

## **COUNCIL**

**12 AUGUST 2015**

### **UPDATE TO THE COUNCIL'S CONTRACT PROCEDURE RULES (CPRs)**

Portfolio Holder: Councillor Adrian Gulvin, Resources

Report from: Perry Holmes, Assistant Director, Legal and Corporate Services

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#### **Summary**

In February 2015, the legislation which governs the procurement rules for public sector procurement was updated and enacted into UK legislation in the form of the Public Contracts Regulations 2015. This legislation replaces the Public Contracts Regulations 2006 (as Amended).

The Council, as a public sector organisation is bound by this legislation and therefore, the internal Contract Procedure Rules of the Council need to be updated accordingly.

**This report will be considered by the Cabinet on 4 August 2015 (the same day as the Council Agenda despatch), therefore, the recommendations of the Cabinet will be circulated to Members separately.**

#### **1. Budget and Policy Framework**

1.1 The Contract Procedure Rules form part of the Council's Constitution, therefore, final approval of these Rules is a matter for Full Council. In addition, the Audit Committee's terms of reference require it to consider any proposals for changes to codes of practice on tenders and contracts.

#### **2. Background**

2.1 The European Union amended its procurement Directives February 2014. The UK Government declared that it would be an early adopter of the new Directive. This was enshrined into UK law, 26 February 2015, in the form of the Public Contracts Regulations 2015.

2.2 As a consequence of the change to the legislation, it is necessary to update the Councils internal Contracts Procedure Rules to ensure that officers, when referring to the rules, are getting up to date and accurate guidance.

- 2.3 There have been a number of changes made to the procurement legislation. Some of the highlights, although not an exhaustive list, are below:
- 2.3.1 Mandatory use of Electronic communication for tenders (Regulation 22 & 53). This requires local Authorities to make available opportunities without restriction. Medway complies with this requirement already through use of the Kent Business Portal.
- 2.3.2 Reduction of minimum timelines for EU procedures (Regulations 26-32). The minimum timelines have been reduced to help speed up procurement exercises.
- 2.3.3 Introduction of new procedure Innovation Partnership (Regulations 26-32). This is a new procedure which is to be used primarily for research and development.
- 2.3.4 Introduction of light touch regime to replace Part A and B Contracts (Regulation 74-76). This is to cover elements such as healthcare and social services with the thresholds for an advert have been placed at a higher level that for goods and services.
- 2.3.5 Abolition of PQQ stage for below OJEU threshold tenders (£172,514) (Regulations 106, 108, 110-113). This has been introduced to help businesses at the lower spend level of contract.
- 2.3.6 Introduction of Contracts Finder requirement (Regulations 106, 108, 110-113). As part of the governments' commitment to open up public sector opportunities, procurements that are published to the market in excess of £25,000, must have an advert place on this website.
- 2.3.7 As part of the Government's drive to open up local Government, a code has been published requiring publication of ITTs in excess of £5,000. In order to comply, the value of low level opportunities has been reduced from £10,000 to £5,000. This is covered in Sections 31 & 32 of the Local Government Transparency Code 2015.

### **3. Options**

- 3.1 Do Nothing: This could leave the Council open to criticism or worse should an officer of the Council use the rules for guidance which are not accurate.
- 3.2 Change the Council Contract Procedure Rules in line with the legislation: This will protect the Council from criticism or worse.

### **4. Advice and analysis**

- 4.1 In order to ensure that the Council is complying with the legislation, the update to the rules (as set out in Appendix 1 to the report) will protect the Council and officers alike.
- Will ensure that contract awards are made in a way the reduces the risk of legal challenge

- Will ensure that purchases made by the council give consideration to the social value Act such as local Supply chain, local employment and Apprenticeship opportunities.
- Will ensure that purchases are made by the council with access to market intelligence to ensure the right outcomes.

## 5. Risk management

- 5.1 The Council as a public body spending tax payers money is bound by legislation that prescribes the conditions which the council must adhere to in order to ensure that the EU principles of Equal treatment, Transparency, Non Discrimination, Mutual recognition and proportionality are present.

Risk	Description	Action to avoid or mitigate risk	Risk rating
Non Compliance with legal requirements	Unintentional breach of the legislation by council officers	Update the Councils Contract Procedure Rules	L

## 6. Consultation

- 6.1 The Category Management Team provides advice and guidance on a daily basis to officers of the council. The team also provides procurement training to help officers understand their obligations under the legislation. This is an on-going commitment that the category management team is undertaking.

## 7. Audit Committee

- 7.1 The Audit Committee considered this report on 14 July 2015. The Head of Category Management, Place introduced a report which advised that in February 2015 the legislation which governed the procurement rules for public sector procurement had been updated and enacted into UK legislation in the form of the Public Contracts Regulations 2015.

- 7.2 The Council, as a public sector organisation was bound by this legislation and therefore the internal Contract Procedure Rules of the Council needed to be updated. Members asked questions as follows:

- Clarification was sought about whether the procurement rules also applied to Medway Norse given that it was partly owned by the Council. Officers advised this was the case but often it was Norse Commercial Services (the parent company) who undertook purchasing.
- Were contracts awarded to Medway Norse by the Council on the same basis as other companies? Officers replied that whilst it was possible for the Council to award contracts to Medway Norse, under the Teckal exemption which had now been codified, without competition the Council did also invite tenders to ensure it obtained value for money. Medway Norse were not always successful in winning Council

contracts. Checks and balances were in place to minimise any risk of the appearance of bias.

- Would the revised CPRs allow more flexibility when purchasing low level consumables? Officers advised that there was a framework contract in place for these which provided better value for money than purchasing through petty cash etc.
- Where it was appropriate and provided value for money, did the new Rules allow the Council to use e-auctions when purchasing goods? Members were advised that officers would look into this and, if appropriate, recommend a revision to the CPRs subject to the usual safeguards and controls being built in.
- Would the new CPRs help small and medium sized enterprises (SMEs)? Officers confirmed that the speeding up of contracting timescales and the requirement to split contracts into lots would be beneficial to SMEs.

7.3 The Audit Committee agreed to:

- recommend approval of the Contract Procedure Rules, as set out in Appendix 1 of the report, to Full Council and;
- ask officers to investigate whether the new Rules should be amended to allow the Council to use e-auctions when purchasing goods where this was appropriate and provided value for money, subject to the usual safeguards and controls being built in.

## **8. Assistant Director's comments**

8.1 A question was raised at Audit Committee as to whether the new Public Contracts Regulations (PCR) 2015, permit the use of electronic websites such as EBAY to purchase goods.

8.2 A review of the relevant parts of PCR 2015, extract attached at Appendix 2 to this document in italics, has shown that whilst the use of e-Auctions is permitted, the approach and format is prescribed.

8.3 The approach prescribed by PCR 2015 is:

- The organisation must present a call for competition to announce to the market the intention to procure and use an e-Auction. This is to enable suitable participants in the market the opportunity to submit a bid to supply. Aggregate value of purchases trigger the requirement for adverts to be placed in OJEU (£172,514) and Contracts Finder (£25,000).
- The Contracting Authority leads a tender process, ensuring technical capacity and experience is in place.
- Once established, bidders are invited to present their proposals and initial prices for evaluation.
- Following acceptance of the proposals, bidders price offering are input into an e-Auction system. Medway Council uses the Kent Business Portal.

- The e-Auction provides bidders the opportunity to reduce their price in order to improve their ranking to be awarded the contract.
- Following the successful completion and award of the contract, a catalogue can be created which can be maintained on the suppliers or the Councils website. This will enable council officers to order the items, covered by the tender, that are required by the business.

8.4 Whilst the above approach may have some similarities with websites such as EBAY and Amazon, the current PCR 2015 would not support a direct purchase generally, although there may be exceptions where a single source arrangement exists that could benefit. Single Source in the context of public procurement means, where for technical or a proprietorial reason, supply is not available from alternative sources or products.

8.5 The Council's current Contract Procedure Rules (CPR Clause 1.8) make provision for exemptions, below the OJEU Thresholds, if agreed by the monitoring officer as a one off. For values above the OJEU Threshold, it must be noted that the Amazon/EBAY approach could expose the council to the risk of challenge where a single source provision is not applicable.

8.6 The EBAY method could expose the Council to an increased risk of fraud. There is less transparency when buying from EBAY as it is unclear who the Council is bidding against to purchase goods. This could lead to artificially inflated prices where proper transparency is not possible.

8.7 The EU principles (Equal Treatment, Transparency and Non-Discrimination) are applicable to all public procurement regardless of value.

## **9. Financial implications**

9.1 The proposals are cost neutral in that the aim of the change in legislation is aimed at delivering best value for money to the public sector. The aims and principles of the Procurement Directives have not changed but in some cases there are additional requirements which are aimed at increasing competition to drive value.

## **10. Legal implications**

10.1 The Audit Committees terms of reference require it to consider any proposals for changes to codes of practice on tenders and contracts. The Audit Committee therefore needs to consider the Contract Procedure Rules and make recommendations to full council.

10.2 Failure to amend the Contract Procedure Rules in accordance with the Public Contracts Regulations 2015 would place Medway Council at risk of legal challenge.

## **11. Recommendation**

11.1 The Council is asked to approve the updated Contract Procedure Rules, as set out in Appendix 1 of the report.

**Lead officer contact**

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**Appendices**

Appendix 1 – Contract Procedure Rules

Appendix 2 - Public Contracts Regulations (PCR) 2015 (extract)

**Background papers**

Public Contracts Regulations 2015

<http://www.legislation.gov.uk/uksi/2015/102/contents/made>

**Appendix 1****PART 7 – CONTRACT PROCEDURE RULES****SECTION 1  
INTRODUCTION AND PURPOSE****1.1 Introduction**

- 1.1.1 These Contract Procedure Rules are made under Section 135 of the Local Government Act 1972. They include provision for competition, and regulate the manner in which procurement and tendering take place within the Council.
- 1.1.2 These Contract Procedure Rules set out the regulations that must be followed by all Officers on each and every occasion that goods, services or works are procured on behalf of the Council.
- 1.1.3 These Contract Procedure Rules also protect the legal position of the Council in respect of compliance with EU and UK law (general law and in relation to the Procurement Regulations) and in its contractual dealings with external third party Suppliers and Contractors.

**1.2 Primary objectives**

- 1.2.1 These Contract Procedure rules have 5 primary objectives:
- (1) To ensure that the Council obtains Value for Money and fulfils its duty of achieving *Best Value* as defined in Section 3 of the Local Government Act 1999. It is of primary importance that Officers, on behalf of the Council, engage in procurement activity with the intention of delivering Best Value services to the citizens of Medway, both at the point of contracting and through effective contract management, throughout the contract term.
  - (2) To ensure that the Council complies with English and European law in force in England that governs the procurement of goods, services and works.
  - (3) To establish procurement procedures which, when followed, should protect Members and Officers of the Council from any allegation of acting unfairly or unlawfully which may be made in connection with any procurement by the Council relating to goods, services or works.
  - (4) To ensure that any risks associated with commencing procurement processes and subsequently entering into contracts are assessed as part of the procurement process and the Council's Procurement Gateway Process.
  - (5) To ensure that fairness and transparency remains at the forefront of all procurement activity undertaken by Officers and approved by Members on behalf of the Council.

### 1.3 Scope and application

~~1.3.1~~ **1.3.1**—These Contract Procedure Rules apply to all procurement activity undertaken by the Council (inclusive of Partnering and Income Generation Contracts) unless any such procurement is expressly prescribed under these Rules, or subject to an *Exemption* (as specified in **Section 1.8**)~~).~~

~~1.3.1~~ **1.3.2** These Contract Procedure Rules shall apply irrespective of how the procurement is funded. Where any ambiguity exists in respect of such funding the decision of the Monitoring Officer and/or Chief Finance Officer shall be sought and that decision shall be final.

1.3.3 All contracts entered into by the Council are subject to these Contract Procedure Rules, the provisions contained within the Council's Financial Procedure Rules and in accordance with guidance from Category Management and Legal Services respectively.

1.3.4 These Contract Procedure Rules apply to all Officers involved in the issuing of Orders or the letting of Contracts for Supplies, (Goods), Services and Works necessary for the delivery of the Council's functions.

