

# Annex 2

## Tonbridge and Malling Borough Council

### Purchasing Guide

#### Introduction – the Contracts Procedure Rules (CPRs) and this Purchasing Guide

- The CPRs are the starting point for good purchasing practice. They contain the core obligations for a robust purchasing framework. As they form part of the Council's Constitution, they can only be changed by resolution of full Council, unless specific powers to make amendments have been delegated to an Officer or other body. They are made under the Council's powers under section 135 of the Local Government Act 1972 and one aim has been to be as consistent as possible with other purchasing districts in Kent.
- This Purchasing Guide provides practical guidance on how the CPRs apply to purchasing decisions and processes. It explains some of the more technical and legal issues involved in procurement and provides practical working examples.
- You must use this Purchasing Guide when purchasing on behalf of the Council. You must also follow the CPRs and the other documents referred to in CPR 4.1.
- Purchasing can involve complex technical provisions and legal rules. Breach of those technical provisions, the legal rules, the CPRs or this Purchasing Guide can have serious consequences for the Council and for you. If you are in doubt then you must seek assistance. If you have any queries about the CPRs, this Purchasing Guide or the other documents used in or related to the Council's purchasing, then please contact the Chief Solicitor or the Council's Chief Internal Auditor.
- The structure of this Purchasing Guide follows the structure of the CPRs. In this Purchasing Guide, the CPRs are set out in shaded boxes, followed by commentary and guidance on those CPRs.
- This Purchasing Guide is a "living" document which will be reviewed regularly. If you have comments or suggestions for improvements please contact the Chief Solicitor or the Council's Chief Internal Auditor.

## THE PURCHASING GUIDE

### 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, equality, 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.

### CPR 1.1

- 1 Good and effective purchasing must be embedded in the day to day practices of the Council. The key objectives of purchasing, outlined in CPR 1.1 and CPR 1.2, must be taken into account from the initial planning and conceptual stages of the purchasing process. The purchasing process is not limited to the stage when you seek a quote or tender.
- 2 Failure to consider these key issues can impact on both the quote or tender process, and also the long term delivery of the works, supplies or services which are being purchased.

Example: You need to think carefully about the quality and specification for the goods you wish to purchase. Failure to incorporate your requirements into the contract may result in substandard or poor quality goods being provided to the Council. The Council is unlikely to be able to do very much about this, if its own requirements have not been clearly specified in the tender and contract documents.

Conversely, if the Council has clearly specified the quality of the goods required and when delivered they are not up to standard, then the Council will be able to ensure that standards can be improved or, potentially, cancel the contract arrangements.

## CPR 1.2

3 You must take into account the principles of sustainability, equality, efficiency, whole life costs and cost savings, during the purchasing process.

4 **"Sustainability"**: The UK Government's sustainable development strategy sets out four key priority areas for action:

- Sustainable consumption and production
- Climate change and energy
- Protecting natural resources
- Creating sustainable communities and a fairer world

Sustainable procurement is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment. The Council's Climate Change Strategy requires all officers who procure goods works and services to have regard to the Council's sustainable procurement policy when conducting procurement.

**"Equality"**: The Council is subject to the public sector equality duty which requires it to have due regard to the need to:

- (i) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act 2010;
- (ii) to advance equality of opportunity between persons who share a relevant protected characteristic and those not sharing it; and
- (iii) to foster good relations between persons who share a relevant protected characteristic and those not doing so. For these purposes the protected characteristics are age, disability, gender re-assignment, pregnancy and maternity, race (including ethnic or national origins, colour or nationality) religion or belief (including lack of belief), sex and sexual orientation.

In making any procurement or purchasing decisions officers must consciously think about these three aims as part of the decision making process. This could entail ensuring that the specification for services does not discriminate in any way against people with protected characteristics or imposing similar duties on our contractors who work on our behalf and ensuring that there is no breach of the duty in relation to the contractors own workforce.

Further guidance is given on procurement and equalities in the officer's checklist on equality issues in the procurement process which appears in Annex 3 to the Buyers Guide on the intranet.

5 **"Efficiency"**: The Council must continuously improve all its services. This means that the Council must purchase the most appropriate best value works, supplies or services and deliver continuous improvement throughout each contract. For contracts which relate to more than just a one off purchase, the Council will need to exercise ongoing monitoring and review of the contract to ensure

- a. customer satisfaction,
- b. continued high quality delivery,
- c. compliance with environmental and equality standards, and
- d. the opportunity to identify service improvements and cost savings.

This could be reflected in an efficiency and improvement clause in the contract. See further comments on standard clauses at CPR 3.

- 6 **"Whole life costing"**: requires you to ensure that the whole potential cost of the contract is taken into account.

Example: In letting an equipment supply contract, as well as the initial capital spend, you need to consider the length of the asset's useful life, the cost of ongoing maintenance, replacement of parts and servicing and consumables, so that there is true cost to the Council of the purchase being made. To buy a copier which initially costs £2,500 may be more expensive than one that initially costs £4,500, if the cheap copier uses expensive paper and toner, needs servicing every three months and is scrapped after 5 years, whilst the more expensive one uses cheaper paper and toner, needs servicing only once every 2 years and lasts for 10 years.

- 7 **"Cost savings"**: Each contract for purchase must set out the agreed price to be paid by the Council to the contractor. The Council cannot then unilaterally reduce the price but conditions relating to long term service improvement and efficiencies can be incorporated into the contract documents.

There may be ways of structuring a purchasing exercise to save costs. This might be through a joint purchasing exercise with other councils, or by re examining the way a service is provided.

- 8 Effective contract monitoring is essential to achieve continuous improvement, especially during the implementation of long-term contracts, particularly if the contractor is under a duty to work with the Council to seek improvements in delivery and efficiency. It is usually sensible to provide for annual reviews in the contract, which can then be tied in with, for example, payments to reflect good performance and provisions allowing for inflation increases.

Example: The Council needs to demonstrate to central government each year, its compliance with the Local Government Equalities Standard. An obligation in the contract to ensure ongoing compliance with Equalities legislation is of little value if the Council fails to review and record the contractor's compliance regularly.

- 9 If the Council knows that a contractor is not complying with contract requirements, then it needs to address the matter promptly. If the Council has regularly raised and recorded issues with a contractor, made formal requests for improvements, which are not delivered, then there may be a clear basis for either an action for damages or termination.

### **CPR 1.3**

- 10 Section 135 of the Local Government Act 1972 obliges councils to make standing orders for contracts for the supply of goods and materials and the execution of works entered into by the Council or on behalf of the Council. The Act requires that the standing orders must include provisions for securing competition for such contracts and must also regulate the way in which tenders are invited. The Act allows for exemptions from the obligation to tender out below a specified threshold and where exemptions identified in the standing orders apply.

### **CPR 1.4**

- 11 This Purchasing Guide is the guide referred to in CPR 1.4. It provides broader guidelines on the best way to purchase works, supplies (goods) and services.

## 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.

### **CPR 2.1**

- 1 The CPRs apply to all purchasing activities by, undertaken by or on behalf of the Council. The words “works”, “supplies” and “services” are the words used in the EU Rules to define different types of contracts. Put simply, “works” cover construction, refurbishment and other building related works. “Supplies” are all types of goods - from paperclips to photocopiers and vehicles, and “services” cover the full range of services provided or purchased by the Council in its day to day activities. Some contracts can be hybrid arrangements covering works, supplies or services. If this is the case and you are not sure how to define a particular arrangement, please take advice from Legal Services or from the consultant you have employed to assist you with the tendering exercise.

### **CPR 2.2**

- 2 **Words and terms used to describe types of arrangements which are often contracts:** Do not be misled by the label for any particular arrangement. The CPRs apply to all purchasing and contracts except where specific exemptions apply. A lot of purchasing is by way of formal contracts. However, contracts can exist even when the word “contract” is not used. So, for example, **"agreements"**, **"purchase orders"**, **"terms and conditions"** and equipment or vehicle **"leases"** are nearly always a type of purchasing and so are contracts which are subject to the CPRs. (Leases for land or property are not covered by these CPRs – see comment on CPR 2.3.2). Sometimes a formal agreement may be preceded by a "memorandum of understanding" or "heads of terms" but take care that such preliminary documents do not themselves amount to a binding contract.
- 3 Contracts can also be created by words or actions and so it is possible to have a contract without having anything in writing.

Example: Be careful to ensure that a contract is not implied as a result of conversations which you have with potential contractors or exchanges of correspondence (including e-mails) which may be intended to be mere exchanges of views but which could amount to a formal contract.

If, for example, you invite quotes and receive a quote in response, you may create a legal contract if you then ring the contractor and say that you are happy with that quote. A contractor could then rely on the conversation to either oblige the Council to enter into a formal written contract or to sue the Council in the event that the Council decides not to go ahead on that basis, despite those assurances.

- 4 **Concessions** are a specific type of contractual arrangement under which, rather than paying the contractor to deliver a work or service, the Council will grant the contractor the right to exploit an opportunity and receive some or all of its income from third parties. A good example is the operation of catering or leisure facilities where some or all of a contractor's income can come direct from paying members of the public.
- 5 The terms "**service level agreements**" and "**grant**" are particularly problematic and their usage is inconsistent. Do not assume that a service level agreement or grant is not a contract. The term "service level agreement" can be used to describe a specification or technical requirements type document which sets out the level of service required under a contract. It is also sometimes used to describe what is, in practice, a legally binding contract. The same issues apply to arrangements classified as grants.
- 6 **Partnering arrangements:** There have been considerable moves over the last few years toward the concept of working "in partnership" with other public, voluntary and private sector organisations. When the Council is entering into a partnering type arrangement, it may need to follow a tendering process resulting in a formal contract. PLEASE TAKE ADVICE.
- 7 Some "partnering" arrangements – particularly those with other public bodies such as the NHS – are genuine partnering (as opposed to a legal partnership (see below)) involving, for example, the pooling of resources to deliver services. Other arrangements are labelled as partnering arrangements but are in reality, formal contractual arrangements. A common example is the "partnering" approach used for construction contracts. [These set out clear contractual targets with the rewards for reaching those targets being shared between the partners in agreed percentages and the losses for not reaching those targets being shared in agreed percentages. They therefore give a real incentive for the contractor to do well because they will have a financial reward for doing so and a disincentive for performing badly because they will share in any loss ensuing.]
- 8 A formal legal "Partnership" has a specific legal meaning. A legal partnership will be caught by statute and other rules. It is possible to create a legal partnership without intending to do so and this can have significant consequences, as partners usually share both profits and losses arising from the partnership. Great care must be taken when using this term, to ensure that a legal partnership is not implied. Legal Services will have a standard clause to deal with this.
- 9 **Summary:** Wherever an arrangement means that works, supplies and/or services will be provided to the Council, or on behalf of the Council, in return for some sort of "payment" (which could be a monetary payment but could also be something else of value to the recipient), then you need to consider whether or not this is a type of contract and purchasing process which is subject to the CPRs and other Regulatory Provisions listed in CPR4.

