

The background of the slide features a large, faint, light blue outline of the Seal of the Government of Yukon. The seal is a shield divided into four quadrants. The top-left quadrant shows a diagonal cross. The top-right quadrant depicts a caribou head with antlers. The bottom-left quadrant shows a sailing ship on wavy lines representing water. The bottom-right quadrant shows an eagle with spread wings perched on a branch. Above the shield is a crown with four maple leaves. A banner at the bottom of the shield contains the text "A NE FOR A'".

# **AGENDA ITEM**

**9**

## **CONTRACT STANDING ORDERS**

**FALKIRK COUNCIL**

**Subject: CONTRACT STANDING ORDERS**  
**Meeting: FALKIRK COUNCIL**  
**Date: 22 JUNE 2016**  
**Author: DIRECTOR OF CORPORATE AND HOUSING SERVICES**

**1. INTRODUCTION**

- 1.1 The Council's contract standing orders (CSOs) were last revised and approved by Council in March 2012.
- 1.2 There have been considerable changes in procurement legislation with the introduction of Procurement Reform (Scotland) Act 2014 (the "Procurement Act") and the Public Contracts (Scotland) Regulations 2015 ("the Procurement Regulations"), as well as internal restructuring within the Council. The majority of the new rules came into force on 18<sup>th</sup> April 2016.
- 1.3 A review has been carried out of the CSOs by the Procurement Team and Legal Services in conjunction with Development Services (Roads and Architects) with a view to bringing them up to date. These have been circulated to Directors and relevant procurement staff for consultation and are attached in their proposed revised form (Appendix 1).
- 1.4 This report highlights the main changes arising from the new legislation and adapted into the CSOs together with proposed increases to contract award authorisation levels, and seeks Council's approval of them.

**2. THE PROCUREMENT REFORM (SCOTLAND) ACT 2014**

***Regulated Contracts***

- 2.1 The Procurement Act introduces a new category of contracts to be called regulated contracts that fall below the EU thresholds, thereby providing an additional layer of statutory requirements. Advertising of these contracts is to be through the Public Contracts Scotland website.
- 2.2 The relevant thresholds (April 2016) for Regulated Contracts are:
  - supplies contracts - £ 50,000 up to EU threshold (£164,176)
  - services contracts - £ 50,000 up to EU threshold (£164,176)
  - works contracts - £ 2,000,000 up to EU threshold (£4,104,394)

### **The Sustainable Procurement Duty**

- 2.3 This duty requires public authorities before and during the procurement of a Regulated Contract to *consider* how in carrying out the procurement it can improve the economic, social and environmental wellbeing of the Council area; facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process; promote innovation; and act with a view to securing such improvements in the procurement. This duty must be exercised in a manner that is transparent, proportionate and which does not discriminate against relevant economic operators (which would include economic operators in the wider EU)

### **Additional Features**

- 2.4 The Procurement Act makes statutory the following matters:
- The preparation and publication of a Procurement Strategy
  - The preparation and publication of an annual procurement report within three months of each financial year end. This would include matters such as details of the regulated procurements within the year and any community benefit requirements imposed.
  - Community benefit requirements should be *considered* for any regulated contracts of £4m or more.
  - Public authorities need to have regard to statutory guidance issued by the Scottish Government.

## **3. THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2015**

- 3.1 The Procurement Regulations replace the 2012 Regulations governing EU procurements and implement EU Directive 2014/24/EU. The EU thresholds (April 2016) are:

- supplies contracts - £ 164,176
- services contracts - £ 164,176
- works contracts - £ 4,104,394

- 3.2 The new rules are relatively familiar. The main changes are summarised below:

- Contracts can no longer be awarded based on cost alone, some quality element must be factored in (A quality/price ratio is already the norm for Council contracts).
- Some time limits have been reduced. For example, the minimum periods for the return of tenders: open procedure 35 days (reduced from 52); the restricted procedure 30 days (reduced from 37)
- Electronic availability of procurement documentation is mandatory as of 18th April 2016. Receipt of tender documentation by electronic means is not made mandatory until 18th October 2018. A new “light touch” regime is introduced for such as social care contracts, with a higher threshold of £589,148.
- A European Single Procurement Document (ESPD) has been introduced for pre-qualification purposes which is to be uniform across the EU. Allied to this is the introduction of greater self- certification on the part of economic operators, with checks undertaken only in relation to the successful tenderer prior to award.

Both measures are intended to reduce the burden on economic operators participating in a procurement.

- An additional tendering procedure called Innovation Partnership supplements the existing Open, Restricted, Negotiated and Competitive Dialogue procedures

#### **4. PROPOSED CHANGES TO AUTHORISATION LEVELS FOR CONTRACT AWARD**

4.1 The following authorisation levels are proposed (see CSO 6.2):

- (i) Chief Officer - Where the Contract Value does not exceed £250,000 (an increase from £100,000).
- (ii) Chief Officer in consultation with the Chief Governance Officer -Where the Contract Value does not exceed £500,000 (an increase from £350,000).
- (iii) Chief Officer in consultation with the Chief Governance Officer (subject to referral to the Executive)(ie the Contract List process) - Where the Contract Value is £500,000 or over (an increase from £350,000).

