

CHERWELL DISTRICT COUNCIL CONTRACT PROCEDURE RULES (February 2023)

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1. INTRODUCTION

This part of the Constitution sets out the Council's ('Council') rules for buying goods, services and works on behalf of the Council and disposing of some types of property. In this document they are referred to as the "Contract Rules".

The Council must have contract rules under section 135 of the Local Government Act 1972.

Officers must have regard to the Council's Procurement Guidance or any replacement of such guidance from time to time in force ("the Guidance").

2. SCOPE OF CONTRACT PROCEDURE RULES

These Rules (and those complementary rules in the Council's Constitution, including its Financial Procedure Rules) apply to all spending on works, supplies and services by the Council. They also apply to the disposal of all Council assets.

The Rules also apply whether the Council is dealing on a commercial basis with entities in the private sector or the public sector.

These Rules must also be followed where the Council decides to accept an expression of interest received from a relevant body under the community right to challenge.

Further, the Rules apply to arrangements which the Council wishes to enter into in consequence of its having received grant funding from an outside body to procure a service, or to receive an income in return for giving another body the right (a concession) to run a service.

The Rules do not apply, however, to:

- contracts of employment
- contracts with Counsel and specialist legal advice
- grant/funding agreements

The Monitoring Officer may amend these Rules where required by statutory change, updates in government procurement policy, managerial adjustment or administrative error.

3. COMMENCING A PROCUREMENT

No procurement shall commence without there being sufficient budget available to cover the estimated cost of the Works, Supplies or Services being procured, or an outside body providing grant for the procurement of Works, Supplies or Services having given a binding commitment to the Council to provide those funds.

Further, for all procurements above £50,000 (inclusive of VAT) the relevant Officer shall first consider and agree with the Procurement and Contracts Manager agree a procurement strategy that is most likely to achieve the procurement's intended outcomes and objectives, having regard, therefore, to such matters as:

- the likely total cost of the project;
- the amount and source of the money earmarked for it;
- the length of the proposed arrangement;
- the procedure to be adopted for achieving effective competition;
- the proposed procurement timetable;
- whether procurement jointly with another public body would be of benefit;
- how Value for Money and/or Service improvements may be achieved;
- how Social Value might be secured for the Council's area by the procurement;
- details as to whether TUPE is likely to apply; and
- any risk to the Council in undertaking (or not undertaking) the procurement.

4. ROLE OF THE PROCUREMENT & CONTRACTS GROUP

The Procurement and Contracts Group (PCG) is an officer led board with its terms and reference set out at Appendix 1.

5. REQUIREMENTS IN RELATION TO TUPE

TUPE, and the interpretation of it, changes frequently, and only a brief reference to it is therefore contained within these Rules. Officer should consult Human Resources and Legal for further TUPE guidance and advice as necessary or appropriate.

Whenever a new supplier is appointed to take over the provision of an existing Service, employees of the original supplier engaged in the provision of that Service (or the Council, if the Service was provided in-house) may be affected by transferring that Service to another provider. If so, it will be necessary to form a view as to whether TUPE applies, and advice from Legal and HR must therefore be obtained by the Project Officer before commencing a procurement.

6. FINANCIAL THRESHOLDS AND PROCUREMENT PROCESS

Where a Relevant Contract is being procured the minimum procurement process and rules for inviting tenders are as follows.

