

## Procurement Policy & Procedures Manual



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## Introduction

1. The purpose of this Procurement Manual is to give guidance and instructions to all staff who, frequently or occasionally, buy goods or services in the course of their job. It is based on good procurement practice and is designed to help Purchasers get through the whole procurement process - from specifying the requirement to ensuring that what you require is what you get. It is intended to help you reduce the risk of selecting an unreliable contractor or of entering into incomplete, disadvantageous or ambiguous contracts. The Manual should help you pinpoint areas where you may need help from central or outside expertise. It should also help you to get good value for money.

## HOW TO USE THE MANUAL

2. The Manual is in the following seven parts and covers the major stages of the procurement cycle:

- 1) **PRINCIPLES AND POLICIES OF PROCUREMENT**
- 2) **LEGAL ASPECTS OF PURCHASING**
- 3) **IDENTIFYING POTENTIAL CONTRACTORS**
- 4) **SELECTING THE CONTRACTOR**
- 5) **APPLICATION OF THE EU PROCUREMENT DIRECTIVES**
- 6) **STANDARD CONDITIONS OF CONTRACT**
- 7) **MANAGING THE CONTRACT**

3. In using the Manual, it may help if first you briefly run through all the parts and then focus on each part in detail, as you need it.

4. The range of procurement scenarios is infinite and it is not practicable to produce guidance that covers every possibility. However, the [Office of Government Commerce \(OGC\)](#) produces a series of Guidance notes, which provide more detailed information on a range of procurement issues. If you have difficulty finding the site, Procurement Services will be able to help. Procurement Services staff will also be happy to discuss any points arising from the contents of the Manual or about procurement issues in general.

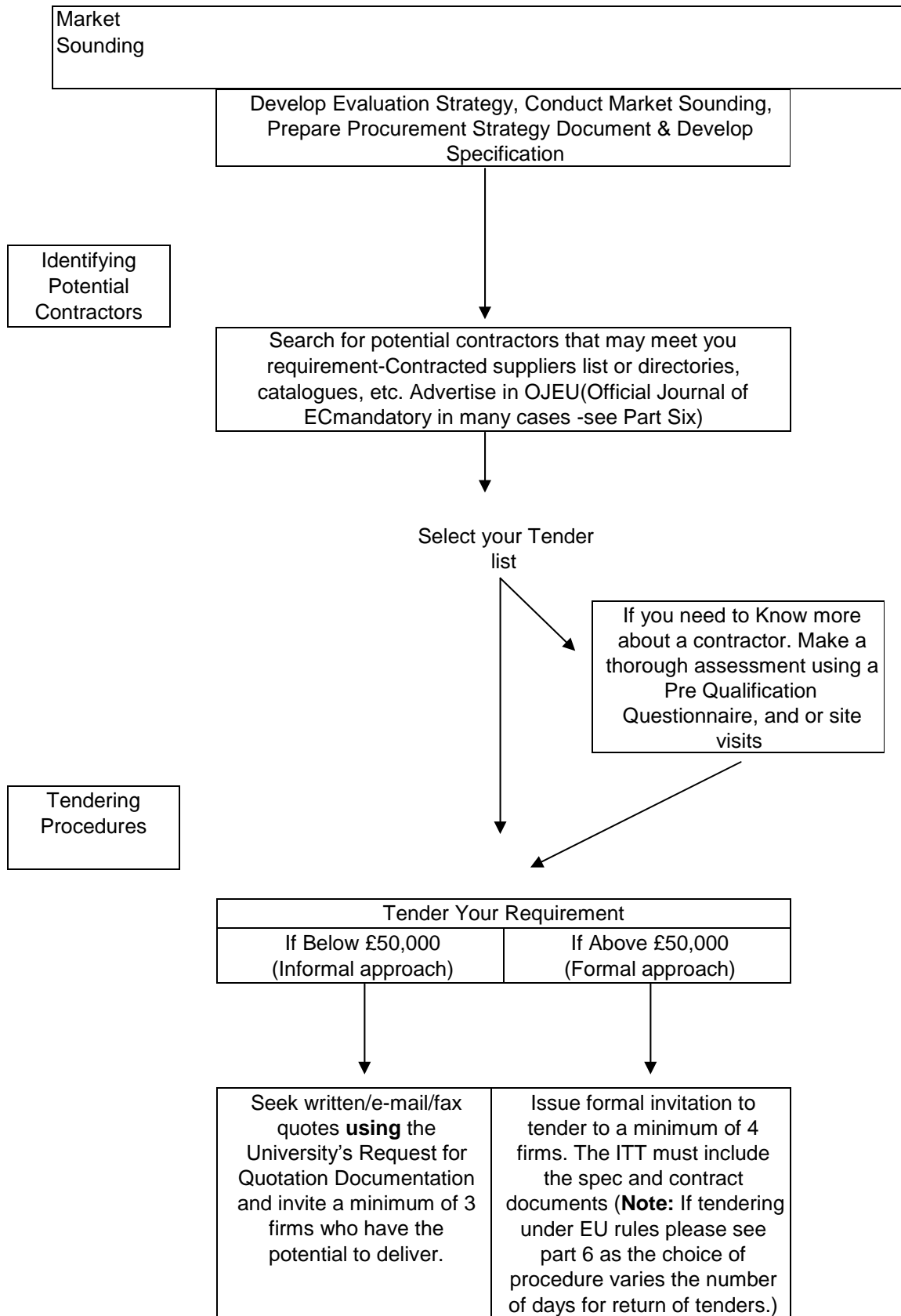
5. There can be many pitfalls to taking forward procurement. It will therefore be worth your while taking time to consider the issues covered

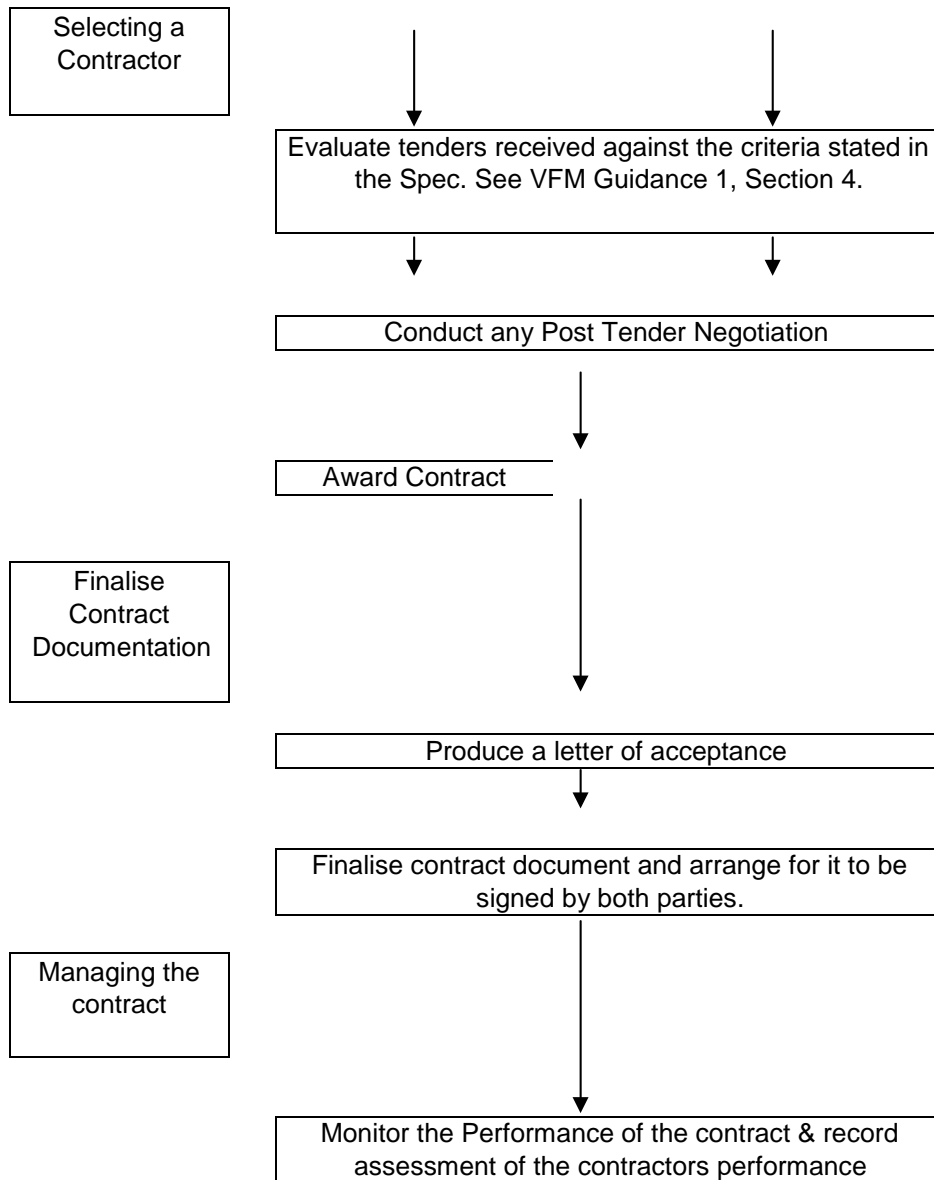
within the Manual. Being alert to potential difficulties will help save time and money.

## **UPDATING THE MANUAL**

6. The Manual will be updated from time to time when necessary, to reflect, amongst other things, changes in European Procurement Legislation and University Procurement Policy. When this document is amended details of the revision date will be posted to the web page.

**PROCUREMENT PROCEDURES – FLOW CHART**





## SOURCES OF ADVICE

Your first source of advice is Procurement Services made up of professionally trained staff who are available to provide specific advice on any aspect of procurement policy and procedure.

### 1. Principles and Policies

## 1.1 INTRODUCTION

The University's strategy for procurement is to achieve continuing improvement in value for money, based on whole-life cost and quality, and to enhance the competitiveness of suppliers, through the development of world-class professional procurement systems and practices.

Within this Policy the University is required to do their best in all dealings with suppliers and potential suppliers:

- to preserve the highest standards of integrity, objectivity;
- to be fair, efficient, firm and courteous;
- to achieve the highest professional standards in the award of contracts, usually by means of competition;
- to provide clear specifications of requirements which encourage innovation and refer where appropriate to relevant technical and other standards;
- to make available as much information as suppliers need to respond to the bidding process;
- to manage the bidding process so as to avoid/minimise the burden on suppliers, while preserving genuine competition and avoiding discrimination;
- to make available the broad criteria for the evaluation of bids, to evaluate bids objectively, and to notify the outcome promptly;
- to debrief winners and losers, within the boundaries of commercial confidentiality, on request on the outcome of the bidding process and the reasons for not being selected;
- to achieve the highest professional standards in the management of contracts;
- to pay promptly for work done in accordance with contracts made; and
- to respond promptly, courteously and efficiently to suggestions, enquiries and complaints.

