

By: Director of Finance
To: Governance & Audit Committee – 29 June 2007
Subject: **Spending The Council's Money**
Classification: Unrestricted

Summary: To agree the replacement of the Code of Practice for Contracts and Tenders.

FOR DECISION

INTRODUCTION

1. The Code of Practice for Contracts and Tenders forms part of the Council's overall governance arrangement and key parts are included in an Appendix of the Constitution. The Procurement Strategy identified a need to modernise the Code to make it more useable and relevant to managers across the Council engaged in procurement activity. "Spending The Council's Money" is the title of the document being proposed to replace the Code of Practice.
2. At the December meeting I reported on progress to update the Code of Practice for Contracts and Tenders. It was agreed that after consultation with Offices and Members the new document be brought to this meeting for a decision.

WHY ARE CHANGES NECESSARY?

3. Although the Code of Practice forms part of the Council's overall governance arrangement and key parts are included in an Appendix of the Constitution the Council's current procurement related policies are published in a number of separate documents. No single document contains them all.
4. The need to modernise reflects the highly devolved approach to procurement across the Council and the need to give very clear guidance to ensure that managers procure legally, efficiently and effectively. It is important to emphasise that the 'rules and regulations' reflected in the Code of Practice are not fundamentally changed by the new document, it is mostly the style and presentation that is different.
5. "Spending the Council's Money" is more than an updating of the Code and includes guidance on the implementation of these policies and procedures. It is intended to be a helpful, useable, reference for all those involved within the

Council at whatever stage, whether they are specifying, contracting, ordering, managing or scrutinising.

CONSULTATION PROCESS

6. An extensive consultation process with officers has been undertaken in 2007. Over forty officers have been directly involved including resource directors and senior finance managers from all Directorates, as well as the senior procurement practitioners responsible for the major areas of external spend across the Council. The full list of consultees is included at Appendix 1.
7. Officer reaction has been universally positive with a strong acknowledgement of the need for this type of comprehensive guidance.

APPROVAL PROCESS

8. Constitutionally this Committee has the power to agree changes to the Code of Practice but the elements included as an Appendix to the Council's Constitution can only be revised by a meeting of the full council.
9. I intend to take, subject to the Committee's approval, a report to the full Council meeting in September requesting appropriate amendments to the Constitution. Only after that Council meeting can Spending The Council's Money be fully implemented. The proposed replacement Appendix to the Constitution is attached as Appendix 3.
10. The Committee is asked to note that:
 - to avoid confusion, the wording in the two documents is identical wherever possible. The exceptions, other than the introductory paragraph 1, are few in number and minor in impact.
 - to achieve the conformity wording in just three chapters of Spending The Council's Money has had to be amended from the version circulated in May. These three chapters (4, 9 & 13) are attached as Appendix 2.

IMPLEMENTATION

11. Although this is not about a major change to the Council's rules and regulations it is nonetheless a significant redefinition and refinement. Resource has been allocated to promote and explain the new approach from its adoption through until early 2008. This is intended to cover Officers, Members and the supplier community.

RECOMMENDATIONS

12. Members are asked to agree to
 - (a) 'Spending The Council's Money' replacing the current 'Code of Practice on Tenders and Contracts'; and
 - (b) the proposed changes to the relevant Appendix in the Constitution to be put to the September Council meeting.

Clive Greaves
Head of Procurement
Ext 6672

Appendix 1

Officer Consultation

UNIT	NAME	JOB TITLE
<u>Chief Executives Department</u>		
Commercial Services	Kevin Harlock	Commercial Services Director
Purchasing Services	Paul Richardson	Procurement Group Manager
Kent County Supplies	Tarryn Kerr	Senior Product Manager
Passenger Transport Services	Tim Edwards	School Transport Manager
Legal Services	Geoff Wild	Director of Law and Governance
Legal Services	Peter Mulholland	Group Leader, Property and Commercial
ISG	Peter Bole	Head of ICT Commissioning
ISG	Ann Cook	Performance Monitoring Manager
ISG	Terry Hazlewood	Strategic Supplier Manager
Property	Peter Binnie	Head of Operations
Property	Therese Hammond	Performance Improvement Manager
Property	Emma Saunders-Foard	Information Manager
Personnel & Development	Amanda Beer	Director of Personnel and Development
Personnel & Development	Jo Richardson	Inclusive Services Policy Manager
Audit & Risk	Andy Wood	Head of Audit and Risk
Audit	Janet Armstrong	Audit Manager
Finance	Nick Vickers	Head of Financial Services
Finance	John Carter	FBS Programme Manager
Exchequer	Linda Arnold	Exchequer Services Manager
<u>Communities</u>		
Communities	Judy Edwards	Director, Policy and Resources
Communities	Jed Shipton	Head of Financial and Asset Management
KDAAT	Hud Manuel	Finance Manager
<u>Environment & Regeneration</u>		
E & R	Alan Loft	Director of Resources
E & R	Barry Gould	Strategic Finance Advisor
Kent Highway Services	David Thomas	Procurement Manager
Kent Highway Services	Mike Murphy	Contracts Manager

Waste	Rob Howard	Procurement and Projects Manager
<u>Children & Families</u>		
CFE	Grahame Ward	Director, Resources
CFE	Keith Abbott	Director, Finance and Corporate Services
Additional Educational Needs and Resources	Colin Feltham	Head of AEN and Resources
Additional Educational Needs and Resources	Marlene Morrissey	County AEN Manager
<u>Kent Adult Social Services</u>		
Resources	Caroline Highwood	Director, Resources
Finance	Michelle Goldsmith	Directorate Finance Manager
Contracting	Cathi Sacco	Head of Contracting and Quality Assurance
Business and Performance Management	Maggie Singleton	Contracts Manager
Contracting and Planning	Jo Empson	Contracting Manager – East Kent
Service, Policy & Standards	Linda Hardware	Contracts Manager
Supporting People	Ian McCartney	Contracting and Monitoring Review Manager
Specialist Services	Mark Hogan	Contracts Manager
Specialist Services	Julie Harris	Contracts Manager
Business and Performance Management	Rita Wakeman	Operational Contracts Manager – Mental Health
Service, Policy & Standards	Michelle Hall	Contracts Standards Officer
<u>South East Centre of Excellence</u>		
	Andrew Larner	Director
	Steve Dunkerley	Assistant Director

Business Case

A **Business Case** boils down to the answering of two fundamental questions:

- should I be doing this; and
- should I be doing it this way?

The required scale of the tasks detailed here, probably more so than for any of the other activities in the procurement process, is dependent upon the value and risk of the overall procurement.

When is one needed?

As stated in the **Introduction** the principles apply to all transactions but the business case activity for buying some copy paper should be a few moments thought, whilst for a multi-million pound road scheme will be an extensive formal report.

All procurements from £100,000* must have a formally recorded business case. Capital projects from £1m+ have their own, additional, requirements. Guidance on which can be found at:

<http://kent304/cgi-bin/wdbcgiw/CS/docs/CAPITALGUIDANCE/CAPITAL+PROGRAMME+PROCESS+AND+PROCEDURES.DOC>

* The value here is taken from the total cost implication of the decision and not the narrower valuation of a particular contract.

The Financial Regulations state:

A.22 The Chief Executive and Managing Directors are responsible for:

- i ensuring that capital proposals reflect agreed service plans, are prepared in line with guidance issued, are realistic, that necessary business case development and option appraisals have been carried out and any risks identified. Any impact of capital expenditure proposals on service running costs must be identified and included in revenue budget estimates or forecasts;

There is no requirement for an individual business case for each contract. Linked procurements or more formally established programmes will give the opportunity for an all-encompassing business case. Where this is applicable there must still be sufficient detail for appropriate judgements to be made for each contract.

What is it used for?

A well prepared business case will:

- challenge the options and allow an informed decision as to whether to commit to the expenditure or not;
- provide a benchmark against which to review progress; and
- provide the means against which to judge success.

In preparing your business case beware of similar activities potentially happening in parallel across the Council, i.e. be mindful that others may have a similar requirement which would be better if linked.

What should be in a business case?

As a minimum a business case will include the following:-

- description of the need ¹;
- linkages into wider Council objectives;
- details of all options looked at ²;
- description, including estimated quantities, of the resources necessary to cover the total impact of the decision ³;
- where the resources, including funding, will be provided from ⁴;
- description of benefits; and
- how success will be measured.

The business case will be completed with information gained from the **Understanding the Market** activity which is carried out in parallel.

¹ The medium term planning process and unit Business Plans will inform the planned needs across the Council. As part of those processes early work on resource allocation may also have been done.

² 'all options' should include those being put forward, those already dismissed and the 'do nothing' option.

³ It is not expected at this stage of the process that you will have detailed and firm figures on quantities and / or costs. However, no business case can be completed without meaningful figures.

A business case must reflect all costs and activities directly or indirectly caused by a particular option. For example the procurement might obtain some new equipment but there are knock on costs for maintenance, consumables and training that need to be included

⁴ It can be a well constructed business case but if you haven't got, or can't get, the resources the process goes no further. However, a well constructed business case could support a bid for the reprioritising of resources to this project that, if granted, would lead to the business case going through to the approval process. In general terms, Council/Cabinet approval of the revenue and capital budgets provides the authority to incur expenditure within those limits. It should be expected that the business case should detail where the resources will be provided from rather than the generic "from within existing budgets".

