

Part 4(6)

Contract Procedure Rules

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West Devon Contract Procedure Rules

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Term	Definition
Agent	A person or organisation acting on behalf of the Council or on behalf of another organisation.
Award Criteria	The criteria by which the <i>Contract</i> is to be awarded to the successful Tenderer (see further Rules 10 and 11.2e).
Award Procedure	Awarding a contract as specified in Rules 8, 10 and 15.
Bid	A <i>Supplier's</i> proposal submitted in response to the <i>Procurement Documentation</i>
Bond	An insurance policy: if the contractor does not do what it has promised under a contract with the Council, the Council can claim from the insurer the sum of money specified in the bond (often 10% of the Contract value). A bond is intended to protect the Council against a level of cost arising from the contractor's failure.

Code of Conduct (Members)	As set out in the Constitution – part 5
Code of Conduct (Officers)	The code regulating conduct of Officers, available on the Council's Intranet.
Concession Contracts	Shall mean a public contract under which <i>Supplier/s</i> are given the (exclusive) right to exploit the works or services provided for their own gain and where the <i>Supplier's</i> income is generated solely from third parties or as a combination of revenue streams from both third parties and the Council.
Constitution	The Constitution document approved by the Council which: <ul style="list-style-type: none"> • allocates powers and responsibility within the Council and between it and others • delegates authority to act to the officers and Executive / Committees; • regulates the behaviour of individuals and groups through rules of procedure, codes and protocols. • available on the Internet
Consultant/Consultancy	Someone employed for a specific length of time to work to a defined project brief with clear outcomes to be delivered, who brings specialist skills or knowledge to the role, and where the Council has no ready access to employees with the skills, experience or capacity to undertake the work.
Contract	Is a legally binding agreement concluded in writing for consideration (whatever the nature of the consideration, whether by payment or some other form of reward) under which a contracting authority engages a person or organisation to provide goods, works or services.
Contracting Decision	Any of the following decisions: <ul style="list-style-type: none"> • withdrawal of Invitation to Tender • whom to invite to submit a Quotation or Tender • Short listing • award of contract • any decision to terminate a contract • any decision to extend or vary a <i>Contract</i>.
Contract Notice	An advertisement placed in the Official Journal of the European Union, which is a legal requirement for all procurements that exceed the <i>EU Threshold</i> .
Corporate Contract	A Contract let by the Corporate Procurement Officer to support the Council's aim of achieving Value for Money to include Contracts let by the Council and/or Contracts or

	Framework Agreements let by other organisations to which the Council has access.
Corporate Procurement Officer	The Council's Procurement Officer charged with providing strategic direction and advice to secure Value for Money in the Council's procurement activities.
Dynamic Purchasing System	A completely electronic system of limited duration which is: (a) established by a contracting authority to purchase commonly used goods, work, works or services; and (b) open throughout its duration for the admission of economic operators which satisfy the selection criteria specified by the contracting authority; and (c) submit an indicative <i>Tender</i> to the contracting authority or person operating the system on its behalf which complies with the specification required by that contracting authority or person.
Electronic Auction	Is a means of seeking the <i>Supplier's</i> pricing in an electronic format in a live competitive environment, the aim of which is to achieve greater <i>Value for Money</i> than traditional tendering
Executive/Committees	The Council's Executive/Committees as defined in the <i>Constitution</i> .
EU Procedure	The procedure required by the EU where the Total Value exceeds the EU Threshold.
EU Threshold	The contract value at which the EU public procurement directives apply.
European Economic Area	The members of the European Union, and Norway, Iceland and Liechtenstein.
Financial Procedure Rules	The Financial Procedure Rules set out in Part 5 of the Constitution outlining Officer responsibilities for financial matters issued by the S.151 Officer.
Framework Agreement	An agreement between one or more authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Government Procurement Agreement	The successor agreement to the General Agreement on Trade and Tariffs. The main signatories other than those in the European Economic Area are the USA, Canada, Japan, Israel, South Korea, Switzerland, Norway, Aruba, Hong Kong, China, Liechtenstein and Singapore.
Senior Officer / Executive Director	The officers defined as such in the Constitution.
High Profile	A high-profile purchase is one that could have an impact on functions integral to Council service delivery should it fail or go wrong.
High Risk	A high-risk purchase is one which presents the potential for substantial exposure on the Council's part should it fail or go wrong.
High Value	A high-value purchase is where the value exceeds the EU Threshold values.
Interests	Is a connection to another person or organisation that meets any of the following criteria: (a) Ownership of shares in a Supplier or any other financial interest in a Supplier whether held by the relevant individual or by a close relative of the Individual or by any corporate entity in which the individual has an interest; and/or (b) Employment by a Supplier of the individual or a close relative of the Individual; and/or (c) Provision of services to a Supplier by the Individual or by the firm the individual is associated with, and/or (d) Connection with, whether prejudicial or otherwise, any person/s said to be affected by the outcome of a procurement process.
Invitation to Tender (ITT)	<i>Invitation to Tender</i> documents in the form required by these Contract Procedure Rules
Key Decision	Decisions that are defined as key decisions in the <i>Constitution</i>
Monitoring Officer	As identified in the Constitution. The Monitoring Officer or the Monitoring Officer's formally nominated deputy
Nominated Suppliers	Those persons specified in a main contract for the discharge of any part of that contract.
Non-commercial Considerations	(a) The terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces ('workforce matters').

	<p>(b) Whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only.</p> <p>(c) Any involvement of the business activities or interests of contractors with irrelevant fields of government policy.</p> <p>(d) The conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons ('industrial disputes').</p> <p>(e) The country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors.</p> <p>(f) Any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees.</p> <p>(g) Financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support.</p> <p>(h) Use or non-use by contractors of technical or professional services provided by the authority under the Building Act 1984 or the Building (Scotland) Act 1959. Workforce matters and industrial disputes, as defined in paragraphs (a) and (d), cease to be non-commercial considerations to the extent necessary or expedient to comply with Best Value; or where there is a transfer of staff to which the Transfer of undertakings (Protection of Employment) Regulations 1981 (TUPE) may apply.</p> <p>Officer.</p>
Officer	designated by a Senior Officer to deal with the contract in question.
Parent Company Guarantee	A contract which binds the parent of a subsidiary company as follows: if the subsidiary company fails to do what it has promised under a contract with the Council, the Council can require the parent company to do so instead.
Pre- Qualification Standard Questionnaire (PQSQ)	The <u>PQSQ</u> is a questionnaire issued to ascertain the suitability of potential suppliers to provide goods, services or works as identified in the tender advertisement / contract notice.
Priority Services	Those services required to be tendered as defined in the EU public procurement directives.

Procurement Documentation	Shall mean the documents dispatched to <i>Suppliers</i> as part of procurement process; comprised of the instructions and information to applicants, contract information, specification, pricing schedule and certificates for signature.
Procurement Strategy	The document setting out the Council's approach to procurement and key priorities for a specified period of time.
Purchasing Guidance	The suite of guidance documents, together with a number of standard documents and forms, which supports the implementation of these contract procedure rules. The guidance is available on the Council's Intranet and Procurement Tool.
Quotation	A quotation of price and any other relevant matter (without the formal issue of an Invitation to Tender). Definition - a formal statement of promise (submitted usually in response to a request for quotation) by a potential supplier to supply the goods or services required by a buyer (the Council), at specified prices, and within a specified period. A quotation may also contain terms of sale and payment, and warranties. Acceptance of quotation by the buyer constitutes an agreement binding on both parties.
Relevant Contract	Contracts to which these contract procedure rules apply (see Rule 4).
S.151 Officer	The officer as may be designated S.151 Officer by the Council in line with the Constitution, including the appointed Deputy S.151 Officer.
Selection Criteria	The Authority's minimum requirements by which the Tenderer is to be assessed as being suitable to proceed with the <i>Tender</i> process
Service Manager	The Officer's immediate superior or the Officer designated by a Senior Officer to exercise the role reserved to the Service Manager by these contract procedure rules.
Shortlisting	The process of selecting Suppliers who are to be invited to quote or bid or to proceed to final evaluation.
Standstill	Shall mean the period between notification of the intention to award a <i>Contract</i> in accordance with the <i>EU Procedure</i> and the formal award of said <i>Contract</i>
Supplier	Any person who asks or is invited to submit a Quotation or Tender.
Teckal	An exception to the Public Contracts Regulations 2006 that means a <i>Contract</i> let by a public body will not be deemed to be a <i>Contract</i> for the purposes of the public procurement regime, provided that certain criteria are met

Tender	A Supplier's proposal submitted in response to the Invitation to Tender.
Tender Register Pro Forma	The log kept by the Monitoring Officer to record details of Tenders (see Rule 13.5).
Total Value	<p>The whole of the value or estimated value (in money or equivalent value) for a single purchase contract or disposal calculated as follows:</p> <p>a) where the contract is for a fixed period, by taking the total price to be paid or which might be paid during the whole of the period including any permitted extensions.</p> <p>(b) where the purchase involves recurrent transactions for the same type of item, by aggregating the value of those transactions in the coming 12 months.</p> <p>(c) where the contract is for an uncertain duration, by multiplying the monthly payment by 48</p> <p>(d) Where a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement</p> <p>(e) Where the <i>Contract</i> is to be executed over a period for goods or services and</p> <ul style="list-style-type: none"> • a series of contracts; or • a <i>Contract</i> which under its terms is renewable <p>is entered into</p> <p>(f) Where there are a number of requirements over a given period for contracts that have similar requirements or are for the same type of goods and service</p> <p>(g) for feasibility studies, the value of the scheme or contracts which may be awarded as a result</p> <p>(h) for Nominated Suppliers and Sub-contractors, the total value shall be the value of that part of the main contract to be fulfilled by the Nominated Supplier or Sub-contractor.</p> <p>(i) The <i>Total Value</i> of all contracts expected to be placed under a <i>Framework Agreement</i></p> <p>(j) The <i>Total Value</i> of all contracts expected to be placed under a <i>Dynamic Purchasing System</i></p> <p>(k) The <i>Total Value</i> of the requirement where more than one (1) organisation will purchase under the same <i>Contract</i></p>
TUPE Transfer of Undertakings (Protection Employment) Regulations 2006	Subject to certain conditions, these regulations apply where responsibility for the delivery of works or services for the authority is transferred from one organisation (e.g. private contractor, local authority in-house team) to another (e.g. following a contracting out or competitive tendering process)

(SI 2006 No.246)	and where the individuals involved in carrying out the work are transferred to the new employer. These regulations seek to protect the rights of employees in such transfers, enabling them to enjoy the same terms and conditions, with continuity of employment, as existed with their former employer. Broadly, TUPE regulations ensure that the rights of employees are transferred along with the business
Value for Money	Value for money is not the lowest possible price; it combines goods or services that fully meet your needs, with the level of quality required, delivery at the time you need it, and at an appropriate price.