### CPR 2.3

- 10 The best approach to adopt is to assume that the CPRs will apply to all of the Council's purchasing activities with only very limited exceptions. You must take advice from Legal Services if you are uncertain about whether or not the CPRs apply.
- 11 There are some specified types of contract to which the CPRs do not apply. These are listed in CPR2.3. These are excluded, because it generally does not make practical or legal sense to require a full tendering process for these types of contract. However, these arrangements are subject to other specific requirements.
- 12 **CPR 2.3.1 Employment contracts:** employment opportunities are usually advertised and people are appointed to their posts as a result of a formal appointment process. Employees enter into individual employment contracts with the Council.
- 13 However, contracts involving the purchase of services from individuals – such as consultancy or advisory service contracts – are often not “employment contracts” for the purposes of this exception and are likely to be subject to the CPRs. Similarly, contracts with employment agencies for the provision of temporary staff will be caught by the CPRs.
- 14 **CPR 2.3.2 Contracts relating solely to the transfer of interests in land** (including existing buildings) are generally not caught by the CPR. This includes the purchase or disposal of land by way of a freehold or lease. This will apply to most of the Council's day to day conveyancing and land transactions.
- 15 Take care over development or re-generation type agreements which may, for example, involve a combination of a land transfer by the Council plus a developer providing building work, even if this is not for the Council. These contracts can be caught by the EU Rules as they can be classified as “public works” contracts (see the Roanne case - C-220/05 Jean Auroux and others v. Commune de Roanne). This is a complex area of European law. You must seek advice from Legal Services.
- 16 **CPR 2.3.3 Contracts for the retention of legal counsel and the appointment of expert witnesses in legal proceedings:** Legal Services is responsible for agreeing fees with and appointing legal counsel (barristers) to work on legal issues and for the appointment of expert witnesses.
- 17 **CPR 2.3.4 Service level agreements setting out the conditions which the Council applies to its funding of particular voluntary sector bodies:** in some limited circumstances, funding arrangements for voluntary sector bodies may not be caught by the CPRs. An example of the type of arrangement which may fall within this exception, is low value funding to a voluntary group in order to ensure the continued provision of a critical local service.
18. Take care because some funding arrangements may, in reality, be more like a contract than a simple funding arrangement. The Council must ensure that it obtains appropriate value in respect of all funding and that it is not contravening State Aid, EU Rules or EC Treaty Principles. You need to look carefully at each funding arrangement and consider whether it could be delivered better as a result of a competitive process. A Service Level Agreement is unlikely to be an appropriate method for large scale and/or long term funding.

### 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\Web Files\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 Bribery Act 2010 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 Information 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 or necessary to enable or facilitate the Council's compliance with the public sector equality duty or any duty imposed on it by the Equality Act 2010. 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.

### **CPR 3.1**

- 1 Because the Council may need to enforce the terms of an agreement, it is important that the terms of the agreement are clearly recorded, and confirmed by the other party. Accordingly, any contract must be evidenced in writing. This does not have to be a formal or lengthy paper contract. It can be a paper contract, signed by both sides, but it can equally be in the form of ordinary correspondence, including emails or faxes rather than hard paper letters, in which one side sets out its requirements and the other side agrees to comply with them.
- 2 A contract in writing can also be created by using the Council's own standard terms and conditions, plus an order form, electronic purchasing where pre-terms and conditions have been pre-agreed or, for example, where a Purchasing Scheme is used so that the terms and conditions have been agreed centrally, (see commentary on CPR 15).
- 3 Please note that if the Council does not make it clear that its own terms and conditions, order forms or contracts apply, then the contractor's terms and conditions may apply to the purchase. This may not be in the Council's best interests.

Example: The Responsible Officer emails a contractor asking them to quote to provide some new software. The software contractor sends its quote back to the Council by post. On the back of the quote are the contractor's own legal terms and conditions. The Responsible Officer accepts the quote, over the telephone and confirms the order by e-mail. A contract has been created in writing. Unless both of the emails from the Responsible Officer made it clear that the Council's terms and conditions apply and the contractor has seen those terms and conditions, it is likely that the contractor's own terms and conditions will apply to that transaction.

### **CPR 3.2**

- 4 To protect the Council's interests, this CPR requires you to use certain standard contract clauses in all contracts over the tendering threshold of £75,000. These can be amended to suit the particular contract in consultation with Legal Services or other professional

advisors. This means that risks are allocated appropriately and that the Council has a remedy in the event of breach of contract.

### **CPR 3.3**

- 5 This CPR either sets out the actual clauses to be used in lower value contracts which are contained in Appendix 1 to this guide or points to the issues which you need to cover in contracts above the specified value. You need to carefully consider the value and complexity of the contract and any potential risks associated with that contract to decide what form of contract and level of detail is appropriate. Where the standard clauses contained in Appendix 1 are not appropriate the other standard clauses mentioned in CPR 3.2 may be used as the starting point for drafting the contract but will need to be amended to accommodate the particular requirements for your contract. This should be checked by the Chief Solicitor or other professional eg consultant surveyors, engineers or architects for work contracts.
- 6 **CPR 3.3.1:** This requires you to describe clearly in the contract what is being purchased and the price which is being paid. The description may cross refer to a more detailed description of the works, supplies or services which could, for example, be attached to the contract by way of an appendix or schedule. If you do not clearly specify what is being purchased, then there is a lot of potential for dispute with contractors about the extent of their obligations to the Council. It is critical for you to know exactly what you will have to pay for the works supplies or services so full terms on all potential costs must be included.
- 7 **CPR 3.3.2:** Be clear about when and for how long the contract is to apply. For example, with the delivery of equipment it would be important to ensure that there is a clause stating when equipment will be delivered and installed. For longer term contracts, you need to be clear about when the obligation to deliver starts and ends.
- 8 **CPR 3.3.3:** Be clear about what level of quality and standards are required. Think about minimum standards required. This should involve discussion with those who are responsible for the purchase.
- 9 **CPR 3.3.4:** All contractors should hold some form of insurance to cover their business liabilities. There are different types of insurance which will apply to different types of purchase. Ensure that there is a clause in the contract stating what type and level of insurance is required. This will link directly to what is being purchased and also the size and nature of the contract. For a very high value contract, higher levels of insurance may be required than for smaller purchases. However, think about the impact of the failure of the contract. A small purchase could have a large impact on the Council and so insurance requirements may well be higher. If you are uncertain about insurance requirements, then please discuss this with the Insurance and Risk Manager.
- 10 **The Responsible Officer should ask for evidence of cover before the start of the contract and during the term of the contract.**

Example: The Council may require a contractor providing a relatively low value contract for the provision of cooked meals direct to users to have higher levels of third party liability insurance than a contractor providing pencils to the Council. This is because the consequences of a faulty product being supplied are likely to be far more significant in a contract involving meals than pencils.

- 11 **CPR 3.3.5:** The contract must explain what happens if there is a failure to meet the Council's requirements under the contract. It is common to have provisions for both a partial failure and a total failure. The implications will vary according to what is being purchased and the nature of those failures. A contract may, for example, just require the

contractor to remedy a failure within a specific time period. If the contractor remedies the failure to the Council's satisfaction, then that may be the only consequence. Failure to remedy to the Council's satisfaction may result in more serious consequences, such as the right to terminate the contract partially or wholly. Think about the practical consequences of failure and the Council's interest in terms of failures and their consequences. In the context of building contracts it is quite common to retain a percentage of the total contract value pending final sign off and approval of the works so that the Council has some real leverage in the event that the work is not delivered to the required standard. Similarly it is becoming more common in service contracts to take either a bond or a money deposit guarantee which both act as security that the services will be performed in line with the contract. If they are not and the Council wishes to terminate the contract the bond or deposit can be utilised to keep the services running (either using external contractors or in house) whilst the contract is re-let.

- 12 **CPR 3.3.6:** Contractors will be subject to their own statutory obligations to comply with both equalities and health & safety legislation. However, the Council may require additional compliance in order to reflect its own statutory obligations, or to pick up specific standards and compliance linked to the subject matter of the contract.
- 13 **CPR 3.3.7:** This is a standard provision entitling the Council to cancel a contract and to recover losses in the event that the contractor is guilty of an offence, such as bribery or corruption or tries to improperly influence a decision.

#### **CPR 3.4**

- 14 IT software and support contracts are often (although not always) let on the suppliers own terms so that the Council's standard terms cannot be used. Officers should either use the Council's standard supply terms where these are relevant or ensure that the supplier's terms fully meet the Council's requirements. Where the Council's standard terms are not used, the Contract should be sent to the Chief Solicitor for advice on the supplier's terms. The Chief Officer should then check that the terms issued by the supplier are satisfactory and forward them to the Information Technology Manager for his approval of technical matters.

#### **CPR 3.5**

- 15 Ensure that the terms used in the contract are relevant to that contract. Do not include provisions in contracts, which do not relate to the subject matter of the contract. Check the proposed terms and ensure that they are relevant. For example, detailed clauses for circumstances where equipment goes wrong may not be relevant to a contract for training services.

#### **CPR 3.6**

- 16 Good quality specifications and/or technical requirements are critical for letting and monitoring a successful contract. A contract which only includes legal terms but does not, clearly describe, what standards are required is of little practical value. Identify these requirements at the start of the purchasing process, so that the standards are clearly described when quotations or tenders are invited for inclusion in the contract and ongoing contract monitoring arrangements.
- 17 Specifications and/or technical requirements need to be "proportionate". This means that for a very simple purchase, the specification could be very simple. E.g. it could in its simplest form amount to the description and quantity of goods required in a purchase order. For more complex purchases, the specification may go into quite a lot of detail. For purchases which are technically demanding, you must address detailed technical and

standards compliance. These documents need to be prepared jointly with officers having specialist knowledge of the purchase who need to be involved as early as possible in the purchasing process.

### **CPR 3.7**

- 18 Even low value contracts may have a significant impact if they go wrong, so it is important to adopt a risk analysis type approach. This is set out in the risk matrix included as "Appendix 2" at the end of this Purchasing Guide.

Example 1: A low value contract for photography services may look initially like a simple arrangement which does not require detailed contract provisions. However, in some circumstances, such a contract may need to include provisions covering the confidentiality of individuals, protection of children and copyright issues and so a fuller form of contract may be appropriate.

Example 2. A contract to set up one stage of a nationally important racing competition event in a town or city may ostensibly be of low financial value, but the difficulties arising from partnership working, reputation risks and even adverse weather, could result in major losses for the Council. The need for careful risk management in the drafting of the contract is correspondingly important.

## **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.

### **CPR 4.1**

- 1 This CPR requires purchasing to be conducted in accordance with "Regulatory Provisions". Regulatory provisions are defined in 4.1.1 to 4.1.4 and cover EU and UK law, as well as the Council's own Constitution and this Purchasing Guide. This means that when undertaking purchasing, you need to take into account a wide range of both legally binding provisions and also internal rules and guidance.
- 2 **CPR 4.1.1:** The statutory provisions applying to purchasing will vary according to the purchase being made. Key provisions include Section 17 of the Local Government Act 1988 which prohibits the application of non commercial considerations to the tender process and in particular the selection of contractors, except insofar as is necessary to secure the achievement of best value or to enable or facilitate the Council's compliance

with the public sector equality duty or any duty imposed on it by the Equality Act 2010. In that context, non commercial considerations include, for example, the contractor's terms and conditions of employment, business activities and interests of contractors in the Government's defence or foreign policy and the conduct of contractors in industrial disputes. Please ask for advice on non commercial considerations for any tendered contract

- 3 **CPR 4.1.2:** The term "EU Rules" in the context of these CPRs means the Public Contracts Regulations 2006 (Statutory Instrument 2006/5) (also referred to as the "Regulations") which implement European Directives 2004/18/EC and 89/665/EEC. The EU Rules will affect you if you are making purchases which exceed the EU Threshold Values set out in CPR 7.4. You MUST seek assistance in these cases.

In certain, limited, circumstances the Council may be classified as acting in the capacity of a "utility". This could occur where the Council is delivering or running certain types of water, energy, transport or telecoms services. Practical examples may include the running of an airport or operation of a tramway or the production of drinking water or, in certain circumstances, undertaking land drainage works. In this case the Utilities Contracts Regulations 2006 (Statutory Instrument 2006/6) which implements European Directives 2004/17/EC and 92/13/EC apply. These CPRs do not cover the rules applying to activities caught by the Utilities Regulations. If you are uncertain about the application of these provisions you must take advice from Legal Services.

- 4 The reference to "EC Treaty Principles" mean those principles derived from the EC Treaty 1957 which apply to all purchasing by the Council. These EC Treaty Principles require the Council to ensure that it acts in a way which is open and transparent, ensures equal treatment of all contractors, and permits appropriate competition.

