

<b>E</b>	<b>Contract Procedure Rules</b>
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**Why is this important?**

This section covers all aspects of procurement and Contracts procedures in relation to EU and National legislation.

**What's covered in this Section?**

The roles and responsibilities of:

- The Cabinet
- The Committees of the Cabinet
- The Statutory Officers
- All Officers procuring goods and services on behalf of the Authority

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## Introduction

- E.1 All Council employees and third parties/contractors engaged to act in any capacity to manage or supervise a contract must comply with these Rules, and each Head of Service must ensure such compliance in the Service for which they are responsible. Any breaches should be reported to the relevant Chief Officer. Failure to comply with these Rules or the associated detailed guidance may be considered a breach of the Officer Code of Conduct and may result in disciplinary action and legal proceedings against the officers or third parties concerned.

All Council employees and third parties engaged on the Council's behalf must ensure that any conflicts of interest are avoided. Any conflict of interest must be declared to appropriate line managers in the Council as defined and in line with the Officer Code of Conduct.

These Rules set a clear framework for the procurement of goods, works and services for the Council. Detailed guidance on these Rules can be found by accessing the Procurement Knowledge Map which can be found on the Council's intranet site. The aim is to ensure a system of openness, integrity and accountability where the probity and transparency of the process will be beyond reproach. Working within the Rules in turn leads to better value for money and gives confidence to all concerned that the Council is fulfilling its fiduciary responsibilities. These Rules apply to all quotations (informal procurement with a value up to £75,000 and tenders (formal procurement over £75,000)

*The reason is to update the Constitution following the development of the Knowledge Map. The Knowledge Map has been developed to assist officers in following the correct procurement path and to assist in ensuring compliance with the Council's Finance and Contract Procedure Rules. Also to increase the financial threshold from £50,000 to £75,000 for informal tenders making it easier for small businesses to do business with the Council.*

- E.2 Any dispute or difference as to the interpretation of these procurement procedure rules shall be resolved by the Borough Solicitor in consultation with the Director of Finance and Business Services.
- E.3 There is a clear requirement for the Council to achieve value for money in its purchase of goods, works or services. These Contract Procedure Rules have been written to ensure that this requirement is achieved on behalf of the whole Council. Any procurement decision by a Service must therefore be made in the context of this overall value for money aims of the Council. It is a requirement that in all cases these Rules will be applied.
- E.4 These Rules will ensure that the Council will:

- get value for money;
- keep within the law;
- maintain standards of conduct;
- be fair to suppliers;
- protect officers;
- demonstrate accountability for public money ;
- meet its corporate and directorate aims and policies; and
- comply with the Council's Procurement Strategy.

E.5 Officers must procure goods and services in the first instance through Corporate Contracts, where these have been awarded. Details of current Corporate Contracts can be obtained from the Director of Finance and Business Services. Failure to comply with this Rule may be considered a breach of the Officer Code of Conduct.

#### Compliance and Officer Responsibilities

E.6 Every contract made by or on behalf of the Council must comply with these Rules and the associated detailed guidance on the Knowledge Map.

E.7 All Council employees and third parties/contractors engaged to act in any capacity to manage or supervise a contract must comply with these Rules, and each Head of Service must ensure such compliance in the Service for which they are responsible. Failure to comply with these Rules or the associated detailed guidance may be considered a breach of the Officer Code of Conduct and may result in disciplinary action and legal proceedings against the officers or third parties concerned. All Council employees and third parties engaged on the Council's behalf must ensure that any conflicts of interest are avoided. Any conflict of interest must be declared to appropriate line managers in the Council as defined and in line with the Officer Code of Conduct.

E.8 Prior to the start of the relevant procurement process where a Chief Officer or his designated representative intends to seek an exception to these Rules, as they apply to contracts and tenders, he shall arrange for a Delegated Decision (DD) to be prepared

DD's are not available if the proposed exception will breach national or EU legal requirements. A DD can only waive the Council's internal rules.

The main areas where it may be appropriate to request a DD are set out within Sections E.23 to E.26. Before a DD is prepared the Chief Officer or his delegated representative must seek authorisation to proceed from the Procurement Service. The draft DD must then be signed off by Procurement, Legal and Finance before being considered by the Borough Solicitor and the Director of Finance and Business Services.

All attempts to waive the rules will be subject to very close scrutiny and may be reviewed by the Corporate Management Team. The DD must

clearly set out the exemption or the exception from the Rules which is being relied upon.

*Reason to update Constitution is to provide clearer guidance on the appropriate use of DD's.*

- E.9 All such exceptions should be recorded in the delegated decisions register and be available for inspection as required.
- E.10 National and European Union legislation overrides the Finance and Contract Procedure Rules.
- E.11 Where it becomes apparent that a Service has failed to comply with these Rules then the Chief Officer or his designated representative shall issue a report outlining the reasons for the non-compliance and the steps taken to prevent a re-occurrence. The Chief Officer or his designated representative will be required to submit the report to the Director of Finance and Business Services and Borough Solicitor before reporting to the Audit and Governance Committee.
- E.12 When any employee either of the Council or of a service provider may be affected by any transfer arrangement. Officers must ensure that Transfer of Undertaking (Protection of Employment) Regulations (TUPE) issues are considered and obtain legal advice before proceeding with inviting tenders and quotations.

