in their own full personal names, so the legal name on the contract would appear like this:

“Anthony Smith and Stephen Allan Jones trading in partnership as Smith & Jones”

The signature of the partners needs also to be witnessed.

Sole traders execute in the same way except, of course, there is only one person to be named.

### 13.5 Unincorporated Associations & other bodies

Once you go beyond limited companies, Plcs, partnerships and sole traders there can be many complications concerning execution of contracts. You must take legal advice if this happens. As a general rule, for example, an unincorporated association can only execute contracts under the signature of every one of its members.

## 14 Contract Award

14.1 If your contract is a High Value Contract (see [Section 2, Part 2, Paragraph 14.5](#) for details) you will need to obtain prior approval from the Executive (or General Purposes Committee if your contract relates a Council side function or the Pension Fund Sub-Committee) to award the contract. If the contract is required to be certified (see Section 2 Part 2 Paragraph 21) member level approval will be required for the issuing of the certificate. A sample report for this purpose is provided in Precedent 1(b). If your contract is a Medium Value Contract you

should check who in your Corporate Unit or Service Area has the authority to award the contract and obtain their approval. Further detail on officer delegated powers is provided in [Section 2, Part 2, Paragraph 8](#).

- 14.2 If you have followed an e-tendering procedure (see Appendix 26) you must ensure that SIGNED hard copies of the form of tender, parent company guarantee, undertaking (where applicable) and bond undertaking (where applicable) are obtained from the successful tenderer prior to award of the contract (Standing Order 101(g)).

- 14.3 If your contract is subject to the full regime of the EU Regulations, you will need to comply with the mandatory minimum 10 calendar day standstill period requirements. The requirements include issuing written notification to all tenderers and those unsuccessful at PQQ stage of the award decision for the contract, then observing a minimum 10 calendar day standstill period after such notification and before the contract is entered into, and providing additional debriefing to unsuccessful tenderers on receipt of written request (see paragraph 4 of Appendix 25 for details).

Only once the requirements have been met may the Acceptance Letter be issued (or the formal contract be entered into or the official order be signed for the contract, depending upon the value of the contract). At a minimum your award letter must include the date of the decision and the name of the decision maker (please see the precedent acceptance letter attached at Precedent 9). It is important to remember that if a commencement date was not specified in the Tender Documents it must be detailed in the Acceptance Letter otherwise it will not be clear what date the Contractor is to commence providing the services or supplies.

If during the mandatory standstill period or prior to the issue of the Acceptance Letter a legal challenge is brought regarding the procurement process or award decision, the contract must not be awarded and the Acceptance Letter must not be issued to the successful tenderer without the prior written approval of the Borough Solicitor.

- 14.4 If the contract is not subject to the mandatory standstill period requirements (as described in paragraph 12.3 above) once you have obtained approval to award the contract from the appropriate decision maker you should write to all successful tenderers advising them of the decision. Standing Orders require you to write to the successful tenderers as soon as possible and where possible within five working days of the decision. As noted above as a minimum your award letter must include the date of the decision and the name of the decision maker - a precedent acceptance letter is attached at Precedent 9. As

previously noted, it is important to remember that if a commencement date was not specified in the Tender Documents it is important to ensure that it is detailed in the Acceptance Letter otherwise it will not be clear what date the Contractor is to commence providing the services or supplies.

- 14.5 It is essential that you send a letter of acceptance and not a letter of intent to the successful tenderers. It is important that your acceptance letter is not qualified in anyway. You should have used the Council's standard form of tender (see Precedent 5 for services and supplies and Section 6 for works) and therefore the successful tenderer's tender and an unqualified letter of acceptance will create a binding contract. In these circumstances, using a letter of intent is dangerous as it may indicate that the Council has not accepted the successful tender as it stands.

14.6 You may only use a letter of intent where:

- (a) the form of tender did not include a statement that until such time as a formal contract is executed the Council's written acceptance of a tender shall bind the parties into a contractual relationship; or
- (b) exceptionally where a contractor is required to provide services, supplies or works prior to written acceptance by the Council and only then with the written approval of the Monitoring Officer.

- 14.7 At the same time as you write to the successful tenderers you should also notify those tenderers who have not been awarded the contract (unless you have already done so in accordance with the mandatory standstill period requirements noted at paragraph 12.3 above. Under the EU Regulations, within 15 days of receiving a request from an unsuccessful tenderer, you are required to provide information as to why the tender was unsuccessful and if the tender was admissible the characteristics and relative advantages of the successful tender as well as the name of the successful tenderer. (Please note that this requirement applies also to those unsuccessful tenderers who do not provide written requests for additional debrief information within two working days of the beginning of the standstill period – see paragraph 4.2.3(ii) of Appendix 25.) You may also wish to use this opportunity to offer advice to tenderers who scored particularly poorly on any race equality aspects of their tender.



14.8 Once the letter of acceptance has been sent you should arrange for the contract documentation to be signed or sealed. The Council's requirements in relation to signing and sealing of contracts are:

- (a) If the value of the contract exceeds £500,000 it must be sealed;
- (b) If the contract relates to land or property or is valued at £150,000 or more it must be in writing and either sealed or signed by two officers who are either Chief Officers or officers duly authorised in accordance with the Constitution by the Chief Officer under whose authority the contract is entered into;
- (c) Other contracts must be sealed if the Chief Officer or Borough Solicitor consider it would be in the best interests of the Council; and;
- (d) Contracts below £150,000 must be in writing (including on the Council's official order form) and signed in accordance with the Financial Regulations or any financial procedures issued by the Director of Finance and Corporate Resources.

14.9 The Council's seal is witnessed by the Borough Solicitor or a person nominated by him or her. Therefore, if your contract is to be sealed you should collate all the contract documentation and send it to Legal Services. This does not mean that your contract is ineffective until sealed, provided you have sent an unqualified acceptance letter as described above. Sealing provides certainty and a longer period of enforceability but is not essential for there to be a contract.

14.10 Don't forget that under Standing Orders if your contract is valued at £150,000 or more you need to notify the Contract Register Officer in the Procurement Strategy and Risk Management Unit within one month of award with the name of the contractor; the services, supplies or works to be provided; the contract value; contract term and where relevant any provisions for extension. Under these guidelines, you are also required to notify Contract value between £50,000 and £149,999.

14.11 It is also important to remember that Standing Order 103 requires Service Area Directors to maintain a record of all tenders invited and received by them and of all contracts entered into on behalf of the Council. That record must include the reasons for non-acceptance of any tender or the rejection of a contractor who has not been included in a tender short list.

- 14.12 Finally, if your contract is subject either to full or partial application of the EU Regulations remember to ensure that a contract award notice is published in [OJEU](#) within 48 days of the award of the contract and that a copy is provided to the Procurement and Risk Management Unit.

**‘MEDIUM VALUE CONTRACT’ TENDERING i.e. BETWEEN**

- **£139,893 & £500,000 FOR SUPPLIES & SERVICES**
- **£150,000 & £1MILLION FOR WORKS**

**Please note that the following checklist does not include the specific rules or requirements for e-auctions or e-tendering. If you are conducting such a process you must ensure you follow the additional specific rules (see Appendix 26)**

1. Chief Officers must ensure in any contract procurement that it is:
  - Fair.
  - Transparent.
  - Auditable process.
  - All tenderers are treated equally and fairly.
 (S.O. 84(b))
  
2. Subject to complying with any relevant parts of the EU Regulations do not need to invite tenders:
  - If for technical or artistic reason(s) connected with the protection of exclusive rights, the service supplies or works may only be provided by one provider – provided advice is sought from the Borough Solicitor.
  - In extreme urgency where there is an immediate danger to life or limb or property provided advice is sought from the Borough Solicitor.
  - For contracts providing individual personal services eg individual care arrangements or individual special educational need provision.
  - Call-off from a framework
 (S.O. 86)
  
3. Subject to the exceptions in (2) a formal tendering exercise must be undertaken.  
(S.O. 84(e))
  
4. Chief Officers have the power to:
  - Invite expressions of interests.
  - Agree shortlists.
  - Negotiate.
  - Award.
  - Extend (within the terms of the existing contract).
  - Vary (although this power is subject to some restriction).
  - Renegotiate.

- Novate or assign.
- Terminate.

Within the framework of the standing orders and the Constitution.  
(S.O. 88(a))

5. The flow chart at 19 below sets out the procurement process options available for this category of contracts.

6. Form of Tender must include the following:

- A statement that the Council is not bound to accept any tender.
- A section where the tenderer states whether their tender is priced on the basis of [TUPE](#) applying or not.
- Statement (except in negotiated contracts) that formal acceptance of the tender by the Council will, until such time as a written contract can be executed, bind the parties into a contractual relationship.
- Price and if this is different if the tenderer were to offer a comparable pension and/or parent company guarantee and/or performance bond.

(S.O. 99)

7. Chief Officers should consider and ensure that sufficient security for the performance of the contract is taken e.g. by considering a performance bond and/or parent company guarantee.

(S.O. 106)

8. The invitation to tender must state (except in the case of an election process) that no tender will be considered unless contained in a plain sealed envelope and endorsed "Tender" followed by the subject to which it relates.

(S.O. 98(b))

9. Tenders must be addressed to the relevant Chief Officer and the tender shall remain in the custody of the Chief Officer until the time appointed for its opening.

(S.O. 100(c))

10. Chief Officers must make appropriate arrangements for the:

- Receipt;
- Storage; and
- opening

of tenders by an officer of appropriate seniority which ensures that each tenderer is treated fairly and equally and ensures probity.