For contracts where there may be a change of contractor, the TUPE Regulations may apply. This is especially important if an in-house unit is involved where the full implications to the Council must be considered. Reference should be made to the "KCC TUPE Guide for Managers" but it should be realised that the interpretation and implications of the TUPE Regulations are always liable to change with case law. Specialist legal and personnel advice should be sought from the very beginning of a tendering exercise whenever the outcome could lead to a TUPE transfer, including the transfer of staff between two commercial companies.

[Insert KNet link here](#) Is there one?

Where employee data is or will be required as part of the information to enable information to be gleaned make sure the incumbent is aware and more importantly make the relevant staff aware. Do not underestimate the amount of work involved with staff transfers.

Detailed guidance on the creation of business cases is provided in “**The Green Book, Appraisal and Evaluation in Central Government.**” published by HM Treasury.

<http://greenbook.treasury.gov.uk/>

It advises that all new policies, programmes and projects, whether revenue, capital or regulatory, should be subject to comprehensive but proportionate assessment, wherever it is practicable, so as best to promote the public interest. The Green Book presents the techniques and issues that should be considered when carrying out assessments and describes how the economic, financial, social and environmental assessments of a policy, programme or project should be combined.

Corporate Finance can assist with Green Book interpretation and can be contacted at:

ben.smith@kent.gov.uk

or by telephone on:

Maidstone (01622) 694597
Freecall 7000 4597

Words of caution

There is a demonstrated, systematic, tendency for project appraisers to be overly optimistic. This is a worldwide phenomenon that affects both the private and public sectors. Many project parameters are affected by optimism – appraisers tend to overstate benefits, and understate timings and costs, both capital and operational.

Taken from “The Green Book” published by HM Treasury 2003

A business case does not have to be positive. Whilst this may sound obvious there are examples where people have been engaged to prepare a business case who believed that they failed when they couldn't show a positive case for proceeding. A well prepared business case will research and show the facts allowing a well-informed decision to be made.

The Council's business cases are of potential interest to a number of parties and requests may be received for them under the Freedom of Information Act. There can be no standard response and each case will need to be treated individually as determining the correct response may be affected by the timing, in the procurement process, of the request. This is a specialist area and guidance should always be sought, initially from your directorate Freedom of Information co-ordinator.

Insert details of Directorate FOI co-ordinators here

Decision Point

Having prepared a business case now is the first major decision point in the process.

The Financial Regulations state:

A.22 The Chief Executive and Managing Directors are responsible for:

- iii ensuring that projects only proceed when they have received the necessary approval and confirmation that any external funding is secured. For schemes and headings where the total cost is estimated to be £1m or more this consent must be obtained from the Leader following procedures issued by the Director of Finance. The Leader may take the decision himself/herself or specifically delegate the decision to Cabinet or the relevant Cabinet Member. For schemes where the total cost is estimated to be less than £1m consent must be obtained from the relevant Cabinet Member.

Budgetary provision must exist before any business case is approved. This provision should be explicit in a budget, programme or resolution of the Council or a Committee where a budget, programme or other report contains a block allocation for multiple contracts for a class of service provision.

Where budgetary approval exists specifically for an item further Member approval is not required. The Cabinet Member/portfolio holder may need to be informed especially when the procurement is strategic or particularly sensitive.

Where there is no specific budget line, the Chief Executive and Managing Directors may approve expenditure of up to £100,000, provided the expenditure can be met within budget. Above £100,000 a formal decision by the Leader, the Cabinet or an authorised Cabinet Member is required in accordance with the Council's Constitution.

The Chief Executive and Managing Directors are free to determine the management processes and levels of delegation around non-capital business cases appropriate for their directorate. However decisions for all business cases from £100,000 upwards must be documented, making it clear who made what decision, and then retained with the other documents relevant to the procurement.

In view of the business case's importance throughout the procurement process it should be treated as a 'living' document and not frozen at the 'Decision Point'. However you need to be careful that whilst keeping it up to date you neither fundamentally change the basis on which the original decision was made nor move the procurement to a different authorisation level. The **Procurement Management** chapter covers this in more detail.

Procuring People

An approved business case will have said where the resources are to be provided from. Where these resources are people the business case should have detailed whether these are already employed within the Council or are additional. If additional, it will further detail whether the preferred route is to employ them and pay through the Council's payroll system or contract for them and pay against an invoice.

If individuals are to be paid through the payroll system then they must be sourced via the Council's HR recruitment processes resulting in a contract of employment. All other contracts are sourced in compliance with the Code.

Competition

Thresholds

The financial values (exclusive of Value Added Tax) at which processes become mandatory are:

£8,000 to £49,999 - three written quotations must be sought from appropriate sources.

£50,000 and above – the competitive tender process must be followed.

However both the overall obligations of the Code and the statutory requirement to achieve value for money apply to all transactions and don't just apply from the above amounts and, as such a competitive tender process may be appropriate for procurements below £50,000.

In addition European Union Directives, enacted in UK Law, set limits for public contracts above which specific procedures are required to be followed. The procedures cover the advertising of contracts, the rejection of suppliers, technical specifications, evaluation, selection and award criteria. All procurements for goods, services and works above the financial thresholds are covered by the legislation but not all procurements for services, social care for example, are subject to the full process. (See 'Where to get help' in **Introduction**.)

The current levels at which these apply are for goods and services, £144,371 and for works, £3,611,319.

There must be no attempt to avoid any of these limits by deliberately manipulating the requirement or frequency of ordering.

The "financial value" here refers to:

- the total amount payable over the contract period, i.e. the Council's total liability under the contract, and not the budget available in the current year; or
- the reasonable expectation of the cost of the consequence of the decision; or
- the 'net benefit' to the contractor. See **"No fee" contractors** at end of this chapter.

whichever is the greater.

For example, if something you are going to buy needs regular maintenance from the supplier then the cost of the annual maintenance for the life of the product must be included.

Avoiding competition

The Council's preferred, and thus default, position is that competition is required for all purchases. As a consequence occasions where competition can be avoided must be treated as exceptions requiring authorisation and reporting above that normally required for a purchase of that size.

For a procurement to be classed as competitive at least three, legitimate, suppliers must have been invited to submit a response. This section applies where there is no plan to invite competition. It does not apply where appropriate competition has been properly sought but only one, or two, suppliers submit a response.

Additionally, the Treaty of Rome requires that competition will be part of the overall procurement approach to securing works goods and services. The Treaty of Rome obligations override specific EU Directives and UK legislation and it is therefore possible that contracts below the EU Directives financial thresholds could be challenged where the European Commission feels that competition has been stifled.

Competition is not compulsory where:

- goods or services are purchased internally, i.e. from within the Council or a Council owned company; or
- urgent works, supplies or services are necessary for the immediate protection of life or property, or to maintain the immediate functioning of a public service for which the Council is responsible; or
- works, supplies or services are required which must be provided by a public utility, a local authority other than the Council or a similar body in pursuance of their statutory powers; or
- works, supplies or services are estimated to cost less than £8,000; or
- the purchasing of adult and children's services are required by law under the National Assistance Act 1948 and the Children Act 1989. Alternative processes are set out in Directorate Operational Procedures; or
- Property Group purchase or sell land or property; or
- the Chief Executive or Managing Director has decided that special circumstances exist.

The Chief Executive and Managing Directors are free to determine the management processes and levels of delegation around non competitive procurements appropriate for their directorate.

However they should, in determining these arrangements, consider the impact of the mandatory reporting requirements detailed in the **Contract Award** section. With the reporting required after the contract has been awarded there is no opportunity at that stage to revisit a decision.

'Special circumstances' are unlikely to exist where it is claimed that:

- only one firm is capable of supplying if;
 - there is no evidence of reasonable research of the market supporting this; and
 - the opportunity was not advertised on the South East Business Portal; or
 - the requirement was written specifically to exclude competition; or
 - an evaluation took place prior to competition being sought that excluded potential suppliers.
- prices or costs would be negatively impacted. Irrespective of indicative or published prices the only way of determining the price the Council will pay is by competition.

Factors other than their costs, i.e. obtaining market share, may influence a firm's offer.

- there is an urgent need if the timescales were within the Council's control. Failure to adequately plan or act is not usually sufficient justification to avoid competition.

The ability to avoid competition is severely limited where the EU Procurement Directives apply. Expert assistance should always be sought early in the process both for a new requirement or possible extension of an existing one.

With appropriate regard for the process costs and administrative effort for all parties it is far better that firms are given the opportunity to compete and they then decline than the Council makes an arbitrary decision to exclude them.

In order to meet your reporting obligations the reasoning behind the decision not to invite competition must be recorded and retained with the other records for the procurement. See the Procurement Management chapter.

Even where competition is deemed inappropriate the Council retains a competitive advantage by not advising the potential contractor of that decision until a contract has been agreed.

Competition and internal providers

There is no requirement for an internal provider, or Council owned company, to routinely bid competitively against external suppliers. However, where there is an internal provider of the goods or service and a Directorate seeks tenders/quotations for the purpose of market testing the internal provider must be included in the competition.

Tenders

What is a tender for?

