

Procedures for Tenders and Contracts

1.0 General

- 1.1 These procedures apply to all contracts, including arrangements for the carrying out of works, the supply of goods and services and the acquisition and disposal of assets. These procedures must be read in conjunction with the Contract Procedure Rules - Minimum Standards for Tenders and Contracts and any procurement guidance notes issued by the Procurement Officer.
- 1.2 Codes of Conduct dealing with Interests of Members and Officers apply to all contracts.
- 1.3 The Schools' Fair Funding Scheme (Scheme of Delegation) governs the management by each school of its delegated and devolved budget as determined in Section 48 of the School Standards and Framework Act 1998.
- 1.4 Due Diligence: for all arrangements where a financial relationship exists between DCC and external organisation(s) or an organisation uses DCC's name, logo, e-mail or telephony system the minimum due diligence checks must be applied (see Constitution Part 5 Code of Business Conduct, Procurement Policy (i) page 128 and (v) page 130)

2.0 Quotation and Tendering Procedures

- 2.1 Apart from particular types of contract specified in section 3, the minimum required numbers of tenders or quotations to be invited from appropriate contractors for a given estimated value of contract are:
- Above £1,000 and up to £2,500 (£5,000 for works) two oral quotations:
 - Above £2,500 (£5,000 for works) and up to £10,000, Invite three organisations to submit written quotations;
 - Above £10,000 and up to £100,000, Invite three organisations to submit written formal quotations submitted by a specified date and time and based on a written specification and evaluation criteria (referred hereafter as "formal quotation");
 - Above £100,000, and up to EU thresholds, invite four organisations to submit tenders;
 - Over EU thresholds, invite organisations to submit tenders in accordance with the requirements of the Public Contract Regulations.

The values are for single items or groups of items, which must not be disaggregated artificially.

From 1 January 2018 the sterling equivalents of EU thresholds (net of VAT) are £181,302 for supplies and services, £4,551,413 for works and £615,278 for contracts falling within the light-touch regime and £4,551,413 for concession contracts. The EU thresholds are changed on 1 January of each even-dated year. The Procurement Officer will advise Heads of Service of these changes.

A light-touch procurement regime applies to certain health, social and education services that are above the applicable EU threshold and listed within Schedule 3 of the Public Contracts Regulations 2015. An OJEU notice is required but there is greater flexibility with the procurement process to be followed.

- 2.2 Where quotations apply, they should be sought from contractors selected from a standing list if one exists but if not from suitable contractors or, for a formal quotation, through open competition.

- 2.3 Where formal quotations are required, they should be sought from organisations selected from a standing list. Where there is no standing list, formal quotations may be sent directly to a minimum of three organisations who have been selectively invited to bid without recourse to open advertisement of the opportunity or they may be selected through open competition.
- 2.4 Where tenders are required, Heads of Service have a choice of tendering procedures. For contracts up to EU thresholds, organisations may be selected from a standing list. Where there is no standing list, and for contracts over EU thresholds, appropriate advertisement must be undertaken inviting suitable organisations to express an interest in tendering. Alternatively, a suitable Framework Agreement can be used (see para 3.3 below). Tenders may be received from either all who respond to an advertisement (open competitive tendering) and, for contracts over EU thresholds, from a selection of suitable contractors who have expressed an interest and who are invited by the Council to tender (selective tendering). The number of tenderers to be invited to tender will depend on the particular market and the individual project procurement strategy.
- 2.5 If selection is to be from standing lists, arrangements for standing list compilation, maintenance, review and use must be approved in advance by the County Solicitor.

Procurement Notification Process

- 2.6 Officers planning to carry out any procurement exercise with a value of £10,000 or more must submit an electronic procurement notification form to the Procurement Officer. This will be used to create an initial entry in the Contracts Database.

