

CABINET

9 July 2010

REVIEW OF CONSTITUTION – CONTRACTS PROCEDURE RULES

REPORT OF HEAD OF LEGAL SERVICES

Contact Officer: HOWARD BONE Tel No: 01962 848552

RECENT REFERENCES:

None.

EXECUTIVE SUMMARY:

The Council's Constitution contains Contracts Procedure Rules, which must be followed in all the Council's procurement activities. This report proposes the revision of the existing Rules, to take account of audit recommendations, the Council's Procurement Policy, and latest good practice.

RECOMMENDATIONS:

TO COUNCIL

That the Contracts Procedure Rules set out at Appendix 1 be approved and included in the Council's Constitution.

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DETAIL:

1 Introduction

- 1.1 Under Section 135 of the Local Government Act 1972, the Council is required to make Contracts Procedure Rules for securing competition in the award of contracts and for regulating the manner in which tenders are invited.
- 1.2 Part 4 of the Council's Constitution includes Contracts Procedure Rules. These were based on the previous Contract Standing Orders, and have been revised periodically.
- 1.3 A detailed review of the Rules has been carried out, to update the Rules and deal with various audit recommendations. A revised version of the Rules is attached as Appendix 1 to the Report.

2 Changes to Contracts Procedure Rules

- 2.1 The new Rules have been largely based on the existing wording. However, the draft Rules incorporate various changes, the main points of which are set out below.
- 2.2 As well as the new Contract Procedure Rules, officers are developing detailed guidance on procurement. This guidance will give more detailed information on the effect of the Rules, with practical examples, and will be issued as part of the implementation of the Authority Financials project.

Audit Reports

- 2.3 Various audit reports have identified a number of issues involving procurement and contracts. Recommendations were made to either amend the Rules, or issue guidance, to address these issues. The recommendations have been considered and changes have been incorporated in the revised Rules where appropriate. In respect of the remaining elements in the recommendations, the Procurement Guidance mentioned in 2.2 above will contain advice to cover the points raised in the audit reports.

Evaluation Criteria

- 2.4 In recent years, the emphasis in procurement has changed from a pure price-based approach, towards one of best value/value for money. Quality,

technical expertise, and a contractor's approach and resources, are now being included in the evaluation of tenders more often, and Members will be familiar with combinations of price and quality (e.g. 60% price:40% quality) being used to decide which tender should be accepted. Although this is covered in the existing rules, the revised rules clarify the use of such price:quality evaluations.

Member Involvement in Procurement

- 2.5 The revised Rules clarify when Members will be involved in the procurement process. The Scheme of Delegation permits officers to enter into contracts where there is provision within the approved revenue budget and subject to the provisions of Contracts Procedure Rules and Financial Procedure Rules. No changes are proposed to this wording.
- 2.6 The revised Contracts Procedure Rules have been drafted taking this delegation into account. A balance has been sought between allowing officers to let contracts where there is budget provision, and ensuring that Members are involved in procurement decisions at an appropriate level. It is therefore proposed that officers can continue to procure contracts on a lowest price basis where there is budget provision (subject to compliance with the Rules). Where a price/quality evaluation is to be used, it is suggested that officers be permitted to procure contracts (subject again to budget provision and compliance with the Rules) where the "Quality" element is no more than 40%, and the contract value is up to £100,000. All other contracts would require Member involvement (either through a Cabinet report, or the Portfolio Holder decision-making process).

EU Procurement

- 2.7 The Rules have been revised to make specific reference to the Public Contracts Regulations, which implement the EU Directive on public procurement. The revised Rules therefore reinforce the need to comply with the Regulations where they apply. The Procurement Guidance will give more information on the effect of the Regulations, to assist officers in complying with them.

Framework Agreements

- 2.8 Framework agreements are contracts which are entered into by either a single authority, or more commonly a consortium of authorities, following a tender exercise. The agreement may be with a single contractor, or a number of contractors, and it will specify which authorities are able to "call-off" work, goods or services under the agreement. Since last reviewed, framework arrangements have developed, and the legal position on their use (in respect of tenders where the EU Directive applies) has been clarified.
- 2.9 The existing Rules refer to consortium/group purchasing arrangements, and revised Rules clarify these by using the more common term of framework arrangements. The existing Rules permit their use, provided the framework

has been approved by Members, and this has been continued in the revised version. A new Rule has been included to provide for how call-offs are to be made under any such arrangements, and to involve Members outside the limits set out in 2.6 above

Electronic Procurement

- 2.10 Increasingly, authorities are being urged to use electronic methods in procurement. The draft Rules provide for advertising of contracts on a portal such as the South East Business Portal, and receipt of tenders via a secure mailbox (with appropriate safeguards). The new Authority Financials system will introduce electronic ordering, and the new Rules allow for this.

2.11 Contracts Register

- 2.12 The revised Rules also set out the requirements for a central Contracts Register to be maintained. There are increasing requirements for Local Authorities to make more information in respect of contracts (amongst other things) available to the public. These developments will support the Council's ability to do this.

Tender Procedure

- 2.13 In response to an audit recommendation, the Rules now incorporate specific provisions relating to late tenders, unsigned/incomplete tenders and tenders opened in error.

