

THE HIGHLAND COUNCIL

Resources Committee

3rd December 2008

Agenda Item	
Report No	

Highland Council Standing Orders Relating to Contracts

Report by Depute Chief Executive and Director of Finance

Summary

This report presents the Council's reviewed Standing Orders relating to contracts for the calendar year 2010.

1. Introduction

- 1.1 The Council has a commitment to review its Standing Orders relating to contract (commonly known as Contract Standing Orders/CSOs) annually. This report fulfils that commitment.
- 1.2 The review has taken account of the latest developments in requirements for publicising business opportunities, the possibilities of using framework arrangements, and the development of the Scottish Government Best Practice toolkit for Procurement.
- 1.3 It is aligned to the requirements of the Council's Procurement Strategy and the McClelland review of Public Procurement in Scotland.
- 1.4 All Services have been consulted on the content and construction of the new version of these orders.

Recommendations

Members **approve** the above attached Standing Orders relating to Contracts

Signature:

Designation: Depute Chief Executive and Director of Finance

Date: 10th November 2008

Author: Ashley Gould, Head of Procurement

Author's Tel.: 01463 703989

Background Papers: Contract Standing Orders

THE HIGHLAND COUNCIL

CONTRACT STANDING ORDERS

December 2008

CONTRACT STANDING ORDERS

CONTENTS

Introduction:	Page
1. Executive Summary	4
2. Procurement Process Management Flow-chart	6
Context:	
1. Commencement	8
2. Definitions	8
3. Extent and Introduction	9
4. EU, UK and Scottish Legislation	10
5. Breach of Contract Standing Orders	10
6. Reporting to Committees	10
Applicable Standards:	
1. Exemptions from Standing Orders	11
2. Exceptions from Standing Orders	11
3. Budgetary Provision and Precautionary Tendering	12
4. Business Cases	12
5. Dispensing with Competition	13
6. Periodic Supplies and Framework Agreements	13
7. Aggregation of Demand and Partnership Working	13
8. Freedom of Information	14
9. Specifications	14
10. Sustainability and Equal Opportunities	14
11. Procurement and Contract Risk	15
12. Significant Trading Operations	15
13. Reporting of Contracts and Contract Expenditure	15
14. Construction Design and Management Regulations	16
Operational Procedures:	
1. Authority to Invite Tenders	17
2. Advertising of Tenders	17
3. Framework Agreements	17
4. Tendering via Restricted Procedures and Ad-hoc Lists	18
5. Open Tendering	18
6. Content of Invitations to Tender	19
7. Evaluation Criteria	19
8. Handling of Tenders	20
9. Award of Contract	21
10. Risk Management Procedures	21
11. Quotations	22
12. Contract Documents	22
13. Termination of Contracts	23

14.	Engagement of Consultants	23
15.	Procedures for Procurement of Part B ¹³ Services	23
APPENDIX 1	PRESCRIBED SUMS	25
APPENDIX 2	AUTHORITY TO CARRY OUT PROCUREMENT TASKS	26
APPENDIX 3	RETENTION SCHEDULE	27

INTRODUCTION

1. EXECUTIVE SUMMARY

Responsibility and accountability for all procurement within the Council shall lie with the Depute Chief Executive and Director of Finance, who shall have the authority to determine all matters relating to procurement subject to compliance with legal requirements. The Depute Chief Executive and Director of Finance may at his discretion delegate areas of procurement to other Directors and to specified officers of the Council.

Requirements for goods and services with a value in excess of £3,000, and requirements for works with a value in excess of £10,000, shall be subject to requests for competitive quotations, unless they are covered by one or more of the exceptions or exemptions noted below. Requirements for goods, services, or works with a value in excess of £25,000 shall be subject to formal tendering procedures unless they are covered by one or more of the exceptions or exemptions noted below. These Prescribed Sums are set out at Appendix 1 to these Orders.

In accordance with agreed actions arising from the 2008 Audit Reports on Receipt of Tenders, arrangements for competitive tendering for all requirements with a value in excess of the prescribed sum shall be made by the Head of Procurement unless authority to do so is delegated by the Depute Chief Executive and Director of Finance to other Directors, either in the scheme of delegation, or specifically through authorisation of a Delegated Authority Form (Appendix 2).

Advertising will take place as follows as a minimum:

- Requirements with a value in excess of £25,000: Council's own Website via the Public Procurement Portal: www.publiccontractsscotland.gov.uk
- Requirements with a value in excess of £50,000: Council's own Website via the Public Procurement Portal and Government Opportunities
- Requirements with a value in excess of €211,000 (Supplies and Services) or €5,278,000 (Works)¹: Official Journal of the European Union (first)², Council's own Website via the Public Procurement Portal, and Government Opportunities.

The single point of publication for these notices will be the Head of Procurement. This means that all Contracts subject to formal tendering procedures must be advertised via the Head of Procurement, and that where quotation level requirements are advertised on a voluntary basis, the same requirement applies.

No transactions or commitments made or costs incurred may be split to avoid the necessity of appropriate calls for competition.

In all commitments made in the commissioning of consultancy services, regardless of value, Statements of Requirement and Terms of Engagement shall be documented in every case.

Tendering for goods, services, and works within the Council shall be carried out by electronic means unless specific agreement has been made with the Depute Chief

¹ Variable equivalents in Sterling are set out from time to time in the Official Journal of the EU and shall be used as a basis, and advice on the current Sterling value can be obtained from Procurement.