#### Appointment of Consultants

- E.13 Any appointment of a consultant or consultancy body is subject to these Rules and any detailed guidance. Advice should be sought from the Director of Finance and Business Services prior to entering into any such arrangement.

#### Pre Contract Requirements

- E.14 The Council's Service Schemes of Delegation set out the approvals necessary for different types of contract.
- E.15 Before beginning a purchase, the authorised officer responsible for letting the contract must:
  - make sure that the appropriate authority is in place to start the process and spend the money in accordance with the appropriate Scheme of Delegation;
  - make sure that there is enough money in the budget to cover the total whole-life financial commitment being made (including any consultant's or other external charges or fees);
  - make sure that the Forward Plan requirements have been followed where the purchase is a Key Decision.

- E.16 The authorised officer must ensure when entering into supply agreements that the requisition order and payment processes to be provided by the supplier are in accordance with Section D (Ordering and paying for work, goods and services) of these Finance and Contract Procedure Rules.
- E.17 For procurements above £10,000 advice should be sought from the Borough Solicitor's Department as to the relevant form of contract to be employed for the procurement.

## General Requirements

- E.18 Before beginning a purchase, the authorised officer responsible for it must also:
- Where the proposed value of the procurement is estimated to be over £75,000 the appropriate officer should seek advice from The Director of Finance and Business Services and where appropriate enquire whether the service is able to be provided by an 'in-house' provider;
  - Carry out an options appraisal, to decide what procurement method is most likely to achieve the purchasing objectives, in a form specified by the Director of Finance and Business Services;
  - Assess the risks associated with the purchase and how to manage them;
  - Prepare a procurement plan where the value of the purchase exceeds £75,000 or where the purchase poses a significant risk to the Council and send a copy to the Director of Finance and Business Services;
  - If the procurement is subject to European Procurement Rules, advice should be sought from the Director of Finance and Business Services.
  - Ensure that all bid evaluation criteria have been determined in advance; and
  - Ensure that these Rules and the detailed guidance contained in the Procurement Knowledge Map have been complied with, and that the proposed contract represents value for money. *Reason to include the new guidance available on the Knowledge Map and to raise the financial threshold for informal tenders.*

## Contract Procedures

- E.19 The table below sets out which procedures must be followed for different contract values.

The Total Value of the contract is determined by considering the annual cost of the goods/services and multiplying by the number of years that the contract is required for including any optional extensions.

	Total Value	Procedure to follow where no
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		Contract exists
Informal	Below £10,000	Compare at least 3 quotes received by advertisement on the <u>Chest</u> , by e mail or by telephone with a written record See E 32
	Above £10,000 but below <b>£75,000</b> for goods, services and works.	Comparison of written quotations from at least 3 bidders received by advertising on the Chest. See E33
Formal	Above <b>£75,000</b> but below the EU threshold* for goods, services and works.	Formal tender process from at least 3 suppliers See E35.
	Above the EU threshold* for goods, services and works. <u>See Procurement Knowledge Map for up to date current thresholds.</u>  <u>Reason Knowledge Map can easily be updated thereby negating the need to formally update the Constitution when the thresholds change.</u>	Tender process in accordance with EU Procurement Rules. See E38

## Exceptions to Requirements of Competition

### Framework Agreements

- E.20 Only Central Government, Local Government, consortia and other legally procured Framework Agreements may be used for the procurement of goods or services. The framework agreement must allow the Council to participate in such an agreement and must adhere to the principles of these Rules and the specification must encompass the Council's requirements. Before starting any procurement guidance should be sought from the Director of Finance and Business Services.

*Reason to make it clear that framework agreements created by Consortia can be used by the Council*

- E.21 Examples of Central Government Frameworks appear on the Office of Government Commerce OGC Buying Solutions website [www.ogcbuyingsolutions.gov.uk](http://www.ogcbuyingsolutions.gov.uk). If the Council is entitled to use the Framework Agreement a mini competition process may be performed to evaluate the best value supplier for the Council. Advice on the process should be sought from the Director of Finance and Business Services.



- E.22 Framework agreements must be for a maximum of four years. If there is any doubt about their duration advice should be sought from the Director of Finance and Business Services.

#### Other Exceptions to Requirements of Competition

- E.23 Where a Chief Officer or his designated representative intends to seek an exception to these Rules as they apply to contracts and tenders, he shall arrange for a Delegated Decision (DD) to be prepared in accordance with the detailed guidance on DDs on the Knowledge Map. DDs are not available if the proposed exception would breach National or EU legal requirements. A DD can only waive the Council's internal rules. Reason clarifies when a DD may be used and directs officers to the Knowledge Map where guidance is provided on completing the forms and also the forms themselves.
- E.24 Provided that a proposed contract award complies with national and EU legislation and any other Finance and Contract Procedure Rule and subject to the Chief Officer or his designated representative having a DD signed by the Borough Solicitor and the Director of Finance and Business Services, then the competition requirements may not apply to:
- The purchase of goods or services or the execution of works which in the opinion of the appropriate Chief Officer or his Authorised Officer and the Director of Finance and Business Services is certain are obtainable only from one source or contractor, and where no reasonably satisfactory alternative is available;
  - The purchase of a product required being compatible with an existing installation and procurement from any other source would be uneconomic given the investment in previous infrastructure as approved by the Chief Officer;
  - The instruction of, advice from, or service provided by Counsel or, by exception, Solicitors to act on the Council's behalf;
  - Special education or social care contracts if, in the opinion of the Chief Officer, following consultation with the Borough Solicitor and the Director of Finance and Business Services, it is considered the Council's interests are best met if there is exemption from the competition rules;
  - The exercise of statutory grant aid powers delegated to a Chief Officer or his authorised officer (which shall be specified by that Chief Officer or his designated representative in each case);
  - Circumstances which in the opinion of both the Director of Finance and Business Services and Borough Solicitor warrant an exception to the requirements for competition, to include, but not limited to when an emergency requires an immediate contract (which should in any event be procured from an approved list of suppliers where available) or when exceptionally the Chief Officer his authorised officer considers that is inappropriate in the interests of the efficient