Health and Safety/Contract Monitoring

- 2.14 Specific provision has been made requiring submission of Health and Safety Policies, and monitoring of such policies.

OTHER CONSIDERATIONS:

3 SUSTAINABLE COMMUNITY STRATEGY AND CORPORATE BUSINESS PLAN (RELEVANCE TO):

- 3.1 The Council's procurement functions relate strongly to the Economic Prosperity objective, and also to the overall aim of achieving best value for the Council.

4 RESOURCE IMPLICATIONS:

- 4.1 The proposed revisions will help to optimise the value for money achieved from the Council's expenditure on goods and services.

5 RISK MANAGEMENT ISSUES

- 5.1 Procurement contracts carry potentially significant risks (both financial and operational) in terms of contractual commitment and ensuring that the best contractor is selected in each case. The revised Rules seek to minimise these

risks by prescribing appropriate processes which incorporate controls to achieve this.

BACKGROUND DOCUMENTS:

None

APPENDICES:

1. Revised Contracts Procedure Rules

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1 Legal Basis

1.1 The Council is required under Section 135 of the Local Government Act 1972 to make Contracts Procedure Rules for securing competition in the award of contracts and for regulating the manner in which tenders are invited.

2 Application

2.1 These Procedure Rules apply to contracts awarded by the Council for works, services or supplies, regardless of the source of funding for the contract.

2.2 These Procedure Rules do not apply to paying of grants, contracts of employment, contracts for the purchase or sale of land or securities, or contracts for the taking or granting of any interest in land (unless such contracts also involve the procurement of works, services or supplies).

2.3 These Procedure Rules do not apply:-

- a) where the procurement is to be undertaken by the Council as agent or managing contractor for another public body, or;
- b) where the procurement is being undertaken on behalf of the Council by another local authority or other public body as part of a partnership involving the Council

provided that the Procedure Rules or other requirements made or imposed by that body in relation to contracts have been complied with.

2.4 Sections 9, 10, 11 and 12 of these Procedure Rules do not apply:-

- a) where the Council, Cabinet or a Portfolio Holder (acting within the powers delegated under the Scheme of Delegation) has made a direction authorising a contract to be negotiated with one or more contractors without inviting tenders in accordance with Contracts Procedure Rules 9, 10, 11 and 12 (provided the Head of Legal Services is satisfied that the procurement complies with the Public Contracts Regulations).
- b) where the procurement is to be undertaken using a framework arrangement structure which has been procured (in accordance with Public Contract Regulations where they apply) by the Council, another local authority, local authority consortium, or other public body (such as the Office of Government Commerce), provided that:-
 - i. the use of the framework has been approved by Cabinet, Committee or the relevant Portfolio Holder under the scheme of delegation in the Constitution; and
 - ii. the Council has the legal power to participate in such a contract;and
 - iii. the method of awarding the contract under the framework arrangement is lowest price (or highest bid in contracts where payment is to be made to the Council); OR
 - iv. the method of awarding the contract under the framework arrangement is a combination of price and up to and including 40% for quality, technical capability and other similar criteria and the value of the call-off is less than £100,000.

2.5 For the purpose of determining the application of any of the financial limits specified in these Procedure Rules:

- a) before entering into any contract the Head of Team must estimate its value. Its estimated value will determine the

appropriate procedure to be followed under these Procedure Rules (“these Rules”) and the Public Contracts Regulations (“the Regulations”). Where the Public Contracts Regulations apply they shall take precedence over these Rules. The Head of Team must establish whether the Council’s requirement can be met through any existing contract (i.e. another contract already entered into by the Council or which forms part of collaborative arrangements which the Council can legally participate in) and ensure that the estimated value can be met from the appropriate budget (capital and/or revenue). Any financial amount shall be interpreted as being exclusive of Value Added Tax;

- b) the estimated value or amount of contracts with the same person during any period not exceeding two years shall be aggregated where it would be practicable for the Council to enter into a single contract with that person;
- c) estimates of value and methods of valuation must be genuine and not designed to avoid exceeding any threshold contained in these Procedure Rules or under the Public Contract Regulations;
- d) the value of a contract is the expected amount of money that will be received by the organisation that carries out the works or provides the services or supplies, over the expected lifetime of the contract (including any possible extensions)
- e) where the period of a contract is indefinite or cannot be ascertained, it shall be assumed to be for a period of four years for the purpose of these Procedure Rules;
- f) contracts or orders must not be divided to avoid exceeding any threshold contained in these Procedure Rules or under the Public Contract Regulations.

2.6 Unless the context otherwise indicates:-

- a) References to “Rules” are references to these Contract Procedure Rules;
- b) References to “Regulations” are references to the Public Contracts Regulations 2006 (as amended or re-enacted).