## 1.2 FINANCIAL AUTHORITY

Financial Regulations Appendix 1 Para 7.5 covers the authority to arrange the Certification of invoices but not the authority to commit money from a budget to pay for those goods and services. That is covered by Appendix A. Except in exceptional circumstances the authorities in Appendix A and Financial Regulations Appendix 1 Para 7.5 **must** to ensure separation of duties. The

other delegations may also impinge on purchases. In particular, they should remember that they would need separate financial authority for expenditure from a budget to be committed to the goods or services they are buying. The list of budget holders must be updated at the start of each financial year and it is the responsibility of Budget Holders to ensure an updated list is forwarded to the Finance Department before the end of August.

### 1.3 VALUE FOR MONEY

Value for money does not necessarily mean the cheapest solution. It is the best combination of whole life costs (i.e. the cost of a product or service spread over its whole life) and quality to meet the customer's requirement. It includes maintenance and running costs not simply initial costs.

In assessing value for money, you should keep questioning whether the service or product being offered by a particular supplier satisfies both short and long-term interest of the University and whether it is the best deal available.

Where the requirement is for the delivery of goods or services over a period of time, in co-operation with suppliers you should seek continuous improvements in value for money throughout the life of the contract.

### 1.4 SUPPLIER COMPETITIVENESS

There are a number of measures that you can use to enhance the competitiveness of suppliers. In particular:

- it will often help both the University and suppliers if you discussed your anticipated requirements in general terms, before the procurement process starts and during the development stage of the specification of requirements [\[see VFM Guidance 1, Market Sounding\]](#);
- you should offer all unsuccessful tenderers a debriefing, explaining why their tender was unsuccessful, after the procurement decision has been made, as this will help improve their future competitiveness. This is a mandatory requirement where the EU Directives apply;
- you should try to be as open and informative as possible to all potential suppliers throughout the procurement process;
- you should encourage innovation by framing the specification in terms of output and performance;
- you should publish tender evaluation criteria;
- you should work with suppliers after award of contract to overcome problems and weaknesses so that they can provide a better service.

## 1.5 COMPETITION

You must purchase all goods, services and works by competition *unless there are convincing reasons to the contrary*. By competition we mean inviting rival suppliers to compete for University requirements. Competition avoids any suggestions of favouritism or the encouragement of monopoly. It also helps to promote efficiency and economy. The form of competition should be appropriate to the value and complexity of the goods or services to be acquired. Competition promotes keen pricing but also encourages the most efficient use of resources.

There will be circumstances when a contract may be awarded without competition. Examples are: when only one firm supplies a particular item or service that the University requires; or where the value of the requirement does not justify the actual cost of going to competition (the current limit is £5,000 - see Annex A).

If you have convincing reasons for inviting only one supplier to tender you must fully document the case justifying the decision. Cases for single sourcing for procurements valued over £5,000 should be made to the Head of Procurement Services. Examples of circumstances where single source may be justified are detailed in Paragraphs 5.5 to 5.6. Procurement Services will be happy to advise in any particular case.

## 1.6 STATUTORY OBLIGATIONS

All Publicly Funded Bodies must comply with the European Union Procurement Directives and UK regulations governing public sector procurement. The Directives concern the principle of non-discrimination on the grounds of nationality, in the award of public supply, services or works contracts. The Directives provide for a number of administrative and other measures whose aim, overall, is to ensure adherence to the principle of non-discrimination.

The Directives are legally binding on all EU member states and apply when a contracting authority (e.g., a University) intends to let a written contract for goods, services or works requirements (or series of contracts) whose estimated total contract value is not less than the following thresholds:

Works - €6,242,028 £3,611,474 (excl. VAT) Supplies - €249,681  
£144,459 (excl. VAT) Services - €249,681 £144,459 (excl. VAT)

\*All of the above thresholds apply from 1<sup>st</sup> January 2006 till 31<sup>st</sup> December 2008

## 1.7 SUSTAINABLE PROCUREMENT STRATEGY

The University will comply with all relevant environmental legislation, and will expect and promote such compliance in its procurement of goods and services.

Procurement Services will endeavour to manage environmental and social impacts as recommended by HEIs Sustainable Purchasing Guidance, Investigate expenditure on a commodity basis to develop appropriate commodity procurement strategies within the University Sustainability Policy. Agree priorities for Sustainable Procurement and target development.

- Make suppliers aware of the University policy and seek compatible policies.
- Encourage the use of Whole Life costing including environmental factors and sustainability policy impacts.
- Encourage review of consumption of goods and services internally to minimise costs and reduce environmental impact.
- Work with users and suppliers to reduce environmental impact by offering alternative or recycled products and return for recycling/environmentally aware purchasing processes, stock management and waste disposal options.
- Work with others on Fair Trade options within the University.
- Work with others on energy and waste options within the University.
- Work with others on Health and Safety aspects within the University.
- Consider impact of new legislation on improving sustainability e.g. Race Relations,
- Freedom of Information act, changes to EU public sector procurement requirements.
- Consider ethical procurement initiatives e.g. CIPS ethical standards, ethical trading.
- Participate in the University Environmental Group.
- Participate in wider local community activities to promote sustainable procurement.
- Participate in University consortia and support national strategic objectives, which promote sustainable procurement, share experiences, and learn from others.
- Provide a progress report annually within the Procurement Services Annual Report and look to continuously improve.

Those responsible for delegated purchasing in the University will:

- endeavour to manage environmental and social impacts as recommended by HEI Sustainable Purchasing Guidance.  
Details at: <http://www.forumforthefuture.org.uk/uploadstore/purchasing.pdf>;
- assist Procurement Services in implementing the Sustainable Procurement Strategy;
- report via the Head of Procurement on the progress on specific commodity targets as required by the Value for Money Group.

Furthermore to develop and promote commodity sustainable/environmental policies and agree monitoring targets in the following areas:

### **Print**

- Print procurement
- Output management (network copiers/laser printers)

### **Stationery Supplies**

- Recycling of toner cartridges/ recycled supply
- Reducing stock holding and distribution/transport

### **Computing**

- Computer re-use/ recycling /disposal in accordance with WEEE Directive
- Promote arrangements for packaging take-back by suppliers

### **Travel/Transport**

- Use of public transport excluding taxis (Persons more than 3) for within London
- Collaborative management of stock/reduced deliveries at Campus

### **Catering**

- Fair Trade coffee and tea arrangements with campus caterers

### **Equipment and supplies**

- Whole life costing training
- E-Procurement – online ordering – reduced paperwork required
- Collaborative purchasing developments

### **Audio-Visual**

- Use of equipment and consumables and whole life costing

### **Works**

- Supplier, consumables and service review

### **Estates**

- E-Tendering – reduced paperwork required
- Waste services procurement
- Energy and utilities procurement
- Postal services rationalisation
- Cleaning consumables impact review
- Vehicle leasing/replacement review

### **Library**

- Electronic materials provision
- Sharing services with other institutions
- Link to local bookshops

### **Policy development**

Work with HE sector guidance on Race Equality in procurement Work with Planning Office on Freedom of Information Train procurement staff on impact of new EU procurement legislation Develop e-Procurement including e-Tendering.

## **1.8 STANDARDS IN PUBLIC PURCHASING**

Purchasers are encouraged to give positive emphasis to standards, quality assurance and independent certification in their purchases and should frame requirements around published standards, which reflect the requirements of world markets rather than use in-house specifications.

## **1.9 PROPRIETY AND THE SEPARATION OF DUTIES**

It is important that you observe public procurement ethics so as to avoid accusations of impropriety and you should always maintain an adequate audit trail.

All staff involved in the decision to award contracts to external suppliers **must** complete the [Register of Interest](#) form.

Guidance on ethical issues is given in Appendix 2 of the Financial Regulations “Code of Practice for receipt of Gifts and Hospitality ” Further advice on procurement ethics is available from Procurement Services.

Wherever possible, to avoid any suspicion of wrong doing, the responsibility for committing expenditure, ordering, certifying performance and authorising payment should be carried out by different people.

## 1.10 POLICY ON THE USE OF EXTERNAL CONSULTANTS

It is University policy to employ external consultants where they can contribute to the achievement of the University's key business objectives but only where:

the consultants offer:

- skills or resources unavailable within the University; and
- value for money;

and the University:

- has clearly defined the goal to be achieved from the use of consultants;
- is committed to action on the outputs of the assignment; and
- has the capacity to manage the assignment effectively to ensure that optimum benefits are realised.

There are a number of key steps that must be followed when appointing external consultants. If the cost of the consultancy (including expenses but excluding VAT) is likely to exceed £10,000 a case must be submitted for approval to the Director of Finance copied to Head of Procurement Services. University consultants of lesser value should be approved at the Head of School/Budget Holder level. Sub-contractors that are being used to carry out work on behalf of the University are also included within the scope of this policy. These are detailed in the publication: VFM Guidance 2 "Buying and Managing External Consultants". Copies can be viewed or downloaded from Procurement Services website. **If any of the consultants on the tender list are current members of staff or ex-member of staff (if they have worked for the University in the preceding 12 months), then clearance will be required from the Director of Human Resources.**

## 1.11 THE USE OF METRIC UNITS OF MEASUREMENT

Since 1 October 1995 all public sector organisations must use the metric units as the primary system of measurement for the conduct of public business in the United Kingdom. This means that all tender specifications and contracts issued by the University must now use the metric system of measurement. Any contract or tender specification issued after 1 October 1995 which contains references to imperial units, would leave the University open to a potential claim from a contractor that a contract is invalid or unenforceable, if it was not expressed in metric units.

Imperial units can be used as *supplementary indications* of quantity. They should, however, not be more prominent than the primary metric indication and should follow, rather than precede, the primary indication.

## 1.12 BUSINESS CASES

### General

The Procurement Strategy Document must be completed for all requirements subject to the University's tender process. The case should cover the following areas:

- *the purpose of the requirement;*
- *the benefits to be derived (how will it deliver value for money?) and when they are likely to accrue;*
- *a systematic assessment of the possible alternatives to the preferred course of action;*
- *the proposed project management arrangement;*
- *whether the EU Directives apply; and*
- *details of the budget to cover the cost of the requirement.*

### Capital Projects

For capital projects the business case must be submitted through Finance and Human Resources Committee to the Board of Governors [see paragraph 12 of the Financial regulations].

The business case **must** be approved before the tender process is started.

### 1.13 PROCUREMENT OF CENTRALLY ORDERED GOODS & SERVICES

For the following categories, contracts have been negotiated centrally on behalf of the University by the departments listed below. If you do not have details on the contracts then please contact the respective departments. The web version will give you contact names and telephone extensions.

<b>Category</b>	<b>Department</b>
Accounting Internal/External Audit	Finance
Advertising/Publicity Services	Marketing
Buildings Plant Maintenance	Estates
Buildings Other Maintenance(decorating, electrical, plumbing)	Estates
Catering	Campus Services
Computer Hardware	Systems & Services
Computer Maintenance	Systems & Services
Computer Services	Systems & Services
Computers Software	Systems & Services
Garden Maintenance	Estates
Legal Services	Secretariat
Library Services	Systems & Services
Media Goods & Services	Systems & Services
Office Cleaning	Estates
Office Furniture and Equipment	Procurement Services
Personnel Advertising/Recruitment	Human Resources
Printing Services/Photocopying	Print Centre
Safety & Environmental	Estates
Security	Estates
Staff Development	Human Resources
Stationery	Procurement Services
Telecommunications(Including Mobile Phones)	Systems & Services
Temporary Staff	Human Resources
Travel & Accommodation	Procurement Services
Vehicle Hire	Procurement Services

Estates are responsible for: all the central University's building services requirements; including cleaning, pest control, minor works, lift maintenance, security.