- management of the service;
- Any other general circumstances, up to the EU threshold, as agreed by both the Director of Finance and Business Services and the Borough Solicitor.

E.25 In those circumstances where only 3 quotations or tenders are required, and these cannot be obtained due to lack of suitable contractors prepared to quote/tender then a record of the reasons for this action must be kept and be reported annually to the Director of Finance and Business Services.

E.26 The Chief Officer or his authorised officer must be satisfied that if three quotations/tenders have not been received that the offer accepted offers the Council best value and the prices are competitive. Advice from the Director of Finance and Business Services should be sought as to the most appropriate form of Contract to employ for the procurement.

#### Variations and Contract Extensions

E.27 All variations must be in the form of written instruction to the contractor. Any such variation should be agreed, documented and signed by both parties.

E.28 The Contract term cannot be extended where this would result in the value of the contract exceeding the European Procurement threshold. In such circumstances the advice of the Director of Finance and Business Services should be sought.

E.29 The term of a Contract may be extended with the approval of the Chief Officer or his authorised officer if there is provision within the Contract terms and conditions to extend and the budgetary provision allows. If the contract has already been extended to the full extent provided in the contract it cannot be extended further.

E.30 If there is no provision within the contract terms and conditions for the Contract to be extended the approval of the Borough Solicitor and the Director of Finance and Business Services must be sought to any proposed extension of the term of contract, and a record kept by the Chief Officer and the reasons why.

#### Advertising of Procurement Opportunities

E.31 To determine the market for each procurement in excess of £10,000 the Chief Officer or his authorised officer should identify the most appropriate method of advertisement including but not restricted to local press, relevant trade journals, council websites and other websites. The Director of Finance and Business Services will facilitate advertisement in the OJEU.

#### Competition Requirements below £10,000

- E.32 Officers must seek quotations so as to demonstrate value for money. Procurement of goods and services below £10,000 must be in accordance with guidance in the Knowledge Map and 'Ordering and paying for work, goods and services' (D.19 – D.43). It is the responsibility of the officer to retain written notice of all the quotes for audit purposes (See E19)

#### Competition Requirements for Procurements between £10,000 and £75,000

- E.33 Procurement of goods and services must not be split to avoid a formal tender award procedure, or to have the effect by such a split that the value of the goods or services would if not split would breach the European Procurement Rules threshold. At least three written quotes must be obtained by advertising on the Chest.
- E.34 Records required to be kept under Rules E.20 – E.26 and E.32 – E.53 shall be in a format to be determined by the Director of Finance and Business Services.

#### Competition Requirements for Procurements over £75,000 but below the EU Procurement threshold

- E.35 Where contracts have an aggregate value over the life of the contract estimated at £75,000 or more, a formal tendering procedure must be undertaken in a format to be approved by the Director of Finance and Business Services. The invitation to tender must be advertised in an appropriate manner and tenders received must be dealt with and evaluated in accordance with these Rules. Subject to E37, either the Open or Restricted Procedures, described below, should be used as practicable. The full European Procurement Regime does not apply below the financial threshold (shown below which is subject to change and should be verified by accessing the Knowledge Map) it is not imperative to publish an OJEU notice in these circumstances, however advertising in the OJ may be a consideration. Further advice can be sought from the Director of Finance and Business Services.

Competition Requirements under European Procurement Rules (currently applicable for Contracts valued as follows, until 31<sup>st</sup> December 2011)

Services	Goods	Works
£156,442(€193,000)	£156,442 (€193,000)	£3,927,260(€4,485,000)

Thresholds are net of VAT.

- E.36 The procedures set out below follow the model set out in the European Procurement Rules. They represent best practice and should be adopted

as the norm for all exercises over the threshold values. Either the Open or Restricted Procedure must be used as practicable. The Negotiated Procedure and Competitive Dialogue Procedure may only be used in exceptional circumstances and with the approval of the Borough Solicitor. Advice on the appropriate procedure to apply may be obtained from the Director of Finance and Business Services or the Borough Solicitor.

#### Negotiated and Competitive Dialogue Tendering Procedure

- E.37 The Negotiated and/or the Competitive Dialogue procedure should only be used in exceptional cases where advice has been sought from the Director of Finance and Business Services and the Borough Solicitor.