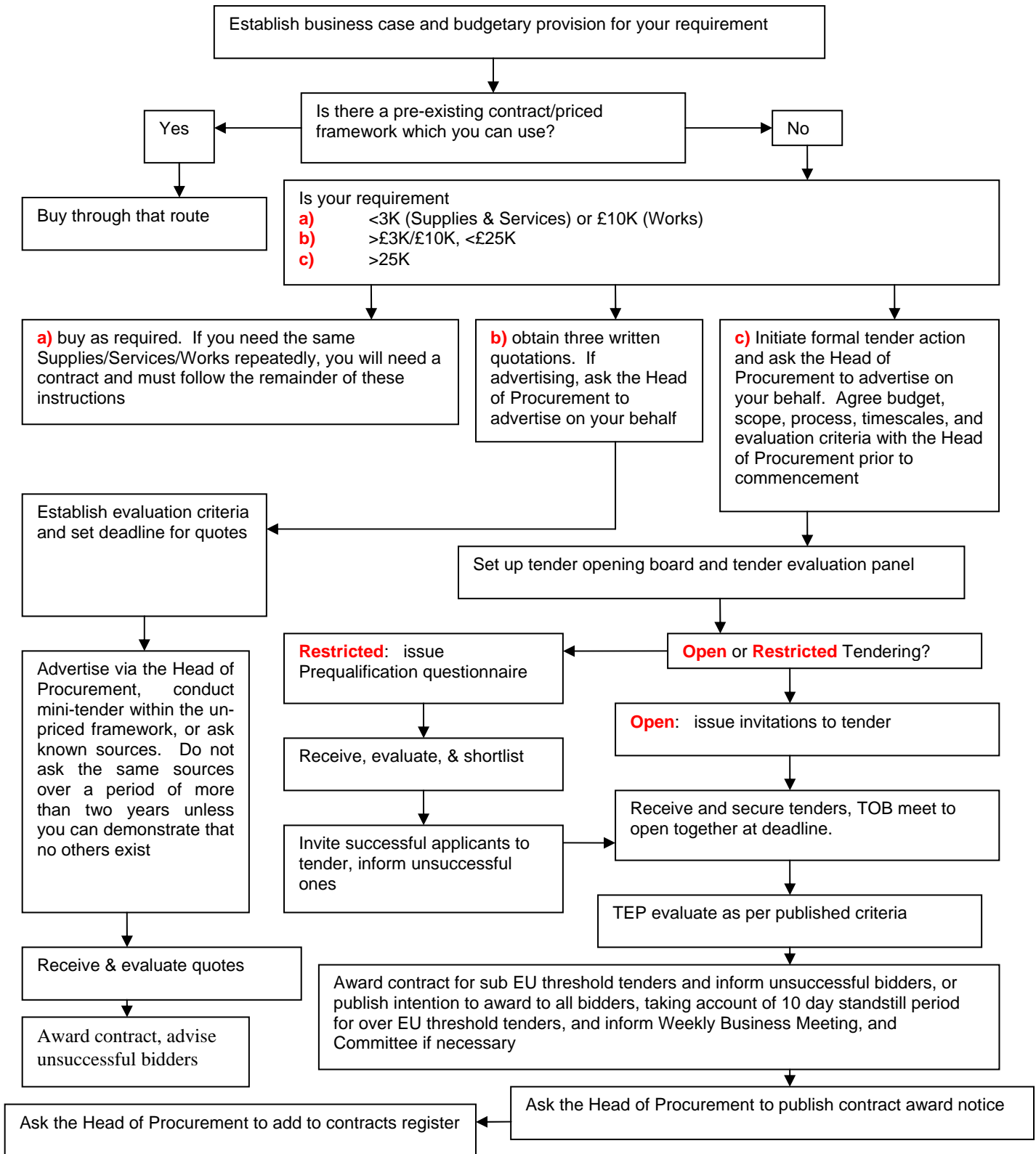
² EU tender threshold values are revised every two years, and will be valid until 1st January 2010.

Executive and Director of Finance that they shall be dealt with manually. Paper order books are to be withdrawn within the lifetime of this revision of Contract Standing Orders, and will only be available to Services following the acceptance by the Depute Chief Executive and Director of Finance of a business case relating to each issue, and as such ordering of goods, services and works shall also be carried out electronically.

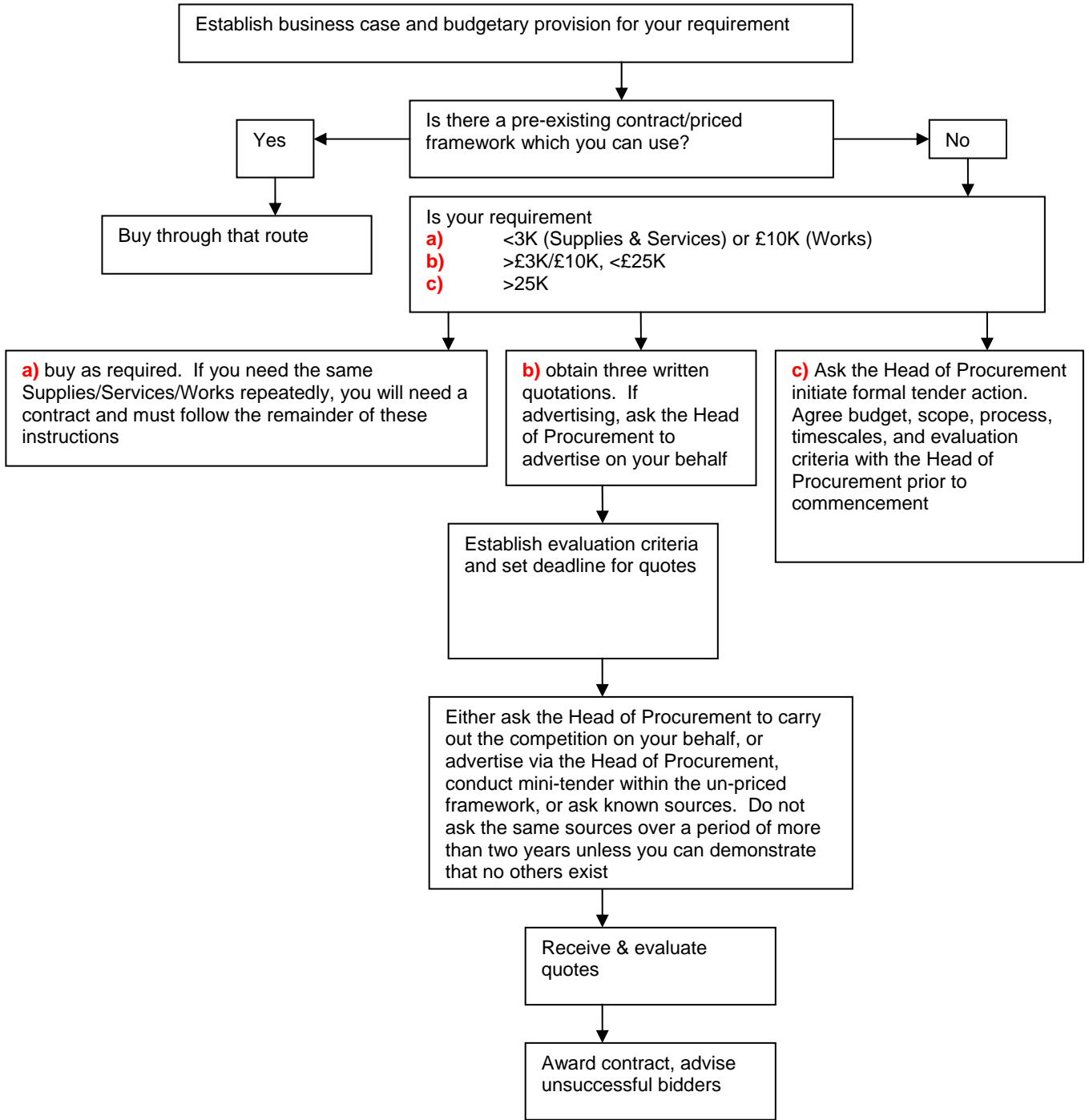
Procurement tasks shall be undertaken only by empowered staff, each of whom must have specific delegation allocated to them using the form at Appendix 2 of these Orders.