These increased levels are requested by the Services particularly in relation to works contracts where constructions costs are reported as increasing.

#### **5. THE USE OF CONSULTANTS/EXTERNAL ADVISERS**

5.1 Currently there are separate procedures in the *Protocol on the Appointment of Consultants* requiring Chief Executive approval for appointments over £10,000 in value. The use of consultants arises normally in the situation where the Council does not have the required in-house expertise or sufficient in-house capacity. The separate authorisation requirements have three main justifications:

- Control of expenditure on external advisers.
- Safeguarding against employees obtaining voluntary severance but being re-engaged to provide the work on a consultancy basis.
- Protecting against over reliance on external advisers to the detriment of in-house expertise and development.

5.2 Officers have consulted across Services to consider if separate authorisation procedures are still required. The Consultation paper is available as a background paper. It is proposed that this separate authorisation is dispensed with provided all contracts for consultancy work are publicised in a fashion similar to that required under the Public Services Reform (Scotland) Act 2010 (local authorities are not subject to the publication requirements relative to external consultancy contracts). This would see the award of such work published on a yearly basis. This step would be allied to a relatively broad change of terminology of consultancy work to that of “external advisers” together with a review of the current financial coding of expenditure work. The aim is to improve the better “capture” of information on an accurate and consistent basis thus providing more useful information. The benefits are considered to include:

- Improved transparency.
- Improved management information on spending on consultancy work.
- Reduced need to prepare separate Information Bulletins.
- Reduced need to respond to FOIs.
- With the public oversight that comes with improved transparency there is less need for special authorisation procedures.

## **6. CORPORATE PROCUREMENT PROCEDURES**

- 6.1 Corporate Procurement Procedures incorporating best practice are being updated by the Central Procurement Unit to account for the new rules and statutory guidance. Once these are available training will be rolled out across the Council to ensure compliance with the CSOs and the new rules.

## **7. CONCLUSION**

The proposed changes to the CSOs are in line with best practice and help to ensure that the Council's procurement and contracting procedures are fit for purpose providing workable processes with appropriate checks and balances at various levels.

## **8. RECOMMENDATIONS**

**Council is asked to:**

- 8.1 **note the introduction of the new procurement rules;**
- 8.2 **approve the revised Contract Standing Orders; and**
- 8.3 **approve the procedures set out at paragraph 5 in relation to external advisers.**

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**DIRECTOR OF CORPORATE AND HOUSING SERVICES**

Date: 14 June 2016  
 Ref: AAA220616 – Contract Standing Orders  
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### **Background papers**

Consultation Document on Consultancy Procedures

CSOs 22/06/16

**CONTRACT STANDING ORDERS**

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## **1. STATUS OF CONTRACT STANDING ORDERS**

- 1.1 The Council's Contract Standing Orders are a requirement of section 81 of the Local Government (Scotland) Act 1973. They exist to ensure that uniform contracting procedures are laid down for use throughout the Council. Compliance with the Orders is mandatory. Use of the Orders promotes consistency, transparency, fair opportunity and equality of treatment. Proper application of the Orders affords protection to those dealing with contracts.
- 1.2 All contracts let by or on behalf of the Council, regardless of whether any such contracts are otherwise exempted from the application of the Orders, shall be subject to an obligation on the relevant Chief Officer to seek Best Value for the Council and to be able to demonstrate fairness and transparency in the contract procedure chosen to all parties having an interest in that procedure.
- 1.3 The Procurement Board will issue Corporate Procurement Procedures ("Procedures" – see definition in paragraph 2.2) which should be read alongside the Orders. The Procedures shall be reported to the Council for noting. Additionally, the Procurement Board will from time to time issue best practice guidance which should be read alongside the Orders and the Procedures.
- 1.4 Chief Officers must ensure that all officers involved with contracts within their Service understand the Orders and Procedures and have this confirmed in writing by them. Chief Officers must ensure that such officers are properly trained to undertake procurement in accordance with the Orders and Procedures. Chief Officers must ensure that such officers follow any best practice guidance on training issued by the Procurement Board.
- 1.5 In interpreting the Orders, reference should be made also to the Council's Policies and Procedures and, in particular, to the Falkirk Council Code of Conduct for Members and Officers.
- 1.6 The Orders shall be applied in such manner as will comply with European Community Law, UK and Scottish Law.

## 2. DEFINITIONS

- 2.1 The Interpretation Act 1978 will apply to the interpretation of these Contract Standing Orders as it applies to the interpretation of an Act of Parliament.
- 2.2 These definitions should be read in conjunction with those at paragraph 2 of Standing Orders Relating to Meetings. In the Contract Standing Orders the followings words and phrases shall be given the meanings stated hereafter.

“Best Value” shall be interpreted by reference to the Local Government in Scotland Act 2003 (*see paragraph 10*).

“Chief Officer” means the Chief Executive, the Directors of Services and other officers holding posts recognised by the Council as having chief officer status including Heads of Service and Depute Chief Officers.

“Community Benefit Requirements” are as set out in sections 24 and 25 of the Procurement Act and, in summary, are obligations on the Council to consider whether to impose requirements in major contracts relating to training and recruitment or the availability of sub-contracting opportunities or otherwise intended to improve the economic, social or environmental well-being of the Council’s area in a way additional to the main purpose of the contract.