#### General Procedure

- E.38 Contracts that are subject to the EU procurement rules (and other contracts where that is appropriate) generally follow a three-stage process:

- Stage 1 - PQQ

This stage uses a Pre-Qualification Questionnaire (PQQ) to short-list those tenderers to be invited to submit a tender. Templates are available from the Director of Finance and Business Services and;

- Stage 2 – Tender

This stage involves the preparation of a detailed tender specification and instructions which explain what is required to be provided and how tenders will be managed and evaluated. Bidders will submit their tenders based on the information provided in this document and give contract specific proposals (including as to delivery and price) and;

- Stage 3 - Evaluation

This will usually lead to the award of the contract. It is at this stage that any contract specific proposals (e.g. price and how the contract will be delivered) are assessed. Evaluation is dealt with in more detail below.

- E.39 Stage 1 PQQ - the only considerations are those matters which are relevant to the performance of the contract in question (e.g. financial standing, expertise, experience and technical capacity). There can be no consideration of the suppliers' proposals as to *how* the contract would be delivered.

- E.40 Once an organisation has been selected through the PQQ stage, they are deemed to be suitable to undertake the contract and they cannot be failed on the same criteria at the Tender and Evaluation stage (Stage 2 & 3) unless relevant changes occur during the later stages of the procurement process (e.g. a change in a supplier's financial standing).

- E.41 A minimum number of short-listed suppliers are then invited to submit tenders within a strict timetable. At the close of the period of time allowed for tender submission, each tender is evaluated against the criteria

identified in the tender instructions/specification document sent out at Stage 3. (See paragraph E.42 below).

- E.42 If following the PQQ stage less than 3 organisations meet the selection criteria consideration should be given as to whether continuing with the process will achieve a competitive price, value for money and quality of services. A further advertisement may be required to achieve a better response and more tenderers.
- E.43 The Chief Officer or his authorised officer must keep a record of the reasons for this action and report these annually to the Director of Finance and Business Services.

#### Open Tendering Procedure

- E.44 All companies expressing an interest will receive an invitation to tender. There is no restriction or selection process prior to the dispatch of tenders.
- E.45 Public Notice must be given in relevant trade journals, newspapers, websites and the Official Journal of the European Union (OJEU) if the EU threshold is breached or exceeded, and where appropriate on the Council's Web-Site. At least 52 days public notice must be given in one or more local newspapers or trade journals circulating amongst such firms who undertake such contracts, and on the Council's Web-Site, setting out details of the proposed contract, inviting tenders from applicants and stating the last date on which tenders will be received. Tenders must be sent out within 6 days of a request. The OJEU must state the date and time of the opening of tenders whether or not the supplier is to be allowed to attend the tender opening.
- E.46 The time limits referred to in E.45 may be reduced by 5 days where electronic versions of the contract documents are made available or be reduced to a shorter period of generally not less than 36 days and in any event not less than 22 days where a prior information notice has been published in accordance with the EU Regulations. These two reductions in the periods of time may be combined. No decision to reduce those time limits must be taken without consulting the Director of Finance and Business Services and the Borough Solicitor.
- E.47 If an alternative (variant) bid is to be permitted, the OJEU must say this. The Instructions for tendering specification document must give details of what is to be regarded as the minimum requirements of a variant bid. If these requirements are not met, a variant bid cannot be accepted.
- E.48 Evaluation of tenders submitted through the Open Procedure must be undertaken in accordance with the EU Procurement Regulations. All tenders submitted must be evaluated. The Open Procedure does not allow any negotiation with bidders.

- E.49 The Open Procedure may not be suitable where it is anticipated that there may be a large number of potential contractors interested in bidding for the contract. The Open Procedure is the most suitable for the procurement of non specialist goods such as stationary. The selection stage and the award stage can be undertaken simultaneously.

#### The Restricted Procedure

- E.50 This is a two stage process involving the invitation of expressions of interest from interested bidders. A contract notice must be published in the OJEU if the EU threshold is exceeded and where appropriate on the Council's website allowing at least 37 days for receipt of expressions of interest from prospective bidders. A shortlist of bidders is then drawn up in accordance with qualification criteria. At least 5 bidders must be selected at this stage, based on economic standing and professional or technical ability. If an alternative (variant) bid is to be permitted, the OJEU must say this. The instructions for tendering and specification document must give details of what is to be regarded as the minimum requirements of a variant bid. If these requirements are not met, a variant bid cannot be accepted. *Reason clarifies when notice should be served.*
- E.51 Those bidders on the shortlist must be invited to tender, allowing at least 40 days for receipt of completed tenders. Tenders are evaluated at the end of the 40 day period. No negotiation with bidders is allowed.
- E.52 The contract will be awarded in accordance with the criteria specified in the OJEU notice. An award notice must be published within 48 days. Unsuccessful tenderers must be de briefed.
- E.53 In circumstances of urgency, the time limits can be reduced. The 37 day period for expressions of interest may be replaced by a period of not less than 15 days. The time for inviting short listed suppliers to tender can be reduced from 40 to 10 days. No decision to reduce the time limits must be taken without first consulting with the Director of Finance and Business Services and the Borough Solicitor.

#### Despatch of Tenders

- E.54 If an invitation to tender is required such invitations can be made using any available form of communication providing all invited parties receive identical information despatched at the same time.

#### Submission and Receipt of Tenders

- E.55 Tenders should be submitted as instructed in the tender documentation. The tendering process can be undertaken using an electronic tendering system and shall be opened by the Borough Solicitor or her authorised officer. The authorised officer will be given 'Verifier' status for the purpose of this task by the system administrator. The task of opening the tender should be performed when the authorised officer opens the electronic seal

facility within the system. Following this action the authorised officer shall release the received tender to permit access by the Procurement Unit. Tenders received electronically shall be recorded as received when the authorised officer opens the electronic seal facility within the system.  
Reason to update Constitution to reflect the Council's ability to receive electronic tenders. Non compliance with this requirement will result in the tender not being considered. Electronic tenders should only be sought following advice from the Director of Finance and Business Services.

