



**COMHAIRLE NAN EILEAN SIAR**  
**CONTRACT REGULATIONS**

## INDEX

1. Introduction
2. Application/Effect
3. Financial Provision
4. Best Value, Competitive Tendering and Exemptions
5. Consultants
6. Framework Agreements
7. Invitation to Tender:
  - Security and Insurance
  - Evaluation Criteria
  - Invitation to Tender
  - Communications
  - Law of Scotland
  - Standards
  - Site Possession
  - Propriety
  - Assignment and Sub-Contracting
  - Conditions of Contract
  - Damages
  - Freedom of Information, Data Protection and Environmental Information
  - Payment Arrangements
8. Receipt and Custody of Tenders
9. Late and Non-Compliant Tenders
10. Opening of Tenders
11. Validation and Certification of Tenders
12. Evaluation of Tenders
13. Acceptance of Tenders
14. Post-Tender Negotiations
15. Contracts
16. Document retention
17. Equal Opportunity in Employment
18. Equality and Non-Discrimination
19. Health and Safety

## **1 INTRODUCTION**

- 1.1 These Regulations are made in terms of section 81 of the Local Government (Scotland) Act 1973 and shall apply, unless otherwise stated, to the making of all contracts by the Comhairle.
- 1.2 These Regulations are subject to the applicable national legislation (referred to in these Regulations as the Public Procurement Regime). Procurement of works, goods and services is governed by the Public Procurement Regime irrespective of these Regulations.
- 1.3 It is not permitted to separate or sub-divide any procurement into two or more contracts in order to avoid application of any of these Regulations or the Public Procurement Regime.
- 1.4 The estimated value of a contract is the total estimated value of the whole contract, not the estimated annual value. Where a contract has an annual value, unless otherwise provided for in the Public Procurement Regime the estimated value is calculated by multiplying the estimated annual value by the term of the contract. If the contract is for an indefinite number of years, the estimated annual value must be multiplied by 4 to obtain the estimated value of the contract.
- 1.5 All contracts for the provision of goods or services having an estimated value of £50,000 or more, or for works having an estimated value of £2,000,000 or more, are subject to the Public Procurement Regime. These figures are current at December 2021. Advice on current values may be sought from the Procurement Section.
- 1.6 All Comhairle employees are required to comply with both the Public Procurement Regime and these Regulations.
- 1.7 The Procurement Section will provide advice to departments on the appropriate means of procuring a contract.

## **2 APPLICATION/EFFECT**

- 2.1 These Regulations shall apply and have effect from the date on which they are approved by the Comhairle. Any procurement procedure commenced but not concluded prior to that date shall be concluded using the previous Regulations.
- 2.2 These Regulations should be applied with reference to the Comhairle's Procurement Policy and all other relevant policies and procedures.

## **3 FINANCIAL PROVISION**

- 3.1 Unless otherwise agreed by the Comhairle in relation to a specific contract, no tender shall be invited or offer made or accepted unless the net estimated expenditure on it is included within budgets previously approved by the Comhairle or, if funding is being provided by a third party, the acceptance of that funding has been approved by the Comhairle.
- 3.2 No tender shall be invited for any contract unless a written estimated valuation and/or business case, which will be prepared by the appropriate Officer and will be held in the department for six years, is prepared and approved.

## **4 BEST VALUE, COMPETITIVE TENDERING AND EXEMPTIONS**

4.1 All contracts shall be awarded on the basis of best value and competition.

4.2 Subject to regulation 4.4 below, competition shall be evidenced by:

- (a) tenders being invited, such process to be conducted via Public Contracts Scotland (the Scottish Government's secure public procurement portal, "PCS") unless impracticable; or
- (b) on a selective basis from contractors on a framework agreement which is either established by the Comhairle in accordance with regulation 6 or by Scotland Excel (or similar representative body approved by the Scottish Government), the Scottish Government, the UK's Crown Commercial Service or any other appropriate organisation, in which the Comhairle is a participant or a beneficiary.

4.3 Any such advertisement or invitation as is referred to in regulation 4.3(a) may reserve the Comhairle's right to restrict the number of suppliers invited to tender, and to select from suppliers intimating a desire to tender.

