

TONBRIDGE AND MALLING BOROUGH COUNCIL**Contracts Procedure Rules****1 Introduction – Purpose of the Contracts Procedure Rules**

- 1.1 Purchasing decisions and processes are important because the money involved is public money. The purpose of these Contracts Procedure Rules is to provide a structure within which purchasing decisions are made and implemented and which ensure that the Council:
 - 1.1.1 Furthers its corporate objectives
 - 1.1.2 Uses its resources efficiently
 - 1.1.3 Purchases quality goods, services and works
 - 1.1.4 Safeguards its reputation from any implication of dishonesty or corruption.
- 1.2 Purchasing by the Council, from planning to delivery, shall incorporate (where appropriate) principles of sustainability, efficiency, whole life costs and cost savings.
- 1.3 These Contracts Procedure Rules are made in accordance with the requirements of Section 135 of the Local Government Act 1972.
- 1.4 These Contracts Procedure Rules do not provide guidelines on what is the best way to purchase works, supplies (goods) and services. They set out minimum requirements to be followed. Further information and guidelines are set out in the Council's Purchasing Guide which must be followed.

2 General Principles – Application and Compliance with Contracts Procedure Rules

- 2.1 These Contracts Procedure Rules apply to the purchase by or on behalf of the Council of works, supplies (goods) and services.
- 2.2 These Contracts Procedure Rules apply to all contracts including all purchase orders, concessions and contractual arrangements entered into by or on behalf of the Council, except for the specific types of contracts and purchasing methods which are listed in 2.3.
- 2.3 These Contracts Procedure Rules do not apply to:
 - 2.3.1 Employment contracts
 - 2.3.2 Contracts relating solely to the purchase or sale of interests in land
 - 2.3.3 Contracts for retention of legal counsel and the appointment of expert witnesses in legal proceedings
 - 2.3.4. Service level agreements setting out the conditions which the Council applies to its funding of particular voluntary sector bodies.

3 General Principles Applying to All Contracts

- 3.1 All purchases however small shall be evidenced in writing.
- 3.2 Subject to 3.4 below, standard contract clauses shall be used in all contracts of a value of £75,000 or more. The standard contract clauses are issued by the Chief Solicitor and can be found on the Council's share drive at 'H:\share\Procurement\WebFiles\Staffnet\Core.doc' for service contracts and the latest edition of standard printed form contracts such as JCT or ICE contracts for works contracts and the Council's standard terms and conditions for supply contracts which can be found in Appendix 1 to the Purchasing Guide. The standard contract clauses must be modified to suit the particular contract in consultation with the Chief Solicitor or other professional advisors.
- 3.3 Subject to 3.4 below, as a minimum, all contracts of a value of £5,000 or more shall include clauses in the format contained in Appendix 1 to the Purchasing Guide or shall set out:
 - 3.3.1 The works, supplies (goods), services, material, matters or things to be carried out or supplied and the price to be paid for them
 - 3.3.2 The time within which the contract is to be performed
 - 3.3.3 Quality requirements and/or standards which must be met
 - 3.3.4 Requirements on the contractor to hold and maintain appropriate insurance
 - 3.3.5 What happens in the event that the contractor fails to comply with its contractual obligations (in whole or in part)
 - 3.3.6 Requirements on the contractor to comply with all relevant equalities and health and safety legislation and any other legislation relevant to the contract
 - 3.3.7 That the Council shall be entitled to cancel the contract and recover losses in the event that the contractor does anything improper to influence the Council to give the contractor any contract or commits an offence under the Prevention of Corruption Acts 1889 to 1916 or s117(2) Local Government Act 1972.
 - 3.3.8 That the contract is to be governed by English law and subject to the exclusive jurisdiction of the courts of England and Wales.
- 3.4 The terms of all information technology contracts for software or support services of a value over £5,000 shall either include clauses in the format contained at Appendix 1 to the Purchasing Guide or be approved by the relevant Chief Officer in consultation with the Technology Manager and the Chief Solicitor.
- 3.5 Written contracts shall not include non commercial terms unless these are necessary to achieve best value for the Council. In this context, "non commercial" means requirements unrelated to the actual performance of the contract.
- 3.6 All contracts shall include relevant specifications and/or briefs/technical requirements which are prepared taking into account the need for effectiveness of

delivery, quality, sustainability and efficiency (as appropriate) and the information set out in the Council's Purchasing Guide.

- 3.7 All contracts which involve a substantial risk to the Council must be subject to a written risk assessment, which should be kept on the contract file.