It is important to remember that a Council tender is designed to explain to potential suppliers what is wanted, to encourage them to compete for the opportunity and, by combining the requirement with the supplier's proposal, provide the basis for the written contract.

Deciding who to invite

Fair and open competition relies on potential suppliers having the opportunity to participate in the competition. Crucial to this is that it should be the potential supplier's choice and not the Council's. There are two ways of determining the list of firms to be involved in tendering for a Council contract:

- by advertising the requirement and requesting that firms express interest; or
- by use of a pre-determined Council Approved List.

As Approved Lists are created via a process that starts with advertising its clear that appropriate advertising is fundamental to this stage.

Advertising

Whether it's for an individual contract or to create or update an Approved List the adverts will be placed in the same locations. These will include:

- the South East Business Portal;
- the Official Journal of the European Union, 'OJEU'; and
- specialist press.

The **South East Business Portal**, (the Portal), must be used for all opportunities. Using the Portal removes the need to place the advert on the Council's website although Directorates may choose to use their particular site as well as the Portal. The Portal is free to use both to place opportunities and for suppliers to find them and register their interest. Suppliers can register their interest in areas of work and the Portal will e-mail them when a relevant opportunity is placed. Whether they're responding to an e-mail alert or for a particular opportunity they've found they are obliged to formally register against each opportunity they wish to compete for.

Advertising in **OJEU** is mandatory for procurements above the EU thresholds for:

- all goods;
- all works; and
- some services. Part A services only.

There are no costs in placing the notice. If an OJEU notice is required you must not place adverts elsewhere that are published before the one in OJEU nor must they contain additional information.

OJEU adverts must include details of both the short listing criteria and the selection criteria. The criteria are required to be stated with their appropriate weightings, usually in percentage terms. You must consider the issues in some detail to arrive at the best mix as changing the weightings during the evaluation is forbidden.

Using the **specialist press** may be the most appropriate way to attract interest from relevant firms. In some areas, waste disposal for example, advertising in the specialist press is a legislative requirement.

Adverts can be used to increase interest in a general way for a contract or area or can serve a dual purpose, by focussing on the specific which will attract the more appropriate firms whilst discouraging the generalists. Which type is appropriate depends on the state of the market. The work done in **Understanding The Market** will inform your decision here.

Provided advertising is done in an open and fair manner there is no requirement that only firms who respond to the advert are included. Both Officers and Members may put forward additional names to be included during this stage. The sharing of personal knowledge that may benefit competition for the Council's business should be encouraged. The only issues around this are that:

- the list of respondents is kept confidential to avoid allegations that firms were only put forward either because another was or was not already on the list;
- at no stage should any firm be told not to respond to an advert or that they will be added to any list without responding;
- the list is closed to additional entrants at the date and time specified in the advert; and
- either all firms are invited to compete or all firms are included in the same selection process from this stage onwards.

The Council is fortunate that, due to its scale and reputation, it has, in most of its markets, a healthy number of potential suppliers interested in providing goods and services to it. This can result in too many potential suppliers expressing interest in opportunities. Where this happens the number of firms has to be reduced to maintain an efficient and cost-effective process. It is important to remember that potential suppliers benefit from, and appreciate, competition with reasonable rather than large numbers.

Reducing Numbers

Any reduction must be done in a fair and transparent way using objective criteria. To maintain the objectivity there is no opportunity or allowance for Officer or Member choice. Both Officers and members are reminded of their obligations under their respective Codes of Conduct referred to in **Overarching Principles**.

The most common approach to reducing numbers objectively is to use a questionnaire, sometimes referred to as a Pre-Qualification Questionnaire or PQQ.

PQQ's are used solely to reduce the number of potential suppliers to be included.

When preparing a PQQ you should:

- never ask a question unless you know what an acceptable, or unacceptable, answer looks like;
 - you should be preparing the marking criteria at the same time as the PQQ. The marking criteria must be those that can be done objectively by someone not involved with the project;
 - firms progress because they have passed the criteria not because they are better than other responses. Responses must not be compared with each other;
 - be cautious of relying too heavily on scoring. Whilst scoring can be a useful tool, because it can also include elements of subjectivity the totals need to be judged as approximate rather than absolute. For example, failing a firm for being 1 short out of a possible 100 is potentially dangerous.
- use questions that require factual responses. Free text responses are hard to judge objectively;
- only use questions and acceptance criteria that are relevant to this requirement;
 - ensure questions and acceptance criteria are appropriate for the circumstances and risk, i.e. don't automatically require three year's accounts if the risk is such that a 'young' company would be acceptable or that the company turnover must be a standard factor larger than the contract value.
- never ask a question or ask for information that you're not going to do anything with;
- remember that, unless you give them additional information, firms have only seen an advert so you shouldn't ask questions around their potential solution;
- be prepared for either too many or too few passing your pre-determined criteria;
 - you can prepare more than one set of criteria to allow for this situation as long as you apply them in the pre-determined order. It's useful in these cases if the criteria are applied by someone not directly involved as this allows those directly involved to make decisions around whether the number having passed is acceptable or not without being able to be influenced by the names of the firms involved.

The EU Directives impose additional restrictions on what can be asked at this stage and the acceptance criteria must be applied with the weightings you used in the OJEU notice.

For all procurements it is difficult, and for those subject to the EU Directive it is illegal, to ask the same question and / or apply different criteria later in the process, i.e. at the tender stage. If you have passed something at this PQQ stage then that answer has to be acceptable to you and cannot be used as a factor in not awarding a contract.

Having determined the list of firms to be invited to compete you should inform those who have not passed your criteria and be prepared to give feedback as to your reasons. Whilst there is no requirement to share the marking criteria before the PQQ's are completed and returned you should release this, if asked, after the event including how the individual response was marked.

There is a movement across the Public Sector to minimise the work firms need to do to apply for opportunities. Accreditation schemes and standardising PQQ's are being put forward to achieve this. Whilst both have merits you need to ensure that both the number and quality of firms you invite to compete for the Council's business are appropriate to the requirement that you're responsible for.

It must be stressed to all firms that not taking part in a tender process will not preclude them from future opportunities. It is far better that firms submit realistic competitive tenders or not submit one at all than submit an unreasonably high, or unsatisfactory bid because they didn't really want the work but felt obliged to respond.

Approved Lists

Firms are invited to apply to be included on the list and a range of checks are made on them. However there is no pricing arrangement or any form of competition and thus using an approved list supplier does not, by itself, provide any value for money justification.

As a consequence purchases from an Approved List are required to follow the competitive processes.

If you use an Approved List you need to ensure that firms are very clear:

- that Approved Lists are used by the Council as a form of pre-vetting;
- that being on the Approved List does not guarantee any work; and
- that being on the Approved List does not guarantee that they will be invited to quote or tender for work to the exclusion of firms not on the list.

Approved Lists can be operated in two ways:

- Creating and reviewing on a regular cycle:
It's arguable that any fixed period will prevent new suppliers being able to compete during that period but it's more true the longer the period.
- Constant review:
Although this allows great flexibility it is very 'resource hungry'.

You need to be aware that how Approved Lists are used can be seen by both suppliers and potential suppliers as a 'black art' which they cannot understand or influence. This is not beneficial to the Council or its competition-based approach. Consequently the selection processes, both to go on the Approved List and to be selected to compete for individual contracts, should be both clear and transparent to all parties.

For units where Approved Lists are deemed appropriate the rationale for that decision and the detail on how they will be operated must be documented and made available for inspection by Members. This rationale must also be regularly reviewed.

Words of caution

By creating an Approved List you are acknowledging that there are ongoing needs for the same or similar requirements. Care must be taken that this doesn't breach the aggregation rules of the EU Directives. Good practice would indicate that the creation and use of a contractual framework should be considered rather than an Approved List.

If you're going to allow firms to be involved who aren't on the Approved List then you should question, because the firms on the list will, the value of having an Approved List.

What should be in a tender?

This section can only give brief coverage of the relevant issues.

Assistance with preparation of tenders can be obtained from:

Legal Services

peter.mulholland@kent.gov.uk

or by telephone on:

Maidstone (01622) 694400
Freecall 7000 4400

or Purchasing Services

purchasing@kent.gov.uk

or by telephone on:

Maidstone (01622) 605790
Freecall 7000 5790

The tender you issue should contain everything that a firm needs to be able to submit a complete, priced response to your needs. This breaks down into four distinct areas:

- Information;
- What you want the appointed Contractor to do;
- Terms and Conditions for the Contract; and
- Schedules you want the firm to complete.

Information

Background

It is easy to think that if you give firms a detailed requirement that they don't need to know anything else. Even with the requirement if they don't know why you want the goods or service they aren't necessarily able to think creatively in preparing a solution and even might decide not to respond at all.

Firms make judgements on which tenders they should respond to and you should provide them with sufficient information and encouragement to decide to respond to yours. It's especially important in encouraging firms who have not worked for the Council before to submit a tender.

Consider giving them information on your current and past operation:

- volume, usage, demand and trends;

- cost of services purchased or provided in-house - consider each case on its merits as to how much, if any, information you provide here, withholding data only where specific reasons exist to do so; and
- technical details where appropriate e.g. equipment type.