1.3.5 Any third party (e.g. a consultant) who is engaged in the letting, management or supervision of a contract on behalf of the Council must comply with these Contract Procedure Rules as if they (the consultant/third party) were Officers of the Council.

### 1.4 Review and amendment

1.4.1 These Contract Procedure Rules shall be reviewed on a regular basis, not less than annually, by the Monitoring Officer who shall consult with the Procurement Board. The Monitoring Officer shall make minor changes to the Contract Procedures in accordance with Section 14.3 of Article 14 of the Council's Constitution. Any other amendments will be subject of approval by Council.

### 1.5 Interpretation

1.5.1 The interpretation of these Contract Procedure Rules is solely a matter for the Council's Monitoring Officer and are not open to interpretation by any other Officer of the Council.

1.5.2 Where an Officer of the Council is unsure of the meaning and implications of these Contract Procedure Rules, guidance must be sought from Category Management, in consultation with and on behalf of the Council's Monitoring Officer and such guidance and direction shall prevail.

1.5.3 Where there is a conflict between these Contract Procedure Rules and the Council's Financial Procedure Rules, the former shall prevail, subject to guidance and clarification from the Council's Monitoring Officer in consultation with the Council's Chief Finance Officer.



1.5.4 Any failure to comply with these Contract Procedure Rules may result in disciplinary action being taken against an Officer and may be seen as gross misconduct.

## 1.6 Procurement governance structure

1.6.1 The governance structure of procurement within the Council is as follows:

- The Cabinet – for decision making in respect of executive functions
- The Council – for all other decision-making
- The Procurement Board - The Procurement Board acts as a Cabinet Advisory Group to the Monitoring Officer and the Chief Finance Officer, in order to assist them in the procurement and contract decision-making process.

The Procurement Board consists of:

- The ~~Deputy Leader~~[Portfolio Holder for Resources \(Portfolio Holder for Finance, the Council's Procurement Champion and Procurement Board Chair](#) (or such other portfolio holder as the Leader of the Council may substitute at his/her discretion).
- The Portfolio Holder for Adult Services (or such other portfolio holder as the Leader of the Council may substitute at his/her discretion) (Note: the Cabinet appoints Cabinet Members to the Procurement Board).
- The Monitoring Officer (Assistant Director, Legal and Corporate Services with over-arching responsibility for Category Management and Legal Services).
- The Chief Finance Officer.
- Head(s) of Category Management.
- Other key representatives from each of the Council's respective Directorates:
  - Category Management Team – Strategic team led by the Heads of Categories responsible for providing strategic support and quality assurance to the Council's Directorates as well as representing and acting on behalf of the Council's Monitoring Officer in all procurement and contract related activities, matters and issues.
  - Directorate Management Team – Led by each respective Director, with operational procurement and contract management responsibility delegated to Assistant Directors and / or Heads of Service in accordance with these Contract Procedure Rules.

## 1.7 General principles

### 1.7.1 Call Off from existing contracts

1.7.1.1 Where the Council's procurement requirement can be satisfied from an existing approved Contract then any order will be considered an Exception to these rules as long as the call-off arrangements defined within the individual contract are followed or where the original Contract can be varied to meet the requirement. Category Management must be consulted before invocation of any such variation.

1.7.1.2 In all instances goods, services or works should be obtained via appropriate, existing, approved arrangements. These include:

- (a) In-house services (for example printing and design, facilities management, etc)
- (b) Established corporate contracts
- (c) An approved list of suppliers maintained by the Council or a formally approved organisation
- (d) Consortia of which the Council is a member
- (e) Approved nationally negotiated contracts (for example those arranged by the Government Procurement Service).

1.7.1.3 Before any contract is made, there must be:

- (a) The proper authority of the Council in accordance with the processes set out in the Constitution, the Procurement Gateway Process (as specified in **Section 2** of these Contract Procedure Rules) and / or Directorate scheme of delegation, as specified and approved by the appropriate Director of each respective Directorate.
- (b) Adequate budgetary provision for the procurement within existing budgets. All such expenditure must be committed in accordance with procedures set out and prescribed by the Chief Finance Officer.
- (c) Where ambiguity exists in respects to the availability of budgets, the decision of the Chief Finance Officer must first be obtained and that decision shall prevail in all instances and the procurement direction will be dictated accordingly.

### 1.7.2 Collaborative/Joint procurement (Public Contracts Regulations 2015, Regulation 38 "PCR 2015")

1.7.2.1 Category Management, on behalf of the Council's Monitoring Officer shall approve any joint procurement arrangements with other local authorities or public bodies including membership or use of purchasing consortia prior to the commencement of any procurement on behalf of the Council as part of the Procurement Gateway Process for Category A Procurements.

1.7.2.2 The Monitoring Officer, in consultation with the Procurement Board shall approve any joint procurement arrangements with other local authorities or

public bodies including membership or use of purchasing consortia prior to the commencement of any procurement on behalf of the Council as part of the Procurement Gateway Process for Category B Procurements.

1.7.2.3 All joint procurement arrangements shall be compliant with the legislation relating to public sector procurement and shall be open to participation by the Council.

1.7.2.4 Where procurements are being carried out jointly there is responsibility to ensure compliance with PCR 2015 even if the other party are conducting the tender process on behalf of Medway Council. Clarity of each contracting authority's responsibilities is therefore needed at the outset to ensure compliance for all elements of the tender both individually and jointly.

1.7.2.5 Where the Council is entering into a contract as an agent for another public body or government department, these Contract Procedure Rules apply only in so far as they are consistent with the requirements of the body concerned.

### 1.7.3 **Engagement of consultants**

1.7.3.1 ~~Officers~~Officers may only appoint external consultants or advisors providing professional or consulting services if such services are not available within the Council or if Officers requiring them do not have the resources or capability to meet the needs of the service.

1.7.3.2 All contracts for external consultants and advisors shall explicitly require that the consultants or advisors provide without delay any or all documents and records maintained by them relating to the services, and lodge all such documents and records with the appropriate Officer at the end of the contract.

1.7.3.3 Officers shall ensure that any consultant working for the Council has appropriate indemnity insurance and shall liaise with the Insurance Team to verify the level required.

1.7.3.4 Appointment of consultants for projects, where not part of an existing Framework, shall follow the procurement process for services

### 1.7.4 **Frameworks (Public Contracts Regulations 2015, Regulation 33 "PCR 2015")**

1.7.4.1 A framework agreement in the context of these Contract Procedure Rules is:

- Where the overall terms and conditions and pricing are agreed but the cost of each call-off will vary dependent upon the requirement via a mini-competition

OR

- Where the costs and terms have been expressed whereby the most economic provider is chosen.

1.7.4.2 Officers cannot automatically make use of a framework agreement; any proposed use must be appraised in accordance with the applicable Procurement Process.

1.7.4.3 Where Officers are proposing to use a framework agreement in relation to a Category A Procurement, guidance must be sought from Category Management before use. This is a mandatory requirement to ensure that the framework agreement is **applicable** **available** to the Council, provides the best value procurement route and to ensure that Officers understand and adhere to the protocols set by the creator (**Central** Purchasing Body) of the framework agreement.

1.7.4.4 Where Officers are proposing to use a framework agreement in relation to Category B Procurements, the framework agreement must be appraised against other available procurement options as prescribed within the Procurement Gateway 1 Report.

1.7.4.5 When procuring from (calling-off) a Framework Agreement, Officers must adhere to the protocol set out under the existing Framework Agreement terms and must seek advice from Category Management if in any doubt.

1.7.4.6 The Council is not required to advertise any proposed call off (in excess of the EU Threshold for Supplies (Goods), Services or Works where the Framework being used was subject to an original OJEU advert.

1.7.4.7 The Invitation to Quote procedure set out at **Section 2.3** shall be used in preference to a formal Invitation to Tender where no other formal process is specified within the terms of that Framework.

#### **4.8 — Exceptions and exemptions**

**1.7.4.8** Where Officers propose to create a Medway Framework arrangement for works, goods and/or services, transparency is required as to how the “Call off” mechanism will work. Where the call off process includes a part direct award, part mini competition, the procurement documents will detail how the choice will be made (on objective criteria) between a direct award and a mini competition and specify which terms may be subject to reopening of competition. This approach could be lot specific, ie it does not have to apply across all lots within a framework.

#### **1.7.5 Central Purchasing Bodies (Public Contracts Regulations 2015, Regulation 37 “PCR 2015”)**

**1.7.5.1** Medway Council, in accordance with the guidance above, may acquire supplies or services, or both, from a central Purchasing body in respect of activities conducted on a permanent basis.

#### **1.7.6 Concession Contracts**

1.7.6.1 Service concessions are no longer exempt once the UK implements the Concessions Directive 2014/23/EU.

### 1.7.7 Light Touch Regime (Public Contracts Regulations 2015, Regulations 74-76 “PCR 2015”)

1.7.7.1 Under PCR 2006, service contracts were divided into Part A (which were subject to the detailed regulatory regime) and Part B (which were only subject to limited obligations under that legislation). EU Treaty principles, including sufficient advertising and fair and transparent process, also applied to Part B services where there was cross-border interest.

1.7.7.2 Under PCR 2015, Part B services have been replaced by a specific list of social and other services which are subject to the “light touch” provisions. These services are more limited than Part B services and there is no “open ended” service category 27.

1.7.7.3 The service contracts which are limited to a “light touch” regime for procurements over 750,000 Euros (£625,050) are listed in Schedule 3 of the Public Contracts Regulations 2015. “Light touch” means that a contract notice or PIN used as a call for competition must be published in the Official Journal in the usual way and a contract award notice published once a contract has been awarded. The procedure can be determined by the contracting authority but must comply with principles of equal treatment and transparency and provide reasonable and proportionate timescales. PCR 2015 specifically says that a contracting authority may use or adapt procedures available for fully regulated procurements.

## 1.8 Exceptions and exemptions

### 1.8.1 Exceptions to Contract Procedure Rules

1.8.1.1 No exception to Contract Procedure Rules can be undertaken where the provision is above the EU tender threshold and subject to European or UK Legislation.

1.8.1.2 The requirements of the Council’s Contract Procedure Rules **shall not apply** in the following exceptional circumstances:

- Where for technical or artistic reasons or reasons connected with the protection of exclusive rights the contract can only be awarded to one economic entity.
- Procurements where the procedure to be followed by the Council is the subject of express legislation.
- Where the Council has agreed a delegation to the Chief Executive and Directors giving them power to act on behalf of the Council in cases of urgency but only where the urgent matter is of such a nature that it may be against the Council’s interest to delay and where it is not practicable

to obtain the approval of the Council (Constitution reference Chapter 3, Part 4 Employee Delegation Scheme). In addition to any reporting related to this delegation, any such expenditure in excess of **£10,000** must reported to Category Management within 1 week of the date of the contract award using the *Exemption Request Form*. Any contract entered into by the Council under this Exemption must not be for a term of more than 6 months.

- Contracts for the acquisition and disposal of land or property that are covered within the remit of the Assistant Director, [HousingLegal](#) and Corporate Services and within the Financial Limits as prescribed within part 5 of chapter 3 of the Constitution.
- Contracts for employment for staff, except where an agency is used to supply the staff.
- Works orders with utility infrastructure providers, e.g. Gas Mains.
- Where supplies are acquired from a closing down sale in circumstances permitted by the Regulations.
- Where the provision of services is reserved to the winner of a design contest as specified in the Regulations.
- The disposal of Council Assets that are covered by the Property Procedure Rules and Financial Procedure Rules.
- Where the contract is for replacement goods or installations and contracting with an alternative supplier to the supplier of the initial goods or installation would either result in incompatibility with existing goods or installations or lead to disproportionate costs or technical difficulties in the operation and maintenance of existing goods or installations.

1.8.1.3 ~~\_\_~~ The Director of Children and Adults shall have authority to award without competition a contract where a placement is sought for an individual with a registered care provider of their choice under the National Health Service and Community Care Act 1990.

1.8.1.4 ~~\_\_~~ A Director shall have authority to award without competition a contract where the particular needs of an individual (either an adult or a child) require a particular social care package, or where an individual has special educational needs which are only available from a particular provider in the opinion as appropriate of the Director of Children and Adults.

