

EAST RENFREWSHIRE COUNCIL20 April 2016Report by Chief Officer – Legal and ProcurementREVISION OF CONTRACT STANDING ORDERS**PURPOSE OF REPORT**

1. To seek the Council's approval of revised Contract Standing Orders (CSOs) in light of a number of legislative and procedural changes in Public Procurement.

RECOMMENDATIONS

2. The Council is asked to:-
- approve the current draft of the revised Contract Standing Orders (Annex 1);
 - agree that they replace existing Contract Standing Orders with immediate effect; and
 - pending conclusion of the review of the Council's current Financial Regulations, agree that in the event of conflict the Contract Standing Orders will take precedence.

BACKGROUND

3. Although Contract Standing Orders were reviewed in May 2013, it is considered necessary to make a number of further amendments in order to reflect changes to the Procurement regime as introduced by the Procurement Reform (Scotland) Act 2014, the EU Procurement Directive and the Public Contracts (Scotland) Regulations 2015.
4. It is also thought appropriate to take this opportunity to simplify the language of Contract Standing Orders to make them more accessible to officers across the Council and, in doing so, improve understanding of their requirements and implications for contract processes.
5. The Council is also now subject to a new form of Procurement audit (PCIP) which focusses to some extent on the commercial value which can be drawn from the contract process. The review has also sought to reflect measures which will assist the Council in improving performance in this regard.
6. Since its last review, a number of audit recommendations have been made and accepted in relation to contract procedures. These have been given effect in the revised draft and the associated procedures which will form companions to them.
7. Initial drafts of proposed Contract Standing Orders have been issued to relevant officers for consultation and some suggested changes have been received. These have been evaluated and if considered appropriate, incorporated into the current draft.
8. The principal amendments currently proposed to the Contract Standing Orders are highlighted in the following report.

REPORT

Tendering thresholds:

9. Contract Standing Orders currently require a full tender process where the value of the procurement is in excess of £50,000 irrespective of whether the contract is for goods and services or works. Quick quote procedures operate for all contracts between £5,000 and £50,000. Below £5,000 the department is charged with making its own arrangements, subject to the overarching requirement to obtain best value for the Council and to act in a transparent and non-discriminatory fashion.

10. Experience indicates that the current thresholds, particularly in relation to works contracts, are impacting on the ability of services to attract a breadth of bidders and, by implication, are hampering the Council's ability to ensure best value. Current tender thresholds are also thought to act as a disincentive to small and medium sized enterprises who view the cost of participating in a full tender process as prohibitive in many cases. While each Council determines its own financial limits, it is recognised that those enshrined within the current Contract Standing Orders are low in comparison to some other Councils, where limits are more generally between £5,000 and £10,000 for Quick Quote and between £50,000 and (for works) £500,000 for formal tenders.

11. It is therefore proposed that the financial thresholds be adjusted for both works contracts and those for goods and services. For works, quick quote will apply from £20,000 to £150,000. For goods and services the threshold for quick quote will be raised to £10,000 with the upper limit of £50,000 remaining.

Statutory Changes.

12. A number of legal changes have been made to the Procurement regime through the introduction of the Procurement Reform (Scotland) Act 2014, the EU Procurement Directive and the Public Contracts (Scotland) Regulations 2015. These include the introduction of a new concept called a regulated contract (goods and services above £50,000 and works above £2million) which attracts certain obligations including consideration of community benefits and sustainability. Both concepts are aimed at improving economic, social and environmental wellbeing while boosting Small and Medium size enterprise involvement and promoting innovation.

13. The Act creates some new obligations for contracting authorities, such as the requirement to prepare and publish a procurement strategy and an annual procurement report. To facilitate these processes, it is proposed that Contract Standing Orders will require departments to provide information regarding proposed procurements to the Chief Procurement Officer on an annual basis. In addition, a register containing details of all contracts awarded as a result of regulated procurements must be made available online. Notification to the Chief Procurement Officer of all contracts awarded is proposed in the draft. The Act also sets out specific rules relating to community benefits, which will apply to all regulated procurements with an estimated contract value of £4 million or more. The Council has recently adopted its own Sustainable Procurement policy and the requirements of this policy are also reflected in the draft.