## 1.14 THE PLACING OF ORDERS

All orders must be placed on the London Metropolitan University finance system. Exceptions are only made for those who hold London Metropolitan University Visa Purchasing Cards or where permission has been given in advance by the Head of Procurement Services.

Budget holders/authorised signatories must ensure that in the case of new suppliers that a Supplier Data form has been completed and forwarded to Procurement Services to register the supplier on the finance system. The appropriate Record of Quotation Form or Single Source Justification Form has been completed and forwarded to Procurement Services so that the order can be processed by Finance on the University's purchase order system.

## 1.15 CONTRACTED SUPPLIERS

A list of contracted suppliers is maintained by Procurement Services and is made available through its website. Where a contracted supplier exists for a particular service or product they are expected to be used. Failure to use the contracted supplier could result in breach of contract and subsequent costly legal action being taken against the University. This legal action may well result in financial penalties being placed upon the University as well as suspension of the contract. All contracted suppliers have gone through the necessary tendering procedures and therefore no quotations are required.

## 1.16 PAYMENT TERMS

Payment for goods and services supplied should be made in accordance with the University's terms and conditions of contract. The general rule is that payment should be made when the product or service is delivered and accepted. For some service contracts where the duration is more than 3 months payment can be made on an interim basis so long as it is linked to satisfactory performance by the Contractor.

Unless a shorter period has been agreed it is University policy that valid invoices **must** be paid within **45 days** of receipt, so long as the work required under the contract has been performed satisfactory. It is your responsibility to ensure that valid invoices are processed and sent to the Finance University for payment in good time. You should have a system for dealing with complaints and disputes and you should advise suppliers without delay when invoices, or parts of invoices, are contested. Payment should only be withheld from the supplier if the disputed amount is more than 10% of the invoice value

As an indication of the University's commitment to our suppliers the University will adopt a Practice on Prompt Payment. We must therefore:

- Have a clear, consistent policy that we pay bills in accordance with contract;
- Ensure that the all staff involved in purchasing goods and services are both aware of this policy and adhere to it;
- Agree payment terms at the outset of a deal and stick to them (agreed by the Head of Procurement Services if they are not our standard terms);
- Not extend or alter payment terms without prior agreement;
- Provide suppliers with clear guidance on payment procedures;
- Ensure that there is a system for dealing quickly with complaints and disputes and advise suppliers without delay when invoices, or parts of invoices, are contested.

### **1.17 TARGETS AND SAVINGS RETURN**

Procurement Services co-ordinate the annual return to HEFCE and the Vice Chancellor & Chief Executive Officer on:

- purchasing expenditure and savings achieved by the University during the previous financial year; and
- the targeted purchasing expenditure and savings for the new financial year.

Procurement Services will complete the compilation of purchasing expenditure centrally, but information required on savings for the new financial year can only be identified by individual schools/PSD's. At the end of each financial year Procurement Services will write to each School/PSD Area requesting details of each School/PSD's:

- savings achieved;
- projected purchasing spend; and
- target savings.
- A brief summary of contractors' performance during the year (this only applies to the main PSD areas and contracts in excess of £50k per annum).

Returns should only include savings obtained through local initiatives.

### **1.18 SMALL AND MEDIUM SIZED ENTERPRISES (SMES)**

It is Government policy that Public Sector Organisations develop systems and procedures that enable SMEs to compete effectively for public sector business. An SME is a firm, which employs less than 200 employees

Size is only a relevant factor in the selection of tenderers if you need to assess the capacity of tenderers to handle the job in question satisfactorily, particularly if a tenderer is likely to suffer severe financial problems if the business is eventually lost. Once that assessment has been made, the prime considerations are likely to be skills, efficiency, experience and reliability - characteristics relevant to value for money and that are just as likely to be found in SMEs as in large firms.

As well as increasing competition SMEs can typically offer:

- innovative approaches to problems;
- flexibility and responsiveness in meeting requirements;
- cost advantages (e.g. because of lower overheads).

When dealing with SMEs you should be aware of the constraints under which they work. Managers are likely to have a large diversity of tasks and to find undue complexity or bureaucracy particularly burdensome. They (and, indeed, all the University's suppliers) will find it easier to compete if the procurement process and the associated documents are kept as simple and short as is commensurate to the University's business needs and propriety.

Cash flow can be very tight in many SMEs. Therefore, it is particularly important to ensure that SMEs are paid promptly for the satisfactory delivery of goods and services.

To allow trends in small firms to be measured, all successful tenderers should be asked to state voluntarily their business size i.e. less than 200 employees, or more than 200 employees.

## **ANNEX A TO PART ONE - UNIVERSITY PURCHASING DELEGATION**

*NOTE: This delegation covers the authorities involved in purchasing goods or services. These authorities should be exercised by different individuals from those deciding to finance the purchase.*

<b>Total Contract/Order Value (excluding VAT)</b>	<b>Delegation</b>	<b>Conditions</b>
<b>DECIDING ON SINGLE SOURCING</b>		

Up to £5,000	Responsibility Budget Officer	1. The Head of School/PSD should take the decision on single sourcing. In all cases the reasons justifying the action should be fully documented and reported, on request, to Procurement Services.	
Over £5,000	Procurement Services	2. All procurements over £5,000 should be by competition unless there are compelling reasons to do otherwise. Cases for single sourcing should be made to the Head of Procurement Services. Procurement Services can advise on whether Requests for Quotation or Formal Tendering is appropriate.	
<b>NEGOTIATING AND AWARDING CONTRACTS OR PLACING ORDERS</b>			
Up to £10,000	Responsibility Budget Officer	3. All orders and contracts should be awarded on the University's standard terms and conditions. Any variations to be agreed by the Head of Procurement Services & Company Secretary.	4. Delegations within Cost Centres should be only to staff with the necessary procurement competencies and should not exceed the following levels:  Deputy Budget Officer up to £2,000 Budget Officer up to £5,000  Other limits may be delegated to budget Officers but Certified by a member of SMT and recorded in the Finance Authorised Spending Officer Annual record.
Over £ 10,000	Responsibility Budget Officer	4. All orders and contracts must be awarded on the University's standard terms and conditions. Procurement Services must approve non-standard terms proposed for all orders or contracts.	Director of Finance  Company Secretary  Head of Procurement
<b>SIGNING ORDERS AND CONTRACTS</b>			
Up to £10,000	Responsibility Budget Officer	5. Delegations within Cost Centres should be only to staff with the necessary procurement competencies and should not exceed the following levels:  Head of School or Managers of PSD or Schools up to £25,000  7. All contracts and orders must be made on the University's standard terms or on terms approved by Procurement Services.  8. The Secretary and Clerk to the Board of Governors must sign contracts made in the University's name, irrespective of value.	
Over £50k	Director of Finance	Or member of Executive	
Over £100,000	Vice Chancellor		

## 2. Legal Aspects of Purchasing

### 2.1 INTRODUCTION

Although a legalistic approach to purchasing is in most cases unnecessary, all staff involved in the procurement of goods and services must ensure that the

University is fully protected at all times against any legal issues which might arise. To this end contracts should be satisfactorily drawn up and legally binding on both parties.

## 2.2 BASIC ELEMENTS OF A CONTRACT

To be both valid and enforceable, a contract must contain the following essential elements:

- agreement ("a meeting of minds") resulting from an offer and an unqualified acceptance of that offer;
- consideration, (also known as mutual obligation);
- the capacity of the parties to enter into a contractual relationship; and
- an established framework of law.

### Offer and Acceptance

When the University sends a purchase order or contract to a supplier, this act usually constitute a legal *offer* to buy goods or services in accordance with the University's terms and conditions stated in the order. A contract will not come into being, however, until the supplier *accepts* the offer unconditionally. When this occurs, the law considers that "a meeting of minds" exists between the two parties regarding the proposed contract. In the same vein, if you request a quotation from a supplier, that supplier's quotation will usually constitutes an offer. A contract then occurs when you *accept* that quotation.

When you invite suppliers to tender for a requirement, in accordance with a specification and terms and conditions of contract, you are, in effect, inviting *offers* from suppliers. The suppliers respond to the invitation to tender by submitting their *offer* (tender) in accordance with your specification and terms and conditions. Offers (tenders) submitted are evaluated and *an unqualified acceptance* of the successful tender is made. *A contract is created by your selection and unqualified acceptance of the winning offer.* In the above case the contract is made on your terms and conditions.

If the recipient of an offer states that he is only prepared to accept the offer on condition that amendments are made (e.g., a supplier wants to change your terms and conditions) the recipient is making a counter-offer. This will cancel the original offer. If the other party accepts the counter-offer unconditionally, agreement occurs and a contract is made. If, however, the other party in turn states that he is prepared to accept the counter-offer, but subject to amendment, then this constitutes a further counter-offer. This process continues until one side accepts the other's offer unconditionally.

### Termination of Offer

An offer may be terminated in the following ways:

- if it is withdrawn and the recipient of the offer is informed that it has been withdrawn;
- if the recipient of the offer rejects it, or makes a counter-offer; and
- if the offer is not accepted by the end of the period stated in the offer, or if no period is stated in the offer then the offer will terminate after a reasonable period of time.

### Consideration

In addition to an agreement, a valid contract must also contain the element of **consideration**. In most procurement contracts, both parties agree to do something they would not otherwise be required to do. The buyer promises to buy from the supplier certain goods at a stated price; the supplier promises to deliver the goods in accordance with stated contract conditions. The important point is that both parties are obligated to carry out a specific act (**mutuality of obligation**). The contract must be drawn so that each party is bound. If both are not bound, in the eyes of the law neither is bound and no contract exists.

### Competent Parties

If a contract is to be valid, it must be made by persons having full contractual capacity. A contract made by a minor, an insane or intoxicated person is usually invalid.

### Established Framework of Law

In a commercial contract it is presumed that the parties intend to create legal relationship. However, if the parties expressly deny this intention by stating that negotiations are "subject to contract" or that any agreement is to be "binding in honour only", then no contract exists.

## **2.3 THE CONTENTS OF A CONTRACT**

A contract may contain three types of clauses:

- express terms;

- implied terms; and
- exemption clauses.

### Express Terms

There are two basic types of express terms:

- a **Condition**. *This is a vital term, which goes to the root of the contract, breach of which normally entitles the innocent party to treat the contract as at an end and to claim damages; and*
- a **Warranty**. *This is a term that is subsidiary to the main purpose of the contract, breach of which only entitles the innocent party to claim damages.*

Classification of a term as a *Condition* or *Warranty* depends upon the intention of the parties, but in many cases their intention is not expressed and the clause will not obviously be a *Condition* or a *Warranty*.

The use by the parties of "Condition" or "Warranty" is not conclusive. If breach of a term expressed to be a condition can only produce a very small loss it may be held that a breach will not justify ending the contract.