Procurement via collaborative contracts such as those awarded by Procurement Scotland, Scotland Excel or the Office of Government Commerce (OGC) may be undertaken without further competition depending on the particular procedure recommended by the Agency concerned at the discretion of the Depute Chief Executive and Director of Finance or Head of Procurement acting on his behalf. In all cases periodic 'value for money' checks involving other alternatives should be carried out as such agencies do not guarantee or always offer best value. The Council has committed itself to membership of Scotland Excel for the lifetime of the revision of these Orders, and as such will undertake to participate in Scotland Excel contracts unless existing arrangements, alignment with strategic or operational requirements, additional supply chain or sustainability costs are added, or the rules of Best Value require otherwise. In such cases the Head of Procurement shall provide justification for non-participation to the Depute Chief Executive and Director of Finance and the Council's representative Members of the Scotland Excel Joint Committee, and following their approval, to the Director of Scotland Excel.

2. Procurement Flowchart Requirements Not in the Head of Procurement's Remit



Note: Other Routes include the Accelerated Restricted and Negotiated Procedures and the Competitive Dialogue, but as these may only be used in the cases of unusually complex or otherwise exceptional contracts requiring a specific justification, they may not be used without consultation with the Head of Procurement first, and are therefore not detailed as standard operating procedures here. Specific guidance on shortening timescales based on the use of a Buyer Profile or Prior Information Notice may also be obtained from the Head of Procurement.



CONTEXT

1.0 Commencement

- 1.1 These Orders (“the Contract Standing Orders”) shall apply and have effect from 1st January 2009 and shall be subject to annual review.

2.0 Definitions

- 2.1 In these Contract Standing Orders, the following words and expressions shall have the meanings hereinafter assigned to them, that is to say:-

“the 1973 Act” means the Local Government (Scotland) Act 1973;

“Contract” means an agreement between that Council and another legal entity having the following characteristics: offer and acceptance/agreement, intention to form legal relationships, capacity (of the parties to enter such an agreement) and legality. A contract is not required to be concluded in writing in order to be binding but may be either verbal or implied by the actions of the parties. As such an agreement to work in partnership with a third party to achieve an end required by the Council is liable to be held to be a contract, and the output required by the Council will be subject to the same rules of competition and commercial conduct as any other requirement. Assignments of work to any of the Council’s Direct Labour or Direct Service Organisations, cannot therefore be contractual in nature, but must be subject to the principles of Best Value

“Contracting Authority” means The Highland Council: this is the Contracting Authority in all Contracts into which the Council or any part of the Council enters. There are no legal personalities within the Council other than the Council itself, and as such no Service, Unit, Establishment, or other part of the Council has the legal capacity to enter independently into a Contract. All Contracts let and purchases made are therefore made by or on behalf of the Council as a whole

“Depute Chief Executive and Director of Finance”: for the purposes of these Orders includes the Head of Procurement acting on his behalf.

“Head of Procurement” in the context of the advertising, arrangement and management of competitive tendering and quotation exercises and award of contracts includes any Principal Contracts Officer or Contracts Officer within the Strategic Procurement Division.

“Most economically advantageous tender” means that giving maximum value for money over the lifetime of the contract for the goods, services or works delivered thereby, taking into account all material matters, visible or invisible, including but not being limited to quality and price. Other than “lowest price” it is the only acceptable means of deciding upon which tenderer should be awarded a contract in terms of the public procurement regulations. It must be noted that in assessing the most economically advantageous tender, the costs taken into account must be material to the purposes of the contract. In other words, the cost must bear upon a significant measurable characteristic of the requirement being procured

“Partners” are defined as any organisations with which the Council works to deliver its objectives, with a formal agreement of roles (contract, funding agreement,

Service Level Agreement etc). Partnerships are defined by the agreements between the partners.³

“Partnering” means a form of collaborative working between partners and in contrast with traditional ‘arms length’ procurement and contract-management approaches, partnering is characterised by a greater degree of openness, communication, mutual trust and sharing information. There may often be a long-term relationship which requires clear roles and responsibilities for decision making, and effective performance reporting. Entering into such agreements is subject to the same rules of competition as other forms of agreement.

“Prescribed Sum” means the value of the Sum prescribed within the Appendices to these orders.

“Procurement Officer” means a member of the Strategic Procurement Division or other Official empowered to award contracts on behalf of the Council by the Depute Chief Executive and Director of Finance in accordance with Appendix 2 of these orders.

“Quality” in this context means fitness for purpose as defined in the Specification or Statement of Requirements.

“Services” “Supplies” and “Works” shall have the meanings ascribed to them as set out in the Public Contracts (Scotland) Regulations 2006;

“Service Director” includes the Chief Executive, and is taken to include any senior officer delegated by the Depute Chief Executive and Director of Finance to undertake specific tasks relating to contracts. .

“Service Provider” “Supplier” and “Contractor” shall have the meanings ascribed to them as set out in the Public Contracts (Scotland) Regulations 2006 <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060001.htm>

“Sponsor” or “Sponsoring Director” means the owner of the requirement as distinct from the Procurement Officer carrying out commercial action on their behalf.

3.0 Extent and Introduction

These Contract Standing Orders are made under section 81 of the 1973 Act. They shall apply to the entering into by the Council, or on its behalf, of contracts for the supply, or lease, of Supplies, Services, and Works, as the case may be, unless classified as being exemptions or exceptions from these Contract Standing Orders. For the avoidance of doubt, these orders do apply to PFI/PPP, Joint Venture, and similar contracts.

They are written in accordance with the terms of the Scottish Government Procurement Policy Handbook, and Scottish Procurement Policy Notes, and shall be implemented by application of the standards and procedures set out in the Highland Council Procurement Manual as published at the time of the requirement arising.

³ HM Treasury, “Managing Risks With Delivery Partners” 2004

Policy responsibility for the governance of commercial business shall rest with the Depute Chief Executive and Director of Finance.