3 Reporting Requirements for Exceptions to Procedure Rules

- 3.1 Every contract shall comply with these Procedure Rules and no exception from any of the following provisions of these Procedure Rules shall be made, otherwise than by direction of the Council, Cabinet, or under the Portfolio Holder Decision Notice scheme. If it is impracticable to convene a meeting of the Council, Cabinet or for the Portfolio Holder

to take a decision under the scheme of delegation in the Constitution, in the time needed to deal with a matter of urgency or emergency, the Chief Executive (or in his absence the Corporate Director (Governance) or Head of Finance), in consultation with the Chairman or Vice-Chairman of the Cabinet and the Chairman or Vice-Chairman of the Principal Scrutiny Committee, shall have power to act.

- 3.2 Express note of any direction permitting an exception from any of the provisions of these Procedure Rules (including a direction under Rule 2.4 a) above) shall be included in the minutes of the Council or the Cabinet concerned, or the Portfolio Holder Decision Notice, as the case may be.
- 3.3 An exception to these Procedure Rules may only be permitted if:
 - a) there are exceptional circumstances justifying departure from these Procedure Rules;
 - b) the exception will not contravene any legal requirement, including the Public Contract Regulations;
 - c) the report to Council, Cabinet, the Portfolio Holder Decision Notice or the Chief Executive provides evidence that the exception is necessary to achieve the Council's objectives and will achieve Best Value for the Council.

4 Requirements for Procurement and Contracts

- 4.1 The principles underpinning these Procedure Rules are:-
 - a) the need to ensure that competition and propriety are present in Council's procurement and the award of contracts;
 - b) the need to secure best value from procurement;
 - c) the need to maintain fairness, transparency, equality and integrity in the Council's procurement activity; and
 - d) the need to comply with applicable legal requirements.
- 4.2 All procurement by the Council shall comply with the Council's statutory duties in respect of equality (including age, gender, race, and disability) with the objective of eliminating unlawful discrimination and promoting equality of opportunity. At all times during the procurement, the Council shall consider and implement the principles of non discrimination, equal treatment and transparency.

5 Achieving Best Value

- 5.1 Every procurement process and contract must be designed to achieve best value for the Council, in accordance with applicable procurement guidance issued by the Corporate Director (Governance).

- 5.2 Before undertaking a new procurement process or awarding a new contract the Head of Team must establish whether the Council's requirement can be met through any existing contract, and ensure that the estimated value can be met from the appropriate budget.
- 5.3 In relation to all contracts, the Head of Team concerned shall consider matters of quality and reliability as well as price and shall not accept, or recommend acceptance of, the lowest tender or quotation if the Head of Team is not satisfied that it is likely to represent the best value for money.

6 Interests of Officers in Contracts and Other Matters

- 6.1 All officers engaged in a procurement process shall comply with any applicable Code of Conduct and must not invite or accept any gift or reward in respect of the award or performance of a contract. High standards of conduct are obligatory. Corrupt behaviour will lead to dismissal and is a crime under Prevention of Corruption Acts 1889 to 1916 and the Bribery Act 2010.
- 6.2 In addition to his/her duty under Section 117 of the Local Government Act 1972 if it comes to the knowledge of any officer of the Council that he/she has a personal and prejudicial interest in any contract which has been, or is proposed to be, entered into by the Council, or in some other matter which is to be considered by the Council, the Cabinet, any committee or sub-committee, or by a Portfolio Holder under the scheme of delegation in the Constitution and which (in either case) is not
- (a) the contract of employment (if any) under which he/she serves to the Council, or
 - (b) the tenancy of a dwelling provided by the Council,
- he/she shall as soon as practicable give notice in writing to the Monitoring Officer of the fact that he/she is interested therein.
- 6.3 For the purpose of this Procedure Rule, a personal and prejudicial interest is an interest that, if the officer were a member of the Council and if the contract or other matter were to be considered at a meeting of the Council at which he/she were present, he/she would have to disclose under the Model Code of Conduct for Councillors in Part 5 of this Constitution prior to providing such advice.
- 6.4 The Head of Democratic Services shall keep a record for the purpose of particulars of any notice of personal and prejudicial interest given by an officer of the Council under Section 117 of the Local Government Act 1972 or Rule 5.3 of this Rule. The record shall be open for inspection by members of the Council during the ordinary office hours of the Council.
- 6.5 Where an officer submits a report to a meeting on a matter in which he/she has declared an interest under Section 117 of the 1972 Act or paragraph 16.1 he/she shall state that such declaration has been made,

and give brief details of it, in a separate paragraph at the commencement of the report.

- 6.6 Where any officer advises orally a meeting of the Council, the Cabinet, a committee or a sub-committee, on any contract, grant, proposed contract or other matter and has declared a personal and prejudicial interest in that matter, whether under the requirements of Section 117 of the Local Government Act 1972 or Rule 5.3, he/she shall remind the meeting orally of that interest.

7 Engagement of Consultants

- 7.1 Before the engagement of any architect, engineer, surveyor or consultant for the purposes of any contract in respect of the supply of goods, services or materials or the carrying out of works, the appropriate Head of Team shall obtain quotations or tenders following the procedure set out in Section 9.
- 7.2 Every such engagement referred to in paragraph 7.1 above
- (a) shall be evidenced in writing, and
 - (b) shall be subject to the conditions that such an architect, engineer, surveyor or consultant shall at all times be fully covered by professional indemnity insurance and that in relation to any contract referred to in (1) above he shall conform to the requirements of this Part of Procedure Rules, the Council's Financial Procedure Rules and any direction from the Council, Cabinet, a Committee or Sub-Committee or duly authorised officer.