Appropriate Advertising

- 2.7 Tenders up to the EU thresholds where there have been no selective invitations to quote or tender, and all tenders above the EU thresholds, will be advertised on the Council e-tendering system. Any opportunities that are advertised on the Council's e-tendering system must also be advertised on the government's Contract Finder website.
- 2.8 For services, supplies and works where the total contract value, including any options to extend the initial term of the contract are expected to exceed EU thresholds, an OJEU notice must also be placed and must follow EU procurement requirements with particular regard to be given to the timescale for such tenders.
- 2.9 Any formal quotation following the open competition procedure will be advertised on the Council's e-tendering system. Any opportunities that are advertised on the Council's e-tendering system must also be advertised on the government's Contract Finder website. The Head of Service will determine, if further advertising in relevant local newspapers and trade publications is also required.
- 2.10 The Procurement Officer will ensure that the e-tendering system website address is publicised appropriately.
[www.devontenders.gov.uk / www.supplyingthesouthwest.org.uk]

Selective Tendering

- 2.11 Following advertisement of tenders above the EU thresholds for goods and services (whether in relation to goods, services or works), invitations shall be sent to the prospective tenderers who are best qualified to bid. ~~The appropriate and relevant Cabinet Member shall approve the tenderers for contracts estimated to exceed £250,000 on the recommendation of the Head of Service.~~

Invitation to Tender

- 2.12 Every invitation to tender must specify that the Council e-tendering system will be used to issue and receive tender documentation. The invitation must state the date and time by which the tender must be received by the e-tendering system and that the tender will be held in the secure area of the e-tendering system and cannot be accessed until after the deadline. Adequate time must be allowed for the preparation and return of tenders ensuring compliance where appropriate with EU requirements. Any exceptions to using the e-tendering system must be approved by the Procurement Officer.

Invitation to Quote

- 2.13 The e-tendering system must be used for a formal quotation, save for any exceptions approved by the Procurement Officer. For quotations below £10,000 the e-tendering system may be used but if paper processes are used, the invitation must state the place, date and time by which the quotation must be returned. Adequate time must be allowed for their preparation and return.

Certification notice by Tenderers

- 2.14 Tenderers shall certify and give undertakings that:
- the tender is genuine and intended to be competitive;
 - they have not fixed or adjusted the amount of the tender by or under or in accordance with any agreement or arrangement with any other person*;
 - they have not done and will not do, at any time before the time and date specified for the return of the tender, any of the following:
 - inform any person* the amount or approximate amount of the proposed tender, except where the confidential disclosure of the approximate amount of the tender was necessary to obtain insurance premium or other quotations necessary for tender preparation;
 - enter into any agreement or arrangement with any other person* with the aim of preventing tenders being made or as to the amount of another tender or the conditions on which the tender is made;
 - offer to pay or give or agree to pay or give any sum of money or valuable consideration directly or indirectly to any person for doing or having done or causing or having caused to be done in relation to any other tender or proposed tender for the Council any of the actions specified and described in this section;
 - cause or induce any person to do any of these things.

* outside the consortium if a consortium tender,

Receipt, Custody and Opening of Tenders and Formal Quotations

- 2.15 The Council's e-tendering system will record the date and time of receipt of all tenders and formal quotations. Any tender or formal quotation not received via the Council's e-tendering system (as a result of an exception approved under paragraphs 2.12 or 2.13)) must be marked with the date and time of receipt and the initials of the receiving officer, and recorded. Any tender or formal quotation received after the specified time shall be recorded as such but must not be considered.
- 2.16 Tenders and any formal quotation not received via the Council's e-tendering system shall be opened at one time and in the presence of at least two officers who shall be independent of each other and shall sign a complete record of all

tenders or formal quotation opened, showing the date and time of opening and the value of each tender or formal quotation.

Use of e-auction functionality

- 2.17 An e-auction process may form part of the overall tender process. The Procurement Officer must approve any proposal to use this process, and such approval will include consideration of all software, systems and procedures to be used. The invitation to tender must state that an e-auction will form part of the tender process.