A Brief Guide to Contract Procedure Rules

These Contract Procedure Rules (issued in accordance with section 135 of the 1972 Local Government Act) are intended to promote good procurement practice and public accountability and deter corruption.

Adherence to consistent and comprehensive Rules helps to protect the Council against challenges that it has acted incorrectly, unlawfully or fraudulently.

Officers responsible for purchasing or disposal must comply with these Contract Procedure Rules. They lay down minimum requirements and a more thorough procedure may be appropriate for a particular contract.

For the purposes of these Rules, where there is a requirement for communication to be in writing, this shall be deemed to include e-mail (or other e-communication systems e.g. e-tendering) fax transmissions as well as hard copy.

- Follow the Rules whenever you purchase goods or services or order building work.
- Take all necessary procurement, legal, financial and professional advice.
- Declare any personal financial interest in a contract. Corruption is a criminal offence.
- Conduct any Value for Money review and appraise the purchasing need.
- Check whether there is an existing contract or framework agreement in place open to the Council that you can make use of before undergoing a competitive process.
- Normally allow at least four weeks for submission of bids (not to be submitted by hard copy, fax or e-mail).
- Keep bids confidential.
- Complete a written contract or Council order before the supply or works begin.
- Identify a contract manager with responsibility for ensuring the contract delivers as intended.
- Keep records of dealings with suppliers.
- Assess each contract afterwards to see how well it met the quality of delivery and Value for Money requirements.

The Monitoring Officer shall have the power to make minor and legal amendments from time to time to these Contract Procedure Rules after consultation with the Council's S.151 Officer, Internal Auditor and the Corporate Procurement Officer. Significant amendments must be agreed by the full Council.

1. BASIC PRINCIPLES

All purchasing and disposal procedures and the letting of concession contracts must:

- Comply with these Contract Procedure Rules and Financial Procedure Rules (both at Part 4 of the Constitution)
- Achieve Value for Money for public money spent
- Be consistent with the highest standards of integrity, having regard to the Council's Anti Fraud, Corruption and Bribery Policy and Strategy, and the Office of Fair Trading guidance on Anti Competitive Behaviour.
- Ensure fairness in allocating public contracts
- Comply with all legal and financial requirements
- Ensure that **Non-commercial Considerations** do not influence any Contracting Decision
- Support the Council's corporate and departmental aims and policies
- Comply with the Council's Procurement Strategies
- Be followed by *Officers* of the Council in all procurement activities including circumstances where there has been any challenge by the community.

2. OFFICER RESPONSIBILITIES

2.1 Officers

2.1.1 Officers responsible for purchasing or disposal must comply with these Contract Procedure Rules, Financial Procedure Rules, the Officers' Code of Conduct and with all UK and European Union binding legal requirements. Officers must ensure that any Agents, Consultants and contractual partners acting on their behalf also comply.

2.1.2 Officers must:

- Comply with the basic principles above
- Have regard to the Council's purchasing and contract guidance
- Ensure that the appropriate approved budgetary provision is in place

- Check whether a suitable Corporate Contract exists before seeking to let another contract; where a suitable Corporate Contract exists, this must be used unless there is an auditable reason not to
- For contracts with a **Total Value above £50,000**, **establish a business case for the requirement and obtain due authorisation to proceed before undertaking any procurement activity (see Constitution for revenue and capital values when key decisions apply)**~~take a report to Executive / Committee at least 6 months before the Contract is due to end to consider whether it is appropriate to tender on the same basis as the existing arrangement~~
- Keep the records required by Rule 6.

2.1.3 When any employee either of the authority or of a service provider may be affected by any transfer arrangement, Officers must ensure that the Transfer of Undertaking (Protection of Employment) (TUPE) issues are considered and obtain legal advice before proceeding with inviting Tenders or Quotations.

2.2 Senior Officers

2.2.1 Senior Officers:

- Comply with the Basic Principles above
- Ensure that their staff comply with Rule 2.1
- Ensure that Exemptions are recorded under Rule 3.2 detailing the nature and value of the contract, parties to the contract, and the circumstances justifying the Exemption and send original exemption to Monitoring Officer
- Ensure that the originals of all contracts are given to the Monitoring Officer who shall maintain the Contracts Register lodge all documentation securely in the Legal safe.

3. EXEMPTIONS TO THESE RULES

Principles

3.1 ~~The Council and its Executive / Committees~~Specific Officers have power to authorise exemptions from the requirement to seek quotations or invite tenders for specific circumstances.

3.2 ~~Where necessary because of exceptional circumstances the An~~ Officer or Senior Officer may seek an **Exemption** with the approval of the officers and in consultation with members set out in the table below. **The Exemption process must not be used as a method of avoiding the use of these Contract Procedure Rules.**

3.3 The circumstances where an exemption may be sought are:

- **Life or Death** – Is there a significant chance that the life or health of officers, members or the public will be put at real risk?
- **Increased Costs/Loss of Income** – Will the Council incur significant avoidable costs or lose significant income (significant shall be taken to mean material in the sense that it is either material to the project, the service or the Council)?
- **Limited Markets** – Would the Council be wasting its time obtaining quotations as supply of the product or service is demonstrably restricted to one or a few businesses? (Evidence that the market has been tested must be available)
- **Risk to Reputation** – Would the Council be criticised for failing to act promptly?

3.4 **No Exemption can be used if the EU Procurement Rules apply.** The latest EU procurement limits are available from either the Corporate Procurement Officer or Internal Audit.

3.5~~11~~ In exceptional circumstances an Exemption may be deemed necessary that is outside of the four criteria at 3.3. Any such Exemption can only be granted by the relevant member body Officers. Officers may consult members in the decision making process on receipt of a joint report of the applicant and the Corporate Procurement Officer.

Process

3.5 Pro-formas must be used and are available on the Council's Intranet or from the Monitoring Officer or Internal Audit.

3.6 Exemptions from compliance with the Contract Procedure Rules may be granted with the original or electronic signatures of:

Total Value (excl. VAT)	Exemption Authorised By
£7,500 – £50,000	<ul style="list-style-type: none"> • Internal Audit • Monitoring Officer • S151 Officer
£50,001 – EU threshold	<ul style="list-style-type: none"> • <i>Corporate Procurement Officer (Internal Audit in his/her absence)</i> • Monitoring Officer • S151 Officer • In consultation with the Chairman or Vice Chairman of the relevant Committee.
Above EU Threshold	No exemption permitted

3.7 **Total Value** is discussed at Paragraph 8 and the **Definitions Appendix**, which says that to obtain the estimated value of the contract, the Officer must calculate the **Total Value** (excluding VAT) for the **period of the contract**. For example, a contract let for 5 years at an estimated £20,000 per year, excluding VAT, has a Total Value of £100,000. The procurement must be based on £100,000 **not** the annual amount.

3.8 **Exemption Applications** supported by the evidence that the exemption criteria have been met, must be sent to the Monitoring Officer or Internal Audit *and the Corporate Procurement Officer*, in the first instance.

3.9 The original copy of the fully completed Exemption form must be sent to the Monitoring Officer, with a copy to Internal Audit.

3.10 The number of approved Exemptions will be reported to the Audit Committee by Internal Audit.

~~3.11 In exceptional circumstances an Exemption may be deemed necessary that is outside of the four criteria at 3.3. Any such Exemption can only be granted by the relevant member body on receipt of a joint report of the applicant and the Corporate Procurement Officer.~~

In-House or ‘Quasi’ In-House Arrangements

3.12 Where the Council seeks to provide goods, works or services through its own internal resources it may do so without triggering a procurement exercise (links to Financial Procedure Rules).

3.13 Where the Council seeks to provide goods, works or services by entering in to a formal arrangement with another public sector body over which it has some ownership or control it may do so without triggering a procurement exercise where it can be demonstrated that two limited conditions are met, that:

- The Council must exercise over the body to be awarded the *Contract* ‘a control which is similar to that which it exercises over its own departments’; meaning that the Council must have a power of decisive influence over both strategic objectives and significant decisions of the body awarded the *Contract*; and
- The body awarded the *Contract* carries out “the essential part” of its activities for the Council; meaning that the body must do little or no other work besides fulfilling the *Contract* on behalf of the Council.

This is known as the ‘**Teckal**’ exception.

3.14 *Officers* must proceed with caution when invoking **Teckal exception**, and advice must be sought from the *Corporate Procurement Officer*, as a number of factors are capable of eroding the exception, including:

- Any private sector funding and/or involvement in the body awarded the *Contract*, whether at the inception or during its life;
- Any market participating by the body awarded the *Contract* to include trading its goods, works or services elsewhere;
- Where joint ownership of the body awarded the *Contract* reduces the amount of control exercised by the Council.