### Implied Terms

Terms may be implied by custom, the courts, or by statute. A good example are the terms implied by the Sale and Supply of Goods Act 1994 (see Annex A).

### Exemption Clauses

An exemption clause is a term in a contract which seeks to exempt one of the parties from liability, or which seeks to limit his liability to a specific sum if certain events occur, such as breach of warranty, negligence or theft of goods.

## 2.4 CONSTRUCTION OF A CONTRACT

A contract is not a physical thing, it is a relationship which exists between the parties making the contract. When a contract is put in writing, the written document is not in fact the contract; it is simply evidence of the contract. It is important to note, however, that once a contract is put in writing, the written evidence supersedes all prior oral statements. You should consider carefully

the content of your negotiations with a supplier and care taken to ensure that all relevant information, to be included in the contract, has been put in writing.

## 2.5 DISCHARGE OF CONTRACT - PERFORMANCE OF OBLIGATION

The parties are freed from their obligations under a contract when they have carried out their obligations. If *neither* party has fully performed his obligations under the contract, each party surrenders something of value and this constitutes consideration. Both parties can then be freed from their obligations under the contract. For example, if a supplier delivers only a portion of the goods that he originally agreed to deliver under a contract and the recipient agrees to pay for the goods delivered, both parties have surrendered something of value. In cases where one party's obligations have been fully performed, the other party cannot be released from the contract unless he gives up something of value.

## 2.6 DISCHARGE OF CONTRACT - FRUSTRATION

A contract may also be discharged by frustration, which means that performance has become impossible. In general if an event is to frustrate a contract, it must be:

- not contemplated by the parties when the contract was formed;
- one which makes the contract fundamentally different from the original contract;
- one which results in a situation to which the parties did not *wish originally to be bound*.

A contract is not frustrated if it becomes unexpectedly more expensive or burdensome to one of the parties. If the contract is to be discharged performance must become "radically different". Frustration will also not apply where the parties have made allowances for the occurrence of a particular event.

## 2.7 BREACH OF CONTRACT

A breach of contract occurs where a party:

- fails to perform his obligations; or

- states explicitly that he will not perform his obligations; or
- does some act which prevents him from performing his obligation.

The normal remedy for a breach of contract is damages, but if the breach is of vital importance to the contract as a whole, i.e. performance is substantially prevented, and the parties can be placed in the same position as before, the innocent party may claim that the contract is at an end. If, however, he wishes, the innocent party may waive the right to end the contract and sue for damages.

## 2.8 DAMAGES

Damages are the financial compensation awarded to the innocent party for a breach of contract. The general rule is that the innocent party recovers his actual loss, ie he is placed in the same position as if the contract had been performed. The innocent party must do what is reasonable to mitigate his loss. He cannot recover damages for a loss that he ought to have avoided.

## 2.9 LIQUIDATED DAMAGES

When the contract makes no provision for damages then the courts will assess the damages payable. Where parties have agreed in a contract how much is to be payable on a breach, this sum is recoverable *if it is a genuine pre-estimate of the loss*. This is known as *liquidated damages*. A clause seeking to *penalise* a supplier for breach of contract is not allowed.

## ANNEX A TO PART 2 LEGAL PROTECTION FOR PURCHASERS

There are two main pieces of legislation dealing with protection for a purchaser: the **Sale and Supply of Goods Act, 1994** and the **Unfair Contract Terms Act, 1977**.

### SALE AND SUPPLY OF GOODS ACT, 1994

Sections 12-15 of the Act set out the principle statutory conditions and warranties which are implied under a contract for sale. The Act amends the Sale of Goods Act 1979. It makes changes in the definition of the quality of goods which have to be supplied by the seller; in the definition of what conduct by the buyer amounts to a binding acceptance of the goods and in qualifying the right of the buyer to reject defective goods.

Section 12 - There is an implied condition that the *seller has a right to sell*, and an implied warranty that the goods are free of any undeclared charge or encumbrance.

Section 13 - In a sale by Description there is an implied condition that the *goods correspond with the Description*.

#### Section 14

- a) Where goods are sold in the course of a business (which by Section 61 includes the activities of a government University) there is an implied condition that the *goods supplied under the contract are of satisfactory quality*. Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances.
- b) The quality of the goods includes their state and condition and the following (among others) are, in appropriate cases, aspects of the quality of the goods:
- *fitness for all the purposes for which goods of the kind in question are commonly supplied;*
  - *appearance and finish;*
  - *freedom from minor defects;*
  - *safety; and*
  - *durability*
- c) The term implied by subsection (2) does not extend to any matter making the quality of goods unsatisfactory:
- *which is specifically drawn to the buyer's attention before the contract is made;*
  - *where the buyer examines the goods before the contract is made, which that examination ought to reveal; or*
  - *in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.*

## Acceptance

Under the terms of Section 35 of this Act, the buyer is deemed to have accepted the goods when:

- *he intimates to the seller that he has accepted them; or*
- *the goods have been delivered to him and he does any act in relation to them it (e.g. he resells it or delivers it to a sub-purchaser) which is inconsistent with ownership by the seller; or*
- *when the purchaser retains the article and does not notify the seller within a reasonable time from delivery.*

Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under (1) above until he has had a reasonable opportunity of examining them for the purpose:

- *of ascertaining whether they are in conformity with the contract; and*
- *in case of a contract for sale by sample, of comparing the bulk with the sample.*

The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

## UNFAIR CONTRACT TERMS ACT, 1977

### General

This Act came into force on 1 February 1978, and, basically provides protection - for purchasers and consumers - against attempts to exclude or restrict certain types of liability. The general features most relevant to the University are outlined below.

### Exclusion of Sale of Goods Implied Undertakings

The attempted exclusion or restriction, by a seller, of implied undertakings on title, quality and fitness for purpose, are dealt with as follows:

- *Liability under Section 12 of the Sale of Goods Act 1979 as regards Title cannot be excluded or restricted by reference to any contract term.*

- *Liability under Section 13 (Sale by description), Section 14 (Implied undertakings as to fitness or quality) or Section 15 (Sale by sample) Cannot in the case of a consumer sale be excluded or restricted by reference to any contract term and can in the case of a business sale be excluded or restricted only to the extent that it can be shown that the contract term satisfies a test of reasonableness.*
- *In determining whether a contract term satisfies the test of reasonableness, regard must be paid in particular to:*
  - i. the relative bargaining strength of the two parties, taking into account the availability of alternative sources of supply;*
  - ii. any inducement to agree to the exclusion term(s) and the opportunity of purchasing elsewhere without having to accept such term(s);*
  - iii. the extent to which the Purchaser knew, or should reasonably have known, of the term through trade practice or a previous course of dealing;*
  - iv. where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect compliance with the condition to be practicable;*
  - v. whether the goods were specially made to the order of the purchaser.*

It is for the party asserting that a condition is reasonable to show that it is indeed so.

### Exclusion of Liability for Breach of Contract

Section 3 of this Act prevents a party to a contract from relying on a contractual term to:

- a) exclude or restrict his liability for breach,
- b) render substantially different performance from what was reasonably expected, or

c) render no performance at all,

unless he can show that such terms satisfies the test of reasonableness. Although Section 3 is mainly intended to cover written conditions imposed by the seller on the purchaser, ie "sales" contracts, it could also apply where the contract is based on the party's written standard terms of business, e.g. as most university purchasing. Whether a term is reasonable is judged by having regard to the circumstances, which were, or should reasonably have been, known to, or in the contemplation of, the parties when the contract was made.

### Restriction of Financial Liability

Under Section 11, where a person seeks to restrict his financial liability in deciding whether the test of reasonableness is satisfied, regard is paid in particular to:

- *the resources which that person could expect to be available to him to enable him to meet the liability; and*
- *how far it was open to him to cover himself by insurance.*

### Negligence

Section 2 of this Act prevents a person from relying upon a contractual term to exclude or restrict liability arising from his negligence. In the case of death or personal injury this is absolute; in the case of other loss or damage, it will be for him to show that it was reasonable for him so to exclude or restrict his liability.

## 3. Sourcing Potential Contractors

### 3.1 INTRODUCTION

Choosing the right suppliers is crucial to the achievement of value for money. A good supplier is one who can offer the right goods or services and prompt delivery at a fair and reasonable price and is able to meet your requirements in all key aspects throughout the life of a contract. Mistakes in choosing suppliers can be costly and a serious error may even mean starting the procurement process all over again. You will, therefore, need to make a careful selection of firms who are:

- *technically competent;*
- *financially stable; and*
- *reputable and good to do business with.*

Please note that, if your requirement is covered by any of the EU Directives, this part should be read in conjunction with Part Six (Application of EU Procurement Directives).

### 3.2 IDENTIFYING POTENTIAL CONTRACTORS

#### Sources of Information

The first step is to establish who is in the business of supplying goods or services that may meet your requirement. This information may be obtained from any one of the sources detailed below:

- *directories on the web or search engines*
- *catalogues;*
- *trade journals);*
- *yellow pages;*
- *mail shots;*

- *sales representatives;*
- *Procurement Services - holds details of suppliers who have expressed an interest in providing goods and services to the University;*
- *other Universities.*

### 3.3 Advertising

Advertising in newspapers or relevant journals is also a useful way of identifying potential contractors. Advertising in OJEU (Official Journal of the European Union) is mandatory for procurements covered by any of the EU Procurement Legislation (Part Six of this Manual refers). Advertising is a good way of ensuring that the net has been cast as far as possible. It also allows firms the opportunity to register their interest in the requirement. It could, however, generate substantial interest from firms, which may make selecting a shortlist of those to be invited to tender a time consuming task.

3.4 A useful publication for advertising service requirements is **Government Opportunities**. This publication is a comprehensive guide to public sector contract opportunities. It is issued twice a month and is available to potential suppliers through subscription. Placing advertisements in Government Opportunities is free of charge. Procurement Services can provide you with assistance in how to use Government Opportunities.