Acceptance of Single Quotation or Tender Received

- 2.18 This section deals with situations where either a single quotation or tender is received. It does not apply to social care contracts for which specific provision is made at paragraph 3.9. For contracts up to £10,000, the Head of Service will determine whether or not to accept the quotation. For contracts over £10,000, the Procurement Officer and the Head of Service shall jointly consider whether or not, in their professional judgement, best value would be obtained. The following provisions shall then apply:-

a) where the estimated value of the contract is between £10,000 and £100,000 if in their view best value would be obtained then the Head of Service may accept the formal quotation. If in their view value for money would not be obtained, or if there is any doubt, the tendering exercise should either be repeated or the matter referred to the appropriate and relevant Cabinet Member for consideration and decision.

b) where the estimated value of the contract is over £100,000 the matter must be referred to the appropriate and relevant Cabinet Member for consideration and decision taking into account the views of the Procurement Officer and Head of Service as to whether to accept the tender or repeat the tendering exercise.

Financial Provision for Contracts

- 2.19 Where tenders or quotations received vary from the approved estimate, the Head of Service must identify funding for any increase. Where the increase exceeds the greater of 5% or £25,000, the funding must be approved by the Chief Finance Officer before awarding the contract. Approval of the Cabinet Member whose remit includes Finance or Resources must also be obtained before awarding the contract where the variation exceeds £100,000.

Maintaining the Contracts Database

- 2.20 Upon the award of a contract with a value of £10,000 or more, the Heads of Service will update and complete the entry in the Contracts Database.

Exemption from the Tendering and Formal Quotation Process

- 2.21 Where the subject matter of a contract is of a specialised nature with only one or a limited number of possible contractors or where exceptional circumstances have arisen, the Head of Service shall submit a written report requesting an exemption from normal tendering or formal quotation rules to the Procurement Officer.

The authorisation requirements for exemption requests are as follows:

- The Procurement Officer may determine such requests in respect of formal quotations up to £50,000.

- The Procurement Officer in conjunction with the Head of Digital Transformation & Business Support may determine such requests between £50,000 to £100,000.
- The Head Digital Transformation & Business Support may determine such requests above £100,000 up to the relevant legal threshold in line with Part 3 of the Constitution following consultation with the Cabinet Member whose remit includes Procurement.

Tenders subject to the European Procurement Regulations shall be subject to exemptions contained within those Regulations. Exemptions in regard to [Social Care Contracts] are set out below in paragraphs 3.2 – 3.6.

3.0 Particular Types of Contract

Acquisition of Property

- 3.1 In order to ensure compliance with capital rules, Heads of Service must obtain approval of the Cabinet Member whose remit includes Finance or Resources before giving instructions for property acquisition to NPS (SW Ltd). The arrangement and terms of all contracts for the acquisition of land or buildings and for property leases must be in line with the Property Transaction process approved by the Council's Executive on 15 January 2008.

Individual Social Care, Support or Education Contracts

- 3.2 The following paragraphs 3.2 – 3.7 cover exemptions from the normal tender processes for contracts which provide for the delivery of social care, support or education to an individual under a statutory duty, or where the service is needed to meet an urgent need. Such exemptions are required because the services are typically of undefined duration; the individual, or their family or carer has a right to express a choice in who provides the service (under government guidance); and there are either defined eligibility criteria that mean the service has to be provided, or there is a presenting need that must be met urgently. Once in place, the services must be supplied consistently and without interruption.
- 3.3 The Heads of Service set out at Part 3 of this Constitution are responsible as identified therein for purchasing social care, support and education services that are delivered to individuals and which fall within the scope of paragraph 3.2 By virtue of the eligibility criteria which are required, these are by definition vulnerable people who may receive a service over a protracted period of time and who rely on services being delivered consistently and without interruption. This places an additional consideration within the commissioning process which is to ensure that the provider market is stable and that long-term relationships between service providers and service users are maintained where this is appropriate.
- 3.4 The aforementioned consideration will on occasion be at variance with the commissioning process required under the Contract Procedure Rules - Minimum Standards for Tenders and Contracts and these Procedures for Tenders and Contracts. Accordingly, it is not appropriate to adhere strictly to the general requirement to tender on every occasion.
- 3.5 In the circumstances described in 3.4 above the following criteria must be satisfied before awarding any individual social care, support or education contract:-