8 Contract Specifications

- 8.1 Every procurement process must specify the Council's requirement in a clear and precise manner, using outcome performance measures where appropriate.
- 8.2 Specifications must not include requirements that are discriminatory or may distort competition. Particular products, sources or processes must not be specified unless this is essential for meeting the Council's requirement and the Specification permits the use or provision of an equivalent product, source or process. Wherever appropriate, a non-discriminatory quality standard should be specified.
- 8.3 Where the Public Contracts Regulations apply to a procurement, appropriate current technical specifications and standards shall be specified, using European standards where they exist.
- 8.4 In all other cases, where an appropriate British Standard set of requirements or British Standard Code of Practice issued by the British Standards Institution is current at the time, every contract or order shall

require that all goods and materials used or supplied and all workmanship shall be at least in accordance with that Standard.

- 8.5 No contract exceeding £100,000 in value or amount shall be entered into until the relevant Head of Team is satisfied (a) that the quality assurance systems of the person concerned either have been certified in accordance with ISO9001 (or any replacement or amendment thereof) or otherwise appear to be satisfactory (having made due enquiries) having regard to the value and nature of the proposed contract and (b) that the procedures concerned are likely to ensure the contract is performed within any time limits imposed by the contract.
- 8.6 All specifications must be in accordance with all other legal requirements and the procurement policy of the Council.

9 Procedure for Quotations or Tenders

- 9.1 Prior to seeking quotations or tenders, the Head of Team undertaking a procurement must ensure that:-

- a) The procurement is properly authorised either:-
- (i) By Council, Cabinet a Committee or a Portfolio Holder Decision Notice, OR
 - (ii) In accordance with the Scheme of Delegation to Officers
- b) The value of the procurement has been calculated in accordance with these Procedure Rules and that appropriate budgetary provision is available;
- c) The appropriate procurement procedure as set out in 9.2 below has been selected;
- d) The evaluation method (price, or most economically advantageous tender) has been selected, and recorded in detail as follows:-

The Head of Team may select an evaluation model based on:-

- (i) lowest price (or highest bid in contracts where payment is to be made to the Council) alone; or
- (ii) a combination of price and up to and including 40% for quality, technical capability and other similar criteria, up to a maximum contract value of £100,000.

In all other cases, the evaluation model must be approved prior to inviting quotations or tenders either by Cabinet, Committee or the relevant Portfolio Holder under the scheme of delegation in the Constitution;

- e) The requirements of the Financial Procedure Rules (including in particular i) the need for separate approval to incur capital expenditure and ii) the need to notify the Head of Finance before entering into all contracts over £100,000) have been complied with.

9.2 The procedure to be adopted in relation to contracts shall be in accordance with the following table:

	Estimated Value of Contract	Procedure
A	£10,000 or less	The Head of Team concerned may enter into such contract with any person that he considers competent for the purpose (subject to complying with Contracts Procedure Rule 5 (Achievement of Best Value)).
B	Over £10,000 but not more than £25,000	The procedure in C will apply (except where a list of tenderers is kept under Procedure Rule 12 (Select List of Tenderers) the Head of Team concerned may obtain one written quotation from such a list and may accept such quotation).
C	Over £25,000 but not more than £100,000	<p>The Head of Team concerned shall:</p> <ol style="list-style-type: none"> 1) Determine the evaluation criteria and model (based on either price or most economically advantageous tender) and obtaining any necessary approval (see 9.1(d) above) prior to inviting quotations; 2) invite a minimum of three written quotations 3) may accept the quotation which scores highest by applying the evaluation model OR 4) with the approval of the Chairman or Vice Chairman of the Cabinet, and the Heads of Finance and Legal Services, and subsequent report to the Cabinet (or Portfolio Holder Decision Notice if permitted under the Council's Scheme of Delegation) for information, may accept a quotation other than the quotation which scores highest by applying the evaluation model.

	Estimated Value of Contract	Procedure
D	Over £100,000 (but outside scope of Public Contracts Regulations)	<p>d) No contract may be entered into unless formal competitive tenders have been invited either:</p> <ul style="list-style-type: none"> • by Public Invitation to Tender (Open Tender) in accordance with Rule 10 • by Restricted Invitation to Tender to persons who have applied for permission to tender for that procurement in accordance with Rule 11 • by invitation to persons on a select list of tenderers in accordance with Rule 12.
E	Over the value of the Public Contract Regulations Thresholds (but only where the Regulations apply to the procurement)	<p>e) Where the value exceeds the Public Contract Regulations Thresholds, the procurement must be undertaken in accordance with one of the following procedures as defined by the Public Contract Regulations:</p> <ul style="list-style-type: none"> • the Open Procedure, • the Restricted Procedure • the Negotiated Procedure • the Competitive Dialogue Procedure <p>The Head of Team may select the Open or Restricted Procedure without Member approval, and shall select an evaluation method in accordance with 9.1(d) above. In all other cases the choice of Procedure and the evaluation model must be approved prior to inviting quotations or tenders either by Cabinet or by the relevant Portfolio Holder under the scheme of delegation in the Constitution.</p>

10 Public Invitation to Tender (Open Tender)

10.1 Where public invitation to tender is given, at least 10 days notice shall be given in at least one local newspaper and also in such trade journals (if any) as the Head of Team concerned may consider desirable. One or more trade journals alone may be used if local advertising would not be appropriate in a particular case. Alternatively, a business portal, such as the South East Business Portal, may be used.