COLLABORATIVE & E-PROCUREMENT ARRANGEMENTS

3.15 The Corporate Procurement Officer must be consulted prior to commencing a procurement process using any professional buying organisation~~consortia contracts frameworks~~ e.g. Crown Commercial Services (CCS). The terms and conditions of contract applicable to any ~~consortia arrangement~~professional buying organisation, including the requirement to undertake competition between providers, must be fully complied with.

3.16 In order to secure Value for Money, the authority may enter into collaborative procurement arrangements. The Officer must consult the Corporate Procurement Officer where the purchase is to be made using collaborative procurement arrangements with another local authority, government department, statutory undertaker or public service ~~purchasing consortium~~ professional buying organisation.

3.17 All purchases made via a local authority ~~purchasing and distribution consortium~~ professional buying organisation are deemed to comply with these contract procedure rules and no exemption is required.

3.18 However, purchases above the EU Threshold must be let under the EU Procedure, unless the ~~consortium~~ professional buying organisation has demonstrated that it has satisfied this requirement already by letting their contract in accordance with the EU Procedures on behalf of the authority and other consortium members.

3.19 Any contracts entered into through collaboration with other local authorities or other public bodies, where a competitive process has been followed that complies with the contract procedure rules of the leading organisation, will be deemed to comply with these contract procedure rules and no exemption is required. However, **advice must be sought from the Corporate Procurement Officer**.

3.20 The use of e-procurement technology enhances the administrative process for tendering (audit trails etc.) but does not negate the requirement to comply with all elements of these contract procedure rules, particularly those relating to competition and Value for Money.

4. RELEVANT CONTRACTS

4.1 All **Relevant Contracts** must comply with these contract procedure rules. A Relevant Contract is any arrangement made by, or on behalf of, the authority for the carrying out of works or for the supply of goods, materials or services. These include arrangements for:

- The supply of goods (for disposal of goods and assets see the Financial Procedure Rules)

- The hire, rental or lease of goods or equipment
- The delivery of services, including (but not limited to) those related to:
 - the recruitment of staff
 - financial, legal and *Consultancy* services
- Development Agreements under certain circumstances (see Section 24 for further details)
- *Concession Contracts*

and where the *Supplier* is:

- Another public sector organisation, to include a town and/or parish council
- A third sector organisation, to include social enterprises, not-for-profit organisations or charities.

4.2 Relevant Contracts **do not include**:

- Contracts of employment which make an individual a direct employee of the authority; or
- Agreements regarding the acquisition, disposal, or transfer of land and buildings (for which Financial Procedure Rules shall apply) subject to the detail provided at section 24; or
- S.151 Officer dealing in the money market or obtaining finance for the Council; or
- Contracts made by the Monitoring Officer for the appointment of counsel.

5. STEPS PRIOR TO PURCHASE

5.1 The Officer must appraise the purchase, in a manner commensurate with its complexity and value and taking into account any purchasing guidance, by:

- Ensuring the Social Value (Public Services) Act 2012 is complied with for all service contracts where the Total Value exceeds the EU Threshold
- Taking into account the requirements from any relevant Value for Money review and the views of the community where appropriate and in line with related Council guidance
- Appraising the need for the expenditure and its priority, including the position of any existing contract or Framework Agreement in terms of end date/required notice
- Defining the objectives of the purchase and consider whether it is appropriate to tender on the same basis as the existing arrangement (see Rule 2.1.2)
- Assessing the risks associated with the purchase and how to manage them
- Considering what procurement method is most likely to achieve the purchasing objectives, including internal or external sourcing, partnering, packaging strategy

and collaborative procurement arrangements with another local authority, government department, statutory undertaker or public service purchasing consortium

- Consulting users as appropriate about the proposed procurement method, contract standards and performance and user satisfaction monitoring
- Ensuring that the appropriate terms and conditions are used to apply to the proposed contract (if other than the Council's standard terms and conditions, the advice of the Corporate Procurement Officer, the Council's Solicitor and/or Monitoring Officer must be sought)
- Setting out these matters in writing if the Total Value of the purchase exceeds **£7,500**.

5.2 The officer must also confirm that:

- There is member or delegated approval for the expenditure and the purchase accords with the approved policy framework and scheme of delegation as set out in the Constitution.
- In the case of expenditure on an asset (particularly property), that the asset is the Council's responsibility.

5.3 Responsible Procurement

5.3.1 There shall be proportionate consideration of the Council's Responsible Procurement Strategy considering the nature, value and risk of the goods, works or services being purchased. This may include consideration of the following policies:

- Sustainability in Commissioning
- Equality and Diversity in Commissioning
- Safeguarding in Commissioning
- Ethical Sourcing Policy
- Health and Safety in Commissioning
- Social Value Policy

6. RECORDS

6.1 Where the **Total Value is less than £50,000**, the following records must be kept:

- Invitations to Quote~~Request for Quotation~~ and Quotations
- A record:
 - of any Exemptions and the reasons for them
 - of the reason if the lowest price is not accepted (to accept a *Quotation* other than the lowest, the *Officer* must be satisfied that the *Tender*

represents the most economically advantageous bid and best value for money. The *Award Criteria* for this should have been set out in advance and evaluation records must be retained. See 10.4 Award Criteria).

- of any negotiations which took place along with written confirmation of final position reached
- Written (which includes electronic) records of communications with the successful contractor.
- The Contract documents and any variations or extensions (where applicable)

6.2 Where the Total Value **exceeds £50,000** the following records must be kept:

- Pre-tender market research
- Any exemption under Rule 3 together with the reasons for it
- The method for obtaining bids (see Rule 8.1)
- The *Selection Criteria*, including pass/fail and scored criteria including weightings in descending order of importance
- The *Award Criteria* including pass/fail and scored criteria including weightings in descending order of importance
- *Invitation to Tender* documents sent to and received from *Suppliers*
- Clarification and post-tender
- Negotiation or dialogue (when applicable to the procurement process followed), (to include minutes of meetings)
- Any Contracting Decision and the reasons for it
- Legal advice
- The *Contract* documents and any variations or extensions
- Post-contract ~~evaluation and~~ monitoring and benchmarking
- Communications with *Suppliers* and with the successful contractor throughout the period of the *Contract*;
- Ongoing checking of the financial position of the successful contractor throughout the period of the *Contract* (see also Section 5 Contract Management).

6.3 Records required by this rule must be kept for **six years** after the end of the contract if made under hand and **twelve years** if made under seal.

6.4 Documents which relate to unsuccessful Suppliers must be destroyed after **12 months** has elapsed from the date of the award of successful contract, provided there is no dispute about the award.

7. ADVERTISING, AND FRAMEWORK AGREEMENTS, DYNAMIC PURCHASING SYSTEMS AND PROCUREMENT PROCEDURES

7.1 Identifying and Assessing Potential Suppliers

Identifying

7.1.1 Wherever practicable *Officers* shall ensure that where the *Total Value* of the proposed *Contract* does not exceed £50,000 they shall invite a minimum of three suppliers, ~~two~~ one of whom (wherever possible) must ~~have a head office which is registered~~ be located within the Council's geographic boundaries. Officers shall be seen to alternate the Suppliers to whom quotation documentation is sent so as to ensure fair competition within the market.

7.1.2 Officers shall ensure that, where proposed contracts, irrespective of their Total Value, might be of interest to potential Suppliers located in other member states of the EU, a sufficiently accessible advertisement is published. Generally, the greater the interest of the contract to potential bidders from other member states, the wider the coverage of the advertisement should be. Examples of where such advertisements may be placed include:

- The Council's website
- Portal websites specifically created for contract advertisements
- National official journals, or
- The Official Journal of the European Union (OJEU) / E Notices / Tenders Electronic Daily (TED) (even if there is no requirement within the EU Procedure).

7.1.3 For proposed contracts that are expected to exceed £50,000, assessment and selection will be in conjunction with the *Corporate Procurement Officer*.

Assessing

7.1.4 Officers are responsible for ensuring that all Suppliers for a Relevant Contract are suitably assessed. The assessment process shall establish that the potential Suppliers have sound:

- Economic and financial standing
- Technical ability and capacity

to fulfil the requirements of the authority.

7.1.5 This shall be achieved in respect of proposed contracts that are **expected to exceed £50,000** by selecting firms from shortlists assessed from expressions of interest in a particular contract submitted in response to a public advertisement.

7.2 Approved Lists

7.2.1 Approved Lists will **not** be maintained. This is because of the cost of proper administration and the need to ensure that competition is maximised.

7.2.2 Suppliers interested in doing business with the Council must register on the Council's electronic tendering system, which is available at available at www.supplyingthesouthwest.org.uk

7.2.3 A register of pre-qualified contractors and Consultants maintained by or on behalf of central government (e.g. Constructionline, Accredited) will be not be deemed to be an Approved List for the purpose of these contract procedure rules and therefore can be used after having sought the advice of the Corporate Procurement Officer.

7.3 Framework Agreements

7.3.1 A *Framework Agreement* is an arrangement of one or more contracting authorities with one or more suppliers in order to establish the terms governing the contracts awarded during a given period.

In setting up a *Framework Agreement* the term of must not exceed four years. There must be one (a single-provider framework), or more than two (2) (multiprovider framework) *Suppliers* within an agreement under EU procurement law. The Council's *Corporate Procurement Officer* must always be consulted before any action is taken.

New framework suppliers may not be added during the life of a *Framework Agreement*.

The *Total Value* of the *Framework Agreement* must be the total of all contracts that are anticipated to be awarded under the agreement and as such it is recommended that a realistic range be provided within the Contract Notice or tender advertisement.