“Contract Value/s” has the meaning given in paragraph 9.

"contracts" includes arrangements for the execution of works, the supply of goods or the provision of services “in-house” by significant trading activities of the Council.

“contractor” includes supplier and service provider.

“Contracting Service” is the Service directly letting a particular contract.

“EU Directives” means Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.

“European Rules” means the requirements of the public procurement regime of the European Community, including (a) the principles of transparency, equal treatment and non-discrimination, proportionality and mutual recognition set out in the EC Treaty of Rome, (b) the detailed procedural rules set out in the EU Directives applying to higher value contracts, as implemented in Scotland by the Procurement Regulations and (c) relevant European Court of Justice and national case-law.



“EU Thresholds” means the monetary limits fixed from time to time under the EU Directives. The EU Thresholds (January 2016)<sup>1</sup> at the date of the making of these Contract Standing Orders are:

- supplies contracts - £ 164,176
- services contracts - £ 164,176
- works contracts - £4,104,394

“Information Bulletin” means the standing item on the Council’s agenda where, among other things, contract decisions taken under delegated authority are reported for information.

“Orders” means these Contract Standing Orders unless the context indicates otherwise.

“Procedures” are the Corporate Procurement Procedures relating to the Orders issued, and updated from time to time, by the Procurement Board. The Procedures explain and expand upon the context in which procurement is carried out within the Council, and include detailed procedures and best practice guidance.

“Procurement Board” means the group of Chief Officers, which reports to the Council’s Chief Executive, responsible for championing procurement best practice across the Council and ensuring the necessary availability of resources, support and commitment.

“Corporate Procurement Unit (CPU)” means the team of officers within the Council’s Corporate and Housing Services responsible for developing best practice procurement guidance and providing professional procurement advice and support across the Council.

“Procurement Act” means the Procurement Reform (Scotland) Act 2014 (as amended from time to time), including any regulations giving effect to its provisions, such as the Procurement (Scotland) Regulations 2016.

“Procurement Regulations” means the Public Contracts (Scotland) Regulations 2015/446 as amended from time to time.

“Quick Quote” means the online quotation facility on the Public Contract Scotland website.

“Regulated Contract” means a contract as defined by section 3 of the Procurement Act and subject to the requirements of that Act, the monetary limits for which are fixed from time to time by the Scottish Ministers. The relevant thresholds (April 2016)<sup>2</sup> for Regulated

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<sup>1</sup> These are generally updated every two years. Therefore, next expected date for revised figures is January 2018. The CPU will advertise current figures on the website.

<sup>2</sup> The Scottish Ministers may by order amend these figures. The CPU will advertise current figures on the website.

Contracts at the date of the making of these Contract Standing Orders are:

- supplies contracts - £ 50,000
- services contracts - £ 50,000
- works contracts - £ 2,000,000

“Sustainable Procurement Duty” is as defined by section 9 of the Procurement Act and, in summary, is the duty of the Council before and during procurement of a Regulated Contract to consider how in carrying out the procurement it can improve the economic, social and environmental wellbeing of the Council area, facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process and promote innovation; and to act with a view to securing such improvements in the procurement.

### **3. SCOPE OF CONTRACT STANDING ORDERS**

The Orders do not apply to:

- 3.1 Contracts of employment.
- 3.2 Contracts for the funding of external organisations (e.g. voluntary/charitable organisations). These are situations where the Council provides funding to an organisation to assist them to operate on their own account. These funding situations are governed by the Financial Regulations (Regulation 10 – Following the Public Pound). Normally this will require the use of a Joint Working Agreement which will set out the conditions for the funding and the objectives to be achieved. This is distinct from the organisation providing goods, services or works for the Council or on behalf of the Council, which will be subject to the Orders.
- 3.3 Contracts for the engagement of the services of artists (including performing artists).
- 3.4 Contracts where the Chief Officer certifies it is necessary to enter into a contract urgently for the prevention or alleviation of an emergency situation.
- 3.5 In addition to procurement the Council will on occasion require to sell. Surplus moveable property will be disposed of by competitive tender, public auction or equivalent as detailed in Para 19.4 of Financial Regulations.
- 3.6 Contracts where the Executive decides that there are special circumstances for some or all of the Orders not applying.

## **4. COMPETITION**

- 4.1 Provision for securing competition is required by s.81(3) of the 1973 Act. Competition is a fundamental principle of public sector procurement. Through competition the Council can demonstrate fairness and transparency in its procurement activities. Through competition the Council can demonstrate Best Value. Standard procurement will normally be through competition.
- 4.2 There will be circumstances where competition is not necessary or appropriate. Procurement without competition will be the exception and may only be done in accordance with the Orders.

## **5. EXCEPTIONS TO COMPETITION**

These exceptions do not apply where the European Rules or the Procurement Act requires competition.