Example: When you invite quotes or tenders, do not act in a way that favours local contractors over contractors from elsewhere in the European Union. All contractors must have the same opportunities and receive the same treatment.

- 5 The EU Rules do not apply to all contracts, but they do apply to most contracts above the specified EU Threshold financial values which are set out in CPR 7.5. For purchases caught by the EU Rules or where you are uncertain whether or not the EU Rules apply you must take advice from Legal Services.
- 6 **CPR 4.1.3:** You need to understand how the Council's Constitution, Financial Procedure Rules and Scheme(s) of Delegation, as they apply to purchasing, interact with these CPRs.

#### **CPR 4.2**

- 7 If there is a conflict between the different sets of Regulatory Provisions, then there is a "hierarchy" application. EU Rules will always take precedence. Where UK legislation seems to conflict with EU Rules their interpretation will apply rather than the UK legislation. All legislation will take precedence over the Council's Constitution, which are the internal rules of the authority. This could occur for instance where the EU or UK laws change and have an affect on what is in the Contracts Procedure Rules. If you are uncertain about these issues then you must contact Legal Services.

## 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 £20,000 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 £20,000 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.

## CPR 5

1 The Chief Officer has overall responsibility for the purchasing processes undertaken by, or on behalf of his or her Service. The Chief Officer is responsible for ensuring compliance as set out in CPR 5.1.

2 **CPR 5.1.3:** The Council's Scheme of Delegations to Officers is contained in Part 3 of the Constitution "Functions Delegated to Officers". Rule 1.1 sets out the basic principle that all Chief Officers are authorised to carry out routine procurement subject to the CPRs which is within an approved budget. Under rule 2.6 of the Scheme of Delegations Chief Officers may designate the appropriate "Responsible Officer" in writing for the purposes of each procurement exercise and indicate the extent of their powers to act.

In practice this means that:

- All quotations (ie where the entire contract value is under £75,000) which are within an approved budget can be undertaken and completed by officers in accordance with the CPR.
- In respect of all tenders for service/supply contract which are not valued above the relevant EU threshold and for works contracts valued at under the EU service/supply threshold which also have (in all cases) an approved budget, the process up to and including the award of contract can be carried out by officers in accordance with CPR.
- For all service/supply contracts valued at over the relevant EU threshold and works contracts valued at over the EU service/supply threshold **unless the contract is a lower value or a simple/routine contract**, the Executive/Council have to authorise the OJ/Contract Notice, the procedure to be followed and details of the competition including the award criteria. Officers can then carry out the selection stage of Contractors who will be invited to tender, reporting back to the Executive/Council for the award of the contract in accordance with CPR.  
The exception mentioned above is for lower value or simple/routine contracts which include those contracts which are only EU contracts by virtue of the aggregation rules.

Example: The Council has let a contract for the supply of £100,000 cardiovascular equipment. In the same financial year it wishes to place a second order for £50,000 more equipment which was not provided for in the original contract. Due to the aggregation rules this £50,000 contract is treated as if it were aggregated with the £100,000 contract even though the two are actually being let separately i.e it is a lower value simple purchase contract which will be subject to the EU rules. Such a contract would fall within this exception and therefore not need to go to members for approval.

You may need to take advice from Legal Services on when the aggregation rules apply.

Example: The Council has a requirement for dog warden services over four years valued at £35,000 pa. This is a routine contract which would fall within the exception as it is only just above the EU services threshold and is therefore a lower value EU Contract.

If you are in doubt whether your contract falls within the exception you should apply to the Chief Executive in consultation with the Monitoring Officer for advice and their decision.

You are strongly advised to ensure that members are kept fully apprised of contracts having a public profile or which they are likely to have a particular interest in (either because they impact on their ward or area of responsibility on a board or because they are a portfolio member). E.g even though the contract for the Council's publication Here & Now may not be above the relevant threshold for members to award the contract, as it is a contract which is likely to be of particular interest to members, it would be advisable for them to be fully aware of the decision and to endorse it. There are a number of ways in which this could be achieved:

- The Chief Officer may decide to voluntarily put up a report to members for a decision even though this is not a requirement of the Contracts Procedure Rules;
- In other cases the Chief Officer may decide to have a standing item on their board agenda to update members on the letting of contracts which are likely to be of interest to members;
- Lastly they may decide to talk to relevant members informally so that there is a proper awareness of which contracts are being let and who the successful contractor is.

The method of communication will be left to the Chief Officers discretion. There is a clear expectation that members should be aware of the letting of contracts which have a public interface regardless of contract value.

- 3 **CPR 5.1.5:** Upon becoming aware of a breach of regulatory provisions (including the Contracts Procedure Rules) a Chief Officer must take immediate action. A failure to take immediate action may result in a purchasing process continuing in breach of the Regulatory Provisions, explained in CPR 4. This could have unwelcome practical, financial and legal consequences for the Council.

If an officer or Member becomes aware of a breach, or a suspected breach, of the Council's Contracts Procedure Rules then he or she must report the matter immediately to the Council's Chief Internal Auditor and Monitoring Officer to ensure that appropriate steps are taken to address the breach or potential breach.

## **CPR 5.2**

- 4 The Responsible Officer is appointed by the relevant Chief Officer. The Responsible Officer's duties are set out in **CPR 5.3**.

## **CPR 5.3**

5 **CPR 5.3.1:** The Regulatory Provisions are explained at CPR 4. In addition to the specific Regulatory Provisions, Chief Officers must ensure that the tender process is conducted in a way which complies with all the requirements of the Contracts Procedure Rules and in a manner which is open and transparent and ensures equality of treatment and opportunity to all participants.

6 **CPR 5.3.2:** Due attention must be made to the requirements in respect of declarations of interests, affecting both Members and officers in respect of purchasing. In the case of Members, the requirements of the Code of Conduct would include:

- Registering any contracts which they or companies with which they are associated have with the Council for goods, services or works;
- Declaring any personal interest which they may have in any contract which is under consideration, and to withdraw from consideration of any contract in which they have a prejudicial interest;
- Not using their position as a Member improperly to seek to confer an advantage or disadvantage on any person or to compromise or seek to compromise the impartiality of any officer;
- Only authorising the use of Council resources, to act in accordance with the Council's requirements;
- Preventing Members from corruptly soliciting or accepting any gift or advantage for doing or forbearing to do anything as a Member.

In the case of officers, such requirements would include:

- To disclose to the Council any interest which they may have in any contract which the Council has entered or proposes to enter into under Section 117 of the Local Government Act 1972;
- To act in the best interests of the Council and not to participate in any matter in which they have a private interest in accordance with their contracts of employment;
- Preventing officers from corruptly soliciting or accepting any gift or advantage for doing or forbearing to do anything as an officer of the Council.

6 **CPR 5.3.3:** The purchasing process must be planned properly so that timescales are reasonable; all those involved know and understand what procedure and documents are to be used and the levels of resource and timescales are understood. A failure to analyse and provide for these requirements can result in poor procurement practice and a failure to deliver purchasing to meet the Council's requirements.

Example: Purchases may require approval within a service or at Executive or full Council level. This approval may require the provision of documentation in advance of that consideration and so this needs to be factored into the overall procurement timescale and project planning.

8 **CPR 5.3.4:** See comment on CPR 1.2.

9 **CPR 5.3.5:** The Council's decision making processes must be factored into the overall planning.

10 **CPR 5.3.6:** The Council's contract register should include all details of contracts valued at £20,000 or more and a contract database record should be maintained for each contract. This should include the name of the contractor, the price and a brief description of the supply service or works, including, in all cases, the CPV code (European Common Procurement Vocabulary) for the contract.

The contracts register ensures that the Council has clear records of contracts awarded and that no particular contractor has been unfairly treated or favoured. Some councils are now using on line tendering systems, which include contract register systems and information

which is then made publicly available. This helps to demonstrate transparency in purchasing processes.

- 11 **CPR 5.3.7:** Proper records of contracts and award procedures must be maintained including the reasons for selecting prospective tenderers onto the select list. This does not necessarily require a very detailed explanation, but it does require records to be maintained in writing and to be easily retrievable should they need to be consulted.
- 12 **CPR 5.3.8:** Value for money is a balance of quality, price and delivery and does not mean that the contract will necessarily be awarded on the basis of the lowest cost to the Council. Directors and Responsible Officers should note the requirement for “active” contract monitoring. It is only by active and ongoing participation in contract monitoring that the Council can ensure that contracts continue to represent good value and meet the Council’s requirements. This can help drive through efficiency savings and improvements, and ensure that poor contract performance can be addressed promptly.
- 13 **CPR 5.3.9:** Contract provisions should include arrangements for mechanisms to be employed in the event of poor performance (see commentary at CPR 3.3.5).
- 14 In addition to contract provisions, it may also be appropriate (depending upon the nature of the purchase), to include requirements such as provision of a parent company guarantee or some form of bond. The appropriate levels of "security" documents will depend upon the purchase being made and also the financial standing of the contractor. Advice should be sought from the Council’s Financial Services when considering additional forms of security, such as bonds or guarantees.

Example: if the Council is concerned about the ability of a contractor to honour its obligations in the event of poor performance and that contractor is a company falling within a larger company structure, then it may be appropriate to seek a form of parent company guarantee from the parent company. Similarly, in large services or works contracts, it is quite common to have some form of bond which provides a direct payment to the Council, in the event of failure to deliver to the contract standard.

#### **CPR 5.4**

- 15 Chief Officers and Responsible Officers (as appropriate) need to think carefully about the best way in which purchases are made. For example, in some circumstances it may make sense to use one of the Purchasing Schemes, identified in CPR 15. It may also prove better value for money to use e-Procurement or other e-purchasing methods.
- 16 Chief Officers and Responsible Officers (as appropriate) need to carry out sufficient analysis and understanding of the market to enable the Council to best select the potential contractors. For certain types of contract, (for example high value and/or long term), it may be appropriate to undertake market research and pre-purchasing enquiries to establish who may be best placed to deliver the requirements and which route will best meet the Council’s needs. Market sounding or pre purchasing enquiries must not result in the Council favouring a particular supplier in breach of the EU Rules or EC Treaty Principles.

#### **CPR 5.5**

- 17 It may be a disciplinary offence for any officer to fail to comply with the CPRs and the Council’s Purchasing Guide. All employees have a personal obligation under the CPRs to report breaches of Contracts Procedure Rules. Failure to report a breach or suspected breach may also amount to a disciplinary offence. Equally, any failure by a Member to comply with the CPRs and the Council’s Purchasing Guide may amount to a breach of the Code of Conduct for Members.

## **CPR 5.6**

18. Failure by an officer or a Member to report suspected corruption can itself amount to a disciplinary offence for an officer, or a failure to comply with the Code of Conduct for Members.

### **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.

## **CPR 6.1**

- 1 Officers who make purchases may only carry out tasks that are properly delegated to them. If you act in good faith and within the powers delegated to you, any consequential liability accrues to the Council as your employer and not to you as an individual. But if you act outside the powers that have been delegated to you, you act as an individual, not as agent for the Council, and the Council is not necessarily bound by your actions. You can then incur personal liability to the Council and to the contractor for any loss which they may suffer.
- 2 The Council's Scheme of Delegation is set out in part 3 of the Constitution "Functions delegated to Officers" . Procurement is specifically dealt with in rule 1.1 for Chief Officers and rule 2.6 allows Chief Officers to delegate particular procurement tasks which they themselves had power to undertake to other officers known as "Responsible Officers" (see note to CPR 5.1.3 for more detailed explanation of what this means in practice).

## 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 100,000	works, supplies and services	At least three written quotes in advance
100,000 up to but not including 189,330**	works, supplies and services	At least three written tenders in advance, following advertisement by public notice
189,330** 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).
189,330 up to but not including 4,733,252**	works	Full competitive process with tenders following advertisement by public notice. Members to approve process in advance (CPR 8.1).
4,733,252** 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.