(S.O. 100(d))

11. Late tenders should not be considered except in special circumstances and only if:

- no other tenders have been opened; and
- there has been a written request to the Chief Executive or the Monitoring Officer specifying the special circumstances and why acceptance of a late tender is justified; and
- following such written request, there is prior written approval of the Chief Executive or the Monitoring Officer.

Any written approval shall be kept with the record of tenders received. Except in these cases any envelope containing a late tender will be opened for the sole purpose of identifying the applicant and will be returned to them immediately.

(S.O. 102)

12. Tender Evaluations:

- Tenders subject to EU Regulations must be evaluated in accordance with the regulations and the instructions to tender.
  - All other tenders must be evaluated in accordance with the criteria and procedures set out in the invitation to tender.
  - In both cases tenders must be evaluated in accordance with the Council's Standing Orders save where there is a conflict with EU Regulations in which case those Regulations shall prevail.
  - Tenders for all contracts (except works contracts where lowest price was pre-determined to be the appropriate criteria) must be evaluated and awarded on the basis of the most economically advantageous offer to the Council.
- (S.O. 104)

13. Mandatory minimum 10 calendar day standstill period:

- If the contract is subject to the full regime of the EU Regulations, all tenderers and those unsuccessful at PQQ stage must be notified of the contract award decision in writing.

- A standstill period of 10 calendar days (minimum) must be observed before the contract is awarded to the successful tenderer(s) – such period beginning on the day after the written notification is issued to all tenderers.
- Additional debriefing information must be provided to unsuccessful tenderers on receipt of written request within 3 working days prior to the end of the standstill period or within 15 days of receipt if the request is not received within two working days of the standstill period commencing.
- The contract must not be awarded and the Acceptance Letter must not be issued without the prior written approval of the Borough Solicitor if legal challenge is brought regarding the procurement process or award decision during the standstill period or prior to the issue of the Acceptance Letter.  
(S.O. 107)

14. Sealing the contract:

- If the contract is under £500,000 consider whether the contract should be executed under seal.
- If the contract is over £500,000 must be executed under seal.  
(S.O. 73)

15. Early termination of a contract may only happen:

- by agreement between the Council and the Contractor; or
- in accordance with the termination conditions of the existing contract

and provided that in either case the financial and legal implications or other relevant circumstances have been taken into account. Chief Officer approval is required  
(S.O. 113)

16. The relevant Service Area Director must maintain a record of all tenders invited and received by them and of all contracts entered into on behalf of the Council and shall record the reasons for non-acceptance of a tender or the rejection of a contractor who has not been included in a tender short list.  
(S.O. 103)

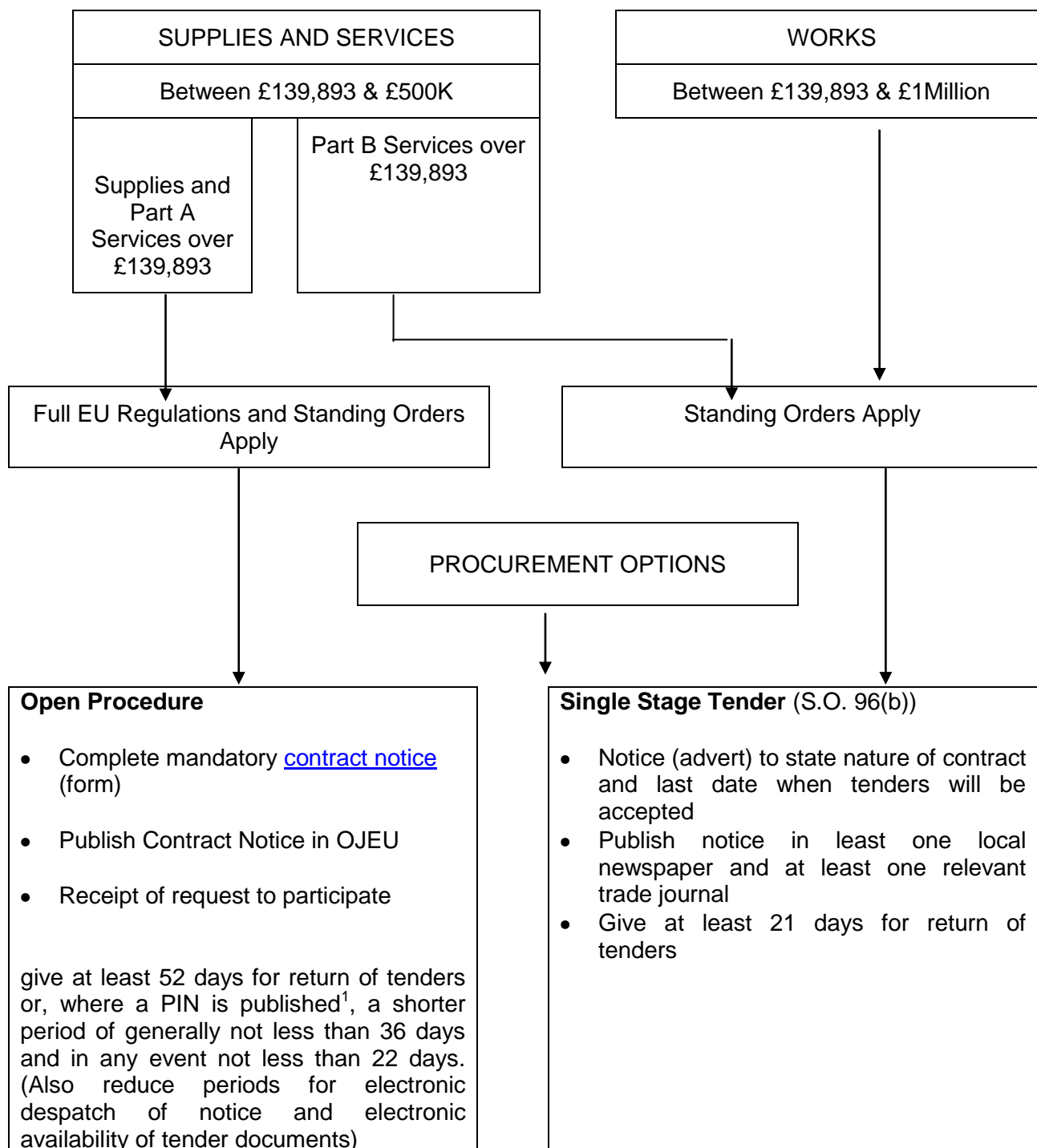
17. Contracts placed by the Council (to the value of £5,000 or more) must be notified to the Contract Register Officer, specifying:

- the name of the relevant Council's Service Unit,
- the name of the contractor,
- the services, supplies or works to be provided,
- the contract value and
- the contract term and
- where relevant any provisions for extension.

Details of all such contracts awarded shall be reported to the Contract Register Officer within one month of award and in the required format.  
(S.O. 110)

18. Must retain accounting documents and contract documents for a minimum of 6 years  
(Fin Reg 9.1.3)
19. Must retain contracts under seal for 12 years after the completion/expiry date.  
(Fin Reg 9.1.2)

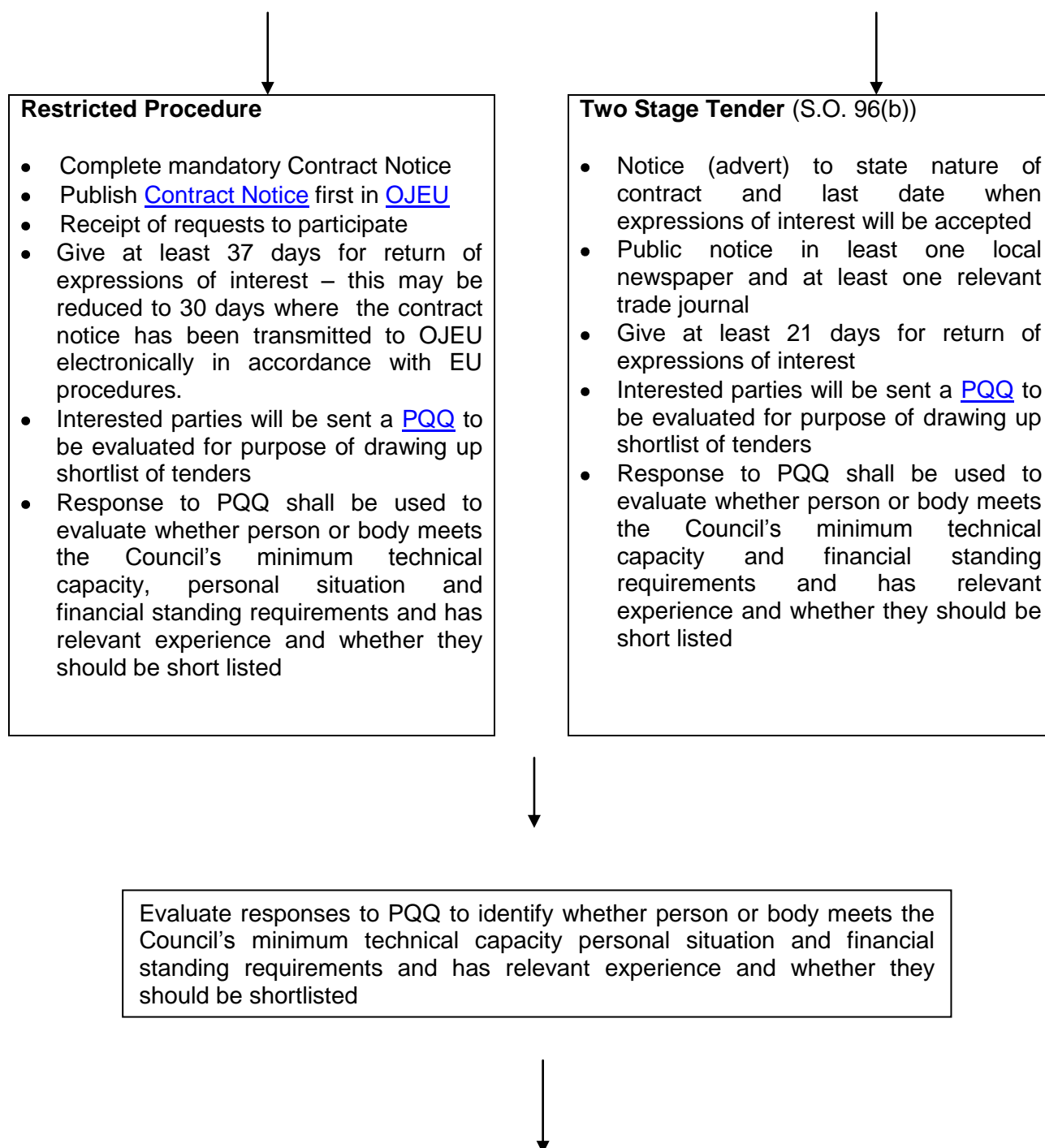
## 20. Medium Value Contracts Flow Chart