- 5.1 Nothing in the Orders shall require competitive tenders to be invited in any of the following situations provided the Chief Officer ensures that Best Value is obtained and the use of an exception is made in the best interests of the Council. The Chief Officer must clearly document in an auditable form their reasons<sup>3</sup> for using a particular exception and how they can nonetheless demonstrate Best Value (e.g. through benchmarking).
- (a) The estimated value of the contract is less than £50,000.
  - (b) The Chief Officer of the Contracting Service deems it desirable to negotiate with an in-house service provider.
  - (c) Where contracts are below EU Thresholds in any circumstances set out in regulation 6 of the Procurement (Scotland) Regulations 2016 and regulation 72 of the Procurement Regulations.
  - (d) Where the Chief Governance Officer in consultation with the Chief Finance Officer and the Chief Executive gives specific authorisation to use the exception to competition on the basis of special circumstances. If this exemption 5.1(d) is employed, a report must be made to the next meeting of the Executive detailing the reasons for the exemption being made.

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<sup>3</sup> That an exception exists is not necessarily a reason for using an exception. For example, competition will still be the norm for contracts below £50,000 in value and the fact that a contract is specialised does not mean there is only one specialised contractor.

## 6. AWARD OF CONTRACTS

### 6.1 No contract shall be awarded unless:

- (i) There is an approved budget for the expenditure (whether from an approved general budget for certain types of expenditure or from a budget specifically approved by Committee for any particular procurement).
- (ii) The Chief Officer is satisfied as to the technical capability and/or professional competency of the contractor proportionate to the value and/or risk associated with the contract.
- (iii) Where the Contract Value is £1 million or more (or where the Chief Officer considers it appropriate) the Chief Finance Officer is satisfied as to the financial standing of the contractor proportionate to the value and/or risk associated with the contract.
- (iv) The Chief Officer is satisfied that the contractor is adequately insured with an approved insurance company in respect to employers' liability, public liability, product liability and/or professional indemnity as may be required.

### 6.2 Authority for the award of Contracts, including (a) framework agreements or (b) call-offs under framework agreements, shall be provided as follows

#### (i) **Chief Officer**

Where the Contract Value **does not exceed £250,000**.

#### (ii) **Chief Officer in consultation with the Chief Governance Officer**

Where the Contract Value **does not exceed £500,000**.

#### (iii) **Chief Officer in consultation with the Chief Governance Officer (subject to referral to the Executive)**

Where the Contract Value is **£500,000 or over**, the Chief Officer, in consultation with the Chief Governance Officer, shall have authority to award the contract, subject to the following proviso:

No authority to award such a contract shall be given until notification of the proposed award has been included in the contract award list notified periodically to members of the Executive. A member of the Executive may request, by not later than noon on the 7<sup>th</sup> calendar day after the date of issue of the list, that any proposed contract award be referred to the Executive for authority to award the contract. If no referral is made, the Chief Officer has authority to award the contract.

(iv) **Chief Officer in consultation with the Leader or appropriate Portfolio Holder and the Chief Governance Officer**

Where the Contract Value is **£500,000 or over** and it is necessary to expedite the contractual process between committee cycles and/or during the summer recess. The contract shall be reported to the next appropriate meeting of the Executive for information.

In all cases the Chief Officer shall properly document the procurement process, the basis of the evaluation and the reasons for the selection of the successful tender. This information shall be incorporated into a report format appropriate to the level of authority required. All delegated decisions, other than those with a Contract Value of less than £10,000, shall be reported in the next Information Bulletin unless already reported to the Executive as in (iv) above and notified to the CPU for inclusion in the contracts register.

- 6.3 Where the appropriate authority for the award of any contract has been obtained, the contract may be signed by the Director or a Head of Service of the Contracting Service (or of the client Service, if different), the Chief Executive, the Chief Governance Officer and the Depute Chief Governance Officer.
- 6.4 If the Procurement Regulations apply, a standstill period must be imposed between the notification of the decision to award the contract and the contract being entered into. Further detail can be found in the Procurement Regulations. Where the Procurement Regulations do not apply a voluntary standstill period should be considered as a matter of best practice.

## **7. ADVERTISING**

- 7.1 Advertising is encouraged to promote competitiveness, fair opportunity and transparency.
- 7.2 If the Procurement Regulations apply, contracts must be advertised in the Official Journal of the European Union (OJEU). This will normally be done via the Public Contracts Scotland website. OJEU adverts may be supplemented by advert in newspapers, trade journals and websites as the Chief Officer considers necessary. In this case such adverts must not precede or contain additional information to that contained in the OJEU advert.
- 7.3 If the contract is a Regulated Contract below EU Thresholds, contracts must be advertised in line with section 23 of the Procurement Act, namely by the Council publishing its intention to seek offers on the Public Contracts website. The specific duties in relation to publication

are set out in Regulation 7 of the Procurement (Scotland) Regulations 2016. This advertising may be supplemented by advert in newspapers, trade journals and websites as the Chief Officer considers necessary. In this case such adverts must not precede or contain additional information to that contained in the Public Contracts website.

- 7.4 In all cases, advertising should be sufficient to ensure competition and may include use of local and national newspapers, trade journals and websites.

## 8. TENDERING PROCEDURES

### 8.1 Contracts above European thresholds (EU-regulated procurement)

If it is estimated that the Contract Value will equal or exceed the EU Thresholds, the Council must comply with all requirements specified in the European Rules, and in particular the Procurement Regulations.