7.3.2 Contracts based on **Framework Agreements** may be awarded by either:

- Applying the terms laid down in the Framework Agreement (where such terms are sufficiently precise to cover the particular call-off) without reopening competition, or
- Where the terms laid down in the Framework Agreement are not precise enough or complete for the particular call off by holding a mini competition in accordance with the following procedure:
 - inviting the organisations within the Framework Agreement that are capable of executing the subject of the contract to submit written Tenders
 - fixing a time limit which is sufficiently long to allow Tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract

- awarding the contract to the tenderer who has submitted the best Tender on the basis of the Award Criteria set out in the specifications of the Framework Agreement.

When a *Framework Agreement* has been selected for use only the *Suppliers* that appear on the agreement may be approached to provide the Contract. Multiple *Framework Agreements* may not be selected for use to procure one single *Contract*.

Contracts may be awarded beyond the life of a *Framework Agreement* provided that such contracts are not awarded improperly or in a way that seeks to distort competition. As an example it would serve to distort competition to award a *Contract* that significantly exceeded the life of the *Framework Agreement* where it was not common practice or expected by the market to do so.

A *Contract* procured under a *Framework Agreement* by another user may not be used by way of avoiding running a further competition, unless expressly permitted by the terms of the *Framework Agreement* or resultant call-off contract. The *Standstill* obligations need only be applied to contracts awarded against a *Framework Agreement* that will exceed the *EU Threshold*.

~~The standstill obligations need only be applied to Contracts awarded against a Framework Agreement that will exceed the EU threshold.~~

7.4 Dynamic Purchasing System

7.4.1 A *Dynamic Purchasing System* is similar to a *Framework Agreement* insofar as it is an arrangement of one or more contracting authorities with one or more suppliers in order to establish the terms governing the contracts awarded during a given period, the term must not exceed four years and its *Total Value* must be the total of all contracts that are anticipated to be awarded under it.

The way in which the *Dynamic Purchasing System* is different to a *Framework Agreement* is that additional *Suppliers* can be added throughout the life of the arrangement.

7.4.2 In opening up access to *Suppliers* to the *Dynamic Purchasing System* the *Officer* must:

- Offer unrestricted, direct and full access to the procurement documents by electronic means at all times throughout the life of the Dynamic Purchasing System;
- Allow new applications to be submitted throughout the life of the Dynamic Purchasing System;

- Complete the evaluation of a newly submitted application within fifteen days of its receipt;
- Admit to the Dynamic Purchasing System all new Suppliers that satisfy the Selection criteria; and
- Notify Suppliers of their admission to the Dynamic Purchasing System or rejection of their application.

7.4.3 In awarding a *Contract* under the *Dynamic Purchasing System* the *Officer* must:

- Place an advertisement against the *Dynamic Purchasing System* to notify Suppliers of the requirement to award a *Contract*. Where the Dynamic Purchasing System has been established in accordance with the EU procurement rules, i.e. where the *Total Value* exceeds the EU Threshold, this must take the form of a simplified Contract Notice;
- Evaluate any new applications in response to the advertisement prior to issuing Invitations to Tender under the Dynamic Purchasing System;

All Suppliers admitted to the Dynamic Purchasing System must be given an opportunity to respond to the Invitation to Tender;

The Contract shall be awarded to the Supplier that submits the best bid in accordance with the Award criteria set out in the original advertisement or Contract Notice.

7.4.4 The Council's *Corporate Procurement Officer* must always be consulted before any action is taken to establish a *Dynamic Purchasing System*.

7.5 Procurement Procedures

7.5.1 Restricted Process

- This is a two stage procedure. Stage 1 is a pre-qualification stage and is used to de-select suppliers. Stage 2 is the tender stage and is used to determine a successful supplier to whom a contract will be awarded.
- Only those suppliers selected by the council may be invited to tender. Suppliers will be selected on the basis of published pre-qualification criteria.
- If the Regulations apply, a minimum of five suppliers must be invited to tender and in all other cases a minimum of three must be invited to tender.
- This process must not be used in any procurement under the EU threshold for goods and services as a pre-qualification stage is not allowed.

7.5.2 Open Procedure

- This is a one stage procedure and is used where there are a limited number of suppliers and where timescales will not allow for use of the restricted procedure.
- Any supplier expressing an interest in tendering for the contract will be able to download the ITT documents.

- A minimum requirement threshold score may be determined for the tender questionnaire and this will be published in the advert (or OJEU Contract Notice if applicable) and in the ITT documentation. Any supplier that scores below this minimum threshold is considered unsuitable and will be disqualified. There is no short listing step in the open procedure and all suppliers that score above the minimum requirement threshold must be evaluated.

7.5.3 Competitive Procedure with Negotiation

- This procedure may only be used after consultation with the Corporate Procurement Officer and Legal Services. It may only be used in very limited circumstances and is rarely used by local authorities.
- Only those suppliers selected by the council are invited to tender. Suppliers shall be selected on the basis of published pre-qualification criteria. Any notice will state that a negotiated procedure is being used.
- A minimum of three suppliers should be invited to negotiate following publication of a notice.
- A minimum of two officers, at least one of whom must be the Corporate Procurement Officer, must be present at all times during the negotiations.
- At all times during the negotiations, the council will consider and implement the principles of non-discrimination, equal treatment and transparency.

7.5.4 Competitive Dialogue Procedure

- The competitive dialogue procedure is for use where the open or restricted procedure will not allow the award of the contract due to the fact that it is a particularly complex procurement. It can only be used with the most economically advantageous award criteria and this must be stated in the contract notice or accompanying descriptive document. This procedure may only be used after consultation with the Corporate Procurement Officer and Legal Services.
- The council envisages the competitive dialogue procedure being used for private public partnerships where contracts are complex and the technical means and/or the legal and financial structure cannot be determined without dialogue with suppliers.
- In the case of a particularly complex contract, you may be aware of your needs but not know in advance what the best technical, and/or legal and/or financial solution is. A competitive dialogue procedure between buyers and suppliers is therefore necessary to identify the solution or solutions that best meet their needs. Such a dialogue is not allowed under the current open and restricted procedures. However, the process is time-consuming and the most expensive method of procurement.

8. COMPETITION REQUIREMENTS FOR PURCHASE ~~OR DISPOSAL~~ **AND PARTNERSHIP ARRANGEMENTS**

8.1 Purchasing: Competition Requirements to Obtain Quotations or Tenders

8.1.1 The **Total Value** of a *Contract* is the whole of the value or estimated value (in money or equivalent value) for a single purchase in the following circumstances:

- (a) Where the *Contract* is for a fixed period, by taking the total price to be paid or which might be paid during the whole of the period, including any permitted extensions.
- (b) Where the purchase involves recurrent transactions for the same type of item, by aggregating the value of those transactions in the coming 12 months.
- (c) Where the *Contract* is for an uncertain duration, by multiplying the monthly payment by 48 (four years).
- (d) Where a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement.
- (e) Where the *Contract* for goods or services is to be carried out over a period of time:
 - as a series of contracts (which might otherwise be disaggregated); or
 - as a *Contract* which under its own terms and conditions is renewable.
- (f) The value of the scheme or contracts which may be awarded as a result of a feasibility study.
- (g) The *Total Value* of all contracts expected to be placed under a *Framework Agreement*.
- (h) The *Total Value* of all contracts expected to be placed under a *Dynamic Purchasing System*.

The *Total Value* shall be that part of the main *Contract* to be fulfilled by the *Nominated Supplier or Sub-contractor*.

In addition to the above, *Officers* need to be aware that there is a wider corporate procurement interest where there are a number of requirements over a given period for purchases that have similar characteristics or are for the same type of goods and services e.g. consultants carrying out similar activities in the same or different service areas. See also paragraph 2.1.2 on the required use of corporate contracts where they exist.

The following procedures apply where there are no other procedures which take precedence (such as agency agreements with government). If in doubt, *Officers* must seek the advice of the *Corporate Procurement Officer*.

Where the *Total Value* for a purchase is within the values in the first column below, the Award Procedure Procurement Process in the second column must be followed. Short listing Evaluation shall be done by the persons specified in the third column.

Total Value (excl. VAT)	<u>Award Procedure Procurement Process</u>	<u>Short listing Evaluation</u>
Up to £7,500	A minimum of one quotation, but good practice to seek most favourable prices and terms, having regard to the Council's Procurement Strategy.	<ul style="list-style-type: none"> • Officer • (see also Financial Procedure Rules)
£7,500 – £50,000	A minimum of three written Quotations	<ul style="list-style-type: none"> • Officer <u>in consultation with the</u> Service Manager
£50,001–EU Threshold	Invitation to Tender by advertisement/list	<ul style="list-style-type: none"> • Minimum of two <u>Officers</u> • <u>In consultation with the</u> Senior Officer in consultation with <u>and</u> the Corporate Procurement Officer
Above EU Threshold	EU Procedure, or where this does not apply, invitation to tender by advertisement	<ul style="list-style-type: none"> • Minimum of two <u>Officers</u> • Project lead Officer to form evaluation team appropriate to the procurement which may include but not be limited to the Officer, <u>procurement, legal & finance</u> Service Manager • Senior Officer

		<ul style="list-style-type: none"> • in consultation with the Corporate Procurement Officer
Up to EU Threshold	<p>All purchases made via a local authority purchasing and distribution <u>consortium professional buying organisation</u> are deemed to comply with these Contract Procedure Rules and no waiver is required e.g. Devon Procurement Services. However, purchases above the EU Threshold must be let under the EU Procedure, unless the consortium has satisfied this requirement already.</p>	<ul style="list-style-type: none"> • <u>Minimum of two Officers</u> • <u>Project lead Officer to form evaluation team appropriate to the procurement which may include but not be limited to the Officer, procurement, legal & finance</u> See paragraph 3.7.
All values: Collaborative Contracts	<p>The Corporate Procurement Officer must be consulted prior to commencing any procurement process using Collaborative <u>professional buying organisation Contracts Frameworks</u>. The terms and conditions applicable to any Collaborative Contract arrangement, including the requirement to undertake competition between providers, must be fully complied with.</p>	<ul style="list-style-type: none"> • <u>Minimum of two Officers</u> • <u>Project lead Officer to form evaluation team appropriate to the procurement which may include but not be limited to the Officer, procurement, legal & finance</u> See paragraphs 3.6
All values: ICT	<p>All system developments and purchases of computer equipment or software must be approved by the ICT Team and awarded in line with these Rules.</p>	<ul style="list-style-type: none"> • Officer • Business Manager • Senior Officer (responsible for ICT) • in consultation with the Corporate Procurement Officer

8.1.2 Where it can be demonstrated that there are insufficient suitably qualified Suppliers to meet the competition requirement, all suitably qualified Suppliers must be

invited to quote ~~and or~~ Tender and the Corporate Procurement Officer informed. If it can be clearly demonstrated that less than the required quotations are available, then an Exemption form in line with paragraph 3.3 must be completed.