Subject to the requirements of the Council's Standing Orders, European Community Law and legislation, the under-noted powers to enter into commercial arrangements on behalf of the Council shall be held by the Depute Chief Executive and Director of Finance-

- a) agreement of specifications with user Services
- b) construction of contract terms and conditions
- c) development of sourcing and contracting strategies
- d) agreement of procurement budget heads
- e) selection of tenderers
- f) opening and evaluation of tenders
- g) award of contracts and framework arrangements, including participation in collaborative contracts awarded by others
- h) appointment of consultants

Note that in these Orders, actions and responsibilities assigned to the Depute Chief Executive and Director of Finance will be executed on his behalf by the Head of Procurement

4.0 EU, UK and Scottish Legislation

These Contract Standing Orders will be operated in such manner as will comply in all respects with the requirements of European Community Law, United Kingdom and Scottish legislation. There should be no conflict between these Orders and the legislation, but for the avoidance of doubt, in all cases EU law takes precedence, followed by UK and Scots law.

5.0 Breach of Contract Standing Orders

Any breach or non-compliance with these Contract Standing Orders must on discovery be reported immediately to the Head of Audit and Risk Management acting on behalf of the Depute Chief Executive and Director of Finance. The Head of Audit and Risk Management should undertake any necessary investigation and report the findings to the relevant Service Director and Chief Executive, as appropriate, and disciplinary proceedings may result from such reports.

6.0 Reporting to Committees

In circumstances where reports have to be provided to a Committee this should be the relevant Service Committee as specified.

CONTRACT STANDING ORDERS – APPLICABLE STANDARDS

1 EXEMPTIONS FROM STANDING ORDERS

There will be exempted from the provisions of these Standing Orders:

- (i) all contracts with a total estimated cost not exceeding the Prescribed Sums set out at Appendix 1;
- (ii) any contract of employment;
- (iii) any contract excluded under the terms of the Public Contract (Scotland) Regulations 2006;
- (iv) any contract relating to the disposal or lease of land or other capital asset.
- (v) any arrangement in which the Council shall fund an external operator to provide services on a non-contractual basis. In such circumstances the principles of the Following the Public Pound Code shall apply.

2 EXCEPTIONS FROM STANDING ORDERS

Nothing in these Applicable Standards 3 to 13 and Operational Procedures 1 to 15 shall apply:

- (i)
 - (a) Where the Sponsor has satisfied the Depute Chief Executive and Director of Finance that the requirement is not readily obtainable from more than one supplier, service provider, or contractor, and it can be demonstrated that no equivalent is available; or that
 - (b) the prices of the goods, materials or specialist services are wholly controlled by trade organisations or government order and it can be demonstrated that no equivalent is available; or that
 - (c) the requirements are subject to intellectual property rights and it can be shown that either no suitable alternative is available, or that exposure to competition of an item covered by copyright, patent, or trademark would breach such rights. Note that where an item is described by a reference to a trade name, it must be followed by the phrase “or equivalent; or
- (ii) where there is an existing contract for the supply of any class of goods, works or services. Such contracts may only be extended without fresh competition within reason, and in accordance with any limitations set out either in the Contract itself or the Contract Notice. The following shall all apply:
 - the original contract must have been won via a competitive process;
 - the extension may not exceed the allowance for extension as set out within the terms and conditions of the contract;.
 - unit costs may not increase under the terms of the extension by more than 25% over those set out in the contract;

- an extension may be necessary in order to allow for the proper conduct of a competitive process,
- the extension proposed must be reasonable in all the circumstances.

Any variation which constitutes a material alteration of the original contract by nature or extent must be the subject of fresh competition; or

- (iii) the demand is for the execution of work or the supply of goods, materials or services, certified by the relevant Service Director as being required as an emergency measure so as not to permit the invitation of tenders. "Emergency" means **only** an event which could not reasonably have been foreseen. Each case must be reported to the Depute Chief Executive and Director of Finance and next meeting of the Relevant Service Committee ; or
- (iv) the work to be executed or the goods, supplies or services to be provided consist of repairs to or the supply of parts for existing proprietary machinery or plant and the Council is bound by the terms of an agreement, by insurance requirements or by the terms of a warranty to use a specified contractor; or
- (v) the contract is for the supply of goods acquired on the Commodities Market.

All instances of such procurements arising shall be reported to the Relevant Service Committee.

3 BUDGETARY PROVISION AND PRECAUTIONARY TENDERING

- (i) The Council's Financial Regulations make reference to the requirement to control capital and revenue expenditure, and therefore the terms of those Regulations must be implemented in the context of activity covered by these Orders.
- (ii) In this respect, the Sponsor of any procurement project must certify that sufficient funds exist prior to the commencement of any contracting action. If the cost of the requirement is not known when it arises, similar requirements elsewhere may be used as a baseline. Informal consultation with potential providers, without making any commitment, may also be used. Precautionary formal tendering aimed solely at establishing costs must not take place. The only exception to this is when external funding is anticipated which must be used within the current financial year. In those circumstances tendering in advance of final agreement is acceptable, but the situation must be made clear to all potential bidders. Prior to the commencement of any commercial action, the Sponsor must advise the Procurement Officer conducting the competitive exercise of the associated budget

4 BUSINESS CASES

- (i) Before committing funds to or commencing a tendering process for any commercial arrangement in excess of the prescribed sum for formal tenders, the Sponsor must ensure that a business case has been established. This must examine all possibilities for meeting the

requirement. It must also show that no other contract which could be used already exists within the Council.

5 DISPENSING WITH COMPETITION

- (i) It is a fundamental principle of Public Sector procurement that purchases should be made as a result of competition.
- (ii) Dispensing with competition at any level of purchase, which may amount to unfair discrimination, is contrary to the provisions of the Treaties of Amsterdam and Rome. Decisions to proceed with a non-competitive purchase above the prescribed sum for the obtaining of quotations, and the justifications for taking them must be recorded, and must only be made within the rules set out in Orders 1 and 2 above.
- (iii) Procurement via collaborative contracts such as those awarded by Procurement Scotland, Scotland Excel or the Office of Government Commerce (OGC) may be undertaken without further competition depending on the particular procedure recommended by the Agency concerned at the discretion of the Depute Chief Executive and Director of Finance or Head of Procurement acting on his behalf. In all cases periodic 'value for money' checks involving other alternatives should be carried out as such agencies do not guarantee or always offer best value. The Council has committed itself to membership of Scotland Excel for the lifetime of the revision of these Orders, and as such will undertake to participate in Scotland Excel contracts unless existing arrangements, alignment with strategic or operational requirements, additional supply chain or sustainability costs are added, or the rules of Best Value require otherwise. In such cases the Head of Procurement shall provide justification for non-participation to the Depute Chief Executive and Director of Finance and the Council's Members of the Scotland Excel Joint Committee, and following their approval, to the Director of Scotland Excel.
- (iv) Breaking down or disaggregating requirements in order to avoid the necessity of exposing them to competition is contrary to public procurement regulations and must not be entered into under any circumstances.