### 3.5 ASSESSING POTENTIAL CONTRACTORS

Once potential contractors have been identified, you must then decide whether you need to carry out a detailed assessment of the firms, before inviting them to tender. The following points should assist your consideration:

- ***the value of the requirement*** - *if it is relatively low, say under £5,000, then a detailed assessment may not be worth the resource commitment;*
- ***the number of potential contractors*** - *if there is only one firm able to provide the goods or service that you require, a detailed assessment of that firm would serve little purpose;*

- ***the reputation of potential contractors*** - *it is sometimes unnecessary to assess well known firms, particularly if the contract is for a short duration. This is a matter of judgement;*
- ***the nature of the requirement*** - *for example if the requirement is for a repeat order it may be worthwhile reassessing the current contractor's track record -large price increases or late delivery might justify a search for alternative sources; and*
- ***duration of the contract, including warranty or after sales service*** - *the longer the duration of a contract the greater the importance of selecting a financially sound contractor.*

3.6 If a contractor assessment is necessary, you will need to obtain additional information to help you build a picture of the firm. Typically, you would need to consider the following points:

- *Has the firm done any work for any other University? If so, then you may wish to ask that University to provide you with their views on the firm's performance;*
- *What evidence is there that the firm is capable of doing the work required, and to the required standards;*
- *How long has the firm been in existence? Firms that have been in existence for less than 12 months are generally considered to be uncertain and should be avoided;*
- *Is the firm financially sound?*
- *Do the Director's have interests in other firms? You **must** avoid seeking tenders from two or more companies run by the same people; and*
- *What are the firm's resources and size of workforce.*
- *What is the firm's management structure? Does it have sufficient management resources in key areas such as finance, procurement, design production.*

3.7 Questionnaires are a useful tool for building up such a picture (a model questionnaires are available for Procurement Services). These can be sent to firms:

- *when they seek to introduce themselves to the University;*

- *at the planning stage of the procurement process; or*
- *if the time is short, at the invitation to tender stage.*

3.8 You should note, however, that the interpretation of any financial information is a complex matter and should, wherever possible, be undertaken by experts. There are a number of commercial agencies (e.g. Equifax) who will provide financial and other assessment information for a fee. *(The University has set up a 'Call Off' arrangement with Equifax for the provision of such information - Procurement Services can provide you with further information about this service for which there is a small charge).*

3.9 The information gathered from the questionnaire should help you identify:

- **ownership of the company** - *knowing this can ensure that you tender to a spread of firms and avoid participation of several owned by one parent company;*
- **number of employees** - *will indicate the size of the firm and the level of impact your requirement will have on its manpower resources and therefore what back-up potential there is;*
- **audited accounts for last 2 years** - *shows the financial stability of a firm, and by comparing years, whether it is growing or in decline and therefore a possible risk;*
- **when the firm was established** - *gives an idea of a firm's experience, knowledge and soundness;*
- **name of bankers** - *For some requirements you may wish to seek a bankers reference;*
- **referees** - *enquiries with other organisations and Universities already using a firm can verify reliability; and*
- **whether registered under ISO9000 or BS5750** - *this British Standard signifies an organisation has control systems to ensure reasonable standards of quality in their products/services.*

3.10 When purchasing goods, it is useful to obtain information about the product that you are interested in, before any contractual commitment is made, for example:

- *what is the lead time (period from placing order to delivery) on products?*
- *what is the minimum order quantity?*
- *are discounts available for bulk purchase?*
- *are there charges for delivery?*
- *who manufactures the goods?*
- *what is the company's policy on exchanging goods?*

3.11 For relatively large requirements (i.e., over £50,000) or requirements for specialist goods or services, a more detailed exercise may be necessary. Supplier & Client site visits, product demonstrations and technical assessments of samples are very useful tools in assessing the supplier's capabilities. Presentations (beauty parades) from potential contractors are very limited in assessing a supplier's ability.

#### Field visits

*Seeing a firm's premises and talking on their own ground can help form a view of their professionalism, experience and capability. Views may be based on:*

- ③ *personnel attitudes / company morale;*
- ③ *condition of premises / machinery (old/modern);*  *interest in customer service;*
- quality of management.*

#### Presentations

*If presentations are to be used, then they can help (e.g. consultants), indicate the following:*

*experience / professionalism; commitment / knowledge of the task in hand.*

*If the presentation is to be effective those who are likely to be engaged on the contract should conduct it. **However**, client reference visits are far more useful at identifying the supplier's commitment & professionalism.*

### 3.12 SHORTLISTING POTENTIAL CONTRACTORS

Once you have gathered all the information you require, you will need to compile a shortlist of potential contractors. The number of firms to be invited to tender should take account of the value of the requirement and the cost of the tendering process. Short listing should be undertaken methodically, fairly and without bias. To help achieve this, selection criteria, should be established before short listing, for example:

- *experience of supplier in providing the type of goods/services required;*
- *financial stability of supplier;*
- *technical capability of supplier;*
- *references from other Universities from projects of a similar type.*

3.13 This will help focus your decision and give structure to the analysis procedure. This is particularly important if the requirement is covered by the EC Directives, as firms who have been unsuccessful at the pre-qualification stage, have a right to know why they failed to make the tender list.

### 3.14 SUMMARY

Identifying reliable sources of supply is an important part of the procurement process. The cost, complexity and importance of procurement should be used to gauge how far you should go in establishing information about firms before placing work with them. The objective is to satisfy yourself, that firms selected to bid for work are financially sound and can undertake the task in a reliable, efficient and effective manner. Where the EU Directives apply, the selection procedure becomes a more formalised process, which needs to be managed in accordance with the requirements of the Directives.

## 4. Tendering Procedures

## 4.1 INTRODUCTION

This Part is concerned with the procedures involved in selecting the right contractor to provide your goods and services by means of *tendering*. Tendering is the process of inviting suppliers to make an offer to provide specified goods or services for a specified price. The procedures used in the University are designed to:

- *be open and give no cause for, or justification to, allegations of favouritism or improper conduct;*
- *encourage the development of innovative and competitive markets; and*
- *discourage the development of cartels, monopolies or other forms of anticompetitive action.*

Where goods and services fall within the EU thresholds this Part should be read in conjunction with Part Six of this Manual (Application of EU Procurement Directives).

## 4.2 TENDERING METHODS

There are three methods used by the University for inviting tenders, these are:

- **formal competition** - where you invite a small number of firms (a minimum of 4) to submit formal bids;
- **informal competition** - where you invite a minimum of three firms to submit simple quotations in writing; and
- **single sourcing** - where only one supplier exists for a particular product or service.

4.3 The most appropriate method depends on the estimated value of the contract and the availability of potential suppliers. You **must** use *formal competition* for all University requirements valued over £50,000 Ex VAT, and where there is more than one supplier able to meet your requirement (if you are unsure whether the value of the contract should exceed £50,000 then you should use formal competition). Formal Competition must be conducted using the University's E-Tendering system using the University Tender Documentation. Advice, Guidance and documentation must be obtained from Procurement Services.

4.4 *Informal competition (Request for Quotations)* may be appropriate where the estimated value of the contract is less than £50,000 but more than £5,000.

4.5 The use of *single sourcing* does not encourage innovation and makes it difficult to establish value for money. It also denies the purchaser the opportunity to discover the strengths of other suppliers and can lead to allegations of bias. Therefore single sourcing should only be used where there is a strong case for doing so, including where:

- *you know that only one supplier can meet your requirement;*
- *continuity of knowledge with work done previously by a supplier is considered essential;*
- *the cost of a competitive tender exercise exceeds the potential savings likely to be achieved; and*
- *the need for the goods and services is extremely urgent and there is not enough time to carry out a competitive tender exercise.*

4.6 If you are considering single sourcing for requirements valued over **£5,000** you must submit a case to the Head of Procurement Services, who must approve the Single Source justification form in annex B, which must be submitted to Finance before the order is placed. **Please note that justification is only given if a sound case is put forward as it has been recognised by HEFCE, that 65% of all single sourcing is unjustified.**

## 4.7 FORMAL COMPETITION

### Preparing tender documents

All Tenders issued by the University **must** be issued using the [University's E-Tendering System](#). When you invite companies to tender, you will need to prepare the following documents:

- the Invitation to Tender (ITT) (the University model ITT),
- the Specification (see VFM Guidance 1 Section 6 Specification Writing);
- a formal declaration of offer, to be completed and signed by the tenderer;
- a copy of the proposed terms and conditions of contract.

4.8 It is important that all firms invited to tender understand the University's requirements and are aware of all the terms and conditions under which the contract will be let. When drafting the contract document, you should take care to ensure that it is clear, accurate and complete.

4.9 All firms invited to tender must receive identical information. No individual firm should be offered any variance on terms and conditions or information. If any additional information is given to a potential tenderer you must ensure that all potential tenderers receive the same information.

### **Time allowed for the return of tenders**

4.10 Try to give potential tenderers a reasonable period in which to prepare and submit their tenders, taking into account the nature of the requirement. You must give all tenderers the same time and date for tenders to be returned.

### **Extension of time allowed for return of tenders**

4.11 There are occasions when potential tenderers request an extension of the due date for the return of tenders. You should treat such requests with caution, especially if received from just one tenderer within a few days of the due date. Unless there appear to be sound reasons for the request, and you consider such an extension to be beneficial to the University, you should decline the request.

4.12 If you decide to extend the due date for the return of tenders, you must notify all tenderers of the revised date.

### **Safeguarding tenders returned**

4.14 To ensure that tender details are not disclosed prematurely, and to prevent any possibility of any other irregularities, if any manual tender returns are submitted all tenders are to remain unopened and maintained under lock and key until the appointed date and time for their opening.

### **Opening of tenders**

4.15 To avoid any suspicions of wrongdoing, all tenders must be opened in the presence of at least two people. One should be an independent witness who will take no further part in the tender exercise. All tenders are required to be submitted electronically and will be opened by the Secretary and Clerk to

the Board of Governors or his/hers designated representative along with a member of Procurement Services.

4.16 If any manual returns are made, as they are opened each tender should be initialled on the front page and the price submission (in the case of more than one copy, sign the 'Original Document') and dated by both witnesses. Both witnesses should:

- *certify that the tenders listed were the only ones received within the time limit; and*
- *certify the time and date the tenders listed were actually opened.*

### **Handling tenders**

4.17 There are a number of general considerations that you must keep in mind when handling tenders. You need to:

- *preserve strict equity between all tenderers;*
- *act in a publicly defensible manner;*
- *safeguard the public purse;*
- *observe confidentiality of tenders (subject to the FOIA)*

4.18 The safeguards built into the University's tender procedures are designed to ensure that these considerations are observed. Some risks, however, inevitably remain.

These are dealt with in the following paragraphs.

### **Late, incomplete and amended tenders**

#### **4.19 Definitions**

- *A late tender is one received after the time and date set out in the invitation to tender:*
- *a technically late tender occurs where a tender, which was clearly despatched in good time (e.g. the postmark (franked by the Post Office, not by the tenderers own franking machine) clearly shows the date of despatch, arrives unopened but late due to delays in transit genuinely outside the control of the tenderer e.g. due to failure of their network so they are unable to submit their bid electronically.*

- *An incomplete tender is one where important information is missing; and*
- *An amended tender is one that is amended by the tenderer upon his own initiative, whether in writing, or otherwise, after the opening date and time.*

4.20 It is possible that a late tender received after other tenders have been opened, could have been amended, in the light of information relating to the other tenders. This could happen if an individual, having access to tender information, either inadvertently or deliberately communicates information to a late tenderer or if, as is the practice in some trades, firms exchange information between themselves about tender prices once the competition is assumed to be closed. Whatever the circumstances, even if no disclosure has taken place, there is a risk that late or amended tenders may appear suspect to the unsuccessful tenderers. For this reason, you should apply the following procedures to all late, incomplete or amended tenders.

### **Procedures for the treatment of late, incomplete and amended tenders**

4.21 As a general rule you should not evaluate late, incomplete or amended tenders. There may however be circumstances where such tenders offer notable financial, technical or delivery advantages and where there is no reason to doubt that the tenders are genuine and have been submitted in good faith. You should give careful consideration to all the circumstances before deciding to include late tenders in the evaluation process.