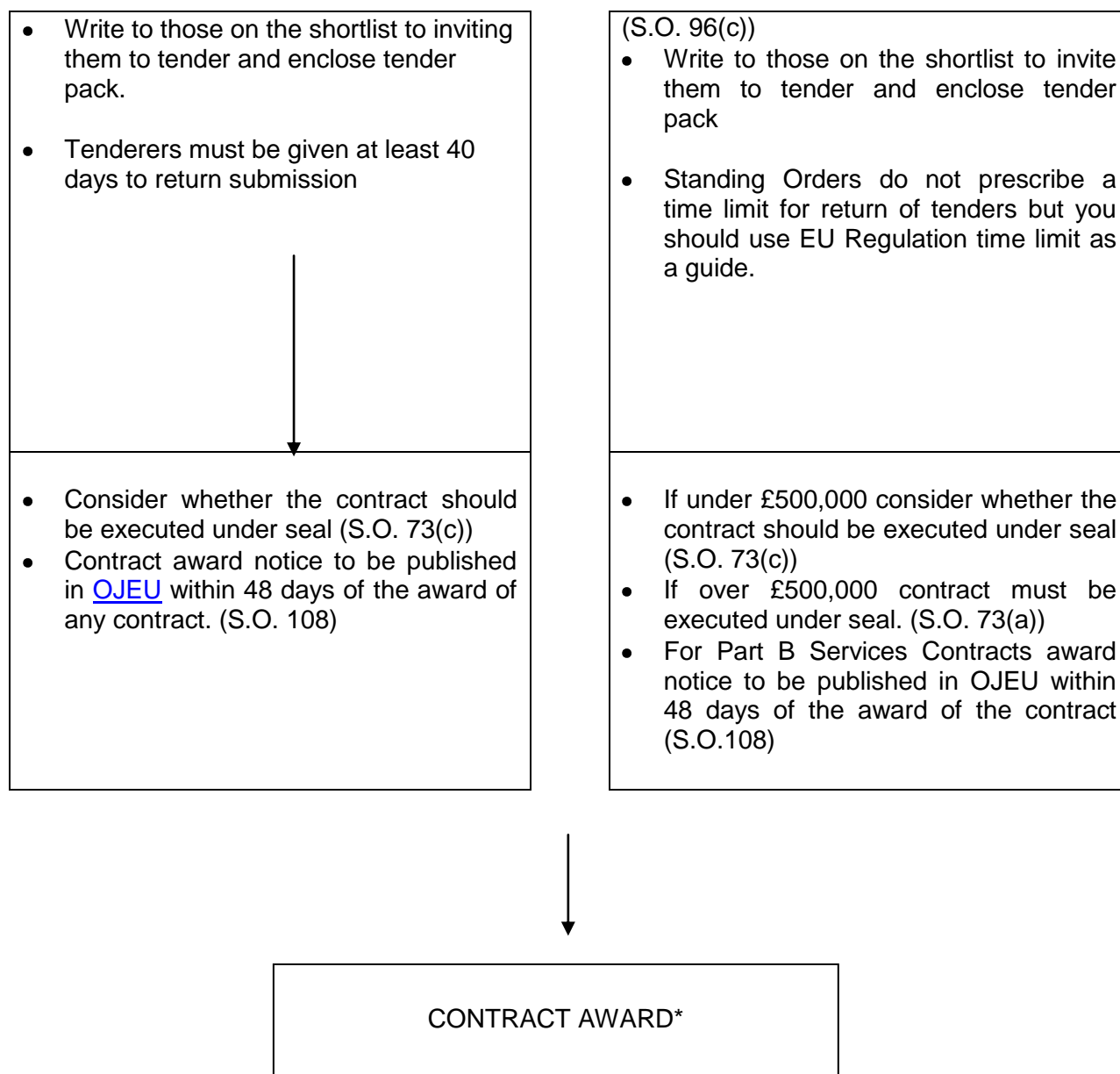


OR

<sup>1</sup> In order to substitute a shorter period as described above the Prior Information Notice must be sent to OJEU at least 52 days and not more than 12 months before the date on which the Contract Notice is despatched to OJEU.







**\* Please note that the above flowchart does not include the specific rules or requirements for e-auctions or e-tendering. If you are conducting such a process you must ensure you follow the additional specific rules (see Appendix 26)**

**\*\* When a contract award decision has been made and the contract is subject to the full regime of the EU Regulations:**

- Notify all tenderers of the contract award decision in writing (S.O. 107 (a) and (b))
- Observe a standstill period of 10 calendar days (minimum) before the contract is awarded to the successful tenderer(s) (S.O. 107 (a) and (b)) (See Appendix 25)
- Provide additional debriefing information to unsuccessful tenderers as required (S.O. 107(c) and (d))
- Award contract at the end of the standstill period only if no legal challenge has been brought regarding the procurement process or award decision during the standstill period or prior to the issue of the Acceptance Letter

[Note: the negotiated procedure and competitive dialogue procedures have not been outlined here. Legal Services should be contacted if you are considering the negotiated or competitive dialogue procedures]



**HIGH VALUE CONTRACT' TENDERING**

- **Exceeding £500,000 FOR SUPPLIES & SERVICES**
  - **Exceeding £1 Million FOR WORKS**
    - **PFI contracts**

**Please note that the following checklist does not include the specific rules or requirements for e-auctions or e-tendering. If you are conducting such a process you must ensure you follow the additional specific rules (see Appendix 26)**

1. Chief Officers must ensure in any contract procurement that it is:
  - Fair
  - Transparent
  - Auditable process
  - All tenderers are treated equally and fairly
 (S.O. 84(b))
2. Subject to complying with any relevant parts of the EU Regulations do not need to invite tenders:
  - If for technical or artistic reason(s) connected with the protection of exclusive rights, the service supplies or works may only be provided by one provider – provided advice is sought from the Borough Solicitor
  - In extreme urgency where there is an immediate danger to life or limb or property provided advice is sought from the Borough Solicitor
  - For contracts providing individual personal services eg individual care arrangements or individual special educational need provision.
  - Call-off from a contract.
 (S.O. 86)
3. Subject to the exceptions in (2) a formal tendering exercise must be undertaken.  
(S.O. 84(e))
4. The Executive has to approve the procurement process before officers go out to tender and approve every stage of the procurement process.  
(S.O. 88)
5. Only the Executive can give authority for the following:

- Invite expressions of interests (go out to advert)
- Award
- Terminate early

Place any decision to be made by Executive on [forward plan](#) and report to Executive.  
(S.O. 88(b)(c))

6. At least 2 reports are required to go to the Executive. Both must appear on the Forward Plan.

The first report before going out to tender should seek approval and detail the following:

- To place a notice in [OJEU](#)/local newspaper/relevant trade journal
- Invite expressions of interests
- Agree the shortlist criteria
- Agree that officer shortlist in accordance with the criteria
- Agree the procedure and timetable
- Agree the award criteria

The second report recommends to the Executive who should be awarded the contract and therefore seeks approval of the award.  
(S.O. 88(b))

If the contract is required to be certified (see Section 2 Part 2 Paragraph 21) member level approval will be required for the issuing of the certificate.

7. Form of Tender must include the following:

- A statement that the Council is not bound to accept any tender
- A section where the tenderer states whether their tender is priced on the basis of TUPE applying or not
- Statement (except in negotiated contracts) that formal acceptance of the tender by the Council will, until such time as a written contract can be executed, bind the parties into a contractual relationship
- Price and if this is different if the tenderer were to offer a comparable pension and/or parent company guarantee and/or performance bond.

(S.O. 99)

8. The flow chart at 19 below sets out the procurement process options available for this category of contracts and the timetable implications.
9. Chief Officers must ensure that sufficient security for the Council e.g. by a performance bond and/or parent company guarantee.  
(S.O. 106)
10. The invitation to tender must state (except in the case of an election process) that no tender will be considered unless contained in a plain sealed envelope and endorsed "Tender" followed by the subject to which it relates.  
(S.O. 98(b))
11. Tenders shall be addressed to the Council's Democratic Services Manager and the tender shall remain in the custody of the Democratic Services Manager until the time appointed for its opening.  
(S.O. 101(a))
12. High Value Contract tenders shall be opened and tender details recorded by an authorised representative of the Democratic Services Manager and at least one other officer.  
(S.O. 100(b))
13. Chief Officers and the Democratic Services Manager must make appropriate arrangements for the:
  - Receipt;
  - Storage; and
  - Opening

of tenders by an officer of appropriate seniority which ensures that each tenderer is treated fairly and equally and ensures probity.  
(S.O. 100(d))
14. Late tenders should not be considered except in special circumstances and if:
  - no other tenders have been opened; and
  - there has been a written request to the Chief Executive or the Monitoring Officer specifying the special circumstances and why acceptance of a late tender is justified; and
  - following such written request, is prior written approval of the Chief Executive or the Monitoring Officer.