6 PERIODIC SUPPLIES AND FRAMEWORK AGREEMENTS

- (i) Where a contract is for the supply of goods or materials or the provision of services or works by means of a call off contract or framework agreement which includes detailed pricing information, formal tendering shall be carried out only once prior to the commencement of such arrangement. The period of such arrangements shall not exceed four years without specific justification which must be published when the requirement is advertised.

7 AGGREGATION OF DEMAND AND PARTNERSHIP WORKING

- (i) Where requirements arise in more than one establishment, unit, Service, or other part of the Council, or where requirements are shared between such parts of the Council, then those requirements shall be aggregated for the purposes of procurement, and no part of the Council shall operate independently of any other.

- (ii) Once a Contract, or set of Contracts or Framework Agreements for any category of Supply or Services, or Works has been let corporately on behalf of the Council, it shall be a requirement for all Services to use the Contract for the provision of the Supplies, Services, or Works concerned where such requirements arise in those Services. New Contracts shall be reported to the Weekly Business Meeting for circulation throughout Services and shall be published on the Council Intranet.
- (iii) In accordance with the principles of the Egan Report on Rethinking Construction, aggregation of demand shall also apply to works procurement. In areas in which strategic partnerships are used, the rules of open competition and equality of opportunity to compete for Council business must be applied. The Council shall maximise the use of Framework Agreements in Construction as far as is possible within the lifetime of this revision of these Orders.
- (iv) Partnership arrangements are a valid means of achieving best value through procurement. The establishment of partnerships must be subject to formal competition and must protect the interests of the Council, by the use of formally agreed and written terms and conditions.

8 FREEDOM OF INFORMATION

- (i) The Council shall treat its commercial and contractual relationships as confidential to the extent allowed by the Freedom of Information (Scotland) Act.
- (ii) To allow for the operation of the requirements of the Freedom of Information (Scotland) Act, the EU Procurement Directives, and the Public Contracts (Scotland) Regulations, a Contracts Register shall be published on the Council's public website. Each Service Director shall ensure that the Depute Chief Executive and Director of Finance is provided with sufficient information to enable this to be kept up to date.

9 SPECIFICATIONS

- (i) Formal Specifications or statements of requirement shall be developed for all tendered or quoted requirements for supplies, services (including each and every consultancy requiring competitive action), or works, which will fully define what the Contractor, Supplier, or Service Provider is to provide.

10 SUSTAINABILITY AND EQUAL OPPORTUNITIES

- (i) To the full extent permitted under legislation at the time of undertaking the Contract, and where the statutory duty of Best Value is not comprised by doing so, the Council shall take full account of the issues of socio-economic and environmental sustainability wherever they are material to the purposes of the Contract
- (ii) In any Council functions carried out by an external supplier, the Council remains responsible for meeting its duty of ensuring equality of opportunity. As such the Council must build relevant equality considerations into

appropriate contracts to ensure each function meets its Race Relations (Amendment) Act requirements, regardless of who is carrying it out.⁴

- (iii) Prior to commencement, all formally tendered contracts for the provision of works and/or services shall be subject as a minimum to initial screening for an Equality Impact Assessment, and the full production of an Equality Impact Assessment if the initial screening shows that to be appropriate. Further guidance is available on the Highland Council Equal Opportunities Intranet pages.

11 PROCUREMENT AND CONTRACT RISK

- (i) These orders are written in order to ensure that officials operate in a way that conforms to the requirements of relevant legislation. In this way, the Council and individuals are protected from legal risk as far as can be reasonably foreseen. Individuals who break the rules set out within these orders not only expose the Council to unnecessary risk, but are also themselves exposed in cases where their actions constitute a criminal act.

12 SIGNIFICANT TRADING OPERATIONS

- (i) The Council has implemented a number of Significant Trading Operations. In order to qualify as such, these operations need to operate in a competitive environment, and this includes bidding for Council business as a long term in-house provider, where such activity is carried out. Where such bids are successful, these operations are entitled to the same status as an external contractor for the exclusive provision of services covered by the related tendering exercise over the lifetime of the advertised contract.
- (ii) The requirements of these Contract Standing Orders apply in full to Trading Operations' commercial activities, and Services must ensure that where supplies, works or services with a value in excess of the specified sum are required, sufficient time is built into the project programme to allow for tendering on their behalf by the Trading Operation. Requirements for the provision of supplies, works, or services may be awarded to "in-house" providers without competition as long as the requirements of Best Value can be met and demonstrated by this means.

13 REPORTING OF CONTRACTS AND CONTRACT EXPENDITURE

- (i) Prior to the commencement of any formal tender exercise, the Sponsor must establish a budget forecast for the requirement and shall certify that sufficient funds exist to cover this in accordance with paragraph 4 of these Orders. The Sponsor's written commitment to this level of funding shall be passed to the Head of Procurement prior to commencement, and this shall be recorded and kept on file within his office.
- (ii) On award of contract, the subject of the contract, successful tenderer, budget figure and actual forecast expenditure shall be reported by the Depute Chief Executive and Director of Finance to the Weekly Business Meeting.

⁴ Public Procurement and Race Equality, Guidelines for Local Government, Commission For Racial Equality 2002, considerations to be based on relevance, proportionality, accountability, transparency, mainstreaming, appropriateness, legality, and risk assessment

- (iii) Where the forecast expenditure figure based on received tenders significantly exceeds the budgetary figure, the Sponsor must produce a plan for either managing the cost down to the level of budgetary provision or for making additional funds available, and this plan must also be reported to the Depute Chief Executive and Director of Finance.
- (iv) In determining the need for reports, Officers should be guided by what is material or significant. A seven or 10% overspend on a £25K tender is not likely to put an unbearable strain on Council or specific Service funds, but a 5% overspend on a £5M project could well make it unaffordable and require a new strategy to be formulated, hence application of a blanket percentage to all tendered contracts or projects is inappropriate and an element of expertise and professional judgement must be exercised. As the cost of a project and the implications of letting an over budget project go forward increase, the percentage at which officers should refer to Head of Service, Directors, WBM etc to consider a decision will come down . If a project is a low value one, then the project sponsor/budget holder should be asked to either increase the funding available or agree a plan to manage the costs down e.g. changing the specification to suit the funds available. If a project has a high value, it will be appropriate to refer it back to the sponsoring Director for the same view, and if a project exceeds the OJEU level for works, then the Director concerned may wish to discuss the same points with the Chair of the committee concerned