8.1.3 An Officer must not enter into separate contracts nor select a method of calculating the Total Value in order to minimise the application of these Contract Procedure Rules or EU Procurement Rules.

8.1.4 Where the EU Procedure is required, the Officer shall also consult the Corporate Procurement Officer, as appropriate, to determine the method of conducting the purchase. See table at Rule 8.1.

8.1.5 Where the Council procures on behalf of itself and other partners (acting as lead authority, the Total Value will be the overall value of the *Contract* and not the element of cost that applies to the Council itself.

8.1.6 Where procurement is for a service to be shared between authorities, it must be stated in advance both how the costs are to be apportioned between the partners and where the ownership of any assets falls.

8.2 Collaborative and Partnership Arrangements

8.2.1 Collaborative and partnership arrangements are subject to all UK and EU procurement legislation and must follow these contract procedure rules (Rule 3). If in doubt, Officers must seek the advice of the Monitoring Officer and the Corporate Procurement Officer. See table at Rule 8.1.1.

8.3 The Appointment of Consultants to Provide Services

8.3.1 Construction Consultants, to include architects, engineers and surveyors, financial and management Consultants, legal advisors and Consultants and any other professional persons considered Consultants as per the definition provided shall be selected and commissions awarded in accordance with the limits and procedures detailed within these Contract Procedure Rules and as outlined at Rule 8.1.1.

8.3.2 The engagement of a Consultant shall follow the agreement of a brief that adequately describes the scope of the services to be provided and shall be subject to completion of a formal letter or contract of appointment to be in the form agreed by the Monitoring Officer.

8.3.3 Records of consultancy appointments shall be maintained in accordance with Rule 6.

8.3.4 Consultants shall be required to provide evidence of, and maintain professional indemnity insurance policies to the satisfaction of the Council's Insurance Officer for the periods specified in the respective agreement.

8.3.5 Officers must be aware of the Council's duty to assess the employment status of individuals and to assess whether they will be working for the Council in an "employed capacity" or "self employed". **The HM Revenue and Customs checklist** must be used in the assessment of status and if the individual could be deemed as employed, the Council's recruitment and payroll procedures must be followed (Guidance is on the Intranet which also links to Financial Procedure Rules).

8.4 Assets for Disposal

8.4.1 The disposal of assets must be made in line with the requirements of Financial Procedure Rules and the Delegation Scheme.

8.5 Contracts to Provide Services to External Purchasers

8.5.1 The Monitoring Officer, Corporate Procurement Officer and Financial Procedure Rules must be consulted where contracts to work for organisations other than the authority are contemplated.

9. PRE-TENDER MARKET RESEARCH AND CONSULTATION

9.1 The Officer responsible for the purchase: may, prior to the issue of the Invitation to Tender / Quotation, consult potential suppliers in general terms about the nature, level and standard of the supply, contract packaging and other relevant matters, provided this does not prejudice any potential Supplier.

9.2 The Officer must not seek or accept technical advice on the preparation of an Invitation to Tender or Quotation from anyone who may have a commercial interest in them, if this may prejudice the equal treatment of all potential Suppliers or distort competition, and should seek advice from the Monitoring Officer and the Corporate Procurement Officer.

9.3 For service contracts where the Total Value will exceed the EU Threshold the Officer must give due consideration to the Social Value (Public Services) Act 2012 prior to the commencement of the procurement process.

10. STANDARDS AND SELECTION & AWARD CRITERIA

10.1 The Officer must define the Selection Criteria that are related and proportionate to the subject matter of the Contract. These shall form a stage one assessment of whether a Tenderer may progress with a tender process, whether from the Pre-Qualification ~~Questionnaire (PQQ)~~ to Tender stage or from the Selection stage evaluation to the Award stage evaluation in an open Tender. The criteria to be assessed against may be chosen from the following:

- Criteria for the rejection of the Supplier; such as prior criminal convictions, evidence of corruption, bribery, fraud, bankruptcy, grave professional misconduct, tax evasion, etc. (this list is not exhaustive)
- Information as to economic and financial standing; such as banker's statements, insurances, statements of accounts, statements of turnover, etc. (this list is not exhaustive)
- Information as to technical or professional ability; such as
 - the Supplier's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability;
 - a list of works carried out over the past 5 years;
 - a statement of the goods sold or services provided by the supplier or the services provider in the past 3 years;
 - a statement of the resources available to complete the Contract;
 - a statement of the Supplier's technical capacity to provide the Contract;
 - environmental management measures;
 - average annual number of staff and managerial staff over the previous 3 years;
 - any samples, descriptions and photographs of the goods to be purchased or hired; and
 - certification by official quality control institutes. (this list is not exhaustive)

The Corporate Procurement Officer must be consulted where the Total Value of the Contract is likely to exceed the EU Threshold and in any event to provide advice and guidance concerning the Crown Commercial Services Standard Questionnaire to ensure that the questions are relevant and proportionate to the subject matter of the Contract.

10.2 Selection Criteria must not include:

- Award Criteria;
- Non-commercial Considerations (See Definitions Appendix);
- Criteria that is not related and proportionate to the subject matter of the Contract.

10.3 The Officer must ascertain what are the relevant British or equivalent European or international standards which apply to the subject matter of the Contract. The Officer must include those standards which are necessary properly to describe the required

quality. This includes sustainability, environmental and health and safety standards. The Monitoring Officer and Corporate Procurement Officer must be consulted if it is proposed to use standards other than European standards.

10.4 The Officer must define Award Criteria that are appropriate to the purchase and designed to secure an outcome giving Value for Money for the authority. The basic criteria shall be:

- **'Most economically advantageous'**, where considerations in addition to price also apply.
- **'Lowest price'** where payment is to be made by the authority when the Award Criteria is price alone; or
- ~~'Highest price' if payment is to be received (See Financial Procedure Rules on disposal of assets)~~

If the former criterion is adopted, it must be further defined by reference to sub-criteria which may refer only to relevant considerations. These may include price, service, quality of goods, running costs, technical merit, previous experience, delivery date, cost effectiveness, relevant environmental considerations, aesthetic and functional characteristics (including security and control features), safety, after-sales services, technical assistance and any other relevant matters. *Award Criteria* must be accompanied by the relative weightings ~~ranked in order of importance to the Council~~ in the context of the specific procurement.

10.5 Award Criteria must not include:

- Selection Criteria
- Non-commercial Considerations (See Definitions Appendix);
- Matters which discriminate against suppliers, irrespective of size, from the European Economic Area or signatories to the Government Procurement Agreement.
- Criteria that is not related and proportionate to the subject matter of the *Contract*.

11. PROCUREMENT DOCUMENTATION

11.1 Council *Officers* must prepare their *Procurement Documentation* using the Council's standard templates, which are available on the Council's Intranet site or via the *Corporate Procurement Officer*.

11.2 The *Procurement Documentation* shall state that no *Bid* will be considered unless it is received by the date and time stipulated. No *Bid* delivered in contravention of this clause shall be considered under any circumstances.

11.3 The *Procurement Documentation* shall include the following:

(a) A specification that describes the Council's requirements in sufficient detail to enable the submission of competitive offers.

(b) A requirement for Suppliers to declare that the Bid content, price or any other figure or particulars concerning the Bid have not been disclosed by the Supplier to any other party (except where such a disclosure is made in confidence for a necessary purpose).

(c) A requirement for Suppliers to complete fully and sign all Tender documents including a form of Tender and certificates relating to canvassing and non-collusion.

(d) Notification that Bids are submitted to the Council on the basis that they are compiled at the Suppliers expense.

(e) A description of the Award Procedure and a definition of the Award Criteria (including any scoring mechanism or sub criteria) accompanied by the relevant weightings~~or in objective terms and if possible in descending order of importance.~~

(f) Notification that no Bid will be considered unless it is submitted via the Council's electronic tendering system.

(g) A stipulation that any Tenders submitted by fax or e-mail shall not be considered, see Rule 13.3 re electronic tendering.

(h) The method by which any arithmetical errors discovered in the submitted Bids is to be dealt with. In particular, whether the overall price prevails over the rates in the Tender or vice versa.

(i) Instructions to Suppliers concerning the procurement process and Procurement Documentation and information concerning the contract opportunity.

(j) The pricing schedule, schedule of rates, whole life costing schedule or other such appropriate pro-forma for gathering the Supplier's pricing.

11.4 All Suppliers invited to Bid or quote must be issued with the same information at the same time and subject to the same conditions. Any supplementary information must be given on the same basis.

11.5 All Procurement Documentation must specify the goods, service or works that are required, together with the terms and conditions of Contract that will apply (see Rule 16).

11.6 The Procurement Documentation must state that the Council is not bound to accept any Quotation or Tender, either as a whole or in part.

