

The Learning and Skills Council Procurement Guide for FE Colleges

This Guide is designed to give a basic understanding of best procurement practice for the Further Education, (FE) college sector, and is intended to be a supplement to any guidance given locally through, for example, the Financial Memorandum of colleges.

November 2005

Of interest to College Finance Directors

Further information

For further information, please contact the appropriate local Learning and Skills Council office, or write to:

Learning and Skills Council

Cheylesmore House

Quinton Road

Cheylesmore

Coventry

CV1 2WT

www.lsc.gov.uk

or

The Centre for Procurement Performance (CPP)

Department for Education and Skills

Public Enquiry Unit,

PO Box 12,

Runcorn,

Cheshire,WA7 2GJ

Tel. 0870 0002288

Textphone/Minicom 01928 794274

Fax. 01928 794248

www.dfes.gov.uk/ccp

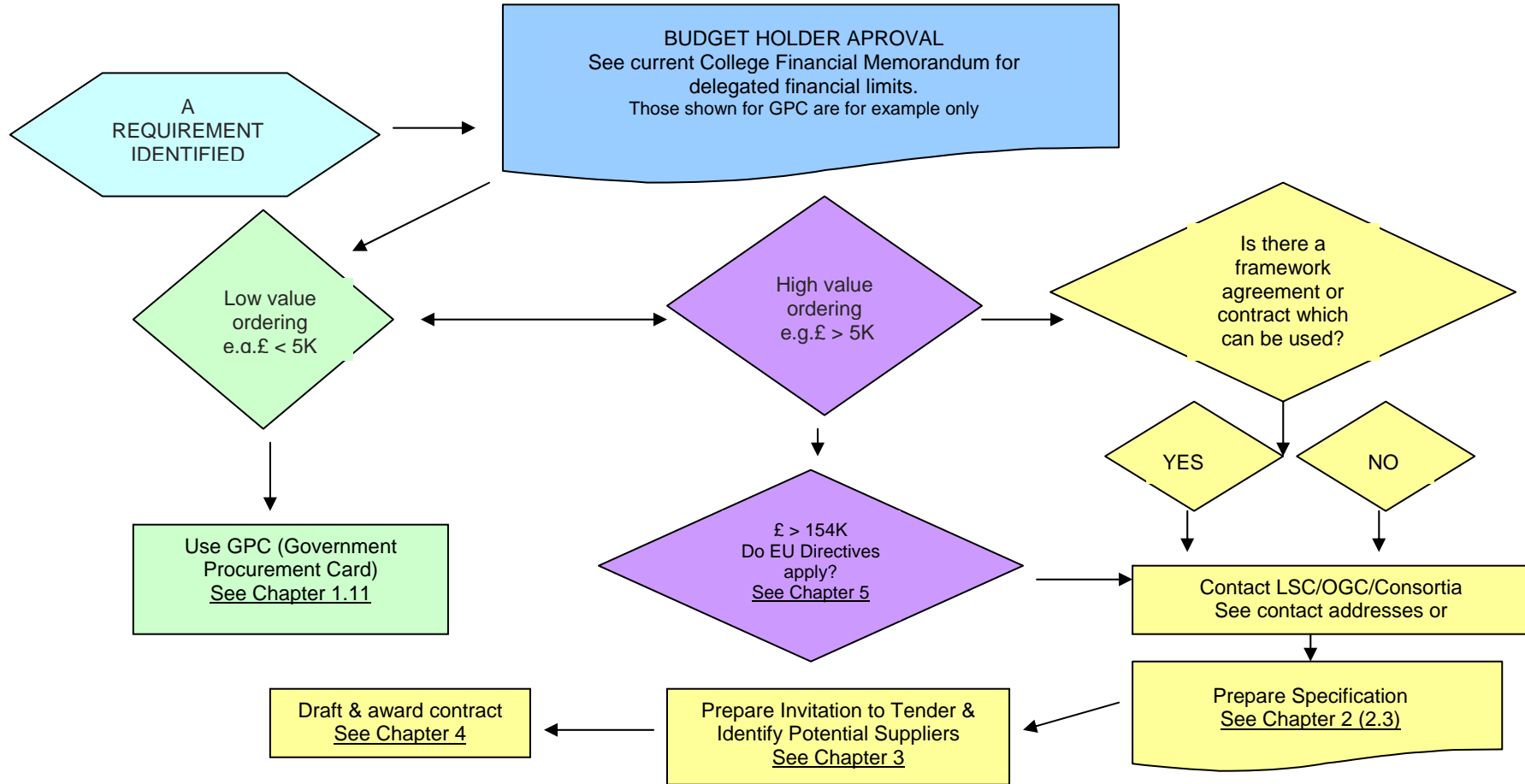
For information

Procurement Guide for FE Colleges

This Guide is designed to give a basic understanding of best procurement practice for the Further Education, (FE) college sector, and is intended to be a supplement to any guidance given locally through, for example, the Financial Memorandum of colleges.

November 2005

PROCUREMENT FLOW PROCESS DIAGRAM



Contents

Procurement Flow Process Diagram

Contact Addresses

Chapter 1 Introduction

- 1.1 The contracting and procurement guide
- 1.2 Who is the Guide for?
- 1.3 What is procurement?
- 1.4 Value for money
 - 1.4.1 The benefits of purchasing consortia
- 1.5 Contracting and procurement policy
- 1.6 The role of the LSC procurement team, (can they help you?)
- 1.7 Ethics
- 1.8 Gifts and hospitality
- 1.9 Collusion and cartels
- 1.10 Conflict of interest
- 1.11 Government procurement cards

Chapter 2 Getting Started

- 2.1 Delegation of authority and approval to purchase
- 2.2 Business cases
- 2.3 Preparing the specification
 - 2.3.1 A good specification
 - 2.3.2 Structure of the specification
 - 2.3.3 Tips on writing the specification
 - 2.3.4 Background information
 - 2.3.5 Non-standard work
 - 2.3.6 Performance requirements
 - 2.3.7 Targets

Chapter 3 Tendering

- 3.1 Tendering
- 3.2 Tendering stages
 - 3.2.1 Market research
 - 3.2.2 Planning and timescales
- 3.3 The tendering process
 - 3.3.1 Telephone and faxes quotes
 - 3.3.2 Open or restrictive tendering?
 - 3.3.3 Open competition
 - 3.3.4 Restrictive competition
 - 3.3.5 Single tender - negotiated tender
 - 3.3.6 Identifying potential suppliers
 - 3.3.7 Suppliers, assessment, and approved lists
 - 3.3.8 Failure to identify enough suppliers
 - 3.3.9 Evaluation criteria

- 3.4 Structure and content of invitations to tender
 - 3.4.1 Tender documents
 - 3.4.2 Additional (further) clauses or schedule(s) - special conditions applying to certain contracts
 - 3.4.3 Terms and conditions
- 3.5 Issuing tenders
- 3.6 Contact with tenderers during the tender process
 - 3.6.1 Principles
 - 3.6.2 Questions from the tenderers
 - 3.6.3 Innovation and confidentiality of information
 - 3.6.4 Meetings with tenderers
 - 3.6.5 After receipt of tender
- 3.7 Receipt of tenders
 - 3.7.1 Identification of tenders
 - 3.7.2 Numbering tenders and contracts
 - 3.7.3 Receipt and custody of tenders
 - 3.7.4 Faxed tenders and quotations
 - 3.7.5 emailed tenders and quotations
 - 3.7.6 Less than minimum number received
- 3.8 Opening tenders
 - 3.8.1 Tender board or panel
 - 3.8.2 Classification of tenders
 - 3.8.3 Late or incomplete tenders
 - 3.8.4 Considering late, incomplete or amended tenders
 - 3.8.5 Checklist for receipt of tenders
- 3.9 Tender evaluation process
 - 3.9.1 Principles
 - 3.9.2 Evaluating the proposed goods and services
 - 3.9.3 Evaluating the tenderer's financial position
 - 3.9.4 Evaluating the tenderer's ability to do the job
 - 3.9.5 VAT
- 3.10 Post tender negotiation (PTN)
 - 3.10.1 Definition
 - 3.10.2 When to use PTN
 - 3.10.3 Preparation and planning
- 3.11 Contract award
 - 3.11.1 Informing tenderers of the results of the competition
 - 3.11.2 Informing unsuccessful tenderers of the results
 - 3.11.3 Debriefing tenderers
 - 3.11.4 Retention of tender and contract documentation

Chapter 4 Contracts and Contracting

- 4.1 Introduction
- 4.2 Standard Model Contracts
- 4.3 General Contract Guidance
- 4.4 Preparation
- 4.5 Contract structure

- 4.5.1 Outline
- 4.5.2 Constructing the contract document
- 4.6 Signing the contract
- 4.7 Letters of intent
- 4.8 Renewing a contract
- 4.9 Extending a contract
- 4.10 Varying the terms of a contract
- 4.11 Transfer of contracts
- 4.12 Contract management and risk management
 - 4.12.1 Contractor relationships
 - 4.12.2 User relationship
 - 4.12.3 Risk management
 - 4.12.4 Change management
 - 4.12.5 Performance management
 - 4.12.6 Evaluation of contract performance
- 4.13 Document numbering and records
- 4.14 Help and advice on contracting issues

Chapter 5 EU Directives

- 5.1 Purpose and background
- 5.2 An outline of the EU directives
 - 5.2.1 Applicable directives
 - 5.2.2 Implementation of directives into national law
- 5.3 Contracts outside of scope of the directives
- 5.4 Common features of the directives
- 5.5 Identifying which regulations apply to mixed contracts for example supply and service
- 5.6 Aggregation rules for establishing whether or not value exceeds the relevant threshold
- 5.7 Priority and residual services
 - 5.7.1 General
 - 5.7.2 Contracts for a priority and residual service
- 5.8 Coverage of service directive
 - 5.7.1 Priority services
 - 5.7.2 Residual services
- 5.9 Choice of procurement procedure
- 5.10 The OJEU advertising requirement
- 5.11 Stages in the procurement process
- 5.12 Statistics and records
- 5.13 Enforcement

Chapter 6 Flowchart of the EU procurement process

Chapter 7 Note re “Alcatel” judgement on OJEU procurements

- 7.1 Summary
- 7.2 Background
- 7.3 A 10 day mandatory standstill period
- 7.4 New debriefing requirements within the standstill period

- 7.5 Procurements not covered
- 7.6 Further information

Executive Summary

This Guide is designed to give a basic understanding of best procurement practice for the Further Education, (FE) college sector, and is intended to be a supplement to any guidance given locally through, for example, the Financial Memorandum of colleges.

It is intended for use when considering the procurement of Goods and Services where they are to be consumed by, or benefiting the college.

For additional help and guidance on procurement issues, you can contact the LSC Procurement Team, (included within this team there is a dedicated FE external facing Procurement Team) at your nearest Procurement Service Centre. Please see the Contacts Addresses page, where there are also other useful names and addresses, including those for Consortia.

We aim to keep this guide as current as possible. Updates will be posted to the LSC website at www.lsc.gov.uk as downloadable pdfs which you can then print off and insert into the Guide to keep it up-to-date. Where text has changed this will be shown by a sideline to the text. The running footer will contain the version number and date of the update.

This document has been written with the help of the Centre for Procurement Performance. The Centre for Procurement Performance (CPP) has been established by the Department for Education and Skills to promote more efficient procurement across the education and children's services sector. Substantial efficiency savings on procurement will free up resources to improve frontline services; savings made will be retained and available for reinvestment by individual institutions.

The CPP will work nationally, regionally and locally, with the procurement community and key stakeholders within the system, to identify and exploit optimum procurement opportunities to help budget managers deliver better value for money.

The LSC is a key partner – working alongside DfES to help deliver procurement efficiency gains across the FE sector. Melinda Johnson, the CPP Deputy Director responsible for FE, works closely with Tim Batkin and David Read is a member of the CPP Programme Board and Steering Group.