Whatever you decide to include make sure it's accurate and relevant to this contract. Including generic information just because you always do is of no benefit.

Firms frequently ask about the budget for a particular procurement so why not include it here? Opinion is divided about the merits or disadvantages of doing so but the following points should be considered:

- for some 'discrete' procurements it is already possible to determine the available budget from budget information already in the public arena via committee papers etc. and there is consequently nothing to be gained by not providing the information with the tender;
- on rare occasions it is the only practical way of scoping the opportunity so on these occasions the figure should be disclosed; and
- for most procurements the requirement is best shown in volume rather than value terms. If affordability becomes an issue because of the tendered price potential resolutions are within the Council's control such as, reducing the quantity or required quality.

Process

You must tell all invited firms precisely what they are required to do to submit a response. This will include:

- the time, date and location responses must be submitted to:
 - tenders covered by the EU legislation have set minimum periods that firms have to submit their response. The legislation requires that these are 'whole' days and consequently the time should be set for at least the day after the minimum period.
 - where legislation does not apply there is no minimum or standard period. What you decide must be reasonable to give firms sufficient time to consider, complete and return their submission. The complexity, subject matter and the detail you require in the submission should all be taken into account. Your objective is to receive quality competitive responses so make sure that poor planning does not get translated into an unreasonably short tender period.
- what happens if the tender is not returned by the specified time;
- what documentation is required in their submission:
 - this will include the completed forms you've sent in the Schedules section including a signature sheet formalising the firm's offer. This section should also be used to specify any additional information you want to assist your evaluation.
- how the submission should be packaged and marked;
- the period for which the tender shall be open to acceptance by the Council.
 - this is the period when the price and other issues are fixed and should not be altered by the firm. No offer can remain like this indefinitely and you should determine how long you will need to evaluate the offers and make a decision. Do not make this period longer than necessary as the firm is taking a risk on their costs changing in that period. The longer time you want the more likely they will have added something in the pricing to cover that risk.
- the number of copies of the submission you require.

- where multiple copies are requested it's helpful that one be identified as the master version. This document can be used for the opening process and retained for the contract file.
- for tenders covered by the EU legislation you must include the detailed weightings to be used in the evaluation of the submissions. These might have been included in the OJEU notice but it's usual for the notice to include these at a high level only.

Evaluation

Especially for complex service contracts you will want to know how the firm proposes to deliver the service. How much information you will need will vary depending on the requirement.

Beware of firms who try to avoid giving this information. 'Why, as we're guaranteeing performance, would you want to know? How we meet the contract is our problem.' is not an unusual response.

Whilst this view has superficial merit there are four reasons you need to know how the contract will be delivered:

- it will show that the firm has thought through how they are going to actually deliver. It should therefore give you confidence that they've properly considered the risks and costs and thus the pricing should be accurate;
- the detail will show their understanding, or lack of it, of your requirement;
- allows you to focus on their experience and references appropriate to their proposed solution; and
- allows you to check the impacts on the Council. The solution may be the most cost effective for the firm but it's not necessarily appropriate if the way they deliver imposes additional costs on your budget.

In some cases this information will only be wanted to assist your evaluation but for others the way they intend to deliver is necessary and you will want it to be part of the contract. If it's not part of the contract the contractor can change their approach without your involvement, let alone your agreement.

Alternatives

Must firms match the requirement? Can they propose something different? If they want to offer an alternative approach must they also submit a bid that matches the requirement? All three are valid options depending on your particular circumstances but beware if you allow alternatives then you must evaluate them all as valid offers and you cannot so easily reject them as not meeting the requirement. However if you specify that proposals must match the requirement and that alternatives cannot be offered you must reject an alternative proposal no matter how attractive it looks.

What you want the Contractor to do

Where the Information section is crucial for the tendering process this section is important as it forms the fundamental basis for the contract.

You will have completed most of this section from the **Requirement** chapter. That chapter concentrated on the description of the goods or service you require whilst this section needs details of the other issues you need the contractor to do. Things like:

- where and when you want the items delivered or the period the service must cover;

- the management arrangements of the contract, including how performance will be measured;
- whether the prices are fixed for the whole contract or if not the arrangements to handle price movements;
- how other changes are handled; and
- if not already included and it's appropriate to the contract what happens at the end of the contract.

Conditions of Contract

No organisation should have a standard set of Terms and Conditions that are applied to all their procurements. Terms and Conditions are there to protect the effects of certain events happening. The effects on your requirement are possibly unique to that requirement and the terms and conditions need to reflect those individual circumstances.

The terms and conditions should also reflect the size and possible impact of the contract to or on the Council. The value of the contract is often not a good indicator of the possible impact or Council exposure.

Although there can be no standard set the types of clauses will be similar but they can't be applied without regard to their appropriateness.

Guidance and assistance with appropriate terms and conditions for your contract must be obtained from Legal Services.

peter.mulholland@kent.gov.uk

or by telephone on:

Maidstone (01622) 694400
Freecall 7000 4400

Your tender should detail the required terms and conditions as it provides clarity for the contract and a level playing field for the competition.

The preferred route is a Council set specifically prepared for the individual requirement. This does impose a 'natural order' for the preparation of the tender with the requirement having to be completed before the terms and conditions can be finalised.

Value for money can sometimes be achieved by using industry standard terms and conditions. The chosen 'industry standard' must of course be relevant to the requirement. These terms and conditions should be included in full in the tender. Where this is not possible they must be described sufficiently to ensure there is no doubt as to which terms and conditions are being referred to.

In exceptional cases it may be appropriate not to include terms and conditions in the tender but ask firms to include their proposed set in their submission. A licence for software is a good example of where there may be no choice other than the firm's conditions. However, even where this is appropriate there may be statutory or other requirements that you must insist are adequately covered in what is submitted.

Legislation

If a law applies then it applies whether it's written in the contract or not so there is an argument to say that references to laws do not need to be included in your tender. However as it's a Council contract it is probable that the impact of the law remains with the Council even though a third party is performing the activity. Consequently it is in the Council's interests to ensure that the contract is performed in accordance with the relevant legislation and that firms are aware of their statutory obligations when preparing their submissions.

Health and Safety is one obvious example but there are many more, some related to specific trades or business. The requirement to involve Legal Services in constructing the terms and conditions for your tender will ensure that the appropriate legislation is covered.

Firms should be made aware that, if a complaint is made about their actions when undertaking work for the Council, they could be subject to investigation by the Ombudsman. The contract conditions need to ensure that documents are made available and the contractor co-operates in other ways with the investigation in such circumstances.

In circumstances where maladministration is found due to the actions of the contractor, the contract should provide for recovery of any compensation payments made to injured third parties.

Contractor's Liabilities and Insurance

Where conditions other than those found in the standard forms of construction contract are used, provision must be made for the contractor to take out those insurances (in particular Public Liability insurance) which are deemed by the Managing Director, in consultation with Insurance and Risk Management Section, as necessary to indemnify the Council against losses or claims for injuries or damage arising from the contract. The conditions should also provide for access to the documents by an authorised officer of the Council.

Steps should be taken to ensure for all contracts that such insurance is in effect at the commencement of the contract and that, where applicable, the policy is renewed during the course of the contract. This can be achieved by stating clearly your needs within the tender documentation and either requesting current documents are sent or stating that they will need to be seen before the contract award is made.

The types of insurance that might be necessary are:

- Employers Liability – statutory minimum - £5m
- Public Liability – Council minimum - £5m
- Professional Indemnity – no set minimum. Amount should be determined from an assessment of the level of risk and contract value.

The Council will not secure insurance at its cost and risk on behalf of contractors as this could be considered anti-competitive.

Detailed guidance can be obtained from the Insurance and Risk Management Section:

darryl.mattingly@kent.gov.uk

or by telephone on:

Maidstone (01622) 694632
Freecall 7000 4632

Terms of Payment

The Council's standard payment terms are payment within 30 days of receiving a correctly presented invoice.

Terms of payment, including when invoices can be submitted and for what amounts (can be expressed as a percentage of the contract value) must be clearly detailed in the tender.

Payments can only be made against invoices where clear deliverables for the Council's benefit have been made.

No contract can be entered into which allows for payment for the provision of works, goods or services to be made in advance without obtaining the prior approval of the Director of Finance.

HM Treasury published detailed guidance on payments to the third sector in "Improving financial relationships with the third sector: Guidance to funders and purchasers" in May 2006. This can be found at:

<http://www.hm-treasury.gov.uk/media/485/B9/guidncefunders1505061v1.pdf>

In it they state that:

"Payments to third sector organisations should be made on the basis of need and therefore can and should, where appropriate and necessary, be made in advance of expenditure, in order to achieve better value for money. A blanket exemption for all third sector organisations is obviously inappropriate."

What happens when things go wrong?

The terms and conditions you issue with your tender should detail what the actions and obligations are for both parties when things don't go the way the contract, and you, expect.