## **CPR 7.1**

- 1 The table at CPR 7.4 sets out a number of thresholds and the purchasing procedures to be used at each of the threshold levels specified. The Council needs to ensure there is appropriate competition for its purchasing, both to comply with statutory requirements, but also in order to demonstrate that it is achieving best value. The table identifies different thresholds because it is also important to ensure that the process undertaken is proportionate to the purchase. Thus, for example, it may be inappropriate to run a more complex tender process of the type provided for by the EU Rules for a small scale, low value purchase.
- 2 As is noted in CPR 7.2, there is a general presumption in favour of competition and so wherever possible, contract opportunities should be advertised by way of some form of public notice. It should be noted that EC Treaty Principles mean that even if a contract is relatively small, if it is of potential interest to contractors from other member states (and this is possible in most situations), then the Council must consider advertising in a manner which ensures that potential contractors from other member states are aware of the opportunity and have a chance to apply to deliver these services. This requirement may be satisfied, for example, by advertising on a website, (either the Council's own website or, for example, the south east business portal) which ensures that contractors from other member states have a chance to search for and so be aware of contract opportunities offered by the Council.
- 3 The EU Threshold levels set out in 7.4 are fixed for 2 year periods. The current levels of £189,330 for supplies and services contracts and £4,733,252 for works contracts will apply until 31 December 2021. The EU Thresholds will then be recalculated by reference to exchange rates at that date.

## **CPR 7.2**

- 4 Whilst there is a general presumption in favour of competition, there will be some circumstances where a competition will not be undertaken for a new contract. These are outlined in CPR 13. All of those involved in the purchasing process must bear in mind that these are genuinely exceptional circumstances and so where a competitive process is not used, then this needs to be clearly evidenced and appropriate approvals obtained in advance.

## **CPR 7.3**

- 5 Public notices for quotes or tenders can take a number of different formats, but the general principle is that they should be easily accessible and easily understood. Whilst paper format, for example an advert in the press or trade journals, may be appropriate, increasingly it is important to ensure that opportunities are made available electronically on an easily accessible website, or other electronic media.
- 6 If an advertisement is to be placed in the Official Journal of the European Union (OJ), then that requires a standard format to be adopted and submitted electronically. If an OJ advertisement is being used, then an advertisement may not be placed for the same contract in any other media until the advertisement has been dispatched to the OJ and the advert must not contain additional information.

## **CPR 7.4**

- 7 As explained above, the procedures to be used tie in with the estimated value of the contract. For contracts under £5,000 it is normally appropriate to award a contract following

receipt of just a written quote. For purchasing at this level, it is quite likely that one of the Purchasing Schemes referred to in CPR 15 may be more appropriate and deliver better overall value to the Council. The Council's basic requirements and principles as outlined in CPR 1 must be complied with, so that even when only a single quote is sought, resources are used efficiently and principles of sustainability, efficiency, whole life costings and costs savings are incorporated, where appropriate, into the process.

- 8 For contracts up to but not including £75,000, it is acceptable to undertake a process involving obtaining quotes, rather than formal written tenders, but serious consideration should be given to the requirement for a public advertisement (see commentary on CPR 7.1).
- 9 For a contract at or in excess of £75,000, you are required to ensure that written tenders are provided in advance, following an advertisement by way of public notice. Written tenders will usually be submitted by contractors in response to an invitation to tender, issued by the Council. Written invitations to tender will generally include relevant specifications and briefs of the technical requirements, the contract terms to be used and instructions on the conduct of the procurement process itself, including timescales for responses.
- 10 For contracts of a type and value caught by the EU Rules, much more detailed provisions apply. The EU Threshold for supplies and services contracts and for works contracts differ significantly. The supplies and services threshold is much lower than the threshold for works contracts.
- 11 The Council has chosen to set its own threshold requiring a full competitive purchasing process for works contracts at the contract value which exceeds the EU Threshold for supplies and services contracts.
- 12 Under the EU Rules there are two types of service contracts. Part A contracts are listed in [Schedule 3, Part A of the Regulations](#). For these type of contracts, *all* of the EU Rules will apply if the contract value is over the threshold. This includes the obligation to advertise in the OJ, follow the detailed EU Rules relating to selection and evaluation processes including the requirement to publish the award criteria and weightings in advance, as well as the requirement to comply with statutory timescales.
- 13 Part B services are listed in [Schedule 3, Part B of the Regulations](#). For these types of contracts, there is no obligation to advertise in the OJ or to follow most of the detailed EU Rules, but there is a presumption in favour of advertising and a competitive process. There are also obligations under the EU Rules to ensure that specifications and technical requirements are defined in a non discriminatory way and to publish an advertisement in the OJ, once the contract has been awarded. Please seek advice from the Legal Services when dealing with any contract which may, or does, fall within the EU Rules including service contracts for Part B services.
- 14 Contracts often involve a mix of works, supplies and services i.e. hybrid contracts. Where the contract is a mixed contract and is of a value which means that it may fall within the EU Rules, then great care needs to be taken in calculating the potential value of the contract to establish whether or not the EU Rules apply. (See notes on calculating the contract value at CPR 9). If you are in any doubt as to whether or not the EU Rules apply, then seek advice from Legal Services.

## **CPR 7.5**

- 15 There are four main types of competitive procedures available for contracts which are caught by the EU Rules. These all involve advertising in the OJ. The open and restricted

procedures are the procedures which the Council will generally use for all purchasing which is caught by the EU Rules.

- 16 **Open Procedure:** This involves accepting applications and tenders from all interested parties. Full contract and specification documents are issued to all applicants and there is no opportunity to negotiate.
- 17 **Restricted Procedure:** This procedure allows the Council to restrict the number of applicants (tenderers) to whom it issues an invitation to tender. The Council is permitted to shortlist applicants responding to the OJ advertisement using specified short-listing criteria. The Council can then issue an invitation to tender to the shortlisted tenderers. The invitation to tender will include the full contract specification and technical requirements, as well as the contract terms. The Council is not permitted to negotiate with the tenderers.
- 18 **Competitive Dialogue and Competitive Negotiated Procedures:** In exceptional circumstances, the Council may use the competitive dialogue, or competitive negotiated procedures. These procedures are only appropriate in the context of complex projects\*. In practice, the competitive negotiated procedure will rarely be available for the Council to use. A decision to use a competitive dialogue or competitive negotiated procedure can only be taken after consultation with the Council's Monitoring Officer and following approval from the Executive or Council.

\*The Regulations do not state whether the competitive dialogue procedure or the competitive negotiated procedure should be used of preference. However, the competitive dialogue procedure has been introduced to provide a clearly structured process for use in the context of complex projects. One of the main reasons for its introduction was to address major concerns at a European level relating to the over use of the competitive negotiated procedure – which was only intended for use in genuinely exceptional circumstances. There was a particular reservation about the extent to which authorities were negotiating with a single bidder towards the end of the procurement process. This was regarded as potentially anti competitive. These concerns led to the introduction of the competitive dialogue which provides for structured negotiations with bidders but little room for further discussion once final tenders are submitted.

Both the European Commission and the UK's Office of Government Commerce have made it clear in their notes/guidance on use of the competitive dialogue that it should be used in preference to the competitive negotiated procedure. The OGC has indicated that the competitive negotiated procedure may only be used in truly exceptional circumstances and has provided the development of the London Underground as an example. Competitive dialogue is now being used as the standard procedure in most PFI, PPP and complex outsourcing projects.

The circumstances where a contracting authority can use the competitive negotiated procedure without prior publication of a contract notice were clarified in January 2008. The regulations now allow use of this procedure where a competitive dialogue has been discontinued because none of the bids received is compliant or satisfactory following evaluation.

- 19 **PIN:** The Council has the option to file a PIN (Prior Information Notice) and if it does so then in certain circumstances it may reduce some of the statutory timescales under the Rules. In respect of supplies and services contracts, a PIN should be published as soon as possible after the commencement of each financial year. The PIN should contain details of supply and services contracts for which the Council expects to seek tenders during the forthcoming 12 months.

For works contracts, a PIN should be issued as soon as possible after the decision approving the planning of a work or works which exceeds the relevant threshold.

If the Council does decide to publish a PIN then the standard PIN form should be used. Standard forms are accessible through the European Commission's website: <http://simap.eu.int/> or <http://www.bipsolutions.com/html/ecdirectives.htm>

## **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.

### **CPR 8.1**

- 1 For all service/supply contracts valued at over the relevant EU threshold and for works contracts valued at over the EU service/supply threshold unless the contract is a simple or routine lower value contract the Executive/Council have to authorise the OJ/Contract Notice, the procedure to be followed and details of the competition including the award criteria. The exception to this is for simple or routine lower value contracts which include those contracts which are only EU contracts by virtue of the aggregation rules or which are just above the EU threshold. Even though the rules do not require members to take the decision where the exception applies, officers should carefully consider whether members should be appraised of the particular contract. They may wish to discuss contracts with members informally or take an information item to the relevant board or to Cabinet to ensure that members are kept informed of contracts which are likely to be of interest to them or which have a public interface such as a contract for new equipment at the Leisure Centres or for a public survey to be carried out.

Example 1	The Council has let a contract for the supply of £100,000 computer equipment. In the same financial year it wishes to place a second order for £50,000 more equipment which was not provided for under the original contract. Due to the aggregation rules this £50,000 contract is treated as if it were aggregated with the £100,000 contract even though the two are actually being let separately i.e it is a lower value simple purchase contract which will be subject to the EU rules. Such a contract would fall within this exception so that the Chief Executive in consultation with the Monitoring Officer could authorise the advertisement and the procedure to be followed in compliance with EU rules.
Example 2	The Council has a requirement for pest control services over four years valued at £35,000 pa. This is a routine contract which would fall within the exception as it is only just above the EU services threshold and is therefore a routine lower value EU contract which would be subject to the Exception.

### **CPR 8.2.2**

- 2 Where contracts are subject to the specific requirement under the EU Rules to advertise in the OJ, then Regulation 30 requires the Council to include a standstill period once it has decided on a successful contractor. The Council is required to write to all of the candidates and tenderers in the process notifying them of its decision and including specified information. The Council may enter into the contract with the successful contractor, only after a period of 10 days has passed and only then, if there has been no formal challenge of the Council's award decision. The provisions of Regulation 30 are quite complex. Correspondence with the candidates and tenderers and timescales must comply with the Regulations. You MUST take advice from Legal Services on this point.

### **CPR 8.3**

- 3 Where a local authority contract is at or above the threshold value of £10,000 but below £75,000, the contract must be signed by two persons on behalf of the Council, at least one of whom must be an officer, or the contract can be under seal. This means that a Member cannot enter into a major contract on behalf of the Council without the countersignature of an officer.

These CPRs require that all contracts at or over the specified threshold value of £75,000 will be under seal, and that the seal must be witnessed by or on behalf of the Chief Solicitor, Chief Executive or Central Services Director. For ceremonial purposes, the seal can also be countersigned by a Member of the Council in addition to the signature of the Chief Solicitor/Chief Executive or Central Services Director, if that is felt appropriate.

### **CPR 8.4**

- 4 Helpful guidance on the Electronic Signature Regulations is available at [www.dti.gov.uk](http://www.dti.gov.uk)

## 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 an 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.

### CPR 9.1

- 1 The estimated contract value is the entire contract value. In practice, this means you need to take into account all of the actual, or potential, payments to be made under the contract, during the whole life of the contract.

Examples: For the purchase of equipment you should take into account the actual and likely costs of:

- The initial purchase (including cost of purchase if it is funded by way of a lease);
- Installation;
- Servicing for the entire contract period;
- Training and other support for the entire contract period; and
- Consumables for the entire contract period.