4 Regulatory Context

- 4.1 All purchasing shall be conducted in accordance with Regulatory Provisions which are:

4.1.1 All relevant statutory provisions

4.1.2 The relevant EU Rules and EC Treaty Principles which are defined in the Council's Purchasing Guide

4.1.3 The Council's Constitution including these Contracts Procedure Rules, the Council's Financial Procedure Rules and Scheme/s of Delegation

4.1.4 The Council's Purchasing Guide and other policies and procedures of the Council as appropriate.

- 4.2 In the event of conflict between the above, the EU Rules will take precedence, followed by UK legislation, then the Council's Constitution, the Council's Purchasing Guide and guidelines, policies and procedures.

5 Responsibilities of Chief Officers and Responsible Officers

- 5.1 Each Chief Officer shall:

5.1.1 be responsible for the purchasing undertaken by his/her Service

5.1.2 be accountable to the Executive for the performance of his/her duties in relation to purchasing

5.1.3 comply with the Council's decision making processes including, where appropriate, implementing and operating a Scheme/s of Delegation

5.1.4 appoint a Responsible Officer in writing who shall be an authorised signatory (see 5.2 below)

5.1.5 take immediate action in the event of breach of these Contracts Procedure Rules.

- 5.2 A Responsible Officer is an officer with responsibility for conducting purchasing processes for the purchase of works, supplies (goods) or services on behalf of the Council who has been authorised in writing by a Chief Officer to carry out those procurement tasks which the Chief Officer has authority to perform in accordance with the Council's Scheme of Delegations in Part 3 of the Constitution.

- 5.3 A Responsible Officer's duties in respect of purchasing are to ensure:

- 5.3.1 compliance with all Regulatory Provisions and integrity of the tender process
 - 5.3.2 compliance with the relevant statutory provisions and the Council's requirements relating to declarations of interest affecting any purchasing process
 - 5.3.3 that there is an appropriate analysis of the requirement, timescales, procedure and documentation to be used
 - 5.3.4 the purchasing process, from planning to delivery incorporates (where appropriate) principles of sustainability, efficiency, whole life costs and cost savings
 - 5.3.5 compliance with the Council's decision making processes
 - 5.3.6 that all contracts of a value of £15,000 or more are included on the Council's Contract Register
 - 5.3.7 that proper records of all contract award procedures, waivers, exemptions and extensions are maintained, with separate files for each purchase of a value of £15,000 or more
 - 5.3.8 that value for money is achieved
 - 5.3.9 that adequate and appropriate security (such as a bond or guarantee) is taken to protect the Council in the event of non-performance as deemed necessary
 - 5.3.10 that risk assessments are undertaken in respect of all contracts and where there is a significant risk identified a written risk assessment is carried out and kept on the contract file.
- 5.4 In considering how best to procure works, supplies and services Chief Officers and/or Responsible Officers (as appropriate in the context) shall take into account wider contractual delivery opportunities and purchasing methods including the use of Purchasing Schemes and e-procurement/purchasing methods, and the availability of local authority charging and trading powers under the Local Government Act 2003.
- 5.5 It is a disciplinary offence to fail to comply with these Contracts Procedure Rules and the Council's Purchasing Guide. All employees have a duty to report breaches of Contracts Procedure Rules to the relevant Chief Officer, the Council's Chief Internal Auditor and the Monitoring Officer.
- 5.6 Any officer or Member who suspects any misconduct or corruption in relation to the purchase by or on behalf of the Council of works, supplies (goods) and services must immediately report that suspicion to the Chief Executive, Director of Finance, Monitoring Officer or to the Council's Chief Internal Auditor in accordance with the Council's Confidential Reporting Code.

6 Scheme/s of Delegation

- 6.1 Council purchasing may only be undertaken by Chief Officers or by an officer authorised in writing by a Chief Officer to exercise powers on his/her behalf in accordance with the Council's Scheme of Delegations in Part 3 of the Constitution. Chief Officers may only authorise other officers to undertake purchasing who have the appropriate skills and knowledge for the task.
- 6.2 Officers shall, where appropriate, be informed by their Chief Officer in the written instrument appointing them of the extent of any delegated authority and applicable financial thresholds.

7 Financial Thresholds and Procedures

- 7.1 The table below sets out the general rules applying to the choice of purchasing procedure for contracts at the stated threshold values.
- 7.2 There is a general presumption in favour of competition. Wherever possible contract opportunities should be advertised by way of a public notice. The Council must consider the potential effect of a contract on interstate trade (at a European level). If a contract may be of interest to contractors from other member states then this may result in a need to advertise in a manner which ensures that potential contractors from other member states are aware of the opportunity, even for small value contracts or contracts under the EU Threshold levels outlined below.
- 7.3 The public notice referred to at 7.2 may take the form of a notice or advertisement in an electronic or paper format, on an easily accessible website or other electronic media and/or in the press, trade journals or Official Journal of the European Union ("OJ") (as appropriate). The Responsible Officer may choose to place one or more public notices in different media.

