

# **CONTRACT REGULATIONS**

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## **1 INTRODUCTION**

- 1.1 These Contract Regulations are made in terms of section 81 of the Local Government (Scotland) Act 1973 and shall apply, unless otherwise stated, to the making of all contracts by the Comhairle or on its behalf.
- 1.2 These Contract Regulations are subject to the over-riding requirements of the EU Directives on public procurement and the applicable national legislation (together referred to in these Contract Regulations as the Public Procurement Regime). Procurement of works, goods and services are governed by the Public Procurement Regime irrespective of whether they are exempted from the provisions of these Contract Regulations.
- 1.3 It is not permitted to separate or sub-divide any procurement into two or more contracts in order to avoid application of these Contract Regulations or the Public Procurement Regime.
- 1.4 The value of a contract is the total estimated value of the whole contract, not the estimated annual value of the contract. Unless otherwise provided for in the Public Procurement Regime, the value of a contract is calculated by multiplying the annual contract cost by the term of the contract. If the contract is for an indefinite number of years, the annual cost must be multiplied by 4 to reach an indicative contract value.
- 1.5 All contracts for the provision of goods or services having a value of £50,000 or more, or for works having a total value of £2,000,000 or more, are subject to the Public Procurement Regime. These are the values at November 2016. Advice on current values should be sought from the Procurement Section or by reference to the Comhairle's Procurement Guide which is available on the Comhairle's intranet.
- 1.6 All Comhairle Officers, including those in Significant Trading Organisations, are required to comply with both the Public Procurement Regime and these Contract Regulations. The Chief Executive is required to ensure compliance with the Public Procurement Regime.
- 1.7 Officers in the Strategic Procurement Section, Department of Finance and Corporate Resources, will provide advice to Officers in relation to the appropriate means of procuring a contract and the use of the standard European Single Procurement Document.

## **2 APPLICATION/EFFECT**

- 2.1 These updated Contract Regulations shall apply and have effect from 15 December 2016. However, any contract procedures commenced but not concluded prior to that date shall be concluded using the previous Contract Regulations.
- 2.2 Application of these Contract Regulations should be made with reference to the Comhairle's Procurement Policy, the Land and Information Technology Regulations and the Scheme of Delegation to Officers and such other policies and procedures as the Chief Executive shall from time to time determine.

## **3 FINANCIAL PROVISION**

- 3.1 Unless otherwise agreed by the Comhairle in relation to a specific contract, no tender shall be invited or offer made or accepted unless the net estimated expenditure thereon is included within budgets previously approved by the Comhairle or, if funding is being provided by a third party, the acceptance of that funding has been approved by the Comhairle.

- 3.2 No tender shall be invited for any contract for the supply of goods or materials, for the provision of services or for the execution of works unless a written estimated valuation and/or business case, which will be prepared by the appropriate Officer and will be held in the department for six years, is prepared.

#### **4 COMPETITIVE TENDERING AND EXEMPTIONS**

- 4.1 Tenders for all contracts for the supply of goods or materials, the provision of services or the execution of works shall be invited on a competitive basis. Every contract shall be in writing and shall be signed by the Chief Executive or his nominee or other Officer designated by him for the purpose, except where otherwise agreed by the Comhairle.

- 4.2 The following shall be exempted from the provisions of these Contract Regulations, but not from the requirement to seek best value or the requirement to comply with the Comhairle's Financial Regulations, Procurement Policy and the Public Procurement Regime:

- (a) any contract where the total estimated value is less than the figure prescribed from time to time under the Procurement Reform (Scotland) Act 2014 as the contract threshold for a regulated public contract (currently £50,000);
- (b) any contract where the total estimated value is less than the relevant threshold set by the Public Procurement Regime provided that the relevant Committee has resolved not to seek tenders. Details of the relevant thresholds may be obtained from the Comhairle's Procurement Website;
- (c) contracts of employment;
- (d) any contract for the provision of urgent professional services (including, for the avoidance of doubt, structural engineering services or the appointment of Counsel or other legal specialists) required to defend or secure the legal position of the Comhairle unless the Comhairle in any particular case decides otherwise;
- (e) any contract relating to the transfer, acquisition or disposal of an interest in heritable property;
- (f) any call-off contract under a framework agreement established in accordance with Contract Regulation 6;
- (g) any contract for the supply of goods or materials, the provision of services or the execution of works which in the opinion of the Chief Executive, in consultation with the appropriate Director, are urgently required for whatever reason and where competitive tendering would cause unacceptable delay. In such circumstances, a report will be prepared by the appropriate Director and submitted to the next meeting of the Comhairle detailing the circumstances and the action taken;
- (h) any procurement conducted by a consortium, or similar body, of which the Comhairle is a member;
- (i) any procurement conducted by Scotland Excel (or similar representative body approved by the Scottish Government) in which the Comhairle is a participant or a beneficiary;
- (j) any framework agreement established by the Scottish Government or Crown Commercial Service in which the Comhairle is a participant or a beneficiary;
- (k) any contract where:
  - purchase from a particular supplier is desirable to ensure compatibility with existing goods or servicing arrangements ("a single source"); or
  - the proposed supplier is the only one known to possess unique or specialised goods and/or services, or the articles are unobtainable from any other source and there are no satisfactory alternatives ("a sole source").

In either case, should the appropriate Director consider it desirable and in the best interests of the Comhairle, a tender may be invited for the supply of

goods or materials, the provision of services or the execution of works from the single source or sole source. The appropriate Director must complete a Single Source Supplier Request for Approval Form and submit it for approval in advance by the Chief Executive; and

- (l) any contract where the Comhairle is satisfied that exemption from these Contract Regulations or any part of them is justified by special circumstances. Such special circumstances may include:
- where the proposed supplier is, by reason of recent experience (i.e. within the last three months), the best value for money and would be likely to remain so in another competition;
  - where intellectual property rights are an important issue.

4.3 Tenders shall be invited on a competitive basis for the supply of goods or materials, the provision of services or the execution of works by:

- (a) advertisement in the Official Journal of the European Union (via Public Contracts Scotland, the Scottish Government's procurement portal), in the event that the type and estimated total value of the contract is such that the Public Procurement Regime requires such advertisement;
- (b) advertisement on Public Contracts Scotland (having due regard to Scottish Government guidelines);
- (c) in exceptional circumstances where it can be demonstrated to the satisfaction of the Chief Executive that the use of Public Contracts Scotland is not an appropriate advertising route, advertisement in at least two newspapers circulating in the area, or in at least one newspaper circulating in the area and a relevant trade publication, or such wider circulation as may be recommended from time to time by the Scottish Government; or
- (d) inviting tenders on a selective basis from contractors on a framework agreement which is either established by the Comhairle in accordance with Contract Regulation 6 or one in which the Comhairle is a participant or beneficiary, in either case having due regard to Contract Regulation 4.3(a).

4.4 Any such notice as is referred to in Contract Regulation 4.3(a) or (b) may reserve the Comhairle's right to restrict the number of contractors to whom the ITT may be issued and to make a selection from contractors intimating a desire to tender.

## **5 CONSULTANTS**

5.1 A recommendation to appoint a consultant or to invite tenders from consultants shall be referred to the Chief Executive by the appropriate Director in terms of the Scheme of Administration and the Scheme of Delegation. Such a reference must include a statement that the project in relation to which it is intended to engage consultants has been approved by the Comhairle in terms of its Constitutional Documents and that adequate financial provision is in place for the consultancy contract. The Director must indicate why the provision of the service is not available within the Comhairle and why the appointment is necessary. The Director will also advise the Chief Executive of any person appointed as a consultant or directly employed by a firm appointed as consultants who, within a period of five years prior to the date of the proposed appointment, has been an employee of the Comhairle.

5.2 It shall be a condition of the engagement of the services of any consultant (not being an Officer of the Comhairle) who is to be responsible to the Comhairle for a contract on its behalf that, in relation to that contract, he shall:-

- (a) comply with these Contract Regulations as if he were an Officer of the Comhairle;
- (b) at any time during the carrying out of the contract, produce on request to the appropriate Director all records maintained by him in relation to that contract; and

- (c) on completion of the contract, transmit all records to the appropriate Director as may be required.