- (i) the service provider selected must have a proven, successful track record in the provision of similar services,
- (ii) the service provider must be able to demonstrate that they can achieve the level of quality required in the provision of the service,
- (iii) the service provider must be able to demonstrate that they can provide the service at a price which represents good value for money,
- (iv) where more than one service provider would be able to meet the criteria listed above then the officer dealing with the procurement must be able to demonstrate that the service provider selected was the most appropriate in relation to the service specification.

3.6 The approval process for awarding an individual social care, support or education contract is as follows:-

- value of contract below £5,000 per week – approval must be by Head of Service or in line with delegated approval levels set out in the service Scheme of Delegated Financial Approval;
- value of contract £5,000 per week or more – approval must be obtained from the Chief Officer or if not available the Chief Executive.

Monthly reports on placement mix, including high cost placements, will be scrutinised by the Cabinet Members with responsibility for Resources and Children's Services.

Non Individual Social Care, Support or Education Contracts

3.7 When social care, support or education contracts other than for an individual, for example block contracts or other contracts not specifically focussing on an individual, are due for renewal, tendering will take place in accordance with the Minimum Standards for Tenders and Contracts and these Procedures for Tenders and Contracts. It is recognised, however, that in certain circumstances, it will be appropriate to seek an exemption from tendering in accordance with paragraph 2.21 above.

3.8 The following factors are examples of circumstances which might justify an exemption for this type of contract:-

(i) there are no other providers who would be able to provide the service at the time of renewal; or

(ii) the service is provided by a voluntary, charitable or not-for-profit organisation that has made a substantial investment in the service and where market testing has established that there is no other provider who could offer similar investment and that there would be no financial advantage to the Council in tendering the service, or

(iii) the funding which is provided to a voluntary, charitable or not-for-profit organisation through a contract helps support the general activity of the organisation without which the organisation's viability might be at risk, and its closure would be to the detriment of the local community, or

(iv) disruption to service users and/or the market would result from a tendering exercise which would outweigh any financial advantage to be gained from undertaking such an exercise, and

3.9 In all cases where such an exemption is sought evidence will need to demonstrate that the contract is providing good value for money.

Framework and Joint Procurement Arrangements

- 3.10 Framework Agreements will be established in accordance with these Procedures for Tenders and Contracts. Framework Agreements set up by government offices or other public bodies may be used after consultation with the Procurement Officer. The relevant Head of Service is responsible for the performance management of the Framework Agreements. Call off contracts under a Framework Agreement will be governed by the terms of the Framework Agreement.
- 3.11 Joint procurement arrangements with other local authorities or public bodies may take place where they represent best value. The Procurement Officer must be notified at the start of the procurement of all such proposed arrangements irrespective of whether the County Council is acting as the lead authority.

Nominated Sub-Contractors and Suppliers

- 3.12 Unless a sub-contractor is subject to an existing County Council framework contract or the sub-contract type is covered elsewhere in this section, where a sub-contractor or supplier is to be nominated to a main contractor, tenders shall be invited from the minimum number of tenderers or all such persons if fewer than the minimum number of sub-contractors or suppliers are considered suitable. Tenders need not be invited if, in the opinion of the Head of Service, it is not reasonably practicable to obtain competitive tenders and the opinion is recorded on the contract file.
- 3.13 All invitations to tender shall require an undertaking by the tenderer that if selected they will be willing to enter into a contract with the main contractor on terms which indemnify the main contractor against his own obligations under the main contract in relation to the works, goods or services included in the sub-contract.
- 3.14 The Head of Service shall nominate to the main contractor the person whose tender in his opinion provides the best value; provided that where the tender is other than the lowest received the circumstances shall be reported to the appropriate and relevant Cabinet Member for information.