For the carrying out of cleaning services you should take into account the actual and likely costs of

- The annual cost of providing the service multiplied by the number of years of the contract INCLUDING possible extensions allowed for in the contract;
- Possible inflation uplifts during the contract period.

- 2 You must take into account the entire contract period. If the contract is for an initial period of, for example, 3 years but there is an option to extend for a further 2 years, then the value of the contract should be the total potential 5 year period and not just the initial 3 year period. Similarly, if the contract relates to an initial purchase but there are options to make additional purchases in the future, then the total potential value, including the value of potential additional purchases, must be taken into account, in calculating the value of the contract.
- 3 You should also take into account, using your best genuine estimates, the impact of any inflation value or uplift on the contract. Thus, for example, if the contract allows for a 3%

increase each year and the contract is for up to a 5-year period, then you need to allow for the total value of the contract, including the likely inflation provisions.

- 4 Where there is uncertainty surrounding the potential total contract value, for example, the inflation provisions have not been finally agreed or there are a number of options, then you need to use your best estimate and act cautiously and assume that the higher potential value will apply.
- 5 Where the contract is a rolling or on-going contract which does not specify a contract period or end date but continues until notice to determine it is given, the CPR states that you should treat that contract as if it is a contract for 4 years when calculating the contract value for the purposes of these Contracts Procedure Rules.

## **CPR 9.2**

- 6 It is very important to ensure there is no artificial splitting of a contract to avoid either the application of the EU Rules, or the CPRs. Whilst there may be genuine reasons why the Council's requirements may be split into various contracts, under the EU Rules there are specific provisions which prevent this being done with the intention of avoiding those EU Rules. In this context, it is also important to understand that if the Council requires repeat purchases of the same or similar items, services or works, then you may have to take into account all of those potential requirements for all Council Services in order to establish whether or not the EU Procurement Rules apply.

Example: The Council knows that it is going to purchase a number of PCs in the next 12 months. It is clear what its requirement is immediately, but it has also budgeted for ongoing purchases over the next 12 months, which take the potential value of the contract over the EU threshold for supplies. In these circumstances, the Council will need to ensure that the purchase is advertised in the OJ and follow the EU Rules.

- 7 The detailed EU Rules on calculating the value of the contract are in place to ensure that the EU Rules are not avoided, due to the inappropriate splitting of contracts. If it is possible that the Council as a whole may have repeated requirements for the same or similar items, services or works, then you must discuss this with Legal Services.
- 8 Where there is a requirement for repeated purchases, it may well be that a Purchasing Scheme is a better approach for the Council to adopt. Purchasing Schemes such as a centrally organised framework arrangement run by a central purchasing body should ensure that the EU Rules have already been satisfied, so there is no ongoing obligation to advertise in the OJ or elsewhere each time a requirement arises. This may well represent better overall value to the Council.

## 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, equality, efficiency and cost savings (where appropriate).

### CPR 10

- 1 Pre-planning is critical for all purchasing. All purchasing procedures (both through quotes and more formal tendering) must be undertaken in a manner which ensures integrity of the process and within appropriate timescales.
- 2 For purchasing processes subject to the EU Rules, there are statutory timescales which must be followed. These are minimum timescales and should be used as a starting point for planning an appropriate timetable.
- 3 In considering how much time is required, you should allow for preparation time, the amount of time and resources required to draft the relevant technical and legal documents. You also need to take account of internal procedural requirements such as approvals processes as well as appropriate timescales to allow contractors to fully prepare their responses. Different timescales will apply according to the nature and complexity of the purchase being made.
- 4 **CPR 10.1.2:** The EC Treaty Principles apply to **all** purchasing by the Council. This means that all contracts must be let fairly. Councils must not do anything that might prejudice fair and open competition for a contract. The principles require the Council to ensure that there is equal opportunity and equal treatment of all potential contractors through any purchasing exercise. The Council must not unduly favour contractors or applicants from a particular country including favouring applicants from the UK.
- 5 **CPR 10.1.3:** The EC Treaty Principles also require all purchasing processes to be run in an open and transparent manner. This means that the documents being used in the purchasing process should make it clear to all parties participating in the process, what is happening, when and why. All potential contractors should be given an equal opportunity to clarify the Council's requirements and processes.
- 6 **CPR 10.1.4:** Probity means that each purchasing exercise transparently secures the best value for the Council in the public interest, untainted by conflicts of interest, collusion or private advantage.
- 7 **CPR 10.1.5:** See comment above at CPR 1.

## 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 one 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.

## CPR 11

- 1 Tender processes must be undertaken in an open and transparent way and explained to tenderers so that they understand what you are doing, why and when.
- 2 All contracts over £75,000 must involve a formal advertisement and invitation to tender process. All contracts above the EU Rules thresholds must also comply with the detailed EU Rules applying to the conduct of the tender process. These may differ according to the type of process used.
- 3 The invitation to tender should, as a minimum, include:

- Instructions to tenderers which set out when and how tenders must be submitted, in what format and where queries should be addressed to at the Council.
- The specification/technical details of the subject matter of the contract.
- The contract terms and conditions which will apply.
- The tender evaluation criteria.
- The process for awarding the contract.

4 Invitations to tender should be written in plain language and avoid the overuse of unnecessary technical terms.

5 **CPR 11.2:** All tenderers must be treated in the same way; hence the requirements that the tenders are all presented in a similar manner when submitted to the Council by the tender return date. Tenders are to remain unopened until the date and time specified for opening so that, for example, there is no potential for an early tender to influence the process.

6 **CPR 11.3:** The same reasoning as for CPR 11.2 underlines the provisions relating to electronic submission of tenders.

7 **CPR 11.4:** Late tenders should normally be rejected unless (1) late delivery is a result of actions outside the control of the tenderer or (2) other exceptional circumstances exist which the Council, in exercising reasonable discretion, deems sufficient to allow acceptance. Where a decision is made to accept a late tender, then it is sensible to document the time of receipt of that tender and the reasons why the tender has been accepted.

Practical examples of the sort of circumstances where late tenders may on occasion be accepted include:

- Where the Council's offices were unexpectedly closed at the date specified for receipt of tenders so that tenders could not be delivered on time.
- Particularly severe weather which may have delayed the arrival of a tender sent by courier but where there is clear evidence of dispatch with sufficient time allowed for delivery to comply with the tender return time and date.
- Where a tender has not been received at all but there is genuine and persuasive evidence that the tender was prepared and dispatched on time.

8 **CPR 11.5:** There needs to be a clear audit trail of all tenders received, from whom and when they are opened, to ensure that there is no preferential or unfair treatment.

9 **What happens if tender processes do not go as planned or if there is technical non compliance?** The Council's standard "Invitation to Tender" document should include provisions stating that tenders can be rejected if they are not compliant with the requirements of the Council, including compliance with submission dates, times and format. Where a tender is received which is non compliant because, for example, the envelope is not marked as required, then, subject to any limitations in the Scheme(s) of Delegation, the Responsible Officer (or Chief Officer where appropriate), may exercise some discretion in terms of whether or not that tender is accepted. Similarly, where there is provision for this in the Invitation to Tender, if after undertaking an initial review of the tender documents, the Responsible Officer is of the view that a genuine mistake, such as a mathematical error has been made in the tender, then the Responsible Officer (or Chief Officer where appropriate) may wish to exercise discretion and go back to the affected tenderer to clarify the submission made. This should always be within the accepted practice for dealing with such discrepancies within the terms of the particular contract and method of purchasing. If you wish to exercise this type of discretion, you should ensure that this falls within your

delegated powers. All exercises of discretion should be carefully recorded in writing, including reasons why the discretion was exercised.

- 10 Where tenders are submitted electronically or by other digital media, then the Council should have in place, appropriate systems to ensure that receipt can be clearly recorded to ensure that tender timescales are complied with. Again, the Responsible Officer (or Chief Officer where appropriate) may exercise discretion as to whether or not to receive and accept tenders which are not submitted strictly in accordance with these requirements, although exercise of that discretion, should be exceptional and you should take advice from Legal Services.

## 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.

### CPR 12.1

- 1 The Council is under a general obligation to ensure that it is open and transparent about its purchasing procedures. This includes how you select the best tender or quote. This general obligation under the EC Treaty Principles applies to all purchasing and contracts – both those subject to the EU Rules and those not caught by those EU Rules.
- 2 “Evaluation criteria” are the criteria which you will use to assess a quote or tender in order to come to a decision on which quote or tender best meets the Council's requirements and so who should be awarded a contract. It is important that you are clear and open with tenderers about what criteria you will use and that both they and you know, in advance, how the Council will assess/mark against the criteria. Where the EU Rules apply to the contract, then you are obliged by law to disclose the tender evaluation criteria in advance (see CPR 12.2).

- 3 This means that for all purchasing, the evaluation criteria must be set out in advance and be provided to the tenderers together with any scoring or assessment scheme which will be used. The criteria and scoring or assessment scheme cannot be changed after they have been provided to the tenderers, so you must be certain that the criteria are robust and the scoring or assessment scheme is appropriate for the particular contract and purchasing process.
- 4 Notification of the criteria and scoring or assessment scheme can be done in a number of ways – depending upon the type of process which you are using. For simple quotes, the evaluation could just be set out in a list in the letter inviting contractors to quote. For more formal processes, it would generally be more appropriate to include this information in the Invitation to Tender document and this may involve a more complex presentation style.
- 5 Specific provisions relating to tender evaluation criteria apply to contracts which are subject to the EU Rules (see commentary on CPR12.2)

## **CPR 12.2**

- 6 The EU Rules have specific provisions applying to tender evaluation criteria. The main legal provisions are at Regulation 30. This section now goes on to explain some of the key provisions of Regulation 30.
- 7 The Council is required to award contracts on the basis of an offer which is either (1) the lowest price or (2) the “most economically advantageous” – which means that other factors, in addition to price, can be taken into account such as quality, timing and delivery. In practice, the Council is extremely unlikely to opt to award a contract on the basis of lowest price only and CPR 12.3 reflects this.
- 8 Regulation 30 provides examples of the sort of evaluation criteria which can be used to assess what amounts to the “most economically advantageous tender”. This includes factors such as quality, price, technical merit and after sales service. The list is not exhaustive and so other evaluation criteria can be used. All evaluation criteria used by the Council in evaluating a tender must be linked to the subject matter of the contract. This means that the criteria must be related to the works, supplies or services which are actually being purchased. We have given two examples of evaluation criteria below. There is more guidance in the Office of Government Commerce papers “Social Issues in Purchasing” and “Fair and Ethical Trading”.

### **Example 1. Environmental Considerations**

The Community of Helsinki decided to put their bus services out to tender. They used award criteria such as overall price, quality of the bus fleet and operational quality. Under one award criterion, companies could score extra points if they could comply with certain emission and noise levels. On the basis of these extra points, the contract was awarded to the municipal transport company.

A losing tenderer opposed this decision, arguing that emission and noise levels could not be used as an award criteria.

The European Court of Justice ruled that the criteria could be used as (1) there was a sufficient link to the subject matter of the contract, (2) the criteria were specific and objectively quantifiable, (3) use of these criteria were notified in advance and (4) it was in accordance with basic Treaty principles.

Example 2. Social considerations -the social issue must be relevant to the purchase  
Buying coffee/Fairtrade principles

The Council may specify organic coffee because the production process relates to the production of the coffee in terms of chemical content and the way it is grown. However, they cannot specify **only** fair trade coffee because this relates to the standard of living of the coffee growers and not the product. The Council can say in its contract documents that it would welcome fair trade coffee options such as Fairtrade or equivalent as part of a coffee supply contract. The bids should be evaluated on a value for money basis using the organic criteria and others directly related to the subject of the contract. Where the winning tenderer can supply fair-trade coffee, then the contract documentation may say that it should be made available at civic meetings.