## **6 FRAMEWORK AGREEMENTS**

Where there is likely to be a repeated requirement for a particular supply, service or works, it may be procured by way of a framework agreement. The appropriate Director shall refer the contract to the Director of Finance and Corporate Resources who will provide assistance and guidance to that Director. No framework agreement with a value above the EU threshold shall last longer than four years, unless there are exceptional circumstances to justify a longer term. Details of any such exceptional circumstances shall be recorded in writing and retained with the framework agreement.

## **7 INVITATION TO TENDER**

7.1 The appropriate Director, in consultation with the Chief Executive and Director of Finance and Corporate Resources, will prepare the Scope of Requirements and any other contract-specific documents to be included in the Invitation to Tender (ITT). If a Consultant is engaged by the Comhairle, he will, if required by the terms of his engagement, prepare the said documents in consultation with the appropriate Director and the Chief Executive.

### **Security**

7.2 If the estimated cost of carrying out the contract is more than £750,000, the Comhairle will ask for security for completing the contract. In the case of a works contract, the preferred form of security shall be such increased level of retention as the Chief Executive, in consultation with the Director of Finance and Corporate Resources and Director of Technical Services, shall determine; a performance bond or other security may be sought if the Director of Technical Services, following consultation with the Chief Executive and the Director of Finance and Corporate Resources, determines that to be more appropriate in the circumstances of the particular contract. The Conditions of Contract shall set out the form and amount of the security.

7.3 The Comhairle may call for security on any other contracts.

7.4 The Comhairle may, in exceptional circumstances, dispense with the requirement for security on such terms and conditions as the Comhairle may resolve. The Comhairle will specify in the ITT the levels of public liability, employers' liability and professional indemnity insurance.

7.5 No payment shall be made under a contract where a bond or other guarantee has been required before the documentation for that bond or other guarantee has been completed except where the value of any accrued interim payments exceeds the value of the bond or other guarantee in which case the cash excess may be paid to the contractor.

### **Invitation to Tender**

7.6 The ITT shall state:-

- (a) the nature and purpose of the contract for which tenders are invited;
- (b) the last date and time for receipt of tenders;
- (c) the method by which tenders are to be submitted;
- (d) that tenders shall remain open for acceptance for the period specified in the ITT unless previously withdrawn in writing;
- (e) the criteria to be used in evaluating tenders. Where the criterion to be used is the most economically advantageous tender, the ITT will state the elements to be considered in assessing economic advantage;
- (f) that tenderers may be requested to provide clarification of their tender;

- (g) that the Comhairle reserves the right to accept a tender other than the lowest, to accept no tender or to accept a tender in whole or in part;
- (h) that any tender received after the last date and time for submission may not be considered;
- (i) that compliance with all the terms of the ITT is compulsory and that tenderers may be disqualified if they fail to complete any part of the ITT unless such failure is rectified as required in the ITT;
- (j) notwithstanding the previous paragraph and subject to the terms of Contract Regulation 11, that the Comhairle will continue to follow good practice by adjusting tender prices where there is an obvious arithmetical error;
- (k) the name of the person to whom, or the email address to which, tenderers may make requests for information or clarification;
- (l) that any attempt by tenderers to communicate either directly or indirectly with Members or Officers of the Comhairle, other than the nominated person, may result in the automatic disqualification of their tender;
- (m) that tenders which are not submitted in accordance with the requirements of the ITT will not be considered; and
- (n) that all tenders must be signed or electronically authenticated by an authorised signatory of the tenderer.

### **Communications**

- 7.7 Elected Members, Comhairle employees and relevant Consultants, other than any person nominated in the ITT to whom requests for information should be made, must report to the Chief Executive any communication, however informal, regarding a contract that is the subject of a tendering process. The Chief Executive will decide whether that contact, direct or indirect, should result in the disqualification of a tenderer.

### **Law of Scotland**

- 7.8 Except where otherwise agreed by the Chief Executive, every contract shall be subject to the law of Scotland.

### **Standards**

- 7.9 Where an appropriate European Standard or Code of Practice (or in the absence of such a Standard or Code, a British Standard Specification or British Standard Code of Practice issued by the British Standards Institution) is current at the date of issue of the ITT, every contract shall require that, as the case may be, all goods and materials used or supplied and all workmanship shall be no less than that standard or an equivalent standard approved in a Member State.