Disposal of Assets

- 3.15 Disposals of surplus property will follow procedures set out in the separate Code of Practice for the Disposal of Surplus Property. This includes a requirement for the local County Councillor to be made aware of any proposal to dispose of land or premises in his/her Division. Land and premises shall be disposed of by the Strategic Property Manager. The method of disposal shall ensure fairness and propriety. Except for special categories or cases approved by the Cabinet Member whose remit includes Finance or Resources, the Strategic Property Manager will arrange advertising for:
- (a) land with an estimated value over £20,000, or
 - (b) leases for over seven years, or
 - (c) rentals of over £5,000 p.a. (excluding business rates or Council Tax).

3.16 Payments to Secure Local Bus Services

- 3.16.1 De minimis provisions may be used for:
- (i) existing and new community-based transport schemes developed in partnership with the County Council;

(ii) experimental local bus services up to a maximum of 12 months;

(iii) experimental local bus services where there is a quantifiable shared capital or revenue risk by the County Council and the operator (revenue risk must be demonstrated by, for example, declining support payments or calculated difference between payments and estimated revenue shortfall, based on contractually binding calculations with clawbacks in the event of early termination);

(iv) extending and enhancing existing services by way of frequency enhancements, route alterations, extensions or diversions of services and investment in buses which have been registered commercially - including Kickstart schemes based on joint investment with the operator - subject to the scale of the supported section, in vehicle resource terms, not exceeding that of the commercial core.

3.16.2 Any Quality Bus Partnerships with operators per se should not bring any special exemption from the tendering process or best value assessment, but within the Quality Bus Partnership framework circumstances may arise which, judged on their merits using the above guidelines, may justify a de minimis arrangement.

3.16.3 The award of de minimis contracts for £50,000 or more per year will need to be approved by the Cabinet Member with responsibility for transportation matters.

4.0 **Contracts** **Contents of Contract**

4.1 Heads of Service shall obtain the advice of the County Solicitor on the contract terms to be agreed, including the Council's terms and conditions of contract.

4.2 Every contract shall be in writing or confirmed in writing and shall specify:

- (a) the work, materials, supplies or services to be provided;
- (b) the quality standards and or service specification to be adhered to;
- (c) the price to be paid, with a statement of discounts or other deductions;
- (d) the time or times within which the contract is to be performed;
- (e) the procedures for variations, termination, or penalties for non-compliance, or security for the due performance of any contract including liquidated damages where works are not completed in the time specified
- (f) a suitable VAT clause and ensure that the Council is fully indemnified in respect of any penalties/interest charges which arise where the contractor treats their supply incorrectly for VAT purposes;
- (g) invoicing and payment arrangements as specified by the Chief Finance Officer;
- (h) that the Council shall pay valid and undisputed invoices within a 30 day period, consider and verify invoices in a timely fashion and impose a contractual obligation on the contractor to ensure that they abide by these conditions in relation to their own sub-contractors; and
- (i) such other terms and conditions as are deemed necessary by the Heads of Service having taken advice from the County Solicitor.

4.3 Contracts shall be signed (except where the seal of the Council is to be applied) in accordance with A5c of Financial Regulations.

Cancellation of Contracts

4.4 All written contracts shall contain a clause enabling the Council to cancel the contract and recover from the contractor the amount of any resulting loss if:

(a) the contractor has offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for:

(i) doing or not doing, or for having done or not done, any action in relation to the obtaining or execution of the contract or any other contract with the Council;

(ii) showing or not showing favour or disfavour to any person in relation to the contract or any other contract with the Council.