12. SHORTLISTING

12.1 Any *Shortlisting* must be done in accordance with the permitted *Selection Criteria*. Where the *Total Value* of the *Contract* will exceed the *EU Threshold*, the *Officer* must contact the *Corporate Procurement Officer* for advice.

12.2 **Evaluation criteria** must be transparent and sub-criteria specified. Shortlisting records must be kept and held for the period specified in the Council's Document Retention Policy and Rule 6.

~~12.3~~ ~~12.3~~ The officers responsible for ~~Shortlisting-Evaluation~~ are specified in Rule 8.1.1.

~~12.4~~ Where the **Total Value will exceed the EU threshold** the Officer must notify all Suppliers who fail to pass the selection criteria in writing simultaneously and as soon as possible. The letters to the unsuccessful Suppliers must contain the reasons why the supplier was unsuccessful.

13. SUBMISSION, RECEIPT AND OPENING OF TENDERS/ QUOTATIONS

13.1 Suppliers must be given an adequate period in which to prepare and submit a proper Quotation or Tender, consistent with the complexity of the contract requirement. Normally at least four weeks should be allowed for submission of Tenders. The EU Procedure lays down specific time periods (see the Council's purchasing guidance on the Council's Intranet).

13.2 All Tenders and Quotations above £7,500 must be submitted through the Council's approved and secure electronic tendering system.

13.3 ~~Tender-Bids~~ received by fax or other electronic means (e.g. email) must be rejected. Quotations with a value below £7,500 may be accepted via e-mail.

13.4 Each ~~Tender Bid~~ must be:

- Suitably recorded through the electronic tendering system so as to subsequently verify the date and precise time it was received
- ~~Sealed under the electronic tendering system until the submission deadline has passed Adequately protected immediately on receipt to guard against amendment of its contents~~
- ~~Recorded immediately on receipt in the Tender Register Pro-Forma.~~

13.5 Tenders received after the set date and time must not be accepted and the Corporate Procurement Officer informed of late submissions. For the purposes of these rules the time will be deemed to be at the first stroke e.g. noon will be 12.00.00.

Tender Opening

South Hams

13.6 The Member Services department will ensure that all *Tenders* are unsealed through the electronic tendering system, verified and downloaded opened at the same time ~~when the period for their submission has ended. The Officer or his or her representative must be present. Tenders must be opened in the presence of an officer representing the relevant Senior Officer and a Council Member. Where the Total Value is more than the EU Threshold, the Corporate Procurement Officer shall also attend.~~

~~13.7 Upon opening, a summary of the main terms of each Tender (i.e. significant issues that are unique to each Tender submission and were not stated in the Tender invitation documents such as Tender sum) must be recorded in the Tender Register Pro-Forma. The summary must be signed by all present. Where an electronic tendering process is used, those involved must verify the results to the screen.~~

West Devon

~~13.8 The Legal department will ensure that all Tenders are opened at the same time when the period for their submission has ended. A legal officer will be present for the following:~~

~~All Tenders with an **estimated value of more than £50,000** shall be opened and recorded by the Officer, relevant Senior Officer in the presence of two members from the relevant Committee~~

~~Where the Total Value is more than the EU Threshold, the Corporate Procurement Officer shall also attend.~~

~~13.9 Upon opening, a summary of the main terms of each Tender must be recorded in the Tender Register Pro-Forma. The summary must be signed by all present. Where an electronic tendering process is used, those involved must verify the results to the screen.~~

~~13.10 All tenders with an estimated value of less than £50,000 shall be opened and recorded by the Officer and relevant Senior Officer.~~

14. CLARIFICATION PROCEDURES & POST-TENDER NEGOTIATION

14.1 Providing clarification to potential or actual Suppliers of an Invitation to Tender or Tender is permitted:

- In writing, via the Council's electronic tendering system
- ~~In writing~~
- At a meeting provided that a written record is made of the meeting
- In a way that is fair, transparent and equal to all participants

14.2 Discussions with tenderers after submission of a Tender and before the award of a Contract with a view to obtaining adjustments in price, delivery or content (i.e. post-tender negotiations) ~~must be the exception rather than the rule~~ **shall not be performed**. ~~In particular, such discussions must not be conducted in an EU Procedure where this might distort competition, especially with regard to price. If in doubt seek professional advice from the Corporate Procurement Officer or Monitoring Officer.~~

~~14.2 If post-tender negotiations are necessary after a single-stage Tender or after the second stage of a two-stage Tender, then such negotiations shall only be undertaken with the tenderer who is identified as having submitted the best Tender and after all unsuccessful Suppliers have been informed.~~

~~Officers appointed by the Senior Officer to carry out post tender negotiations should ensure that there are recorded minutes of all negotiation meetings and that both parties agree actions in writing.~~

~~14.3 Post tender negotiation must only be conducted in accordance with the guidance issued by the Corporate Procurement Officer who must be consulted wherever it is proposed to enter into post-tender negotiation. Negotiations must be conducted by a team of at least two Officers, one of whom must be from a division independent to that leading the negotiations.~~

~~14.4 Where post-tender negotiation results in a fundamental change to the specification (or contract terms) the contract must not be awarded but re-tendered.~~

15. EVALUATION, AWARD OF CONTRACT, & DEBRIEFING SUPPLIERS

15.1 Apart from the debriefing required or permitted by these contract procedure rules, the confidentiality of Quotations, Tenders and the identity of Suppliers must be preserved at all times and information about one Supplier's response must not be given to another Supplier.

15.2 Tenders and Quotations must be evaluated and awarded in accordance with the Selection and Award Criteria. During this process, Officers shall ensure that submitted Tender prices are compared with any pre-tender estimates and that any discrepancies are examined and resolved satisfactorily.

15.3 The arithmetic in compliant Tenders must be checked.

If arithmetical errors are found they should be notified to the tenderer, who should be requested to confirm the price or withdraw their Tender.

15.4 *Officers* may use *Electronic Auctions* as means of driving additional *Value for Money* and as part of the *Award Criteria*, where this process is completed using the Council's electronic tendering portal.

Where the *Officer* wishes to use such a tool, the *Corporate Procurement Officer* must be contacted to offer assistance.

~~Electronic Auctions may also be used as a tool for seeking bids in sale transactions, such as land, where the highest possible price is sought from an applicant. (Links to 'Disposals' in Financial Procedure Rules).~~

15.5 *Officers* may accept *Quotations* and *Tenders* received in respect of proposed contracts, provided they have been sought and evaluated fully in accordance with these Contract Procedure Rules. Awarding of contracts that are expected to exceed the approved budget sum shall be referred back to the *S.151 Officer*.

15.6 Where the value of a contract exceeds £50,000, a contract may only be awarded by an Officer after seeking the requisite authority to award a contract.

15.7 Where any Tender for projects under the Capital Programme exceeds the available budget to the extent set out in the Financial Procedure Rules, approval to proceed may be made by following those Rules.

15.8 In the event that the council does not wish to award a contract after evaluating a tender response the Officer should advise all suppliers in writing detailing the reason for the decision and the way forward.

15.96 Where the **Total Value is over £50,000**, the *Officer* must notify all *Suppliers* in writing simultaneously and as soon as possible of the intention to award the *Contract* to the successful *Supplier*, and include the reasons why for the unsuccessful bidders. Where an unsuccessful *Supplier* requests debrief information the *Officer* may use their discretion in deciding whether or not to comply with the request; there is no legal obligation imperative on the *Officer* to do so although it is good practice.

15.107 ———Where the **Total Value will exceed the EU Threshold** the *Officer* must notify all *Suppliers* in writing simultaneously and as soon as possible of the intention to award the *Contract* to the successful *Supplier*; ~~unless it is known sooner in the procurement process that a *Supplier* has been unsuccessful, in which case the *Officer* must notify the *Supplier* soonest with as much of the information required at 15.8 below as possible. (See 15.9 for further details). The latter applies most particularly, but not exclusively, in the case of a Restricted Procedure whereby the *Officer* must communicate the list of shortlisted *Suppliers* to those that have not been shortlisted.~~

15.118 ———The letters to the unsuccessful *Suppliers* must contain:

- The criteria for the award of the *Contract*;
- The reasons for the decision, including the characteristics and relative advantages of the successful *Tender*, the score (if any) obtained by:
 - the *Supplier* which is to receive the notice; and
 - the *Supplier* to be awarded the *Contract*; or to become a party to a *Framework Agreement* or *Dynamic Purchasing System*,

- The name of the Supplier to be awarded the *Contract*; or to become a party to a Framework Agreement or Dynamic Purchasing System; and
- A precise statement of either—
 - when the *Standstill Period* is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or
 - the date before which the Council will not enter into the *Contract* or conclude the *Framework Agreement* or *Dynamic Purchasing System*.

15.129 ———The *Officer* must provide a *Standstill Period* of at least ten working days, where the communication is made electronically (fifteen days if not) to allow unsuccessful *Suppliers* the opportunity of challenging the decision before the *Officer* awards the *Contract*. The *Standstill Period* shall end at midnight on the final day of *Standstill* and no sooner. Where the last day of the *Standstill Period* is not a working day, the *Standstill Period* is extended to midnight at the end of the next working day. If the decision is challenged by an unsuccessful *Supplier* then the *Officer* shall not award the *Contract* and shall immediately seek the advice of the *Monitoring Officer* and *Corporate Procurement Officer*.

~~15.10 Where the *Supplier* has been informed of the fact that they have not been successful at an early stage in the procurement process, they must be provided within fifteen days of any request in writing from said *Supplier*, with the reasons that they were unsuccessful.~~

Contract Award Notice

15.13 Where a contract has been tendered pursuant to the regulations, the council will publish a contract award notice in OJEU no later than 30 days after the date of award of the contract.