Any written approval shall be kept with the record of tenders received. Except in these cases any envelope containing a late tender will be opened for the sole purpose of identifying the applicant and will be returned to them immediately.

(S.O. 102)

15. The Borough Solicitor and the Director of Finance and Corporate Resources must be notified of the evaluation and must if he/she considers it appropriate be part of or appoint a representative to the evaluation panel or shall advise the panel as he/she sees fit.

(S.O. 93)

16. Tender Evaluations:

- Tenders subject to the EU regulations must be evaluated in accordance with the Regulations and the instructions to tender.
- All other tenders must be evaluated in accordance with the criteria and procedures set out in the invitation to tender.
- In both cases tenders must be evaluated in accordance with the Council's Standing Orders save where there is a conflict with the EU Regulations in which case the Regulations shall prevail.
- Tenders for all contracts (except works contracts where lowest price was pre-determined to be the appropriate criteria) must be evaluated and awarded on the basis of the most economically advantageous offer to the Council.

(S.O. 104)

17. Mandatory minimum 10 calendar day standstill period:

- If the contract is subject to the full regime of the EU Regulations, all tenderers must be notified of the contract award decision in writing.
- A standstill period of 10 calendar days (minimum) must be observed before the contract is awarded to the successful tenderer(s) – such period beginning on the day after the written notification is issued to all tenderers.
- Additional debriefing information must be provided to unsuccessful tenderers on receipt of written request within 3 working days prior to the end of the standstill period or within 15 days of receipt if the request is not

received within two working days of the standstill period commencing.

- The contract must not be awarded and the Acceptance Letter must not be issued without the prior written approval of the Borough Solicitor if legal challenge is brought regarding the procurement process or award decision during the standstill period or prior to the issue of the Acceptance Letter.  
(S.O. 107)

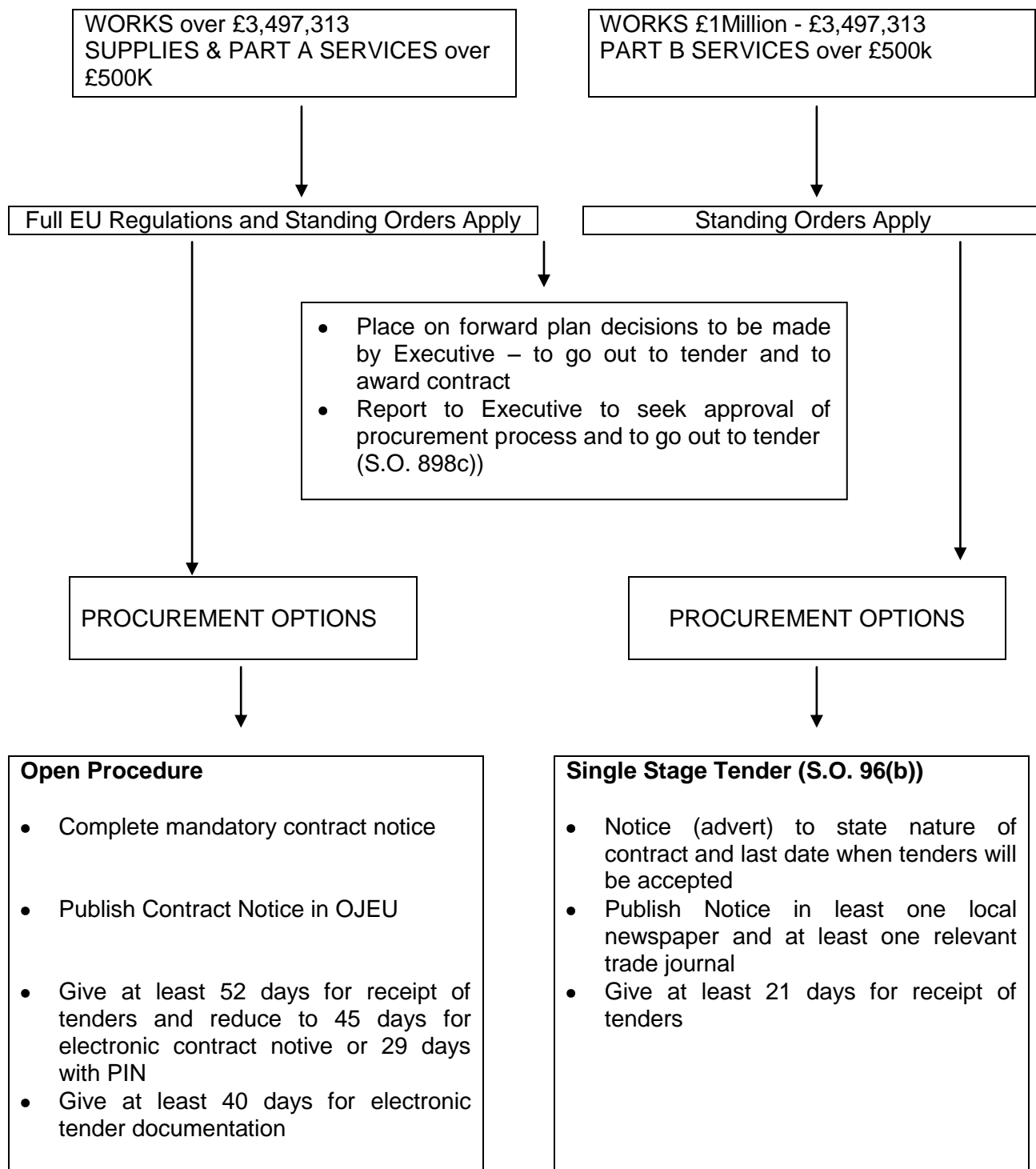
18. Contract must be executed under seal.  
(S.O. 73(a))
19. Early termination of Contract may only be by the Executive, General Purposes or the Pension Fund Sub Committee.  
(S.O. 113)
20. The relevant Service Area Director must maintain a record of all tenders invited and received by them and of all contracts entered into on behalf of the Council and shall record the reasons for non-acceptance of a tender or the rejection of a contractor who has not been included in a tender short list.  
(S.O. 103)
21. Contracts placed by the Council (to the value of £150,000 or more) must be notified to the Contract Register Officer, specifying:
  - the name of the relevant Council's Service Unit;
  - the name of the contractor;
  - the services, supplies or works to be provided;
  - the contract value;
  - 
  - the contract term; and
  - where relevant any provisions for extension.

Details of all such contracts awarded shall be reported to the Contract Register Officer within one month of award and in the required format.  
(S.O. 110)

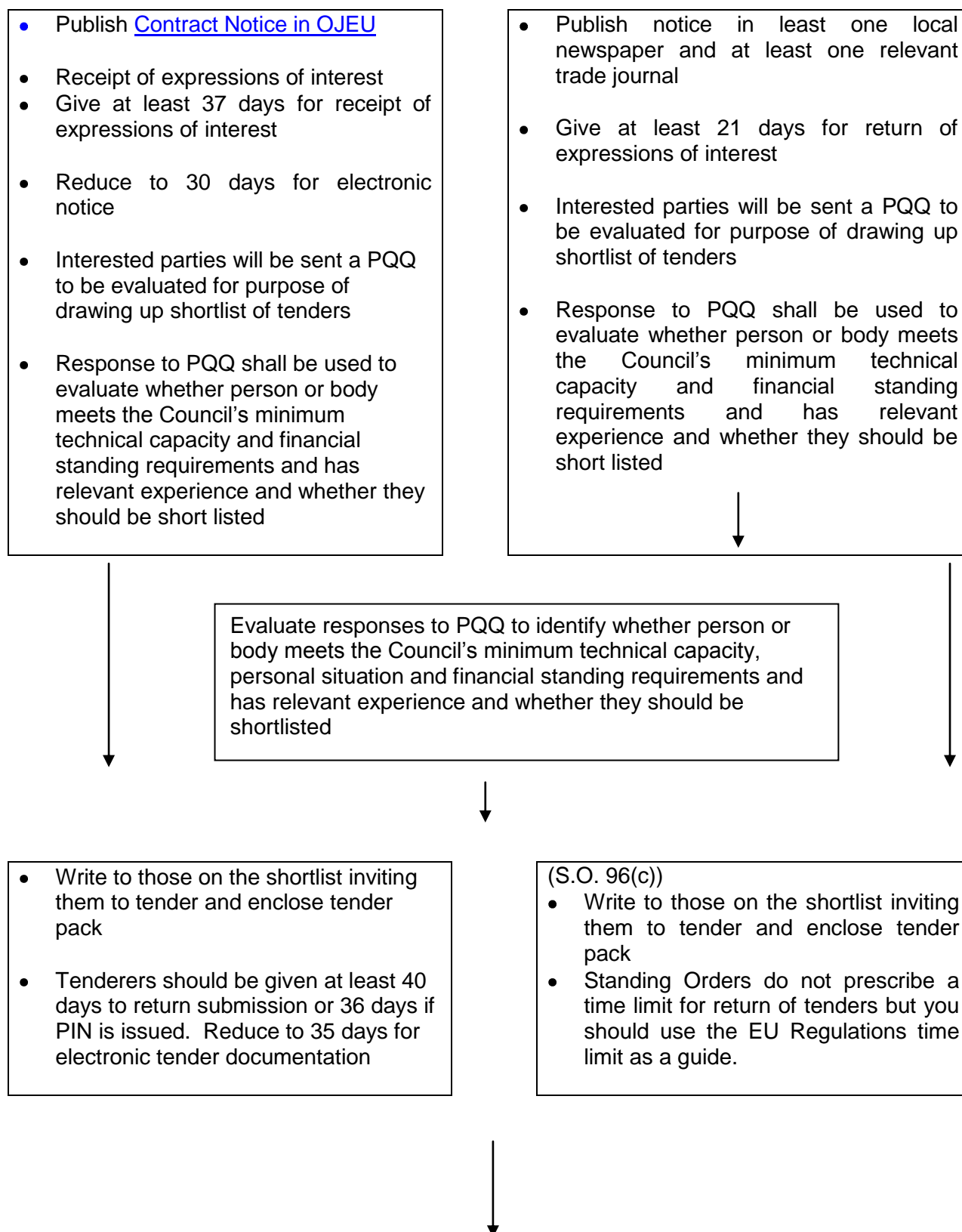
Must retain contracts for 12 years after the completion/expiry date.  
(Fin Reg 9.1.2)