(b) the same things have been done by any person employed by the contractor or acting on his behalf (whether with or without the knowledge of the contractor);

(c) in relation to any contract with the Council the contractor or any person employed by them or acting on their behalf has:

(i) given any fee or reward the receipt of which is an offence under Section 117(2) of the Local Government Act 1972;

(ii) committed an offence under the Bribery Act 2010.

4.5 Every contract that has been tendered via the Official Journal of the European Union must also contain the right for the Council to terminate the contract where:

- (a) there has been a modification of the contract which falls outside one of the permitted categories specified in Regulation 72 of the Public Contracts Regulations 2015 and which are summarised at paragraph 4.5 below;
- (b) the contractor should have been excluded on mandatory grounds under Regulations 57(1) and /or 57(2) of the Public Contracts Regulations 2015
- (c) the contract should not have been awarded in view of a serious infringement under European Law which has been declared as such by the Court of Justice.

Variation of Contracts

4.6 All orders given to a contractor directing them to vary in any respect the subject of the contract must be in writing, signed by the supervising officer and quote an agreed value (if any). The written agreement of the Head of Service must be obtained before variation orders are issued if the total value of the accepted tender will be exceeded by more than £5,000, or if the value of specified elements within the tender total will be exceeded by more than £5,000. Written agreement will not be required for:

- (a) price fluctuations in respect of wages, plant and materials;
- (b) variations resulting from statutory obligations;
- (c) agent authority works subject to equivalent external controls;
- (d) urgent construction arrangements;

but supervising officers must inform Heads of Service in advance of all significant cost increases so that they can ensure that their budgets are not exceeded without appropriate approvals.

In addition to the above requirements, where a contract has been tendered via the Official Journal of the European Union (i.e. a contract above the relevant value threshold), a variation to the original contract terms will trigger a new procurement process unless it falls within one of the following permitted changes:-

- Modifications that are clearly provided for in the original procurement and contract documents; or
- Necessary modifications where a change of contractor cannot be made due to economic or technical reasons and would cause significant inconvenience or substantial duplication of cost and does not result in an increase in price of more than 50% of the original contract value; or
- Modifications to deal with unforeseen circumstances where the modification does not alter the overall nature of the contract and does not result in an increase in price of more than 50% of the original contract value; or
- Modifications to deal with a new contractor replacing the original contractor where the replacement is due to corporate restructuring and the new contractor meets the pre-qualification criteria and there are no other substantial amendments to the contract, or
- Modifications that are not substantial. The following will be considered substantial modifications:-
 - modifications that render the contract materially different in character,
 - modifications that could have resulted in a different outcome in the procurement;
 - modifications which shift the economic balance in favour of the contractor;
 - modifications which extend the scope of the contract considerably, and
 - where a new contractor replaces the old contractor other than in the circumstances permitted above.
- Low value modifications where the value attributable to the modification falls below the relevant EU threshold **and** is less than 10% of the initial contract value for supplies and services or 15% for a works contract.

Where a contractor notifies a change in their company structure which results in a change of VAT treatment of their supply then advice should be sought internally from the VAT team before the contract is novated.

Heads of Service must seek the approval of the County Solicitor in relation to any proposed variation of a contract which has been tendered via the official Journal of the European Union for all other variations of contracts the Head of Service must first seek the advice of the county solicitor.

Payment for Contracts for Building or Civil Engineering Work

4.7 Each certificate for payment must show:

- (a) contract sum (usually tender total);
- (b) value of work to date;
- (c) total amount of certificates previously paid;
- (d) amount of the certificate;
- (e) retention amount (if any);
- (f) value of price fluctuations;
- (g) Value Added Tax (if any).

Monitoring of Contracts

4.8 Heads of Service must monitor all contracts and report to appropriate and relevant Cabinet Member(s) any significant exceptions to normal progress exceeding £100,000. Significant exceptions include delay or advance in expenditure by more than £100,000 compared with expectations within a financial year and critical delay in meeting target completion dates.