### **Site Possession**

- 7.10 In the case of a contract for the execution of works, no contractor shall be permitted possession of the site until:-
- (a) land acquisition has been completed (or other arrangements have been made to the satisfaction of the Chief Executive);
  - (b) the contract documentation has been completed; and
  - (c) evidence of adequate insurances has been produced to the absolute satisfaction of the Director of Finance and Corporate Resources.

### **Propriety**

- 7.11
- (i) Any person who has reason to believe that these Contract Regulations have been applied or complied with improperly or incorrectly may express such concerns in writing to the Chief Executive who shall then conduct an investigation.
  - (ii) In every written contract a clause shall be inserted to secure that the Comhairle shall be entitled to cancel the contract and to recover from the contractor the amount of any loss resulting from such cancellation if the contractor or any of his employees or any person acting on his behalf (with or without the knowledge of the contractor) shall have offered or given or agreed

to give any person any gift or consideration of any kind as shall be an inducement or reward in connection with any contract with the Comhairle or shall have committed any offence under the Bribery Act 2010, or shall have given any fee or reward, the receipt of which is contrary to the relevant Code of Conduct.

#### **Assignment and Sub-Contracting**

- 7.12 In every written contract a clause shall be inserted whereby the contractor shall be prohibited from transferring or assigning or sub-contracting to any person or persons whatsoever, any portion of the contract without the prior written consent of the Comhairle.

#### **Negotiated Conditions**

- 7.13 Contracts shall be subject to such terms and conditions as the Chief Executive may deem appropriate and the Chief Executive shall have authority to agree where appropriate such amendments to the contract conditions as shall be justified in the context of particular contracts, subject always to the Public Procurement Regime and the Comhairle's Procurement Policy.

#### **Damages**

- 7.14 The Comhairle may require the inclusion of liquidate and ascertained damages clauses in any of its contracts.

#### **Freedom of Information, Data Protection and Environmental Information**

- 7.15 All contracts shall make clear the Comhairle's obligations and requirements under the Freedom of Information (Scotland) Act 2002, the Data Protection Act 1998 and the Environmental Information (Scotland) Regulations 2004.

#### **Payment Arrangements for Building, Construction and Engineering Contracts**

- 7.16 Where a contract provides for payment to be made by instalments, the Director of Finance and Corporate Resources shall arrange for the keeping of a register to show the state of the account on each contract between the Comhairle and the contractor, together with any other payments and the related professional fees.
- 7.17 Payments to contractors on account of contracts shall be made only on a certificate issued by the contract administrator, engineer or property maintenance Officer (or private architect, engineer or consultant) as appropriate, or by his deputy or other Officer nominated by him in writing for the purpose.
- 7.18 Subject to the provisions of the contract and the Public Procurement Regime, in each case any extra payment or variation of the payment arrangements shall, unless otherwise evidenced to his satisfaction, be authorised in writing by the contract administrator, engineer or property maintenance Officer (or private architect, engineer or consultant) as appropriate, or by his deputy or other Officer nominated by him in writing for the purpose. Any such extra payment or variation, the estimated additional cost of which exceeds £25,000, shall be reported to the appropriate Committee as soon as practicable.
- 7.19 The Director of Finance and Corporate Resources shall, to the extent he considers necessary, examine final accounts for contracts and he shall be entitled to make all such enquiries and receive such information and explanations as he may require in order to satisfy himself as to the accuracy of the accounts.
- 7.20 Claims from contractors in respect of matters not clearly within the terms of the contract shall be referred to the Chief Executive for consideration of the Comhairle's legal liability and, where necessary, to the Director of Finance and Corporate Resources for financial consideration before a settlement is reached.
- 7.21 It shall be the duty of the Officer concerned to take appropriate action in respect of the application of any liquidate damages clause in a contract and to report his action



to the Committee concerned after the issue of the final certificate with a value in excess of £250,000.

- 7.22 Where the total cost of work carried out under a contract exceeds by more than 5% the approved contract sum a report of such costs shall, after agreement of the final account, be submitted to the appropriate Committee. This provision to monitor and report cost over-runs shall also apply to bus contracts, school catering services, and any other service contract or group of similar contracts which exceeds £250,000 per annum.