- 10.2 Where a procurement is subject to the Public Contract Regulations, a Contract Notice in accordance with the Regulations shall also be published in the Official Journal of the European Union (OJEU) prior to any notice being published under Rule 10.1 above.
- 10.3 All tender opportunities shall be published on the Council's website and any other relevant websites mentioned in the any Procurement Guidance issued by the Corporate Director (Governance).
- 10.4 Where either Public Invitation to Tender is given, a person is invited to tender, or a Contract Notice in Respect of the Public Contract Regulations is given every notice or such invitation shall:
- (a) express the nature and purpose of the contract;
 - (b) invite tenders for its execution;
 - (c) state where tender documents may be obtained;
 - (d) state either the last date and time when tenders will be received or the last date when applications for tender documents will be accepted;
 - (e) where public invitation is given for the execution of works or services, require the tenderer to provide the name and address of their Bankers and an authority to take up financial reference with them.
- 10.5 All Invitations to Tender must include instructions to tenderers stating that the Council reserve the right to accept a tender other than the lowest, or to accept no tender at all. The process for receiving tenders shall be either a paper process or an electronic process.

For the paper process, instructions to tenderers shall state that:

- (a) no tender will be considered unless received before the date and time specified in the tender documents in a plain sealed envelope, which shall bear the word 'Tender' followed by the appropriate tender reference or title.
- (b) no tender envelope shall bear any name or mark indicating the sender.
- (c) tenders shall be addressed to the Head of Democratic Services.

For the electronic process, instructions to tenderers shall state that no tender will be considered unless received before the date and time specified in the tender documents in a designated secure mailbox.

- 10.6 During the tender process, the Head of Team conducting the procurement shall ensure that all issues and questions concerning the

tender documents, the scope of the procurement or the conduct of the procurement process are answered promptly and copies sent to all tenderers, regardless of whether they raised the issue themselves.

11 Restricted Invitations to Tender

11.1 This Procedure Rule shall have effect where invitation to tender for a contract is to be restricted to persons who reply to a public notice, but shall have no effect in respect of tenders required to be advertised by a Contract Notice in accordance with the Public Contract Regulations (such tenders are to be dealt with in accordance with the requirements of the Regulations).

11.2 Public notice shall be given in one or more local newspapers circulating in the district and in one or more newspapers or journals circulating among such persons as undertake such contracts or on a Business Portal setting out particulars of the contract into which the Council wish to enter and inviting persons interested to apply within such period, not less than ten days, as may be specified, for permission to tender. One or more trade journals, or the Business Portal alone, may be used if local advertising would not be appropriate in a particular case.

11.3 All contract notices shall be published on the Council's website and any other relevant websites mentioned in the Council's Procurement Guidance.

11.4 Persons expressing an interest within the time prescribed in the public notice shall be sent a pre-qualification questionnaire (PQQ), to be completed and returned to the Council by a specified date. The PQQ shall set out the selection criteria against which PQQ submissions

11.5 After the expiration of the period specified in the public notice invitations to tender for the contract shall be sent to no fewer than four of the persons who applied for permission to tender, selected by the relevant Head of Team in consultation with the Head of Finance using the information set out in the PQQ or, if fewer than four persons have applied and are considered suitable, to all such persons.

12 Select List of Tenderers Procedure

12.1 This Procedure Rule shall have effect where Cabinet or a decision taken by the relevant Portfolio Holder under the scheme of delegation in the Constitution determines that a select list shall be kept of persons to be invited to tender for contracts.

12.2 The said select list shall:

- (a) be compiled and maintained by such officer of the Council as may be appropriate for the purpose;

- (b) contain the names of all persons who wish to be included in it and are approved by the Council or the Cabinet and
 - (c) indicate whether a person whose name is included in it is approved for contracts for all, or only some, of the specified values or amounts or categories.
- 12.3 At least four weeks before the list is first compiled, notices inviting applications for inclusion in it shall be published in one or more newspapers, trade journals or on a Business Portal.
- 12.4 The said list may be amended as required from time to time and shall be reviewed at intervals not exceeding four years. At least four weeks before each review each person whose name appears in the select list may be asked whether he wishes his name to remain therein and notices inviting applications for inclusion in the list shall be published in the manner provided by paragraph 9 of these Procedure Rules.
- 12.5 Where by virtue of a decision of the Council, of the Cabinet or the relevant Portfolio Holder under the scheme of delegation in the Constitution, invitation to tender for a contract is limited to persons whose names appear in the select list maintained under this Procedure Rule, an invitation to tender for that contract shall be sent to at least four of those persons whose names appear in the said select list as being approved for a contract for that value or amount or of that category, or, if there are fewer than four persons, to all such persons. If there are not less than four such persons, the persons to whom invitations are sent shall be selected in the manner determined by the Council, Cabinet or the Portfolio Holder (as the case may be), either generally or in relation to a particular contract or category of contracts.
- 12.6 For the purposes of Procedure Rule 9.2 B or D the Head of Team concerned shall be entitled to treat as a list kept for the purpose of this Procedure Rule so far as work or goods of the same nature are concerned.
 - (a) any list maintained by Hampshire County Council which the City Council is legally required or entitled to use in connection with any agency arrangement with the County Council.
 - (b) any list maintained by another officer of the Council under this Procedure Rule.
 - (d) any other list maintained by any other organisation which is approved from time to time by Cabinet for the purpose of this rule.
- 12.7 For construction and construction related supplies, the Head of Landlord Services and the Head of Estates are authorised to use Constructionline as a pre-approved list of suppliers.