4.22 The procedure you should follow in such cases is set out below:

- *Technically late tenders may be considered in the normal way;*
- *The decision to take late, incomplete and amended tenders into consideration should be made quickly and agreed with the Tender Panel. If an amended offer received after the due time;*
  - raises the lowest tender price but it still remains the lowest, the amended offer may be accepted, provided that the tenderer gives satisfactory evidence of an error in his original price or altered circumstances justifying the increase;*
  - reduces the lowest tender price, the amended offer may be accepted if it is otherwise satisfactory.*

4.23 If you decide to consider late, incomplete or amended tenders, it is essential that you preserve equity between the tenderers. Unless there are special reasons for not doing so (and particularly if an amended tender was not originally the lowest) you should seek re-quotations or fresh tenders from those tenderers originally under consideration.

### **Withdrawal of tenders**

4.24 Tenderers are free to withdraw their tenders at any time without notice or explanation, it is therefore in your interest to evaluate tenders and award contracts with the minimum of delay.

### **Unreasonably low tenders**

4.25 If you receive a tender in which it appears that the tenderer has made a genuine mistake in the price offered, you should ask the tenderer to confirm that the price is genuine before you accept the tender.

4.26 If a tenderer submits an unreasonably low tender you should give careful consideration before accepting it. What may seem like value for money at the outset may have serious consequences for both the Supplier and the University in the long term.

### **Qualified tenders**

4.27 If a tenderer proposes conditions that you consider to be unacceptable, you will need to negotiate their withdrawal before giving further consideration to the tender. A firm's "printed" conditions of contract, which often appear on the back of quotations or invoices, are generally nullified by the undertaking made by tenderers on their "formal declaration of offer". If, however, a tenderer draws special attention to his own conditions, you will need to consider them as part of the tender evaluation process.

4.28 The protection from a firm's conditions of contract given by the undertaking made in the "formal declaration of offer" does not apply to any conditions proposed by tenderers as part of their tender.

4.29 Nothing that the University specifies in the tender documents can prevent the tenderer from making what offer he pleases: they may have signed the undertaking excluding "printed" conditions, but they are not prevented from expressly including their own conditions in their tender.

4.30 The principles of competitive tender demand that any relaxation allowed to one tenderer must be extended to all. If one tenderer makes a favourable offer of a product not conforming with the specification, you should consider

informing all those invited to tender of any concession the University may be prepared to give. In such instances you should give tenderers the opportunity to amend offers already made.

### **Ineffective Competition**

4.31 If you receive only two bids and you have doubts that the competition has been genuine and effective, you should consider seeking new tenders from other firms. If you consider that a second competition is undesirable, and decide to accept the lowest satisfactory tender, you should treat this tender as if it was a *single source* (see Paras 4.64 to 4.67).

4.32 If only one tender is received following an invitation to a number of firms, it cannot be regarded as an effective competition and should be treated as a *single source* (see Paragraphs 4.64 to 4.67).

### **Re-Issue of tenders**

4.33 On the occasions when tenderers are to be given the opportunity to reconsider their tenders, they should be informed, in writing. They should be told clearly of any changes in the requirements, that the deadline for the return of the tenders has been extended from the original date, and that any confirmation or revision of their tenders received by the new deadline will be considered.

### **Enquiries from tenderers**

4.34 Firms sometimes enquire how consideration of their tenders is progressing, particularly, whether they are in the running or not, or when a decision is likely. Your answers should be as helpful as possible, but you must not disclose any information, or make any commitments, about prices, prospects or any of the University's confidential business, even if you know that the enquirer's tender is, or is not going to be accepted.

### **Evaluating tenders**

4.35 Your primary object in assessing competitive tenders is to get best value for money and normally the 'economically most advantageous offer' should be accepted. However, in deciding which tender will give the best value for money you will need to take into account such features as delivery, performance, quality, life of the equipment and price.

5.36 No firm should be invited to tender unless you are prepared to place a contract with them, subject to the price, delivery and other requirements being

satisfactory. You should not therefore reject any complete tenders for reasons outside of the tender evaluation criteria.

4.37 In assessing complex tenders, it can be difficult to make valid comparisons, especially where a contract can be approached differently, as with some consultancy contracts. Here responses to the specification can vary enormously. Some contractors may try to gain the business by including extras that, while innovative, add unnecessary extra cost.

4.38 The most important principle is that the assessment process must be systematic, thorough and fair **and seen to be so**. Copies of all awards and tender evaluations detailing the reason for selection must be submitted to Procurement Services for audit purposes.

### **Analysing tenders**

4.39 A tender analysis team (consisting of at least 3 members) will need to meet to assess the tenders. In order to make a full assessment of each tender, the following factors will need to be considered:

- **Capability Assessment:** *which should establish whether tenderers have the capability (including the personnel, support systems and experience) to deliver the requirement. The assessment should address the experience, capability and qualifications of the key personnel who propose to manage the activity, including their management and supervisory support;*
- **Technical Assessment:** *which should establish whether tenders can meet the requirements set out in the specification. Any modifications proposed should be checked against the outputs defined on the specification to establish whether they provide an acceptable cost-effective approach or whether there is doubt about the tenderer's ability to meet the user's needs. The assessment should consider whether there is sufficient capacity available and seek assurances that the facilities/manpower are adequate to meet the requirement;*
- **Quality Assessment:** *which should establish whether tenderers can deliver the service to the appropriate quality standards. Consider the adequacy of the proposed systems of quality control if tenderers do not have relevant quality certification;*
- **Financial Assessment:** *which should include:*
  - i checking that all relevant costs are included;*

- ii any adjustments needed to make tenders comparable;*
- iii Financial capacity to perform the contract;*

4.40 Detailed below is a typical approach to tender analysis.

- *rank tenders in order of price (creating a summary chart);*
- *compile a brief list of core requirements taken from the specification and the criteria by which the contract could be awarded. For example a consultancy project's core requirements might be:*
  - i how the objectives of the specification will be met;*
  - ii the experience and know how of key personnel;*
  - iii the adequacy of the proposed quality plan; and*
  - iv*cost.

- assign a numerical rating to each tender for executing each core requirement, to quantify the analysis. Higher score ranges can be applied to more important requirements, so that these have a higher weighting. A total can then be calculated for each contractor. For tenders below £50,000 threshold an evaluation scoring system is available from our web pages. Systems and training for analysis of larger tenders can be obtained from Procurement Services.

### **Interviewing Tenderers**

4.41 In most cases an analysis of tender or quotations should be sufficient to reach a final decision. In some instances, however, particularly when the requirement is for a service/goods of relatively high value or complexity you should carry out site visits in order to confirm or expand upon the evaluation process.

4.42 Site visits carried out by a Tender Board should build upon the findings of the initial tender analysis. You can confine this procedure to a shortlist of the most suitable tenderers. The type of key issues that you may wish to explore are:

- *how contractors intend to organise their resources;*
- *how quality will be controlled during the contract;*

- *methods to ensure compliance to contract monitoring requirements; and*
- *soundness of proposals.*

4.43 Site visits bring many advantages such as getting more information, clarifying details, generating further ideas for managing the contract and providing a better understanding of contractor's bid and approach. You should try to interview those personnel who will be involved in the delivery of the services.

### **Post Tender Negotiation (PTN)**

4.44 Post Tender Negotiation is defined as "*Negotiation after a receipt of formal bids or tenders and before the letting of a contract with those companies submitting tenders offering best value for money with a view to obtaining an improvement in content in circumstances which do not put other tenderers at a disadvantage, distort competition or affect adversely trust in the competitive tendering process.*"

4.45 PTN is not only about price. It is about getting better value for money by using planned, ethical, fair negotiation. It may result in for example:

- *improved delivery times/completion dates;*
- *extended warranties;*
- *improved payment terms;*
- *lower prices.*

4.46 PTN should not be confused with tender clarification, which is sometimes necessary to clarify aspects of the tender, to help the evaluation process. PTN is a tool to develop areas and specific aspects of a tender to improve or enhance value for money.

### **Where to use PTN**

4.47 The major factor influencing your decision to use PTN is whether the time spent in PTN is likely to outweigh any benefits likely to be made.

### **Preparation and Planning**

4.48 Successful PTN depends on being well prepared. Before entering into negotiations you should have a thorough understanding of:

- *the requirement;*
- *the tender;*
- *the tenderer;*
- *the areas that are likely to yield improvements; and*
- *realistically achievable objectives.*

4.49 You should then:

- *gather the information you will need to quantify your objectives;*
- *identify the strengths and weaknesses of both parties;*
- *determine what is negotiable; and*
- *plan your strategy for the negotiation.*

4.50 The negotiations must be fully documented so that a clear audit trail is left.

### **Best and final offers**

4.51 The concept behind best and final offers is the search for better value for money through a further round of tendering either with all the tenderers who have submitted acceptable bids in the preceding round or, where these are numerous, with those judged to be most in contention for the contract. Normally the emphasis will be in securing a reduction in the quoted prices, but this should not preclude seeking other improvements, for example in delivery or performance.

4.52 *Best and final offers* should be used only occasionally to ensure that tenderers do not come to expect such an approach as the norm, and build allowances into their initial tender prices.

4.53 If you decide to invite some or all of the tenderers to submit 'best and final offers' you should invite the companies concerned in writing (those not being invited should also be notified that they have been unsuccessful). You should state clearly any changes in the requirement and the date by which revised offers are to be received.

4.54 You should evaluate tenders received under 'best and final offers' in accordance with Paragraph 4.35 to 4.38 (*evaluating tenders*).

### **Acceptance of tenders**

4.55 When the acceptance of a tender has been approved, you should send an acceptance letter together with the contract document (prepared from the copy attached to the ITT), to the successful tenderer. The descriptions, quotations, terms and conditions in the contract should be the same as those in the tender, and any subsequent approved amendments. *Unless the acceptance is identical to the offer a binding contract will not be created.* A model acceptance letter is at Annex C.

### **Advance acceptance of tenders**

4.56 If there is exceptional urgency a letter of acceptance may be sent in advance of the detailed contract documents, and the contractor must acknowledge this. You should send the detailed contract documents as soon as possible.

### **Conditional acceptance of a tender**

4.57 Under English Law it is unwise to accept a tender *conditionally* as there is no binding contract until all conditions are agreed. Where an important point is unsettled, it is better to postpone acceptance of the tender.

### **Delay in acceptance**

4.58 If it appears a lengthy period of time will elapse between the date of a tender and its proposed acceptance, you should ask the tenderer to confirm that his tender is still valid. If you delay acceptance for too long, you may find that the tender is no longer valid and a binding contract will not be created. A tender can be withdrawn or amended at any time before it is accepted.

### **Acknowledgement of acceptance**

4.59 Although the University's acceptance creates a contract, it is worth your while obtaining a formal acknowledgement of receipt of the acceptance and contract documents from the contractor. If the acknowledgement appears to vary the contract, you should reject the variation with a reminder that your earlier acceptance of the tender created a binding contract.

### **Declining unsuccessful tenderers**

4.60 You should notify unsuccessful tenderers as soon as possible, in writing. Your letter to them should do no more than thank them for their bid and inform them that they have been unsuccessful. You should not attempt to explain why they were unsuccessful. A model letter to unsuccessful tenderers is at Annex D.