14. The new regime replaces what was formerly known as Part B services with a new category of contract relative to Social and Specific Services. These contracts are subject to a light touch and as such the processes around tendering are less restrictive. This is reflected in the new draft.

15. Procurement guidance issued in 2015 requires contracting bodies to consider the relevance of fair working practices in any procurement exercise it undertakes. A contracting authority must consider, before undertaking a procurement exercise, whether it is relevant and proportionate to include a question on fair work practices, which would be evaluated along with other relevant criteria, while ensuring the appropriate balance between quality and cost of the contract. This requirement is addressed in the draft.

Changes in process

16. National Procurement guidance and the PCIP process highlights the expectation that procurement will now drive efficiencies through the creation of comprehensive contract strategies and a rigorous approach to contract management following contract award. The revision of Contract Standing Orders seeks to address these requirements by explicitly requiring the procuring service to consider strategy, risk and a proposed management regime prior to tendering and to thereafter identify contract managers who will be responsible for ensuring that contractors adhere to contract terms and perform the contract to appropriate standards.

Financial Regulations

17. A review of the Council's Financial Regulations is currently being progressed by the Head of Accountancy. This review has not yet concluded but will ultimately require to ensure that the Regulations reconcile with the revised standing orders. In the meantime, the Council is asked to agree that the revised standing orders will take precedence should there be any inconsistencies between the two documents.

CONSULTATION

18. This review of Contract Standing Orders was carried out in consultation with all Council Services and with the Chief Internal Auditor.

CONCLUSIONS

19. The adoption of the revised Contract Standing Orders will not only reflect recent legislative changes in the procurement regime but also enable the Council to embrace a more commercial outlook on contracts to stimulate best value and derive efficiencies from the procurement process. It is also hoped that it will encourage participation from small and medium size enterprises, stimulating the local economy.

RECOMMENDATIONS

20. It is recommended that Council:-

- approve the current draft of the revised Contract Standing Orders (Annex 1);
- agree that they replace existing Contract Standing Orders with immediate effect; and
- pending conclusion of the review of the Council's current Financial Regulations, agree that in the event of conflict the Contract Standing Orders will take precedence.

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APPENDIX 1**EAST RENFREWSHIRE COUNCIL
STANDING ORDERS RELATING TO CONTRACTS (DRAFT)****1. DEFINITIONS**

These words and expressions have the meanings given to them in this standing order:-

“Contract” means a contract for the provision of services, supply of goods or materials or carrying out of public works or a combination of the same.

“Contract manager” means a person designated by the relevant department and named on the contract register as having day to day responsibility for managing the contract during its lifetime to ensure appropriate performance by the contractor.

“Consultant” means a professional person, or any firm or company employing such a person, engaged to provide professional advice in their particular field of expertise whether for a specific period or to complete a specific task,

“Contract for Social and other Specific Services” means a contract for any service as defined in Schedule 3 of the Public Contracts (Scotland) Regulations 2015. This includes, but is not limited to, contracts for social care provision, education and training services and event services.

“Contract for works” means a contract for the provision of any works as defined in Schedule 2 of the Public Contracts (Scotland) Regulations 2015. This includes, but is not limited to, contracts for construction, site preparation, demolition, civil engineering, roofing, plumbing and electrical installation.

“ Department” means any Service of the Council as identified in its corporate structure, namely Chief Executive’s Office, Corporate and Community Services, Environment , Education and Health and Social Care Partnership

“Director” means the Chief Officer of the department but also includes the Chief Executive, a Head of Service in that department or the Chief Officer- Legal and Procurement

“EU Threshold” means the value of a contract above which compliance with the full terms of the Public Procurement Regime is required.