Contact Addresses

South East – *PSC Areas Covered:

South East Region

Milton Keynes
Oxfordshire/Bucks
Bracknell Forest
West Berkshire
Hampshire/Isle of Wight
Portsmouth
Surrey
East Sussex/West
Sussex
Brighton
Kent and Medway

East England Region

Norfolk
Cambridgeshire
Suffolk
Bedfordshire/Luton
Hertfordshire
Essex

Greater London Region

London – North
London – West
London – Central
London – East
London – South

Contacts:

Martin Blake
0207 904 0738

Raj Ragiwala
0207 904 0796

Julie Pottier
0207 904 0797

North – PSC Areas Covered:

North East Region

Northumberland
Tyne and Wear
County Durham
Tees Valley

Yorks and Humberside Region

North Yorkshire
West Yorkshire
South Yorkshire
Humberside

North West Region

Cumbria
Lancashire
Greater Merseyside
Greater Manchester
Cheshire/Warrington

Contacts:

Sally Lee
0191 492 6306

Gary Ferguson
0191 492 6317

Hayley Addison
0191 492 6318

Midlands – PSC Areas Covered:

East Midlands Region

Derbyshire
Nottinghamshire
Lincolnshire
Leicestershire
Northamptonshire

West Midlands Region

Shropshire
Staffordshire
Black Country
Birmingham/Solihull
Herefordshire
Coventry/Warwickshire

Contacts:

Geraldine Hickman
0121 345 2343

Craig Pollard
0121 345 4541

Sorrel Thomas
0121 345 4521

**South West – PSC
Areas Covered:**

South West Region

Devon and Cornwall
Somerset
Bournemouth
Dorset/Poole
West of England
Wiltshire/Swindon
Gloucestershire

Contacts:

Bob Hughes
0117 372 6487

Carla Honeybun
0117 372 6473

Hannah Pratt
0117 372 6470

**National Office– PSC
National Office Groups**

Contacts:

Mandy King
02476 823971

Deb Campbell
02476 825716

David Addington
02476 823844

Carol Rogan
02476 823625

Carol Galloway
02476 823642

The Centre of Procurement Performance (CPP)

The Unit can be reached at:

Public Enquiry Unit,
PO Box 12,
Runcorn,
Cheshire,
WA7 2GJ
Tel. 0870 0002288
Textphone/Minicom 01928 794274
Fax. 01928 794248

Office of Government Commerce (OGC)

Roseberry Court,
St Andrew's Business Park,
Norwich, Norfolk
NR7 0HS

You can contact the Service Desk on:
Phone: 0845 000 4 999

GTN: 3040 4999

Email: ServiceDesk@ogc.gsi.gov.uk

Association of Colleges (AoC) Funding

Current alphabetical list of available group discounting bodies

A. List of consortia offering access to general discounted purchasing

Central Buyers Consortium (CBC)

Colin Russell 01962 826 907 www.cbconline.org.uk/index.htm

- Security, transport, catering, cleaning, maintenance, storage, stationery, utilities and various other ad-hoc contracts including architectural services
- Geographically limited
- No membership fee, costs covered by rebate from companies
- CBC says 'We welcome FE colleges to take advantage of the negotiated contracts that we have available'

Crescent Purchasing Consortium (CPC)

Peter Brewer at p.brewer@salford.ac.uk

on 0161 295 5784 www.cpc.salford.ac.uk/index.php

- Group specifically set up for FE colleges, but some schools and NGOs are members
- Any college in England can join, but some other consortium might object to dual-membership
- No fee to join. Free e-procurement software and training. CPC's costs are covered by taking a small rebate of college spend from CPC suppliers
- CPC ask for a named 'liaison officer' be in place as part of membership requirements, which will have some time commitment
- 115 FE colleges are members of the group
- CPC says 'One of our colleges achieved savings of £70,000 in the first six months of membership'

London Universities Purchasing Consortium (LUPC)

John Ritchie at enquiries@lupc.lon.ac.uk

on 020 7692 1600 www.lupc.procureweb.ac.uk

- Colleges able to be full members
- General geographical restriction on membership to M25
- No software required. Tiered fees dependent on non-salary costs – typically £2,200 + VAT (for £5 million non-pay costs). No rebate received from contracted companies
- Fifteen FE colleges are members
- LUPC says ‘Membership of the LUPC will provide colleges with substantial and demonstrable benefits

North Eastern Universities Purchasing Group (NEUPG)

Simon Toplass at s.a.toplass@bradford.ac.uk
on 01274 236170 <http://neupg.procureweb.ac.uk/>

- Colleges not able to be full members, but can join directly as associates. Not required to attend or vote at meetings
- NEUPC likely to restrict recruitment to the geographical area covered as some contracts are regionally based
- No software required. Fees depend on College turnover and vary between £2,750 and £3,250 (plus VAT) per college; charges will be reviewed as more members join. Almost all consortium costs are covered by subscriptions and no rebates received from contracted suppliers
- Three FE colleges are associate members
- NEUPC says ‘We would expect colleges to be able to take advantage of our contracts to see immediate savings

North West Universities Purchasing Consortium (NWUPC)

paul.tomany@man.ac.uk
on 0161 273 7094 www.nwupc.man.ac.uk

- Colleges not able to be full members, but can join directly as associates and can attend and vote at meetings
- NWUPC ‘likely’ to restrict recruitment to the Northwest of England and North Wales, but might consider applicants from outside these areas
- No software required. Tiered fees (including VAT) of £1,750 (for non-pay costs of £5 million), £3,750 (non-pay costs below £15 million pa) or £6,300 (non-pay costs of up to £120 million), plus rebate of 0 per cent to 11/2 per cent total contract value from companies
- Four FE colleges are associate members

- NWUPC says 'We would expect colleges to recoup their membership cost within six months of joining'

Southern Universities Purchasing Consortium (SUPC)

Susan Wright on supc@reading.ac.uk
on 0118 378 6542 <http://supc.procureweb.ac.uk/home.jsp>

- Colleges eligible for Affiliated Associate Membership and must be affiliated through a full member (a University)
- Affiliated Associates cannot attend governing meeting but can participate in all other meetings
- No geographical restriction on membership
- No software required. Nominal fee paid to affiliated member (between nil and £1,000). SUPC costs recovered entirely from subscriptions. No rebate received from contracted companies
- Twenty-four FE colleges are affiliated members
- UPC says 'We would expect colleges to realise savings immediately after joining'

B. List of consortia offering access to specialist discounted purchasing

The Office of Government Commerce (OGC)

Service Desk 0845 000 4999 <http://www.cp.ogc.gov.uk>

- The Coordinated Procurement Division, of the Office of Government Commerce, is working to help the public sector to achieve £7.17 billion savings by the end of 2008, through more efficient procurement of commodity goods and services
- The Team is doing current procurement activity in the following areas: IT/telecomms, fleet, executive search, research services, translation and publications. Feasibility studies in other commodity areas are being taken forward this year. The findings will be published on the website
- OGC Coordinated Procurement

OGC Buying Solutions

Enquiries 0870 268 2222 <http://www.ogcbuyingsolutions.gov.uk/>

- OGC Buying Solutions, an Executive Agency of OGC in the Treasury, runs several catalogues of negotiated framework contracts relating to a wide range of goods and services and which can be accessed by the public sector

British Educational Communications and Technology Agenda (BECTA)

www.becta.org.uk/leas/leas.cfm?section=6_2&id=3164

- Discounts purchases of whiteboard and projectors
- FE colleges not specifically covered by this deal, but prices are available on website for comparison and negotiation with suppliers

National Information and Learning Technologies Association (NILTA)

<http://www.hci-aocnilta.co.uk/>

- Discounts available on tax-free benefit computers for college staff under the Home Computing Initiative

CHEST

chesthelp@eduserv.org.uk

01225 403 222 www.eduserv.org.uk/chest/fe/

- Software (including Microsoft products), online resources and some courseware only – some software available free of charge
- No membership fee, costs covered by rebate from companies
- All colleges automatically members
- CHEST says ‘we negotiate best-value licence agreement for the FE sector’

Consortium of Local Education Authorities for the Provision of Science Services (CLEAPSS)

membership@cleapss.org.uk

01895 251 496 www.cleapss.org.uk

- Discounts purchases of science supplies
- Consortium mostly provides guidance and leaflets for science students
- Colleges can be members and pay £0.465 per FTE science student
- Can obtain 10 per cent + discount on purchases from specialist providers of scientific material

The Energy Consortium (Education) (TEC)

David Thomas on 0121 472 2081 www.tec.bham.ac.uk

- Discounts purchases of energy supplies
- Colleges able to be full members and vote
- No geographical restriction on membership

- No software required. Members' fees dependant on energy spend from £100 + VAT for annual energy spend of about £25,000 to £500 + VAT for up to £1 million annual spend on energy costs. Commission received from winning tender
- Three FE colleges are affiliated members
- TEC says 'colleges should expect to see their energy bills falling by much more the annual fee and some might achieve substantial savings

This list is a 'live' document and therefore not necessarily exhaustive. It is for information only and does not indicate AoC endorsement of any one of the above organisations.

Please contact the AoC or the LSC if you are aware of any other organisation offering discounted purchasing for FE colleges.

Procurement Guide for FE Colleges

1 Introduction

1.1 The Contracting and Procurement Guide

This Guide is designed to ensure that the acquisition of all Goods and Services and Works are undertaken in a consistent manner, demonstrate best practice throughout the supply chain and are compliant with all relevant regulations including EU legislation.

1.2 Who is the Guide for?

The Guide is intended for everyone throughout the FE College network involved in procurement and describes best practice. The principles set out apply to **all** contracting and procurement activities.

1.3 What is Procurement?

Procurement is one of the fundamental functions common to all types of business. It is fundamental because without it we cannot achieve our core aims and objectives. By its very nature, procurement is an integral part of business management. Procurement is the acquisition of goods and services, ideally of the best possible quality at the best possible cost. Procurement is not just about spending money on goods and services. It is about working in partnership with others including suppliers and end users, to ensure the provision of cost effective and reliable goods and services to the required standard.

1.4 Value for money

Value for money (VFM) should not be judged solely on the basis of the cheapest initial price, but on the lowest whole life cost to the College. This means that, in anticipating the price to pay, we should consider aspects such as maintenance, support costs, buy back values, design, delivery, and reliability. Factors such as these may justify a higher initial cost in the expectation of lower whole life costs. In major purchases or projects this may include preliminary business cases and discounted cash flow calculations.

One of the best ways to get VFM is through competition. It is a fundamental principle that College contracts should be let as a result of some form of competition, or against a nationally or regionally negotiated contract or Framework Agreement that exists on behalf of Government and has been let by for example The LSC, The OGC, and Consortia and so on. We can also endeavour to achieve best value for money when placing purchase orders by shopping around to obtain quotes for comparison of prices, not losing sight of quality requirements, ensuring they do satisfy fitness of purpose.

1.4.1 The benefits of purchasing consortia

Purchasing consortia provide their membership with a number of major benefits which can be invaluable to an FE college of any size:

- Better value for money and lower prices as members aggregate their spend
- Automatic institutional compliance with EU regulations
- Reduction of staff time spent on buying duties allowing their use in other areas
- An opportunity to obtain free professional purchasing advice
- Obtain assistance in writing your institution's purchasing strategy and policy documents
- An opportunity for staff to share purchasing experiences and learn from others
- Receive all the latest purchasing related news on topics like e-procurement, Purchase cards, e-tendering and how to comply with Government legislation such as Freedom of information and Race relations requirements
- And many other benefits

Many FE colleges are already a member of a Purchasing consortium but for those that are not, details of the main providers to the FE sector are provided within the Contacts Addresses page. It is recommended that all FE institutions take up membership of one of these consortia as soon as is practicable to realise the immediate benefits available.