7.4 Table setting out financial thresholds and procedures

Total value £	Type of contract	Procedure to be used
Up to but not including 5,000	works, supplies and services	At least one quote in advance
5,000 up to but not including 75,000	works, supplies and services	At least three written quotes in advance
75,000 up to but not including 139,893**	works, supplies and services	At least three written tenders in advance, following advertisement by public notice
139,893** plus **EU Threshold for supplies and services	Supplies and services	EU Rules apply – full competitive process following advertisement in the OJ for supplies and ‘Part A*’ services. Members to approve process in advance (CPR 8.1) For ‘Part B*’ services reduced requirements apply under the EU Rules but there is a presumption in favour of advertising and a competitive process. Members to approve process in advance (CPR 8.1)
139,893 up to but not including 3,497,313**	Works	Full competitive process with tenders following advertisement by public notice Members to approve process in advance (CPR 8.1)
3,497,313** plus **EU Threshold for works	Works	EU Rules apply – full competitive process with tenders following OJ advertisement Members to approve process in advance (CPR 8.1)

* For the purposes of the EU Rules services are divided into two types and the EU Rules apply to a different degree. Responsible Officers should act cautiously and seek advice when considering the procedure to be used and application of the EU Rules to services contracts

** or relevant threshold in force at the time under the EU Rules

7.5 Where contracts are of a type and value which means that they are subject to the EU Rules then there are four main types of EU procedures available. These are the open, restricted, competitive dialogue and competitive negotiated procedures. Care must be taken to ensure that the correct and most appropriate procedure is used and assistance on the choice and use of EU procedure should be sought from Legal Services.

8 Financial Thresholds and Processes Applying to Approval and Execution of Contracts

8.1 For Service and supply (goods) contracts valued at or over the EU threshold (in force at the time) and for works contracts which are valued at or over the EU services/supply threshold (in force at the time) the choice of procedure to be used and the decision to proceed to advertisement must be authorised by the Executive in advance SUBJECT TO an exception for simple or routine lower value contracts where officers may apply to the Chief Executive in consultation with the Monitoring Officer to authorise the choice of procedure and decision to advertise subject to

such exception being fully documented and complying with the EU rules. Guidance on the type of simple or routine lower value contracts which may be caught by this exception from the need to seek Executive approval are set out in the Council's Purchasing Guide.

- 8.2 When a decision is made to award a contract then the Responsible Officer must, in addition to complying with his/her general obligations under these Contracts Procedure Rules ensure, in particular, that:
 - 8.2.1 the appropriate approvals have been obtained to authorise that decision (see rules 12.4 and 12.5 below); and
 - 8.2.2 where appropriate, a standstill period complying with the EU Rules is incorporated into the final award process.
- 8.3 Any contracts valued at £75,000 or above shall be executed as a deed. Officers with the appropriate delegated authority may sign other contracts. £10,000 shall be the threshold for the purposes of Regulation 8 of the Local Authority (Executive Arrangements) (Modification of Enactments and Further Provisions) (England) Order 2001.
- 8.4 Electronic signatures may be used in accordance with the Electronic Signature Regulations 2002 provided the sufficiency of security arrangements has been approved by the Council's Information Technology Manager.

9 Calculating the Contract Value

- 9.1 The starting point for calculating the contract value for the purposes of these Contracts Procedure Rules is that the contract value shall be the genuine pre-estimate of the value of the entire contract excluding Value Added Tax. This includes all payments to be made, or potentially to be made, under the entirety of the contract and for the whole of the predicted contract period (including proposed extensions and options). Where the contract is a rolling contract which does not specify a contract period or end date, the contract period shall notionally be taken to be 4 years for the purpose of calculating the contract value to apply these Contracts Procedure Rules.
- 9.2 There shall be no artificial splitting of a contract to avoid the application of the provisions of the EU Rules and/or these Contracts Procedure Rules.
- 9.3 The EU Rules can cover contracts which are below the stated EU threshold where they constitute repeat purchases and/or purchases of a similar type in a specified period. Responsible Officers should therefore seek advice on the application of the EU Rules where they envisage that they may require repeat purchases and/or purchases of a similar type.

10 Principles Underlying Tendering Processes and Tender Evaluation

- 10.1 All tendering procedures (including obtaining quotes), from planning to contract award and signature, shall be undertaken in a manner so as to ensure:
 - 10.1.1 Sufficient time is given to plan and run the process
 - 10.1.2 Equal opportunity and equal treatment

- 10.1.3 Openness and transparency
- 10.1.4 Probity
- 10.1.5 Outcomes which deliver sustainability, efficiency and cost savings (where appropriate).