Estimated Total Contract Value (inclusive of VAT)	Minimum Process	Method of Invitation & Transparency Obligation	Authority to award	Authority to sign
Less than £5000	At least one quote must be sought from an appropriate source via the procurement portal (or alternative method with prior approval of the Procurement and Contracts Unit)	None mandated	Relevant Assistant Director	Relevant Assistant Director
£5000 to £100,000	Invitation to quote or tender must be sent via the procurement portal to at least three	Method to be approved by the Procurement and Contracts Unit, with any procurement	Relevant Assistant Director and if over £50,000 in value with the prior approval of	Authorised Signatory (Legal Services)

	suppliers - including at least one SME* or VCSE* organisation - where appropriate and possible	over £50,000 requiring prior approval by Procurement & Contracts Group	Procurement & Contracts Group.	
Over £100,000 to the relevant FTS (Find a Tender Service) threshold.	Tender process via the procurement portal, with at least five written tenders sought, where appropriate and possible	Advertise open invitation to tender (ITT) on the Council's portal and Contracts Finder	Relevant Assistant Director with the approval of Procurement & Contracts Group	Executed as Deed under Seal (Legal Services) or alternative method approved by the Monitoring Officer
Over Relevant FTS threshold	Full competitive tender process applies via the procurement portal.	Advertise relevant Procurement Procedure by on the Council's portal. Advertise on Contracts Finder and Find a Tender system Other media may also be used	Relevant Assistant Director with the approval of Procurement & Contracts Group If over £500,000 Executive approval is required	Executed as Deed under Seal (Legal Services) or alternative method approved by the Monitoring Officer

Purchasing Schemes

An officer responsible for the procurement exercise may use Purchasing Schemes subject to the following conditions:-

An officer responsible for the procurement must seek advice in advance that:

- the Council is legally entitled to use the Purchasing Scheme;
- the purchases to be made do properly fall within the coverage of the Purchasing Scheme;
- the establishment and operation of each Purchasing Scheme is in compliance with the Procurement Legislation and meets the Council's own requirements.

A "Purchasing Scheme" may include:

- Contractor prequalification lists/select lists;
- Framework arrangements (including those set up by the Government Procurement Service);
- Purchasing arrangements set up by central purchasing bodies and commercial organizations; Consortium purchasing;
- Collaborative working arrangements;

- Formal agency arrangements;
- E-procurement / purchasing schemes and methods;
- Other similar arrangements.

Where a Purchasing Scheme is used then there shall be a whole or partial exemption from the obligations under these Contract Rules of Procedures in respect of the choice and conduct of procedures. Advice should be sought from the Procurement and Contracts Services prior to entering to such arrangements.

Getting Tenders and Quotations

Where quotations or Tenders are required, the documentation comprising the ITT or the ITQ shall be based on relevant model documents available from the Procurement and Contracts Unit.

Evaluation Criteria

Any ITT or ITQ must contain details as to the criteria for awarding the Contract to which it relates. Those criteria must be robust, fair, auditable, compliant with any relevant Public Procurement Legislation and, for any ITT, weighted wherever possible.

The award criteria may be based on price alone or on that which represents the Most Economically Advantageous Offer received. In relation to Contracts above the FTS Threshold, any award *must* be based on the Most Economically Advantageous Offer.

Lowest Price

Awards based on price alone will usually only be suitable for Supply Contracts where the Supplies required can be specified in significant detail at the outset and no after sales service or other special requirements are needed in connection with that Supply. Where appropriate, guidance should be sought on price assessment and lifecycle costs from the Procurement and Contracts Unit.

Most Economically Advantageous Offer

Where the Council intends to award a Contract on the basis of the proposal which is the Most Economically Advantageous Offer received, the criteria (and any sub-criteria) to be used in the evaluation shall, as a minimum:

- be pre-determined,
- have relevant weightings set out with applicable criteria
- be strictly observed at all times throughout the competition for the Contract,
- include (with any relevant weightings) criteria where appropriate in respect of Social Value
- reflect value for money,
- include price and quality criteria,

- be capable of objective assessment, and
- have regard to environmental impact and sustainability considerations relevant to the Works, Supplies or Services being procured.

Where a contract award is to be made following the above approach, it should be awarded to the tenderer obtaining the highest overall score (i.e., the Most Economically Advantageous Offer) from the evaluation process with a compliant tender.