- 9 The evaluation criteria which the Council will use must be stated in advance either in the OJ advertisement or in the tender documents. (The Regulations refer to the “contract documents” but in this context this means the Invitation to Tender (or equivalent documents if the open or restricted procedures are not being used).
- 10 In addition to setting out in advance what the evaluation criteria are, the Council is also required to state what “weighting” will be applied to assessing each of the criteria. The weightings must be listed together with the criteria – either in the OJ notice or in the tender documents. This requires the Council to give careful thought well in advance as to how tenders will be evaluated. You may need to take advice on formulating evaluation matrices from the appropriate professionals.
- 11 It is only in very exceptional circumstances, that the Council will be able to avoid the requirement to list the weightings in advance. You should start with the assumption that weightings must be provided. If you consider that it is not possible to do this, then you must discuss this with Legal Services. If weightings cannot be provided, then Council is still required to list the criteria and must list them in descending order of importance.

#### CPR 12.4/ 12.5

- 12 For all service/supply contract which are valued at over the relevant EU threshold and for works contracts valued at over the EU Service/Supply threshold unless the Contract is a simple or routine lower value contract the Executive/Council have to authorise the award of the Contract by applying the award criteria already set which were notified to the tenderers. The Chief Officer shall report the results of the competition to the Executive for determination. The exception to this is for simple or routine lower value contracts which include those contracts which are only EU contracts by virtue of the aggregation rules. A number of examples of the types of contract falling within this exception are given at the commentary to CPR 5.1.3 and CPR 8.1 above. If an officer is unsure whether the exception applies he/she should seek a determination from the Chief Executive in consultation with the Monitoring Officer.
- 13 There must be a stand still period after the decision to award has been taken as outlined in rule 8.2.2 before the award can be formalised.
- 14 For all service supply and works Contracts which are valued below the EU service/supply threshold (in force at the time) the Chief Officer may determine the award of the contract by applying the award criteria already set and notified to the tenderers. There is no need for a stand still period as the EU rules do not apply to these contracts.
15. There is a clear expectation that members will be kept fully briefed on the letting and award of contracts which are likely to be of interest to them regardless of the contract value. This may be because the particular contract impacts on their ward, or on their area of responsibility on a board, or because they are a portfolio member, or simply because the contract has a public profile. There are a number of ways in which this could be achieved:

- The Chief Officer may decide voluntarily to put up a report to members for a decision even though this is not a requirement of the Contracts Procedure Rules. This is more likely to be appropriate for contracts which have a particularly high public profile.
- The Chief Officer may decide to have a standing information item on the relevant board agenda to update members on the letting of contracts which are likely to be of interest to members. This is more likely to be appropriate where the Service deals with a number of contracts which all have a public profile.
- The Chief Officer may decide to take an information item on a particular contract to a board or to Cabinet.
- Lastly they may decide to talk to relevant members informally so that there is a proper awareness of contracts which are being let affecting their ward or particular area of responsibility. This is more likely to be appropriate where the contract is likely to be of interest to only a limited number of councillors.

The method of communication is left to the Chief Officers discretion.

### **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.

## CPR 13

- 1 The requirements of the CPRs can only be waived in exceptional circumstances and in advance. If a waiver is made to these CPRs, then the provisions of CPR 13.3 must be complied with to ensure it is clear why the decision has been made and by whom. All the relevant circumstances must be taken into account.
- 2 These provisions should not be used merely where to go out to tender would, for example, result in additional administrative or procedural burdens or a short period of delay. The waiver provisions should not be used as an excuse for poor procurement practice or for a lack of advance planning (see CPR 13.6). The general presumption is that contracts above the relevant tendering threshold will be put out to competitive tender so as to ensure that the Council uses its resources efficiently, purchases quality goods and services and works, safeguards its reputation from any implication of dishonesty or corruption and is able to demonstrate principles of sustainability, efficiency, whole life costings and cost savings.
- 3 It is very important to note that if the contract is of a type and value which means that it is subject to the EU Rules then there are only very limited circumstances in which a contract can be awarded without competition and the permitted circumstances are extremely narrowly interpreted. If you are seeking to exclude an EU contract from the requirement to go out to competition then you must seek advice in advance from Legal Services.
- 4 For contracts which are not subject to the EU Rules there are still obligations in terms of ensuring appropriate levels of competition (see comment at CPR 4.1.2 and CPR 7.1).

### CPR 13.1

- 5 **CPR 13.1.1:** This CPR sets out the circumstances where it may be permissible due to urgency for the Council to purchase works, supplies or services without going through a competitive process.

Example: For a contract not subject to the EU Rules, a waiver from the requirement of competition may be appropriate using CPR 13.1.1 where, due to unforeseen circumstances, there is an urgent requirement for the provision of domiciliary care services and failure to deliver those services as speedily as possible may lead to health and safety issues for users.

**6 CPR 13.1.2:** Regulation 14 of the Public Contracts Regulations 2006 sets out certain, narrowly constrained circumstances where contracts which are subject to the EU Rules can be awarded without following a competitive purchasing process. These EU Rules also provide a good steer for the sort of circumstances where it may be acceptable to waive the requirement for competition for contracts which are not subject to the EU Rules. These include the following types of situation:

Examples:

- Where the Council has already gone out to an open and competitive tender, but only non compliant tenders have been received. It therefore decides to terminate the procurement process and negotiate the contract with those bidders who submitted a tender as part of the previous process.
- Where the Council went out to open competition and received no responses at all, in which case it decides to approach a single contractor and negotiate a deal on the basis of the original terms included in the public tender process.
- Where the Council already has a contract under which goods have been supplied to it and then it requires additional goods which could not be provided by another supplier. There must be genuine incompatibility between the existing goods and those to be purchased or genuine and disproportionate technical difficulties in procuring the goods from elsewhere. Under the EU Rules, the additional requirements must also be purchased within 3 years of the original contract.
- Where there is a closing down sale and so goods can be purchased on a particularly advantageous basis.

These examples are not an exhaustive list but they do give an indication of the sort of circumstances where the purchase of additional goods, works or services without competition may be permissible. Where the Council wishes to extend a contract then CPR 14 will also apply.

**7 CPR 13.1.3:** Where a contract is awarded using a Purchasing Scheme (where appropriate, one which is compliant with the EU Rules) then provided that the Council is satisfied that the conditions set out in CPR 15 are met then there will be no further need to run a competition as that has already been undertaken on behalf of the Council.

**8 CPR 13.1.4:** In exercising discretion as to the award of the contract without the competitive process, the individual making that decision must pay due regard to the requirements of the CPRs and this purchasing guide. If the EU Rules apply then they must seek advice from Legal Services prior to proceeding.

Examples of where a waiver may be justified include:

- Requiring two rather than three written quotes for a contract between the value of £5,000 - £75,000 where there is clear evidence that the number of potential contractors is extremely limited
- A decision to go down a written quotation route rather than the requirement to obtain three written tenders in advance (for contracts below the EU threshold) and where the Council is satisfied that (1) there is no obligation to advertise that opportunity to comply with the general requirements of the EC Treaty Principles and (2) the general underlying requirements of the procurement process will still be satisfied.

## **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 must report the circumstances to the next meeting of the Executive or Council and follow the procedure in 14.2 above.

## CPR 14

- 1 This CPR is primarily aimed at addressing the issue of when and how a contract period may be extended. There is a general presumption against the extension of contracts. Contracts may only be extended beyond their original term in genuinely exceptional circumstances. Any extension must be for a limited and specified period. Where the contract is caught by the EU Rules then the contract period may only be extended in limited circumstances and you must seek advice from Legal Services.
- 2 Clarity and certainty are key factors in establishing whether or not an extension is permissible. A well drawn up contract will set out in advance the clear basis upon which that contract may be extended.

Example: When the contract for IT support services was advertised, it was made clear in the advertisement that the contract would be:

- for an initial period of five years
- with an option to extend for up to a further two years

The provisions of the original contract explained how the extension is to be exercised together with the costs. The Council is now proposing to exercise the option to extend. There will be no renegotiation of either the legal terms, scope of the contract or the payment arrangements (except for the price inflation provisions specifically allowed for within the contract and clearly defined in advance). This extension is permissible.

- 3 The problem with contract extensions arises where either there is no provision for extension within the contract or the potential for extension was not made clear at the outset or where the arrangements for the contract extension result in renegotiations. In these circumstances, there are specific provisions which apply in the context of contracts subject to the EU Rules and you must seek advice from Legal Services.
- 4 For contracts not subject to the EU Rules then the basic principle is that any period of extension should be limited, for a specified period and the effect of the extension should not be such as to create a disproportionate expansion in the coverage either in terms of value, time period or subject matter of the contract. This is because it may well be regarded as anti-competitive to agree an extension of the contract which effectively awards a valuable opportunity to the existing supplier without having exposed that opportunity to competition and providing other providers with the opportunity to deliver those additional requirements.
- 5 Any extension of the subject matter (as opposed to the contract period) of a contract can generally only be permitted in accordance with the provisions of the contract or in very exceptional circumstances covered by the EU Rules. For longer term or major contracts, there are often provisions that allow for the evolution of the contract to meet the Council's needs, for example, by way of continuous efficiency and improvements clauses. Most of these contracts also incorporate mechanisms to allow for a certain degree of variation or change to reflect the practical issues associated with implementation and ongoing service delivery. Contracts must not be drafted in such a way as to be so flexible that they are in breach of the basic requirement that the contract terms must be clear and certain or to allow for changes which are so significant as to be potentially anti competitive because, for example, they effectively amount to the award of a new contract.
- 6 Particular caution should be exercised in terms of the practical effect of an extension on the contract value. In no circumstances should an extension be made to a contract that has the effect of increasing the contract to a value over the EU Rules thresholds in force at that time.

## 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.

### CPR 15

- 1 There are an increasing number of Purchasing Schemes which the Council may choose to participate in which assist in terms of purchasing efficiencies and value for money. An illustrative list is set out in CPR 15.3 and these types of schemes are discussed in further detail below.
- 2 **CPR 15.2:** Responsible Officers must check three key factors in advance, prior to using a Purchasing scheme:
- 3 **CPR 15.2.1:** Responsible Officers must check that the Council is legally entitled to use the Purchasing Scheme.

Example: in the context of a framework arrangement or purchasing arrangement set up by central purchasing bodies, it is important to ensure that the original process (particularly if it is an EU process) made it clear that the Council could potentially purchase under the terms of that scheme. If the Council was not sufficiently clearly identified in the original establishment of the schemes, then there may be problems with use of that scheme. If it is a purchase subject to the EU Rules, then if the Council has not been sufficiently clearly identified in advance, it may not be able to rely on that scheme to satisfy its own obligations under the EU Rules.

- 4 **CPR 15.2.2:** Responsible Officers need to check that the Purchasing Scheme covers the purchases to be made. All Purchasing Schemes should clearly specify what can be purchased under the scheme. This is to ensure that contractors participating in the scheme know what they are providing and purchasers are clear about the coverage and limitations of the scheme. It is therefore important to check that particular schemes do cover all your requirements including the terms and conditions under which the purchases are to be made.
- 5 **CPR 15.2.3:** Responsible Officers should ensure that the Purchasing Scheme has been established and is operated in accordance with the detailed EU Rules (where they apply). Purchasing Schemes can be a very efficient way of ensuring compliance with the EU Rules without having to undertake further separate EU procurement processes. The Council cannot discharge itself from its obligations to ensure compliance with the EU Rules.

Example: In the context of framework arrangements it is important to ensure that types of potential purchases to be made by the Council are clearly identified in the original OJ notice, that the framework is established for the permissible four year period and that any mini competitions are operated in accordance with the provisions of the EU Rules.

### CPR 15.3

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

6 The term "Purchasing Scheme" is used to describe a range of different purchasing practices and the list is not intended to be exhaustive.