The Procurement Regulations require that the Council consider whether the contract may be broken down into separate lots – see Regulation 47. Best practice guidance is available from the CPU.

The types of tendering procedures are:-

- **open procedure** - where all contractors who have responded to an advert are invited to tender.
- **restricted procedure** - where a selection process is applied to those who have responded to an advert in order to restrict the numbers that are invited to tender.
- **competitive procedure with negotiation** - where a selection process is applied to those who have responded to an advert and the Council is permitted to enter into negotiations with those selected to finalise the contractual arrangements.
- **competitive dialogue procedure** – where a selection process is applied to those who have responded to an advert and the Council is permitted to enter into dialogue on all aspects of the proposed contract with the selected contractors with the aim of working up solutions with each contractor.
- **innovation partnership** – where contractors request to participate in an advertised opportunity which is aimed at the development of innovative works, products or services. The development is split into phases and the Council can decide after each phase to terminate the partnership or continue with the procurement.

The Council will normally use either the open or restricted procedure. The other procedures can only be used in very limited circumstances and only with the approval of the Chief Governance Officer. There also

exists the use of the negotiated procedure without prior publication but this is only available in exceptional circumstances such as situations of extreme urgency that were not foreseeable.

The Council may also use a design contest, a dynamic purchasing system or an electronic auction, in line with the Procurement Regulations with the approval of the Chief Governance Officer.

**Framework agreements** may also be set up under the Procurement Regulations. A framework agreement is an agreement between a supplier or suppliers on the one hand and a contracting authority or authorities on the other which sets out the terms and conditions under which call-off contracts can be made through-out the term of the agreement. This will normally involve use of the open or restricted procedures but the competitive procedure with negotiation and competitive dialogue procedures are also permitted where the conditions for their use are met. Further information is included in the Procurement Regulations, the Procedures and CPU best practice guidance.

## 8.2 Regulated Contracts below European Thresholds

Where the estimated Contract Value is **below** the European Thresholds but where the contract will be a Regulated Contract, the Council must comply with all requirements specified in the Procurement Act.

The following tendering procedures may be adopted as an alternative to the European procedures.

- **open tenders** - similar to the European open procedure but with reduced requirements in relation to advertising and timescales.
- **restricted tenders** - similar to the European restricted procedure but with reduced requirements in relation to advertising and timescales.
- **framework agreements** - Similar to framework agreements under the European Rules.

Use may also be made of externally maintained lists of contractors where approved by the Chief Officer, the Chief Finance Officer and the Chief Governance Officer. An example is Constructionline maintained by the Department for Business Innovation and Skills.

## 8.3 Statutory and other Guidance

Services engaged in procurement require to have regard to any statutory guidance on procurement matters and to other relevant guidance and best practice including the Council's own Corporate Procurement Procedures and best practice guidance.

## 8.4 Contracts below £50,000

For contracts below £50,000 there is the option to invite tenders under the Orders, seek quotations under Financial Regulation 13 or use Quick Quote.

## **8.5 External Frameworks**

Where approved by the Chief Officer, the Chief Finance Officer and the Chief Governance Officer, procurement may be through central purchasing agencies. Such agencies allow contractors to be selected direct from an existing framework arrangement which has already been subject to competition in compliance with European Rules. Purchasing through such agencies may or may not require further tendering depending on the particular contract. In all cases value for money checks should be considered as Best Value cannot be assumed. Consultation with the CPU is required.

## **8.6 Scottish Procurement and Scotland Excel**

Scottish Procurement is part of the Scottish Procurement Directorate of the Scottish Government and puts in place national contracts which can be used by Scottish public authorities.

Scotland Excel is the centre of procurement expertise for the local government sector. It is run by Joint Committee and the Council is a member. It puts in place contracts which can be used by Scottish local authorities.

The Council may procure supplies, services and works via Scottish Procurement and Scotland Excel where this offers Best Value for the Council and where authority to award the contract has been obtained pursuant to paragraph 6.2 of the Orders.

## **8.7 Consortia**

Where the Council participates in a Council-approved buying consortium with other local authorities and the tendering process has followed one of the other authority's contract standing orders, compliance with that other authority's orders will be deemed compliant with the Orders. It will still be necessary to obtain authority to award the contract pursuant to paragraph 6.2 of the Orders and the signing of any contract binding upon the Council shall still require to be by, or authorised by, a Chief Officer of the Council in terms of paragraph 6.3 of the Orders.

## **8.8 Special Arrangements**



Separate procedures will apply for contracts in the following areas. These procedures will be developed by the relevant Service Director in consultation with the Chief Governance Officer. The procedures will be reported to the Executive for approval. Compliance with the procedures is mandatory. The Orders shall apply in so far as not amended or excluded (expressly or impliedly) by the special arrangements.

- (1) Interests in land: sale, acquisition and lease – Director of Development Services

## **8.9 Social and Other Specific Services**

Procuring social care services is a complex area and as such it requires special consideration within the Councils overall approach to procurement. This recognises that the quality or availability of these services can have a significant impact on the quality of life and health of people who might use these services and also their carers. Special consideration also acknowledges that many of these services are becoming increasingly personalised to better match individual needs.