7. INSURANCE

At the commencement of any procurement exercise, the relevant Officer and the Assistant Director of Finance (or nominated officer) shall together determine the type and level of insurance cover required in relation to a particular procurement. The appropriate Officer shall ensure the successful bidder has any required insurance cover in place before performance of the Contract begins, and shall further ensure, at appropriate intervals, that such cover is maintained by the supplier throughout the Contract period.

8. PARENT COMPANY GUARANTEES AND PERFORMANCE BONDS

Before commencing any tendering exercise for a Contract exceeding £150,000 in value of amount, the relevant Officer and the Assistant Director of Finance (or nominated officer) shall together determine the need for, and value of, any parent company guarantee and/or performance bond necessary in relation to that procurement.

The Assistant Director of Finance (or nominated officer) may also require any Contract below £150,000 to be supported by a parent company guarantee and/or performance bond for such amount as the Assistant Director of Finance (or nominated officer) may consider necessary or appropriate in all the circumstances.

In determining the need for appropriate guarantees, regard should be had to using performance bond and/or a parent company guarantee only in specific and justified circumstances where the contract is judged to be at high risk of supplier or performance failure. Key points include: is the contract with the ultimate parent company; is the balance sheet commensurate with the liabilities in the contract; what proportion of the net assets are represented by the maximum liability under the contract; and to what extent are the assets are tied to the contracting party?

The appropriate Officer shall ensure the successful tenderer has any required parent company guarantee and/or performance bond in place before the Contract is commenced.

9. TENDER ADMINISTRATION: PROCEDURE FOR ISSUING AND RECEIVING TENDERS

An electronic Invitation to Tender shall be issued by the Council for all contracts with an estimated value of £100,000, or more and tenders shall be

submitted electronically via the Council's Procurement Portal.

The Council Procurement Portal and the Invitation to Tender must specify the format in which an electronic tender is submitted by tenderers and such tenders shall be stored in a secure portal account which is locked until the date and time specified for its opening.

No tender received after the time and date specified for its opening shall be accepted or considered by the Council unless the Monitoring Officer is satisfied that there are exceptional circumstances and the other tenders have not been opened.

The electronic opening of tenders submitted on the Procurement Portal shall be conducted by a Procurement or Legal Officer and the relevant Assistant Director or their nominated representative.

Only in limited circumstances a tender process should be undertaken by hard copy submissions. In such cases written approval of the Monitoring Officer is required.

All Tenders must be returned strictly in accordance with the instructions prescribed in the ITT and must not be returned directly to the Project Officer, a Council Member or to any consultant acting on the Council's behalf.

10. EXCLUSIONS

The requirement to conduct a competitive procurement process is excluded in the following circumstances:

	Type of circumstance	Written record and approval
a)	the proposed contract is excluded under the Procurement Legislation; or	Prior written approval from the Monitoring Officer is required.
b)	the proposed contract is being awarded under a Purchasing Scheme of a type where a competition has already been undertaken on behalf of the Council or other public sector organisation; or	Prior written approval from the Monitoring Officer is required.
c)	the proposed contract is an extension to or a variation of the scope of an existing contract where the existing contract provides for such extension or a variation or where the variation is a modification permitted under the Procurement Legislation.	For contract extension where annual value is below £50,000 prior written approval from the Monitoring Officer and S151 Officer is required. For contract where annual value greater than £50,000, approval of the

		Procurement & Contracts Group.
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11. EXCEPTIONS

The Council does not have the power to waive the applicability of Public Procurement Legislation.

Subject to Public Procurement Legislation the requirement to seek Tenders or Quotations may be waived as follows:

Value	Authority to Waive
Below £50,000	Monitoring Officer and Section 151 Officer
Above £50,000	Monitoring Officer and Section 151 Officer with a report approved by Procurement & Contracts Group and

All exceptions or waivers to these Contract Rules of Procedure must be:

fully documented with a record noting the reasons for the waiver and that the circumstance are genuinely exceptional; and

noted on the waiver register to be kept by the Procurement and Contracts Unit.