1.5 Contracting and Procurement Policy

The Government's strategy for procurement as set out in the White Paper "Setting new Standards" requires that, a consistent and uniform approach to all purchasing, supplies and contract activities to achieve VFM. The key principles of the policy are:

- That VFM based on 'whole life cost' will be sought through a range of techniques involving procurement
- At all times, those involved in procurement show the highest possible standards of legal and ethical behaviour in any procurement activity
- Activity will be conducted in full compliance with European Union (EU) procurement regulations

- In dealings with suppliers you should seek to combine competition with cooperation

1.6 The Role of the LSC Procurement Team, (can they help you?)

The LSC Procurement Team, (which includes a dedicated outward facing FE College Procurement Team) are based in the National Office in Coventry and, also within five geographically dispersed Procurement Service Centre's (PSC), and have responsibility for the development and implementation of procurement policy and strategy within the LSC. This includes identifying and disseminating procedures, which may be of help to you to obtain value for money. Their LSC remit includes:

- Promoting and encouraging increased awareness, knowledge and professionalism among those involved in contracting and tendering
- Working to improve procurement and management information systems
- Providing an interface with the DfES, the Office of Government Commerce (OGC), FE Colleges, and other contacts
- Providing guidance and expert advice on contracting and procurement matters
- Setting up and managing National Contracts for goods and services required by national and local offices, which can also benefit the FE sector; and
- Advising on EU related tender exercises

1.7 Ethics

Suppliers, competing for business, are likely to be both persuasive and highly motivated, so you must ensure that decisions are fair and unbiased.

The guidance in the following paragraphs will protect you in your dealings with suppliers and others and is designed to help you to show the highest standards of legal and ethical behaviour:

Do know what the rules are and stick to them. If you suspect that someone involved in the contracting and procurement process is acting in an unethical way tell your line manager immediately

Don't use your position for personal gain. Always keep the highest standard of integrity in all your business relationships both inside and outside the College. Do not use College suppliers and contractors for your own personal use

Do declare and record any personal interest that might influence, or be seen by others to influence, your impartiality in any procurement exercise

Do keep all commercial information strictly confidential and don't mislead people. Make sure that confidential information is not made available to competing contractors through carelessness, for example in debriefing unsuccessful tenderers, or by leaving files open on desks

Do avoid any arrangement that might prevent fair and open competition, for example use of a single tender where it is not necessary

Don't accept gifts except low value business gifts such as diaries and calendars. If in doubt about whether to accept business gifts contact your Line Manager

Do remember there is no such thing as a free lunch. If you do accept modest hospitality make sure you don't allow yourself to reach a position where your impartiality may be influenced, or seen by others to be influenced

Don't accept invitations to attend social functions without receiving consent from your Line Manager. The general rule is "if in doubt, do not accept"

Don't anything if you would not be happy for your manager or the press to know about it

1.8 Gifts and Hospitality

Each College should keep a simple record of hospitality or gifts offered and received, and should establish internal procedures for ensuring that records, as a minimum, show the name of the organization who gave or offered the hospitality/gift, the date it was received, its nature, approximate value, decisions taken and by whom.

1.9 Collusion and Cartels

One example of improper behavior by suppliers includes colluding with others on tender prices, and attempting to obtain favourable treatment. A cartel is an agreement between suppliers to fix prices or to share the market between them. Their objective is to reduce or eliminate competition. Cartel arrangements are invariably secret and are unlawful. Let your Line Manager know if you suspect a secret cartel is operating.

1.10 Conflict of Interest

Always avoid any situation where a contractor may potentially have an unfair advantage over another supplier. For example this could occur where a current contractor has access to information not disclosed to other companies, or where a consultant is in a position to influence the award of future contracts in the direction of their own company.

1.11 Government Procurement Cards

In October 1997, the Government Procurement Card (GPC) was introduced as a tool to purchase goods and services, efficiently and cost effectively. The GPC is a Visa purchasing card at no cost to Government. Government Agencies and Departments have been set a target to buy 80 per cent of all its low value purchases (that is, under £5,000 – but subject to your college financial memorandum) using a GPC.

Some of the benefits of GPC include:

- Significant reduction in ordering costs, (Typically £65 verses £12, – CIPS)
 - Reduction in the time taken to process payments to suppliers
 - Easy to order, and able to order goods and services when needed
 - Able to take advantage of special offers (for example on the internet)
 - Faster delivery
 - 10,000 Visa capable suppliers
 - Suppliers receive payment promptly enabling you to reduce the risk of incurring charges because of the Late Payments Act
 - Staff in control of low value purchasing
 - Most goods and services can be procured with GPC
1. Budget holders – the Management Team and Financial Memorandum will decide who can have cards, financial limits and what purchases can be made using GPC. They are also responsible for signing off end of month expenditure.
 2. Cardholders – usually at admin level (requisitioner) who would order goods using the card on the intranet, by telephone, in person and so on.

2 Getting Started

2.1 Delegation of Authority and Approval to Purchase

The starting point is getting the appropriate form of authority from the relevant budget manager or someone with the delegated authority. For straightforward purchases including those where you will be ordering from an existing framework contract, you can obtain the authority to proceed using a purchase requisition form. However, if this is a significant purchase or a project, it is likely that you will have to write a business case. Significant purchases and projects can be classed as those, which are large, high value contracts such as capital, build, IT infrastructure and so on. The business case should be submitted to the person who has the correct level of delegated authority to authorise your expenditure.

Whether you invite tenders is dictated by the potential value of the expenditure and the delegated authorities that have been granted to you.

Please note that ALL Goods and Services (whether from a single transaction or subject to aggregation over a period – that is, usually procurements in last financial year, current financial year, and forthcoming financial year) over the Values of £154,477 and over (200,000 euros) may also be subject to the EU Procurement Directives.

NB. Written quotes can include faxed and emailed quotes provided a hard copy record is retained. Faxed or emailed Tenders are **not** acceptable, unless suitable e-tender software is available, in the case of emailed Tenders.

2.2 Business Cases

The business case should cover:

- Background, need and strategic fit
- Benefits to be derived, financial and intangible plus measurement criteria
- Deliverables expected for example what is to be supplied/delivered in terms of goods or services, to whom and by when; an early specification would be useful at this stage
- Key milestones and the contract management arrangements
- Assessment of the current supply market and alternatives considered including a 'do nothing' option and the consequences of adopting that approach
- Risk assessment

- How evaluation of the tenders will be handled

The business case should be more extensive for major purchases or projects and should include **Discounted Cash Flow** calculations where appropriate. Someone with the correct delegated authority must agree the business case, as it will form part of your audit trail.

2.3 Preparing the Specification

Once you have been given the authority to go ahead the next step is to prepare your specification.

This is the most critical element of your procurement/ contracting process and is your statement of need to be satisfied by the procurement of external goods or services.

The specification will describe what you require to meet your particular need. The content and format of a specification must be very carefully thought out so that there is no ambiguity, nothing is omitted, and all key areas and points are covered.

Wherever possible you should opt for a performance driven specification that focuses on the functions of the product or service. A performance specification is a description of what is to be done not how it is to be done.

Effective communication is essential if you are to get the specification right. There are three critical factors to be aware of when preparing a specification:

- Always consult – consult the end users, your colleagues and stakeholders. The involvement of trade organisations and/or potential suppliers can also provide a valuable input to development – but great care should be taken that this does not result in adoption of a specification that favours one particular supplier
- Undertake research – do some digging around. Check with the LSC Procurement Team or Centre for Procurement Performance to see whether they have contacts that could help you, and which represent the best value for money. They may have a specification that was drawn up for an earlier procurement exercise. Additionally, there may be a contract currently available that you could access
- Aim for maximum liaison – get in touch with the LSC Procurement Service Centres

2.3.1 A good specification

A good specification should:

- State the requirement clearly, concisely, logically and unambiguously

- Contain enough information for potential suppliers to decide and cost the goods or services they will offer
- Permit offered goods or services to be evaluated against defined criteria by examination, trial, test or documentation
- State the criteria for acceptance of goods or services
- Contain only the essential features or characteristics of the requirement
- Provide equal opportunity for all potential suppliers to offer a product or service that satisfies the need
- Comply with any legal obligation, for example, UK law, European Economic Community, (EEC) Treaty, European Community, (EC) Directive, or the General Agreement on Trade and Tariffs, (GATT)

It should not:

- Over-specify requirements
- Contain features or terminology that directly or indirectly discriminate in favour of, or against, any supplier, product, process or source

2.3.2 Structure of the specification

Break down your requirements into its lowest level component or sub component parts. This will allow you to define the requirement better in terms of function, performance and outcome.

This process will help you discover conflicts and inconsistencies and may even lead to alternative solutions

2.3.3 Tips on writing the specification

- Use simple language
- Define symbols, terms and acronyms
- Write the specification so that a layman will understand – test it out on a colleague from another department to gauge its readability and effectiveness
- Use a logical structure
- Be as concise as possible but keep the meaning clear
- Do not explain the same requirement in more than one section

- Aim to define each aspect of the requirement in one or two paragraphs
- Discuss all drafts with colleagues, and end users

Avoid the use of such terms as:

"the Contractor shall **assist** the College" – "assist" leaves the requirement unclear;

"the Contractor **should** carry out - - " – "should" is not an actual requirement;

"the Contractor **may** be required to- -" this creates a tender pricing problem;

"the Contractor **should maintain** a record of- -" – no good if "create and maintain" is intended.

Further guidance on specification writing can be found in CUP (Central Unit on Procurement) Guidance number 30 which can be found on the OGC website www.ogc.gov.uk. (under communities click procurement and then CUP Guidance).

Design your **Evaluation Criteria** at this stage, it will assist you to be objective and focus on the key issues.

When written does the specification identify:

- What is to be done
- Who is responsible for what
- When they will do the task(s)
- How you will measure achievement
- What you will do if there is failure to meet the output
- Why it has to be done this way

2.3.4 Background information

The specification can include BRIEF background information relating to the provision of the specific Goods or Services. Further comprehensive overview of the College should, if needed, be contained in a separate document.

Where elements of the supply of Goods or Services are volume related, take great care to ensure that the specification is clear regarding the basis on which the volumes are based. In addition considerable thought must be given regarding how non-standard work, supplies or service in addition to the specified requirements would be treated and priced. Cover this element in your Offer and Pricing Schedule.

2.3.6 Performance requirements

Unless the performance criteria has been clearly stated, you will have a problem agreeing completion of the contract, monitoring progress and agreeing corrective action.

Clearly separate "performance requirements" issues from "performance monitoring". Performance monitoring is an administration function and should be dealt with accordingly.

2.3.7 Targets

Targets, benefits and expectations must be clearly stated and, where possible, linked directly to the Colleges strategy and deliverable objectives.

Look also at the opportunity of linking achievement of targets to payment.

Avoid general and irrelevant issues and try to identify Key Performance Indicators.

For example Quantity, frequency, demonstrable achievement.

3 Tendering

3.1 Tendering

It is a fundamental principle of Government purchasing policy that contracts must be let through competitive tendering. Competitive tendering policy is to:

- Seek tenders from more than one supplier
- Discourage the development of cartels, monopolies and other forms of anticompetitive activity; and
- Encourage the development of an open and competitive market, which is innovative in proposing solutions to needs

EU procurement directives make this process **mandatory** for the purchase of all goods and certain types of services whose value exceeds specific thresholds.

3.2 Tender stages

3.2.1 Market research

Once you have identified your need, written a clear specification (see 2.3), the next step is to 'source the market' or carry out 'soft market research' to identify how many potential suppliers exist. It may also be appropriate to encourage new entrants to the market place.

This can be done in a number of ways and using a range of different media such as Internet search tools, trade journals, sector confederations, Yellow/Business Pages. This is crucial when tendering for goods or services where many suppliers may exist.

Use of CPP Web sites, Consortia, and LSC Procurement Service Centres to identify prevailing value for money arrangements.