## **8 RECEIPT AND CUSTODY OF TENDERS**

- 8.1 The Licensing Officer shall keep and maintain a register of all tenders received, with the exception of those received through PCS-Tender (the Scottish Government's eTendering system), in respect of each contract and shall record therein the name and address of each tenderer and the value or amount of the tender at tender openings. The full names of all Officers attending tender openings shall also be recorded by their signing the Register. The Register shall also record the name of the Officer responsible for verifying the validity of the tender and the result of said verification shall also be recorded in the Register when said verification has been carried out.
- 8.2 All tenders received must be securely stored.
- 8.3 No elected Member or official shall directly approach the Officer responsible for keeping the Register to request sight of the said register or to obtain information in relation to a particular contract during the evaluation process prior to the award of the contract. Any person requiring such information should request the same from the Chief Executive stating their "need to know" as defined in common law.
- 8.4 Tenders submitted through PCS-Tender shall be opened by a member of the Procurement Section and a member of the Licensing Office and recorded on a tender receipt template which will be retained in the Licensing Section.

## **9 LATE AND NON-COMPLIANT TENDERS**

Tenders which are submitted late or which are non-compliant shall be dealt with in accordance with the Comhairle's Policy on Late and Non-Compliant Tenders.

## **10 OPENING OF TENDERS**

- 10.1 After the last date and time for receipt of tenders, they shall be opened by the Chief Executive or his nominee and Licensing Officer or the Licensing Assistant or such other Officer as the Chief Executive may nominate as the person responsible for keeping the Register of tenders in the presence of another Officer of the Comhairle representing the department on whose behalf the tenders are being obtained. No tenders shall be opened prior to the date and time specified.
- 10.2 No elected Member may be present at the opening of tenders and any Officer other than those detailed above may only be present with the prior written consent of the Chief Executive.
- 10.3 After the last date and time for receipt of electronic tenders submitted through PCS-Tender, they shall be opened by the Procurement Manager or his nominee and such other Officer as the Chief Executive may nominate as the person responsible for keeping the Register of tenders.

## **11 VALIDATION AND CERTIFICATION OF TENDERS**

All tenders shall be inspected by the Procurement Officer as soon as possible after opening. The Officer within the relevant Department, or the Accountancy Section if appropriate, will check tenders against the ITT for arithmetic, completeness and accuracy. Where such an issue in a tender is noted, the tenderer may be afforded the opportunity of confirming his offer or amending it to correct a genuine error or omission. In such circumstances, the Procurement Officer will consult with the Chief Executive to determine the extent to which it is appropriate to afford the tenderer an opportunity to amend his tender. Where the tenderer amends his tender, the Procurement Officer shall ensure that the tender report details the original and corrected bids.

## **12 EVALUATION OF TENDERS**

- 12.1 Tenders shall be evaluated in accordance with the evaluation criteria set out in the ITT determined prior to the tendering exercise by the appropriate Director and approved by the Chief Executive (and the Director of Finance and Corporate Resources for his respective interests). Only those tenders that comply with the evaluation criteria shall be considered for acceptance.
- 12.2 Details of the processes adopted by the Comhairle and its policy, strategy and approach to contracts for supplies, services and works are available on the Comhairle's website. Links to further sources of information are also provided on the website.

## **13 ACCEPTANCE OF TENDERS**

- 13.1 The Chief Executive shall have delegated authority to accept the lowest tender for any contract or the tender deemed to be most economically advantageous following evaluation of quality/price criteria detailed in the ITT. In the event that a tender is not to be accepted in terms of the Scheme of Delegation and is the subject of a Report to Members, elected Members shall only seek an explanation of matters within the Report that are not clear to them.
- 13.2 Only the Chief Executive may accept a tender and thereby bind the Comhairle.
- 13.3 All tenderers shall be advised in writing of the outcome of the tendering process and a tender acceptance issued to the successful tenderer by the Chief Executive as soon as it is reasonably practicable after the conclusion of the tender evaluation process.

## **14 POST-TENDER NEGOTIATIONS**

- 14.1 There may be instances where, after tenders have been received, the appropriate Director may consider that negotiations on price, delivery or content would be in the Comhairle's best interests. Between the last time and date for the receipt of tenders and the date on which a decision is taken as to which, if any, tender is to be accepted, the appropriate Director may instruct his staff to enter into post-tender negotiations, provided that such a course of action is permitted by the Public Procurement Regime.
- 14.2 A full written record of all post-tender negotiations will be kept by the appropriate Director and retained with the original tender.