### **Debriefing unsuccessful tenderers**

4.61 Unsuccessful tenderers are, however, entitled to some explanation of why their tender failed and, if they ask for it, should be given feedback (this is **compulsory** under the EU Procurement Directives). Debriefing tenderers is also a way of helping tenderers to improve their competitiveness in future exercises and in the wider marketplace.

5.62 The debrief should be constructive and credit may be given for those areas of the tender where it is deserved. You should try to limit discussions to general points at issue, rather than comparing the specifics of one tender with another. While 'restricted commercial' information cannot be given away, an indication of the weaknesses of a tenderer's bid can be given referring specifically to the award criteria laid out in the tender document. On occasion in the past, what was intended as kind words of consolation has given an unsuccessful tenderer a basis for challenging the tender process. Where the contract is in excess of £35k or an EU tender then it is expected that the awarding department will offer tenderers a debrief interview if requested, either by telephone or in person. Where a tender is conducted under the EU Procurement Legislation the requirements are.

"The contracting authority shall, within 15 days of the date on which it receives a request' from any provider who was unsuccessful (at either the selection or tender stage) inform that provider of the reasons for being unsuccessful and, if the provider was unsuccessful at the tender stage, the name of the provider awarded the contract."

4.63 Should you ever need to undertake debriefing, advice & guidance should be sought from Procurement Services.

### **4.64 SINGLE SOURCING**

Where approval has been given for single sourcing (see the Purchasing Delegations at Annex A to Part One) you will still need to invite bids from the firm you intend doing business with. For requirements valued over £5,000, a formal approach, along the lines detailed for requests for quotations, is still

recommended. Exceptionally, a firm may be invited to submit a tender by letter. For example where the firm is carrying out, or has recently completed, a similar service and time is too short to allow for normal single tender action, or where the requirement is valued under £5,000.

4.65 As only one firm will be invited to bid, you will need to negotiate a fair and reasonable price for the work. To do this, you will need to obtain as much information about the quoted price (a price breakdown) from the firm, before discussing the price with them. Procurement Services can assist you in negotiating fair and reasonable prices.

### **Maintaining the appearance of competition**

4.66 In theory, when a firm is invited to tender it cannot tell whether it is alone in the field or bidding against competitors. In practice, however, experienced contractors can usually determine whether or not they are the sole tenderer. Although there may be occasions when there is a real advantage in maintaining the appearance of competition, in general this is not the case. More often than not, there can be real disadvantages. For example, a tenderer may try to avoid supplying information needed for pricing purposes, such as a quotation breakdown, by advancing the excuse that he had believed that he was quoting in competition. It is normally desirable, therefore, not only to forgo the appearance of competition, but actually to make it clear to a contractor that he is alone in the field.

4.67 If a breakdown of a quotation is required for pricing purposes, you should ask the tenderer to supply it with his tender.

### **4.68 INFORMAL TENDERING**

For requirements valued at less than £50,000 quotations must be obtained using the University's [Request for Quotation Documentation](#) (RFQ).

- In Writing - Requests for quotations and quotations received must be kept and a [record of quotation form completed and submitted](#) to Procurement Services justifying the choice of contractor prior to the order being placed. A minimum of 3 firms must be asked to quote and the University RFQ template must be used. **Please note that below £5,000 you still may be required to justify your selection.**

4.69 The RFQ may be sent to suppliers by e-mail, fax or post, or where applicable the University E-Tendering system used.

4.70 To guard against the possibility of you making any unintentional commitment on behalf of the University, you should preface all discussions and correspondence with firms with the following legal safeguard: ***“Without commitment”***.

## 5. Application of the EU Procurement Directives

### 5.1 INTRODUCTION

This Part gives advice and guidance on the European Union Public Procurement Directives, and how they affect procurement in the University. The Directives were introduced to open public procurement by making EU member states remove restrictive practices. These rules place particular mandatory duties and responsibilities on the University, which the UK courts can enforce. All goods or services bought by Universities and other public bodies are subject to these rules and procedures.

### 5.2 THE DIRECTIVES

The following four Directives apply to procurement in the University:

- *Supplies Contracts for the purchase, lease, hire-purchase or rental of goods;*
- *Contracts for the purchase of Services;*
- *Public Works Contracts for construction or civil engineering works; and*

### 5.3 WHEN THE RULES APPLY

5.3 The *Supplies Directive* applies when the value of a contract, or series of contracts for the same types of goods, exceeds **£153,376** exclusive of VAT. Annex D details the scope of the Supplies Directive. Prior Indicative Notices(PIN) must be published at the beginning of the financial year for contract values likely to exceed £464,024.

5.4 The *Services Directive* applies when the value of a contract, or series of contracts for the same types of services, for the purchase of any one of the "Priority" services, listed at Annex C, (except R&D Services) exceeds

**£153,376** exclusive of VAT. Annex E details the scope of the Services Directive. The threshold for services not listed at Annex C ("non-Priority" or "Residual" services) and R&D services has been increased to **£123,740**. This means that the University must place an Award Notice in the OJEU for all "Residual" services, which exceed this threshold. Prior Indicative Notices (PIN) must be published at the beginning of the financial year for contract values likely to exceed £464,024.

5.5 The *Works Directive* applies when the value of a contract for one of the types of projects involving one of the professional activities listed in the Directive (including all works necessary to make the project operational) exceeds **£3,834,411** exclusive of VAT. Prior Indicative Notices (PIN) must be published at the beginning of the financial year for contract values likely to exceed £3,834,411.

5.6 Every two years the national currency equivalents of the thresholds have to be recalculated. The above sterling figures came into effect on 1 January 2004.

## Exclusions

5.7 The provisions of the Directives do not apply to contracts which are:

- *declared secret or which require special security measures for their delivery or execution;*
- *subject to international agreements notified to the Commission;*
- *services covered by other Directives (eg, Utilities Directives).*

## 5.8 CONTRACT VALUES

The Directives lay down how the value of a contract is to be estimated.

### Total costs

5.9 The estimated value must cover the total requirement. For example, if the contract is to supply, deliver and install, the estimate must include the cost of delivery and installation as well as the articles to be supplied.

### Splitting Requirements

5.10 A requirement for a given amount of goods or services must not be split up into small contracts to avoid the provisions of the Directives.

### **Aggregation**

5.11 Where you propose to enter into two or more contracts at the same time for goods of a particular type, the estimated value of each of the contracts must be added together. This aggregate value is the one which must apply. If the *aggregated estimated value* exceeds the threshold, each contract has to be advertised, even if the estimated value of the individual contract is below the threshold.

### **Services subdivided into lots**

5.12 Under the *Services Directive* if the services are *subdivided into several lots*, each lot being the subject of a contract, the value of all the contracts must be combined to test whether the threshold has been reached. If the threshold is reached, the provisions of the Directive apply to each contract other than contracts whose estimated value net of VAT is less than £63,207, provided that the total value of such contracts does not exceed 20% of the combined value of all the contracts.

### **Regular and Renewable contracts**

5.13 The value of *recurring contracts* and the contracts which are to be renewed within a given time may be estimated either by looking back to similar contracts over the previous financial year or past 12 months, adjusted where possible for foreseeable changes in quantity or value over the coming year, or by looking forward to the estimated aggregate cost in the year following first delivery or during the term of the contract if this is longer. If the aggregate estimated value exceeds the threshold, each contract has to be advertised even if its estimated value is below the threshold.

## **5.14 PRIOR INFORMATION NOTICE**

Where the sum total of a number of contracts for the same product group or service category, amount to **£464,024**(exclusive of VAT) or more, a Prior Information Notice (PIN) must be published in the Official Journal of the European Communities (OJEU) at the beginning of each financial year. This is to give suppliers an indication of the value of contracts, which will be on offer during the year. Procurement Services is responsible for submitting the PIN covering the whole of the University.

## 5.15 CONTRACT AWARD PROCEDURES

Under the Directives contracts can be awarded by *open* or *restricted* procedures or, in specified circumstances, under the *negotiated* procedure. The University has a free choice between the use of open and restricted procedures but the circumstances within which they may use a negotiated procedure with or without competition remain limited.

5.16 In *Open Procedures*, all organisations interested in the contract can submit tenders. The use of Open procedures increases the level of interest and competition to the maximum available. However, the nature and value of the requirement needs to be such as to justify committing the large level of resources which could be needed to manage effectively a potentially large volume of tenders.

5.17 In *Restricted Procedures*, expressions of interest must be invited and tenders are then requested from a selection of suppliers expressing an interest. This procedure is the one most commonly used in the University, as it allows you to maintain a balance between contract value and the cost of running the exercise (see paragraph 5.29 to 5.30).

5.18 *Negotiated procedures* allow the University to consult one or more suppliers of their choice and, in certain closely defined circumstances, negotiations can commence without prior publication of tender notice.

5.19 Contracts may be awarded by negotiated procedure in the following circumstances:

- *if you receive no tenders in response to an open or restricted procedure and the original terms of contract are not substantially altered and the Commissioner has been notified of the circumstances;*
- *when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier;*
- *in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the University, the time limits laid down for the open and restricted procedures cannot be met. The circumstances invoked to justify extreme urgency must not in any case be attributed to the University; and*
- *for additional deliveries by the original supplier which are intended to partially replace normal supplies or installations, where a change of*

*supplier would result in the University having to obtain material with different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.*

## 5.20 LEAD TIMES FOR TENDERING

Lead times (normally 6 to 9 Months) will need to be allowed for the time that will be absorbed by:

- *market sounding, specification preparation, despatch and publication of the notice for the Official Journal.;*
- *the period for response to the notice by candidates;*
- *period for tendering; and*
- *additional time for consideration of tenderers which may include unfamiliar offers.*

## 5.21 ADVERTISEMENT IN THE OFFICIAL JOURNAL

Under both open and restricted procedures, you must call for competition by means of a prescribed contract notice published in the Official Journal of the European Communities (OJEU), allowing minimum time scales for response by potential tenderers. The contract notice is published without charge in the Supplement to the OJEU. A model notice for the *restricted* procedure can be found at Annex A. Procurement Services are responsible for placing all notices in OJEU.

5.22 Contracts must not be advertised in the UK before a notice is despatched to the OJEU. Any subsequent advertisement must not contain information other than that published in the OJEU.

### Time Limits

5.23 In *restricted procedures*, the following minimum periods apply:

- *at least **37 days** from date of despatch to the OJEU of the notice should be allowed for **receipt of requests from firms to participate**;*

- *not less than **40 days** from the date of despatch of the written invitation to tender should be allowed **for the return of tenders**. This period may be reduced to 25 days in the case of second or subsequent publications in respect of recurring contracts, provided a previous advertisement in the OJEU specified the nature and quantity of the anticipated future requirement, and, where possible, an estimate of when the subsequent tender notices would appear. The second or subsequent publication should include a cross reference to the original advertisement;*
- *provided it has been requested in good time, **additional information relating to the contract documents** must be supplied not less than **6 days** before the final date fixed for receipt of tenders.*

5.24 For reasons of extreme urgency brought about by events unforeseeable by the University, you can use the *accelerated procedure*. The following time limits would then apply:

- *receipt of requests to participate - not less than 15 days from the date of despatch of the notice;*
- *receipt of tenders - not less than 10 days from the date of the invitation to tender;*
- *provision of additional information - not less than 4 days before the date fixed for receipt of tenders.*

5.25 Justification for the use of the accelerated procedure must be included in Box 10(a) of the tender notice submitted to the OJEU. **You are not allowed to use the accelerated procedure to recover internal administrative delays.**

5.26 In *open procedures*, the time limits are:

- *not less than **52 days** from the date of despatch of the notice should be allowed for the **return of the tenders**;*
- *provided they have been requested in good time, the **contract documents and supporting documents** must be sent to the suppliers within **6 working days** of receiving their application;*
- *provided it has been requested in good time, **additional information relating to the contract documents** must be supplied not later than **6 working days** before the final date fixed for receipt of tenders.*

5.27 You should also allow adequate time for any necessary action to verify the evidence of technical competence and financial standing submitted by the firms with their requests to participate.