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

- (a) any contract of which the estimated value is less than £1,000;
- (b) any contract which falls into a category of contract which is excluded from regulation by the Public Procurement Regime (but only to the extent that the contract is so excluded);
- (c) a direct call-off contract permitted under a framework agreement;
- (d) any procurement conducted by a consortium, or similar body, of which the Comhairle is a member;
- (e) any contract of which the estimated value is less than the applicable threshold for a regulated public contract and:
  - purchase from a particular supplier is desirable to ensure compatibility with existing goods, services or works ("a single source");
  - the proposed supplier is the only one known to possess unique or specialised goods and/or services, or the articles are unobtainable from any other source and there are no satisfactory alternatives ("a sole source"); or
  - goods, services or works are, urgently required for whatever reason and competitive tendering would cause unacceptable delay provided that, in any of those cases, the appropriate Director has completed a Single Source Supplier Request for Approval Form in advance and the Chief Executive has approved the request; and
- (f) exceptional or emergency circumstances where the requirement to comply with the Public Procurement Regime is suspended or amended by law, or where the Comhairle is satisfied that exemption is justified.

## **CONSULTANTS**

- 5.1 A request to appoint a consultant or to invite tenders from consultants shall be referred to the Chief Executive by the appropriate Director in terms of the Scheme of Administration and the Scheme of Delegation. Such a reference must include a statement that the project in relation to which it is intended to engage consultants has been approved by the Comhairle in terms of its Constitutional Documents and that adequate financial provision is in place for the consultancy contract. The Director must indicate why the provision of the service is not available within the Comhairle and why the appointment is necessary. The Director will also advise the Chief Executive of any person appointed as a consultant or directly employed by a firm appointed as consultants who, within a period of five years prior to the date of the proposed appointment, has been an employee of the Comhairle.
- 5.2 It shall be a condition of the engagement of the services of any consultant who is to be responsible for a Comhairle contract that, in relation to that contract, he shall:
- (a) comply with these Regulations as if he were an Officer of the Comhairle;
  - (b) at any time during the carrying out of the contract, produce on request to the appropriate Director all records maintained by him in relation to that contract; and
  - (c) on completion of the contract, transmit all records to the appropriate Director as may be required.

## **6 FRAMEWORK AGREEMENTS**

Where there is likely to be a repeated requirement for a particular supply, service or works, it may be procured by way of a framework agreement. No framework agreement shall last longer than four years unless there are exceptional circumstances to justify a longer term. Details of any such exceptional circumstances shall be recorded in writing.

## **7 INVITATION TO TENDER**

- 7.1 The appropriate Director, in consultation with the Chief Executive and the Director for Assets, Finance and Resources, will prepare the Scope of Requirements and any other contract-specific documents to be included in the Invitation to Tender (ITT). Any consultant engaged by the Comhairle will, if required to do so, prepare the documents in consultation with the appropriate Director and the Chief Executive.

### **Security and Insurance**

- 7.2 If the estimated value of carrying out a works contract is £750,000 or more, the Comhairle will ask for security for completing the contract unless the Chief Executive, in consultation with the appropriate Director, determines that security is unnecessary or inappropriate. The contract shall set out the form and amount of the security.
- 7.3 The Comhairle may call for security on any other contract.
- 7.4 Where a bond or other guarantee has been required, no payment shall be made to the contractor before the documentation for that bond or other guarantee has been completed.
- 7.5 The Comhairle will specify in the ITT the levels of public liability, employers' liability, professional indemnity and any other appropriate insurance.

### **Evaluation Criteria**

- 7.6 In proposing the selection and evaluation criteria to be used for determining the most economically advantageous tender(s), the relevant Director shall have regard to how those criteria might promote:
- environmental, economic and social sustainability
  - equality and non-discrimination
  - fair work practices
  - community benefits
  - community wealth-building
- 7.7 It shall be for the Chief Executive (and the Director for Assets, Finance and Resources for their interests) to approve the selection and evaluation criteria to be used for determining the most economically advantageous tender(s). Such approval must be obtained prior to publication of the ITT.

### **Invitation to Tender**

- 7.8 The ITT shall state:
- (a) the nature and purpose of the contract for which tenders are invited;
  - (b) the last date and time for receipt of tenders;
  - (c) the method by which tenders are to be submitted;
  - (d) that tenders shall remain open for acceptance for the period specified in the ITT unless previously withdrawn in writing;
  - (e) the criteria to be used in evaluating the most economically advantageous tender;
  - (f) that tenderers may be requested to provide clarification of their tender;
  - (g) that the Comhairle reserves the right to accept a tender other than the lowest, to accept no tender or to accept a tender in whole or in part;
  - (h) that any tender received after the last date and time for submission may not be considered;
  - (i) that compliance with all the terms of the ITT is compulsory and that tenderers may be disqualified if they fail to complete any part of the ITT, unless such failure is rectified as required in the ITT;
  - (j) subject to regulation 11, that the Comhairle will continue to follow good practice by adjusting tender prices where there is an obvious arithmetical error;
  - (k) the method by which tenderers may make requests for information or clarification;
  - (l) that any attempt by tenderers to communicate with Elected Members or Comhairle employees may result in the disqualification of their tender; and
  - (m) that all tenders must be signed or electronically authenticated by an authorised signatory of the tenderer.