3.2.2 Planning and timescales

Competitive tendering takes time. Where EU Directives apply there are strict time limits that must be adhered to. You must allow yourself sufficient time for each stage – **plan ahead**.

It is important to keep full and accurate records. You must document all stages, ensuring a comprehensive audit trail demonstrating probity and propriety.

For most purchases tendering involves:

- Preparation of the specification

- Deciding well in advance the criteria for the award of the order or contract
- Deciding the most appropriate tendering process (EU compliance and so on)
- Preparing tender documents
- Notifying “the market”, advertisements and Tenderer selection
- Issuing invitations to tender
- Receiving tenders
- Opening tenders
- Evaluating tenders and potential suppliers
- Awarding the order or contract
- Award Notices (where appropriate) and debriefing unsuccessful Tenderers

3.3 The Tendering Process

3.3.1 Telephone and faxed quotes

If you invite quotes by telephone or fax you must still follow the principles of the tendering process. Keep a written record of your actions and conversations with suppliers, and a full list of the tenders invited and received. The Budget Holder should select and authorise the winning quote from this list (according to delegation).

3.3.2 Open or restrictive tendering?

Tendering costs colleges and the supplier time and money. Selecting the best way to tender is an important step in the planning process. Generally there are three options available to you. Open, Restrictive and Negotiated, although Negotiated usually implies a Single Tender approach, and is therefore not recommended except in unusual circumstances and must satisfy key criteria for adopting this approach.

- Open competition – interested parties identify themselves in response to an advertisement; or
- Restrictive competition – where you draw up a list of tenderers who you believe can provide the response you need and ask them to put in a bid – the potential tenderers are usually selected from an approved list together with subsequent applicants from a pre-qualification stage

3.3.3 Open competition

Under the Open process advertise your requirement and issue the Invitation to Tender (ITT) to anyone who asks for it, together with appropriate suppliers on your approved list. Once you receive the bids, evaluate them against previously agreed criteria.

You may wish to evaluate bids in a number of stages by assessing them against logical groups of criteria: bids only move from one stage of assessment to the next provided they meet the predetermined criteria. For example, there are three distinct stages of evaluation in EU procurement:

- i) Bids must conform to financial and technical or economic requirements
- ii) Bids passing stage i) must then meet any mandatory requirements; and
- iii) Then, and only then, do you look at what desirable elements are on offer

Everyone who is interested has the opportunity to bid with open tendering. This can be very useful when you are unsure of the market and the response rate you are likely to achieve. Fears of being overwhelmed by the potential volume of the response can be a deterrent from taking this approach. However, effective market appraisal will help to minimise this and suppliers will often "de-select" themselves when they receive the ITT if they perceive that they have little chance of success.

3.3.4 Restrictive competition

Under the selective process you identify suppliers whom you assess as capable of meeting your need and invite them to put in a bid. This process usually covers two stages:

- i) The first stage is designed to obtain information about suppliers and their ability to deliver the requirement and to identify a manageable number of suitable organisations, against pre-determined criteria
- ii) The second stage is to invite those selected to submit bids

3.3.5 Single tender – negotiated tender

In exceptional circumstances a single tender may be necessary. This is when one supplier only is invited to submit a bid. In principle you should not encourage single tendering.

By its very nature it is an anti competitive practice that leaves the College open to criticism from would-be tenderers, or worse, the National Audit Office, the Public Accounts Committee, and the European Commission.

As a public body you have a legal obligation to comply with European Public Procurement Regulations. **Single tendering is prohibited when making purchases where the EC Directives apply.**

There are few situations where single tendering can be justified. If you wish to issue a single tender, you will need to construct a business case that is strong enough to convince your Manager (or the person with delegated responsibility), and will ultimately rest on the files to form part of your audit trail.

However, there may be circumstances where you can argue, for example that:

- It is known (not assumed) that only one supplier can meet the requirement
- The cost of Open or Restrictive tendering would exceed the potential for saving, for example based on the results of a recent tender exercise
- The continuity of knowledge or synergy with previous work is an overriding consideration
- You have received an unsolicited proposal that contains ideas or concepts that you wish to use because it meets your needs. Be aware that these ideas are the property of the tenderer and may be legally protected under intellectual property rights

You must not use the process simply for reasons of expediency or convenience, for example lack of planning, insufficient time, or knowledge of where to look for alternative sources.

A copy of the business case approval should be retained with the tender documentation.

If you do obtain authority to issue a single tender **do not let the bidder know** that theirs is the only bid – doing so could put you in a difficult position in the negotiations leading up to contract signing.

3.3.6 Identifying potential suppliers

The first stage of identifying potential suppliers is to gather market intelligence. There are two basic ways of doing this:

- When suppliers approach you, invite them to provide information in a standard format, and
- Source the market by actively seeking out suppliers, either to broaden your existing supplier base or to meet a specific need. Suggested mediums for sourcing are trade journals, sector confederations, national and local publications, Yellow Pages, Internet, trade

exhibitions, conferences and so on

Where the level of purchasing activity in a particular market for a particular product justifies it, you may do both the above as a continuous process.

3.3.7 Suppliers, their assessment and approved lists

A list of Approved Suppliers is usually established when the market is specialist or limited and it is important to have adequate numbers of pre-evaluated organizations prior to invitation to tender. Complacency should be guarded against with the use of approved supplier lists, and require periodic review to ensure competitiveness.

Where there is a list of Approved Suppliers it can be used to help in the selection process provided **that it is used in a non-discriminatory way and that all suppliers who reply to an advertisement are allowed to compete equally.**

In limited markets you should strive to encourage new entrants and where a supplier is not on an "approved list", a reasonable effort should be made to verify technical competence and financial standing in time for them to be considered to tender. Turnaround of suppliers on an Approved Supplier List is essential to promote competition and value for money.

The information contained on the list should include date admitted to list, competencies, reference to file containing full company data, date any quotes/tenders sent, size/financial health outcome, any evaluation score and significant space for comments.

Clear evaluation criteria will assist in the approval process and suppliers should be encouraged to complete a purpose designed pre-qualification questionnaire for contracts that are likely to be tendered.

Financial assessment of suppliers of goods and services should be considered. The degree of assessment will depend on the value, complexity, scope and duration of proposed contracts. Initial appraisal, or design of the pre-qualification questionnaire, should include:

- History/Background of Company (registration date, parent, employees and so on)
- Principal areas of business
- Details of similar experience/capabilities
- References from similar projects/supplies
- Description of accreditation standards and measures to ensure quality assurance

- Educational/professional qualifications of those managing/providing the service
- Insurance details
- Last 2/3 years accounts. Where appropriate

Further information can be obtained from CUP Guidance No 60 (Supplier Appraisal)

3.3.8 Failure to identify enough suppliers

If you cannot identify enough suppliers to put in a bid keep a record with the tender documentation to show what efforts were made to get the required number. If your ITT fails to produce any bids you may wish to examine the way in which the contract opportunity was presented that is, did it look sufficiently attractive and/or worthwhile to potential Tenderers?

3.3.9 Evaluation criteria

Your specification, evaluation criteria and the contractual requirement should be drafted together. Imposing the discipline of deciding how you will evaluate bids will sometimes highlight any deficiencies there may be in the specification, thus giving you the chance to clarify and amend before the ITT is issued. Before you open a tender (and preferably before the invitations to tender have been sent out) you **must** decide and record in writing, the criteria that you will use to award the contract. Publicising the evaluation criteria in the ITT should result in better quality bids and is helpful in making it clear how bids will be assessed.

When you evaluate the bids you should be looking for answers to key questions. If you know what they are at this early stage you can ensure you ask the right questions in the ITT. For example, if quality standards are of great importance and you wish to award marks for it, you should ask bidders in the ITT to tell you what their quality standards are.

You have two options when deciding which tender to accept:

- Lowest price only; or
- The most economically advantageous bid

The lowest price only option can be used when tendering for very straightforward or closely specified, goods and services where all other aspects, for example delivery or quality, are standard across the market.

The most economically advantageous bid option entails consideration of quality, delivery, financial standing of the supplier and calculation of lowest cost, taking into account all financial advantages. When you are buying services, factors such as professional skill, efficiency, and reliability should be

taken into account.

3.4 Structure and content of invitations to tender

The Invitation to Tender (ITT) should set out clearly a standard format of what information is required. This will provide tenderers with a simple framework to prepare their bids, making it easier both for prospective tenderers, and for you, or the panel, when evaluating bids.

3.4.1 Tender documents

The Invitation to Tender (ITT) documents should be thorough, business like and focused. In many cases it will be the first contact with prospective suppliers and will convey the college image.

The appropriate schedules below, when returned from the tenderer, will become part of the final contract document and should be unambiguous. The ITT documentation should consist of the following:

Letter inviting bids –

referring to pack content, setting out broad contract detail, timescales and what to do

Acknowledgement of receipt of tender form –

a document for the tenderer to fax back as confirmation – The College should progress non-receipt after an appropriate timescale for example 8 days

The document pack identified below should be well presented e.g. Use of coloured section dividers, transparent plastic covers and held by a plastic spine.

Part 1 –

Use a front heading sheet bearing your College Logo and address, contract description, tender reference and retention instructions

List of contents

Schedule A – Instructions and Information on Tendering Procedures

Schedule B – Contract Terms and Conditions –

Schedule C – Specification – see section 2.3

Plus any appropriate Annex(s)

Part 2 –

This sheet fronts the documentation to be returned to the College and should be prepared as per the Part 1 sheet but with tender return time and date

Form of Tender –

This is the formal offer by the Tenderer and will include confirmation of acceptance of College Contract Terms and Conditions

Schedule D – Tender Requirements and Method Statement –

This document is a key component of the evaluation process and will give the tender review panel, when combined with any pre-qualification data, an insight into the capability and deliverability of the Tenderer. content will be varied to suit individual College requirements. If not requested in the pre-qualification process it will contain requests for tenderers policies considered essential to the decision award for example Environmental, Health and Safety, Equal Opportunities.

Schedule E – Offer and Pricing Schedule –

The essential pricing policies should be used

3.4.2 Additional (further) clauses or schedule(s) – special conditions applying to certain contracts

Some contracts will require special conditions that are not available in the standard clauses or may need further definition. These are clauses which are only required in specific contracts. If special conditions do apply then they should appear as a separate Schedule.

Additional clauses may include:

- Copyright and all other Intellectual Property
- Ownership of drawings, specifications and other data
- Conditions affecting execution of services
- Contractors' standards
- Issued property
- Contractors' employees and sub-contractors
- Hazardous materials
- Steering Committees to oversee the running of the contract
- Use of premises
- Facilities provided
- Data protection
- Arbitration

3.4.3 Terms and conditions of purchase and model contract

The ITT should contain a statement to make it clear, that only tenders which state acceptance of the College terms and conditions, **as the basis** of any contract will be considered.

Do not however, exclude at this stage tenders that offer negotiation of the terms and conditions. In doing so you could find that the level of competition is greatly reduced though there is a requirement to draw the bidders attention to the fact that ultimately, it will be the Colleges contract that is used, varied where appropriate through mutual agreement.

Most suppliers will be eager to get your business and will usually sign your contracts. Normally, it is suppliers in a monopoly position in the market place who try to insist that you sign their contract. Under no circumstances should you do so without further advice from your line manager.

3.5 Issuing Tenders

To enable you to demonstrate that you have tried to achieve best value for money you should obtain at least three quotes, or formal tenders if the value of the purchase requires it. However, be aware that not everyone will reply to an ITT so it is prudent to allow for this.

When EU rules apply an advert must be placed in the Official Journal of the European Union (OJEU).

3.6 Contact with Tenderers During the Tender Process

3.6.1 Principles

You must treat all tenderers in a fair and open way. All contacts with tenderers during the tendering process must be fully and accurately documented. Where possible, requests for further information should be in writing (faxed correspondence is acceptable) and kept with the tender documents.