15.14 The Officer will publish the contract award notice:

- in OJEU (if required by the Regulations)
- on the council's procurement portal (www.supplyingthesouthwest.org.uk)
- on Contracts Finder

15.15 Where the **Total Value exceeds the EU Threshold** the Officer shall draw up a written report (Regulation 84 report). Where the Contract Award Notice contains the information required above, the Council may refer to that notice

16. CONTRACT DOCUMENTS

16.1 Relevant Contracts

16.1.1 **All Contracts above £7,500 shall be in writing** in a form approved by the Monitoring Officer.

16.1.2 All Relevant Contracts, irrespective of value, shall clearly specify:

- What is to be supplied (i.e. the works, materials, services, matters or things to be furnished, had or done)
- The provisions for payment (i.e. the price to be paid and when)
- The time, or times, within which the contract is to be performed
- The provisions for the Council to terminate the contract.

16.1.3 The Council's order form or standard terms and conditions must be used for simple purchases of goods. In any circumstances that require special terms and conditions, the advice of the Monitoring Officer and Corporate Procurement Officer must be sought.

16.1.4 In addition, every **Relevant Contract of purchase over £50,000** must also state clearly as a minimum:

- Health and safety requirements (where applicable and proportionate)
- Sustainability and environmental management requirements (where applicable and proportionate)
- Social Value Act requirements (where applicable, i.e. for service *Contracts* with a *Total Value* in excess of the *EU Threshold*)
- Equality Act 2010 requirements (where applicable and proportionate)
- Any insurance requirements
- Data protection requirements, if relevant
- Charter standards to be met, if relevant
- Bribery Act 2010 requirements
- Freedom of Information Act requirements
- A right of access to relevant documentation and records of the contractor for monitoring and audit purposes if relevant
- Prevention of Corruption and Anti Competitive Behaviour (see paragraphs 18.1 and 18.2) and
- A transparency clause that allows the Council to comply with the government's transparency agenda
- Any confidentiality requirements
- Tax evasion and avoidance requirements

Where Agents are used to let contracts, Agents must comply with the Council's Contract Procedure Rules.

16.1.5 The **formal advice of the Monitoring Officer** on the form of documentation to be used must be sought for contracts where any of the following apply:

- Where the Total Value **exceeds £50,000**; or
- Below £30,000 **if other than the Council's standard terms and conditions** are to be used; or
- Those involving **leasing arrangements** (when the S.151 Officer should also be advised); or
- Where it is proposed to use a **supplier's own terms**; or
- Those involving the purchase of application software with a Total Value **of more than £50,000**; or
- Those that are **complex** in any other way.

16.2 Contract Formalities

16.2.1 Agreements shall be completed as follows:

Total Value	Method of Completion	By
Purchase orders - up to £50,000	Electronic Order or Signature	Authorised officer (see Rule 16.2.3)
Contracts and licences up to £50,000. Council's Standard Terms and Conditions	Signature	<ul style="list-style-type: none"> • Senior Officer • Nominated Deputy (Rule 16.2.3) or • Monitoring Officer
Contracts and licences up to £50,000 Non Standard Terms and Conditions	Signature	<ul style="list-style-type: none"> • Senior Officer, on the advice of the Monitoring Officer (Rule 16.2.3) • Monitoring Officer
Above £50,000, or if any of para 16.1.5 applies (except ICT software).	Sealing (unless advised by the Monitoring Officer that sealing is not necessary)	Monitoring Officer (See also Rule 16.2.3 and 16.3), on the instruction of Senior Officer

ICT - system developments and purchases of computer equipment or software	Method of completion in line with limits above	As above, except that in all cases to be the ICT CoP Lead
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16.2.2 All contracts must be concluded formally in writing before the supply, service or construction work begins, except in exceptional circumstances, and then only with the written consent of the Monitoring Officer or S.151 Officer.

16.2.3 The Officer responsible for securing a signature on the contract must ensure that the person signing for the other contracting party has authority to bind it. An award letter is insufficient. The use of Letters of Intent (which are binding for the Council) should be avoided, but in exceptional circumstances they may be used with the approval of and review by the *Monitoring Officer* before issue. The same rules relating to signatures apply.

~~16.2.4 Any new contract should not be signed until the contract it replaces is either ended or under notice.~~

16.2.4 Depending on the circumstances an officer of the Council may be subject to disciplinary action if he/she signs a contract without being specifically authorised to do so.

16.2.5 All contracts, (save straight forward purchase orders, must be given to the Monitoring Officer for secure storage and recording in **Legal's Contract Register** . **It is the responsibility of the *Officer* to ensure that this happens, only copies of contracts should be held within services.** An electronic copy must be copied to the Corporate Procurement Officer for all contracts with value over £50,000.

16.3 Sealing

16.3.1 A *Contract* must be sealed where:

- The Council may wish to enforce the *Contract* more than six years after its end
- The price paid or received under the *Contract* is a nominal price and does not reflect the value of the goods or services, or
- There is any doubt about the authority of the person signing for the other contracting party.

South Hams

16.3.2 Where appropriate contracts are completed by each side adding their formal seal. The fixing of the Council's seal must be witnessed by a further officer on behalf of the *Monitoring Officer*.

16.3.3 Every Council sealing will be consecutively numbered, recorded and signed by the person witnessing the seal. The seal must not be affixed except in accordance with the Council's *Constitution*.

West Devon

16.3.4 Contracts must be sealed in accordance with Council Procedure Rules and will be overseen by the Council's Solicitor or as otherwise delegated.

16.4 Keeping a register of contracts

16.4.1 The Corporate Procurement Officer will allocate a contract number to each individual contract and will maintain a register of all contracts awarded.

16.4.2 The contract register will be published in accordance with the Local Transparency – A Practitioners Guide to Publishing New Contracts and Tenders Data, November 2010.

What will the register record?

16.4.3 For each contract, the register will record:

- what the contract is for;
- the total contract value;
- contract reference number;
- OJEU details (if applicable);
- The council officer name & contact details;
- the name, address & contact details of the contractor;
- the start and end dates;
- the procurement method used;
- whether the contract can be extended and how;
- Type of contract;
- Name of contract manager;
- whether a certificate was issued under the Local Government (Contracts) Act;

17. BONDS AND PARENT COMPANY GUARANTEES

17.1 The Officer must consult the S.151 Officer about whether a Parent Company Guarantee is necessary when a Supplier is a subsidiary of a parent company and:

- The Total Value **exceeds £50,000**, or
- Award is based on evaluation of the parent company, or there is some concern about the stability of the Supplier.

17.2 The Officer must consult the S.151 Officer about whether a Bond is needed:

- Where it is proposed to make stage or other payments in advance of receiving the whole of the subject matter of the contract and there is concern about the stability of the Supplier i.e. following a formal risk assessment, or
- Where the Total Value exceeds £500,000.

18. PREVENTION OF CORRUPTION & ANTI COMPETITIVE BEHAVIOUR

~~18.1 Prevention of Corruption~~

~~18.1.1 The Officer needs to be aware of the Bribery Act 2010, which introduces general offences of offering or receiving bribes, a specific offence of bribing a foreign public official and the new corporate offence of failing to prevent bribery, as well as the Council's Anti Fraud, Corruption and Bribery Policy and Strategy. The Council's Anti-Fraud, Corruption and Bribery Policy shall be observed at all times when conducting a procurement process and subsequently in the management of the contract which is awarded.~~

18.1.2 The Officer must comply with the Officers' Code of Conduct and must not invite or accept any gift or reward in respect of the award or performance of any contract. It will be for the Officer to prove that anything received was not received corruptly. High standards of conduct are obligatory. Corrupt behaviour will lead to dismissal and is a crime under the Bribery Act 2010~~statutes referred to in Rule 18.1.3 below.~~

~~18.1.3 The following clause must be put in every written Council contract:~~

~~"The Council may terminate this contract and recover all its loss if the Contractor, its employees or anyone acting on the Contractor's behalf do any of the following things:~~

~~(a) offer, give or agree to give to anyone any inducement or reward in respect of this or any other Council contract (even if the Contractor does not know what has been done), or~~

~~(b) commit an offence under the Bribery Act 2010, or~~

~~(c) commit any fraud in connection with this or any other Council contract whether alone or in conjunction with Council members, contractors or employees. Any clause limiting the Contractor's liability shall not apply to this clause."~~

18.2 Anti Competitive Behaviour

~~18.2.1 In their guidance for public sector procurers, the Office of Fair Trading has highlighted practical steps to take to reduce the risks of anti-competitive behaviour, and this should be followed where it is practical to do so:~~

~~(a) Use non-collusion clauses, certificates of independent bids and requests;~~

~~(b) Ensure sufficient credible bidders;~~

~~(c) Look for suspicious bidding patterns (further guidance available);~~

~~(d) Keep good notes of all discussions and potential bidders and systematically scrutinise them for suspicious patterns e.g. geographical prevalence of certain suppliers' areas.~~

~~18.2.2 If there is any doubt during a procurement exercise, or for further guidance, the Officer should contact the Corporate Procurement Officer or Internal Audit.~~

19. DECLARATION OF INTERESTS

19.1 If it comes to the knowledge of a member or an employee of the authority that a contract in which s/he has an Interest has been or is proposed to be entered into by the Council, s/he shall immediately give written notice to the Monitoring Officer.

~~19.2 Officers must comply with the Officers' Code of Conduct, as discussed at paragraph 18.1.2.~~

19.23 All Councillors must comply with the Members' Code of Conduct and register all contracts for goods, services or works made with the Council as required by the Rules on Disclosable Pecuniary Interests.

19.34 The Monitoring Officer shall maintain a record of all declarations of interests in contracts notified by Members and Officers.