To decide what is needed you'll have to run through a number of 'what if?' scenarios, determine how likely they are and what you expect to happen. Depending on their severity and likelihood you can decide to include the actions in the terms and conditions. Things you might want to consider including are:

- detailing the process to bring the contract back on track;
 - do you expect the contractor to provide more resources at their cost?
 - would you want the ability to bring in a different supplier to 'fix' the problem but charge this to your contractor?
- detailing the financial compensation. This can include;
 - liquidated damages – which are an up front estimate of your genuine financial losses caused by an event. These are not a penalty and must, if challenged, be able to be shown as reasonable.
 - service credits – which are a method of reducing the charge if a service doesn't meet the agreed contract standards. It is not unusual for firms to attempt to reject the concept of service credits or, if they accept the concept, attempting to minimise their impact, sometimes just to part of their potential profit. This should be rejected. If you ordered a quantity of goods and less were delivered you would expect to pay less and the same principle must apply to services.

Determining the level of service credits depends entirely on the service you're contracting for. In critical areas a contractor missing the service levels by 10% may make the service entirely unacceptable and just reducing your charge by 10% is therefore inadequate compensation.

- performance bonds – sometimes also referred to as a parent company or bank guarantee – which are where a third party provides a legal guarantee to the performance of the contractor and are responsible for paying the compensation where the contractor can't or won't.

Any form of financial guarantee will potentially affect the firm's income from the contract and will be seen by them as a risk. In evaluating contract opportunities firms will assess risk, cost it, and include it in their tendered price. It is good practice to adequately address up front the consequences of things going wrong but beware of a too heavy handed approach that either puts firms off from competing or adds unnecessary costs.

If you're considering using bonds or guarantees assistance must be sought from your directorate Finance Manager.

Assignment and Sub-Letting

If you've gone through a competitive exercise, advertising, short listing, tendering and awarding a contract why would you then allow the work to be done by someone completely different? Almost certainly your answer is that you wouldn't, but that is what could happen if you allow the contract to be assigned or sub-let.

Consequently a contract should not be passed onto a third party even if it is deemed in the Council's interest without the Council's prior approval and contracts must contain a clause that states this.

Clear identification of who the contract is with is crucial so that we know who is responsible in the case of non-performance or in a worst case scenario who to sue. Also the issue of knowing the identity of contractors working on high risk sites is important so that appropriate police checks can be carried out. It is of little benefit if names of operatives are submitted to the police only to find that the delivery of the contract has been passed down the supply chain ending up with operatives who may not have been subject to a Criminal Records Bureau (CRB) check.

Schedules

In essence all the bits that you provide that you want the firm to complete as part of their submission. Not all tenders need them but they do help you control how submissions are presented. Allowing firms complete freedom will add to the difficulty of finding the required information and will usually extend your evaluation.

The section could contain:

- pricing schedule;
- signature sheet; and
- questionnaires.

Issuing the tender

Tender documentation can be issued by almost any method. The overriding principle must be that all tenderers are treated fairly.

For example sending some by e-mail with others via the post would be unfair.

The three most common methods are:

- by post - produce the complete document in paper, or transfer everything to a disk, and send it using post or courier;
- by e-mail – this is legitimate in all circumstances even if you are not allowing them to be returned electronically. If you e-mail the documents be careful not to show where else the tender is being sent. Either use the 'blind copy', (BCC), facility or send individual e-mails;
- by placing the documents on the website to allow firms to download them. There are two approaches here. Just placing the documents on the website potentially removes the ability to determine who competes. To resolve this it is possible to use a secure site where only those given the password can access the documents. This facility is only currently available for social care tenders.

What can be done whilst tenders are out?

Contact with Tenderers

No matter how careful you are in the preparation of the tender documentation someone will almost always find something they need to question.

As the preparation of a response to a tender is expensive firms will try to make sure that they properly understand the requirement but you should be alert to prevent an unfair competitive advantage being gained.

To ensure that all firms are treated equally it is important that contact with firms is controlled, preferably through just one person. This can be difficult where the firm is an existing contractor but all Council staff involved in the existing contract need to be aware that any discussion on the competitive process is inappropriate and must be referred to the Council's nominated contact. You should also recognise that it is not always immediately obvious that a conversation will assist a tenderer and consequently extreme care should be taken with all contacts.

Despite all the restrictions the process of enhancing tenderers' understanding of the Council's requirement is to be supported.

Except for very minor, administrative, issues all requests and responses should be in writing (fax or email) to ensure a permanent record is kept.

Meetings

During this period meetings with individual tenderers should be avoided wherever possible. Tenderers can be quite insistent but you need to answer the following questions before agreeing to meet:

- how will the Council benefit from the meeting?
- what will be achieved in a meeting that couldn't be done in writing?
- are other tenderers being disadvantaged?

In some situations a meeting with **all** tenderers is a way of informing the process without the inherent risks of meeting them individually. However you do need to determine why you're having a meeting. If the meeting is being held in order for the requirement to be refined or explained then why wasn't this included in the published requirement?

It is not unusual for the responses from tenderers at these open meetings to be disappointing. One way to help stimulate responses from those present is to state up front

that all questions received after the event, i.e. asked on a one to one basis will be shared so it might be prudent to ask them now.

Tender meetings should always be well structured and records kept. It is good practice to confirm the outcomes of the meeting in writing.

Equality of treatment

There is no requirement to give the identical information to all tenderers. Where clarification is sought because of a tenderer's particular approach then this information should not be shared with the others. However where a weakness or error in the Council's requirement is discovered then it is in the Council's interests that this is rectified with all tenderers immediately.

Extension to Tender period

You will have determined the closing date for the tenders to be returned from your understanding of what the market would expect as reasonable in conjunction with the time pressures of your requirement. Despite this it is not unusual for tenderers to request an extension to this deadline.

The Council is under no obligation to extend a tender period. Who asked for an extension cannot be a factor in the decision. The questions you should ask are:

- is the competition improved by the additional time and if so will these outweigh the delay?
- is anyone being treated unfairly because of an extension?

Unfairness can arise because:

- a firm may have declined to tender because the original time was too short. Their decision may have been different if the revised date had been known at the start;
- firms have worked to the original date yet a late request is granted by someone who may not have planned their activity so well. This is especially true for 'last minute' requests.

Only formal requests, i.e. those made in writing, should be considered. The decision making process and decision should be formally recorded and filed in the contract file.

There can be no definitive rule applied but there is a stronger case for an extension where more than one tenderer asks.

Where an extension is given all tenderers must be told immediately and as close together as possible preferably in writing by e-mail or fax.

Receiving the tender responses

The fundamental principles around both the receipt and opening of tenders are that:

- no one should be aware of, or be able to find out, either what is being tendered or who is actually tendering until all tenders are opened together; and
- there are no opportunities for tenders to be altered once received.

The following processes are the minimum necessary to meet these principles and protect both the Council and those involved from accusations of impropriety.

Receipt

Firms will deliver their submissions via post, carrier, courier or by hand. It is possible therefore that they could be received in a number of different places within the same site. It is important that staff in these areas, reception, post room or goods inwards, are made aware that tenders are due and that they know what to do with them.

Those delivering the submissions must not be required to sign a form or otherwise indicate where the delivery is from. Should they wish to take away a signed receipt then a simple date and time receipt should be issued. At no time should they be able to see or identify either how many tenders have been received or their origin.

Electronic submission is covered separately, although it is important to note that tender responses, other than where only one firm was invited, cannot be accepted via e-mail as this defeats the objective of a formal opening process.

Where tender submissions are received along with other deliveries, including the post, there is the possibility of them being opened inadvertently. Should this happen all the papers as well as the original envelope/packaging must be kept together. Repack all the papers and the original envelope into new packaging, mark it with the tender number and take it specifically, not in the normal post round, to the appropriate receipting officer for recording and retention. A written record must be made of the circumstances and retained in the contract file.

Storage

All received tenders should be secured as soon as practicable in an area / cupboard allowing access to be restricted. The restriction should apply generally but specifically from those directly involved in the evaluation and award processes.

An officer must be nominated as responsible for the recording of the receipt of the tenders and their security.

Tenders must remain secure in this location until immediately prior to the opening process.

Where any damage to the packaging of tenders has occurred the tender should be repacked in another suitable container.

Opening the tender responses

The opening of tenders is an administrative process and therefore attendance by others is neither necessary nor helpful.

Despite the formal receipt process detailed above it is good practice to check all possible receipt locations again just before commencing the tender opening process. Appropriate diligence in doing this will prove useful if tenders are received after the official opening.

Although tenders should always be marked appropriately such that they can be easily identified the size of some responses means they could be delivered as parcels rather than via the post. In some locations tenders are received in different parts of the building, hence the need to check all locations before opening takes place.

Tenders must always be opened with a minimum of two people present as an 'opener' and 'witness'. The two people should be independent of each other and anyone directly concerned with the evaluation or contract award cannot be involved in the opening process.

No person can be involved in the opening process who:

- has any pecuniary interest in any supplier used by the Council;
- is serving a probationary period;
- is the subject of disciplinary proceedings;
- has any outstanding dispute with the Council; or
- has tendered their resignation.

It is best practice that the opener and witness should not be part of the Directorate responsible for the tender however it is recognised that this may not always be achievable.

The main function of the opening process is to provide independent verification of what is actually submitted as part of the tender thus preventing removal, addition or modification of pages in the subsequent evaluation.

To achieve this all finance related pages must be initialled by both of the opening officers. However, where costs/figures etc are not clearly presented then this process may not be easy.

Where multiple copies of the tenders have been requested only the master copy needs to be checked and initialled.