13 Changes to the approved evaluation method

13.1 Any proposal to accept a quotation or tender which is not in accordance with the approved evaluation method must be approved either by Cabinet or the relevant Portfolio Holder under the scheme of delegation in the Constitution.

14 Procedure on Receipt of Tenders

14.1 Paper tenders shall remain in the secure custody of the Head of Democratic Services, and electronic tenders will not be accessible, until the time appointed for their opening.

14.2 Tenders shall be opened or the secure mailbox accessed at one time and only in the presence of:

- (a) a member of the Council, and
- (b) the Head of Democratic Services or his representative, and
- (c) the Head of Team concerned or an officer of the Council designated by him/her.

14.3 All opened paper tenders shall be signed by the Member of the Council present. For all electronic tenders the Form of Tender shall be printed and signed by the Member of the Council present.

14.4 The Head of Democratic Services or his representative shall at the time the tenders are opened record:

- (a) the tender reference or title, the nature of goods, services or materials to be supplied or the work to be executed
- (b) the name of each person by or on whose behalf a tender was submitted
- (c) the amount of each tender
- (d) the date and time of the opening of the tenders
- (e) the names of all persons present at the opening of the tenders.

and the record shall be signed by all persons present.

14.5 A copy of the tender record must be retained by the Head of Democratic Services and the relevant Head of Team responsible for the procurement. The Head of Team shall notify each tenderer that their tender has been received.

14.6 Tenders received after the closing date/time set may be opened in the absence of a member of the Council but all other requirements above shall be complied with. For paper tenders the envelope enclosing the tender shall be retained by the Head of Democratic Services; for electronic tenders the secure mailbox shall be retained and monitored for a period of two working days after the deadline. A note shall be compiled by the relevant Head of Team recording the circumstances of the late tender. No such tender may be accepted without consulting the Head of Legal Services, and if the Head of Legal Services considers it appropriate, the express authority of the relevant Portfolio Holder under the scheme of delegation in the Constitution should also be obtained, taking into account the circumstances of the late tender.

14.7 Where a tender is accidentally opened prior to the formal tender opening, the person opening the tender shall make a full report and submit such report, the tender (and the envelope in the case of paper tenders) to the Head of Democratic Services. The tender shall then be retained by the Head of Democratic Services until the formal tender opening, when it shall be processed as set out above, and a note of the accidental opening added to the tender record.

15 Nominated Sub-Contractors and Suppliers

15.1 Where the Council nominates a subcontractor or supplier to a main contractor, the provisions of Procedure Rules 9,10, 11 and 12 shall apply (with any necessary alterations to the wording) as if the contract were to be entered into with the Council

Provided that if -

- (a) goods, supplies services or equipment are obtainable only from one contractor; and
- (b) in the opinion of the Council's architect, engineer, surveyor or consultant (whether in-house or external) no reasonably satisfactory alternative is available in the special circumstances of the case,

the requirements of Procedure Rules 9,10, 11 and 12 shall not apply to such goods, supplies services or equipment.

15.2 The terms of the invitation for a nominated sub-contractor shall require an undertaking by the tenderer if he is selected he will be willing to enter into a contract with the main contractor on terms which indemnify the main contractor against his own liabilities under the main contract in relation to the goods, supplies services or equipment included in the subcontract.

15.3 Where the Head of Team concerned considers that it is necessary or appropriate for the Council to enter into an agreement with the

nominated subcontractor or supplier he shall have authority to arrange for such an agreement to be entered into accordingly.

15.4 It shall be a condition of the employment by the Council of any person (not being an officer of the Council) to supervise a contract that in relation to such contract, he shall comply with the requirements of Contracts Procedure Rules as if he were an officer of the Council.

16 Alterations To Tenders

16.1 Every Invitation to Tender shall contain a statement that the Council will not accept applications for alteration of the tender received after the closing date for tenders.

16.2 A tenderer shall be able to change an error in their submission prior to the closing date and time for receipt of tender responses by resubmitting new tender documents and clearly highlighting which documents are correct and should be considered as part of the tender process.