1.8.1.5 ~~\_\_~~ In relation to **Sections 1.8.1.3** and **1.8.1.4**, The Director of Children and Adults will through the appropriate scheme of delegation, keep a record of the reasons for the choice of provider, which will be maintained on the individual's case notes. In addition, a record of the annual cumulative expenditure with each provider will be maintained by the Director of Children and Adults and made available for audit purposes upon request.

1.8.1.6 \_ The Monitoring Officer may engage a barrister or solicitor without competition. The appointment will be made on the basis of which barrister or solicitor is in the opinion of the Council's Monitoring Officer, best able to provide the necessary expertise and value for money. The Council's Monitoring Officer will maintain a departmental record of the amounts of expenditure with external barristers and will ensure that this information is made available for audit purposes upon request.

1.8.1.7 \_ The Monitoring Officer may procure without competition, emergency accommodation for the homeless for individual service users that are not covered by a Council Framework Agreement or Contract.

## 1.8.2 Exemptions to Contract Procedure Rules

1.8.2.1 \_ Any Officer requesting an exemption must complete an *Exemption Request Form*. This form must be approved and signed by the appropriate Director before submission to Category Management for the Monitoring Officer to consider.

1.8.2.2 \_ The Council's Monitoring Officer will review the exemption request and will make a decision in consultation with the Procurement Board as to whether to accept or reject. This decision by the Monitoring Officer will be minuted and communicated for informational purposes to the appropriate Director as part of the *Procurement Board Process*.

1.8.2.3 \_ All approved exemption requests will be submitted to the Full Council for information purposes.

1.8.2.4 \_ Circumstances where time is lost through inadequate forward planning or a lack of internal resources existing to manage procurement processes will not automatically constitute the basis for an exemption under these Contract Procedure Rules.

1.8.2.5 \_ The Monitoring Officer will have ultimate discretion to consider resources and time constraints in the overall context of risk of non-delivery when deciding upon whether to accept or reject an exemption request.

1.8.2.6 \_ In the event that a valid reason for urgency exists, the Monitoring Officer will have ultimate discretion to consider an exemption outside of this formal decision-making mechanism. Any such occurrence shall be reported retrospectively to the Procurement Board by the appropriate Officer as per **Sections 1.8.2.1 – 1.8.2.2**.

1.8.2.7 \_ No Exemption to Contract Procedure Rules can be undertaken where the provision is above the EU tender threshold and subject to European or UK legislation.

### **1.8.2.8 Teckal Exemption (Medway Norse)**

- The Teckal exemption allows the award of contracts between contracting authorities and controlled entities provided the following conditions are met:
- the contracting authority exercises control over the entity similar to that which it exercises over its own departments;
- more than 80% of activities of the entity relate to the performance of tasks entrusted to it by the authority; and
- there is no direct private capital participation in the entity (with the exception of non-controlling and non-blocking forms of private capital participation required by national law in conformity with the EU Treaties). Contracts can be exempt where contracting authorities jointly control an entity based on similar tests to the above and for “Reverse Teckal” where the controlled entity (if a contracting authority itself) can award a contract to its controlling contracting authority.

## **1.9 Delegate authority and officer responsibilities**

1.9.1 Any procurement carried out on behalf of the Council may only be undertaken by Officers with the appropriate delegated authority to carry out such tasks. This delegation must be included in the current scheme of delegation as prescribed within the Council's *Constitution* or as advised by the appropriate Director.

~~1.9.2~~ Each Director is responsible for all procurement activity within their respective Directorate and has the overall responsibility for ensuring Directorate compliance with these Contract Procedure Rules, Procurement Gateway Process, the Council's Procurement Strategy, Financial Regulations, and all UK and European Legislation.



- ~~1.9.3~~ Through the appropriate scheme of delegation, this authority may be passed down to Assistant Directors, Heads of Service and other appropriate Officers within each Directorate and Department. However, ultimate responsibility and accountability will remain with the appropriate Director in respects to Officer conformance with these Contract Procedure Rules unless the Constitution sets out otherwise.
- ~~1.9.41.9.3~~ Officers must ensure that agents, including consultants, acting on their behalf also comply with these Contract Procedure Rules as prescribed with **Section 1.7.3** of these Contract Procedure Rules,
- ~~1.9.54~~ The Officer responsible for managing any contract or procurement process must comply with the Employee Code of Conduct and Anti-Fraud and Corruption policies, and must not invite or accept any gift or reward in respect of the award or performance of any contract.
- ~~1.9.5~~ The Officer responsible for managing any contract or procurement process **must** establish if an existing Contract or Framework Agreement exists before seeking to let another Contract (See **Section 1.7**). This Contract or Framework Agreement **must** be considered accordingly as part of a robust options appraisal in line with the Procurement Gateway Process for Category A and Category B Procurements as prescribed in **Section 2.3** and **Section 2.4** of these Contract Procedure Rules. In appraising Framework Agreements and existing Contracts, the Officer **must** provide tangible and demonstratable evidence within the *Procurement Gateway 1 Report*,
- ~~1.9.5~~ whether or not these arrangements provide Value for Money and whether or not the goods, services or works therein are “fit for purpose” for the particular requirement.
- ~~1.9.76~~ The Officer responsible for managing any contract or procurement Process **must** ensure that when any employee or contractor arrangement may be affected by any transfer arrangement, such as the Transfer of Undertaking Protection of Employment (TUPE), that advice is obtained from HR and/or Legal Services before proceeding with inviting tenders. Officers must consult Pensions and Payroll concerning all TUPE and pension issues before the advert for the contract opportunity is placed, as this will affect the financial value of the contract. Where guidance and confirmation as to the applicability of TUPE is not sought from HR and/or Legal Services, the procurement process will not be permitted to commence nor can be subjected to the Procurement Gateway Process in respects to Category A or Category B Procurements, as prescribed within **Section 2** of these Contract Procedure Rules.
- ~~1.9.87~~ The Monitoring Officer and the Chief Finance Officer, in consultation with the Portfolio Holder for Finance, shall both have the delegated authority to enter into contractual arrangements on behalf of the Council for all contracts involving the purchase of utilities (i.e. gas, water and/or electricity supply) on behalf of both the Council and schools. This delegation shall apply to both individual contracts let between the Council and the utility supplier, and where the Council enters into any Framework Agreement or Consortia Agreement.

- | 1.9.~~9~~8 Any such award agreed directly by the Council's Monitoring Officer and the Council's Chief Finance Officer or through delegation to Category Management, will be reported to the Procurement Board for informational and audit purposes. The Procurement Board will have the discretion to decide whether or not to report any such award(s) to the Cabinet for informational purposes.

## SECTION 2 PROCUREMENT PROCESS

### 2.1 Thresholds and risks

2.1.1 The complexity of the procurement process (Category & Level) to be followed will vary in accordance with the value and risk of the requirement as set out below.

<b>CATEGORY A PROCUREMENTS</b>		
Level	Value	Risk
1	0 - £ <del>10K</del> <u>5K</u>	Low
2	£ <del>10K</del> <u>5K</u> - £100K	
<b>CATEGORY B PROCUREMENTS</b> (Subject to the Procurement Gateway Process)		
3	£100K+	Medium
4	Any project deemed 'High Risk' by Procurement Board	High

### 2.2 Calculating contract value

2.2.1 In order to identify the appropriate Category and Level of procurement the Total Value should be calculated over the life of the contract.

2.2.2 The Total Value will be calculated as follows:

- (a) Where the contract is a capital or one-off purchase or for a fixed period, by taking the total price to be paid or which might be paid during the whole of the period;
- (b) Where the purchase involves recurrent transactions for the same type of items, by aggregating the value of those transactions over the contract period, including any anticipated extension periods;
- (c) Where the total contract value over the full duration of the contract (not just the annual value) is uncertain, by multiplying the monthly payment by 48 or annual payment by 4;
- (d) For Framework Agreements with no guaranteed commitment the contract value will be the estimated value of orders placed/commissions let under the Framework Agreement over the full duration of the contract term;
- (e) Where an in house service provider is involved, by taking into Account TUPE workforce matters, redundancy and similar/associated costs as guided by Legal Services, Human Resources, Pensions and Payroll and Category Management Teams;

- (f) Where a partnering arrangement is to be put in place, the total value of the likely partnership;
- (g) For income generation contracts the Total Value will be the estimated revenue stream payable to the Council over the period of the contract. Where the total revenue stream over the full duration of the contract (not just the annual value) is uncertain, by multiplying the monthly payment by 48 or annual payment by 4;

2.2.3 The Total Value must be calculated in pounds sterling exclusive of Value Added Tax.

2.2.4 Contracts must not be artificially under estimated or disaggregated to avoid the application of these Contract Procedure Rules or EU/UK Procurement Legislation.

### 2.3 Category A procurement process

#### 2.3.1 Level 1 procurement (Low Risk) 0 - £10K5K

- The appropriate Assistant Director and/or Head of Service must sanction the commencement of any procurement activity.
- A **minimum** of one written quotation must be obtained (Officers are encouraged however to seek further competitive quotations where possible).
- The quotation may take the form of a Suppliers email, letter or reference to a current/valid catalogue or by using the *Low Value Quotation* Form.
- Officers must keep such quotations on record for audit purposes and make reference to them on the corresponding Financial Purchase Order.

#### 2.3.2 Level 2 procurement (Low Risk) £10K5K - £100K

- The appropriate Assistant Director and/or Head of Service must sanction the commencement of any procurement activity.
- Officers from the Service must work in partnership with Category Management to ensure a corporate approach and delivery of the procurement on behalf of the Council
- Officers must ensure that they liaise with their Procurement Board Directorate Representative and place the procurement project on their respective Directorate Forward Procurement Plan before commencing a Level 2 Procurement.
- A **minimum** of three written quotations must be obtained by Category Management using the *Invitation to Quote* document.

- Category Management must keep such quotations on record for audit purposes and Officers must make reference to them on the corresponding Financial Purchase Order.

## 2.4 Category B procurement process

2.4.1 Category B Procurements are considered either a medium or high risk rating and are subject to management through the Council's Procurement Gateway Process by Category Management, the Procurement Board and the Cabinet (where applicable).

2.4.2 The Procurement Gateway Process is a five-stage process as outlined below:

**Gateway 1** – Project commencement/options appraisal – Category Management must (in partnership with Service Departments) complete and submit a *Gateway 1 Report* for review and approval to the Procurement Board dependant upon the risk parameters outlined in **Section 2.1.1** and in accordance with **Sections 2.4.4, 2.4.5 and 2.5**.

**Gateway 2** – Tender process (including document creation, advertisement, evaluation) – Category Management must (in partnership with Service Departments) complete all necessary procurement documentation and tendering formalities in accordance with **Section 3** of these Contract Procedure Rules.

**Gateway 3** – Tender process review and contract award - Category Management must (in partnership with Service Departments) complete and submit a *Gateway 3 Report* for review and approval to the Procurement Board dependant upon the risk parameters outlined in **Section 2.1.1** and in accordance with **Sections 2.4.4, 2.4.5 and 2.5**.

**Gateway 4** – Procurement post project completion review - Category Management must (in partnership with Service Departments) complete and submit a *Gateway 4 Report* for review and approval to the Procurement Board dependant upon the risk parameters outlined in **Section 2.1.1** and in accordance with **Sections 2.4.4, 2.4.5 and 2.5**.

**Gateway 5** – Procurement contract management report (prescribed by the Procurement Board and not automatically mandatory) – Category Management must (in partnership with Service Departments) complete and submit a *Gateway 5 Report* for review and approval to the Monitoring Officer, in consultation with the Procurement Board as and when prescribed.

(Note: In determining the level at which procurement decisions are taken regard will be had to requirements relating to key decisions as set out in Article 12 and the Leader and Cabinet rules in Chapter 4 of the Council's Constitution).

2.4.3 In addition to the above Category B Procurements are also subject to the requirement of the EU Procurement Regulations where over the relevant threshold for Supplies, (Goods), Services and Works.