- E.56 The tender must be submitted to the location, and by the time and date specified in the invitation to tender as being the last time and date for the receipt of tenders in the envelope provided bearing “ Tender “ or carrying any tender label supplied with the invitation to tender.
- E.57 Where the Council estimates the tender value to be £75,000 or more, all tenders must be submitted to the Borough Solicitor.
- E.58 Unless it forms part of an electronic tender process tenders will be submitted in hard copy in the first instance and must bear no details of name, mark, slogan or logo of the contractor on the tender envelope. Non compliance with this requirement may result in the tender not being considered. The Director of Finance and Business Services will in such circumstances determine whether it is in the interests of the Council to consider the relevant tender. Electronic versions of tenders must not be delivered or opened before the opening of hard copy tenders.
- E.59 The Council is not bound to accept the lowest (see E.83) or any tender.
- E.60 Each hard copy tender submitted in accordance with the procedures detailed in E.64 – E.66 will remain in the custody of the Borough Solicitor until the time appointed for opening.
- E.61 Upon receipt of a hard copy tender the receiving officer must indicate on the envelope the date and time of its receipt.
- E.62 Tenders received after the date and time indicated for the receipt of tenders will not normally be considered except with the agreement of the Borough Solicitor and Director of Finance and Business Services. Such tenders will be opened and returned to the tenderer if they are not to be considered.

#### Opening of Electronic Tenders

- E.63 The majority of tenders are now submitted via the Due North System. These electronic tenders are verified by The Borough Solicitor or her delegate and released to the Procurement Department.

#### Opening and Registration of Hard CopyTenders/Quotations

- E.64 Hard copy tenders shall be opened at one time by the Borough Solicitor or

her authorised officer, in the presence of the purchasing Chief Officer or his designated representative and Director of Finance and Business Services or his designated representative.

E.65 The authorised officer must at the time non electronic tenders are opened, record on the Register:

- the type of goods or materials to be supplied or disposed of, or the work or services to be carried out;
- the name of each contractor submitting a tender;
- the amount of each tender where appropriate
- the date of the opening of a tender
- the signatures of all persons present at the opening of each tender
- the reason for any disqualification of any tender
- the name of each contractor invited to tender but who did not submit a tender. *Reason to make clear that this only applies to hard copy tenders*

E.66 Every written quotation obtained for each proposed contract must be opened at one time and details recorded by the Chief Officer or his/her Authorised Officer.

#### Errors in Tenders

E.67 Errors in Tenders shall be dealt with in one of the following two ways:

- the tenderer shall be given details of the error(s) found during the examination of the tender and shall be given the opportunity of confirming without amendment or withdrawing the tender; or
- Amending the tender to correct genuine error(s) provided that in this case, apart from these genuine errors, no other adjustment, revision or qualification is permitted.

E.68 Tender documents must state which method will be used for dealing with errors in tenders. Any request for an extension to the tender period must (in normal circumstances) be no later than 5 working days before the tender closing date. If the date is to be extended the revised date must be advised to all tenderers.

#### Exclusions of Tenders

E.69 No valid tender received should be excluded from the tender process



without the approval of the Borough Solicitor and the Director of Finance and Business Services.

#### Evaluation of Tenders and criteria for selecting a supplier

- E.70 All the procedures, with the exception of the Open Procedure, anticipate a selection process which involves at least two stages. The first stage is to draw up a shortlist of candidates who will be invited to submit tenders, and a second stage when the contract is awarded to one (or more) of the bidders. Where the procedure is a Negotiated Procedure or Competitive Dialogue Procedure there may be an intermediate stage which allows further refinement of the shortlist.
- E.71 The following criteria (set out in Public Contracts Regulations 23, 24, 25 and 26) may be used to draw up the shortlist of those who are to be invited to tender:
- Suppliers who have, or whose directors have been convicted of certain offences listed in Public Contracts Regulation 23 are ineligible to submit bids and must not be included in the short list;
  - A public authority can (but does not have to) refuse to shortlist businesses which are insolvent, have been convicted of a criminal offence relating to the running of the business, or committed grave misconduct in the running of the business. Advice should sought from the Borough Solicitor in the event that you do not wish to exclude on this basis.
  - Businesses can be excluded if they have not paid all their taxes or social security contributions. Advice should sought from the Borough Solicitor in the event that you do not wish to exclude on this basis.
  - Businesses can be excluded if they are not included on the appropriate trade register in their home state
  - Public authorities are allowed to request evidence from prospective bidders to allow them to assess whether any of the above factors apply.
  - Public authorities may make an assessment of bidders' economic and financial standing by taking into account all or any of the following:-
    - statements from the bidders' bankers or evidence of relevant professional indemnity insurance;
    - published accounts where publication of such accounts are a legal requirement;
    - a statement covering the 3 previous financial years setting out the overall turnover of the bidder's business and the turnover in respect of the goods or services being provided.
  - Technical or professional ability which can only be assessed against the criteria set out in the Regulations.