There should be an individual nominated to manage contacts during this stage to prevent confusion, and additionally to limit the tenderers opportunity to gain an unfair competitive advantage. The Procurement contact should also liaise with the end-user that is responsible for technical queries on the specification. Management of contracts with existing suppliers should continue as normal. Requests from existing contractors for additional information on new requirements should be referred to the nominated officer and documented. The principle is that existing suppliers should not have an opportunity to gain any more information than is supplied to other potential tenderers.

If an approach is made to you that you consider, or others may consider to be, improper, you **must** make a full report in writing immediately to your line manager. If in any doubt as to whether the approach might be improper,

contact your line manager.

3.6.2 Questions from the tenderers

Tenderers will often ask questions about the ITT and/or other documents and you must resolve any ambiguities. Limit any correspondence to factual replies and do not tell suppliers who else you have invited to bid, or most importantly, what the College budget is for that contract.

If a tenderer's request for clarification reveals a serious deficiency in the specification consider issuing a revision to it. If it is decided to revise the specification all tenderers must be issued with the revision at the same time (deadlines may have to be extended). If a query raised by a tenderer is of a very minor nature, and does not indicate that wider clarification is required, the answer should be given to that tenderer alone. However, care must be taken in ascertaining whether a query is minor in nature, and not material and able to provide the tenderer an unfair advantage over other tenderers. If in doubt all queries and responses should be shared with all the tenderers.

3.6.3 Innovation and confidentiality of information

If a tenderer proposes an innovative solution to meet the College requirements it must be treated as confidential. Under no circumstances should it be passed on to the other tenderers. The tenderer's idea is the 'intellectual property' of its inventor and, potentially has a value and thus is legally protected.

If a Tenderer raises a query and this will identify their company, and they wish to remain anonymous, the response must be circulated in a format first agreed with whoever raised it. This is to ensure equality in access to information whilst protecting confidentiality of the bidders.

3.6.4 Meetings with tenderers

Open meetings

You may wish to consider holding an open meeting with all the potential tenderers. Such a meeting will provide an opportunity to give them additional background to the College or more up to date information to clarify the contractual requirement. Be careful to avoid being drawn into side meetings by individual suppliers. If you do hold an open meeting, make sure that you allow sufficient time during the tender period. The contract advertisement or the ITT should carry the intended date of your open meeting to enable tenderers to make themselves available in advance. A record of the questions raised by tenderers, and the answers given is helpful to supply information and briefing for those bidders who were unable to attend. Do not expect too much information from the tenderers at these meetings in the presence of their competitors they are justifiably cautious.

Closed meetings with individual tenderers

If your strategy is to have discussions with a small number of tenderers to develop detailed proposals, for example for consultancy requirements or complex projects such as research or IT requirements, you should aim to hold discussions with at least 3 suppliers.

If you enter into meetings with individual suppliers, you must ensure there is equality of treatment and access to information. Follow a prepared script and ensure that you say the same to everyone with whom you meet. You must be able to demonstrate that you have given everyone the same information and the same opportunities to ask questions. Being unable to refute allegations of unfairness could lead to legal challenge.

3.6.5 After receipt of tender

Contact with tenderers after tenders have been opened and before a contract is awarded is not unusual. You must however make sure that:

- You treat tenderers impartially
- The purpose of any contact is solely to clarify or correct the tender; and
- You keep confidential the content of all tenders Frame your questions carefully, or tenderers may try to revise bids.

3.7 Receipt of Tenders

An independent person or department should be nominated for the receipt, safe custody and opening of all tenders and should not be involved in the subsequent tender process. The procurement or contracting department should provide a “tenders control” sheet to enable easy and formal recording of receipt and opening.

3.7.1 Identification of tenders

The tender invitation documents must say to whom, where and by when tenders are to be returned, and when they will be opened. Provide either an envelope or a label with the ITT for use with the return of the tender documents.

The label or envelope must enable the College to identify immediately the contents as a tender but it must not allow individual tenderers to be identified i.e. it should indicate the unique tender number, the return deadline and time.

3.7.2 Numbering tenders and contracts

It is recommended a standard convention for allocating tender identification numbers be used. The same number should also be used as the contract reference number on the contract subsequently let.

3.7.3 Receipt and custody of tenders

All tenders must be treated as “**Restricted – Contracts**” that is, they must be kept unopened, under lock and key until the designated tender opening time (which should be as soon as possible after the closing date).

Log the tenders as you receive them. The person appointed to witness the opening of tenders does this and should have no further role in the tendering process.

On no account should you disclose to tenderers who else you have invited to bid or reveal details of any bid to anyone outside the evaluation team. This applies even after the contract has been awarded.

Prior to tenders being received the procurement/contracting department should check that tenderers have returned their “Acknowledgement of tender receipt form.” If during the course of chasing up acknowledgement forms, it is identified that a nil response is obvious and no documentation is being sent out by the tenderer, record that fact by initiating a nil response acknowledgement form on behalf of the supplier and send to the independent person receiving the tenders.

If, by the deadline for receipt of tenders, you have received less than the expected number check that none are being delayed internally – such as in the post room, reception or with messengers. Failure to consider such tenders could result in a later challenge and legal action.

3.7.4 Faxed tenders and quotations

Faxed tenders cannot be accepted. You can accept faxed quotations. The fax must be confirmed by a hard copy as soon as possible.

3.7.5 Emailed tenders and quotations

Emailed tenders cannot be accepted, unless you have a robust IT System to securely hold in place e-tenders prior to tender opening. You can accept emailed quotations. The email must be confirmed by a hard copy as soon as possible.

3.7.6 Less than minimum number received

When you receive less than the expected minimum number of tenders, they should be opened and evaluated in the normal way (see sections 3.9 and 3.10), and the circumstances recorded in the tender documentation.

You may wish to try and find out why tenderers declined to tender. Enquiries may reveal, amongst other things, ambiguities or deficiencies in the specification. If the original specification is deficient, it should be amended and reissued to the original tenderers, with an explanation of the circumstances, or issued to a new group of suppliers.

3.8 Opening Tenders

3.8.1 Tender board or panel

All tenders must be opened in the presence of at least two people. At least one person should be an independent witness who will take no further part in the exercise.

Details of all tenders expected should have already been recorded on the tender control sheet supplied by the contracting department.

The independent witness should certify that the tenders listed were the only ones received within the time limit, and both people will record and certify the time and date the tenders were actually opened.

3.8.2 Classification of tenders

When you open tenders you must decide whether the contents constitute a valid tender, 'No Tender' or whether it is a late or incomplete tender.

If it is decided that a "No Tender" has been made, that is, the envelope contains merely the ITT, or a letter stating that the tenderer does not wish to bid at this stage, the contents should be so marked. This should then be recorded as "No Tender".

3.8.3 Late or incomplete tenders

The following definitions should be applied when opening such tenders:

- Late tender – one received after the time and date set for their return in the invitation letter
- Technically late tender – one received after the time and date set out in the invitation letter, but where it is clear beyond dispute that it was despatched in good time (for example the postmark clearly shows the date of despatch) and the delay in transit is genuinely outside the control of the bidder
- Incomplete tender – one where important information is missing

3.8.4 Considering late, incomplete or amended tenders

When examining late, incomplete or amended tenders, you must:

- Be impartial
- Act in a publicly defensible manner; and
- Be able to demonstrate economic and cost-effective management of public funds

Late tenders: in general late and amended tenders should be excluded – they should only be accepted after consulting your line manager.

It might be alleged that tenders received or amended after the due opening time have benefited from information inadvertently or deliberately given to the bidder (some companies exchange tender information, sometimes to maintain cartels).

Consider technically late tenders as you would consider tenders received by the due date. Keep the evidence and circumstances supporting your decision on file and record it on the tender file.

Incomplete tenders should be evaluated as far as possible against the relevant evaluation criteria. You will need to decide whether the missing information is critical and whether it is simply omitted as an oversight. You may then wish to go back to the tenderer to ask for it. Generally, if time allows, try to give tenderers the chance to supply the missing information.

Be on your guard to ensure that tenderers do not use any tender clarification to enable them to rework their tender in order to gain an unfair advantage.

3.8.5 Checklist for receipt of tenders

At all stages, the contents of the tenders must be treated as Restricted-Commercial in Confidence.

Receipt

- Nominate/agree an independent person/department for receipt of tenders. This person should not be involved in the tender process
- Send copy of the “tenders sent checklist” to the independent person/department with any actions to take place
- Ensure that a label or envelope is sent out with tender documents to use for their return. The label will show the nominated persons name and address, deadline return time and date and the contract reference number
- Tenders to be date stamped on arrival
- Use a tender receipt log, to record the date and time of receipt of each tender. This can be combined with the form identified in two above
- All tender envelopes should be kept unopened in a locked and secure cabinet until the date and time allocated for opening the tenders

Tender opening procedure

- At least two people must be present, ideally both persons will take no

further part in the tendering exercise. There must be at least one independent witness

- Tenders must be opened within five days of the date set for their return. By law all tenders must be opened
- The first page of the tender should be signed and dated by each person as soon as it is opened
- A tender opening log must be completed. Ensure and note that the correct documents have been submitted, that is, Form of Tender, Tender Requirement and Method Statement, Offer and price schedules
- Each page of the original tender (Part 2 response documents as 4. above) should be numbered and initialled
- Hand over the documents to the tender evaluation panel that will carry out the evaluation. Their findings will be discussed at a moderation meeting and a shortlist of suppliers will be developed

3.9 Tender Evaluation Process

3.9.1 Principles

The basic principle is that the evaluation process must be systematic, thorough and fair, and can be seen as such. Evaluation should always be against criteria which are established before the tenders are opened and examined.

The tender evaluation process focuses on two topics:

- Assessing whether the tenderer is able, and financially stable enough, to do the job. Much of this work may have been undertaken at a pre-qualification stage, and
- Measuring the goods and services proposed against the requirements stated in the ITT, using the evaluation criteria

3.9.2 Evaluating the proposed goods and services

The goods and/or services proposed by each tenderer should be evaluated against the criteria drawn up before the ITT was issued.

Lowest price – provided that what is being offered meets the basic minimum threshold of performance, the contract can be awarded to the tenderer who has submitted the lowest price.

Most economically advantageous – the purpose of the evaluation is to work through a systematic, often multi-stage, process which will identify the proposal of what is being offered for example can the supplier deliver to a

multitude of different sites and/or to the deadlines required? Price is then considered and a judgement exercised as to whether the bid offers value for money.

You may wish to reinforce the principal of awarding the contract on the basis of most economically advantageous (value for money) by asking bidders to enclose the price schedule separately. You can then consider the bid without being influenced by price. If you wish to adopt this approach the tenderers should be asked in the ITT to separate price proposals when they submit their bid.

In procurements where there are large numbers of tenderers or where proposals are long or complex, for example, IT, construction projects, you can use a system of progressive short listing or sifting. The number of stages will vary.

It is best practice to identify on the first sift those tenders that meet all the minimum requirements and are from tenderers who are financially healthy enough to complete the contract. The remaining stages should aim to rank proposals in order of best fit to the remaining criteria as determined in section 3.3.9.

3.9.3 Evaluating the tenderer's financial position

You must assess whether the tenderer has sufficient resources to be able to complete the Colleges contract. The depth of the examination needs to be appropriate to the risk and value of the contract.

Financial checks can be tailored to the type of goods or services to be supplied and the size/risks of contract. Usually this will be the tenderers' audited accounts for the previous two to three years, where appropriate, a Bankers Reference, business plans and cash flow forecasts, level of investment and expertise, level of risk to the College.

If the procurement is subject to EU Directives there are specific rules covering the type of information that can be requested.

Small Firms or Individuals – Rarely, you may intend to contract with an individual or firm which has not been established for long or is assessed as being financially weak, in which case you should consider asking for a **guarantee**. There are many forms of guarantee for example banks, performance bonds and parent companies. Basically, it is the balance between risk and failure, which will dictate whether you need to ask for a guarantee.