For these reasons, these types of services are often purchased differently to other services. The Council needs to retain flexibility to decide how to procure these contracts on a case-by-case basis. This includes whether these require advertising and competition and also the form that this should take under the new “light touch regime” (LTR).

The LTR is a specific set of rules for certain service contracts that tend to be of lower interest to cross-border competition. Those service contracts include certain social, health and education services, defined by Common Procurement Vocabulary (CPV) codes. The list of services to which the LTR applies is set out in Schedule 3 of the Procurement Regulations

The LTR applies only to Schedule 3 contracts which are worth at least 750,000 Euros (the current sterling equivalent is £589,148) over the life of that contract. Contracts below that threshold, but which are worth at least £50,000 are regulated separately by the Procurement Act.

Advice on all Schedule 3 procurements should be obtained from the CPU.

## 9. CONTRACT VALUES

- 9.1 The values stated in the Orders are the total estimated value of the contract concerned and not the estimated annual value of the contract. Where it is likely that a supply of goods or services will be required on a continuing basis over a number of years, for example with maintenance contracts, the Chief Officer shall take into account the anticipated duration of the continuing supply when estimating the value of the contract for the purposes of the Orders, including any options for extension of the contract period beyond its original duration.
- 9.2 It is not permitted to deliberately divide any procurement exercise or disposal into two or more contracts if the intent in doing so is to avoid the application of any financial thresholds in the Orders, the Procurement Regulations or the Procurement Act.
- 9.3 The values stated are exclusive of any Value Added Tax that may be levied.

## 10. EVALUATION

- 10.1 The Council has a duty to secure Best Value by virtue of the provisions contained in Part 1 of the Local Government in Scotland Act 2003. Best Value represents continuous improvement in the performance of the Council's functions and in securing Best Value the Council must maintain an appropriate balance among –
- (a) the quality of its performance of its functions;
  - (b) the cost of the Council of that performance; and
  - (c) the cost to persons of any service provided by it for them on a wholly or partly rechargeable basis.

In maintaining that balance, the Council shall have regard to -

- (a) efficiency;
  - (b) effectiveness;
  - (c) economy;
  - (d) the need to meet the equal opportunity requirements;
  - (e) where appropriate, its Sustainable Procurement Duty and the Community Benefit Requirements.
- 10.2 Evaluation will be based on the concept of Best Value and will normally be on the basis of the most economically advantageous tender. This allows quality as well as price to be considered and may mean acceptance of a tender other than the lowest priced. For procurements over the EU Thresholds and Regulated Contracts, evaluation **must** be

on the basis of the most economically advantageous tender on the basis of the best price-quality ratio. The Council cannot use price only or cost only as the sole award criterion for such contracts.

Tenders must be evaluated fairly and objectively in accordance with pre-determined and pre-notified criteria. There is an overriding obligation of equal treatment between tenderers. This might require non-compliant bids to be rejected.

Awarding work under a call off contract from a framework must be according to the rules set by the framework. Any mini-competition under a framework must be according to the criteria set by the framework (as adapted for mini-competition).

- 10.3 In relation to Works, officers should comply, to the extent compatible with the Orders and the European Rules and the Procurement Act, with either the NEC Engineering and Construction Contract Guidance Notes or the JCT Practice Note 6, Main Contract Tendering.

10.4 Sustainable Procurement Duty for Regulated Contracts

The Council must comply with the Sustainable Procurement Duty before and during procurement of a Regulated Contract.

10.5 Community Benefit Requirements

The Council must also discharge its duty to secure Best Value in a way which contributes to the achievement of sustainable development. Sustainable development includes sustainable procurement, one element of which is Community Benefits in Procurement to which Falkirk Council has committed in its Strategic Community Plan. Chief Officers should consider whether such benefits could be achieved through the procurement process and seek advice from the CPU. Community Benefit Requirements must be considered in the procurement of a Regulated Contract where the estimated Contract Value is equal to or greater than £4 million, and if not used, the reasons why not must be explained in the contract notice.

## **11. RECEIPT, CUSTODY AND OPENING OF TENDERS**

### **11.1 Receipt of Tenders**

Where tenders are invited, no tender will be considered unless:

- contained in a plain envelope which is securely sealed.
- bearing an approved label, provided by the Council which shows the word "Tender" followed by the subject to which the tender relates.

- the envelopes has no distinguishing mark intended to indicate the identity of the sender, and prospective tenderers shall be notified accordingly.
- the tender envelope is addressed impersonally to the Chief Governance Officer.

The member of staff receiving the envelope containing the tender must:-

- mark the time and date of receipt on the approved label;
- record the receipt of the envelope in the designated triplicate receipt book recording all the required information;
- where possible hand the top copy of the receipt to the person delivering the envelope and attach the second copy to the tender envelope; and
- give the envelope to the Officer designated by the Chief Governance Officer as custodian of tenders, and ensure that that Officer initials and dates the third copy of the receipt as confirmation that he/she has custody of the envelope.

Until the time appointed for its opening, the tender shall remain in the custody of the Chief Governance Officer.

## 11.2 **Opening of Tenders**

Tenders shall be opened at one time by two Officers designated for the purpose at least one of whom shall be so designated by the Chief Governance Officer.

No Officer who has an interest in any company may attend the opening of tenders.