#### Acceptance of Tenders/Quotations

- E.72 The award of a contract to the successful tenderer must be conditional

upon the tender costs being within budgetary limits and subject to any prior Member decision making procedures.

- E.73 For goods and services procured in accordance with EU Procurement Rules notification to the successful tenderer of the award of the contract is subject to the 10 day “Alcatel” standstill period, (the Director of Finance and Business Services can provide advice), and may, if a decision by Cabinet Members was required, involve the 5 working day 'call in' period. (see E.84)

#### Criteria for Awarding the Contract

- E.74 There are only two possible criteria:

- Lowest price; or
- Most economically advantageous tender

NB where the selection is based on price the contract must be awarded to the bidder offering the lowest price unless it is made clear in its invitation to tender that it reserves the right not to award the contract at all.

- E.75 Where the winning bid is to be selected on the basis of the most economically advantageous tender, this is assessed from the point of view of the contracting authority. Usually quotes will be selected for the lowest price however they can be selected on the basis of the most economically advantageous quote if this is made clear in the request for quote and sufficient detail is submitted to enable an evaluation. Criteria linked to the subject matter of the contract must be used to determine the most economically advantageous tender. These might include:

- quality;
- price;
- technical merit;
- aesthetic and functional characteristics;
- environmental characteristics;
- running costs;
- cost effectiveness;
- after sales service;
- technical assistance;
- delivery date;
- delivery period;
- period of completion

- E.76 The criteria to be used to evaluate bids and the weightings to be attached to them, or if weightings cannot be established, their relative importance, must be set out in the invitation to tender. However, it is not possible to take into account tenderer's experience, staffing levels, equipment or ability to perform the contract within a set timescale. These factors can only be considered at PQQ stage.

## Specifications

- E.77
- Any technical specifications to be met by the goods, services or works to be provided must be set out in the contract documentation.
  - Technical specifications can include requirements relating to quality, environmental performance and accessibility or usability by the disabled (among others)
  - Any reference to British Standards in the specification must be followed by the words "or equivalent"
  - A public authority is only allowed to consider bids which vary from the requirements set out in the specification if the OJEU notice states that variants are permissible
  - Where variants are to be permitted the public authority must set out its minimum requirements.

E.78 Subject to E.72 and E.73 above:

- in the case of a tender the Chief Officer or his authorised officer authorise the acceptance of the tender on behalf of the Council, such acceptance to be notified in writing to the successful tenderer in a manner specified by the Borough Solicitor; or
- in the case of a quotation the Chief Officer or his authorised officer may accept the quotation by issuing either an official order (which should be signed by the Chief Officer or his authorised officer (as set in the Scheme of Delegation) or an Agreement signed by the Borough Solicitor or his/her Authorised Officers, as set out in E.98 - E.111.

E.79 If a decision is taken to abandon or to recommence a tender process in respect of which a contract notice has been published, each tenderer must be informed of the decision and the reasons for it, as soon as possible after it has been made.

## Post Tender Negotiations (Open and Restricted Procedure)

- E.80 Providing clarification of matters in the Invitation to Tender to potential or actual bidders or seeking clarification of a Tender, whether in writing or by way of a meeting, is permitted. However, the discussion with tenderers after submission of a Tender and before the award of a Contract with a view to obtaining adjustments in price, delivery or content (i.e. post-tender negotiations) must not be conducted. There are special rules relating to procurements using the Negotiated and Competitive Dialogue Procedures.
- E.81 Negotiations post-award of the contract are only permissible in exceptional circumstances and should only be commenced after the Director of Finance and Business Services and the Borough Solicitor have given written approval of the procedure(s) to be adopted in any negotiation. The Director of Finance and Business Services or the Borough Solicitor must

be involved in the negotiation process and any consequent amendments to the contract terms and conditions must be approved by the Borough Solicitor.

- E.82 Where post-tender negotiation results in a fundamental change in specification (or contract terms) the contract must not be awarded but re-tendered.

#### Best Offer

- E.83 As a rule the award of a contract will be made to the organisation offering the lowest price, or in the case of a sale the highest price. The lowest price may not then be the “best offer” and may not merit award of the Contract. In assessing the tender however consideration may be given to quality, service and other determining factors as well as price. Where this is intended then this must be clearly set down in the tender documentation and the evaluation criteria. The Chief Officer or his/her Authorised Officer will record the detail of the contract award where the basis of the award is “best offer” rather than lowest price, which should then be reported to the appropriate Member. Advice should always be sought from the Director of Finance and Business Services as to whether the “best offer” approach is appropriate in the circumstances.

#### Disclosure of Tender information and debriefing Tenderers

#### Procedure for Notification of Contract Award for EU Contracts

- E.84 All participants in a tender procedure must be notified in writing as soon as possible after the successful bidder has been chosen.  
Content of Standstill Notice

- The criteria for the award of the contract
- The reason for the decision, including the characteristics and relative advantages of the successful tender
- The score (if any ) obtained by the tenderer to whom the notice is addressed and that of the successful tenderer
- Any reason why the unsuccessful tenderer did not meet the technical specifications.
- The name of the successful tenderer:
- A precise statement setting out the date on which the standstill period ends or before which the contract will not be let. If a precise date cannot be given the notice should explain when it is expected to end, including anything which might affect the date.
- A contract award notice must be published in OJEU within 48 days of the award of the contract
- Information may be withheld if disclosure would :

- a) improve law enforcement;
- b) otherwise be contrary to public interest;

- c) prejudice the legitimate commercial interests of any economic operator or
- d) might prejudice fair competition.