“IT related goods and services” means hardware, software, datasets, communication media, audiovisual equipment and applications and/or the installation, servicing or updating of these goods

“Proprietary goods or services” mean goods or services that can only be obtained from one party because of technical or legal reasons

“Public Procurement Regime” means the EU Directives on Public Procurement and the UK legislation implementing the Directives in force at any given time

“Regulated procurement” means a procurement for goods or services with a value of £50,000 or over or a public works contract with a value of £2,000,000 or over.

2. SCOPE

These standing orders apply to all Contracts made by or on behalf of the Council except:-

- a) any contract relating to the engagement of Counsel or other legal specialists;
- b) any tenders invited on behalf of any consortium, collaborative group or similar body the Council is a member of
- c) any procurement conducted under any Framework Agreement set up by the Council or another Public Contracting Authority as defined in the Public Contracts (Scotland) Regulations 2015 as amended, including, but not restricted to, Scotland Excel, Scottish Procurement, Crown Commercial Services, the National Health Service, HUB West Scotland or other grouping of Local Authorities or public bodies.
- d) Any contract relating to a private finance initiative or a public private partnership or to HUB West Scotland.
- e) Any contract progressed by the Council under the City Deal initiative (which will be subject to the procedures and strategy agreed by the Council and others for that particular purpose).

To avoid doubt, these Standing Orders do not apply to any employment contract or any contract relating to the lease, transfer, acquisition or disposal of an interest in land or buildings.

3. APPLICATION/EFFECT

These Standing Orders take effect from 20 April 2016. Any unfinished contract process started prior to that date must be concluded using the previous Standing Orders.

4. VARIATION, REVOCATION

The Chief Officer – Legal and Procurement can vary these standing orders to reflect changes in job titles, departmental restructuring, vacancies in posts or any change in the financial values of the E.U. Thresholds. In all other respects these standing orders may be varied or revoked only by decision of the Council.

5. BEST VALUE, FAIRNESS AND TRANSPARENCY

A department must seek Best Value for the Council in all contract processes it starts. It must be able to demonstrate fairness and transparency to all parties having an interest in a contract

6. ANNUAL PLAN

Before the end of March in each year, each Director must give the Chief Procurement Officer a list of proposed regulated procurements which their department expects to progress in the

next two financial years. This will allow the Chief Procurement Officer to produce the Council's annual plan which must be submitted to Scottish Government.

7. CONTRACT VALUE AND BUDGET

A department must identify the value of a prospective contract before placing it without competition or starting a tendering process for it. The Director must have a reasonable belief that there will be sufficient budget available to meet the net estimated cost of the contract. If funding is being provided by a third party, the Director must ensure that the Council have approved acceptance of that funding prior to commencing the tendering process.

8. COMMUNITY BENEFITS AND SUSTAINABLE PROCUREMENT

In all quick quotes/tenders of a value of £50,000 or more, the procuring department must decide whether to require bidders to identify proposed community benefits they will provide together with a method statement as to how they will achieve these benefits. A decision to include such a requirement will be based on the nature and length of the contract and other local factors.

Where community benefits are being sought from a contractor this fact should be included in any Quick Quote or contract notice

If community benefits are being sought, at the closing date for bids the preferred bid will be considered under the Council's Community Benefits policy current at that time.

For all proposed contracts with a value in excess of £25,000 relating to the matters specified in the Council's Sustainable Procurement Policy current at the time, an environmental opportunities checklist (embed link) must be completed by the procuring department before they are advertised.

9 CONTRACT PROCESS

- i) Contracts for goods and services of a value of £10,000 or less and for works of a value of £20,000 or less will be progressed in a manner to be determined by the Director of the procuring department, subject to the general requirement to obtain best value and ensure fairness reflected in Standing Order 5.
- ii) Contracts for goods and services of a value above £10,000 but under £50,000 and for works of a value above £20,000 but under £150,000 will be progressed by means of the Quick Quote procedure (link to procedure note)
- iii) Contracts for goods and services of a value of £50,000 and above and for works of a value of £150,000 and above will be progressed by the Chief Procurement Officer.(link to procedure note)

10 PUBLICITY FOR TENDERS AND CONTRACTS

This Standing Order does not apply to tenders for Social and other Specific Services which are subject to the terms of Standing Order 17 or to contracts for the appointment of consultants which are subject to Standing Order 19.