### **Communications**

- 7.9 Elected Members, Comhairle employees and relevant consultants must report to the Chief Executive any communication, however informal, regarding a contract that is the subject of a tendering process. The Chief Executive will decide whether that communication should result in the disqualification of a tenderer.

### **Law of Scotland**

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

### **Standards**

- 7.11 Where an appropriate British Standard Specification or British Standard Code of Practice issued by the British Standards Institution is current at the date of issue of the ITT, every contract shall require that, as the case may be, all goods, services or works shall be no less than that standard or an equivalent standard.

### **Site Possession**

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

### **Propriety**

- 7.13 Any person who has reason to believe that these Regulations have not been applied or complied with may express such concerns in writing to the Chief Executive who may then investigate.
- 7.14 Every contract shall provide that the Comhairle shall be entitled to terminate the contract and to recover from the contractor any resulting loss if the contractor or any of his employees or any person acting on his behalf shall, with or without the knowledge of the contractor, have offered or given or agreed to give to any person any gift or consideration of any kind as shall be an inducement or reward in connection with any contract with the Comhairle or shall have committed any offence under the Bribery Act 2010, or shall have given any fee or reward, the receipt of which is contrary to the relevant Code of Conduct.

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

- 7.15 Every contract shall provide that the contractor shall be prohibited from transferring or assigning or sub-contracting to any person or persons whatsoever any portion of the contract without the prior written consent of the Comhairle.

### **Conditions of Contract**

- 7.16 Contracts shall be subject to such terms and conditions as the Chief Executive may deem appropriate, subject always to the Public Procurement Regime and the Comhairle's Procurement Policy.

### **Damages**

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

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

- 7.18 All contracts shall make clear the Comhairle's obligations and requirements in respect of the Freedom of Information (Scotland) Act 2002, the Data Protection Act 2018 and the Environmental Information (Scotland) Regulations 2004.

## **Payment Arrangements**

- 7.19 Where a works contract provides for payment to be made by instalments, the Director for Assets, Finance and Resources shall arrange for the keeping of a register to show the state of the account on each contract between the Comhairle and the contractor, together with any other payments and any related professional fees.
- 7.20 Payments to contractors on account of works contracts shall be made only on a certificate issued by the contract administrator, engineer or property maintenance officer (or private architect, engineer or consultant) as appropriate, or by their deputy or other person nominated by them in writing for the purpose.
- 7.21 Subject to the provisions of the works contract and the Public Procurement Regime, in each case any extra payment or variation of the payment arrangements shall not be made unless authorised in writing by the contract administrator, engineer or property maintenance officer (or private architect, engineer or consultant) as appropriate, or by their deputy or other officer nominated by them in writing for the purpose. Any such extra payment or variation, the estimated additional cost of which exceeds £25,000, shall be reported to the appropriate Committee as soon as practicable.
- 7.22 The Director for Assets, Finance and Resources shall, to the extent that they consider it necessary, examine final accounts for contracts and shall be entitled to make all such enquiries and receive such information and explanations as they may require in order to be satisfied as to the accuracy of the accounts.
- 7.23 Claims from contractors in respect of matters not clearly within the terms of the contract shall be referred to the Chief Executive for consideration of the Comhairle's legal liability and, where necessary, to the Director for Assets, Finance and Resources for financial consideration.
- 7.24 It shall be the duty of the officer concerned to take appropriate action in respect of the application of any liquidate damages clause in a works contract and to report their action to the Committee concerned after the issue of the final certificate with a value in excess of £250,000.
- 7.25 Where the total cost of work carried out under a contract exceeds the original contract sum by more than 5%, a report of such costs shall, after agreement of the final account, be submitted to the appropriate Committee. This provision to monitor and report cost over-runs shall also apply to bus contracts, school catering services, and any other service contract or group of similar contracts which exceeds £250,000 per annum.

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

- 8.1 All tenders shall be registered and opened electronically via PCS save in exceptional circumstances.
- 8.2 All tenders received must be securely stored.



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

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

## **10 OPENING OF TENDERS**

- 10.1 Only after the deadline for receipt shall tenders be opened.
- 10.2 Tenders shall be opened only by a Procurement Officer, their nominee or such other Officer as the Chief Executive may nominate. PCS automatically records the name of the Officer who opens a tender.
- 10.3 No Elected Member may be present at the opening of tenders. No other employee be present save with the consent of the Chief Executive.