12. CONTRACT FORMALITIES

12.1 The Form of Contract

- 12.1.1. All contracts should be made in writing and on the Council's standard written terms unless Legal Services approves otherwise. Contracts made on the supplier's written terms must be reviewed and approved by Legal Services. In advance of the tender process, the procuring Officer must seek advice from Legal Services on the form of contract to be used.
- 12.1.2. Advice from the Finance team must be obtained where the contract involves a finance leasing arrangement.
- 12.1.3. Every contract shall specify the goods, materials or services to be supplied and the work to be executed; the price to be paid together with a statement as to the amount of any discount(s) or other deduction(s); the period(s) within which the contract is to be performed and such other conditions and terms as may be agreed between the parties and are required by law.
- 12.1.4. Consideration must be given as to whether or not a performance bond, parent company guarantee, or other form of security acceptable to the S151 officer and Legal Services, is required from the supplier.

12.2 Required Terms

- 12.2.1 **Boilerplate Clauses** - The Council is required to include statutory terms which include non-exhaustively: Anti Bribery; Anti-Money Laundering;

Freedom of Information; Data Protection; Safeguarding of Vulnerable Adults and Children; Transparency; Prevention of Terrorism; Audit; Anti-Discrimination Equality and Diversity; Payment of Subcontractors; Termination and Exit of Above Threshold Contracts; Compliance with Anti-Slavery and Human Trafficking laws; Force Majeure; Health and Safety.

If Officers consider one of the above clauses is more appropriate to their contract, they must notify Legal Services when asking them to consider the contract terms. For example, where personal data is being controlled or processed by a third party on the Council's behalf, an additional data sharing agreement may be required.

12.2.2 Liquidated Damages - Officers must consider the effect on the Council of any delay in performance of the contract, and whether that delay is likely to cause the Council financial loss which requires protection. If so, the Officer must estimate the reasonable and genuine loss that the Council is likely to suffer as a result of the delay and that would fairly compensate the Council, usually at a daily or weekly rate for that loss.

12.2.3 Standards - Where an appropriate British Standard or code of practice (or other applicable standard) applies to the procurement, the relevant Officers are required to the relevant standard is included in the contract or specification.

12.3 Execution of Contracts

12.3.1. Where any contract is required as a result of any legal procedure or legal proceedings on behalf of the Council, it will be signed by the Monitoring Officer or another person authorised by them, unless any enactment otherwise authorises.

12.3.2. Contracts with a value of less than £5,000 (inclusive of VAT) can be signed by the relevant Assistant Director. Contracts of £5,000 (inclusive of VAT) to £100,000 are to be executed in Legal Services, unless Legal Services approves otherwise.

12.3.3. Any contract for an amount of or greater than £100,000 (inclusive of VAT) is to be to be executed as a deed using the common seal of the Council, signed by an authorised signatory and witnessed as formality requires.

12.4 Electronic Signatures & Seals

12.4.1. For all contracts below £5,000 (inclusive of VAT), the Council may execute the contract via a method of e-signature which has been pre-approved by Legal Services. Any contract with a value between £5000 and £100,000 (inclusive of VAT) must be authorised, signed and completed by Legal Services.

12.4.2. For contracts that require a seal, the Monitoring Officer may adopt such

means of sealing as from time to time they consider appropriate. This may include allowing electronic sealing in accordance with section 7A(1) of the Electronic Communications Act 2000 (or other subsequent legislation). Affixing of an electronic seal approved in this way shall be of the same legal effect as affixing the common seal of the Council. Any additional formality relating to the witnessing of such contracts are complied with.