All other Contracts for goods and services of a value of £10,000 or less and for works of a value of £20,000 or less shall be advertised at the discretion of, and in a manner decided by, the Director of the procuring department taking account of the nature of the contract, its value and the need to ensure best value for the Council. The Director must record the reasons for deciding that a contract will not be advertised and must keep this record as evidence.

All other Contracts for goods and services valued between £10,000 and £50,000 and for works valued between £20,000 and £150,000 shall be advertised by the Director of the procuring department in accordance with the Quick Quote procedure.

All other Contracts for goods and services valued £50,000 and above and for works valued £150,000 and above will be advertised by the Chief Procurement Officer publishing an invitation to tender on the Public Contracts Scotland portal.

11. ACCEPTANCE OF TENDERS

In all cases the tender to be accepted will be the most economically advantageous tender. Where the preferred tender falls within the approved budget it will be accepted:-

- i. If of a value of £10,000 or less (for goods and services) or £20,000 or less (for works), by the procuring department issuing an acceptance letter together with a purchase order.
- ii. If a Quick Quote, by the placing of a contract award notice on the Quick Quote system by the procuring department
- iii. If for the supply of goods and services and of a value between £50,000 and £150,000 inclusive, by the Chief Officer – Legal and Procurement, Chief Procurement Officer or the Principal Solicitor.
- iv. If of a value in excess of £150,000, by the Chief Officer – Legal and Procurement or the Principal Solicitor.

If it is proposed to accept a tender and the price is in excess of the approved budgetary figure, the prior approval of the Chief Executive or the Chief Finance Officer must be obtained and a report submitted to the next meeting of the Cabinet or appropriate Committee.

12. PURCHASE ORDERS AND CONTRACT REGISTER

At the time of acceptance of any tender, Quick Quote or award of contract, the procuring department must issue a corresponding purchase order. It must thereafter follow the required procedures regarding goods received notification and prompt payment of invoices.

The contract and the purchase order must be cross referenced and all payments in respect of the contract made in accordance with the contract and purchase order terms.

The value of any purchase order should reflect the value of the corresponding contract but may be increased during the life of a contract by a figure no more than 10% of the contract value in the case of goods and services contracts and no more than 15% in the case of works contracts to allow for contingencies which arise.

For contracts that have no guaranteed or fixed expenditure (such as framework agreements or measured term contracts) the purchase order value should be set in line with anticipated spend

Departments must advise the Chief Procurement Officer by e-mail of the award of any contracts of Quick Quote value and above and the corresponding purchase order references so that they can be entered on the Council's Contract register.

13. CONTRACT STRATEGY

Before issuing any tender for goods and services of a value of £50,000 and above and for works of £150,000 and above, the procuring department must liaise with the Chief Procurement Officer to produce a contract strategy. Amongst other matters, the strategy will require to identify whether it is relevant and proportionate to evaluate contractors in relation to fair work practices given the nature of the contract.

At the strategy development stage the procuring department should identify all risks associated with the procurement so as to include measures to mitigate them in tender documentation. The procuring department will enter the risk in their service risk register if the Director perceives the risk to be significant.

In developing the contract strategy, procuring departments should identify the appropriate level of contract management to be applied during the contract period taking into account the total contract value, complexity, risk and market conditions. This should be reflected in the invitation to tender.

After awarding the contract, the procuring department should identify a Contract manager to manage it in line with the standards identified in the tender. Contract management reviews shall cover the financial aspects of the contract and other relevant operational issues to establish a measure of supplier performance against the contract requirements with evidence being retained for audit purposes.