16.3 All tenders shall be checked after opening for arithmetical errors or other discrepancies. In the event of an arithmetical errors or other discrepancies become apparent, the tenderer shall be given details of the error or discrepancy found during the examination of the tender and shall be given the opportunity of:

- (a) confirm the tender without amendment; or
- (b) withdrawing the tender; or
- (c) amend the tender to correct genuine arithmetic errors provided that in this case, apart from these arithmetic errors, no other adjustment, revision or qualification is permitted. In this case, written confirmation should be requested from the tenderer as to the error or discrepancy and confirming what the correct entry should be.

16.4 Nothing in Contract Procedure Rule 16 shall permit alteration of any tender where the tender price is a single total figure.

17 Post Tender Clarification and Negotiation

17.1 Post Tender clarification may be undertaken with tenderers only where it is essential in order to be completely clear about any fundamental aspect of the tender submission before the completion of the tender evaluation process is possible. Such communication shall be solely about seeking clarification and explanation and shall be conducted either in writing or in a meeting. All correspondence or meetings must be documented and retained on the procurement file. Where a meeting is required, there must always be more than one officer present.

17.2 Any paper tender which is not signed shall be acceptable provided the tenderer submits a signed copy of the form of tender in the same form as the unsigned submitted version.

17.3 Any guidance issued by the Head of Legal Services or the Head of Finance with respect of post tender clarification or negotiation must be taken into account.

18 Tender Evaluation

18.1 The evaluation criteria (along with associated weightings) shall be set out in the Invitation to Tender or the Invitation to Negotiate.

18.2 Tenders subject to the Public Contracts Regulations shall be evaluated in accordance with the relevant Regulations. All other tenders shall be evaluated in accordance with the evaluation criteria set out in the Invitation to Tender.

18.3 The evaluation criteria shall be predetermined and approved by the relevant Head of Team, and in accordance with any requirements for approval by Members (see 9.1 (d) above). The criteria shall be listed in the Invitation to Tender or the Invitation to Negotiate and shall be strictly observed (and remain unchanged) at all time throughout the contract award procedure.

19 Awarding Contracts (Acceptance of Quotation and Tenders)

19.1 If only one quotation or tender is received as part of a tender process, then advice should be sought from the Head of Legal Services on the correct way to proceed.

19.2 Quotations and tenders shall be evaluated in accordance with the pre-agreed evaluation criteria (price or most economically advantageous tender) and awarded in accordance with those criteria, provided this is within the relevant approved budget and the estimate for the contract.

19.3 A contract may only be awarded by an Officer with the requisite delegated authority to award contracts. The relevant Head of Team should ensure, prior to award, that the budget holder responsible for the contract has sufficient funds in place to sustain the contract prior to award.

19.4 No contract shall be entered into unless all relevant requirements in the Financial Procedure Rules have been complied with, including in particular the requirement to notify the Head of Finance of all contracts over £100,000 in value (before entering into the contract to ensure proper financial management of the Council).

19.5 All award decisions shall be recorded in writing, signed and dated by the relevant Head of Team and retained on the contract file.

20 Documentation, Insurance, Liquidated Damages and Bonds

20.1 Every contract or order exceeding £10,000 in value or amount shall be in writing, and shall specify

(a) the work, services, materials, matters or things to be furnished had or done including the required standard and/or the relevant specification;

(b) the price to be paid with a statement of discounts or other deductions;

and

(c) (where appropriate) the time or times within which the contract is to be performed and whether the time or times so specified is or are to be of the essence of the contract.

20.2 The Head of Legal Services shall be informed of every proposed contract which exceeds £50,000 in value or amount and if he so determines a formal contract shall be prepared or approved by him.

20.3 Every contract required to be in writing under Contract Procedure Rule 20.1 shall either be executed under seal, if so required by the Head of Legal Services, or in all other cases shall be signed by two officers authorised for the purpose.

20.4 Every contract for the execution of works which exceeds £50,000 in value or amount shall, unless otherwise agreed by the Head of Finance, provide for liquidated damages to be paid by the contractor in case the terms of the contract are not duly performed. The value or formula for calculating liquidated damages shall be specified in the contract.

20.5 Unless otherwise agreed by the Head of Finance, every contract for the execution of works exceeding £50,000 in value or amount shall require the contractor to produce satisfactory insurance policies in respect of employers liability, third party and fire risks in a sum of not less than £5,000,000 (or such other sum as may be specified in the Council's adopted Insurance Guide) in respect of any one accident. Such policies shall be maintained by or on behalf of the contractor during the term of the contract. The Head of Finance shall be consulted and a risk assessment carried out before a lower level is agreed.

20.6 In respect of every contract exceeding £125,000 and in every other case where the Council so decides, the Council shall require and take

sufficient security for the due performance of any such contract by taking a bond for 10% of the total cost or such other percentage as the Head of Finance approves. The bondsman shall be such as must be approved by the Head of Finance. The Head of Finance may approve a suitable alternative form of security, such as a parent company guarantee, or a stakeholder arrangement involving retention of monies due to a contractor.

20.7 All contracts over £250,000 or where the contractor will come into contact with the public shall supply copies of the contractor's health and safety policies.

21 Contracts Register

21.1 A contracts register shall be maintained by the Head of Finance, containing details of:

- a) Any contract that is for a finite period, that will need to be reviewed at the end of that period, regardless of value;
- b) Any other contract that is above the value of £50,000.