7 **CPR 15.3.1: Contractor prequalification lists/select lists** are often operated by councils to produce a list of contractors who are appropriately pre qualified to deliver the requirements of the Council. This streamlines purchasing as it means that a contractor's suitability does not have to be assessed every time a contract award is contemplated. Care does need to be taken to ensure that these arrangements do not fall into the trap of being caught by the EU Rules, because they amount to a repeated requirement for the same or similar provision (see comment at CPR 9). Pre qualification and select lists are not permitted for purchasing caught by the EU Rules.

8 **CPR 15.3.2: Framework Arrangements:** care needs to be taken to ensure that you understand what is intended by this term and whether or not the Purchasing Scheme is a framework arrangement subject to the EU Rules. The EU Rules define framework arrangements as a very specific type of arrangement. Where the EU Rules apply, frameworks are subject to controls including a limit of 4 years on the life of the framework and the conduct of mini competitions within a framework. However, the term "framework" is used more generally and so you need to be clear about what type of framework you are participating in and whether or not it complies with EU Rules.

9 **CPR 15.3.3: Purchasing arrangements: set up by central purchasing bodies and commercial organisations** (including arrangements established by the Office of Government Commerce) are frequently forms of framework arrangements set up to comply with the EU Rules. However, you will need to check that you understand what format the purchasing arrangements comprise and whether or not EU Rules have been taken into account and, where appropriate, complied with in their award.

- 10 **CPR 15.3.4: Consortium purchasing** may refer to purchasing by groups of authorities together or as one authority on behalf of others, in which case, it is more likely that technically this amounts to a central purchasing arrangement.
- 11 **CPR 15.3.5: Collaborative working** arrangements may involve different levels of formality. Some collaborative working is merely a loose agreement between different organisations to work together in their purchasing. Collaborative working is also used to refer to arrangements which may in practice, involve the pooling of resources. It is important to clarify which sort of collaborative working arrangement is proposed, so as to identify the rules which may apply.
- 12 **CPR 15.3.6:** In some circumstances, a **formal legal agency** arrangement may apply in which case you need to ensure that you understand the legal terms which the Council will be required to contract on.
- 13 **CPR 15.3.7:** All of the above types of Purchasing Schemes may include some form of EU procurement, but there are also other forms of electronic Purchasing Schemes and information sharing.

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.

#### **CPR 15.4**

- 14 Where a Purchasing Scheme is used then, as a main driver behind many of these Purchasing Schemes is to simplify procurement, some or all of the CPRs may not apply. In practice, the CPRs less likely to apply, are those which relate to the tendering procedures as many of these procedures will often be undertaken as part of the Purchasing Scheme process. The extent of the application of the CPRs and the exemptions from those rules will vary according to the type of scheme being used.
- 15 In general, the provisions of the following CPRs will continue to apply when a Purchasing Scheme is used:
- CPR 1 – Purpose of the Contracts Procedure Rules**
  - CPR 2 – General principles**
  - CPR 3 – General principles applying to all contracts – contracts in writing/standard clauses**
  - CPR 4 – Regulatory context**
  - CPR 5 – Responsibilities of Chief Officers and Responsible Officers**
  - CPR 6 – Schemes of Delegation**
- 16 **CPR 7: Financial Thresholds and Procedures**
- CPR 7.1:** Will apply where a Purchasing Scheme is used.
  - CPR 7.2:** Will apply where a Purchasing Scheme is used.
  - CPR 7.3:** Will apply where a Purchasing Scheme is used where the Responsible Officer is required to make a decision as to the choice of advertising media.
  - CPR 7.4:** This CPR will apply only to the extent that it is relevant for a particular Purchasing Scheme. Quotes or written tenders may be procured by way of the Purchasing Scheme.

In some circumstances, for example where a framework arrangement for supplies has been established, then the Council can purchase direct from contractors on the framework without the need for a further quote or tender process.

**CPR 7.5:** Will apply where a Purchasing Scheme is used.

17 **CPR 8: Financial Thresholds and processes applying to approval and execution of contracts.**

**CPR 8.1:** For contracts over the relevant EU threshold, the choice of purchasing procedure – including choice of the Purchasing Scheme (and thus procedure) should still be authorised in writing in advance.

**CPR 8.2, CPR 8.3 and CPR 8.4:** Responsible Officers still need to ensure that if a Purchasing Scheme is used, then these requirements are complied with.

18 **CPR 9: Calculating the contract value.** These principles still apply in calculating the contract value of purchases to be made under Purchasing Schemes.

19 **CPR 10: Principles underlying tendering processes and tender evaluation.** The extent to which this CPR will apply will depend upon the nature of the Purchasing Scheme. Some Purchasing Schemes will involve the undertaking of tender evaluation entirely by another organisation. In these circumstances, the Council still needs to be satisfied that the process to be undertaken by that other organisation meets its basic requirements but for example, less attention will need to be paid to ensuring sufficiency of time in planning and running the process as this has been done on behalf of the Council.

20 Basic EC Treaty principles of equal opportunities and equal treatment, openness and transparency as well as the need to ensure probity and that the outcomes deliver sustainability, efficiency and cost savings will still apply irrespective of the type of procurement process used, including the use of Purchasing Schemes.

21 **CPR 11: Submission and opening tenders:** For certain types of Purchasing Schemes, the Council will not need to issue Invitations to Tender and comply with the other requirements of this CPR as the process itself may be run by another organisation. Again, this will be dependant on the type of Purchasing Scheme used.

22 **CPR 12: Evaluation of quotes and tenders and award of Contract:** Irrespective of the Purchasing Scheme used, the Council should be satisfied that the criteria used to select contractors meets its requirements and ensure that best value is obtained. However, for certain types of Purchasing Schemes such as centrally organised framework arrangements and those undertaken by central purchasing bodies, the evaluation criteria and processes will be run by another organisation.

23 **CPR 13: Waivers:** These provisions still apply to the extent that they are relevant under Purchasing Schemes.

24 **CPR 14: Extension to existing contracts:** These provisions will continue to apply and any extensions to contracts awarded under Purchasing Schemes will also need to meet the requirements of those Purchasing Schemes and be carried out in accordance with those arrangements.

25 **CPR 16: Review and change of these CPRs:** These provisions apply. It should be noted that the list at CPR 15.3 of permissible Purchasing Schemes allows for a range of Purchasing Schemes to apply. These are not identified specifically but generically and so

new Purchasing Schemes may well fall within the permitted type of Purchasing Scheme without a requirement for a change in the CPRs themselves.

## **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.

### **CPR 16**

- 1 The CPRs themselves can only be updated in accordance with the provisions set out in the Council's Constitution.
- 2 The EU Thresholds are set by the EU every two years and apply to all member states. There is no discretion available in terms of the threshold at which the EU Rules will apply. It is therefore more appropriate to arrange for amendment of CPR 7 to reflect the new EU Threshold under a scheme of delegation.
- 3 The provisions of this Purchasing Guide can be updated and amended more easily than the CPRs themselves. If you have comments, suggestions or proposals for amendments or improvements to this Purchasing Guide then please contact Legal Services.

## **APPENDIX 1 – Council’s standard terms and conditions:**

### **1. Interpretation**

In these Conditions:

#### **1.1 "Conditions"**

means the standard terms and conditions of purchase set out in this document, and (unless the context otherwise requires) includes any special terms and conditions agreed in writing between the parties;

#### **"Contract"**

means the contract for the purchase of the Goods and/or the supply of the Services;

#### **"Council"**

means Tonbridge and Malling Borough Council;

#### **"Council’s Whistle blowing Policy"**

means the Council’s policy in relation to whistle blowing in force from time to time.

#### **"Delivery Address"**

means the address stated on the Purchase Order;

#### **"Goods"**

means the goods (including any instalment of the goods or any part of them) described in the Purchase Order;

#### **"Price"**

means the price of the Goods and/or the charge for the Services;

#### **"Provider"**

means the entity who is responsible for providing the Goods and/or the Services as stated in the Purchase Order;

#### **"Purchase Order"**

means the Council's purchase order on the back of which are these Conditions, or in relation to an electronic purchase order, the Council’s purchase order to which these Conditions are annexed;

#### **"Services"**

means the services (including any part of them) described in the Purchase Order;

#### **"Specification"**

includes any plans, drawings, data or other information relating to the Goods and/or the Services.

#### **"Works"**

means all records, reports, documents, papers, drawings, designs, transparencies, photos, graphics, logos, typographical arrangements, software, invention, idea, discovery, development, improvement or innovation and all other materials in whatever form, including but not limited to hard copy and electronic form, prepared by the Provider in the provision of the Goods and/or Services.

Any reference in these Conditions to a statute or a provision of a statute shall be construed as a reference to that statute or provision as amended, re-enacted or extended at the relevant time.

The headings in these Conditions are for convenience only and shall not affect their interpretation.

## **2. Basis of Purchase**

- 2.1 This Purchase Order constitutes an offer by the Council to purchase the Goods and/or the Services subject to these Conditions.
- 2.2 These Conditions shall apply to the Contract to the exclusion of any other terms and conditions which the Provider has sought to or subsequently seeks to impose on the Council.
- 2.3 No variation to the Purchase Order or these Conditions shall be binding unless agreed in writing between the authorised representatives of the parties.

## **3. Specification**

- 3.1 The quantity, quality and description of the Goods and/or the Services shall, subject as provided in these Conditions, be specified in the Purchase Order and/or in any applicable Specification supplied by the Council to the Provider.
- 3.2 The Provider shall comply with all applicable regulations and/or other legal requirements concerning the manufacture, packaging, and delivery of the Goods and/or performance of the Services.
- 3.3 The Provider shall not unreasonably refuse any request by the Council to inspect and test the Goods during manufacture, processing, or storage at the premises of the Provider (or any third party) prior to dispatch, and the Provider shall provide the Council with all facilities reasonably required for inspection and testing.
- 3.4 If as a result of inspection or testing carried out in accordance with Condition 3.3, the Council is not satisfied that the Goods will comply in all respects with the Contract, the Provider shall take such steps as are necessary to ensure compliance.

## **4. Price and Payment**

- 4.1 The Price of the Goods and/or the Services shall be as stated in the Purchase Order and, unless stated otherwise, shall be inclusive of all charges for packaging, shipping, carriage, insurance and delivery of the Goods to the Delivery Address, and any duties or levies other than Value Added Tax.
- 4.2 No increase in the Price may be made (whether on account of increased material, labour or transport costs, fluctuation in rates of exchange or otherwise) without the prior consent of the Council in writing.
- 4.3 The Council shall be entitled to any discount for prompt payment, bulk purchase or volume of purchase customarily granted by the Provider, whether or not shown in its own terms and conditions of sale.
- 4.4 The Provider's official invoice should be sent promptly to the Council after delivery of the Goods and/or the Services, as the case may be, to the address indicated on front of the Purchase Order, unless otherwise instructed and must show:
  - 4.4.1 the Council's Purchase Order number;
  - 4.4.2 an Invoice number;

- 4.4.3 a full description of the Good and/or the Works and/or the Services;
  - 4.4.4 full details of prices;
  - 4.4.5 any discount allowed;
  - 4.4.6 current VAT requirements; and
  - 4.4.7 officer contact details where known.
- 4.5 Unless otherwise stated in this Purchase Order or agreed in writing, the payment of the Price will be made within 30 days of receipt of a correct invoice, and upon the confirmation by an officer of the Council that the Goods and/or the Services have been provided to the Council's satisfaction, unless the Provider's credit terms are less onerous on the Council than this, in which case the Provider's credit terms will apply.
- 4.6 The Council shall be entitled to set-off against any invoice, any amount due from the Provider under this Purchase Order or under any other contractual arrangement.
- 4.7 Value Added Tax, where applicable, shall be shown separately on all invoices as a strictly extra charge. All invoices containing Value Added Tax must conform to the requirements of HM Revenue and Customs.