14 Construction (Design and Management) Regulations 2007

- (i) Duties under the Construction (Design and Management) Regulations 2007 require clients to provide pre-construction information to designers and contractors in any project involving works as defined in the CDM Regulations.
- (ii) Further guidance is available from Housing Property Services Property Risk Management Unit and on
<\\ntpahq1\documentmanagement\Risk Management\Operational\CDM\CDM2007\cdm2007.htm>

OPERATIONAL PROCEDURES

1 AUTHORITY TO INVITE TENDERS

- (i) Formal tendering exercises shall be managed by the Head of Procurement, following receipt of budgetary certification and business case, unless authority to do so is delegated by the Depute Chief Executive and Director of Finance to other Directors, either in the scheme of delegation, or specifically through authorisation of a Delegated Authority Form (Appendix 2)..
- (ii) Tenders in respect of goods or equipment to be supplied by way of a lease arrangement may only be invited following approval from the Depute Chief Executive and Director of Finance.
- (iv) Tenders with a value in excess of the prescribed sums must be dealt with in accordance with the EU Commission Open, Restricted, Accelerated Restricted, Negotiated, or Competitive Dialogue Procedures. Timescales for these can be found in the Consolidated Procurement Directive http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_13420040430en01140240.pdf

2 ADVERTISING OF TENDERS

- (i) In order to meet the requirements of the European Commission for adequate publicity of opportunities, advertising will take place as follows as a minimum:
 - a) Requirements with a value in excess of £25,000: Council's own Website via the Public Procurement Portal: www.publiccontractsscotland.gov.uk
 - b) Requirements with a value in excess of £50,000: Council's own Website via the Public Procurement Portal and Government Opportunities
 - c) Requirements with a value in excess of € 211,000 (Supplies and Services) or €5,278,000 (Works): Official Journal of the European Union (first) Council's own Website via the Public Procurement Portal, and Government Opportunities

The single point of publication for these notices will be the Head of Procurement. This means that all Contracts subject to formal tendering procedures must be advertised via the Head of Procurement, and that where quotation level requirements are advertised on a voluntary basis, the same requirement applies

- (ii) In circumstances in which it is reasonable to expect the requirements to be of interest to companies based beyond the Council's borders, they must be advertised at level (b) above regardless of value.

3 FRAMEWORK AGREEMENTS

- (i) The Depute Chief Executive and Director of Finance in conjunction with the Sponsor may decide to set up framework agreements in which parties admitted to the framework by way of competition may be invited to tender

via further mini-competitions for individual contracts for the provision of goods, materials, services or works of specified categories, or in which direct orders can be placed on parties admitted to the framework without further competition. in the former case, invitations to tender for such contracts shall be limited to parties admitted to the framework

- (ii) The establishment of framework agreements is subject to the same requirements for advertising and evaluation as all other contracts. No such framework may have a lifetime of greater than four years without specific and justifiable reason being recorded for the commitment to a longer period. Only one framework agreement shall be set up within the Council in respect of any category of goods, services or works, though these may be addressed as “lots” and in each case its compilation and maintenance shall be the responsibility of and shall be owned by the Procurement Officer assigned that category of supplies, works, or services. Framework agreements may be made with one provider or with at least three providers, unless a multiple-supplier framework is required and only two competent tenders are received.
- (iii) Where tenders within an over-arching framework agreement are appropriate, invitations to tender must be sent to at least four participants on the framework unless there are less than four or fewer in the framework, in which case all shall be invited. If the membership of the list falls to less than three, it shall be set aside and open tendering shall be used.
- (iv) where there are more than five participants in any framework agreement, invitations to tender may not be sent to the same set of potential bidders in any framework on more than two consecutive occasions, and allocation of work or inclusion in the list of those to be invited to tender must be on a fair basis such as by use of Key Performance Indicators.

4 TENDERING VIA RESTRICTED PROCEDURES AND AD-HOC LISTS.

- (i.) Should the Depute Chief Executive and Director of Finance in conjunction with the Sponsor choose to use ad-hoc list or restricted procedure tendering, then the requirement shall be advertised in accordance with Part 2 Para 2 of these Orders and expressions of interest invited. After the expiry of the period specified in the public notice, a select list of tenderers will be drawn up from the list of applicants returning questionnaires or providing other evidence of competence as set out in the advertisement. Invitations may then be made as detailed in part 7 of the Highland Council Procurement Manual.

5 OPEN TENDERING

- (i) Should the Depute Chief Executive and Director of Finance in conjunction with Sponsor choose to use an open tendering procedure, then the requirement shall be advertised in accordance with Part 2 Para 2 of these Orders, and expressions of interest invited. All persons responding must then be invited to tender as detailed in the Highland Council Procurement Manual.

6 CONTENT OF INVITATIONS TO TENDER

- (i.) For each contract the potential tenderers shall be issued a formal invitation to tender, detailing at least the following:
- the nature and purpose of the contract and detailed requirement specification
 - the last date and time when Tenders will be received
 - the return address
 - that the Council is not bound to accept the lowest or any tender
 - the evaluation criteria to be used in priority order and with any weightings given.
 - the draft contract document
 - the no collusion certificate
 - the certificate of bona fide tendering
 - that the Council is subject to the requirements of the Freedom of Information (Scotland) Act
 - that the Council will not accept liability for bid costs.
- (ii) Detailed procedures in respect of the recording, handling, and management of tender documents and the tender process are shown in part 7 of the Highland Council Procurement Manual.
- (iii) Tenderers will be required to return their tenders via the Council's electronic tendering system or by hard copy if this is impossible. Tenderers must be advised that open e-mail is not an acceptable method for returning tender documents. Late tenders may not be considered and if submitted in hard copy must be returned unopened to the tenderer unless tenderers can prove that lateness was caused by factors beyond their control. Where more stringent codes of practice apply, then those codes may be adhered to.
- (iv) The confidentiality of tenders must be respected, and no details may be disclosed to any tenderer regarding any tender other than their own during the conduct of a tender. No officer who has direct or indirect personal pecuniary interest may participate in any tendering procedure, and all such interests must be declared prior to commencement of the tender exercise.

7 EVALUATION CRITERIA

- (i) Prior to the publication of any notice or invitation to tender, the Depute Chief Executive and Director of Finance in conjunction with the Sponsor must decide on the objective evaluation criteria to be used in assessing both pre-qualification questionnaires (if a two stage process is involved) and tenders. Pre-qualification criteria must be set in such a way as to ascertain and select tenderers who are qualified to tender, and contract award criteria must be set in such a way as to ascertain and award contract(s) in favour of the most appropriate tender(s) put forward in response to the invitation in terms of the most economically advantageous or lowest priced tender. These criteria must be weighted according to the needs of the contract, and both the criteria and their weightings must be published in the pre-qualification/tender documentation. In the case of tenders carried out in accordance with EU tendering procedures, the criteria and weightings must be set out in the

OJEU notice. Criteria must include technical capability and compliance with any relevant health and safety requirements. Where these criteria are not met, tenders must be rejected.