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

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

## **12 EVALUATION OF TENDERS**

- 12.1 Tenders shall be evaluated in accordance with the selection and evaluation criteria set out in the ITT and previously approved by the Chief Executive. Only tenders which meet those criteria shall be considered for acceptance.
- 12.2 No Elected Member or official shall directly approach any Officer to obtain information in relation to a particular contract during the evaluation process prior to the award of the contract. Any person requiring such information should request it from the Chief Executive stating their reason.

## **13 ACCEPTANCE OF TENDERS**

- 13.1 The Chief Executive shall have delegated authority to accept the tender deemed to be most economically advantageous or, where permissible under the Public Procurement Regime, the tender which is the lowest priced. In the event that a tender is not to be accepted in terms of the Scheme of Delegation and is the subject of a Report to Elected Members, Elected Members shall only seek an explanation of matters within the Report that are not clear to them.
- 13.2 Only the Chief Executive may accept a tender and thereby bind the Comhairle.

13.3 All tenderers shall be advised in writing of the outcome of the tendering process, and a tender acceptance issued to the successful tenderer, by the Chief Executive as soon as reasonably practicable after the conclusion of the tender evaluation process.

#### **14 POST-TENDER NEGOTIATIONS**

14.1 There may be instances where, after tenders have been received, the appropriate Director considers that negotiations on price, delivery or content would be in the Comhairle's best interests. Between the deadline for the receipt of tenders and the date on which a decision is taken as to which, if any, tender is to be accepted, the Chief Executive may enter into post-tender negotiations, provided that such a course of action is permitted by the Public Procurement Regime.

14.2 A full written record of all post-tender negotiations will be kept by the appropriate Director and retained with the original tender.

#### **15 CONTRACTS**

15.1 A Contract Register shall be maintained by the Chief Executive detailing the departmental Officer responsible for each contract so that copies may be readily accessible.

15.2 The Procurement Section shall ensure that all relevant documentation relating to the tendering process (including ITTs and tenders) shall be retained and stored securely for the periods set out in regulation 16. Additionally, tenders shall be retained on PCS for the period determined as appropriate by the Scottish Government.

15.3 Every contract shall be in writing and shall be signed by the Chief Executive or his nominee or other Officer designated by him for the purpose, except where otherwise agreed by the Comhairle.

15.4 In the event that an option is available to the Comhairle to extend a contract, a decision of the Comhairle will be required to exercise that option unless delegated authority is granted by the Comhairle to an Officer of the Comhairle.

#### **16. DOCUMENT RETENTION**

The following document retention policies should be followed in all cases

<b>ACTIVITY</b>	<b>RETENTION ACTION</b>	<b>EXAMPLES OF RECORDS</b>
<b>Pre-tender Activity</b> The process of calling for expressions of interest	Destroy 5 years after date of award of contract or date of decision not to award	Expressions of interest
<b>Specification and Contract Development</b> The process involved in the development and specification of the contract	Destroy 5 years after date of expiry of contract	Tender specification

<b>ACTIVITY</b>	<b>RETENTION ACTION</b>	<b>EXAMPLES OF RECORDS</b>
<b>Tender Issuing, Return and Evaluation</b>	Destroy 5 years after date of award of contract	<ul style="list-style-type: none"> <li>• ITT</li> <li>• Evaluation documents</li> <li>• Tenders/Quotations</li> </ul>
<b>Awarding of contract</b> The process of awarding the contract	Destroy 5 years after date of expiry of contract	<ul style="list-style-type: none"> <li>• Clarifications</li> <li>• Post-tender negotiations</li> <li>• Signed contract</li> </ul>
<b>Contract Management</b> Operation, management, amendment and monitoring of the contract	Destroy 5 years after date of expiry of contract	<ul style="list-style-type: none"> <li>• Service level agreements</li> <li>• Compliance</li> <li>• Performance</li> <li>• Changes to requirements</li> <li>• Variations</li> <li>• Extension</li> <li>• Complaints</li> <li>• Disputes</li> </ul>

## **17 EQUAL OPPORTUNITY IN EMPLOYMENT**

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

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

18.1 The Comhairle must have due regard to whether the tendering process and conditions of contract should include considerations to enable it to better perform the equality duty set out in the Equality Act 2010.

18.2 The Comhairle shall obtain information from a contractor to enable the Comhairle to assess whether the contractor is complying with its responsibilities under the Equality Act 2010 relating to equality and non-discrimination in respect of the protected characteristics set out in that Act.

## **19 HEALTH AND SAFETY**

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

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