Immediately after a tender has been opened, it shall be stamped and/or perforated, where appropriate, with the official stamp and the Officers in attendance shall sign the relevant page of the tender document.

The tender opening form, stamped and initialled by the Officers present, shall be retained by Corporate and Housing Services. A copy of the form shall be held by the Contracting Service.

A register of all tenders opened stating:

- date,
- contract description,
- names of tenderer, and
- tender prices,

shall be kept by the Director of Corporate and Housing Services.

### 11.3 Late Tenders

Any tender received after the time specified for the receipt of tenders will be considered if no other tender has been opened, and in the opinion of the Chief Governance Officer there are good and sufficient reasons for the late receipt of the tender, provided the late receipt of the tender does not place any tenderer at an advantage over any other tenderer.

Any tender received after the official opening has commenced, or rejected under the provisions above, will be returned to the tenderer by the Chief Governance Officer. It may be opened to ascertain the name of the tenderer but no details of the tender shall be disclosed.

### 11.4 Confidentiality

During the period between the opening of tenders and any report on the award of the contract being made public, an absolute obligation will lie with Members and officers not to disclose any details regarding the tenders and the possible outcome of the tendering process.

### 11.5 Eprocurement

The conduct of procurements subject to the European Rules by electronic means is due to become mandatory by 18<sup>th</sup> April 2018 (subject to certain exceptions). Procurement of all goods, services and works (of whatever value) by electronic means is encouraged meantime, in so far as practicable, to assist preparations for 2018. Tender documents for European procurement s must be available electronically from 18<sup>th</sup> April 2016. The Public Contracts Scotland website has been specifically designed to facilitate such operations and as such, shall be the method of communication and submission used to engage in competitive exercises. The principles set out above for the receipt, custody and opening of tenders should be followed in relation to e tenders to the extent practicable.

## 12. CONTENT OF TENDER DOCUMENTS

Unless the Chief Governance Officer, on the submission of a Chief Officer, approves otherwise the following information must be contained in all tender documents:-

- (1) the **nature and purpose** of the contract for which tenders are invited;
- (1a) the **selection and award criteria** for the award of the contract
- (2) the **last date and the time** by which tenders should be received;

- (3) the **Officer** and the **address** (including electronic addresses) to which tenders are to be **returned**;
- (4) that the Council reserves the right to accept a tender **other than the lowest tender** or **not to accept any tender** at all;
- (5) **details of the specification** relating to the contract. Where there is an appropriate European Standard current at the date of the tender, the specification must require the tenderer to meet the requirements of the European Standard. Where there is no such European Standard then if there is an equivalent International Standard that shall be used. In the absence of either a European or an International Standard an appropriate British Standard “or equivalent” shall be used;
- (6) provision for the insertion by the tenderer of **the price** to be paid with a statement of discounts or other deductions;
- (7) the date of **commencement** of the contract or provision for the insertion of such date by the tenderer, as appropriate;
- (8) the **time or times within which the contract is to be performed** or provision for the insertion of such information by the tenderer, as appropriate;
- (9) that the Council will be entitled to **cancel** the contract and to recover from the tenderer the amount of any loss resulting from such cancellation if the tenderer or their representative (whether with or without the knowledge of the tenderer) shall have practised **collusion** in tendering for the contract or any other contract with the Council or shall have employed any **corrupt or illegal** practices either in the obtaining or execution of the contract or any other contract with the Council or shall have provided **misleading or inaccurate** information in tendering for the contract or any other contract with the Council;
- (10) that the tenderer shall be **prohibited from transferring or assigning** directly or indirectly, to any person or persons, whomsoever, any portion of the contract without the written permission of the Council and that sub-letting of any part of the contract, except to the extent permitted in writing by the relevant Head of Service, shall be prohibited;
- (11) in the case of contracts where the Chief Officers deem that the date of completion or the date of delivery is of importance, that specified **liquidated damages** will be payable for failures to comply with the date of completion or delivery;
- (12) that before entering into a contract, the tenderer shall give an assurance, in writing, that to the best of their knowledge and belief they have complied with all statutory requirements in respect of ensuring **equal opportunity** in employment;

- (13) that before entering into a contract, the tenderer shall give an assurance, in writing, that to the best of their knowledge and belief they are **not unlawfully discriminating** within the meaning and scope of the equal opportunity requirements;
- (13a) that before entering into a contract, the tenderer shall give an assurance, in writing, that (i) any **payments to the tenderer's sub-contractors** (if any) in respect of the contract will be paid timeously and that, as a minimum, invoices rendered by sub-contractors will be paid within 30 days of receipt, unless formally disputed and (ii) the tenderer will impose a similar condition on its sub-contractors in respect of payments due to sub-sub-contractors (if any);
- (14) that the contract will be **subject to the law of Scotland**;
- (15) in the case of contracts where the Chief Officer deems it appropriate tenderers shall be required to enter into a **Bond** with a Bank or Insurance Company for a sum as stipulated by the Chief Officer for the due performance of the contract and/or in such circumstances as the Chief Officer may decide, a **parent company guarantee**. In the case of works contracts, a bond and/or parent company guarantee shall be obtained where the Contract Value is **over £1 million** unless the Chief Officer considers it unnecessary.
- (16) that the tenderer shall be **adequately insured** with an approved Insurance Company in respect of Employers Liability, Public/ Products Liability and/or Professional Indemnity as may be required. Copies of the relevant policies and premium renewal receipts shall be produced by the tenderer whenever required for inspection by the Council;
- (17) that, before entering into a contract, satisfactory evidence has been exhibited to confirm a **Health and Safety Policy** is in place and operational within the contractor's organisation.
- (18) that all contracts made with the Council shall provide that the conditions and obligations to be observed by contractors shall likewise apply to any permitted **sub-contractor** and that a tenderer shall be responsible for the observance of such conditions by any sub-contractor;
- (19) that the contractor shall confirm an awareness of the Council's **Environmental Policy** (or any other policy adopted by the Council) and intimated to the contractor) and adhere to the philosophy of that policy;
- (20) that, in so far as carrying out functions of the Council, the contractor will comply with the **Human Rights Act 1998** and will indemnify the Council in respect of any claims arising due to a contractor's breach of that Act;