11 Submission and Opening of tenders

- 11.1 An Invitation to Tender shall be issued by the Council for all contracts over £75,000 and tenders shall be submitted in accordance with the requirements of the Invitation to Tender.
- 11.2 Any tenders received (other than those received electronically, to which 11.3 shall apply) shall be:
 - 11.2.1 contained in a plain envelope which is securely sealed and bears the completed tender envelope address label sticker supplied by the Council
 - 11.2.2 free from any distinguishing mark or matter which identifies the sender
 - 11.2.3 kept in a safe place by the Council's Central Services Director
 - 11.2.4 retained unopened until the date and time specified for its opening.
- 11.3 Where the Council has indicated in the Invitation to Tender that a tender can or must be submitted electronically, then those tenders shall be:
 - 11.3.1 addressed to the e-mail address as notified in the Invitation to Tender
 - 11.3.2 in the format specified in the Invitation to Tender
 - 11.3.3 stored in a secure mailbox, which requires a code or other appropriate security measure, to open it
 - 11.3.4 retained unopened until the date and time specified for its opening.
- 11.4 No tender received after the time and date specified for its opening shall be accepted or considered by the Council unless the Chief Executive in consultation with the Monitoring Officer is satisfied that there is sufficient evidence of the tender having been dispatched in time for it to have arrived before the closing date and time, or other exceptional circumstances apply and the other tenders have not been opened.
- 11.5 Tenders shall be opened by the Council's Cabinet Member for Finance in the presence of the Chief Executive, the Monitoring Officer or the Chief Internal Auditor or their representatives and an immediate record shall be made of tenders received including names and addresses and the date and time of opening.

12 Evaluation of Quotes and Tenders and award of Contract

- 12.1 All quotes and tenders shall be evaluated in accordance with evaluation criteria notified in advance to those submitting quotes/tenders.
- 12.2 Tenders subject to the EU Rules shall be evaluated in accordance with the EU Rules.
- 12.3 Save in exceptional circumstances approved in advance by the Executive all contracts shall be awarded on the basis of the quote or tender which represents best value for money to the Council and not on the basis of lowest price.
- 12.4 All service supply (goods) or works contracts which are valued below the EU service or supply threshold (in force at the time) may be awarded by the relevant Chief Officer provided that there is an approved budget and the procurement has been conducted in accordance with these Contracts Procedure Rules.
- 12.5 Subject to the exception referred to in this rule all service or supply (goods) contracts valued at or over the relevant EU threshold (in force at the time) and works contracts valued at or over the EU service/supply threshold shall be awarded by the Executive or Council following a report by the relevant Chief Officer(s) on the tenders received or such decision shall be delegated to named officers or officers in consultation with members by the Executive or Council. The exception referred to relates to simple or routine lower value contracts where officers may apply to the Chief Executive in consultation with the Monitoring Officer to determine the award of the Contract provided that the decision is fully documented, complies with the EU rules and has otherwise been conducted in accordance with these Contracts Procedure Rules. Guidance on the type of simple or routine lower value contracts which may be caught by this exception is set out in the Council's Purchasing Guide.

13 Waivers

- 13.1 Subject to the approval being given in rule 13.3.3 below and the correct process in rules 13.2, 13.3 and 13.4 being followed the requirement for the Council to conduct a competitive purchasing process for contracts in excess of £5,000 may be waived in the following circumstances.
 - 13.1.1 For contracts which are not subject to the EU Rules, the work, supply or service is required as a matter of urgency and a delay would be likely to lead to financial loss, personal injury or damage to property; or
 - 13.1.2 the circumstances set out in Regulation 14 apply (whether or not the contract is of a type which is subject to the application of the EU Rules); or
 - 13.1.3 the contract is awarded under a Purchasing Scheme of a type where a competition has already been undertaken on behalf of the Council; or
 - 13.1.4 at the discretion of the relevant Chief Officer who may proceed in a manner most expedient to the efficient management of the Service/Council with reasons recorded in writing.