## 22. High Value Contracts Flow Chart\*



OR



**CONTRACT AWARD\*\***

- Check the decision to award the contract is on the forward plan
- Report to Executive seeking approval for the award of the contract

(S.O. 88(c))

- MANDATORY SANDSTILL period (if applicable)

- Contract must be under seal (S.O. 73(a))
- Contract award notice to be published in OJEU within 48 days of the award of any contract (S.O. 108)

- Contract must be executed under seal.(S.O.73(a))
- For Part B services contract award notice to be published in OJEU within 48 days of the award of any contract (S.O. 108)

**\* Please note that the above flowchart does not include the specific rules or requirements for e-auctions or e-tendering. If you are conducting such a process you must ensure you follow the additional specific rules (see Appendix 26)**

**\*\* When a contract award decision has been made and the contract is subject to the full regime of the EU Regulations:**

- Notify all tenderers of the contract award decision in writing (S.O. 107 (a) and (b))
- Observe a standstill period of 10 calendar days (minimum) before the contract is awarded to the successful tenderer(s) (S.O. 107 (a) and (b)) (See Appendix 25)
- Provide additional debriefing information to unsuccessful tenderers as required (S.O. 107(c) and (d))
- Award contract at the end of the standstill period only if no legal challenge has been brought regarding the procurement process or award decision during the standstill period or prior to the issue of the Acceptance Letter

**[Note: the negotiated procedure and competitive dialogue procedures have not been outlined here. Legal services should be contacted if you are considering either of these procedures.]**

# **SECTION 5**

## **CONTRACT MANAGEMENT AND TERMINATION**

### **Part 1      Overview**

### **Part 2      Detail**

# CONTRACT MANAGEMENT AND TERMINATION

## Part 1 – Overview

The purpose of this part is to provide a brief overview of Section 5 covering contract management and termination. You should consult the relevant paragraph(s) of the Section for further information and not rely solely on this overview.

### Contract Management

- 1 The first part of Section 5 describes the advantages of active contract management and some of the methods which you may wish to use. Paragraph 3 sets out various methods of contract management. These include inspection, setting and monitoring performance indicators, obtaining customer feedback, quality audits, mystery shopping, bench marking and self monitoring.
- 2 Paragraphs 4 and 5 provide some useful tips on how you can monitor equal opportunity issues and Health and Safety. Paragraph 6 provides tips on monitoring environmental performance. In monitoring it is important to also actively manage changes to the contract. This involves not only managing the process but also ensuring that any changes are recorded. See paragraph 8 for further information.
- 3 Regular review meetings should be held with the contractor. These should address performance, any variations, complaints, defaults, special briefings and Health and Safety and environmental performance where relevant. You may consider it appropriate to involve other interested parties periodically in these meetings.
- 4 If the Code of practice on Workforce Matters applies to the contract you will need to monitor the contractor's compliance with the Code.
- 5 Paragraph 9 provides you with guidance on issues you should consider when extending or varying your contract.
- 6 When considering whether to extend your contract you need to consider whether the contractor is continuing to provide a best value service. If you do decide to extend the contract for a further period you should start planning for the new contract at that stage.
- 7 If your contract is subject to the EU Regulations you need to consider whether extending the scope of the contract is outside the scope of what was envisaged in your [contract notice](#). Paragraph 9.6 sets out the circumstances when officers may extend contracts.

8. Your contract will set out the circumstances in which it may be varied and by which party. It is important that you consider in advance the cost of any variation and any proposals by the contractor in relation to the cost of a variation should be checked carefully. Paragraphs 9.11 and 9.12 provide guidance on variations within the scope of the EU Regulations and officers powers to agree variations.
9. Paragraph 10 provides a number of practical hints for how to manage your contract.

### **Default in Performance**

10. This Part of Section 5 provides guidance on handling situations where the contractor is in default.
11. Your contract should provide a practical system of compensation in the event of default. This does not necessarily have to mean the application of financial damages although this section does set out information about the operation of financial default provisions in Paragraph 12.
12. If seen as beneficial to the Council, it may be appropriate to build performance incentives into payment systems, in addition or in parallel to default mechanisms. Any plans to include incentives into a contract should be checked by Legal Services to ensure that the Council is not at risk financially or legally.
13. There are other ways of resolving the dispute that may be provided for in the contract including:
  - Expert determination
  - Arbitration
  - Alternative dispute resolution, normally mediation
14. Your contract will contain provisions to enable you to bring it to a premature end in specified circumstances. You should always take legal advice before you terminate for breach.
15. In the case of a High Value contract you cannot agree to bring the contract to a premature end or terminate the contract early in any other way without first seeking the approval of the Executive or the General Purposes Committee as appropriate.

## **Planning For The End Of Your Contract**

16. Your contract may come to a peaceful end on its natural expiry date or it may end suddenly by either agreed or unilateral action prior to its natural expiry. In either case you want a smooth and efficient transfer of the service to a new provider to be achieved. This part of Section 5 sets out some considerations that will help you to achieve this through planning in advance.

# CONTRACT MANAGEMENT AND TERMINATION

## Part 2 – Detail

### 1 Introduction

- 1.1 This section of the guidelines looks at the ways in which a contract can be effectively managed. Contract management is the process that ensures both the Council and the contractor fully meet their respective obligations as efficiently and effectively as possible, in order to deliver the business and operational objectives required from the contract and in particular to provide value for money. The aim of effective contract management is to ensure that the service is delivered as expected and to budget.

### 2 Why Manage?

- 2.1 There are many reasons for monitoring your contract effectively. These include:

#### **Stewardship**

The Council has a duty of care to its taxpayers and should ensure that its assets and resources are used efficiently, with care and to the best advantage.

#### **Specified Services**

The Council needs to ensure that it is getting the services specified in the contract.

#### **Agreed Costs**

The service provided by the contractor must be provided at the cost which was agreed in the contract. This can only be identified by monitoring those costs.

#### **Specified Quality**

This must also be a part of what is monitored to ensure the service is provided not just in terms of quantity specified but of the quality specified.

#### **Value for Money**

The monitoring process must also consider whether the service provided, regardless of the price at which the contract was let, represents value for money.

#### **Pro Activity**

Without monitoring the best that can be achieved is a reaction to complaints or failures.



**Service Development and Continuous Improvement**

The services provided will not stand still over the contract period. Monitoring identifies the need for change at an earlier stage during the contract period.

**Service Efficiency**

Just because the service has been let at a particular price does not mean the service is being provided at the most efficient level possible. Monitoring helps identify further improvements in efficiency.

**Relationship Management**

Too many contractual relationships are based on mistrust and suspicion. A relationship based on trust will result in a better service. Contract management staff are the prime contact in building a co-operative relationship with the contractor.

**Legal Compliance**

For example, where data subject to the Data Protection Act is being processed on behalf of the Council, the Council, as data controller, must ensure that it monitors the security measures of the data processor throughout the term of the contract.

### **3 Monitoring Methods**

There are a number of different monitoring techniques which can be classified as follows:

#### **3.1 Inspection**

##### **(a) Continuous**

Continuous inspection usually means direct inspection on a daily basis. Its main use is likely to be during the contract start-up period when the objective is to ensure that an adequate level of performance is established from the outset.

Continuous inspection, if too zealously applied or pursued throughout the term of the contract, is likely to antagonise the contractor's personnel and create tension between the contractor and the Council. It can also be extremely labour-intensive, although continuous systems monitoring (e.g. in IT) can be built in and use little extra resource to identify failures.

##### **(b) Planned**

Planned (scheduled or periodic) inspection is arranged in advance with the contractor. At the agreed time the Council inspects the contractor's operation together with the contractor's

representative. Joint inspections of this kind can be one of the best means of fostering a partnership approach to service delivery.

However, a potential disadvantage of this approach is that the contractor's personnel can be alerted beforehand and may put in a special effort. Other possible problems could be bias in choosing services to be inspected, and the fact that what is inspected may not necessarily be representative of the work overall. On the other hand, identifying for the contractor areas that you are going to check particularly often as they are important may mean effort is focused where you want it most.

### **(c) Random**

Random inspection or sampling is direct monitoring of the contractor's performance undertaken without the contractor's prior knowledge. This form of monitoring can only be applied to discrete outputs or processes. It is unlikely to be sufficient on its own but has a number of advantages:

- it is less labour-intensive than either continuous or planned inspection;
- it provides an insight into performance not obtainable by other methods;
- it encourages the contractor to maintain consistent standards of performance; and
- it establishes a basis for rejection of whole areas/sections of work if there are failures in the sample.