#### 2.4.4 Level 3 procurement (Medium Risk) £100K+

- Officers must ensure that they liaise with their Procurement Board Directorate Representative and place the procurement project on their respective Directorate Forward Procurement Plan before commencing a Level 3 Procurement.
- Category Management (in partnership with Service Departments) must complete and submit a *Gateway 1 Report* to the respective DMT for review.
- Relevant Director (DMT) must then either approve the report as Level 3 (Medium Risk) or recommend the report to be up-scaled to Level 4 (High Risk) for submission to the Procurement Board for a Gateway 1 review.
- The Authorised Officer will be required to attend the Procurement Board to present the Gateway 1 Report.
- The Monitoring Officer in consultation with the Procurement Board will review the Gateway 1 Report and either approve the risk rating or upscale the procurement risk and instruct the presenting Authorised Officer to submit the Gateway 1 report for a further review by the Cabinet.
- If the Monitoring Officer, in consultation with the Procurement Board approves the Level 3 (Medium Risk) decision, then the procurement process will be permitted to continue to Gateway 2.
- The Monitoring Officer, in consultation with the Procurement Board will also set the risk and reporting stages for the remainder of the procurement process for Gateway 2, 3, 4 & 5 (if so required) as per the parameters prescribed in **Section 2.4.1** of these Contract Procedure Rules.
- If the Monitoring Officer, in consultation with the Procurement Board upscales the risk rating, then the Gateway 1 decision making process will be decided upon by the Cabinet. The Cabinet will also set the risk and reporting stages for the remainder of the procurement process for Gateway 2, 3, 4 & 5 (if so required) as per the parameters prescribed in **Section 2.4.1** of these Contract Procedure Rules.
- Once the initial Gateway 1 and subsequent Gateway stages have been approved by the Monitoring Officer, in consultation with the Procurement Board and/or the Cabinet, the Authorised Officer must liaise with the Procurement Board Directorate Representative and update the procurement project on their respective Directorate Forward Procurement Plan.

**2.4.5 Level 4 procurement (any project deemed High Risk by the Procurement Board)**

2.4.6 Level 4 (High Risk) Procurement Process are prescribed by the Monitoring Officer, in consultation with the Procurement Board with recommendations for the decision-making associated with the initial Gateway 1 Report and subsequent Gateway 3, 4 & 5 Reports being made to the Cabinet.

**2.5 Upscaling Category A to Category B procurements**

2.5.1 Where deemed necessary for the achievement of best value, management of internal/external risk and adherence to EU/UK Procurement Legislation, the Council's Category Management Team, on behalf of the Council's Monitoring Officer can at any time upscale a Category A Procurement to a Category B Procurement.

2.5.2 Any such decision by the Council's Category Management Team to upgrade a procurement project will require Officers to comply with the Council's Procurement Gateway Process for Category B Procurements.

2.5.3 Any such decision to upgrade a procurement from a Category A to a Category B by Category Management on behalf of the Council's Monitoring Officer will be final and must be adhered to by Officers of the Council.

2.5.4 Officers through the Procurement Gateway Process for Category B Procurements will have the opportunity to present a case to the Procurement Board. This will provide Officers with an opportunity to review the decision to upgrade a procurement from Category A to Category B.

2.5.5 Any such review against the decision of the Council's Category Management Team by an Officer of the Council will be decided upon by the Monitoring Officer in consultation with the Procurement Board (except in the case of urgency when the Monitoring Officer will make the decision in consultation with the Chief Finance Officer).

2.5.6 The decision of the Council's Monitoring Officer to either uphold the decision made by the Council's Category Management Team or support any such review will be final and binding.

2.5.7 Any such decision will be project and situation specific and cannot be automatically relied upon or assumed by any Officer to apply across the board for reviewing future decisions made by Category Management.

## SECTION 3

### GENERAL TENDER PRINCIPLES

- 3.1 **Pre-tender market research and consultation (Public Contracts Regulations 2015, Regulation 40 & 41 “PCR 2015”)**
- 3.1.1 Officers may review the market for a proposed procurement through discussions with suppliers and other research but may not:
- (a) Base any specification on one Contractor’s offering such as to distort competition; Bidders may be excluded from the procurement in circumstances where their prior involvement would distort competition (and there are no other means of ensuring equal treatment which can be applied);
  - (b) Make any indication or commitment to Contractors that their offer may be preferred by the Council;
  - (c) Suggest any procurement route, which is not consistent with these Rules;
  - (d) Enter into negotiations about price where a competitive procurement process has yet to take place.
- 3.1.2 Any pre-market research undertaken, including discussions with Contractors and others must be fully documented on file. Where organisations have been involved at pre-procurement stage (whether in soft market testing or otherwise, eg incumbents), a contracting authority must ensure that there is a level playing field when the tender process starts such as providing information which has been made available at pre-procurement stage.
- 3.1.3 Any market research must then be proceeded by a compliant procurement process where there is a business case to proceed.
- 3.2 **Third party pre-qualification services**
- 3.2.1 Pre-Qualification Services describes the assessment, by a third party organisation of potential suppliers’ generic suitability to contract with a Contracting Authority across a range of requirements (effectively an outsourced pre-qualification process although not specific to any one contract requirement).
- 3.2.2 Pre-qualification results in the formal accreditation of those potential suppliers, which successfully complete the process.
- 3.2.3 Pre-qualification services can be commissioned for vetting of potential suppliers where internal resources are unable to undertake such assessments to assist in the expression of interest process subject to approval by Category Management.



- 3.2.4 Pre-qualification involves suppliers submitting information specified by the Contracting Authority to facilitate its assessment of suppliers' suitability to tender, below EU thresholds, for tenders relating to works capital projects.
- 3.2.5 These select lists are generally only available for services, works and/or supplies where its estimated value is below the relevant EU threshold value requiring compliance with the procurement Regulations.

### ~~3.3~~ **Advertising tender requirements**

#### ~~3.3~~ **Advertising Tender Requirements (Public Contracts Regulations 2015, Regulations 106, 108, 110-113 "PCR 2015")**

- 3.3.1 All requirements above £100K must be advertised on the Council's Website, the Kent Business Portal and in the OJEU (where above the EU tender thresholds for goods, services or works).
- 3.3.2 In addition to the above, Officers (in consultation with Category Management) may consider where appropriate additional advertisement in one of the following to increase awareness and competition:
- A dedicated contracts publication;
  - The local press;
  - A relevant trade journal;
  - Voluntary and Community Sector circulation list or website.

### ~~3.4~~ **Pre-qualification process**

#### ~~3.4.1~~ ~~Non~~3.3.3 From 1 April 2015 advertising requirements include:

- All contract notices to the Official Journal (OJEU), must also be published on Contracts Finder within 24 hours. The same applies in respect of contract award notices although this is not required within 24 hours;
- The PCR 2015 state that sub-central authority contracts over £25,000, include a requirement to publish contract opportunities and award notices on Contracts Finder. For all opportunities that are published to the open market, this is a mandatory requirement.
- All Public contracts will include a requirement for 30 day payment terms (for undisputed invoices) and these are to be passed down the supply chain. There is also a requirement to report on late payment of invoices. Where express provisions are not included, PCR 2015 imply specific terms into contracts.

#### ~~3.3.4~~ **Prior Information Notices (Public Contracts Regulations 2015, Regulation 48 "PCR 2015")**

- PINs are no longer a mandatory requirement.
- PINs may be used by officers as a call for competition for the restricted or competitive procedure with negotiation. Additional information must be included in the PIN if used for this purpose.
- A contracting authority cannot rely on a PIN until 35 days after sent for publication.
- Maximum validity is 12 months (except for social and other specific services) (ie those covered by the “light touch” regime)

### **3.3.5 Reserved contracts for certain services (Public Contracts Regulations 2015, Regulation 77 “PCR 2015”)**

- PCR 2015 allows contracting authorities to reserve the award of contracts for certain specific health, social and cultural services to certain types of organisations as part of its call for competition.
- The organisations entitled to bid must meet the following conditions:
  - the organisation's objective is the pursuit of a public service mission linked to the delivery of the services;
  - profits are reinvested with a view to achieving the organisation's objectives;
  - the structure of management/ownership of the organisation performing the contract are based on employee ownership or participatory principles; and
  - the organisation has not been awarded a contract for those services in the past 3 years.
- If a contracting authority decides to reserve these contracts to such organisations, the maximum duration of a contract which can be awarded is 3 years.

### **3.3.6 Lots (Public Contracts Regulations 2015, Regulation 46 “PCR 2015”)**

- Officers may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.
- Officers may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or (if a PIN is used as a call for competition) in the invitation to confirm interest. Officers must set out how this will work in practice including the objective criteria which will determine which lots will be awarded where the application of the award criteria results in one tenderer being awarded more than one lot.

- Although not compulsory, if officers decide not to divide an opportunity into separate lots, reasons for this must be included in the Regulation 84 report (Award Report/Gateway 3).

### **3.3.7 Electronic communication and access to documents (Public Contracts Regulations 2015, Regulations 22 & 53 “PCR 2015”)**

- Subject to certain limited exceptions, all communication and information exchange must be carried out by electronic means. These exceptions include where the specialised nature of the procurement means that specific tools or file formats are needed which are not open to all and generally available or require a licence or where physical or scale models are required which cannot be transmitted by electronic means. There may also be circumstances in which information of a particularly sensitive nature requires a high level of protection which cannot be ensured by using electronic tools or devices.
- The reasons why electronic communications are not being used must be set out in the Regulation 84 report.
- Contracting authorities must offer unrestricted and direct access (free of charge) to all procurement documents from the date of publication of the contract notice in OJEU and that the contract notice must include a reference to the internet address where the documents can be accessed. The definition of “procurement documents” is widely drafted meaning any document produced or referred to by a contracting authority which describes elements of the procurement or procedure including the contract notice, technical specification, proposed conditions of contract and formats for the presentation of documents by candidates or tenderers (eg pre-qualification questionnaires and invitations to tender). The requirement to make available all procurement documents at the outset applies to every procurement process unless one or more of the listed exceptions for the use of electronic communications apply.
- Oral communication can be used provided that its content is documented to a “sufficient degree”. However, oral communication cannot be used in relation to essential elements (defined as including the procurement documents, the request to participate, etc) of the procurement procedure.
- Oral communications with tenderers which could have a substantial impact on the content and assessment of tenders is also required to be documented by appropriate means which may include audio records.

### **3.4 Pre-Qualification Questionnaire PQQ (Public Contracts Regulations 2015, Regulations 56-64 “PCR 2015”)**

- 3.4.1 A PQQ stage is prohibited to be used for tenders below the EU Notices, no matter how transacted Threshold level for goods and services. Tenders that fall below the EU threshold values for goods and services will follow an Open Tender Procedure approach ie one stage which will encompass selection and award criteria.

~~3.4.2~~ All tenders, except where prescribed timelines are in place, must specify a time limit of not less than 10 working days, within which to enable interested parties must express their interest in Tendering the opportunity to Tender. All exercises shall be completed electronically via the Council's Quotation/Tendering System.

~~3.4.2~~ The Council's Pre-Qualification Questionnaire must be used for all procurements in relation to goods; services or works related 3 Officers undertaking a PQQ will verify that bids submitted comply with the rules and requirements (where pre-qualification is required) and must include high applicable to the tender as well as checking whether grounds for exclusion apply and low level evaluation selection criteria is satisfied.

~~3.4.4~~ Officers will check that a tenderer remains "eligible to tender" throughout the process ie there are no exclusion grounds or changes in circumstances which would mean an operator fails to meet the selection criteria.

~~3.4.5~~ Officers will consider the mandatory and discretionary grounds for selection exclusion including financial and technical criteria. additional discretionary grounds where conflicts cannot be remedied or where persistent poor performance has led to contract termination or similar sanctions. Bidders are allowed to provide evidence to demonstrate reliability despite the existence of grounds for exclusion. The duration for the exclusion is:

- 3 years from the date of conviction for mandatory grounds and
- 5 years from the date of the event for discretionary grounds.

~~3.4.6~~ As part of the evaluation of the Pre-Qualification Questionnaire credit checking must be completed on all those Suppliers expressing an interest. Further financial analysis should be conducted in conjunction with Corporate Finance, dependent on the nature, value or risk of the contract to fully test the financial ability of the bidder. Full details of the nature of the financial analysis to be undertaken must be included in the Pre-Qualification's Questionnaire's evaluation criteria. These will include:

- minimum annual turnover:
  - o no more than 2 x estimated contract value, unless justified;
  - o applies per lot but can be combined if awarded more than one lot (note there are specific rules for frameworks and DPS).

