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 singed 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 <u>all</u> contracts covered by the Directive even those classed as “Residual Services” where advertising and the other requirements are not mandatory.