- (21) where a contract requires data processing on the part of a contract it will be a condition of the contract that the contractor complies with the security obligations of the **Data Protection Act 1998**.
- (22) that the contract is subject to the requirements for disclosure under the **Freedom of Information (Scotland) Act 2002**. Acceptance of conditions which unreasonably restrict disclosure is prohibited. In dealing with FOI requests, the Council subscribes to the guidance of the Scottish Procurement Directorate on Scottish Public Sector Procurement and Freedom of Information.
- (23) where the **Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE)** are likely to apply in a change of service provision, a clause imposing a contractual obligation on the contractor to provide TUPE information in good time prior to the termination of the contract and potential future service provision change.
- (24) that, in so far as carrying out functions of the Council, the contractor will comply with the **Public Records (Scotland) Act 2011** and indemnify the Council in respect of any claims arising due to a contractor's breach of that Act; and
- (25) that the contractor will take all measures necessary to comply with its obligations in the field of social, environmental and employment law.
- (26) where there is tendering activity exceeding £50,000 of contract value in areas identified by Police Scotland as vulnerable to infiltration by Serious Organised Crime Groups (SOCGs), that the two part **Declaration Of Non-Involvement In Serious Organised Crime or Relevant Convictions** is included as part of the pre-qualification process.
- (27) that the contract will include a termination clause to permit effect to be given to regulation 73 of the Procurement Regulations.

### 13. CONTRACT MONITORING

- 13.1 The Chief Officer will establish a contract monitoring process which will review all contracts during the contract term and after their completion. This review will not only consider financial aspects of the contract but other relevant operational issues to establish a measure of the performance of the supplier in relation to the contract requirements. The degree of monitoring will be determined by the Chief Officer and take account of the Contract Value, the frequency and complexity of the contract and relevant market conditions.

Records will be maintained of the monitoring process to provide evidence that Best Value has been addressed and that an assessment is taking place to enable continuous improvement of the process.



## **14. CONTRACT PAYMENTS BY INSTALMENTS**

- 14.1 Where contracts provide for payment to be made by instalments, the Chief Finance Officer shall arrange for the keeping of a contract register or registers to show the state of account on each contract between the Council and the contractor together with any other payments and the related professional fees. Services shall provide the necessary information to the Chief Finance Officer.
- 14.2 Payments on account of the contract sum shall be made by the Chief Finance Officer within the time specified in the contract upon production of authorised certificates by the Chief Officer. Such certificates shall be in a form approved by the Chief Finance Officer.

## **15. VARIATIONS TO CONTRACTS/CLAIMS**

- 15.1 Any material variation to a contract, whether it be by an addition or an omission, shall be authorised by the Chief Officer who having consulted with the Capital Co-ordinator, Corporate and Housing Services shall notify the contractor in writing by issuing an official variation order specifying the addition or omission and include the financial effect of any variation order on the contract price in any progress reports on that contract submitted to other Chief Officers.
- 15.2 All such variations shall be reported to the Executive as soon as possible if the cumulative effect of these is to increase or decrease the Contract Value by:
- £50,000 if the value of the original contract is £500,000 or less; or
  - 10% if the value of the original contract is over £500,000
- 15.3 The Chief Officer must ensure that any variations are compliant with the Procurement Regulations and/or the Procurement Act and in particular regulation 72 of the Procurement Regulations.
- 15.4 Claims from contractors in respect of matters not clearly within the terms of any existing contract shall be referred to the Chief Governance Officer for consideration of the authority's legal liability and, where necessary, to the Chief Finance Officer for consideration, before a settlement is reached.

## **16. RETENTION OF DOCUMENTS**

The provisions relating to the retention of tender documentation are set out in the Council's Retention Schedule.

- (1) All unsuccessful tenders will normally be retained for one year.
- (2) Successful tenders and consequent contracts shall normally be retained for five years after completion of the contract.
- (3) Contracts with historical significance should be referred to the Council's Archivist.
- (4) The Chief Officer may decide to retain contracts beyond the normal periods if particular circumstances require, for example, the risk of latent defects appearing in works.

These retention requirements go beyond the minimum requirements of regulation 82 of the Procurement Regulations.