~~3.4.33.4.7~~ A supplier's technical and financial ability to undertake the contract requirements is evaluated at this stage. This cannot be re-tested at the Invitation to Tender stage. This will include:

~~3.4.4~~ After the expiry of the advertised time limit, Invitations to Tender should be dispatched to the shortlist of interested parties who have satisfied the requirements of the Pre-Qualification's Questionnaire's evaluation criteria.

- education and qualifications if not to be used as award criteria.

- a requirement to accept the European Single Procurement Document (ESPD) which is a self-declaration, as preliminary evidence that there are no grounds for exclusion and that the selection criteria is satisfied. Supporting documents referred to in the ESPD can be requested at any time. The winner must provide up to date information to confirm this.
- Ability to have recourse to e-Certis.
- relying on other entities – Officers may require joint liability (if an economic operator is relying on other entities for educational/ professional purposes, that entity must be performing the relevant parts, must be checked for eligibility and there may be requirement to replace them in certain circumstances).

### 3.5 **The invitation to tender (Public Contracts Regulations 2015, Regulations 22 & 53 “PCR 2015”)**

- 3.5.1 The Council’s standard *Invitation to Tender* documentation must be used for all tender exercises involving the procurement of Supplies, (Goods), Services and Works in excess of £100K.
- 3.5.2 For those procurement exercises involving the procurement of Works and Works related requirements, the appropriate industry standard Invitation to Tender documentation can be used (~~e.g. JCT, ICE, NEC~~) as an alternative to the Council’s *Invitation To Tender* document. Any amendments to the industry standard terms must be included in the tender pack and drawn to the attention of all bidders. Legal Services must be consulted on the correct form of contract. used (e.g. JCT, ICE, NEC3)
- 3.5.3 The Chief Finance Officer (or such other officer as he shall designate) must be consulted on the financial and commercial aspects of the tender documents, including the evaluation process.
- ~~3.5.4 — Post advertisement as per Section 3.3 of these Contract Procedure Rules, subject to the requirements of the Public Contracts Regulations 2006 (as amended) (where applicable)~~ 3.5.4 Post advertisement at least 3 Contractors must be invited to Tender, unless there is overriding business or legal justification that this is not required and in these circumstances an Exemption must be sought.
- 3.5.5 The specification and evaluation criteria must take into account Social and Economic, Equality, Sustainability, Health and Safety and Value for Money considerations.
- 3.5.6 The risks associated with the contract must be assessed and documented. Appropriate actions should be taken to ensure that the Council’s potential and actual exposure to risk and challenge is minimised.

- 3.5.7 A timetable setting out the key stages of the procurement should be set out in the appropriate section of the Council's standard Invitation to Tender documentation.
- 3.5.8 The ~~Council's standard~~ Invitation to Tender documentation should include a copy of the relevant Standard Terms and Conditions of Contract.
- 3.5.9 The Legal Services Team must be instructed on the form of contract and any amendments. It is important for Officers to consider the form of contract to be used to ensure that it is fit for purpose and affords the Council the appropriate level of protection.
- 3.5.10 Where Officers considers that it is not fit for purpose they must liaise with the Legal Services Team with regards to any amendments required to make it fit for purpose.
- 3.5.11 The Invitation to Tender must explain how information provided in the Tender will be treated with regard to statutory requirements.
- 3.5.12 For below EU Threshold procurement projects, Tenderers must be given adequate time to respond, consistent with the level of complexity of the requirement and, except where the industry norm is otherwise, this should be a minimum of 15 working days.
- 3.5.13 Tenderers must be required to hold their Tenders open for acceptance for a minimum of 90 calendar days from the date of opening.
- 3.5.14 Invitations to Tender must include a statement that the Council does not bind itself to accept the lowest Tender or any other Tender.
- 3.5.15 Every invitation to tender shall be completed electronically via the Council's Quotation/Tendering System.
- 3.5.16 Dynamic Purchasing System (Public Contracts Regulations 2015, Regulation 34 "PCR 2015")**
- 3.5.16.1 These systems are essentially open frameworks and provide for an electronic process for commonly used supplies, services or works. Contracting authorities must allow all economic operators the ability to participate during the validity of the DPS.
- 3.5.16.2 To set up a DPS, the restricted procedure must be used. A contract notice or PIN must be used, which confirms that it is a call for competition.
- 3.5.16.3 The minimum time period for receipts of request to participate is 30 days.
- 3.5.16.4 The minimum time period for the receipt of tenders is 10 days from the date on which the invitation to tender is sent.
- 3.5.16.5 The maximum duration must be indicated in the call for competition.

### 3.5.17 Electronic auctions/catalogues (Public Contracts Regulations 2015, Regulations 35 & 36 “PCR 2015”)

To ensure transparency the following provisions must be followed:

3.5.17.1 The use of electronic catalogues must be identified in the call for competition/ ITT.

3.5.17.2 If electronic catalogues are required as part of framework mini-competitions.

3.5.17.3 Tenderers can adapt to requirements and resubmit catalogues; or

3.5.17.4 Contracting authorities can collect information and adapt these to the requirements of the contract in question and then request confirmation from tenderers (tenderers may object to collection).

### **3.6 Receipt and tender opening**

3.6.1 Tenders shall be kept secure electronically and unopened until the time and date specified for their opening.

3.6.2 All tenders received by the time and date specified shall be opened within 5 working days of the closing date in the presence of the Officer from the Service or their nominee and a designated Officer from Category Management.

~~3.6.3 All tenders received shall be recorded on the *Tender Opening Log* and retained by Category Management. Where tenders are not returned, Officers should confirm the reason why a tenderer had decided not to submit a tender.~~

~~3.6.4 Criteria for the award of contracts shall have been disclosed within the tender invitation and these criteria shall be strictly observed by Officers designated to evaluate the tender.~~

~~3.6.5~~3.6.3 No tender received after the time and date specified shall be considered unless agreed by the Councils Monitoring Officer either directly or via delegation to the Chief Finance Officer or Category Management.

~~3.6.6 An original version of the accepted Tender (in full) must be sent to the Legal Services Team to be sealed or signed, recorded and retained in the Council's Deeds Room for a minimum period of six years from the contract end, for signed contracts, and a minimum of twelve years from the contract end date for contracts made under seal.~~

~~3.6.7~~3.6.4 The formal contract which will include the accepted Tender can be sealed or signed by Authorised Officers within Legal Services. The Authorised Officer must initial every page of a Bill of Quantities or each page of any Schedule to the Form of Tender prepared by the Tenderer.

3.6.85 A record of all tenders signed or sealed will be made and kept by the Legal Services.

### 3.7 Errors in tenders

~~3.7.1 The Council can require final tenders, once received and opened, to be clarified, provided that this does not involve changes to the basic features of the tender or call for substantial variations to the tender which are likely to distort competition or have a discriminatory effect.~~

3.7.1 Officers are entitled to clarify errors, missing or incomplete bids but any clarification is made in full compliance with the principles of equal treatment and transparency.

3.7.2 Where there is an obvious error or omission Category Management may permit a Tenderer to either correct or withdraw their submission. Any such corrections will be completed via the Council's electronic Quotation/Tendering System.

3.7.3 For Works contracts, errors are to be corrected in accordance with the relevant industry standard or best practice.

### ~~3.8 Tender evaluation~~

#### 3.8 Tender Evaluation (Public Contracts Regulations 2015, Regulations 67 & 68 "PCR 2015")

3.8.1 All Tenders must be assessed in accordance with the pre-determined evaluation criteria and weightings as advertised in the Tender Notice, Pre Qualification Questionnaire and Invitation to Tender documentation as appropriate.

3.8.2 The Tender Evaluation Panel must include relevant representation ~~from Category Management, the Service/Business and Finance~~ as appropriate. Where the contract potentially could involve TUPE then HR must be advised at the earliest opportunity and included as part of the Evaluation Process. If a consultant leads on the team then a Head of Service or Assistant Director must sign off their findings.

3.8.3 The Chief Finance Officer or his representative must be consulted on the commercial evaluation of all Category B procurements.

3.8.4 The results of the Tender evaluation must be retained by Category Management.

#### 3.8.5 Abnormally Low Tenders (Public Contracts Regulations 2015, Regulation 69 "PCR 2015")

3.8.5.1 Officers are obliged to seek reasons from bidders to explain prices and costs which appear to be abnormally low in relation to the works, supplies or services.



3.8.5.2 Officers may only reject a tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

### 3.9 Negotiation

3.9.1 Officers may only carry out negotiations if:

- (a) An Exemption of these rules has been granted;
- (b) A single Tender;
- (c) The Tender is above the EU Thresholds and is in accordance with the EU requirements for ~~a Negotiated Tender~~ an EU Competitive Procedure with Negotiation or a Competitive Dialogue (and a Waiver of these Rules has been granted);
- (d) They are post tender negotiations in accordance with the rules set out below.

3.9.2 Where a competitive tender exercise cannot be carried out in accordance with the Council's Contract Procedure Rules, a single or multiple negotiated tender exercise may only be sought if a Waiver of Contract Procedure Rules has been granted first. This only applies to a requirement below the OJEU threshold. This Negotiated Procedure must only be used in exceptional circumstances and must be approved in advance by the Council's Monitoring Officer prior to use as part of the Gateway 1 Process for Category B Procurements.

~~3.9.3~~ 3.9.3 Where the procurement is conducted through either the *Open* or *Restricted Procedures* within the EU Regulations, no negotiations are permitted (including post tender negotiations), which may have the effect of distorting competition (for example fundamental changes to aspects of the contract, including prices changes and variations to the Council's requirements).

3.9.4 Where dialogue with tenderers is permitted under the Negotiated EU Competitive Procedure with Negotiation or Competitive Dialogue procedures ~~within the EU Regulations~~, negotiations shall be conducted by a team of at least two Officers, at least one of who shall be from Category Management.

3.9.5 Written records must be made and retained by Category Management of all negotiations. If an Officer is in doubt on any negotiations, they should contact Category Management and Legal Services for guidance.

### 3.9.6 Variants (Public Contracts Regulations 2015, Regulation 45 "PCR 2015")

3.9.6.1 Officers may now require as well as permit bidders to submit variants (and must set out the minimum requirements they must meet).

3.9.6.2 Officers may specify that a variant can only be submitted if a standard bid is submitted or can allow just variants but this must be clear in the procurement documents.

3.9.6.3 Officers must ensure that the award criteria can be applied to both non-variant and variant tenders.

### 3.9.7 Sub-contracting (Public Contracts Regulations 2015, Regulation 71 “PCR 2015”)

3.9.7.1 In the procurement documents, Officers may ask the tenderer to indicate in its tender any share of the contract that it intends to sub-contract to third parties and any proposed subcontractors.

3.9.7.2 Main contractors must notify Officers of the name, contact details and legal representatives of its sub-contractors in so far as known at the time. This relates to works contracts and in respect of services to be provided at a facility under the direct oversight of Medway Council and must take place after the award of the contract but at the latest when the performance of the contract commences. Officers may extend this approach to supply and other services contracts and to lower tiers of sub-contractors.

3.9.7.3 Officers may verify whether there are grounds for exclusion of sub-contractors under Regulation 57 and must require the main contractor to replace a sub-contractor if there are mandatory grounds for exclusion and may require replacement where there are discretionary grounds.

## 3.10 Award of contracts

3.10.1 A contract may only be awarded by an Authorised Officer with the requisite delegated authority to award contracts in accordance with **Section 2** of these Contract Procedure Rules.

3.10.2 For contracts subject to the full scope of the EU Regulations, Category Management must inform as soon as possible any tenderer the intended award of contract ~~using the Council's Standstill Notice Letter.~~

3.10.3 The Council must allow a minimum standstill of 10 calendar days between communicating the decision (~~issue of the Standstill Notice Letter~~) and contract conclusion.

3.10.4 The “Standstill” period must not commence until all internal approvals have been finalised in accordance with the Council’s Constitution.

3.10.5 Whilst the mandatory standstill period does not generally apply to procurements below the EU thresholds or procurements otherwise outside the full scope of the EU Directives, the above process shall be applied for all Category B Procurements except where the Monitoring Officer agrees otherwise.

3.10.6 Where a contract exceeding the EU Threshold has been awarded, Category Management must publish a Contract Award Notice in OJEU no later than 48 days after the date of award of the contract.