If you have identified and quantified the risks, established appropriate contract management controls and, if necessary, obtained guarantees, the fact that a business is small or new should not be a barrier to contracting with it.

If possible new or small suppliers should initially be given small, low risk contracts to prove their capabilities and allow them to establish a track record.

The ratio of turnover to contract value should be carefully balanced. This will enable the College to **encourage small businesses** without being exposed to undue risk. The more you can encourage competition in the market place, the more choice you will have, and the more likely it is that we will be able to obtain value for money.

3.9.4 Evaluating the tenderer's ability to do the job

In order to do this you will need information from the tenderer that covers a number of areas. Precisely what areas you will need to cover will depend on the nature of the goods and services you are buying. Most topics should have been covered in the Tenderers response.

You will be in a better position to evaluate tenderers, and their capability and capacity to deliver, by site visits and by reference to recent or existing customers.

Visits, and the timing of visits, will depend on the resources available but should be targeted to those tenderers who are serious candidates to win a contract.

You may also wish to invite tenderers to make a presentation to you to demonstrate their ability to deliver - this is particularly important when buying consultancy services or training. Time should be set aside for this and the dates(s) notified to prospective tenderers in advance for example in the tender advertisement, to enable them to plan their availability.

3.9.5 VAT

Generally, VAT, where levied, is a cost to the College. All tenders should be evaluated on the basis of VAT inclusive prices. VAT maybe recoverable on Energy input costs.

Educational institutions that levy charges to some students are in business for VAT purposes and therefore must be registered with H.M. CandE, but owing to the special nature of education, will only be able to reclaim some of the VAT charged on purchases. In order to alleviate this situation, some purchases by FE colleges are specifically and uniquely exempt from VAT.

3.10 Post Tender Negotiation

3.10.1 Definition

Post tender negotiation (PTN) can be defined as negotiation that takes place after receipt of formal bids and before the letting of contract(s). It takes place with those companies submitting tenders who offer the best value for money. It is conducted in order to obtain an improvement in the content of the bid in circumstances that do not put other tenderers at a disadvantage, distort competition, or adversely affect trust in the competitive tendering process. PTN should be conducted with each potential supplier separately.

PTN should not be confused with tender clarification. Tender clarification is just what it says, communications between buyer and seller to clarify aspects of the tender, to help the evaluation process. PTN is a tool to develop specific areas and aspects of a tender in order to improve or enhance VFM.

3.10.2 When to use PTN

Consideration of PTN should be an integral part of formulating the strategy for any purchase. PTN is not mandatory but it can be used with effect on almost all types of purchase.

The major factor influencing the decision as to whether PTN should take place is whether the cost of time spent in PTN outweighs any realistic assessment of any additional savings likely to result.

It is a common misconception that PTN is only about price. It is not about squeezing out the last concession. On the contrary, if handled well it is sometimes possible to obtain something of value to you by conceding something which may not be important to you but which is important to the tenderer. PTN is about getting better VFM by using planned, ethical, equitable negotiation. PTN may result in, but is not limited to, improved price, better terms, better response times or tighter specifications and so on. The end result should be an agreement which better suits our needs.

PTN requires tact, care, training and thorough preparation since there is a fine line between what is perfectly right and proper and what is unacceptable. Three criteria must be met in all PTN:

- Only trained, experienced staff should undertake negotiations
- The negotiations must be documented fully to ensure a clear audit trail. The importance of a clear audit trail cannot be over-emphasised
- A Senior Manager should approve a Negotiation Mandate prior to any negotiation taking place

The negotiation mandate should set out the details of the contract, reasons for negotiation, overview and expectations, methodology, space for authorisation and the ultimate outcome.

3.10.3 Preparation and planning

Successful PTN depends on being well prepared. You must only enter negotiation with a thorough understanding of the:

- Requirement
- Tender
- Tenderer

- Areas that are likely to yield improvements
- Realistically achievable objectives

Involve the budget manager at an early stage (if that is a different person to the one who carries out the procurement process) so that they have the opportunity to make a positive contribution and can acquire all relevant knowledge of the requirements of the contract. The preparation stage involves gathering the information you will need to quantify your objectives, identify strengths and weaknesses, determine what is negotiable and plan your strategy for the negotiation. You must also put yourself in the position of being able to explain your decisions, so remember to keep a record of negotiations and the reasons for choosing a particular contractor.

3.11 Contract Award

3.11.1 Informing tenderers of the results of the competition

You must respect the confidentiality of tenderers at all times.

The letter is an invitation to finalise contractual arrangements and makes it plain that **no commitments are made and no work is to commence until the contract is signed by both parties.**

3.11.2 Informing unsuccessful tenderers of the result

If tenderers have been unsuccessful, it is fair and reasonable that you offer to inform them, in general terms, why they have not been selected. This is particularly true where you have used criteria other than simply "lowest cost". This should be done after the contract has been signed with the successful contractor.

Reasons for failure to win the contract should not be included in the letter, these are best given if or when the tenderer takes up the offer of a debrief.

3.11.3 Debriefing tenderers

Debriefing tenderers helps them to improve their competitiveness in future exercises this in turn brings benefit to the College.

The debrief should be constructive and where appropriate credit should be given for those areas of the tender where it is deserved. Care must be taken to limit the discussion to that particular tender: you must not compare the specifics of one tender with another, winning or otherwise. Debriefing must never be used as a device to reopen negotiations.

Keep notes of the debrief and where possible more than one member of staff should be present where the debrief is face to face.

Generally a tenderer will seek a telephone debrief as an alternative to a face-to-face interview. You should still keep notes.

EU timescales for debriefing – Once the contract has been awarded, or in the case of the restricted procedure when a shortlist of those suppliers to be invited to tender is drawn up, certain information must be given to unsuccessful tenderers;

- Notification within 7 days of publicising the award of the contract that they have been unsuccessful
- Within 15 days, **on request**, the reason for the rejection of an application to tender
- In the case of an unsuccessful tender, information such as the reasons for the failure of their tender, the characteristics and relative advantages of the winning bid, and the name of the successful tenderer

3.11.4 Retention of tender and contract documentation

Tenders from unsuccessful tenderers should be retained until audited or two years have passed from the date of signing the contract, whichever occurs first.

Tenders from successful tenderers who are awarded contracts should be filed with the contract documents and retained for six years from the end-date of the contract.

4 Contracts and Contracting

4.1 Introduction

The previous chapter looked at the tendering process. Once the tender exercise is complete and a successful bidder has been chosen you will be in a position to draft and award a contract using the tender response schedules and any subsequent, mutually agreed, Post Tender Changes. See section 3.4.1 Tender Documents.

A contract is an agreement that is binding in law. The purpose of a contract is to formally and legally allocate responsibilities and risks at the agreement of both parties.

Contracts do not have to be in writing, they can be oral. You should therefore be aware of the implications of what you do and say in the course of official business. In order to avoid inadvertently entering into a contract before everything is agreed, it is vital that, during the pre-contract stage, conversations begin with, and correspondence is headed, "**Without Prejudice – Negotiation only. Subject to signed written contract.**"

It Is Recommended That You Should Always Use Written Contracts

4.2 Standard Model Contracts

It is recommended that you let contracts using your colleges own terms and conditions.

The exact clauses of the contract will vary slightly dependent upon whether the contract is for:

- Goods, or
- Services

Suppliers may ask you to sign up to their terms and conditions of contract. You should take advice from your line manager before anything is agreed.

Purchase Orders also constitute a binding contract and can be used for procurements that are low value, low risk or low complexity.

4.3 General Contract Guidance

Before you draft a contract you should read the guidance in the remainder of this chapter. This will help you to:

- Get the structure of the contract right

- Understand the roles of the different parts of the contract particularly the schedules; and
- Be aware of other factors in respect of contracts for example signing the contract, the policy on contract extensions and variations

4.4 Preparation

Drafting a contract can take time but the careful work undertaken at the Tender stage will now prove beneficial and it should be a simple process to bring together all the detail to provide a comprehensive document. Allow enough time before the work is due to start for the contract to be drawn-up, agreed and signed by both parties.

It is recommended that work must not begin until both parties have signed the contract.

4.5 Contract Structure

4.5.1 Outline

You will need to put the name and address of the contractor, contractual dates and the contract reference number on the front of the model contract and, list all appropriate information and documents to be included as part of the contract under the clause ENTIRE CONTRACT/AMENDMENTS. See 4.5.2 below.

4.5.2 Constructing the contract document

Following the tendering procedure in Chapter 3.4.1 you will have received Part 2 from the successful bidder - these documents **plus** Schedule C (Specification) and any supplementary appendices or schedules detailing additional clauses or contract criteria, **agreed** with the contractor, will be listed in the model standard contract under clause **entire contract/amendments**, and will form the core attachments to the Contract (Goods or Services).

The complete formal contract sent to the successful tenderer will comprise:

Formal acceptance and contract letter

Standard model contract – completed and ready for signature (Goods or Service)

Specification – (Schedule C) plus any annex(s).

NB. Any post tender changes should be incorporated within the specification, including mutually agreed, and appropriate, changes arising from the tenderers offer from Schedule D.

Form of tender – originally signed by the tenderer

Offer and pricing schedule – (Schedule E)

Additional (further) schedule(s) – detailing additional clauses – see 3.4.2.

NB. You may wish to include additional special contract clauses and detail included in separate schedules from the original tender process. Only clauses and detail agreed with the tenderer can be included.

4.6 Signing the Contract

Once the final document has been prepared, number all of the pages sequentially and send two copies to the Contractor for signature.

When the Contractor returns both copies they should be checked for any amendments.

If no alterations have been made or amendments suggested, the contracts can be signed and dated on behalf of the college by an officer with the appropriate level of delegated financial authority. **It is recommended that you always sign the contract, and other subsequent variations, after the other party.**

One copy is returned to the Contractor, and the other copy should be held on a file which is easily accessible for future reference.

4.7 Letters of Intent

There may exceptionally be occasions where it is necessary to get work underway before some terms and conditions of the contract have been agreed, and in advance of the contract being signed. A Letter of Intent is used to bring a contract into practice **before** the formal document has been signed and exchanged. This is a **high risk** tactic, and you should discuss its use with your line manager. A letter of intent, technically a Statement of Intention, and therefore not legally binding, have been held to be legally binding. Use only sparingly, if there is time to communicate with a letter of intent, there should also be time to issue a contract! If there is no intention to create legal relations, a letter of intent should be headed “memorandum of intent”.

4.8 Renewing a Contract

Contracts should be examined and reconsidered before they reach their natural conclusion. This should be done in good time to initiate a re-tendering exercise, which will allow for the new contract to be signed and operational at the point where the old contract expires. Contractor performance must be evaluated and assessed periodically. **Contracts must not be automatically renewed.**

4.9 Extending a Contract

It is accepted that occasionally the contractor may need a little more time to finish the contract. The contract can be varied to change the end date and therefore give some flexibility when:

- The cause for the delay was unavoidable
- The amount of time needed to finish the task is reasonable; and
- You have been given the authority to do so by someone with the correct delegated authority

The notification to extend the contract **MUST** be issued to the contractor before the original contract expiry date has passed.

4.10 Varying the Terms of a Contract

Variations to a contract once both parties have signed it will usually apply to the operating schedules. Once the contract has been signed, the schedules can only be varied if:

- Both parties agree to the variation; and
- That agreement is in writing

This should be sent, along with a covering letter, to the contractor for them to sign before the college signs

Variations to contract should be signed by a person with the financial authority to sign the contract.

4.11 Transfer of Contracts

Responsibility for a contract cannot be transferred to another party without agreement in writing of the existing parties to the contract. The agreement is called a Novation Agreement.

4.12 Contract Management and Risk Management

All contracts rely on other people to deliver the outputs and things may change or go wrong. Successful contract management is to be aware of the development of the contract so that:

- Opportunities for improvement can be identified
- Problems can be anticipated and prevented or resolved quickly
- Risk (the likelihood of something going wrong) can be limited

It is essential all parties fully understand and meet their respective obligations and work together towards achieving the aim of the contract. By proactively managing the relationship between the Council and the contractor outputs detailed in the specification will be delivered to the agreed standards and price.