- (ii) Pre-qualification questionnaires and tenders must be checked and evaluated only on the basis of the published criteria, and no others, and contract awards must be made solely on the basis of that evaluation. Evaluation matrices are available within part 7 of the procurement manual. Evaluation of pre-qualification questionnaires must be based on assessment of the financial, legal, and technical standing of the potential tenderer only, and tender evaluation criteria must be based on assessment of actual proposals for meeting the requirement. The criteria used for pre-qualification may not be used in tender evaluation and the two sets of criteria must be distinct from each other.
- (iii) Awards of contract may only be made by the Depute Chief Executive and Director of Finance or Procurement Officer formally recorded as being specifically delegated by him to do so. Where a tender to be accepted is not the lowest priced or most economically advantageous, the view of the relevant Committee (or time not permitting, the Chair or Vice Chair of the relevant Committee) must be sought prior to award and the reasons for making the award must be reported to the next available meeting of the relevant Service Committee.
- (iv) Tenders must be evaluated by a panel of at least three persons (the Tender Evaluation Panel: further details are set out in part 7 of the procurement manual) which must report to the Sponsor and Depute Chief Executive and Director of Finance the means by which the evaluation criteria were determined and used, questionnaires and tenders were scored, and the award decision was arrived at.

8 HANDLING OF TENDERS

- (i) Upon receipt, all tenders must be receipted and logged, and retained unopened and secure until the advertised time of opening. Note that this is automatic where the Council's electronic tendering system is used. A record of each tender received, showing the name of the tenderer, date received, date of tender, and value of tender must be retained on file. Where prices are submitted as a schedule, the pricing field on the tender recording form may be endorsed "see attached schedule" and a copy of the tender's pricing pages attached to the form and retained with it. This may be retained electronically.
- (ii) Tenders must be opened at the advertised time of opening or as soon as possible thereafter, simultaneously, by at least three persons, one of whom must be entirely independent of the exercise.
- (iii) Tenders which include Bills of Quantities must be checked for arithmetical accuracy, and where inaccuracies are found, the tenderer must be given the opportunity to correct them in accordance to any relevant Code of Practice (e.g. ICE or JCT) that is appropriate for the contract. If no particular code applies, the same opportunity must be afforded to such tenderers on the understanding that none of the individual figures constituting the wrongly calculated cost may be altered.

9 AWARD OF CONTRACT

- (i) Contracts must be awarded in accordance with the published criteria and no others.
- (ii) Tenders may be rejected immediately where they fail to meet the published criteria or where alternative terms and conditions are put forward which are unacceptable to the Council.
- (iii) Following evaluation, notification of intention to award a contract and rejection of tenders on the basis of the evaluation criteria must be issued simultaneously, however in respect of contracts tendered via OJEU, a period of at least ten days must elapse between this date and contract commencement in order to allow unsuccessful tenderers to appeal⁵. This must be explained to the successful contractor in the letter of award.

10 RISK MANAGEMENT PROCEDURES

- (i) The Depute Chief Executive and Director of Finance in conjunction with the Sponsor will assess the level of risk they wish to undertake and that which they wish to transfer to a Contractor when setting the appropriate detail of the specification, the particular terms and conditions which will form the basis of the Contract, levels of insurance, and performance bonds. Risk management tools include the following and further advice can be obtained from Internal Audit and Risk Management
- (ii) Insurance
 - (a) Employers' Liability Compulsory Insurance (ELCI). The sum insured must be in accordance with relevant legislation existing at the time of the requirement arising. . The Council must see a copy of the ELCI insurance policy and/or a copy of the certificate of insurance prior to contract award.
 - (b) Public Liability and All Risks/Professional Indemnity: The levels of insurance cover required in respect of each project should be set by the Council in the context of the contract and reflecting the level of risk involved to members of the public, the Council's staff, its operational effectiveness, and its financial liabilities. In respect of Works contracts it, Public Liability insurance shall be not less than the Prescribed Sum
- (iii) Financial Vetting: In respect of Contract with a value in excess of the prescribed sum, or in respect of contracts which the Sponsor views as exposing the Council to excessive risk, a formal financial assessment of the potential tenderers' financial standing shall be undertaken prior to shortlisting of tenderers or at pre-qualification stage, depending upon the procedure used.
- (iv) Liquidated Damages: Dependent on the terms of the contract document, where a breach, default or negligent act on the part of the Contractor result in direct losses to the Council, it will be the duty of the Sponsor to take

appropriate action. This includes deducting pre-estimated liquidated damages, and making any appropriate retentions where such retentions are agreed as genuine pre-estimates of loss and may not be construed as unenforceable penalty clauses,

- (v) Conditions of Contract: these must ensure clear contract arrangements and should contain clauses that will protect the Council against a variety of risks, and the Depute Chief Executive and Director of Finance must ensure that the conditions of contract are sufficient to deal with the risks involved in the project/contract.
- (vi) Contingency Planning: Depending on the Sponsor's assessment of risk, a contingency plan may be produced that provides an outline of decisions and considers the programme's effects on public services and ensure that decisions are taken about those for which contingency arrangements will be needed. These can be complex and time consuming to produce and may only be appropriate when a high level of risk is envisaged
- (vii) Forms of Security: Where a contract pre-tender estimate exceeds the prescribed sum, or, where the Depute Chief Executive and Director of Finance in conjunction with the Sponsor ascertains that the Council is exposed to sufficient risk, the Sponsor shall in conjunction the Depute Chief Executive and Director of Finance, consider whether the Council should require security for its due performance. He shall either certify that no such security is necessary or will decide what form of security may be appropriate. Forms include Parent Company Guarantees, Escrow Agreements, or Performance Bonds for the due performance of the contract. Note: "On Demand" Bonds are deemed unfair and should not be used. Where bonds are required, they should be from reputable UK based issuers.

11 QUOTATIONS

- (i) Where the estimated value of a requirement falls between the prescribed sum for the invitation of quotations and the prescribed sum for formal tendering, it will be appropriate to request quotations rather than to undertake a formal tendering process. The detailed minimum procedure applicable is set out in the part 7 of the Council's Procurement Manual.
- (ii) The procedures for dealing with quotations must be as rigorously fair and open as those for dealing with tenders, the only differences being that the requirement owner is not obliged to use a sealed bid procedure, may advertise in a more restricted manner, or may rely upon at least three reputable providers known to be competent to provide quotations. Reliance on the same providers for the provision of quotations may not be continued for any longer than two years without documented evidence that no other potential providers exist at the end of any such two year period.

