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. (Se '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.

<u>Words of caution</u>

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.

<u>Process</u>

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.

<u>Legislation</u>

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 wont.

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.