#### Challenging the award of a Contract

E.85 Any person who was eligible to bid for the contract (even if they did not bid) or actually bid for the contract can challenge the award of the contract on the basis that the Regulations have not been complied with:

- A person proposing to bring proceedings must notify the public authority concerned of that fact;
- The proceedings must be brought promptly, and in any event within 30 days from the date when the grounds for bringing proceedings first arose unless the Court considers there is good reason for extending the period;
- There are two possible remedies available to a party who wishes to challenge the award of a contract. *The remedies available for a successful challenge are setting aside of the contract and the award of damages. Where the contract is set aside it may be necessary to carry out a further procurement process to award the contract. Reason new remedies have now been introduced that permit the set aside of a contract after signature if it has been illegally let and the limitation period for bringing a claim has been reduced to 30 days*

E.86 Advice as to the extent and detail necessary for debriefing tenderers should be sought from the Director of Finance and Business Services.

#### Keeping Written Records

E.87 The Chief Officer or his/her designated representative must keep proper written records of:

- the different stages of the tendering process including all the quotes and letters you have received, and notes of phone calls and meetings about selecting suppliers;
- the awarding of the contract;
- any information provided to tenderers or contractors; and
- any decisions made, together with the reasons for those decisions.

E.88 Records must be kept for the periods set out in E.91.

#### Contracts Register

E.89 The Chief Officer or his designated representative must record on the Contracts Register held by the Director of Finance and Business Services details of all contracts it has awarded with a total value of £75 000 or above including contracts above the EU threshold for goods and services.

## Changes to Contracts

- E.90 Contract Extensions/Variations which take place must be consistent with the term specified in the OJEU notice. Any extension provision must be consistent with the OJEU notice, otherwise it is a breach of the Regulations. Similarly any substantial variation of the contract may amount to a breach of the Regulations, such as a change to include the provision of additional services.

## Storing Documents

- E.91 All documents relating to a tender award must be kept at least 12 years. Officers must consider confidentiality when storing contracts and other information relating to tenders and agreements.

## Requests for Information under the Freedom of Information Act

- E.92 Before making any disclosures to third parties on any element of a procurement following a request under the Freedom of Information Act advice should be sought from the Director of Finance and Business Services and the Borough Solicitor.

## Contracts where the Council is the supplier

- E.93 Any Service, where such exists whose goods, works or services have been subjected to competition and who has now been approved as a nominated supplier, or are included on the Council's electronic marketplace, or where there is a Corporate Contract in place, in accordance with the Procurement Strategy, for those particular goods or services must be the first choice for that particular procurement.

## Collaborative, Consortia and Partnership working

- E.94 Collaborative, consortium and partnership arrangements are subject to all UK and EU procurement legislation and must also follow the Finance and Contract Procedure Rules (Section F).

- E.95 Collaborative, consortium and partnership arrangements include joint working where one partner takes the lead and awards contracts on behalf of the other partners, long term collaborative partnerships, pooled budgets and joint commissioning.

*Reason to make it clear that the Council can procure as part of a consortium*

- E.96 Further guidance can be obtained from the Director of Finance and Business Services and the Borough Solicitor.

## E Procurement

- E.97 The use of e-procurement technology does not negate the requirement to comply with all elements of these Finance and Contract Procedure Rules, particularly those relating to competition and value for money.

### Written Contracts and Signing of Contracts

- E.98 Every contract must be in writing and advice should be sought from the Borough Solicitor.  
The table below sets out which procedures must be followed for different contract values:

Total Value	Form of Contract
Below £10,000	As per Section D – Ordering and paying for work, goods and services (D.19 – D.28).
Above £10,000	As for Below £10,000, plus:  The advice of the Borough Solicitor must be sought to agree an appropriate form of contract or written agreement which must be signed by the successful third party and on behalf of the Council by the Borough Solicitor and/or one of his/her authorised signatories, or by two of his/her authorised signatories.
<u>Above £75,000</u>	Formal contract executed under seal and attested by the Borough Solicitor or her authorised signatory.

### Content of Contracts

- E.99 The appropriate Chief Officer or her authorised officer must ensure that in addition to terms and conditions set out in E.103 every contract details:
- The goods, works and services, materials, matters to be carried out or supplied;
  - The price to be paid and/or the amounts and frequency or the method of calculation of contract payments including the treatment of inflation, with a statement of discounts or other deductions including terms of payment and settlement periods;
  - The time(s) within which the contract is to be performed;
- E.100 Every contract with an estimated value of £75,000 or more must state that if the third party fails to comply with its contractual obligations in whole or in part, the Council may:
- cancel all or part of the contract

- perform the contract
- recover from the firm any additional costs in completing the contract
- take other legal action against the contractor

#### Contract Terms and Conditions

E.101 A glossary set out in Annex 1 defines the terms used throughout this Section.

E.102 The Rules set out below will apply to all contracts entered into by the Council involving goods, works or services, with the exception of contracts of employment and contracts relating to the purchase or disposal of land and property. They will also apply to contracts entered into as where the Council acts as agent for another body, subject to the specific terms of the agency agreement.