A potential disadvantage of this form of inspection is that if used too often it may create a relationship of distrust with your contractor.

### **(d) Responsive**

This involves inspecting services in response to individual complaints by customers. It may also be used to undertake inspections in response to a particular set of circumstances e.g. in the case of a waste collection service you may choose to undertake an inspection the day following a street parade.

This form of monitoring should be used in conjunction with the other methods of inspection as detailed above. Used alone, this method is

reactive rather than proactive and is effectively the ambulance at the bottom of the cliff.

### 3.2 Performance Indicators

A contract may describe minimum performance levels for a contractor to achieve - or even target performance levels that reward the Contractor for providing improved value for money. These contract targets will have some clear form of measurement (i.e. performance indicators).

e.g. for a rent recovery contract, performance indicators may include:-

- (a) Rent arrears collected as percentage of total arrears.
- (b) Total amount of rent arrears collected.

Performance indicator data can be gathered by the Council and/or provided by the contractor (with checks by the Council).

Where there are relevant performance indicators required by the Audit Commission, contract performance indicators should be designed to correspond.

Planned regular Council/contractor meetings should be held to discuss the implications of performance indicator levels and any action required by both the contractor and the Council.

### **Documenting Performance**

Information on performance can be gathered from a wide variety of sources, including:

- monitoring checklists
- monitoring field diaries
- contractor's reports
- contractor's records
- contractor's complaints book
- activity logs (IT services)
- Council's complaints records
- complaints made to elected members
- notices requiring rectification
- notices indicating default
- customer satisfaction cards
- user surveys
- market research surveys
- hotlines

No single source should be relied upon to provide a complete picture. Complaints, for example, can turn out on investigation to be groundless.

### 3.3 Customer Feedback

#### **(a) Surveys**

Customer satisfaction may be assessed directly by the Council or by requiring the contractor to carry out regular surveys, with the format of the survey agreed by the Council. Feedback may be ascertained by a survey or questionnaire, either completed by an individual and returned, or completed as part of an interview with the customer. Another alternative is carrying out the survey by telephone interviews. The design of the questionnaire is very important. To achieve the essential information that is required:

- (a) the analysis method should be considered during the design process;
- (b) the overall questionnaire should be short; one page wherever possible;
- (c) the language should be clear, simple and precise; and
- (d) tick boxes and multiple choice responses should be used instead of space for longer written answers for the majority of questions. An even number of options means the customer has to make a choice.

The survey should be a representative sample if all customers are not to be surveyed. If the survey is posted/circulated for completion by individuals:

- (a) adequate time must be given for completion and return;
- (b) a pre-paid envelope should be included;
- (c) a date for return should be indicated; and
- (d) consider an incentive for returning the form.

An analysis of the survey results should be discussed with the contractor and the results could then be used:

- (a) to highlight problem areas;
- (b) as possible performance indicators; or
- (c) for further development of the contract

Customer satisfaction may also be assessed through customer satisfaction cards, telephone hotlines or user forums/panels/focus groups.

### **(b) Complaints**

Your contract should include a procedure for managing and dealing with complaints. As a minimum this procedure should ensure that all complaints are dealt with and the complainant is informed of the action taken.

It is important that the contractor's method of responding to complaints is monitored and analysed to ensure that complaints are responded to effectively and preventative action is taken within the timescales specified in the contract. The number, the type of complaints received and the action taken should be analysed regularly and discussed with the contractor. Complaint levels and response to complaints can be used as performance indicators.

## **3.4 Quality Audits**

The contractor's quality management system including environmental management should be audited regularly, in order to:

- (a) ensure compliance with the contract requirements;
- (b) assess the progress of the contractor against their own quality plans;
- (c) verify information provided by the contractor; and
- (d) monitor responses to customer complaints

Where appropriate, officers trained to undertake quality auditing should be used to audit areas where specialist knowledge is required.

For contracts with a high degree of environmental impact involved, you can expect the contractor to have some form of environmental management system and you are likely to have included environmental clauses and performance measures. You should ensure that the contract allows for auditing by the Council's Environmental Auditors.

An environmental audit can verify the Contractor's reported level of environmental performance and that they are meeting the clauses in the contract. Environmental Audits can be arranged with the projects and policy Unit in Environment and Culture.

### 3.5 Mystery Shopping

Mystery shopping is the process of anonymously testing service delivery and is widely used in many service sectors, notably leisure services and retailing.

#### **Application**

The concept of mystery shopping is fairly straightforward, fundamentally testing a service as a user (or consumer), but with a more critical eye than that of an average user. Mystery shopping is appropriate for any situation where a service user interfaces with a service representative such as front line service points, reception areas, etc.

#### **Methodology**

When planning mystery shopping, “normal” everyday scenarios should be created as far as possible. The idea is not to catch people off guard but rather assess the level of service that is provided every day. The “mystery shopper” should be briefed as to the basics of service provision (opening hours, telephone numbers, etc.), but not as to what is right or wrong as this could bias the interpretation and the recording of facts.

Shoppers should be provided with a checklist against which they can rate or record the service received. You should consider whether to use a quantitative (rating) or qualitative (remarks) based recording system - perhaps a mixture of both can be used. Shopping can be either through personal visit or by telephone. Useful elements of service against which a unit or organisation can be measured are:

- Helpfulness
- Courtesy
- Knowledge
- Attitude
- Responsiveness
- Appearance (staff and surroundings)
- Orientation (signage)
- Telephone answering

This list is by no means exhaustive and can be added to as particular circumstances dictate.

#### **Analysis**

Points for consideration:

- It is not advisable for the person who undertook the mystery shopping to also carry out the analysis.
- The better option is probably not to let the shopper know what is expected of the service but simply to record the facts with impartiality, thus leaving the analysts to compare expectations against actual events.
- You should be cautious of making sweeping judgements on the basis of one or two mystery shops - after all it is only a "snapshot".

### 3.6 Benchmarking

The idea of Benchmarking is to take a service or process in the Council and compare it or measure it against a similar service or process in a "best practice" organisation. Benchmarking enables you to watch how other organisations operate, learn from them and use their best ideas.

### 3.7 Self Monitoring

Self monitoring is the procedure whereby the contractor monitors service standards itself and reports on a regular basis to the Council. This method of monitoring will assist in creating a more co-operative way of working but is open to abuse by the contractor.

## 4 Monitoring Equal Opportunities Issues

4.1 In order to monitor the contractor's effectiveness in meeting the equality requirements in the contract, the guidance produced by the Commission for Race Equality and Local Government Association suggests approaching the following categories of people and you may like to consider using the methods suggested under each of the categories below:

- (a) the contractor through:
  - questionnaires
  - occasional interviews
  - reviews of the contractor's monitoring data
- (b) staff working on the contract through:
  - questionnaires
  - monitoring interviews
  - site visits

(c) users and potential users of the service through:

- ethnic monitoring
- interviews
- surveys
- site visits
- consultation

(d) community representatives.

(e) other public authorities in the area.

4.2 In addition, you may wish to undertake direct observation of the contractor's effectiveness through site visits. Further information on the guidance produced by the Commission for Race Equality and the Local Government Association can be found in Appendix 12. Also included as Precedent 12 is the Council's Contractor Workforce profile monitoring form. For more information concerning this see section 4A Paragraph 9.

## **5 Monitoring Health & Safety**

5.1 The basis for monitoring the contractor's Health and Safety procedures will be a combination of the specification, the contractor's method statement on Health and Safety and the contractor's risk assessment.

5.2 It is important that someone from the monitoring team meets with a representative from the Council's Health, Safety & Licensing Unit as soon as possible following the award of the contract. The purpose of this is to establish what aspects of Health and Safety compliance will be monitored by the monitoring officers and what aspects will be monitored by specialist Health & Safety officers. Health, Safety & Licensing can also assist in the development of checklists for monitoring Health and Safety compliance.

5.3 At the beginning of the contract, it is important that you explain to the contractor the Council's Health and Safety arrangements and Health and Safety policy and how this fits with the specification for the contract and the contractor's method statement on Health and Safety.

5.4 For monitoring to be effective it must be systematic in approach to both operation and communication and will include the following:

- Regular spot checks on contractors which may be pre planned and supplemented by unannounced visits. For mobile operations the contractors will need to make



available their work schedules. As with all inspections, the results of the inspection should be recorded.

- Health and Safety should be a standard item on the agenda for meetings between the Council and the contractor. It may also be appropriate for a Health and Safety Adviser to attend these meetings periodically.
- A requirement for the contractor to report regularly on any accidents and how these were resolved.

5.5 The more impact the contractor's work could have on the Health and Safety of anyone, the greater the level of monitoring that is required. Monitoring should include checking whether the contractor's risk assessment is up to date and that the control measures identified in that risk assessment are working.

5.6 Where Health and Safety requirements are not being met, the first step is for you to discuss with the contractor why this is the case and how the situation can be rectified. If Health and Safety performance is not brought up to the required standard work should be stopped until it is.

5.7 Further information on monitoring health and safety can be found in the Corporate Standards on the intranet at Corporate Standards/Corporate Standards (Lime Green Book)/Health and Safety/Corporate Health and Safety Policies and Guidance/Management of Health and Safety/Risk Assessment.

## **5A Monitoring Environmental Performance**

5A.1 In a contract where you have included environmental clauses and performance measures such performance should be monitored. The monitoring of the environmental performance of the contract will be based upon the environmental management and improvement clauses placed in the specification. These clauses have already taken into consideration the level of environmental impact of the contract and therefore the monitoring of the contract will be in line with this level.