### ~~3.11—Debriefing~~

~~3.11.1 Any economic operator (i.e. Supplier, Contractor or Service Provider) that fails to progress past the Pre-Qualification Questionnaire stage of a tender process must be notified of their failure to be considered further and this notification should include the reasons for this.~~

~~3.11.2 All unsuccessful tenderers that submitted a tender response under a Category B Procurement should receive feedback in respect of their tender submission (and that of the successful tenderer) within the Standstill Notice Letter as described in **Section 3.10** above.~~

~~3.10.7 Award of contracts will be based on the most economically advantageous tender assessed from the point of view of the authority. This may be on the basis of price or cost and may include the “best price quality ratio”.~~

~~3.10.8 Life-cycle costing is also permitted and rules are set out on how to work out life-cycle costing etc in Regulation 68. The approach must be disclosed to bidders.~~

~~3.10.9 Award criteria must still be linked to the subject matter of the contract but may also include “organisation, qualification and experience of staff assigned to performing the contract” where the quality of the staff assigned can have a significant impact on the level of performance of the contract. Care must be taken not to duplicate any “staff” related assessment undertaken at pre-qualification stage.~~

### ~~3.10.10 **Individual Reports (Public Contracts Regulations 2015, Regulation 84 “PCR 2015”)**~~

- ~~• Contracting authorities are required to create and keep a written report on each contract, framework agreement and dynamic purchasing system entered into under PCR 2015. (Gateway 3)~~
- ~~• The information recorded must include information relating to the following (amongst other):~~
  - ~~• the qualification and selection of tenderers and the award;~~
  - ~~• where applicable, why electronic procurement is not used;~~
  - ~~• the use of the negotiated procedure without a call for competition;~~
  - ~~• how conflicts of interest have been managed; and~~
  - ~~• the non-application of the regulations in certain circumstances.~~
- ~~• In addition to the above, there is a general obligation on contracting authorities to document the progress of all procurement procedures including ensuring sufficient information is kept to justify decisions such~~

as communications with economic operators and internal deliberations, preparation of procurement documents, any dialogue and negotiation, selection and award. Documentation must be kept for three years from the award of the contract.

### **3.11 Debriefing/ Bidder Feedback (Public Contracts Regulations 2015, Regulation 55 “PCR 2015”)**

3.11.1 Officers are required to inform each candidate and tenderer (as soon as possible) of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system.

3.11.2 Economic operators have a right to request information (and a response must be provided no later than 15 days of a request) and the majority of this information should be provided in the standstill letter. There is also a right to request details of the conduct and progress of negotiations and dialogue with bidders which is in addition to information made available in the standstill letter.

~~3.11.3~~ 3.11.3 Providing unsuccessful tenderers the information above should in most instances remove the requirement for a further debrief meeting, as there is no further evaluation information to be provided. Where a further request is received in writing from an unsuccessful tenderer (and considered beneficial) a face-to-face debrief meeting may be held with appropriate representation from the Evaluation Panel.

### **3.12 Contract extensions Modification of contracts (Public Contracts Regulations 2015, Regulation 72 “PCR 2015”)**

3.12.1 Any contract, which provides for (an) extension(s), may be extended in accordance with its terms subject to a Gateway 5 review at the Procurement Board.

~~3.12.2~~ Where any contract is extended, Category Management will update the Contract Register accordingly.

~~3.12.3~~ 3.12.3 Where the terms of the contract do not expressly provide for an extension, an exemption is required and is subject to any necessary authorisation within the scheme of delegation. These should only be extended in exceptional circumstances and advice must be sought from Category Management and Legal Services.

~~3.12.4 The Director must be sure that such an extension would not breach EU/UK law in particular with regards to distorting competition. Any variation that is sufficiently material such as to require a renegotiation of the financial model or other core contract provisions relating to the pricing or charging arrangements or the scope of works or services provided may trigger a fresh requirement to put the contract out to competitive OJEU tender process. Any contract variations agreed in breach of an obligation to conduct a fresh OJEU process would be regarded as "illegal direct awards" under the Public Contracts~~

~~Regulations 2006 (as amended), leaving them (where the value of the contract is in excess of the relevant EU threshold) vulnerable to be challenged and declared ineffective by the courts.~~

### ~~3.13 Termination of contract~~

~~3.13.1-3.12.3~~ Should there be any contract variations within the first 12 months of the life of the contract which increases the spend on any element within the contract, approval must be given by the relevant Portfolio holder and/or Procurement Board prior to the variation being agreed.

~~3.12.4~~ Modifications to existing contracts are permitted without commencing a new procurement in the following circumstances:

- Where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.
- For additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor:\*
- cannot be made for economic or technical reasons; or
- would cause significant inconvenience or substantial duplication of costs for the contracting authority; However, any increase in price cannot exceed 50% of the value of the original contract.
- Where all of the following conditions are fulfilled:\*
- the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- the modification does not alter the overall nature of the contract; and
- any increase in price is not higher than 50% of the value of the original contract or framework agreement.

(\*Note: the contracting authority must publish a notice in the OJEU when a contract has been modified under these headings.)

- Where a new contractor replaces the one which had initially been awarded the contract as a consequence of either:
  - an unequivocal review clause or option which is clear, precise and unequivocal (referred to above); or
  - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to

the contract and is not aimed at circumventing the application of PCR 2015.

- Where the modifications, irrespective of their value, are not substantial. A modification is considered to be substantial where one or more of the following conditions is met:
  - the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
  - the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
  - the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
  - the modification extends the scope of the contract or framework agreement considerably;
  - where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those envisaged above.
  - Where the value of the modification (on a cumulative basis) is below both of the following values:
    - the relevant EU procurement thresholds; and
    - 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.Where a modification falls outside of the above circumstances, a new procurement process is required. To proceed in those circumstances without a new procurement will therefore amount to an unlawful direct award.

### 3.13 Termination of Contract (Public Contracts Regulations 2015, Regulation 73 “PCR 2015”)

3.13.1 Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where:

- the contract has been subject to a substantial modification which would have required a new procurement procedure;

- o the contractor has, at the time of contract award, been in one of the situations referred to in certain of the mandatory grounds for exclusion; or
- o the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive (that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU).

3.13.2 To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned above, such a termination term shall be implied into the contract.

3.13.3 Early termination of any contract may be carried out by the Authorised Officer in accordance with the terms of that contract. Advice must be sought from Category Management and Legal Services, in the first instance, prior to termination. Before a contract can be terminated, a Gateway 5 report must be submitted to the Procurement Board to make an informed decision

### 3.14 **Procurement by non-council officers**

3.14.1 Where the Council uses non-Council Officers to act on its behalf in relation to any procurement, then the Officer responsible for the procurement shall ensure that the third parties carry out any procurement in accordance with these Contract Procedure Rules.

3.14.2 All non-Council Officers must sign an agreement not to use information gained during employment with the Council, to gain any commercial or pecuniary advantage in relationship to concurrent or future employment/engagement.

3.14.3 No non-Council Officer shall make any decision on whether to award a contract or whom a contract should be awarded to unless specifically empowered to do so in writing by an Officer or body authorised to confer that power.

3.14.4 The responsible Officer shall ensure that the non-Council Officer's performance is monitored.

3.14.5 Non-Council officers includes, but is not limited to:

- Consultants
- Main Contractors
- Sub-Contractors
- External Advisors.

## **SECTION 4 CONTRACT AND OTHER FORMALITIES**

## 4.1 Contract documents

- 4.1.1 All Contracts must be in writing using the *Council's Standard Documents*.
- 4.1.2 Where the procurement is for a Total Value of up to £100K the use of a Purchase Order is an acceptable form of contract, which must make reference to the successful quotation and the Council's Terms & Conditions of Purchase.
- 4.1.3 Where the procurement is for a Total Value over £100K, a Formal Contract is to be drawn up by Legal Services. The Contract will incorporate the Conditions of Contract included in the Invitation To Tender documentation and any subsequent variations to these made and agreed during the Invitation to Tender procurement process.
- 4.1.4 Two copies of the contract will be sent to the successful tenderer to duly sign. After signing and returning both copies to the Council, they will both be signed on behalf of the Council. One copy will be retained by Legal Services and one copy will be returned to the successful tenderer for its retention.
- 4.1.5 Contract documents must be retained in accordance with the Corporate Retention Schedule or for a minimum period of six years from the contract end date and, if under seal, for a period of twelve years from the contract end date. Please refer to **Section 4.5** of these Contract Procedure Rules.
- 4.1.6 Category Management will record and retain all decisions, correspondence and documentation for audit purposes.

## 4.2 Contract formalities

- 4.2.1 Contracts must be completed as follows:

TOTAL VALUE	METHOD OF COMPLETION	BY
Up to £100K	Signature Purchase Order/ITQ Document	Officer with appropriate authority to enter into a contract
£100K+	Signature on Standard Contract & sealed (where appropriate)	Legal Services

- 4.2.2 All contracts for the Supplies (Goods), Services and Works must be concluded in writing using the appropriate Standard Contract before the contract commences.



### 4.3 Letters of intent

4.3.1 Letters of intent can only be issued by an Officer of the Council with prior approval of the Monitoring Officer or Head of Legal Services.

4.3.2 The letter must set out the key contract terms - price, duration, etc, and authorises the Contractor to carry out work up to a specified value before the formal agreement is signed.

4.3.3 In the case of Works contracts, a letter of intent in a form approved by The Monitoring Officer is acceptable in order to allow work to commence, although the issue of a formal contract must follow without delay.

~~4.3.4~~ Letters of intent are only binding on the Council and the contracting Party where the letter expressly states that their Tender has been accepted and the Council agrees to pay them the tender sum. The letter of intent should normally seek to incorporate the terms and conditions of the relevant Council standard contract or relevant industry standard contract (e.g. JCT, ICE, NEC) indicating the Council's intention to enter into a formal, written contract with the contracting party, to carry out the Works/Services and receive Supplies (Goods) described in the letter, such Works/Services and receipt of

4.3.4 Supplies (Goods) to commence on a date specified or at any rate before the parties execute the formal, written contract, until then the contracting parties obligations to the Council shall be governed by the Invitation to Tender documentation.

4.3.5 The wording of the letter of intent should be reviewed by Legal Services prior to issue, to ensure the letter is fit for its intended purpose.

4.3.6 A letter of intent is not a substitute for a formal agreement but can be used as an interim measure until the formal agreement has been signed. The tendering procedure set out in **Section 2** of these Contract Procedure Rules shall apply.

#### 4.4 **Signature**

4.4.1 The only person(s) authorised to formally sign a contract is the Monitoring Officer, Head of Legal Services or their representative within Legal Services and they must ensure that the person signing for the other contracting party has authority to bind it.

4.4.2 In the case of contracts for commissioning of care services, including educational placements and emergency accommodation for the homeless where the Total Value of the contract is not known, the Solicitor responsible for signing must have been granted authority to enter into commissioning contracts by the Monitoring Officer.

#### 4.5 **Sealing of contracts**

4.5.1 A contract must be sealed where:

- (a) the Council wishes to enforce the contract for more than six years after its end (e.g. for land or construction works); or
- (b) the price paid or received under the contract is a nominal price and does not reflect the value of the goods or services; or
- (c) a Performance Bond is established on behalf of the Contractor(s) or their guarantors; or
- (d) it is required by parties to the contract; or
- (e) the total value of the Supplies (Goods), Services and Works exceeds £250K.

4.5.2 Where contracts are completed by each side adding their common seal, the affixing must be attested by or on behalf of Legal Services. Legal Services are responsible for the process of sealing contracts on behalf of the Council's Monitoring Officer.

#### 4.6 **Bonds, parent company guarantees and insurance**

4.6.1 For all Supplies (Goods), Services and Works contracts, over £250K a Parent Company Guarantee or Performance Bond shall be required unless agreed otherwise by the Council's Monitoring Officer in conjunction with the Council's Chief Finance Officer and as part of the Procurement Gateway Process for Category B Procurements. In all other cases consideration should be given to the need for security (a Parent Company Guarantee or a Bond) to be given for the proper performance of the contract by the contractor.