14. CONTRACT VARIATIONS

Any contract variation under £50,000 must be authorised in writing by the Director of the procuring department or other officer nominated in writing for that purpose by that Director. In such cases, any variation over £30,000 or 15% of the original contract value (whichever is greater) must be reported to Cabinet as soon as practicable.

Variations over £50,000 must be reported to Cabinet for approval prior to the variation being instructed. If the variation is urgently required, approval may be given by two members of Cabinet. The variation should be reported to Cabinet as soon as practicable after such approval.

15. EXEMPTIONS FROM COMPETITION

Prior to the award of a contract, and provided best value is obtained, exemption from competition may be sought:-

- i. where the Director of the procuring department considers that the contract is urgently required to minimise risk of personal injury or damage to property. A report will be submitted by the Director to the next meeting of the Cabinet or appropriate Committee detailing the risks identified and the action taken.
- ii. where the Director of the procuring department is satisfied that special circumstances apply (such as an urgent need to fulfil an ongoing Council function otherwise incapable of performance).
- iii. where the Director can establish that the contract relates to proprietary works, goods or services.

The Chief Procurement Officer will decide all exemption requests under ii and iii above for contracts valued within the Quick Quote thresholds.

The Chief Officer Legal and Procurement will decide all exemption requests under ii and iii above when the value of the contract is £50,000 and above but less than £100,000 (goods and services) or £150,000 and above but less than £200,000 (works).

The Director shall complete the exemption form (embed link) outlining the basis on which the exemption is sought and e-mail it to the relevant approving officer.

Exemption requests under ii and iii above relating to contracts with a value of £100,000 or more (goods and services) and £200,000 or more (works) must be reported to the Cabinet or appropriate committee for approval prior to entering into the contract. The report must outline the circumstances justifying use of this provision and a copy must be retained by the procuring department for audit purposes.

These exemptions do not apply where the contract value exceeds the EU threshold.

16. FRAMEWORK AGREEMENTS

In cases where there is likely to be an ongoing demand for works, goods or services over an extended period, Directors should consider the use of a Framework Agreement to engage a variety of contractors.

The Director should seek advice from the Chief Procurement Officer to confirm the suitability of a framework arrangement and/or the availability of any pre-existing frameworks which can be used by the Council.

No Framework Agreement set up by the Council shall last longer than 4 years unless there are exceptional circumstance to justify a longer term. A written record of the exceptional circumstances must be kept with the Framework Agreement.

The way in which future contracts under a Framework are to be called off and the terms and conditions of those call-off contracts must be specified in the Framework agreement and must be honoured by the procuring department throughout the life of the Framework.

17. CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES

Standing Orders 9 and 10 do not apply to contracts for Social and other Specific Services.

The Director of the procuring department may decide on the procedure to be used to award any contract or framework for "Social and other Specific Services." In particular, the Director will decide whether the contract requires to be advertised for competition. To avoid doubt, Standing Order 5 continues to apply to all such procedures

For Contracts with a value in excess of £625,000, the Director will liaise with the Chief Procurement Officer to identify what formal notices, if any, require to be published before commencing the procedure.

The Director will provide the Chief Procurement Officer with all details required to enable the publication of any necessary notice.

The Director of the Health and Social Care Partnership (HSCP) may decide on the procedure to be used to award any contract or framework for social care services taking into account the specific nature of the services sought and the needs and requirements of the clients likely to use the services.

Any award of a contract or framework for social care services with a value in excess of £625,000 must be based on the best price quality ratio, taking into account the following criteria:-

- the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- the involvement and empowerment of users; .
- innovation; and
- any other relevant consideration

The Director of the HSCP will keep a full written record of his/her position regarding the specialist nature of the services to be procured and/or the availability of appropriate providers and will retain the record with the contract.

The Director of the HSCP must submit an annual report to the Council detailing the contracts awarded in relation to the provision of specialist social care services. This report will not identify the recipients of such services but will be submitted on an anonymised basis.