Successful performance will depend on the effectiveness of this relationship and, on the quality of the written specification and contract.

The key principles are to:

- Clearly set out the roles, responsibilities and expected outcomes
- Have meaningful two-way communication
- Establish a clear programme of performance review against target(s)
- Be proactive and act in partnership

4.12.1 Contractor relationships

It is recommended policy to work proactively with the contractor in a mutually beneficial manner towards the successful completion of the contract. Whether the relationship is likely to be short or long term the College has principles to which contract managers should conform. They are:

- The contract manager is always in control of the relationship
- All dealings with the contractor are conducted with propriety and recorded for audit trail purposes
- Action should be in accordance with the terms and conditions of the contract
- The relationship is free from bias

The management style you adopt in your relationship with the contractor will depend on a variety of factors but the overriding aim is that it should be fit for purpose. Things to take into account when deciding what style to use are, value, risk, type of contractor and their position in the market place and also the importance of the Colleges business to the contractor.

The three main management styles of behaviour are:

- Submissive
- Aggressive; and
- Assertive

It is easy to be **submissive** and give way to the other party but it may mean that the Colleges interests are ignored and that your rights as contract manager are disregarded. You are also likely to lose the respect of the other party turning the relationship into a one-sided one. It is difficult to conceive of any situation where submissive behaviour is the best management style to use.

Aggressive behaviour will alienate the other party and may reduce or remove all together the level of cooperation you will get. You may gain in the short term but any long-term relationship will stand little chance of success. Sometimes for short term contracts where there is no need to build up a relationship aggressive behaviour may be the management style, which will gain the best value for money. However, it needs to be used with caution as the other party are unlikely to forget the experience and any future dealings with them will be difficult.

Behaving **assertively** in a professional, well informed and honest manner should gain you the respect of the other party and may encourage the development of a more partnership orientated relationship where mutual support, trust and openness will make problems easier to manage. Without doubt the majority of the colleges relationships with contractors would benefit from this style of management.

4.12.2 User relationships

Having identified the user you need to recognise that their role is of equal importance to you as that of the contractor. Your relationship can be beneficial provided that it is positive and proactive with the user giving good and bad feedback on the contractor's performance rather than negative and reactive feedback only.

You will need to agree with the user the procedures for monitoring performance, exchanging information and the mechanism for problem management. You may also need to manage the expectations of the user as they can sometimes ask for more from the contractor than the contract requires.

4.12.3 Risk management

A risk assessment should be carried out on all contracts to determine the level of risk associated with it. Depending on the complexity of the contract there may be few minor risks or many major risks and the assessment itself will allow you to:

- Identify and prioritise the risks
- Draw up contingency plans where appropriate
- Identify triggers to alert you that things are starting to go wrong

- Prevent occurrences or minimise the impact if they do happen

The most common elements of the contract to assess for risk are:

- Delivery of the outputs
- Meeting the standards you expect
- Staying within the contract price
- The contractor failing to complete the contract

The amount and level of risks involved will vary depending on each contract, how important the outputs are to the college and the potential for embarrassment if things go wrong.

4.12.4 Change management

Depending on the length and complexity of the contract there may be several or no variations. Variations may be needed for a number of reasons including:

- Change of requirement, for example, date change for production of a report
- Budget change, for example, more funds available for an increased number of information packs
- Contract extension, for example, when, due to unforeseen circumstances, the contractor needs more time

Requests for change can come from either, the user, the contract manager or the contractor but from wherever they originate you should gain agreement from all the key players before authorising the change and ensure that funds are available where applicable.

4.12.5 Performance management

Part of contract management responsibility is to monitor the performance of the contractor. This monitoring allows you to see whether or not the contractor is:

- Delivering the outputs to the required standard within the agreed budget
- Meeting their contractual obligations

It will also enable you to identify any problems early and take prompt remedial action.

Whatever method of monitoring you adopt should include checking:

- Outputs against agreed standards
- Outputs are delivered on time
- Invoices are correct
- The contractor is providing reports/information at the time specified in the contract

The appropriate reporting and monitoring arrangements will need to be agreed with the user and contractor.

4.12.6 Evaluation of contract performance

Evaluation can be defined as the assessment of the contract performance in an objective manner. Contributions to the evaluation process will come from the performance monitoring reports, user feedback and the contractor themselves.

For most of your contracts the evaluation will be done at the end but for some lengthy contracts you should carry out an evaluation at a point in time which has some relevance, e.g. before an annual price review or at the end of a specific stage.

The aim of contract evaluation is to establish whether or not value for money has been obtained and, if not, to analyse why and what lessons can be learnt for future contracts. More specifically we need to know:

- If the objectives of the contract have been met
- If the performance, quality and costs were those set out in the contract
- Depending on the type of project you should be able to ascertain whether or not the specification is still valid and can be used again

A written report of your evaluation should be retained with the contract file and used to inform future similar projects

4.13 Document Numbering and Records

It is vital that the contracting process is managed and full records kept of the action taken throughout. You should allocate a unique reference number to each contract, which should be shown on all correspondence. As mentioned earlier in paragraph **3.7.2** these numbers should also be used on the contract which is let as a result of that tender exercise.

Amendments or variations to a contract must, in addition to the unique reference, be numbered sequentially to show the order in which they were made. Making sure that contract documents are uniquely identifiable will avoid any misunderstandings or disputes.

4.14 Help and Advice on All Contracting Issues

If you need assistance whilst drafting your contract or want clarification on any contractual issue you can contact your local LSC Procurement Service Centre for advice.

5 EU Directives

5.1 Purpose and Background

The purpose of the rules is to open up the public procurement market and to ensure the free movement of goods and services within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money focus of the government's procurement policy. This requires that all public procurement must be based on value for money (defined as the optimum combination of whole-life cost and quality to meet the user's requirement), which should be achieved through competition, unless there are compelling reasons to the contrary.

The rules apply to purchases by public bodies and certain utilities that are above set monetary thresholds. They cover all EU member states and, as a result, of international agreements, their benefits also extend to a number of other countries worldwide.

Where the Regulations apply, contracts must be advertised in the Official Journal of the EU (OJEU) and there are other detailed rules that must be followed. The rules are enforced through the courts, including the European Court of Justice (ECJ).

5.2 An Outline of the EU Directives

5.2.1 Applicable directives

The EU procurement Directives set out the legal framework for public procurement. They apply when public authorities and utilities seek to acquire goods, services, civil engineering or building works. They set out procedures that must be followed before awarding a contract when its value exceeds set thresholds, unless it qualifies for a specific exemption for example on grounds of secrecy. Details of the current thresholds can be found at the Office of Government Commerce's website (OGC) <http://www.ogc.gov.uk/index.asp?docid=397>.

5.2.2 Implementation of the directives into national law

The Directives have been implemented into national law in the UK by Regulations. The current Regulations, which can be viewed at OGC's website, cover:

Public authorities (the State, regional and local authorities and other public bodies)

- Works (civil engineering/building works)
The Public Works Contracts Regulations 1991 (SI 1991/2680)
- Supplies (the purchase or hire of goods)

The Public Supply Contracts Regulations 1995 (SI 1995/201)

- Services

The Public Services Contracts Regulations 1993 (SI 1993/3228)

Utilities (that is, certain operators in the water, energy, transport and telecommunications sectors)

- The Utilities Contracts Regulations 1996 (SI 1996/2911) covering works, supplies and service contracts

5.3 Contracts Outside of the Scope of the Directives

Even when a tender process is not required under the Directives, for example because the estimated value of a contract falls below the relevant thresholds, EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply and some degree of advertising, appropriate to the scale of the contract, is likely to be necessary to demonstrate transparency. This is in line with the UK objective of achieving value for money in *all* public procurement, not just that which is covered by the procurement Directives.

5.4 Common Features of the Directives

In practical terms the Directives dictate:

- Contracts should be put out to competitive tender
- Minimum time limits for the tender procedure
- Discrimination against foreign firms is prohibited; disqualification from taking part in a tender is permissible only if certain standards are not met by a potential tenderer
- Debriefing of unsuccessful tenderers
- The need to keep statistics of procurements made under the terms of the Directives

5.5 Identifying Which Regulations Apply to Mixed Contracts, for example, Supply and Service

For public authorities, the first step in the process is to establish which of the Regulations apply that is, Works, Supplies or Services. Usually that will be clear from the contract's subject matter but there are occasions when contracts contain elements covered by more than one of the Regulations. In this case, the Regulations provide that:

- Where a contract covers both services and supplies, the classification should be determined by the respective values of the two elements
- Where it covers works/supplies or works/ services, it should be classified according to its predominant purpose
- Where a contract provides for the supply of equipment and an operator, it should be regarded as a services contract
- Contracts for software are considered to be for supplies unless they have to be tailored to the purchaser's specification in which case they are services

5.6 Aggregation Rules for Establishing Whether or not Value Exceeds the Relevant Threshold

Where a single **work** involves more than one contract the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached each of the works contracts will be covered by the rules except small contracts (known as small lots) the value of which fall below the minimum level provided for in the Regulations.

In determining whether the threshold has been or is likely to be reached for public **supplies and services** contracts, the rules require aggregation:

- Of the estimated value of separate contracts for meeting a single requirement; and
- In particular defined circumstances, where a series of contracts or a renewable contract is entered into for supplies/services of the same type during a 12-month period

Where a public authority is divided into a number of discrete operational units with devolved authority to decide independently whether or not to enter into procurement contracts, then aggregation need only be applied to each unit. In other cases, (that is, where authority is not devolved) the public authority as a whole must be considered for aggregation purposes.

5.7 Priority and Residual Services

5.7.1 General

The Services covered by the Directive are broken down into two categories:

- Priority Services
- Residual Services

A contract for a Priority Service is subject to the full requirements of the Directive. While a contract for a Residual service is not subject to the requirements for advertising you must send a contract notice to the OJEU when a contract has been awarded.

5.7.2 Contracts for a priority and residual service

Where there is a contract for both a Residual and a Priority service then you will need to decide which takes precedence. Where the Priority service element is the greater proportion then all the provisions of the Directive will apply. Where the Residual service element is the greater then you need only submit the Contract Award Notice.

There are some cases where it would appear that the contract is one for a Residual Service i.e. an Education and Vocational Education Services Project. However, when you look at the individual elements of the service required, these may contain, for example, computer related services, management consultancy or publishing and printing. These are Priority Services and if they make up 50% or more of the total expected contract value, and the total value of the contract exceeds the thresholds (including Priority and Residual), the contract will be classified as a Priority Service. It will therefore be subject to the full requirements of the Services Directive.

5.8 Coverage of Service Directive

5.8.1 Priority services

The following are classified as priority services for the purposes of the Directive.

- Maintenance and repair of equipment
- Land transport, other than of mail, but not rail including armoured cars and courier services
- Air transport other than of mail
- Transport of mail by land or air but not rail

- Telecommunications, but not voice, telex, radiotelephony, paging and satellite
- Banking, insurance and certain financial services
- Computer and related services
- Purchase of Research and Development
- Accounting, Auditing and book-keeping services
- Market research and public opinion polling
- Management consultancy and related services, but not arbitration or conciliation
- Architectural services, engineering, urban planning and landscape services, related consultancy services, technical testing and analysis
- Advertising services
- Cleaning of buildings and property management
- Publishing and printing on a fee or contract basis
- Sewage and refuse disposal, sanitation and similar services

5.8.2 Residual services

The following are classified as residual service for the purposes of the Directive.