Purchasing Services, within Commercial Services, provide, along with other services, a tender receipt and opening service.

Purchasing Services can be contacted at:

procurement@kent.gov.uk

or by telephone on:

Maidstone (01622) 605790

Freecall 7000 5790

Does this apply to 'single' tenders?

The only aspect that varies for a 'single tender' process is the ability to move the opening to as soon as the tender response has been received. For all other occasions whether two firms were invited or a competitive exercise undertaken the opening cannot happen until after the closing date even if the number of responses received matches the number of firms invited.

The reason behind tenders not being opened early is because firms may discover errors or omissions and submit an additional response, before the deadline, to correct their proposal. Also, as a consequence of the requirement that responses must not be identifiable you can never be sure that either all responses have been received or that an additional response is not to be submitted.

"Late Tenders"

A tender is 'late' if it is not available to be opened at the specified opening time and date. Such late tenders shall not be opened until after the acceptance of the successful tender.

Providing the appropriate checks were made at the start of the process there should be only the rare occasion where the tender was received by the stated time but mislaid / misdirected when received. Only where there is reasonable evidence that it was within the Council's 'control' by the required time can it be considered further.

Where the submission can not be opened the outer package must be marked with the word 'Late' along with the time and date it was received. The tender opening record should be completed with the number of late tenders received. This record can be updated by a responsible officer, not necessarily the opener or witness, if the submission is received after the opening process.

“Marked Tenders”

A tender is 'marked' if it is possible to identify the tenderer from the outer packaging. Such tenders shall not be opened until after the acceptance of the successful tender, i.e. the contract has been awarded and/or the procurement completed.

Where the outer package is marked it must be clearly highlighted. The tender opening record should be completed with the number of marked tenders received.

Record keeping

A formal record of the opening must be made and should contain as a minimum:

- tender name;
- time and date of opening;
- names of opener and witness;
- list of firms submitting tenders;
- number of late tenders; and
- number of marked tenders.

Both the opener and witness should sign the record confirming it as correct. Any concerns you have must be raised immediately rather than sign and comment later.

When the opening process is complete the documents must still be retained securely until the evaluation process starts. The security issue now moves from protecting the integrity of the receipt process to joint concerns around a fair evaluation and the commercial confidentiality of tenderers' submissions.

For the avoidance of any doubt in this area it is worth remembering that third parties, either public or private sector, undertaking procurements specifically on the Council's behalf must be required to do so in compliance with the Code.

Quotations

This chapter has concentrated on the formal tender processes which become mandatory at £50,000. Although quotations require less formality the principles of the tender process apply.

This means:

- there must be some rationale in who is asked to quote;
- you must ensure that all quotations are given against the same requirement. If the requirement is clarified or changed through the process all invited firms must have the opportunity to quote against that revision;

- no price or other information from a quotation will be shared with any firm during the process;
- although you may not require Council terms and conditions to apply you must understand what the terms and conditions are that are being proposed for the contract. Acceptance of a quote, either formally or by placing an order, accepts the conditions and their acceptability must be a factor in your decision.
- if you decide to contract with other than the lowest quotation you must have recorded your reasons.

Quotations do not have to be obtained all at the same time. There is no requirement for a formal opening process although you may choose to set a specific date and time by when they must be received.

You are required to seek a minimum of three written quotations but the underlying requirement is to get genuine competition resulting in good pricing. If that needs more than three or you need to seek additional quotes after your initial request then that is what you should do.

Pilots

Pilots, also sometimes referred to as ‘proof of concepts’, can be ‘tests’ of either a particular service or type of product or a solution from a particular firm and the procurement approach is different for both.

For either of them if it’s a genuine pilot and there is no intention of doing anything beyond the pilot phase then the standard competitive approach applies reporting non-competition as appropriate.

If however you anticipate the pilot being a success and you would want to roll out the solution further then you have the following options:

- you can choose to competitively tender for the full roll out before the pilot but initially contract just for the pilot; or
- contract for the pilot and competitively tender for the roll out.

For both options the required competition is dependent on the value. What you can’t do is use either a competitive process for the lower value pilot or the success of the pilot and the consequent advantage the pilot firm has as reasons to justify avoiding the competition for the overall contract.

The best approach is to have determined your likely preferred outcome and use that value to decide which rules apply from the start.

“No fee” contractors

It is possible to consider opportunities for work being undertaken at no cost to the Council as not being a procurement. However this approach should be treated with caution as the issue really relates to the net benefit received by the firm from working for us. The net benefit can be derived from areas such as income received from other sources or a percentage of savings they generate on Council spending.

These arrangements must be treated as any other procurement and it’s this net benefit that will determine the necessary competitive process.

Electronic Processes

Products are commercially available that allow the issue, receipt and analysis of tenders to be done electronically. Separate products exist that facilitate the use of electronic auctions. Nothing in this Code should be seen as preventing their appropriate use indeed social care contracting is already done exclusively via a Council written software package.

<http://www.kent.gov.uk/SocialCare/social-care-and-business/contracting-and-e-tendering>

Currently no other part of the Council has access to equivalent software.

Electronic auctions, otherwise known as a reverse auction can provide significant additional cost reductions. Their use needs to be planned carefully and included from the start of the procurement. It is important to remember that they are an additional activity at the end of the process and do not replace the usual advertising and tendering processes.

Not all markets will benefit from using a reverse auction but where you believe they will bring benefits you should be cautious of potential tenderers attempting to manipulate your process by putting forward obstacles to their use.

Contract Award

What do you need for a contract?

A contract may be defined as a bargain agreed between two (or more) parties that is binding in law and may be enforced in the courts. In law it can be created verbally or in writing.

The agreement will generate rights and obligations on each party. To be legal, a contract must fulfil the following requirements:

- there must be “offer and acceptance” i.e. one party has made an offer that has been accepted by the other;
- it must be the intention of each party to be legally bound;
- there must be valuable consideration on each side i.e. one party may deliver, or undertake to deliver, goods, works or services which the other party will pay for;
- the parties must have the legal capacity to enter into the contract;
- the contract must be legal; and
- the contract must not be procured by force, coercion or undue influence; nor must it rest on fraud or misrepresentation.

There is no link between when a contract exists and the Council’s financial thresholds for obtaining quotes or tenders. A contract can exist from even the smallest order.

All contracts shall be entered into on behalf of and in the name of “The Kent County Council”, this being the name of the Council prescribed by Section 2 of the Local Government Act 1972. Contracts cannot be entered into by committees, directorates, Members or officers because they do not have a legal entity. Kent County Council alone has that status. It follows that the whole authority is ultimately responsible for all contracts entered into in its name no matter that it is on behalf of an individual committee or directorate.

It is not possible for the Council to enter into a contract with itself, e.g. one Directorate / unit with another.

1. Any contract should always be in writing and set out all the terms of that appointment. This is regardless of whether it is for an individual to give personal advice on a small matter or the appointment of a large firm to work on a major project.
2. In all cases the paperwork documenting the terms of the contract should be agreed, accepted and signed by all parties, before work commences. In the case of urgent matters the temptation is often to ask the contractor to commence work and resolve the detailed terms of contract later. This is almost always prejudicial to the best interests of the Council, because once the work has started the Council is effectively committed to using them and so its bargaining power in terms of the conditions is greatly reduced. The Council is then open to claims for increased costs as a condition of accepting what should be standard conditions.
3. Council policy is not to issue letters of intent. Letters of intent are typically suggested in cases where the parties are keen for work to commence but where all the terms of the deal are not agreed. A letter of intent issued in such a case can be a dangerous instrument as it can commit the Council to have services carried out and to pay for them, but without the protections that a full contract would provide.

4. The key issue in contracts is that they should set out specifically in writing all of the terms that the parties want to govern the deal. A common problem with contracts entered into by persons who are specialists in their own fields but not specialists in contracting is that they assume that certain terms which are obvious to them (as part of their specialist area) must form part of the contract even though they are not in any document. The problem comes when it turns out later that the other side never did in fact agree that this was obviously part of the contract. So in any contract make sure that there is set out all of the terms that affect the deal.

5. The following are the minimum matters that should be considered when entering into a contract, and appropriate provisions to cover these should be in each contract. These cover the points covered in “What should be in a tender?” section of the **Competition** chapter:

- Details of who the legal persons are who are the parties to the contract. This is, surprisingly, a major issue in some parts of the Council. There are a number of contracts entered into where the Council cannot say with certainty who the other contracting party is.
 - In the case of a limited company the details required are full company name, country of registration, registered company number and address of registered office.
 - In the case of a standard partnership, generally the full names and addresses of the partners – sufficient so that you know who to sue if it comes to it.
 - In the case of a sole trader, his/her full name and personal address, together with any trading address.

It is NOT sufficient to enter into a contract with a trading name, e.g. a contract with “Sunnyview homes” or “B&S Consultancy Services” gives us no information as to the legal persons who we are contracting with, so we will have difficulty enforcing the contract against anyone if trouble arises. A contract should rather be with “Samuel Smith of 34, X Street, Rochester trading as Sunnyview homes at Y street Maidstone”, or “Samuel Smith Limited (registered in England under company number xxxxx) whose registered office is at 34, Y Street, Rochester trading as Sunnyview homes”. That level of detail gives us some certainty.