## **15 CONTRACTS**

- 15.1 A Contract Register shall be maintained by the Director of Finance and Corporate Resources detailing the departmental Officer responsible for each contract so that copies may be readily accessible.
- 15.2 The appropriate Director on whose behalf the tenders are being obtained shall ensure that all relevant documentation relating to the tendering process (including ITTs and tenders) shall be retained and stored securely for the periods set out in Contract Regulation 16. Tenders submitted through PCS-Tender shall be retained on the system for the period determined as appropriate by the Scottish Government Electronic Procurement Team operating the system on behalf of the Comhairle.
- 15.3 Every contract shall be in writing and shall be signed by the Chief Executive or his nominee or other Officer designated by him for the purpose, except where otherwise agreed by the Comhairle.
- 15.4 In the event that an option is available to the Comhairle to extend a contract, a decision of the Comhairle will be required to exercise that option unless delegated authority is granted by the Comhairle to an Officer of the Comhairle.

## 16. DOCUMENT RETENTION

The following document retention policies should be followed in all cases.

ACTIVITY	RETENTION ACTION	EXAMPLES OF RECORDS (This is not an exhaustive list)
<b>Pre contract advice</b> The process of calling for expressions of interest	Destroy 2 years after contract let or not proceeded with	Expressions of interest
<b>Specification and Contract Development</b> The process involved in the development and specification of a contract	Destroy 12 years after the terms of contract have expired	Tender specification Note: For project files containing drafts leading to a final version these records can be destroyed
<b>Tender Issuing and Return</b> The process involved in the issuing and return of a tender	Destroy 1 year after start of Contract	<input type="checkbox"/> Opening notice <input type="checkbox"/> Tender envelope
<b>Evaluation of Tender</b> Summary tender evaluation criteria Successful tenders	Destroy 12 years after the terms of contract have expired	<input type="checkbox"/> ITT <input type="checkbox"/> Evaluation documents <input type="checkbox"/> Tenders <input type="checkbox"/> Quotations
Unsuccessful tenders	Destroy 1 year after start of Contract	<input type="checkbox"/> Tenders <input type="checkbox"/> Quotations
<b>Post-tender Negotiation</b> The process in negotiation of a contract after a preferred tender is selected	Destroy 1 year after the terms of contract have expired	<input type="checkbox"/> Clarification of contract <input type="checkbox"/> Post-tender negotiation minutes
<b>Awarding of contract</b> The process awarding of contract	Destroy 12 years after the terms of contract have expired	<input type="checkbox"/> Signed contract
<b>Contract Management</b> Contract operation and monitoring	Destroy 2 years after the terms of contract have expired	<input type="checkbox"/> SLA <input type="checkbox"/> Compliance <input type="checkbox"/> Performance <input type="checkbox"/> Minutes and papers of meetings
Management and amendment of contract	Destroy 12 years after the terms of contract have expired	<input type="checkbox"/> Changes to requirements <input type="checkbox"/> Variation forms <input type="checkbox"/> Extension of contract <input type="checkbox"/> Complaints <input type="checkbox"/> Disputes on payment

## **17 EQUAL OPPORTUNITY IN EMPLOYMENT**

Before any contract is awarded, the Comhairle shall obtain from the contractor an assurance in writing that, to the best of the contractor's knowledge and belief, the contractor has complied with all statutory requirements in respect of ensuring equal opportunity in employment.

## **18 EQUALITY AND NON-DISCRIMINATION**

- 18.1 The Comhairle must have due regard to whether the award criteria and conditions of contract should include considerations to enable it to better perform the equality duty set out in the Equality Act 2010.
- 18.2 The Comhairle shall obtain information from a contractor to enable the Comhairle to assess whether the contractor is complying with its responsibilities under the Equality Act 2010 relating to equality and non-discrimination in respect of the protected characteristics set out in that Act.

## **19 HEALTH AND SAFETY**

No contract to which these Contract Regulations apply will be accepted unless the contractor satisfies the Comhairle that they are operating health and safety policies which conform to current relevant legislation including, where appropriate, the Construction (Design and Management) Regulations 2007.

**21 November 2016**