4.6.2 The Council must never give a bond.

4.6.3 For all Works and Services contracts, the appropriate Director or appointed Authorised Officer, must notify in writing the Council's insurance officer giving full details of the nature, duration and value of the Works and Services being undertaken on any particular project.

## 4.7 Prevention of corruption

4.7.1 The Officer responsible for the contract must comply with the Council Employee Code of Conduct and the Council's Anti Fraud and Corruption Policy and must not invite or accept any gift or reward in respect of the award or performance of any contract. A breach of this requirement by Council officers is likely to result in disciplinary action and may be gross misconduct.

Officers must not enter into discussions with any tenderer or other interested third party during a procurement process, unless specifically permitted by the procurement process, Category Management or Legal Services.

4.7.2 All clarification received from bidders during a procurement process must be submitted electronically via the Council's electronic Quotation/Tendering System. The question and the response must then be sent to all bidders via the Council's electronic Quotation/Tendering System.

4.7.3 All contracts must contain an appropriate clause that provides protection and the right to terminate the contract in the event of a supplier offering any inducement, committing fraud or committing an offence under the Prevention of Corruption Acts.

4.7.4 The Council participates in anti-fraud and corruption exercises with other public bodies. In order to do this data is exchanged with such organisations. The data exchange is likely to contain information on our contractors.

4.7.5 If an Officer becomes aware that any bidder is lobbying a Member or Officer of the Council then they must report this immediately to the Monitoring Officer.

## 4.8 Declaration of interests—/ Conflicts of interest (Public Contracts Regulations 2015, Regulation 24 "PCR 2015")

4.8.1 If it comes to the knowledge of a Member or an Officer of the Council that a contract in which he or she has a ~~pecuniary~~financial, economic or other personal interest ~~has been or is proposed~~which might be perceived to be entered into by the Council~~compromise their impartiality or independence~~, he or she shall immediately give written notice to the Council's Monitoring Officer and record it on the register of interests.

4.8.2 Conflicts may also arise with incumbent suppliers. Officers are obliged to take appropriate measures to effectively prevent, identify and remedy conflicts of interest. In circumstances where measures cannot be taken to remedy conflicts, a contracting authority may have discretion to exclude the relevant bidder.

~~4.8.1.~~

## **SECTION 5 PERFORMANCE AND CONTRACT MANAGEMENT**

- 5.1 All Category A and Category B Procurements must include a set of performance standards (where appropriate) that must be met throughout the contract. Any performance standards must be inserted into the terms and conditions of contract. Key performance indicators or similar benchmarks of quality should be used where available and appropriate.
- 5.2 All Category B Procurements (and Category A where of a complex nature) must have a designated Contract Manager whose name should be notified to the Contractor. Likewise, the Contractor must have a designated Contract Manager whose name is notified to the Council. These resources must be identified and agreed before the contract is awarded.
- 5.3 Regular contract monitoring meetings should be held with the Contractor and minutes of agreed actions taken. The frequency of the meetings to be dictated by the nature, value and associated risks of the contract.
- 5.4 Performance against contract standards must be monitored and recorded on a regular basis, proportionate to the nature, value and associated risks of the contract.
- 5.5 Where service improvements are enshrined in the contract these must be evidenced for the annual audit inspection and for any Gateway 5 review as prescribed by the Council's Procurement Board.

## **SECTION 6 RISK MANAGEMENT**

- 6.1 A full risk assessment should be undertaken on all procurement options available to the Council. These should be documented and owners assigned once an option is selected.
- 6.2 A risk log should be created at the start of the procurement project and managed by the responsible Officer, in the case of High Value/Risk procurements. Risks should be reviewed regularly and appropriate actions taken to manage them. The Director should be kept aware of all risks and provided with a regular report on their status.
- 6.3 The Risk Management section should be consulted on all high value/risk procurement projects at the commencement of the project.

## **SECTION 7 ENVIRONMENT/SUSTAINABILITY**

- 7.1 The Council is committed to making Medway Council a greener and more environmentally friendly place to live and work.
- 7.2 The Council is committed to working towards a 'greener' future, by:

- Taking practical action to reduce, as far as possible, the effect the Council's activities have on the environment.
- Improving the quality of the local environment; and
- Encouraging the people of Medway to live and work in ways that reduce the borough's effect on worldwide environmental problems, to improve the environment now and protect the future.

7.3 The Council's green procurement rules are based on the following principles:

- (a) Banning products that damage the environment when an alternative is available.
- (b) Promoting products that damage the environment the least.
- (c) Understanding that buying environmentally friendly goods and services is part of a process of continuous improvement.
- (d) Considering costs such as energy and maintenance when we consider tenders.
- (e) Engaging with suppliers who can actively contribute to the reduction in energy use as part of their Contract with the Council.
- (f) That all Contractors and Suppliers can demonstrate commitment to carbon reduction in their operations (insofar as they relate to the particular commission)
- (g) That all Contractors and Suppliers undertake to supply relevant data to the Council to enable the carbon impact to be monitored

## **SECTION 8 EQUALITIES**

- 8.1 Before starting any procurement, Council Officers must make sure that they consider equality issues by liaising with Corporate Performance & Intelligence and completing a Diversity Impact Assessment. This is essential if the procurement outcome will be a service or product that affects the staff or residents of Medway Council. The Equalities Impact Assessment will inform the detail of the contract specification.
- 8.2 Contractors must adhere to current equalities legislation at all times whilst performing a contract on behalf of the Council.

## **SECTION 9 SOCIAL AND ECONOMIC VALUE**

- 9.1 The current EU Procurement Directives, and UK legislation, allows the Council to take social and economic considerations into account when procuring Supplies (Goods), Services or Works.
- 9.2 The Council is required under the Public Services (Social Value) Act 2012 to consider how the services it procures and commissions might improve the economic, social and environmental well-being of Medway.
- 9.3 For those tender opportunities/contracts where the Council intends to include such social requirements it will ensure that they are drafted in the Invitation to

Tender documents, as part of the evaluation criteria and ultimately defined in ways that do not discriminate against any bidders across the UK/EU.

## **SECTION 10 WHISTLE BLOWING**

- 10.1 The Council is committed to the highest possible standards of openness, probity and accountability. In line with that commitment, it encourages employees and others with serious concerns about any aspect of the Councils' work to come forward and voice those concerns.
- 10.2 The Councils *whistle blowing policy* encourages our employees to raise concerns in respect of any conduct of officers of the council that:
- may be unlawful;
  - may be contrary to the council's policies;
  - falls below established standards or practice or that may amount to improper conduct;
  - Councils *whistle blowing policy* is intended to encourage and enable staff to raise serious concerns within the council rather than overlooking a problem or blowing the whistle outside. The policy recognises that certain cases will have to proceed on a confidential basis and makes it clear that our staff can raise issues without fear of reprisals.
- 10.3 The council is anxious to ensure that the employees of its contractors are similarly encouraged and enabled to raise concerns in respect of any misconduct of officers of the council.
- 10.4 Contractors are also encouraged to introduce similar provisions to apply in the case of any similar misconduct of the Contractors staff when involved in work for the Council.
- 10.5 Any Member or Officer who believes there has been a breach of these Contract Procedure Rules should report the matter to the Monitoring Officer or use the Council's Whistle blowing Policy.

## SECTION 11

### CRIMINAL RECORDS BUREAU CHECKS (Disclosure Barring Service DBS)

- 11.1 The Council requires all people who, through the delivery of services to The Council, come into contact with the elderly, disabled and children, to have up to date satisfactory ~~Criminal Records Bureau reports~~Disclosure Barring Service (DBS) report prior to award of any contract. The Council should also require such Contractors' personnel to be registered with the Disclosure and Barring Service (DBS) if and when such registration becomes necessary.

**APPENDIX A - GLOSSARY OF TERMS**

Contract	A contract that has been created in accordance with the Contract Procedure Rules for call off or use by the Council. If in doubt whether a contract is approved or not contact the Category Management Team (see also Framework Agreement)
Approved Standard Terms	Includes industry standard terms and terms included within the Council's Standard Contracts
Officer/ Authorised Officer	A person with appropriate delegated authority to act on the Council's behalf within their respective Directorate.
Best Value	Under Best Value, each local authority has a duty to 'make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness' as set out in the Local Government Act 1999. This takes into consideration the 4Cs of Challenge, Compare, Consult and Compete.
Code of Conduct	The code regulating conduct of Officers contained within the Council's Constitution
<u>EU Competitive Dialogue Procedure</u>	A procedure leading to the award of a contract whereby the Council produces a shortlist through a dialogue with those tenderers who are considered to have appropriate capacity. Based on the solutions discussed, final tenders are sought from the short listed contractors This procedure is most appropriate for complex procurements where significant input is required from the market to inform the drafting of the specification.
Contract Register	A register held by Category Management containing details of all contracts entered into by the Council.
<u>PCR 2015</u>	<u>Public Contract Regulations 2015. These replace the PCR 2006 (As amended)</u>
Procurement Board	A Cabinet Advisory Group chaired by the Deputy Leader of the Council or Member as appointed by the Leader of the Council, with representation from across the Council charged with the duty of



developing and reviewing procurement and contractual issues. For the avoidance of doubt, the Procurement Board is a Cabinet Advisory Group and has no formal decision making powers.

Contractor

Any person or body of persons providing, or seeking to provide, Supplies (Goods), Services or Works to the Council.

Council's Procurement Strategy

Defines the overall approach to procurement related activity for the Council.

EU ~~Negotiated~~ Competitive Procedure with Negotiation

A procedure leading to the award of a contract whereby the Council negotiates the terms of the contract with one or more persons selected by it. The procedure is a complex set of rules, and it is extremely difficult for contracting authorities to meet the requirements to allow the use of this procedure.

EU Notice

Notice posted in the Supplement to the Official Journal of the European Union (OJEU). Includes a Prior Indicative Notice (PIN), a Tender Notice or an Award Notice.

EU Open Procedure

A procedure leading to the award of a contract whereby all interested persons may tender for the contract, duly advertised by notice, i.e. there is no limit on the number of tenders received nor may the Council consider the suitability of interested tenderers prior to submission of Tenders.

EU Regulations

The EU public procurement directives implemented into UK legislation by virtue of the Public Contracts Regulations ~~2006~~ (amended).2015.

~~EU Restricted Procedure~~

~~A procedure leading to the award of a contract whereby only persons selected by the Council may submit Tenders for the contract, duly advertised by notice, i.e. the contract is advertised, where prospective Tenderers are screened before being invited to tender ("selective tendering").~~

<u>EU Restricted Procedure</u>	<u>This is a 2 stage process which uses a Pre-Qualification (PQQ) and an Invitation to Tender (ITT) Stage.</u>
EU Threshold	<p>The financial threshold at which <del>EEU</del> public procurement directives must be applied if expected to be exceeded by the Total Value. Current EU thresholds are:</p> <ul style="list-style-type: none"> <li>• Works                    £4,322,012</li> <li>• Services                 £172,514</li> <li>• Supplies (Goods)    £172,514</li> <li>• <u>“Light touch” Services £625,050</u></li> </ul>
Exemption	A formal request in writing made by a Director to exempt the proposed requirement from the Contract Procedure Rules in exceptional circumstances.
Financial Reference	A financial risk assessment of the finances of a company, parent or group of organisations in order to establish their liquidity, profitability, stability and capability to support a contract of the value required. This service is available through a credit reference agency such as Dunn and Bradstreet
Chief Finance Officer	The Chief Finance Officer or a senior officer representing the Chief Finance Officer designated by him to provide financial advice to the Council’s Authorised Officers.
Financial Regulations/Finance Procedure Rules	The Financial Regulations contained within the Constitution.
Framework Agreement	An agreement with suppliers whose purpose is to establish the terms governing contracts to be awarded during a given period, in particular with regard price and quality. It allows the Council to make specific purchases (call-offs) in accordance with the terms of that agreement.
Invitation To Quote	A formal written invitation to a minimum number of suppliers to provide written quotations for goods, services or works on the Council’s standard terms for requirements between £10K and £100K
Invitation to Tender	A formal written invitation to a minimum number of suppliers to provide sealed bid offers for goods, services or works on the Council’s standard terms for requirements over £100K