In the event that the contract involves the provision of services across a range of Council functions eg Education and Social Care, the Director of the HSCP will consult with any other relevant director prior to commencing the award process.

18. PRIOR APPROVAL FOR SPECIFIC CONTRACTS

Prior to commencing a process to let any of the following types of contract (of whatever value), the procuring department shall liaise with and seek approval of the senior officer identified below.

- any contract for the purchase of IT related goods and services, the Head of ICT and Digital Enablement,
- any contract involving work to Council land and buildings, the Head of Housing, Property and Technical Services
- any contract involving the handling of records containing personal data, the Council's Chief Officer - Legal and Procurement.

19. CONTRACTS FOR APPOINTMENT OF CONSULTANTS

Where the fee for the desired consultancy work is likely to be less than £50,000 the Director of the Procuring department may decide on the procedure to be used to make the appointment, but must always take into account the need for equal treatment, best value and transparency in reaching such a decision. If an award of consultancy is made without competition, a written record of the basis on which the appointment is made identifying relevant factors in the decision must be retained by the Director.

Where it is anticipated that a fee bid is likely to exceed £50,000, the appointment process will be conducted by the Chief Procurement Officer as per Standing Order 10 (iii)..

Any consultant appointed will be required to comply with these Standing Orders as though they were officers of the Council.

Any consultant appointed will be required, upon request at any time during the contract, to produce all records maintained by them in relation to the contract and on completion of the contract deliver all such records to the Director of the procuring department, if so requested.

20. PRE- CONTRACT CONFIRMATIONS

Before any contract is awarded, the Council shall satisfy itself that a preferred bidder:-

- i. is complying with the responsibilities placed on them by the Equality Act 2010 relating to discrimination in employment.
- ii. If the contract is valued in excess of £50,000, is of satisfactory financial standing as confirmed by the Chief Procurement Officer checking with a reputable credit reference agency.
- iii. is operating health and safety policies which conform to current legislation including, where appropriate, the Construction (Design and Management) Regulations 2015 or any future amendment or replacement of those regulations.

21. INSURANCE

The Director of the procuring department must identify the level of liability insurance relevant to any prospective contract based on the risks to the Council inherent in the contract. This should be stated in the tender documentation. Before any contract is awarded, contractors must provide details of all insurances held by them relevant to the contract, including, but not restricted to, Public Liability, Employers' Liability, Professional Indemnity, Product Liability

and Contract Works. No contract shall be awarded to a contractor who does not exhibit the relevant level of insurance cover.

A contractor's insurance cover should be checked annually by the contract manager during the term of the contract.

22. SPECIFICATION STANDARDS

Any tender submitted in response to an invitation to tender shall require to comply with any recognised British, European or International standard current at the date of tender return and the goods, materials or services to be used or supplied and all relevant workmanship shall meet that standard as a minimum requirement.

23. CONTRACT PROVISIONS

Every Contract issued by the Council will include a clause :

- i. prohibiting the contractor from transferring or assigning to a 3rd party any part of the contract without the prior written consent of the Chief Procurement Officer or Director of the procuring department;
- ii. identifying the extent to which the contract may be sub-contracted, if at all;
- iii. entitling the Council to cancel the contract and to recover from the contractor any loss resulting from the cancellation, if the contractor or the contractor's representative (whether with or without knowledge of the contractor) has colluded in tendering for that contract or any other contract with the Council or has employed any corrupt or illegal practices in either the procurement or the execution of the contract or any other contracts with the Council.
- iv. requiring the contractor to maintain relevant levels of insurance throughout the terms of the contract

24. LIQUIDATE AND ASCERTAINED DAMAGES

If the contract must be performed by a particular date or with reference to a series of dates, the Director of the procuring department will identify a genuine pre-estimate of any loss that may arise from its non-performance in that timeframe so that a clause may be inserted into the contract allowing recovery of such sums should the contractor default.

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