E.103 Advice should be sought from the Borough Solicitor, prior to taking action to secure quotations and tenders referred to in the following paragraphs, on the specific Conditions of Contract, in addition to any standard terms and conditions, appropriate in each individual case. They may include some or all of the following:

- Form of Contract
- Authorised Officer
- Modifications
- Bonds and Guarantees
- Contractors Obligations
- Contractors Employees
- Control and Supervision of Staff
- Complaints
- Confidentiality
- Health and Safety
- Agency
- Standards
- Observance of Statutory Requirements
- Gratuities and Inducements
- Indemnities and Insurance
- Use of Authority's Premises and Facilities
- Security
- Equipment and Materials
- Freedom of Information and Data Protection
- Royalties and Patent Rights
- Certificates and Payments
- VAT
- Equality and Diversity
- Fluctuations
- Review of Prices
- Assignment and Sub-Contracting
- Emergencies



- Default
- Termination
- Recovery of Sums Due (set off)
- Notices
- Waiver
- Special Conditions

All contracts must also include appropriate clauses referring to:

- Prevention of Corruption
- Assignment or sub-contracting without the Council's agreement
- Quality Standards
- Indemnities and Insurance
- Compliance with Council policies and procedures where appropriate (see E.105 to E.111)
- Where possible application of TUPE or a successor provision could apply then the Personnel and Pensions Services must be consulted.
- Transparency
- Anti Bribery

E.104 Unless the Borough Solicitor and the Chief Officer or his designated representative considers it to be unnecessary or impractical, every contract must provide that:

- Where under any contract, one or more sums of money are to be received by the Council, the contracting party responsible for the payment of such sum or sums must pay interest at the rate stated in the contract from the date when payment is due until the date when payment is received;
- In the performance of the contract, the contractor must not act incompatibly with the rights contained within the European Convention on Human Rights or the Disability Discrimination Act; [or the Bribery Act 2010](#)
- The contractor must provide any information reasonably requested relating to the performance of the contract to ensure that the Council meets its statutory obligations including under: Section 71 of the Race Relations Act 1976; Race Relations Amendment Act 2000; Best Value Legislation; Transfer of Undertakings and Protection of Employment Regulations; Code of Practice on Workforce Matters in Local Authority Service Contracts;
- In the performance of the contract, the Contractor must comply with the requirements of the Health and Safety at Work Act 1974, and of any other relevant Acts, Regulations, Orders or Rules of Law pertaining to health and safety;
- without prejudice, and subject to any other condition of the contract, no sub-letting by the contractor will relieve the contractor of its liability to the Council for the proper performance of the contract;

- the contractor must not sub-contract the contract or any part of the contract, without the prior written consent of the appropriate Chief Officer or his Authorised Officer who will take advice from the Borough Solicitor where appropriate.
- E.105 The contractor is responsible to the Council for the proper performance and observance of all sub-contractors of all the Contractor's obligations under the contract as if references in the contract to "the contractor" were references to the sub-contractors. Failure or neglect by a sub-contractor is deemed to be failure or neglect by the contractor;
- E.106 The contractor is prohibited from transferring or assigning directly or indirectly to any person or persons whatsoever any part of its contract, without the prior written consent of the appropriate Chief Officer or his authorised officer (following consultation with the Borough Solicitor and the Director of Finance and Business Services);
- E.107 All goods, works and services must comply with any appropriate European Union Specification or Code of Practice or British Standard Specification or British Standard Code of Practice or European Union equivalents in force at the date of tender/quotation;
- E.108 The Council is entitled to cancel the contract and to recover from the contractor the amount of any direct loss resulting from such cancellation, if the contractor or its employees or agents (with or without its knowledge):
  - does anything improper to influence the Council to give the contractor any contract;
  - commits an offence under **the Bribery Act 2010** or under Section 117(2) of the Local Government Act 1972; *Reason the Bribery Act 2010 came into force on 1<sup>st</sup> July and repealed previous legislation on corruption to reflect modern concerns.*
- E.109 Whenever under the contract any sum of money is recoverable from or payable by the contractor, this sum may be deducted from any sum due or which at any time may become due to the contractor under this or any other contract with the Council. Exercise by the Council of its rights under this clause will be without prejudice to any other rights or remedies available to the Council under the contract.
- E.110 The contractor must provide evidence of adequate insurance to cover both Public Liability and Employers' Liability. Indemnity Levels to reflect the risk to the Council which typically will be £10m for both public and employer liability policies. In some cases where the contract is of low risk this may be reduced to £5 million but advice should be sought from the Insurance team on indemnity levels before the issue of Invitations to Tender have been despatched.

- E.111 Any standard terms and conditions of contract submitted by contractors must not be accepted without advice from the Borough Solicitor. Proposed payment arrangements under a contract must be discussed with and agreed by the Director of Finance and Business Services in advance of any contract being entered into.

#### Parent Company Guarantees and Performance Bonds

- E.112 Advice of the Director of Finance and Business Services whether a parent company guarantee or performance bond is needed in cases where;
- there is doubt about the suppliers financial standing
  - the contract poses a high risk to the Council

#### Performance Monitoring

- E.113 During the life of the contract, the authorised officer should monitor the contract in respect of the following:
- Performance;
  - Compliance with specification and contract;
  - Cost;
  - Any Best Value requirements;
  - User satisfaction; and
  - Risk management
- E.114 Where the contract is to be re-let this information should be available early enough to inform the approach to re-letting the subsequent contract.