5A.2 The Council's Environmental Projects Officers are able to advise what monitoring should take place and if an environmental audit may be necessary at some stage.

5A.3 At the start of the contract it is advisable for the Contractor to be made aware of the Council's Environmental Policy and what this means for the Contract, and how the monitoring of environmental performances will need to be written into the Contractor's procedures.

5A.4 Monitoring will generally form a system of regular data submission and an annual environmental performance report on the progress towards meeting specified environmental targets. Data may include, for example;

- a) energy use.
- b) water use.
- c) amount of waste recycled.
- d) spend on products with a recycled content.
- e) species diversity of natural areas.

5A.5 Where environmental measures are not being implemented and targets not being met, open and honest dialogue should begin with the Contractor to identify the root cause and possible solutions. Should performance not improve, the appropriate measures, as outlined in the Contract, should be taken.

## **6 Monitoring Compliance With The Code Of Practice On Workforce Matters**

If the Code of Practice on Workforce Matters applies to your contract (see section 4A, paragraph 7 and Appendix 7) you will have a responsibility to monitor the contractor's compliance with the Code. You should include this in your routine monitoring arrangements. The Code requires the contractor when employing new staff to work along side transferred staff to employ them on terms and conditions that need not be the same as those of the transferred staff but which must be "overall, no less favourable than those of transferred staff". The contractor will also be required where the Code applies to offer such staff one of the pension arrangements specified in the Code. If this involves admission to the LGPS you need to clarify that the individual(s) concerned are employed by the contractor as in company group arrangements this is not always the case and you need to be sure the correct employer is party to the admission agreement. This means that you will need to ensure that you obtain the necessary information from the contractor to enable you to assess compliance on a regular basis.

## **7 Selecting Monitoring Method**

7.1 In order to decide on the type and frequency of the monitoring methods to be used you should carry out an assessment of the service to be provided, customer priorities, strengths and weaknesses of the contractor, and the resources available.

- 7.2 An indication of what methods of monitoring may be appropriate in certain circumstances is given in paragraph 3 above which sets out the different types of monitoring.

## **8 Contract Performance**

- 8.1 Regular progress or review meetings need to be held. In addition to the Council and the contractor, these meetings might involve, as appropriate:
- internal service users.
  - elected members.
  - head teachers or school governors.
  - representatives of user groups.
  - representatives of tenants/leaseholders/customer organisations.
  - Health and Safety advisers.
- 8.2 Typical agenda items for a review meeting would include performance, contract variations, complaints, defaults, special briefings (e.g. service development, special events) and Health and Safety.
- 8.3 You should use routine and special meetings with contractors to discuss future development of the service, conclusions to be drawn from how the contract has operated and any changes in requirements during the current and future contracts.

## **9 Managing Changes to the Contract**

- 9.1 It is important that changes to the contract are managed and recorded. This is the case whether it is a change in the scope of the service or an amendment to the terms and conditions.
- 9.2 The key aspects of managing change are:
- (a) record any potential need for change;
  - (b) consider the full implications of the change;
  - (c) ensure that those concerned have the authority to agree the change;
  - (d) record each step of the action taken; and

- (e) ensure a formal document is produced recording the change. This may be by letter for minor changes or for more major changes by a Deed of Variation.

### *Extensions*

- 9.3 Your contract may include provision to extend the contract for a further period. It is usual for such an extension to be at the discretion of the Council. In deciding whether to extend the contract you should undertake a review of the performance of the contractor to date and assess whether it is still providing a best value service or whether there may be a better alternative in the market place. If you do decide to extend the contract for a further period it is a good idea to start planning now for the new contract that will need to be in place at the end of the extended contract. Decisions to extend contracts within the provisions of the contract may be made by officers but sometimes require Executive approval. You should consult Section 2 for further information on which officers can make such decisions.
- 9.4 There may also be situations where you wish to extend the contract beyond what is provided for in the contract. This may be, for example, where there will be a gap between the end of the current contract and the start of the new contract. If this is the case, it is important that you review why this is happened so that it can be avoided in the future.
- 9.5 Whilst it is always possible for the parties to agree something different to what is in the contract, it is important that in the case of contracts subject to the EU Regulations you check the Contract Notice in order to ensure that you are not acting outside the scope of that notice or descriptive document in the case of the competitive dialogue procedure. The EU Regulations do allow for negotiating with an existing contractor to provide a repetition of certain services and works in limited circumstances. If your contract is subject to the EU Regulations you should contact Legal Services for advice on whether these circumstances are relevant to your contract.
- 9.6 Chief Officers and other duly authorised officers (see Section 2 for further information) are able to agree extensions that go further than that provided for in the contract in certain circumstances. In the case of contracts with an original life of less than one year (including any extension provided for in the contract) officers can extend the contract for up to a further six months. In the case of contracts with an original life of a year or more (including an extension provided for in the contract) officers can extend for up to a further year. You should note that officers powers to extend in these circumstances are limited by the following requirements:
- (a) compliance with the EU Regulations

- (b) that the extension does not substantially alter the terms and conditions; and
- (c) that there is sufficient existing budgetary provision for the extension

9.7 Officers' powers to extend contracts are set out in the table at paragraph 2.5, Part 4 of the Constitution.

### *Variations*

- 9.8 This section covers variations other than extensions. Your contract should provide for variations to the contract in particular in what circumstances the contract may be varied, who decides whether the contract may be varied in a particular way and the impact on the contract price. You are most likely to rely on a variation provision where you wish to vary the service, supplies or works that the contractor is to provide. In addition, you should encourage the contractor to suggest improvements to the service and implement these where appropriate.
- 9.9 Before initiating a variation you should calculate the likely cost. Any price given by the contractor for undertaking the variation should be carefully checked.
- 9.10 You should ensure that all variations are documented and your contract may provide specifically for how this should be done. If an alternative method is not provided for in your contract, contracts executed under seal should be varied by way of a formal Deed of Variation.
- 9.11 In the case of contracts subject to the EU Regulations, it is important to consider carefully whether the proposed variation is within the scope of the [Contract Notice](#). The EU Regulations allow for negotiation with an existing provider to provide additional services or works in limited circumstances. You should consult Legal Services for advice on whether this provision is relevant to your contract.
- 9.12 Part 4 of the Constitution sets out officers' powers to vary contracts. Officers may vary contracts if the value of the variation does not exceed £500,000 and if it exceeds £50,000 so long as the variation is not more than 20% of the original contract value. This power is subject to the requirements to comply with the EU Regulations, that the variation does not substantially alter the terms and conditions and that there is sufficient existing budgetary provision for the variation.

## **10 Practical Hints For Managing The Contract**

### **10.1 Be Clear and Firm**

The contractor must be clear that the monitoring officer wishes some action to occur. Requests should be specific and leave no doubt.

### **10.2 Set Deadlines**

Set deadlines for the contractor to remedy any defaults. Follow up all deadlines with the contractor.

### **10.3 Act on Warnings**

When setting deadlines the monitoring officer should be clear what action will be taken in the event that the contractor fails to meet the deadline. Having indicated to the contractor that some form of action will be taken, the action **must** be taken.

### **10.4 Be Sure of the Facts**

Before taking any action against the contractor the monitoring officer must be certain of the facts and be satisfied that the Council is not at fault in any way. Whilst this may seem obvious, the damage caused to the relationship by threatening action which cannot subsequently be justified, is substantial.

### **10.5 Persist**

Do not relax the pressure on the contractor where you are certain that the service is unsatisfactory. Hold regular progress meetings with the contractor and get things down in writing.

## **DEFAULT IN PERFORMANCE**

### **11 General**

11.1 With a contract for services the relationship between the Council and the contractor should be a co-operative and interactive one. The primary objective of performance monitoring must be to identify problems and have them resolved as quickly as possible. The resolution of problems should take place at the lowest possible level of management on both sides.

11.2 You need to decide what constitutes an acceptable minimum level of performance and what action will be taken if that minimum level is not attained. Allowance needs to be made for the fact that sometimes

outcomes are unrelated to the quality of inputs or outputs. For example, even though a solicitor may prepare a case very diligently and may display excellent advocacy skills, the outcome might nonetheless be that the case is lost because it was never realistically "winnable" in the first place!

- 11.3 Most contracts will have a "honeymoon" period when the Council and contractor work closely together sorting out any "teething troubles" with service provision and interpretation of the Specification. During this period financial damages are not normally enforced.
- 11.4 If the Council and the contractor work together to rectify problems the provisions covering default in performance may never be invoked **BUT** they need to be there in the contract just in case.
- 11.5 There are some fairly clear areas. Clearly, if the contractor fails to provide a service no payment should be made to the contractor for that service. However, you may suffer other losses in those circumstances and sometimes there will have been some performance but not complete or satisfactory performance.
- 11.6 A practical system of damages should be available to you - either for immediate application when work is substandard/not completed or where performance has fallen to an unacceptable level and all other avenues have been explored with the contractor.
- 11.7 If there is a failure to perform you will want your contract to enable you to recover:
  - (a) the cost to the Council of providing the service itself or employing another contractor to do so where the contractor is in default;
  - (b) any additional administrative and supervisory costs that arise because the contractor is in default;
  - (c) any income lost as a consequence of the failure; and
  - (d) any other losses.
- 11.8 This does not necessarily have to mean the application of financial damages. It may be agreed with the contractor that increased/additional services are provided to compensate for the drop/gap in performance of the contract.