20. MANAGING CONTRACTS

20.1 Senior Officers must appoint Contract Managers for all new contracts and for the entirety of the contract.

20.2 Contract managers must follow best practice in the area of supplier relationship and contract management.

20.3 **Variations or extensions** should not be made unless this is provided for in the Invitation to Tender and the Contract itself. The Contract Manager must obtain approval to extend the contract from the Senior Officer.

The Senior Officer must contact the Monitoring Officer and the Corporate Procurement Officer before any variation is actioned (excludes on site variations for construction projects). Any variations to contracts are to be in writing in the form approved by the Monitoring Officer, sequentially numbered and stored with the original contract.

~~Variations or extensions~~Modification of Contracts during their term proposed by the *Officer* that are likely to be considered as 'materially different' from the original *Contract*, on the following grounds:

- When the amendment introduces conditions which, had they been part of the original procurement process, would have allowed for the admission of different *Tenders* or the acceptance of a *Tender* other than the one accepted

- When the amendment “extends the scope of the *Contract* considerably to encompass goods, works or services not initially covered”
- When the amendment changes the economic balance of the *Contract* in favour of the contractor; or
- When there is a change of main contractor, change of ownership of the main contractor, a transfer of shares in the main contractor or a change of sub-contractor where the inclusion of a sub-contractor is inherent to the decision to award the *Contract*

Variations or extensions are unlikely to be permitted on the basis that the proposed *Contract* will be fundamentally different from the old and therefore will require a re-tender ~~will be required~~.

20.4 **Payments** to contractors will only be made on certification by the designated contract manager in line with the Financial Procedure Rules.

20.5 Ongoing checking of the financial position of the successful contractor throughout the period of the *Contract*. The level of any review will vary depending on the type of *Contract* and contractor involved, so the advice of the S.151 Officer or Internal Audit must be sought. The Contractor’s insurance should also be checked annually through the life of the *Contract* and details passed to the Council’s insurance officer for comment.

20.6 **Liquidated and ascertained damages** must be deducted for all periods of delay in line with the terms of the contract. If the Contract Manager does not consider that such damages should be deducted s/he must seek and follow the advice of the Monitoring Officer and 151 Officer.

20.7 The Contract Manager must notify the Monitoring Officer, the responsible Senior Officer, and the S.151 Officer promptly on becoming aware of any **significant dispute**, or **claim for additional payment** in connection with a contract.

No liability shall be accepted without the approval of the Executive / Committee in such cases.

21. RISK ASSESSMENT AND CONTINGENCY PLANNING

~~21.1 A business case must be prepared for all procurements with a potential value over the EU Threshold. Provision for resources for the management of the contract, for its entirety, must be identified in the business case.~~

21.2 For all contracts with a **value of over £75,000**, Contract Managers must:

- Maintain a risk register during the contract period in accordance with the Council's Risk Management Strategy
- Undertake appropriate risk assessments and for identified risks (in consultation with the Council's Lead Officer – Risk Management and Risk Management Strategy as appropriate)
- Ensure contingency measures are in place
- Monitor the financial performance of the contractor or any parent company and alert the S.151 Officer if there is any concerns

22. CONTRACT MONITORING, ~~EVALUATION AND REVIEW AND BENCHMARKING~~

Contracts Financed from Revenue

~~22.1 Contracts shall be monitored in accordance with the Contract Management Toolkit for all Contracts above £50,000. All contracts which have a value higher than the EU Threshold limits, or which are High Risk, are to be subject to formal review(s) by the contract manager with the contractor. The review may be conducted at a frequency that is determined by the risk value and profile of the contract.~~

22.2 As a minimum, for all contracts with a value higher than the EU Threshold limits, or which are High Risk, an annual report must be submitted to the Senior Management Team detailing the financial and service performance.

~~22.3 A contract review process must be applied to all contracts deemed to be High Risk, High Value, or High Profile. This process must be applied at key stages of major procurements.~~

~~22.4 During the life of the contract, the Contract Manager must monitor and take any necessary corrective action in respect of:~~

- ~~• Performance~~
- ~~• Compliance with specification and contract~~
- ~~• Cost~~
- ~~• Any Value for Money requirements~~
- ~~• User satisfaction and risk management.~~

~~22.5 When the contract is completed the Contract Manager must submit a report to the Senior Leadership Team. The report must evaluate the extent to which the~~

~~purchasing need and the contract objectives (as determined in accordance with Rule 5.2) were met by the contract. Where the contract is to be re-let, a provisional report should also be available early enough to inform the approach to re-letting of the subsequent contract.~~

Contracts Financed from the Capital Programme

~~22.6 Procurement for approved capital projects must be made in line with these Rules. Having regard to Rule 15.4, where any Tender for projects under the Capital Programme exceeds the available budget by 10% or £50,000 approval to proceed may be made by the CoP Lead for Assets and S.151 Officer with retrospective reporting through the monitoring process. Above these amounts the specific approval of the Executive / Committee should be sought prior to acceptance.~~

~~22.7 The Section 151 Officer assisted by the CoP Lead for Assets, has Mmonitoring responsibilities to receive regular reports have been set out in the Financial Procedure Rules. from Project Managers on the performance of their project; and report quarterly to the Executive / Committee on the overall progress of the Capital Programme.~~

22.8 The monitoring report will outline the budget position as a whole and include, as a minimum, the financial position of each approved project.

Project Overspends - authorisation

22.9 In monitoring expenditure on a project, the Officer/Project Manager should seek the formal approval of the Section 151 Officer, CoP Lead for Assets or Members at the earliest opportunity where the approved expenditure appearing in the capital programme is likely to be exceeded. See Financial Procedure Rules.

The following table sets out the **authorisation** required:

Project Total Value excl. VAT	Overspend excl. VAT	Authorised By
Up to £500,000	£25,000 to £50,000	<ul style="list-style-type: none">• 151 Officer• CoP Lead for Assets• retrospective reporting to Executive / Hub Committee within the quarterly monitoring report.

Up to £500,000	Exceeds £50,000	Hub Committee
Over £500,000	10%	Hub Committee

23. STATE AID

Definition

23.1 State aid can be defined as any assistance offered by a public sector body in any form whatsoever that distorts or threatens to distort competition by favouring certain organisations and/or *Suppliers* or the production of certain goods. Such aid may take the form of a grant (capital injection), business tax relief, a reduction in rent or preferential finance (this is not an exhaustive list).

23.2 Where the Council wishes to administer aid in this manner careful consideration must be given prior to such a grant so as to ensure that it is compatible with EU law. Aid that is not compatible with EU law may be recovered from the beneficiary with interest.

23.3 For a grant to be considered as State Aid the following cumulative criteria must be met:

- The beneficiary receives a grant of a benefit or advantage; and
- The aid is give by a Member State or through state resources; and
- The beneficiary receives the aid on a selective basis; and
- The aid granted distorts or threatens to distort competition; and
- The aid is capable of affecting trade between Member States

Granted aid must fulfil all of these criteria in order to be deemed as a State Aid for the purposes of EU law.

23.4 Where a grant is defined as State Aid it must be notified in sufficient time to the European Commission. Aid will not be permitted to be bestowed upon the beneficiary until the Commission has reached a decision as to whether it can be deemed as compatible with EU law or not. Where Aid is incompatible the Council will not be permitted to grant it.

Exemptions for State Aid

23.5 Besides seeking approval from the European Commission, State Aid can be said to be compatible with EU law and can therefore be granted legally if:

- For the most part the total de minimis Aid given to a single recipient is less than €200,000 over a 3-year fiscal period

- Aid in favour of SMEs, research, innovation, regional development, training, employment of disabled and disadvantaged workers, risk capital and environmental protection.
- Aid measures promoting female entrepreneurship, such as aid for young innovative businesses, aid for newly created small businesses in assisted regions, and measures tackling problems like difficulties in access to finance faced by female entrepreneurs.

23.6 Such Aid must still be notified to the European Commission and as a result Council *Officers* are advised to seek the advice and guidance of the *Council's Solicitor* and/or *Monitoring Officer* and *Corporate Procurement Officer* where State Aid may be said to exist on a particular project or procurement.

24. DEVELOPMENT AGREEMENTS - Applies South Hams Only.

Definition

- 24.1 A development agreement can be defined as an arrangement between a public sector body and a third party about the use or development of land or property, the nature of which invariably involves the transfer of land that would be otherwise be considered commercially undesirable, which becomes commercial desirable as a result of incentivisation by the public sector body.
- 24.2 Where the Council wishes to establish a development agreement that meets the definition above again careful consideration must be given prior to such an agreement being established so as to ensure that it is compatible with EU law. A development agreement that is not compatible with EU law may be said to be a public works or *Concession Contract* and may therefore be subject to the legislation on public procurement.
- 24.3 For a development agreement to be considered as not triggering the public procurement legislation some or all the following characteristics must be met:
- The proposed development (or a significant part) is to be undertaken at the initiative and autonomous intention of the developer. (This may be particularly likely if the developer already owns or has control of land to be developed);
 - The development agreement is ancillary or incidental to a transfer or lease of land or property from the Council to the developer, and is intended to protect the interests of the Council which is the lesser or otherwise retains an interest in the land or property;

- The development agreement is based on proposals put forward by the developer, rather than requirements specified by the Council, albeit that these proposals may be sought, and the “winner” chosen by the Council;
- There is no pecuniary interest passing from the Council to the developer as consideration for undertaking the development, either through direct payment or indirectly, for example by the assumption of obligations such as contributions towards project finance or guarantees against possible losses by the developer;
- The development agreement does not include specific contractually enforceable obligations on the developer to realise a work or works (even if that work or works is recognised as being the general intent of the parties to the agreement);
- The development does not consist of or contain works for the direct economic benefit of the Council. The involvement of the Council consists only in the exercise of statutory land-use planning powers.

24.4 Where a development agreement cannot be said to meet the criteria defined above a public works or *Concession Contract* must be awarded in accordance with the public procurement legislation.