12 CONTRACT DOCUMENTS

- (i) Every contract subject to these Orders shall be in writing in an approved form, and shall specify all the applicable terms and conditions, drawn from the Highland Council standard terms and conditions of contract or other specialist or professional bodies' terms and conditions as appropriate including a statement to the effect that

- (a) those terms and conditions shall apply, and that no others shall apply unless issued as a formal variation by the Council, and;
- (b) that the Contract constitutes the entire agreement between the Parties relating to the subject matter of the Contract and supersedes all prior negotiations, representations and undertakings, whether written or oral, except that such Condition shall not exclude liability in respect of any fraudulent misrepresentation;

13 TERMINATION ETC. OF CONTRACTS

- (i) No contract may be terminated, or materially altered, on behalf of the Council without the prior approval of the Depute Chief Executive and Director of Finance.

14 ENGAGEMENT OF CONSULTANTS

- (i) Consultancy is subject to the full rigour of public procurement regulations. In all cases requiring the conduct of quotation or tender exercises, a formal Statement of Requirements and Terms of Engagement must be agreed by the Depute Chief Executive and Director of Finance prior to the engagement of the Consultant. Where it is likely that a former employee of the Council may be interested in undertaking the work, then in addition to the safeguards outlined in these Standing Orders, quotations or formal tenders shall be invited regardless of contract value. No contract shall be awarded to a former employee without the specific approval of the Chief Executive
- (ii) It will be a condition of the engagement of the service of any architect, engineer, surveyor or other consultant who is to be responsible to the Council for the supervision of a contract on its behalf, that in relation to that contract they will –
 - (a) comply with these Contract Standing Orders as though they were a Service Director of the Council;
 - (b) at any time during the carrying out of the contract, produce to the Depute Chief Executive and Director of Finance on request, all relevant records or copies maintained in relation to the contract; and
 - (c) on completion of a contract, transmit appropriate records or copies to the appropriate Service Director.

15 PROCEDURES FOR THE PROCUREMENT OF PART B SERVICES

(i) Procurement of services

- (a) The Council may enter into a negotiated contractual agreement with a provider appearing in a previously competed framework agreement for the provision of services falling within the categories Part B categories set out in SSI 2006 No 1 subject to:-
 - (i) a need being established by the Service;

- (ii) the service required corresponding with the Council's Strategic Plans;
 - (iii) consultation with the Chair or Vice-Chair of the appropriate Committee.
 - (iv) such lists being re-competed at least every four years, as with framework agreements.
- (b) Wherever possible the use of free and open competition shall be taken up.
- (c) Negotiated contracts shall be continuously monitored and amended as necessary and shall be approved annually by the appropriate Committee.
- (d) No provider shall be contracted unless their:-
 - (i) technical ability is certified as satisfactory by the Sponsor;
 - (ii) financial standing is satisfactory;
 - (iii) compliance with Health and Safety legislation has been evidenced.

(ii) Exemption

- (a) There will be no requirement to tender for care or housing support services, where the requirements of the individual or individuals concerned are such that the normal tendering arrangements are impossible or impracticable, whether through urgency, non-availability of specialist care or housing support providers or similar considerations.

(iii) Requirements for Adequate Publicity

- (a) In circumstances relating to "Part B" requirements, the terms of EU Commission Interpretive Communication 2006/C179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives shall be adhered to:

http://www.govopps.co.uk/guidance_db_files/ec_directives/communication_en.pdf

**APPENDIX 1
CONTRACT STANDING ORDERS
PRESCRIBED SUMS:**

	£000
Exemption limit for contract using formal tender documents. Exemption limit for contract using quotations	(Below) 25
Supply (including lease) of goods, services and materials	(Below) 3
Maintenance/works contracts.	(Below) 10
Exemption limit for financial vetting	(Below) 500
Exemption limit for leases to be approved by the Depute Chief Executive and Director of Finance	(Below) 100
Contract limit for performance bonds	(Over) 500
EU tendering threshold in respect of goods and services	144
EU tendering threshold in respect of works	3,611
Minimum value for employers' liability insurance	5,000
Minimum value for public liability insurance (Works contracts)	5,000
Minimum value for professional indemnity insurance	1,000

CONTRACT STANDING ORDERS DEPUTE CHIEF EXECUTIVE AND DIRECTOR OF FINANCE DELEGATED AUTHORITY TO UNDERTAKE PROCUREMENT TASKS

IT SHALL BE A CONDITION OF EXERCISING THE UNDERNOTED DUTIES THAT EACH OFFICER ENTITLED TO DO SO, INCLUDING THOSE CARRYING OUT THESE ACTIVITIES IN SERVICES OTHER THAN FINANCE UNDER THE DELEGATION OF THE DEPUTE CHIEF EXECUTIVE AND DIRECTOR OF FINANCE, SHALL HAVE THIS FORM COMPLETED AND AUTHORISED BY THE DEPUTE CHIEF EXECUTIVE AND DIRECTOR OF FINANCE PRIOR TO DOING SO.

OFFICER'S NAME:

JOB TITLE:

SERVICE:

SECTION:

LOCATION/AREA:

Contract and any value limits to which Authority extends	
--	--

PLEASE COMPLETE BY TICKING THE RELEVANT COLUMN BELOW:

ACTIVITY.	
Manage quotation requests	
Draw up specifications and statements of requirements	
Formulate contractual terms and conditions	
Select method of tendering	
Prepare lists of prospective tenderers	
Issue invitations to tender	
Issue tender documents	
Determine evaluation criteria	
Evaluate tenders	
Perform technical vetting	
Recommend award of Contracts	
Award, Vary and Cancel Contracts	
Obtain Committee/Committee Chair Approval	

Approved by:

(Director) Date:

Accepted by:

(Authorised Officer) Date

APPENDIX 3 DOCUMENT RETENTION SCHEDULE

Note: These records may be electronic/digital rather than hard copy.

Document	Retention Period
Contract documents (per Limitations Act 1980)	Current + 5 Years
Evaluation reports	"
Hire/Rental Agreements	"
HM Revenue and Customs Import documentation	"
Maintenance/Software licence agreements	"
Purchase Orders	"
Specifications	"
Successful Tenders	"
Successful Quotations	"
Variation Orders	"
Unsuccessful Quotations	Current + 1 Year
Unsuccessful Tenders	"
Tender Envelopes (from award) All procurement documentation relating to projects benefiting from European funding: .	1 Month 10 years from the date of final payment of any related account