- Hotel and restaurant services
- Transport by rail
- Transport by water
- Supporting and auxiliary transport services
- Legal services
- Personnel placement and supply of services
- Investigation and security services, except armoured cars
- Education and vocational education services
- Health and social services

- Recreational, cultural and sporting services
- Other services

5.9 Choice of Procurement Procedure

The time allowed for responses or tenders depends on which award procedure is used. Three award procedures are provided for:

- The **open procedure**, under which all those interested may respond to the advertisement in the OJEU by tendering for the contract
- The **restricted procedure**, under which a selection is made of those who respond to the advertisements and only they are invited to submit a tender for the contract. This allows purchasers to avoid having to deal with an overwhelmingly large number of tenders

Public authorities have a free choice between the open and restricted procedures.

5.10 The OJEU Advertising Requirement

As a general rule contracts that are covered by the Regulations must be the subject of a call for competition by publishing a contract notice in the OJEU. Standard forms for OJEU notices are available at http://simap.eu.int/pdf/forms/forms_in_pdf_en.html. In most cases the time allowed for responses or tenders must be no less than a set period, although some times can be reduced if a prior information notice (PIN) was published sufficiently far in advance of the procurement. A table setting out the timetable for each procedure is shown overleaf in **Table 1**.

Table 1 Procurement Directives: OJEU advertising timescales

All notices to go to the Office of the Official Publications, (OJEU).

Procedure	Text	Days
Open	Minimum time for receipt of tenders from date contract notice sent	52
	Reduced when prior information notice (PIN) published (subject to restrictions) to, generally -	36
	And no less than -	22
Restricted	Minimum time for receipt of requests to participate from the date contract notice sent	37
	Minimum time for receipt of tenders from the date invitation sent	40
	Reduced when PIN published (subject to restrictions) to, generally	26

You must take great care with the wording of the OJEU advert to avoid distorting competition or discrimination against a supplier or group of suppliers. Incorrect wording may result in the procurement being halted if a complaint is received and/or incorrect information is included.

You must keep a record of notices sent and have proof of the date of despatch of the notice that is to appear in OJEU, and a copy of the notice when it is published.

All notices are published free of charge. You should endeavour to keep the notice short (no more than 650 words - including titles) and make sure that the writing is clear. If there is an error in the notice or it is illegible when it is received by OJEU, you will be asked to remedy the fault within 24 hours. Failure to meet this deadline will mean that the OJEU Publications Office will:

- Publish the notice as it is; and
- Send a file to the European Commission that could lead to action being taken against the college

5.11 Stages in the Procurement Process

The regulations set out detailed criteria that are designed to avoid discrimination on grounds of origin in a particular Member State and to ensure

that all suppliers or contractors established in countries covered by the rules are treated on equal terms. The criteria cover:

- Specification stage – how requirements must be specified, avoiding brand names and other references which would have the effect of favouring or eliminating particular products or services – and the requirements to accept equivalence
- Selection stage – the rejection or selection of candidates based on
- evidence that they are not unsuitable on grounds for example of bankruptcy, criminal conviction or failure to pay taxes
- their economic and financial standing for example that they are judged to be financially sound on the basis of their annual accounts
- their technical capacity for example that they will be adequately equipped to do the job and that their track record is satisfactory
- Award stage – the award of contracts either on the basis of “lowest price” or various criteria for determining which offer is “the most economically advantageous” to the purchaser (i.e. best value for money). Government policy is to use the latter criterion

5.12 Statistics and Records

As a public body, your college is required to notify each calendar year to Treasury, statistical details of all contracts that have been awarded as a result of EU tendering.

The details required by Treasury apply to contracts for Goods, Services and Works where the financial value for the entire duration of the contract exceeds the threshold in force at the time the contract was let.

In addition the Treasury may request a **written report** on the main features of contracts awarded for onward transmission to the EU Commission.

The college should establish records in relation to each contract awarded specifying:

- a) The services provided under the contract and value
- b) The names of the tenderers whose offers were evaluated, where the contracting authority has used the restricted procedure, the reasons for their selection
- c) The names of the tenderers who were unsuccessful and the reasons why they were not successful

- d) The name of the tenderer(s) to whom the contract was awarded and the reasons for having awarded the contract
- e) If known, the services under the contract which the tenderer to whom the contract has been awarded intends to sub-contract

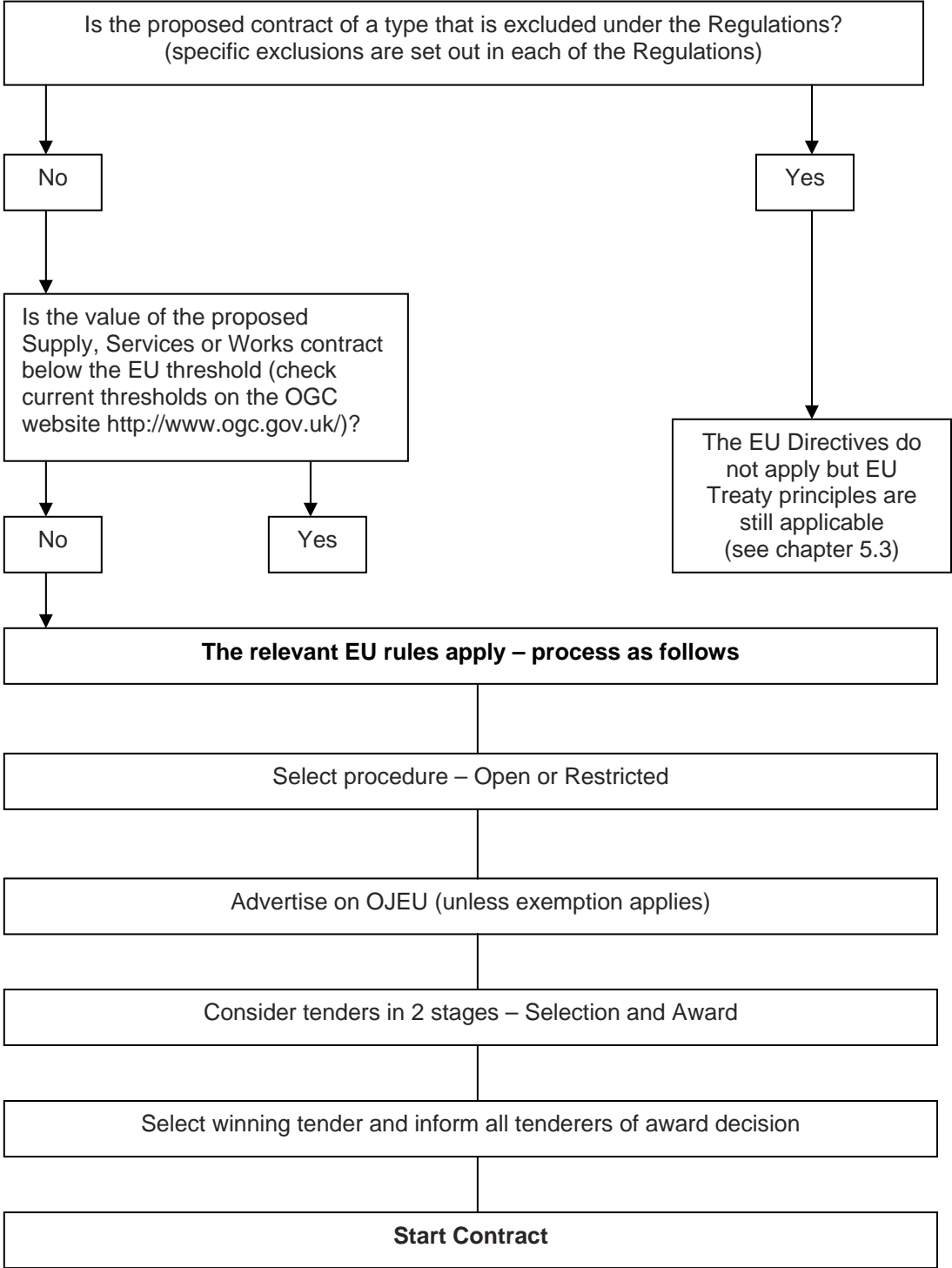
5.13 Enforcement

The principal means of enforcement for a breach of the Regulations and other enforceable EU law such as the Treaty are:

- action by suppliers or contractors against individual purchasers in the High Court; and
- action by the European Commission against the member state in the ECJ

Either way the result might be the suspension of an incomplete contract award procedure or the setting aside of a decision in an incomplete contract award procedure. The High Court also has powers to award damages. In cases where a contract has been entered into, an award of damages is the only remedy that the High Court can provide. However, the ECJ has demonstrated that, in appropriate circumstances, it is prepared to overturn a contract.

6 Flowchart of the EU Procurement Process



7 Note re “Alcatel” Judgement on OJEU Procurements

7.1 Summary

The Alcatel ruling found that national courts in EU Member States must, in all cases, be able to review and set aside award decisions in procurement contracts subject to the full EU procurement Directives. A subsequent ECJ ruling clarified that there should be a period of time between the contract award decision and the start of the contract to ensure that complainants are able, in duly justified cases, to bring actions in the national court for suspension and set-aside of the contract award decision.

7.2 Background

Following on from the “Reasoned Opinion” issued by the European Commission against the UK in 2004 requiring the UK to comply with the Alcatel judgement by introducing a mandatory standstill period between communication of award decision and contract conclusion the proposed amendments UK procurement regulations are as follows:

7.3 A 10 Day Mandatory Standstill Period

For all public sector and utilities procurements covered by the full procedural requirements of the EU Procurement Directives, a minimum of 10 calendar days mandatory standstill period is required between communicating the award decision by email or fax and also by post to all tenderers and entering into a contractually binding agreement.

The notice of the contracting authority’s award decision concerns only those contractors who submitted a tender (valid or invalid). The notice must contain:

- The award criteria
- Where appropriate (for example where scores were used. Scores are not necessarily relevant in the case of an award notice made on the basis of lowest price) the score the tenderer obtained against those award criteria
- Where appropriate, the score the winning tenderer obtained
- The name of the winning tenderer

7.4 New Debriefing Requirements Within the Standstill Period

The contracting authority must provide additional debriefing within the mandatory standstill period where an unsuccessful tenderer requests it by the end of the second working day of the standstill (additional debriefing can allow for the contracting authority to inform the tenderer of the reasons why he was unsuccessful and, if the tenderer submitted an admissible tender, to inform him of the characteristics and relative advantages of the successful tender. This additional debriefing can be given in such manner and form as the contracting authority considers appropriate).

Contracting authorities must allow for three full working days between the despatch of this additional debriefing and the end of the standstill period. Contracting authorities may accordingly need to extend the standstill around public holiday periods. Where a request arrives within the standstill period but after the two working days deadline, contracting authorities are not bound to provide further debriefing within the standstill period but still need to provide it within 15 days of receiving a written request, as per the normal rules. The existing contract award information rules remain unchanged in the event that tenderers do not take up the opportunity for an “accelerated” debrief within the standstill period.

7.5 Procurements not Covered

The mandatory standstill period does not apply to below threshold procurements or to procurements otherwise outside of the full scope of the EU directives that is, Part B services.

7.6 Further Information

Further information and a more detailed explanation of these proposed amendments can be obtained by looking at the Consultation Document on Draft Amendments to the UK procurement Regulations implementing the ECJ “Alcatel” judgement August 2005 on the OGC website.

Learning and Skills Council.
National Office

Learning and Skills Council
Cheylesmore House
Quinton Road
Coventry
CV1 2WT
www.lsc.gov.uk

© LSC November 2005

Published by the Learning and Skills Council.

Extracts from this publication may be reproduced for non-commercial educational or training purposes on condition that the source is acknowledged and the findings are not misrepresented.

This publication is available in an electronic form on the Council's website:www.lsc.gov.uk

The Learning and Skills Council offers an alerting service for any circular posted to our website, to subscribe to this service visit <http://www.lsc.gov.uk/subscriptions.cfm>

In Partnership with

department for
education and skills
creating opportunity, releasing potential, achieving excellence

Publication enquiries: 0870 900 6800
Publication reference LSC-P-NAT-050585