Officer	Council employee as defined in the Constitution
OJEU	Official Journal of the European Union
Parent Company Guarantee	A contract, which binds the parent of a subsidiary company as follows: If the subsidiary company fails to do what it has promised under a contract with the Council, the Council can require the parent company to do so instead or for the parent of the subsidiary company to pay the Council's reasonable costs/losses (including damages) for the Council having to procure a third party to meet the promises under the Contract with the Council.
Performance Bond	An insurance guarantee policy: If the Contractor does not do what it has promised under a contract with the Council, the Council can claim from the insurer the sum of money specified in the Bond (often 10% of the contract value). A Bond is intended to protect the Council against a level of cost arising from the supplier's failure.
Pre-qualification <u>Questionnaire (PQQ)</u>	<del>A <u>process document that covers economic standing, past experience and technical suitability</u> to determine a shortlist of potential suppliers <u>onto invite to ITT</u>. <u>The does not cover delivery questions that will be asked at the basis of general economic and technical criteria in accordance with ITT stage</u>. <u>The use of pre-qualification questionnaires for below EU threshold contracts is prohibited</u>. <u>For the EU regulations on purpose of clarity, the use of the restricted procedure</u>. <u>The evaluation must be limited to that of the technical/financial ability of the bidder</u> thresholds are those used for goods and <u>must not include evaluation of tender related matters. services rather than works or light touch contract.</u></del>
Official Purchase Order	An order placed through the Integra Finance System (Web Req)
Category Management	<u>means the business improvement process that brings together people from different parts of a business</u> . The <u>aim is to analyse and review discrete parts of the overall spend (called "Categories")</u> , with suppliers, and <u>identify the most appropriate and effective approach to sourcing for</u>

~~each Category Management Team is part of the Housing & Corporate. The intention should always be to increase the value provided by the supply chain. A Category can be defined as a discrete area of spend with boundaries determined by the market facing nature of the function or attributes of the Goods, Services Department and is responsible for supporting the Council in its Strategic Procurement activity on behalf of the Council's Monitoring Officer or execution of Works being purchased.~~

The Council	Medway Council.
Tenderers	Suppliers/contractors who have been invited to submit a tender to the Council.
Total Value	<p>The whole of the value or estimated value (in money or equivalent value) over the contract term for a group of similar commodities or services, in accordance with Best Value:</p> <ul style="list-style-type: none"><li>• whether or not it comprises several lots or stages across the Council as a whole</li><li>• whether or not it is to be paid or received by the Council as a whole or separate departments within the Council</li></ul>
Value for Money	The optimum combination of through life cycle cost and quality (or fitness for purpose) to meet the user's requirement.
Written Quotation	Quotation provided by a supplier/contractor to the Council containing pricing information and delivery details for requirements

## **APPENDIX B – PROCEDURES UNDER PUBLIC CONTRACTS REGULATIONS 2015, REGULATIONS 26-32 “PCR 2015”**

Officers can choose the Open and Restricted Procedures. The Competitive Procedure with Negotiation and Competitive Dialogue Procedure are available only in specific circumstances. These two processes are available where:

- o needs cannot be met without adaptation of readily available solutions;
- o contract cannot be awarded without negotiations due to nature, complexity, legal/financial make-up or risks;
- o technical specifications cannot be established with sufficient precision;
- o they involve design or innovative solutions; or
- o irregular (eg late submissions, abnormally low tenders) or unacceptable (eg not required qualifications/ price exceeds published budget) tenders have been received in response to open/ restricted processes.
- o The ability to award contracts by way of the negotiated procedure without an advert remains in place provided the specific (considered to be exceptional) circumstances for its use are applicable

There is also the new Innovation Partnership Procedure as set out below.

### **Open Procedure**

Any interested party may submit a tender in response to the call for competition which will be an OJEU notice. The new minimum timescales are set out below. It should be noted that the issue of a prior information notice (PIN) can shorten the timescales under the open procedure but cannot itself be used as the call for competition.

New provisions within PCR 2015 entitle a contracting authority to examine tenders before verifying whether exclusion grounds are absent and selection requirements are satisfied provided a contracting authority does so in an impartial and transparent manner and the contracting authority ensures a contract is not awarded to a supplier which should have been excluded or has failed to meet the selection requirements.

### **Restricted Procedure**

Any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection requested by the contracting authority. The new minimum timescales are set out below. A call for competition can be made by means of a contract notice or, for certain types of contracting authorities, by way of a PIN.

### **Competitive Procedure with Negotiation**

Following qualitative selection, all selected economic operators are invited to negotiate but this procedure can be carried out in successive stages provided this is indicated to bidders upfront (like the competitive dialogue procedure). The procedure has been clarified to confirm that contracting authorities may negotiate initial and all subsequent tenders but not the final tender. Contracting authorities may reserve the right to award following receipt of initial tenders without negotiation but this must be

made clear at the start. The new minimum timescales are set out below. A call for competition can be made by means of a contract notice or, for certain types of contracting authorities, by way of a PIN.

### **Competitive Dialogue Procedure**

The competitive dialogue procedure largely remains the same as that under PCR 2006 except towards the end of the process. Following close of dialogue and receipt of final tenders, tenders may be “clarified, specified and optimised” but this must not involve changes to the essential aspects of the tender or procurement. Post evaluation, the contracting authority may “negotiate” with the winning tenderer to “confirm financial commitments or other terms by finalising the terms of the contract” provided this does not materially modify the essential aspects of the tender or the procurement.

Care must be taken as a contracting authority must ensure that changes do not risk competition being distorted or risk causing discrimination. Minimum timescales are set out below.

Note that a PIN cannot be used as a call for competition so a contract notice must be published.

### **Innovation Partnership**

This is a new for public procurement which is aimed at increasing innovation. The economic operators taking part are known as partners. The basic features of the innovation partnership procedure include:

- o seek offers for one or more partners to assist in the development of an innovative product, service or works not yet on the market, and the subsequent purchase of the innovative solution without the need for a separate procurement procedure for the purchase, provided the final purchase corresponds to pre-agreed levels of performance and maximum costs;
  - o the procurement can be run with one or several partners carrying out separate R&D activities;
  - o the partnership procurement shall be structured to follow R&D activities and the duration/value of each phase should reflect the degree of innovation and sequence of the activities;
  - o the partnership procurement shall set intermediate targets to be attained by the partners taking part and provide for payment in appropriate instalments;
  - o termination after each phase (in full or per partner) can be reserved upfront;
  - o the procurement can be carried out in successive stages provided this is indicated upfront;
  - o the initial and each subsequent tender is to be negotiated but the final tender must not be negotiated; and
  - o the minimum requirements and the award criteria must not be negotiated.
- Minimum timescales are set out below. Note that a PIN cannot be used as a call for competition so a contracting authority using this procedure will need to commence its tender process by publishing a contract notice in the usual way.

## **APPENDIX C – TIME LIMITS UNDER PCR 2015**

Without prejudice to these minimum timescales, Officers must have regard to the complexity of the contract and the time required for drawing up tenders when setting the time limits. If the tender documents are not available electronically at the call for competition for one of the grounds set out in Regulation 22 then 5 days must be added on to the tender period, except in cases of substantiated urgency in relation to the open, restricted and competitive procedure with negotiation.

### **Open Procedure**

Minimum time period for tender deadline:

- o reduced from 52 to 35 days.
- o may be reduced from 35 to 15 days where a PIN is published not being a call for competition (previously 22 days although could be further reduced).
- o may be reduced from 35 to 30 days where electronic tender submission (minimum before was 40 days).
- o may be reduced where state of urgency (duly substantiated by the contracting authority) from 35 to 15 days.

### **Restricted Procedure**

Minimum time period for requests to participate:

- o reduced from 37 to 30 days.
- o runs from contract notice or invitation to confirm interest if a PIN is used for call for competition.
- o may be reduced where state of urgency (duly substantiated by the contracting authority) from 30 to 15 days.

Time period for tender submissions:

- o reduced from 40 days to 30 days.
- o may be reduced further from 30 days to 10 days where PIN is published (not used as call for competition).
- o may be reduced where state of urgency (duly substantiated by the contracting authority) from 30 to 10 days.
- o may be reduced from 30 to 25 days where electronic tender submission is permitted.
- o sub-central authorities may agree a deadline with all selected bidders. In absence of agreement, period must be at least 10 days.

### **Competitive Procedure with negotiation**

- o Minimum time period requests to participate as per restricted procedure.
- o Option for sub-central contracting authorities to agree timescales as per restricted procedure.

### **Competitive dialogue**

- o Minimum time period for requests to participate reduced from 37 to 30 days.
- o PIN cannot be used as a call for competition.

### **Innovation Partnership**

- Minimum time period for requests to participate is 30 days.
- PIN cannot be used as a call for competition.

### **Negotiated procedure without a call for competition**

- No minimum timescales.



**Electronic auctions**

35.—(1) Contracting authorities may use electronic auctions, in which—

(a) new prices, revised downwards, or

(b) new values concerning certain elements of tenders,

or both, are presented.

(2) Contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

**When electronic auctions may and may not be used**

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual performances (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the subject of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of the procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

(a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(8)(b) or (c), and

(b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction shall be based on one of the following elements of the tenders:—

(a) solely on prices where the contract is awarded on the basis of price only;

(b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded—

(i) on the basis of the best price-quality ratio, or

(ii) to the tender with the lowest cost using a cost-effectiveness approach.

### Preliminary requirements

(7) Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest.

(8) Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:—

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

### Admissibility of tenders

(9) Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

(a) it has been submitted by a tenderer which has not been excluded under regulation 57 and which meets the selection criteria; and

(b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

(a) which do not comply with the procurement documents,

(b) which were received late,

(c) where there is evidence of collusion or corruption, or

(d) which have been found by the contracting authority to be abnormally low, shall be considered irregular for the purposes of paragraph (10)(b).

*(12) In particular—*

*(a) tenders submitted by tenderers which do not have the required qualifications, and*

*(b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure, shall be considered unacceptable for the purposes of paragraph (10)(b).*

*(13) For the purposes of paragraph (10)(b)—*

*(a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and*

*(b) a request to participate shall be considered not to be suitable where the economic operator concerned—*

*(i) is to be or may be excluded under regulation 57, or*

*(ii) does not meet the selection criteria.*

#### *Commencement and structure of the auction*

*(14) All tenderers that have submitted admissible tenders shall be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the connections in accordance with the instructions set out in the invitation.*

*(15) The electronic auction may take place in a number of successive phases.*

*(16) The electronic auction shall not start sooner than 2 working days after the date on which invitations are sent out.*

*(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9).*

#### *The formula to be used*

*(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.*

*(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.*

*(20) For the purposes of paragraph (19), any ranges of weightings shall be reduced beforehand to a specified value.*

*(21) Where variants are authorised in accordance with regulation 45, a separate formula shall be provided for each variant.*

### **Communication of information**

*(22) Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment.*

*(23) Contracting authorities may, where this has been previously indicated, communicate other information concerning other prices or values submitted.*

*(24) Contracting authorities may also at any time announce the number of participants in the current phase of the auction.*

*(25) In no case, however, may contracting authorities disclose the identities of the tenderers during any phase of an electronic auction.*

### **Closing the auction and awarding the contract**

*(26) Contracting authorities shall close an electronic auction in one or more of the following manners:—*

*(a) at the previously indicated date and time;*

*(b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or*

*(c) when the previously indicated number of phases in the auction has been completed.*

*(27) Where contracting authorities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.*

*(28) After closing an electronic auction, contracting authorities shall award the contract in accordance with regulation 67 on the basis of the results of the electronic auction.*

### **Electronic catalogues**

#### **Generally**

*36.—(1) Where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.*

*(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.*

*(3) Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.*

*(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 22 as well as with any additional requirements set by the contracting authority in accordance with that regulation.*

*(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall—*

*(a) state so in the contract notice or in the invitation to confirm interest; and*

*(b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 22(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.*

#### *Framework agreements*

*(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues.*

*(7) In such a case, contracting authorities shall use one of the following methods:—*

*(a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or*

*(b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.*

*(8) Where contracting authorities reopen competition for specific contracts in accordance with paragraph (7)(b), they shall—*

*(a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and*

*(b) give tenderers the possibility to refuse such collection of information.*

*(9) Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.*

*(10) Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.*

### Dynamic purchasing systems

*(11) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.*

*(12) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.*

*(13) For the purposes of paragraph (12), the catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).*