- Exactly what is to be done or produced. How will we know if the Council has got all that it wanted from the contract?
- What duties the Council has.
- The timescales by which the work is to be completed, and any intermediate milestones.
- Exactly what payment is to be made for what level of performance, and when such payment is to be made. Is there to be provision for stage payments against performance?
- How the Council gets compensation if the services are not done properly or fully. Would a bond or guarantee be appropriate? Is it appropriate to specify liquidated damages – bearing in mind that penalties are unenforceable and therefore useless? [The difference is that liquidated damages are supposed to be a fair estimate of loss in certain circumstances – so that in those circumstances the Council can just claim (or withhold) that set sum rather than having to resort to court proceedings to determine the quantum of damages. A penalty is a sum which does not represent a fair and reasonable estimate of loss, but which is designed to scare the contractor or consultant into compliance, e.g. a clause which said “if the advice is not produced by 31st March then xxxxx / name shall pay to the Council £10million” would generally be a penalty and not enforceable (unless exceptionally the Council could show that it would lose £10m by not having the advice by that actual day)].
- Is the quoted price inclusive of VAT?

- When the contract starts and when and how it ends. When and how can it be terminated early and for what reason?
- Who will own what rights or what property at the end of the contract? E.g. if a report is to be produced, who will own the copyright in it? If a design or logo is to be produced, who will own the rights in it? If data is to be produced or stored, who will own the rights in it? A lot of problems are caused by people assuming that if the Council pays for something to be produced (or produced in a particular format) then the Council automatically owns all of the rights in that thing. This is not the case.
- Can the contractor or consultant assign the contract? Does the Council want to specify that certain individuals shall carry out the services? If there is no intention that third parties should be able to enforce the contract, does it need to say so?
- What happens if circumstances beyond the control of the parties prevent completion of the services – whose risk is that? Does the Council still have to pay?
- Whether there is any need for a confidentiality clause, for the contractor or consultant to keep confidential any information received in connection with the contract?
- If there are any other documents which set out matters relevant to the contract then if there can be any doubt as to what these documents might say then these should be attached to (or kept with) the contract and initialled by both parties as being the document referred to in the contract.
- Whether there are any matters in respect of which the contractor should be required to indemnify the Council and/or maintain insurance.
- For consultants it should be made explicit (where there is any possible doubt) that the consultant is not an employee of the Council who is managed by the Council on a day to day basis. This has implications for (among other things) the Council's liability to deduct tax and National Insurance payments.
- For sole traders undertaking training contracts the Council may be liable for the National Insurance payments. In these cases payments have to be paid via payroll to deal with the National Insurance, but there are no income tax issues.

Assistance with arrangements for National Insurance deductions can be obtained from your directorate payroll contact or by telephone to the general payroll number on:

Maidstone (01622) 605570
Freecall 7000 5570

6. In the case of a contract for professional services connected with building, i.e. where the contractor or consultant is an architect, surveyor, engineer or other similar building industry professional, the contract is usually in a standard form produced by the relevant professional body, with no unusual or particularly onerous amendments or additions. In the case of building related professionals, the fee is sometimes fixed by reference to the final build cost. Where this is the case, the contract should specifically say so. Where this is not stated in terms but a fee is specified, then the contract will be taken to be for a fixed fee regardless of the final build cost.

7. A contract can be just signed ("under hand") or can be sealed as a deed. The difference in practical terms is that claims under a deed can generally be enforced for 12 years, whereas if the contract is just signed the relevant time limit is just 6 years. So, where a contract relates to a situation where it might be desirable to make a claim many years later (e.g. where it is a contract for architectural works for a building) it might be advisable to have the contract executed as a deed. From the Council's side this would usually be carried out by Legal Services, but it is for the client department to provide an authority for this to be done – which will either be a decision of a Cabinet member or a decision of a Managing Director (or delegate duly authorised to do this).

8. Advice and assistance on the production of contracts can be obtained from the Contracts and Procurement Team of KCC Legal Services. It is suggested that in the first instance you address your query to Fiona Webb, the Group Secretary, on:

fiona.webb@kent.gov.uk

or by telephone on:

Maidstone (01622) 694409
Freecall 7000 4409

and the matter will be allocated to a lawyer to assist you.

Before the award

Authority

All transactions must fall within the powers delegated to the Chief Executive or Managing Director or have been approved by a decision (in accordance with the Council's Constitution) of the Cabinet, the Leader, an authorised Cabinet Member, the Council or one of its committees or sub-committees.

No contract, agreement or other document shall be signed or sealed unless it gives effect to:-

- a decision or resolution (in accordance with the Council's Constitution) of the Leader, the Cabinet, an authorised Cabinet Member or one of its committees or sub-committees; or
- a decision by an officer exercising delegated powers.

You should satisfy yourself that the contract you are proposing to award is covered by the appropriate fundamental authorisation. NB This is not the same as authorising this particular award. Where the root of the delegated power is not obvious, perhaps because it's a fundamentally new service, the details should be recorded in the Award Report.

Award Report

The Code requires a Contract File to be kept which contains, amongst other things, the information around the award decision. This information should be brought together in an 'Award Report' which will:

- be 'complete' in its own right, allowing the reader to understand the process and the decision. Reference should be made to any additional information available in the contract file.
- show the recommendation and authorisation process with appropriate signatures Approvals – delegations, records who actually recommended and approved the award
- be used, where appropriate, for:
 - Member scrutiny;
 - the basis of debriefs; and
 - answering FOIA requests.

It is good practice to prepare and sign an Award Report, as a record of the decision, even where the author is the contract approver and thus the only signatory of the report.

Where a contract for a Consultant is estimated to cost £20,000 or more the Award Report must be forwarded to the relevant Cabinet Member prior to the appropriate officer approving the report.

In this context a 'Consultant' is defined as a named individual (i.e. the Council states it wants individual x) taken on to perform a particular, temporary and defined, task.

It should be obvious that the officer approving the report, and thus the award, should not do so until the Cabinet Member has had an opportunity to review the report's contents.

Key Decisions

It is unlikely that a decision to award a particular contract will be classed as a "Key Decision". Where appropriate the Key Decision process will more probably have been applied at the **Decision Point** as described in the **Business Case** chapter.

Standstill Period

For all contracts resulting from an EU procurement there is a mandatory period between the decision being made on who to award a contract to and the actual award - commonly known as the Alcatel period.

This is a minimum 10 day period which starts from when you notify all the unsuccessful firms of your intention to award to your chosen firm. The period allows the unsuccessful firms to seek clarification around the decision and challenge it, if appropriate, before the contract is awarded. Without this period unsuccessful firms could only obtain damages if they could show the basis of the decision was unsound but with the standstill period the decision can be reviewed in light of the challenge.

Although there is a minimum period there is no maximum set. No contract can be awarded with a challenge outstanding. There are specific obligations on the Council to respond within certain periods but there is also an overriding benefit to the Council of resolving issues as soon as possible.

There are no legitimate shortcuts to this process. You must be in a position to be able to actually award a contract to your chosen firm(s) before you can inform the unsuccessful firms and start the 'Alcatel period'.

Words of caution

Any verbal communication to a tenderer may lead to a legal contract existing from that moment. Acceptance of tenders shall always be in writing.

In no circumstances shall a letter of intent be sent, they have no legal value in the United Kingdom in establishing a contract. Letters of intent give rise to more problems than they solve and can lead to unnecessary legal problems. 'Letters of intent' here include all forms of communication to tenderers that they are to be, or are likely to be, awarded a contract.

If work/service has to start before the formal award decision can be made then this should be separated from the main contract. Dependent on the value a separate quotation for the work which has to be done prior to the decision taking effect should be obtained and an order raised. If ordering this pre-decision work/service would, in effect, force the complete contract award to that firm then this would be seen as bypassing the Council's delegated decision making process and is consequently forbidden.

Care must be taken to ensure that where pre-decision work/service is ordered the Council is not committed to either pay or have the work/service done twice.

The award

In simple terms an award can be made by a written acceptance, e-mail or letter, of a firm's offer. Where the award is for neither the original offer or for all parts of the offer the written acceptance must be explicit as to what is being accepted. Ambiguity here will undoubtedly cause confusion later and may technically not actually form a contract.

Alternatively all the papers forming the contract should be brought together as one contractual document and signed by appropriate representatives of both parties.

The Chief Executive, Managing Directors and the Director of Law and Governance may sign documents on behalf of the Council or authorise officers to do so. This authority may be given by inclusion in the nominated officers' terms of appointment, by specific resolution or as part of a system implementing delegation arrangements within the directorate.

Any contract with a value in excess of £1m must be made in writing and either:

- affixed with the common seal of the Council and be attested by at least one authorised officer, or
- signed by at least two authorised officers.

The common seal of the Council shall be affixed to any document or agreement if the Director of Law and Governance considers it appropriate for the purpose of transacting the Council's business or safeguarding its interests.

The seal may be fixed and witnessed only by the Director of Law and Governance or officers authorised in writing to do so.

The Director of Law and Governance shall ensure a register is maintained of all documents and agreements which are sealed including the name of the person who witnessed the affixing of the seal.