## **12     Default Payments**

- 12.1 Provision can also be made for "liquidated and ascertained damages" (sometimes incorrectly described as "penalty payments") to be deducted from payments.
- 12.2 Liquidated damages must represent a genuine pre-estimate of the loss or damage which the Council will sustain as a result of the default. The amounts deductible should therefore, wherever possible, be shown in the contract.
- 12.3 However, if there is great difficulty making such an estimate with a particular contract it may be necessary to develop an alternative approach, perhaps stating that the amount will be that "reasonably determined" by the Council with the proviso that disputes as to what is reasonable will be settled by a third party (arbitrator, expert etc.).
- 12.4 Before you consider deducting liquidated damages, the contractor will need to be:
- (a) informed as to the precise nature and location of the default, the time at which it occurred and so on; and
  - (b) afforded a reasonable time to rectify the default unless of course the default cannot be rectified.
- 12.5 Before taking any action against the contractor you need to be certain of the facts and be satisfied that the Council is not at fault in any way. Whilst this may seem obvious, the damage caused to the relationship with the contractor by threatening action which cannot subsequently be justified, is substantial.
- 12.6 Some systems distinguish between default points and liquidated damages. Default points may be awarded on each occasion that the minimum level of performance is not attained accumulating to a level where liquidated damages will be deducted.
- 12.7 Alternatively, default points and liquidated damages may operate independently, the former accumulating to a predetermined level which triggers the serving of a warning notice. The contractor is put on notice that the receipt of a specified number of warning notices will result in the termination of the contract by the Council.

## **13     Incentive Systems**

If seen as beneficial to the Council, it may be appropriate to build performance incentives into payment systems, in addition or in parallel to default mechanisms. "Retentions" (a percentage of the value of the



contract held in reserve until a desired level of performance is obtained) or contingency sums can be set aside to make performance payments based on scores, points or particular outcome targets which are achieved in the delivery of the service. The operation of such incentive schemes must be set out in the contract. Any plans to include incentives into a contract should be checked by Legal Services to ensure that the Council is not at risk financially or legally.

## **14 Resolving Disputes**

- 14.1 Some forms of default do not lend themselves to a default payment system or may arise from a disagreement as to what is required under the contract. Hopefully regular contract review meetings will enable most misunderstandings to be resolved but it is important that your contract provides for circumstances where that is not the case.
- 14.2 The first step will often be to move the issue out of the hands of those closest to it (i.e. you and the contractors representative with whom you usually deal) in the hope that those less involved can find a resolution or that those in a higher managerial position can take a commercial or policy view that you may not be in a position to take. This is generally provided for in a “dispute escalation clause” which provides for disputes not resolved within a given time to be referred up through each party’s management structure to a clear timetable to seek a resolution. These can be very effective.
- 14.3 There are other ways of resolving the dispute that may be provided for in the contract. Expert determination may be appropriate in respect of issues which can be objectively established. If the contract says an expert determination is binding on the parties it can be enforced in the courts.
- 14.4 Contracts often also provide for arbitration. This will generally be a procedure that is much like a court process but in private. Any award has to be enforced through the courts and there is only limited scope for appeal. Generally speaking there are few advantages to arbitration and if that sort of adversarial resolution is the only one left to be pursued it is probably better simply to go to court. For that reason arbitration clauses are generally not included in Brent contracts.
- 14.5 There is an increasing pressure from the courts that parties should make attempts to reach agreement before resorting to court proceedings. In addition the increasing recognition of the benefits of working with contractors in a spirit of partnership means that parties to contracts will look for alternatives to court proceedings as a way of resolving disputes, particularly in the case of long term contracts.

- 14.6 Alternative dispute resolution generally takes the form of mediation, i.e. settlement negotiations facilitated by a neutral third party. Clearly this will only work where the parties are prepared for it to work so mediation should not be compulsory. If mediation is to be specifically included in your contract it is sensible to identify the organisation and/or procedure that would be used. There are a number of models easily available. Mediation is particularly useful for salvaging long term relationships that have run into difficulty. Additional information on mediation is available on the Centre for Effective Dispute Resolution (CEDR) website at [www.cedr.co.uk](http://www.cedr.co.uk). A model procedure and agreement for mediation is available on the website.
- 14.7 If the Code of Practice on Workforce Matters applies to your contract the Council is responsible for enforcing the Code. This means that if you or an employee protected by the Code or the union consider the contractor is not meeting its obligations under the Code you must take steps to resolve the dispute and if necessary enforce the obligations under it. The Code requires that an alternative dispute resolution procedure for disputes about whether the contractor has complied with the Code must be included in your contract. Any dispute arising in this category must therefore be dealt with through that procedure.

## **15 Termination Clauses**

- 15.1 These enable you to bring the contract to a premature end. As well as applying in the cases of insolvency of the contractor and so on they will also cover defaults by the contractor. However, it will not be possible to terminate for any breach however small and you will need to consider the terms of the relevant clause. Your clause should make it clear that use of default payments as above does not mean that the defaults to which the payments relate cannot also be taken into account when considering whether the overall level of default by the council is such that the contract can be terminated.
- 15.2 If you are going to terminate for default it is really important that you have an effective audit trail and can back up what you say. You should always take legal advice before terminating for breach.
- 15.3 In the case of a High Value contract you cannot agree to bring the contract to a premature end or terminate the contract early in any other way without first seeking the approval of the Executive or the General Purposes Committee as appropriate.

## **16 Default in Equality Requirements**

- 16.1 If your monitoring suggests that the contractor is not meeting the equality requirements in the contract, the Guidance produced by the CRE advises that you should take the following cumulative steps:

- (a) Arrange to meet with the employee of the contractor who is responsible for the equality aspects of the contract. The purpose of this meeting is to review in detail the problematic areas, and to spell out clearly what you expect from the contractor. You should try and identify the reasons for the poor performance and discuss ways of dealing with them, for example through more training, or better monitoring systems. You should agree the improvements that you expect to see by the next monitoring report.
- (b) Invoke the default provisions in the contract. You should only take this step if there is serious or persistent failure to meet the equality requirements in the contract.

## **PLANNING FOR THE END OF YOUR CONTRACT**

### **17 Introduction**

- 17.1 Your contract may come to a peaceful end on its natural expiry date or it may end suddenly by either agreed or unilateral action prior to its natural expiry. In either case you want to achieve a smooth and efficient transfer of the service to a new provider. This requires careful forethought and is particularly difficult to achieve in the event of premature termination.
- 17.2 You will need to consider well before the natural expiry date of your contract, or if you can see the contract is going wrong and may be terminated early, how you are going to handle any retendering exercise and the handover to any new contractor without major disruption to your service.
- 17.3 You should plan for the end of your contract when you begin the process of tendering for it. This is because many of the issues you need to consider to ensure a smooth transition will have to have been provided for in the contract.

### **18 Issues to Consider**

- 18.1 Potential contractors are often required to show in their tender how they will handle commencement of the contract if they are successful. You should also consider requiring them to explain in a method statement how they will deal with handover to a new contractor or back to the Council if they are not successful on a re tendering exercise. Alternatively, especially in a complex contract, you could include a contractual requirement for them to produce a handover plan towards the end of the contract or if notice of termination is given.

18.2 In planning for the end of your contract matters you will need to consider include the following:

- **What review of the existing contract you will undertake.**

As your contract enters its final stages you will have come full circle in the procurement process and will need to refer back to the guidance on preparing for a tendering process in Section 4.

- **How to ensure a level playing field and avoid advantage for a current incumbent if there is one.**

This will mean ensuring that the necessary information to enable potential new contractors to tender will be made available. Your existing terms and conditions of contract should impose obligations on contractors to co-operate with this exercise. Specific guidance on what steps to take where [TUPE](#) may apply is contained at Appendix 7.

- **How you will ensure that the key assets that a potential new contractor will need in order to continue to provide the service remain available.**

Again this is something you should have provided for in your contract. You will need to have an inventory of assets so everyone knows what is available to the contractor and what is not. Data will need to be handed over in a suitable format. Physical assets, including buildings, may need to remain available. Some may belong to the contractor and you may want to buy them, some may be leased.

- **Are there any arrangements with third parties in connection with the service that need to be transferred?**

If this is a transfer between contractors they should carry out their own due diligence exercise, but if the service is coming back in house you will need to consider this. There may be software licenses or maintenance arrangements to sort out.

- **How can you prevent an existing contractor who does not expect to be reselected, or does not want to be, running down the service?**

You want your contract to make it difficult for the contractor to get away with under investing, moving good staff on to other contracts and so on. Think about how you will keep the contractor on their toes in these circumstances.

- **How to ensure that service recipients receive as little disruption to their service as possible.**

This will depend on the service and thinking about the other items on this list will be part of this. For services that involve a lot of personal contact with the public (for example housing benefits) you will want to ensure that service recipients are kept informed about impending changes to the service and changes to contact details. In some cases you will have specific obligations to consult with recipients of the services.

- **What will you do about work in progress.**

Will the existing contractor finish any work in progress (for example, where they have started a repair under a repairing contract) or will the incoming contractor complete the work? If so, how will payment be determined?

There will be other issues depending upon particular contracts and services but the sooner you identify what they are the better placed you will be to provide for them.

## **19 Premature Termination**

- 19.1 It will not be feasible to address all the above effectively in a situation of premature termination, especially if you have very little notice. You should try and have a fall back plan. Sometimes the arrangements you have put in place may mean that you have alternative contractors you can turn to, for example, you may have appointed a second contractor for overflow work. If things start to go wrong on your contract or you are aware that the contractor is in difficulties generally, making sure you are up to date with who is in the market for the service or supply you are concerned with will help you put in place emergency interim arrangements if the need arises.

# SECTION 6

## WORKS CONTRACTS

**This section has yet to be completed. Pending its completion please contact Legal Services for further advice.**