21.2 The Head of Team who is responsible for any particular procurement shall ensure that details of any contracts in 21.1 above entered onto the Contracts Register within two weeks of the contract being entered into.

22 Commencement of Contract

22.1 No contract shall commence until a formal agreement has been entered into, and where applicable the contract documents have been sealed by the contractor, and all other procedures have been completed to the satisfaction of the Head of Legal Services. Provided that where evidence of satisfactory insurances has been supplied by the contractor and it is in the interests of the Council that work commences prior to the sealing of the contract, work may commence if the Head of Legal Services approves the terms of a Letter of Intent, setting out the works and maximum value of works such as may be undertaken.

22.2 It shall be a condition of every contract to be secured by a bond that no payment shall be made to the contractor until the bond has been duly executed.

22.3 Records shall be kept on the contract file for each procurement in the relevant Team of all pre-contract meetings held with the contractor.

23 Monitoring of Contracts

- 23.1 The Head of Team must ensure that all contracts are monitored throughout the contract period, and the performance of contractors is reviewed regularly.
- 23.2 In particular, the Head of Team shall ensure that where the contractor has been required to submit Health and Safety Policies in accordance with these Contracts Procedure Rules, the contract monitoring process includes monitoring of the implementation and effectiveness of such Health and Safety Policies.
- 23.3 Records of review meetings or site meetings (as applicable) shall be kept on the contract file.
- 23.4 Where contracts include a retention of monies provision the Head of Team shall ensure that release of such monies is managed in accordance with the contract terms.
- 23.5 The Head of Team shall monitor contract expenditure and report on any contractual overspend in accordance with the relevant provisions of the Financial Procedure Rules.

24 Prevention of Corruption

- 24.1 In every formal contract a clause shall be inserted to secure that the Council shall be entitled to cancel the contract and to recover from the contractor the amount of any loss resulting from such cancellation, if the contractor shall have offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of the contract or any other contract with the Council, or for showing or forbearing to show favour or disfavour to any person in relation to the contract or any other contract with the Council, or if the like acts shall have been done by any person employed by him or acting on his behalf (whether with or without the knowledge of the contractor) or, if in relation to any contract with the Council the contractor or any person employed by him or acting on his behalf shall have committed any offence under the Prevention of Corruption Acts 1889 to 1916 or the Bribery Act 2010, or shall have given any fee or reward the receipt of which is an offence under the provisions of Section 117 of the Local Government Act 1972.

25 Framework Agreements

- 25.1 Where a Framework Agreement is used in accordance with Rule 2.4 (b), the contract shall be awarded either:

- (a) applying the terms laid down in the Framework Agreement (where such terms are sufficiently precise to cover the particular call off) without re-opening competition or
- (b) where the terms laid down in the Framework Agreement are not precise enough or complete for the particular call off, by holding a mini competition in accordance with the following procedure:
 - i. Inviting all organisations within the Framework Agreement that are capable of executing the subject of the contract to submit written tenders:
 - ii. Fixing a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract.
 - iii. Awarding each contract to the tenderer on the basis of best price or most economically advantageous tender.

26 **Partnering Arrangements**

26.1 No Partnership or Joint Venture Arrangement shall be entered into by the Council except with the approval of Cabinet or under the Portfolio Holder Decision Notice Scheme except:

- (a) where there is no on-going commitment by the Council and the payment by the partner(s) to the Council does not exceed £25,000 or
- (b) any payment by the Council does not exceed £25,000 and is provided for in existing budgets and
- (c) The Head of Finance has been consulted.

27 **Post Contract Arrangements - Contract Variation, Extension and Renewal**

27.1 All variations to a contract must be authorised in writing by the appropriate officer and made in accordance with the provisions of the contract. If there is reason to believe that the estimated final cost of any contract will increase beyond a 10% permitted variation or £10,000 then a written report will be required to the Head of Finance.

27.2 Contracts should not be extended beyond the period for which they were awarded unless i) provision for extension was included in the contract documents and ii) (where the value of the extension exceeds £100,000), the extension is approved by Cabinet, Committee or the relevant

Portfolio Holder under the scheme of delegation in the Constitution.

Where the terms do not expressly provide for extension, advice must be sought from the Head of Legal Services.

- 27.3 Any contract extension must not be longer than two years. In all other circumstances an extension of contract will require the written approval of the Head of Legal and the Head of Finance following consideration of a report from the Head of Team. They shall only approve an extension if it can be demonstrated that this will achieve best value for money for the Council and will not contravene any legal requirement. Extensions of contract cannot be approved retrospectively. Once a contract expires it cannot be extended.

28 Retention of Contractual Documents

- 28.1 All Pre-Qualification Questionnaires, tenders (successful or unsuccessful) and contracts must be kept in accordance with the Council's adopted Records Retention Policy.

29 Claims Arising from Contracts

- 29.1 Claims arising from contracts (either by the contractor or the Council) in respect of matters not clearly within the terms of any existing contract shall be determined by the relevant Head of Team after having acted on the advice of the Head of Legal Services on the Council's legal liability and the Head of Finance on the financial considerations.