13. ENGAGEMENT OF CONSULTANTS

- 13.1 The financial limits in these Contract Rules apply to the engagement of consultants and the appointment must be based on approved evaluation. If a consultant is to provide services over the lifetime of a project then the whole lifetime cost should be taken into account when procuring the consultant.
- 13.2 External legal consultants must be appointed through Legal Services in accordance with the Council's Constitution.
- 13.3 Prior to the engagement of the consultant the Officer must:
- a) Prepare a business case in advance of the appointment which as a minimum, should detail the reason for seeking external expertise, for example, lack of internal capacity or capability due to the specialist nature of services;
 - b) This business case should be approved by either the Director or the Head of Service or their delegated nominee;
 - c) Financial checks of lead consultants' financial stability and professional indemnity insurance should be made (which should also include any sub-consultants);
 - d) Insurance expiry date should be monitored by project managers except in those cases where the insurance Section is directly responsible for such insurance. Ongoing checks of valid insurance renewals should be undertaken during the lifetime of contracts;
 - e) Where the consultant is an individual, check with Payroll and Procurement to find out if the consultant is acting in the capacity of an employee and therefore subject to IR35 (tax and national insurance payments at source)
- 13.4 The terms of engagement of a consultant (not being an Officer of the Council) shall be set down in a form approved by Legal Service.
- 13.5 Previous employees should not be engaged as consultants until a period of at least 6 months has elapsed since they ended their employment with the Council.

14. CONTRACT PERFORMANCE MONITORING

- 14.1 The relevant Officer should ensure that the contractor's performance is monitored against the contractually agreed terms, by an appropriate Officer

responsible for contract management in their department. The extent of the monitoring should be proportionate to the nature, duration and associated cost of the contract.

- 14.2 Assistant Directors and managers are required to ensure Officers carry out proper contract management and that any issues in contract performance are brought to their attention. PCG may also require an updating report on contract performance.
- 14.3 Contract managers are to periodically revise how delivery and processes under ongoing contracts might be improved and to ensure that those improvements are implemented by the supplier and monitored by the contract manager.
- 14.4 Where further goods, works, or services will be required at the end of an existing contract term, contract managers must consult with the Procurement and Contracts Service prior to the expiration of the existing contract in sufficient time to plan the re-procurement to avoid disruption to Council services.

15. CONTRACT COMMENCEMENT

As a general rule, the Project Officer shall not authorise performance of any Contract, nor raise any Purchase Order in connection with it, unless and until all of the documents comprising the Contract have been executed by all of the parties to it, unless the Purchase Order itself comprises the Contract

However, where there are exceptional circumstances requiring a successful tenderer to commence performance of a Contract prior to its execution as a matter of urgency (to avoid delay and increased costs on the Contract), the relevant Officer must satisfy the Monitoring Officer and the Section 151 Officer before authorising such commencement that:

- a. the supplier has confirmed in writing its unequivocal commitment to:
 - perform the Contract in accordance with the established terms, and
 - execute the document comprising those terms when it is available and to indemnify the Council against any breach of such undertakings;
- b. any performance bond or parent company guarantee required under the terms of the Contract has been received from the supplier's surety or parent company or the surety or parent company has written to the Project Officer confirming the relevant organisation's agreement to be bound by the terms of such performance bond or parent company guarantee from the date of such communication;
- c. a certificate of insurance has been received from the supplier's insurers to confirm all requisite insurance cover is in place; and
- d. the Section 151 Officer has undertaken appropriate financial checks on the supplier to establish its financial capability to undertake the Contract.

16. RECORD RETENTION

All Contracts executed under seal (including the winning Tender and any documentation supplementary thereto) shall be held by the Assistant Director Law and Governance for safe keeping and copy to be kept by relevant Assistant Director.

All other procurement documentation, including all expressions of interest, selection questionnaires, ITTs, unsuccessful Tenders, Quotations, clarification responses, internal deliberations and recorded decisions shall be kept safe and secure by the relevant Assistant Director for a period of at least 3 years from the date of Contract award whereupon such documents shall be destroyed.

Contracts executed under hand shall be held by the relevant Assistant Director and Procurement and Contracts Service for a period of 6 years from the date it is signed.