- 13.2 A Responsible Officer whom seeks a waiver of Contracts Procedure Rules, shall do so only in advance and only in exceptional circumstances. Further guidance on what may constitute exceptional circumstances permitting waiver of these Contracts Procedure Rules is set out in the Council's Purchasing Guide.
- 13.3 All waivers from these Contracts Procedure Rules must be:
- 13.3.1 Fully documented
 - 13.3.2 Subject to a written report to be submitted in advance to the Chief Executive, the Director of Finance and the Monitoring Officer which shall include reasons for the waiver which demonstrate that the waiver is genuinely required
 - 13.3.3 Subject to approval in advance by the officers referred to in 13.3.2 above who shall record that they have considered the reasons for the waiver and that they are satisfied that the circumstances justifying the waiver are genuinely exceptional. Applications for waiver which are a result of poor contract planning will not usually be considered exceptional.
- 13.4 All decisions on waivers must take into account:
- 13.4.1 Probity
 - 13.4.2 Best value/value for money principles.
- 13.5 For contracts subject to the EU Rules, any waiver from the requirement for competition must meet the conditions set out in the EU Rules in addition to the general requirements above.
- 13.6 A waiver shall not be applied for reasons of poor contract planning.
- 13.7 For those Contracts valued at £75,000 or more the relevant Chief Officer shall report the waiver to the next appropriate meeting of the Executive or Council.

14 Extensions to Existing Contracts

- 14.1 Subject to rule 14.6 below where extensions to existing contracts are made the extensions must be determined in accordance with the contract terms, for a specified period and made in accordance with the principles set out in the Council's Purchasing Guide.
- 14.2 Subject to rule 14.6 below any extension to a contract valued at £75,000 or more must be:
- 14.2.1 Fully documented
 - 14.2.2 Subject to a written report to be submitted to the Executive or Council which shall include reasons for the extension which demonstrate that the need for the extension is genuinely exceptional
 - 14.2.3 Subject to approval by the Executive or Council who shall record that they have considered the reasons for the extension and that they are

satisfied that the circumstances justifying the extension are genuinely exceptional.

- 14.3 Subject to rule 14.6 below any extension to an existing contract valued at under £75,000 may be determined by the relevant Chief Officer provided that there is an authorised budget and that rules 14.1, 14.4 and 14.5 have been complied with. The reasons for the decision must be fully documented.
- 14.4 Subject to rule 14.6 below any extension must take into account:
 - 14.4.1 Probity
 - 14.4.2 Best value/value for money principles.
- 14.5 For contracts subject to EU Rules, any extension must meet the conditions set out in the EU Rules in addition to the more general requirements set out above.
- 14.6 This rule 14 does not apply to an extension of time under a standard JCT/ICE works Contract or their equivalent where the extension is permitted in the Contract due to the occurrence of unforeseen events. Such an extension should be dealt with in accordance with the terms of the particular contract.
- 14.7 Where continuing work originally estimated to cost below £75,000 has been performed over a period, the appropriate Chief Officer shall monitor the total cost of that work. As soon as it is apparent that the work has exceeded £75,000, or the work is of such a nature that it will need to continue for a further period and future costs will take the total value of the work over £75,000, he/she shall report the circumstances to the next meeting of the Executive or Council and follow the procedure in 14.2 above.

15 Purchasing Schemes

- 15.1 A Responsible Officer may use Purchasing Schemes subject to the following conditions and the Council's Purchasing Guide.
- 15.2 Responsible Officers must check in advance that
 - 15.2.1 The Council is legally entitled to use the Purchasing Scheme
 - 15.2.2 The purchases to be made do properly fall within the coverage of the Purchasing Scheme
 - 15.2.3 The establishment and operation of each Purchasing Scheme is in compliance with the EU Rules (where they apply) and meets the Council's own requirements.
- 15.3 A "Purchasing Scheme" may include:
 - 15.3.1 Contractor prequalification lists/select lists
 - 15.3.2 Framework arrangements (including those set up by the Office of Government Commerce)

- 15.3.3 Purchasing arrangements set up by central purchasing bodies and commercial organisations
 - 15.3.4 Consortium purchasing
 - 15.3.5 Collaborative working arrangements
 - 15.3.6 Formal agency arrangements
 - 15.3.7 E-procurement/purchasing schemes and methods
 - 15.3.8 Other similar arrangements.
- 15.4 Where a Purchasing Scheme is used then there shall be a whole or partial exemption from the obligations under these Contracts Procedure Rules in respect of the choice and conduct of procedures to the extent permitted and indicated in the Council's Purchasing Guide.

16 Review and Changes to these Contracts Procedure Rules

- 16.1 These Contracts Procedure Rules shall be reviewed and updated on a regular basis. Save in the case of revisions to the EU Thresholds in Contract Procedure Rule 7, amended Contracts Procedure Rules shall be agreed and adopted by full Council. Revisions to the EU Thresholds in the table at 7.4 shall be dealt with by the Chief Solicitor who may amend such thresholds with effect from the date when new thresholds are introduced by directives or other legislation.