## **5. Delivery**

- 5.1 The Goods shall be delivered to and/or the Services shall be performed at the Delivery Address on the date or within the period specified in the Purchase Order, in either case during the Council's business hours.
- 5.2 Where the date of delivery of the Goods and/or performance of the Services is to be specified after the placing of the Purchase Order, the Provider shall give the Council reasonable notice of the specified date.
- 5.3 A delivery note which specifies the number of the Purchase Order shall accompany each delivery or consignment of the Goods, and must be displayed prominently.
- 5.4 If the Goods are to be delivered and/or the Services are to be performed by instalments, the Contract will be treated as a single contract and will not be severable.
- 5.5 The Council shall be entitled to reject any Goods delivered which are not in accordance with the Contract, and shall not be deemed to have accepted any Goods until the Council has had reasonable time to inspect them following delivery or, if later, within a reasonable time after any latent defect in the Goods has become apparent.
- 5.6 The Provider shall supply the Council in good time with any instructions or other information required to enable the Council to accept delivery of the Goods and/or performance of the Services.
- 5.7 The Council shall not be required to return to the Provider any packaging or packaging materials for the Goods, whether or not the Goods are accepted by the Council.
- 5.8 If the Goods are not delivered and/or the Services are not performed on the due date then, without prejudice to any other remedy, the Council shall be entitled to deduct from the Price or, if the Council has already paid the Price, to claim from the Provider an amount equal to the additional costs incurred by the Council as a result of the delay.

- 5.9 Risk of damage to or loss of the Goods shall pass to the Council upon delivery to the Council in accordance with the Contract.
- 5.10 The property in the Goods shall pass to the Council upon delivery, unless payment for the Goods is made prior to delivery, where it shall pass to the Council once payment has been made and the Goods have been appropriated to the Contract.

## **6. Quality Assurance**

- 6.1 The Provider shall operate a self-regulatory system of quality assurance and quality measures relating to the Contract in addition to any quality requirements in the Specification which ensures that the Goods and/or Services are provided in accordance with the requirements of the Contract and as part of this requirement, the Provider shall check that information, data or software supplied pursuant to the Contract is fit for the purpose for which the Council intends to use it.

## **7. Warranties and Liability**

- 7.1 The Provider warrants to the Council that the Goods will be:
- 7.1.1 be of sound materials and first class workmanship;
  - 7.1.2 be equal in all respects to the samples, patterns, description or specification provided or given by either party;
  - 7.1.3 if the purpose for which they are required is indicated in the Purchase Order or otherwise, either expressly or by implication, be fit for that purpose;
  - 7.1.4 be of satisfactory quality (within the meaning of the Sale of Goods Act 1979);
  - 7.1.5 be free from defects in design, material and workmanship; and
  - 7.1.6 will comply with all statutory requirements and regulations relating to the sale of the Goods.
- 7.2 The Provider warrants to the Council that the Services will be performed by appropriately trained and qualified personnel, with due care and diligence, and to the standards which would reasonably be expected from a skilled and experienced provider engaged in the provision of services similar to the Services under the same or similar circumstances.
- 7.3 The Provider will indemnify the Council in full against the following:
- 7.3.1 all loss, liability, damages, costs, expenses (including legal expenses) or injury whatsoever and whenever arising caused to the Council, or for which the Council may be liable to third parties due to defective workmanship or unsound quality of the Goods and/or the Services supplied;
  - 7.3.2 all claims in respect of death or injury, howsoever caused, to any of the employees, or those of the agent or sub-contractors, of the Provider, while in or about the Council's sites, works or other places of business;
  - 7.3.3 any consequential loss or damage sustained by the Council for which the Council may be liable, as a result of the failure of the Provider to supply the materials or perform the work in accordance with the terms of this Purchase Order.
- 7.4 The Provider having given the abovementioned indemnity shall accordingly maintain in force during the term of the Contract full and comprehensive insurance as appropriate in

respect of the provision of the Goods and/or Services such insurance to be with reputable insurers acceptable to the Council acting reasonably.

7.5 Without prejudice to any other remedy, if any of the Goods and/or Services are not supplied or performed in accordance with the Contract, then the Buyer shall be entitled:

7.5.1 to require the Provider to repair the Goods or to supply replacement Goods and/or Services in compliance with the Contract within 7 days; or

7.5.2 at the Council's sole option and whether or not the Council has previously required the Provider to repair the Goods or to supply any replacement Goods and/or Services, to treat the Contract as discharged by the Provider's breach and require repayment of any part of the Price which has been paid.

## **8. Termination**

8.1 The Council shall be entitled to cancel the Contract in respect of all or part only of the Goods and/or the Services by giving notice to the Provider at any time prior to delivery or performance, in which event the Council's sole liability shall be to pay the Provider the Price for the Goods and/or the Services in respect of which the Council has exercised its rights of cancellation, less the Provider's net saving of cost arising from the cancellation.

8.2 The Council shall be entitled to terminate the Contract without liability to the Provider by giving notice to the Provider at any time if:

8.2.1 the Provider makes any voluntary arrangement with its creditors (within the meaning of the Insolvency Act 1986) or (being an individual or firm) becomes bankrupt or (being a company) becomes subject to an administration order or goes into liquidation (otherwise than for the purpose of amalgamation or reconstruction); or

8.2.2 of the property or assets of the Provider an encumbrancer takes possession, or a receiver is appointed, of any; or

8.2.3 the Provider ceases, or threatens to cease to carry on business; or

8.2.4 the Provider does anything improper to influence the Council to give the Provider any contract or commits an offence under the Bribery Act 2010 or to improperly influence an officer under section 117(2) Local Government Act 1972; or

8.2.5 the Council reasonably believes that any of the events mentioned above is about to occur in relation to Provider and notifies the Provider immediately.

8.3 For the avoidance of doubt, where the Council terminates the Contract in accordance with the provisions of Condition 8.2, the Provider shall compensate the Council for any losses suffered as a result of this.

## **9. General**

9.1 The Provider shall be prohibited from transferring, assigning or sub-letting, directly or indirectly, to any person or persons whatever, the whole or any portion of this Contract without the written permission of the Council.

9.2 Any notice required or permitted to be given by either party to the other party under these Conditions shall be in writing addressed to that other party.

9.3 No waiver by the Council of any breach of the Contract by the Provider shall be considered as a waiver of any subsequent breach of the same or any other provision.

- 9.4 If any provision of these Conditions is held to be invalid or unenforceable in whole or in part, the validity of the other provisions of these Conditions and the remainder of the provision in question shall not be affected.
- 9.5 The Provider shall use all reasonable efforts to assist the Council to comply with such obligations as are imposed on the Council by the Freedom of Information Act 2000 (“the 2000 Act”) and the Environmental Information Regulations 2004 (“the 2004 Regulations”) including providing the Council with reasonable assistance in complying with any request for information in connection with the Goods and/or Services served on the Council under the 2000 Act or the 2004 Regulations and processing information provided by the Council in accordance with a record management system which complies with the Lord Chancellor's records management recommendations and code of conduct under section 46 of the 2000 Act.
- 9.6 The Provider shall not issue any press release or make any public statement concerning the Council, its employees, agents, councillors, the Goods and/or Services without the prior written consent of the Council.
- 9.7 The Provider shall ensure that its employees and agents are made aware of the Council's Whistleblowing Policy and that the details of this policy are fully explained to them, and the Provider shall provide the Council with evidence of doing so upon request.
- 9.8 The Provider shall, and shall use reasonable endeavours to ensure that its employees, agents and subcontractors shall, at all times, act in a way which is compatible with the Convention Rights within the meaning of Section 1 of the Human Rights Act 1998.
- 9.9 The Provider agrees to comply with its social responsibilities as follows:
- 9.9.1 the provider shall not discriminate directly or indirectly or by way of victimisation or harassment against any person with respect to opportunity for employment or conditions of employment on grounds of age, colour, race, nationality, ethnic or national origins, disability, sex, sexual orientation, marital status (including civil partnership) pregnancy or maternity, gender re-assignment or religion or belief.
- 9.9.2 the provider shall in all matters relating to the performance of this Agreement and any services provided hereunder comply with the provisions of the Employment Equality (Age) Regulations 2006 and the Equality Act 2010 and any regulations made thereunder and any amendment or re-enactment thereof from time to time and shall in so doing seek to make the services as accessible as possible to all persons.
- 9.10 Acceptance of this Purchase Order will be deemed to bind the Provider to these Conditions and no Goods and/or Services shall be supplied or performed by the Provider, its employees, agents or representatives, except in accordance therewith.
- 9.11 These Conditions and the Purchase Order constitute the entire understanding between the parties relating to the subject matter of the Contract and, save as may be expressly referred to or referenced herein, supersede all prior representations, writings, negotiations or understandings with respect hereto, except in respect of any fraudulent misrepresentation made by either party.
- 9.12 Save for the Parties, no person shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of the terms of this Purchase Order and/or these Conditions.

9.13 The Parties agree to submit to the jurisdiction of the English courts and agree that the Contract is to be governed and construed according to English law.

## APPENDIX 2

### RISK ASSESSMENT

The most common form of assessment in general usage is the 5 x 5 matrix. The colours red, amber, green reflect differing levels of overall risk with green and amber being acceptable and red requiring caution and ways of reducing/managing that risk.

The table at Appendix 2 sets out suggested criteria for assessing the likelihood and impact to produce an overall score.

Ideally, scoring should be undertaken by more than one person to allow for different perceptions of risk; one person's high risk can be another's low to medium.

Where the scoring differs across the criteria for impact and likelihood, it is suggested that a cautious approach is to use the score, which is highest for any of the criteria rather than an average. However, be prepared to apply a common sense approach and score accordingly

### RISK MATRIX

L I K E L I H O O D	VERY LIKELY SCORE 5	5	10	15	20	25
	LIKELY SCORE 4	4	8	12	16	20
	POSSIBLE SCORE 3	3	6	9	12	15
	UNLIKELY SCORE 2	2	4	6	8	10
	HIGHLY UNLIKELY SCORE 1	1	2	3	4	5
		NEGLI-GIBLE SCORE 1	LOW SCORE 2	MEDIUM SCORE 3	HIGH SCORE 4	VERY HIGH SCORE 5
IMPACT						

## Appendix 2: Risk matrix for use in assessing what type of contract is required

<b>Score - 2 Unlikely</b>	<b>Score - 3 Possible</b>	<b>Score - 4 Likely / Highly Likely</b>	<b>Score - 5 Very Likely / Definite</b>
Previous experience discounts this risk as being likely to occur but other organisations have experienced problems in this area.	The council has in the past experienced problems in this area but not in last three years.	The council has experienced problems in this area in the last three years.	The council is experiencing problems in this area or expects to in the next 12 months.
There are controls in place that whilst not tested appear to be effective.	Some controls are in place and generally work but there have been occasions when they have failed and problems have arisen.	Controls may be in place but are generally ignored or ineffective.	No controls are in place.

<b>Score - 2 Low</b>	<b>Score - 3 Medium</b>	<b>Score - 4 High</b>	<b>Score - 5 Very High</b>
The financial impact would be extra costs or loss of income of no greater than £25,000.	The financial impact would be extra costs or loss of income of no greater than £100,000.	The financial impact would be extra costs or loss of income of no greater than £500,000.	The financial impact would be greater than £500,000.
Some temporary disruption to the activities of one council service but not beyond this.	Regular disruption to the activities of one or more council services.	Severe service disruption on a departmental level or regular disruption affecting more than one department.	Severe disruption to the activities of all council departments.
It may cost more or there may be delay in delivery one of the council's corporate objectives.	A number of corporate objectives would be delayed or not delivered.	Many corporate objectives delayed or not delivered.	Unable to deliver most objectives.
Some loss of confidence and trust in the council felt by a certain group or within a small geographical area.	A general loss of confidence and trust in the council within the local community.	A major loss of confidence and trust in the council within the local community.	A disastrous loss of confidence and trust in the council both locally and nationally.