Where not already required to do so before the award all tenderers must be notified of the award decision as soon as possible after the event. This notification should include details of who the contract was awarded to and the reasons for the firm being unsuccessful. Where appropriate, the values of tenders received, in order of value and, if considered relevant the names of the tenderers in alphabetical order. At no time should any firm be informed of, or be able to determine, the value of any other firm's tender.

After the award

Member notification

For contracts of £50,000 or more where:

- quality issues as well as price (to achieve Best Value), have been taken into account such that it's more advantageous to accept a tender(s) other than the lowest; or
- acceptance of the most favourable tender(s) means that the approved budget will be exceeded; or
- a non-competitive process was used to determine the contractor*;

the approved Award Report # must be sent to the Head of Democratic Services, and the relevant Cabinet Member, within 14 days of the contract being awarded so that s/he may notify Members of the Cabinet Scrutiny Committee.

* Contracts awarded without competition of adult and children's services required by law under the National Assistance Act 1948 and the Children Act 1989 are exempt from this reporting requirement.

The signed copy should be retained in the Contract File. The copy sent to the Head of Democratic Services must include the names of the officers who recommend and approved the report.

Where multiple firms are awarded contracts the rationale for the awards must be reported where any of the contractors has tendered a higher price than any of the unsuccessful firms.

Being a named individual a 'Consultant' must, by definition, have been sourced via a non-competitive process. All contracts for a Consultant from £20,000 must be reported, as a non-competitive procurement, to the Head of Democratic Services within 14 days of the contract being awarded so that s/he may notify Members of the Cabinet Scrutiny Committee.

Updating the Portal

The South East Business Portal must be updated with the details of the award including the electronic copy of the contract within 14 days of the contract being awarded.

Debriefs

Debriefing firms after a competitive procurement have similar benefits for both parties. For the Council it's about improving the quality of future tenders and for firms it's about gaining a further understanding of the process and what they need to do to improve their chances of winning future opportunities from the Council and other public sector bodies.

Even the appointed contractor may benefit from a formal debrief.

A debrief should be offered to all tenderers when they are told of the award decision and should take place as soon as practicable.

If the reason for them not being awarded the contract is included in sufficient detail when they are told of the award decision many firms will not ask for a debrief. Of those that do most will probably be happy with a short phone conversation. The actual number requesting a formal face-to-face debrief at the Council's offices is quite small. Firms must not be pressured into accepting a phone debrief.

A debrief is an integral part of the procurement and should be done by the senior officers closely involved in the procurement.

Firms should be free to ask any questions but you should concentrate your answers on:

- the award decision reasons detailed in the award report including the strengths and weaknesses of the firm's submission;
- details of the actual process; and
- any information you would release under the Freedom of Information Act.

Be careful that whilst trying to be helpful you do not directly compare the submissions nor release information that should remain commercially confidential.

In cases where the procurement and subsequent award has been particularly sensitive it is good practice to:

- not undertake the debrief on your own; and
- make and retain a written record of the meeting.

General points that may apply are:

- the Council is always looking for a firm to meet the published requirement. A proposal should concentrate on showing how they meet that requirement;
- the evaluation process does not compare bids;
- firms generally do better asking for clarification than making incorrect assumptions; and
- the evaluation is done against what they submit and information, good or bad, that the Council has before the procurement is not used.

For procurements covered by the EU directive:

- The contracting authority is required within 15 days of receipt of a written request to inform any eliminated candidate or tenderer of the reasons for the rejection of his application or his tender. Any tenderer who submitted an admissible tender must also be advised of the characteristics and relevant advantages of the tender selected as well as the name of the successful tenderer. Purchasers may however withhold information which would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interest of public or private undertakings, or might prejudice fair competition.
- Contracting authorities which have issued an invitation to tender must also promptly inform candidates and tenderers, in writing, if required, of the decision and the reasons for not making a contract award or for starting the process again.

OJEU Notice

For all contracts that are subject to the EU Procurement Directive a contract award notice must be placed in OJEU, within 48 days of the contract being awarded.

It is important to note that this applies to all contracts covered by the Directive even those classed as “Residual Services” where advertising and the other requirements are not mandatory.

Contracts and Tenders Standing Orders

- 1** It is the responsibility of the Chief Executive and Managing Directors to ensure that all purchases of goods and services comply with:
 - (a) legal requirements;
 - (b) EU Directives;
 - (c) the Council's Financial Regulations;
 - (d) the Code contained in 'Spending The Council's Money' (as approved by the Governance & Audit Committee);
 - (e) standards for the management of property, information technology resources and staff; and
 - (f) any conditions attached by the Leader or the Council to the exercise of powers delegated by them.

Authority

- 2**
 - (a) All transactions must fall within the powers delegated to the Chief Executive or Managing Director or have been approved by a decision (in accordance with the Council's Constitution) of the Cabinet, the Leader, an authorised Cabinet Member, the Council or one of its committees or sub-committees.
 - (b) No contract, agreement or other document shall be signed or sealed unless it gives effect to:-
 - (i) a decision or resolution (in accordance with the Council's Constitution) of the Leader, the Cabinet, an authorised Cabinet Member or one of its committees or sub committees; or
 - (ii) a decision by an officer exercising delegated powers.
- 3**
 - (a) Budgetary provision must exist before any contract can be entered into. This provision should be explicit in a budget approved by resolution of the Council. Where budgetary approval exists for a specific item further Member approval is not generally required.
 - (b) Where there is no specific budget line, the Chief Executive and Managing Directors may approve expenditure up to £100,000, provided the expenditure can be met within budget. Above £100,000 a formal decision by the Leader, the Cabinet or an authorised Cabinet Member is required in accordance with the Council's Constitution.

4 Thresholds

(a) **The financial values (exclusive of Value Added Tax) at which processes become mandatory are:**

- (i) £8,000 to £49,999 - three written quotations must be sought from appropriate sources.
- (ii) £50,000 and above – the competitive tender process, as defined in ‘Spending The Council’s Money’, must be followed.

However both the overall obligations of the Code and the statutory requirement to achieve value for money apply to all transactions and don’t just apply from the above amounts and, as such a competitive tender process may be appropriate for procurements below £50,000.

(b) In addition European Union Directives, enacted in UK Law, set limits for public contracts above which specific procedures are required to be followed. The procedures cover the advertising of contracts, the rejection of suppliers, technical specifications, evaluation, selection and award criteria. All procurements for goods, services and works above the financial thresholds are covered by the legislation but not all procurements for services, social care for example, are subject to the full process.

The current levels at which these apply are for goods and services, £144,371 and for works, £3,611,319.

(c) There must be no attempt to avoid any of these limits by deliberately manipulating the requirement or frequency of ordering.

(d) The ‘financial values’ here refers to:

- (i) the total amount payable over the contract period, i.e. the Council’s total liability under the contract, and not the budget available in the current year; or
- (ii) the reasonable expectation of the cost of the consequence of the decision; or
- (iii) the ‘net benefit’ to the contractor

whichever is the greater.

The award

5 The Chief Executive, Managing Directors and the Director of Law and Governance may sign documents on behalf of the Council or authorise officers to do so. This authority may be given by inclusion in the nominated officers’ terms of appointment, by specific resolution or as part of a system implementing delegation arrangements within a directorate.

- 6** Where a contract for a Consultant is estimated to cost £20,000 or more details of the proposed award must be forwarded to the relevant Cabinet Member prior to the appropriate officer making the award. In this context a Consultant is defined as a named individual (i.e. the Council states it wants individual x) taken on to perform a particular, temporary, and defined, task.
- 7** (a) Any contract with a value in excess of £1m must be made in writing and either:
- (i) affixed with the common seal of the Council and be attested by at least one authorised officer, or
 - (ii) signed by at least two authorised officers.
- 8** The common seal of the Council shall be affixed to any document or agreement if the Director of Law and Governance considers it appropriate for the purpose of transacting the Council's business or safeguarding its interests.
- 9** The seal may be fixed and witnessed only by the Director of Law and Governance or officers authorised in writing to do so.
- 10** The Director of Law and Governance shall ensure a register is maintained of all documents and agreements which are sealed including the name of the person who witnessed the affixing of the seal.

After the award

- 11** (a) For contracts of £50,000 or more where:
- (i) quality issues as well as price (to achieve Best Value), have been taken into account such that it's more advantageous to accept a tender(s) other than the lowest; or
 - (ii) acceptance of the most favourable tender(s) means that the approved budget will be exceeded; or
 - (iii) a non-competitive process was used to determine the contractor*;
- the approved Award Report must be sent to the Head of Democratic Services within 14 days of the contract being awarded so that s/he may notify Members of the Cabinet Scrutiny Committee.
- * Contracts awarded without competition of adult and children's services required by law under the National Assistance Act 1948 and the Children Act 1989 are exempt from this reporting requirement.
- (b) Where multiple firms are awarded contracts the rationale for the awards must be reported where any of the contractors has tendered a higher price than any of the unsuccessful firms.

- (c) Being a named individual a 'Consultant' must, by definition, have been sourced via a non-competitive process. All contracts for a Consultant for £20,000 or more must be reported, as a non-competitive procurement, to the Head of Democratic Services within 14 days of the contract being awarded so that s/he may notify Members of the Cabinet Scrutiny Committee.