17. PROCEDURE FOR THE DISPOSAL OF COUNCIL ASSETS

Where the estimated value of an asset is £50,000 or more, or where the Executive so determines, disposal of that asset shall, unless a valuer with relevant qualifications has certified that an alternative method of disposal would better achieve the Council's aims and objectives, be conducted in one of the following ways using approved agents if appropriate:-

- Sale by Tender
 - Ad-hoc Tenders - At least 14 days' notice to be given in such local newspapers circulating in the Council's area and/or in such national journals as the relevant Assistant Director considers desirable stating the nature of the asset and inviting tenders for its purchase and stating the last date when tenders will be accepted; or
 - Approved List - Public notice to be given in respect of a particular transaction in the same manner as that described in *Ad-hoc Tenders* above inviting applications from interested persons to be placed on a list to be approved by the Executive from which prospective purchasers shall be selected and invited to submit tenders.

- Sale at a Named Figure

An assessment of the value of the asset shall be made by a valuer with relevant qualifications. The relevant Assistant Director shall issue particulars of the asset and the price to all enquiring persons. Details of the asset shall be publicly advertised on at least one occasion and, in the case of land or property, a sign board erected upon the site.

- Invited Offers

The asset shall be advertised in accordance with the rules for Sale by Tender but no figure shall be placed in the particulars and interested parties shall be asked to make offers for consideration by the Council. In order to

give guidance to prospective purchasers a minimum figure may be quoted where appropriate.

- Sale by Public Auction

Properly qualified and experienced auctioneers shall be commissioned to act on behalf of the Council in offering for sale by auction assets in the Council's ownership.

COMPLIANCE

18. STANDARDS OF CONDUCT AND OBSERVANCE OF RULES

All employees involved in the award or the potential award of any Contract or the disposal or potential disposal of any asset shall:

- act with integrity and honesty; and
- exercise all fairness and impartiality; and
- comply with the Rules; and
- respect the Officer's Code of Conduct; and
- observe any policy adopted by the Council on measures to combat bribery and corruption

and shall report instances of suspected fraud and other irregular activity connected with such award or disposal under any whistleblowing policy adopted by the Council.

ANY MANIFEST OR MATERIAL DEPARTURE FROM THESE RULES OR THE OFFICER'S CODE OF CONDUCT OR ADOPTED ANTI-BRIBERY POLICY IS A DISCIPLINARY OFFENCE.

PROCUREMENT & CONTRACTS GROUP TERMS OF REFERENCE

1. INTRODUCTION

1.1 PCG means the Procurement & Contracts Group comprising of:

- Section 151 Officer
- Monitoring Officer
- Representative from each of the Directorates
- The portfolio holder responsible for Procurement and/or Governance; and
- Such other Council Members as any of the Core Group may invite on a case by case basis or their nominees

1.2 The PCG shall meet monthly or where urgent transact its business electronically.

2. TERMS OF REFERENCE OF THE PCG

2.1 approve the contract strategy report, extension, exception and award reports of all Contracts above £50,000 (inclusive of VAT):

- Perform a strategic and overview role in relation to the Council's procurement and contract management.
- Provide a forum for Officers to discuss policy development, seek strategic advice and raise questions, issues and problems with procurement and contract management.
- Define and spread best-practice as it relates to contracting and Contract management and monitoring.
- Provide advice to Officers as appropriate on contracting issues.

3. PROCEDURES FOR THE PCG

3.1 The PCG shall both be chaired by the Monitoring Officer or their nominee.

3.2 The Procurement and Contract Manager shall convene all meetings of the PCG, and at least two working days before such meeting shall send to every member an agenda and copies of all reports.

3.3 Members of the PCG, or their nominees, shall attend any meeting of them when requested to do so.

3.4 Action shall be made by the Procurement and Contract Manager of the proceedings of the PCG.

3.5 Additional procedures and related arrangements may be issued in Guidance from time to time by the Monitoring Officer.