5.28 The address to which the notices should be sent is:

**Office for Official Publications of the European Communities, 2, rue  
Mercier L-2985, Luxemburg (Fax: 00 352 49 00 03)**

## **5.29 SELECTION OF TENDERERS UNDER THE RESTRICTED PROCEDURE**

Under the Restricted Procedure the notice in the OJEU is merely an invitation to suppliers to indicate a wish to be considered for an invitation to tender. The Directives lay down rules for the exclusion of certain candidates or tenderers; the selection of tenderers; and the evidence that can be required that a supplier has a registered business and the financial, economic and technical capacity to fulfil the contract.

5.30 A response to an OJEU notice does not give a firm a prescriptive right to be invited to tender. You should satisfy yourself, on the basis of the evidence supplied in response to the OJEU notice, that it is reasonable to assume that a supplier could satisfactorily meet the particular requirement. Part Four (*Identifying Potential Contractors*) provides further assistance in the selection of tenderers. Paragraphs 5.7 to 5.63 describe the procedures to be followed on the tendering process. However, a minimum of five firms must be invited to tender.

## **5.31 CRITERIA FOR AWARD OF CONTRACTS**

The criteria for award of contracts are either;

- *the lowest price only; or*
- *the most economically advantageous tender which reflects the normal basic principles of awarding contracts of best value for money.*

5.32 Contracts should be let in accordance with the specification and on the basis of the award criteria contained in the notice published in the OJEU or in the invitation to tender itself.

### 5.33 MANDATORY STANDSTILL PERIOD (ECJ ALCATEL RULING)

#### Summary of main points:

A minimum 10 days mandatory standstill period between communicating the award decision to all tenderers and contract conclusion.

The mandatory standstill period does not apply:

- to below threshold procurements
- to procurements outside the full scope of the procurement directives
- where single tendering takes place under the urgency provision of the negotiated procedure.

Notification of the contracting authority's award decision must contain:

- award criteria
- where appropriate, the tenderer's score • where appropriate, the winning tenderer's score
- the name of the winning tenderer.

New debriefing rules include:

- providing additional debriefing within the standstill if requested by the end of the second working day of the standstill period
- allowing three working days between this debriefing and end of the standstill.

The standstill to be:

- extended if necessary, e.g., around public holidays
- started the day after the award decision is issued and must end on a working day.

If there is a legal challenge, authorities should wait to see if interim measures are granted before proceeding. If interim measures are granted, they should wait until the outcome of legal proceedings before concluding the contract.

### 5.34 CONTRACT AWARD NOTICE

A notice of contract award must be published in the OJEU for **all** contracts awarded under the provisions of the Directives, whether under the open, restricted or negotiated procedure (a model Award Notice is at Annex B). This obligation is not limited to contracts that have been previously advertised. The notice must be despatched to the OJEU not later than 48 days after the award of contract(s). The Directives recognise the need to withhold certain information where public release would be contrary to public interest, would

prejudice commercial interest, or might prejudice fair competition between firms.

## 6. Conditions of Contract

### 6.1 INTRODUCTION

The aim of this Part is to give you a clear understanding of what a contract is and what it should contain. It explains when a contract should be used and how to ensure that it does what you want.

### 6.2 ESSENTIAL INGREDIENTS OF A CONTRACT

The essential ingredients of any procurement contract are:

- *two recognisable legal entities;*
- *an established framework of law;*
- *a meeting of minds;*
- *an agreement willingly entered by both parties;*
- *a clear description of the requirement;*
- *precise details of any buyer performance essential to the contract;*
- *the time of delivery (duration of the contract);*
- *a price (or agreed pricing mechanism);*
- *a method of payment; and*
- *provision of dealing with disputes.*

### 6.3 PURPOSE OF A CONTRACT

The purpose of a contract is to establish within a legal framework what is to be done, at what price and by whom. If there is a dispute, the terms of a contract will clearly identify the action to be taken.

#### **6.4 AVOIDING UNWANTED CONTRACTS**

All University contracts should be in writing. It is possible, however, to make a contract *verbally* so you need to be aware of the implications of what you do and say in your dealings with suppliers.

6.5 To avoid entering into a contract inadvertently during your discussions with suppliers, you should take care not to *commit* the University to any action, unless that is your deliberate intention. It is all too easy to create a contract. You should make it clear to suppliers that any such discussion or correspondence is "*without commitment - negotiation only*" or "*subject to signed written contract*".

#### **STANDARD FORMS OF CONTRACTS**

6.6 Procurement Services has prepared standard conditions of contracts to meet the majority of the University's contracting requirements. These and other standard conditions of contract covering building works and IT hardware, software and services are available from [Procurement Services website](#).

#### **DRAFTING THE CONTRACT**

6.7 The standard contract include terms and conditions that are standard for government contracts and should serve as a basis for the drafting of the eventual contract. When drafting contracts you should try to tailor them to ensure that they meet the actual requirement, as some of the conditions used in the standard forms may not be applicable to all requirements. All contracting needs to be handled with care to avoid unintentional, under or over commitment. Advice on how to draw up a contract is available from Procurement Services.

#### **APPROVING THE CONTRACT**

6.8 All contracts valued at £5,000 that involve terms and conditions other than our standard forms must be approved by Procurement Services. Such approval should be sought early, and certainly before the draft contract is shown or offered to potential contractors.

## **SIGNING THE CONTRACT**

6.9 When the contract has been drafted and approved by Procurement Services you should send two copies to the Contractor for signature. When both copies have been signed and returned by the Contractor you should check for any amendments. If none have been made, both copies should be signed, on behalf of the London Metropolitan University, by the Secretary and Clerk to the Board of Governors. *The person who signs or negotiates the contract must not then authorise payment under the contract.*

6.10 One copy of the contract should be returned to the Contractor. A copy of the other should be sent to Procurement Services and the original filed on a registered file within your School/PSA area.

## **STANDARD CONDITIONS IN UNIVERSITY CONTRACTS**

6.11 The most widely used standard conditions for the purchase of goods are contained on the back of the University's Purchase Orders "*General Conditions of Purchase*".

## **CONDITIONS USED IN UNIVERSITY STANDARD CONTRACTS**

6.12 Annex A contains a short explanation of the terms and conditions used in the standard contracts. They are intended as a reference guide. The full effect of the conditions and their use, the conditions themselves should be consulted in conjunction with any relevant information or procedures given elsewhere in the Manual. Please note, those marked '\*' are conditions specific to the model conditions for the *purchase of goods*.

## **USE OF SUPPLIER'S CONDITIONS**

6.13 Whilst every effort should be made to ensure that all contracts entered into by University are on the University's own terms and conditions, it is recognised that there will be occasions where there are no alternatives but to enter into a contract on the supplier's own terms and conditions.

6.14 On these occasions extra care must be taken to ensure that the University's rights are adequately protected, as the supplier's conditions will naturally be biased in their favour. The conditions of contract must therefore be carefully scrutinised and where necessary, every effort should be made to have the offending conditions amended or removed. For contracts of over £5,000 the supplier's conditions may be accepted only with the agreement of Procurement Services and Secretary and Clerk to the Board of Governors.

**Annex A to Part Six****CONDITIONS USED IN UNIVERSITY STANDARD CONDITIONS OF CONTRACT****DEFINITIONS**

All contracts must define terms clearly. The suggested definitions are not exhaustive and will need to be amended to meet specific requirements. This condition should be included in all contracts.

**SERVICE/PROJECT**

*Requires the agreement of the contractor to provide the services set out in the Schedule of Requirement for an agreed price.*

**SPECIFICATIONS ETC**

*Underlines the importance of the specification, drawing, etc., in the description of the articles ordered under the contract.*

**ALTERATIONS OF SPECIFICATIONS ETC**

*Gives the University the right following consultation to alter the specifications etc., from time to time; and indicates that the contract price and/or delivery programme may be subject to consequential revision.*

**INSPECTION, REJECTION AND GUARANTEE**

*Contains the general rules of inspection and rejection. It also details the guarantee period for the delivered Goods.*

**ACCEPTANCE MARKS**

*Provides for the marking of approved articles, materials, etc. Details of markings are usually given in specifications.*

**LABELLING AND PACKAGING**

*Requires the contractor to pack Goods in accordance with University's instruction.*

**DELIVERY**

*Defines the contractor's duties regarding delivery under the contract.*

### **LOSS OR DAMAGE OF THE ARTICLES, ETC**

*Defines the contractor's responsibility for loss or damage before and after inspection until delivery and, in certain stated circumstances, after delivery.*

### **PROPERTY AND RISK**

*Ensures that the Property and risk of the Goods passes to the University on delivery.*

### **DAMAGE IN TRANSIT**

*Requires the contractor to repair or replace Goods damaged in transit.*

### **ACCEPTANCE**

*Makes acceptance a condition of the contract; the previous practice was to rely on the Sales of Goods Act.*

### **HEALTH AND SAFETY**

*Ensures that the Goods are safely designed and constructed for use by the University and provides for the contractor to indemnify the University against possible actions.*

### **RECOVERY OF SUMS DUE**

*Gives the University the right to recover any sum due under the contract from sums due to the contractor under any University contract.*

### **VAT**

*Covers the payment of VAT and should be included in all contracts where the Contractor is registered for VAT.*

### **BANKRUPTCY**

*Provides for the contract to be determined in the event of bankruptcy.*

### **DISCRIMINATION**

*Requires contractors in Great Britain (not Northern Ireland) to comply with the provisions of the Race Relations Act 1976, or the sex discrimination Act 1975 relating to discrimination in employment.*

### **TRANSFER, SUB-LETTING, ETC**

*Forbids the unauthorised transfer of a contract from one contractor to another. Helps to ensure that a contract is let only to the firm that will execute it and not to any intermediary.*

### **CORRUPT GIFTS AND PAYMENTS OF COMMISSION**

*Prohibits the offer of such gifts etc.*

### **USE OF DOCUMENTS, INFORMATION ETC**

*Requires the University's approval before a contractor can disclose (or use) the contract for other purposes.*

### **DISCLOSURE OF INFORMATION**

*Restricts disclosure by the contractor of information about the contract.*

### **LAW**

*Declares the law governing the contract.*

### **ARBITRATION**

*Provides for the arbitration of disputes etc. which may arise from the provisions of the contract.*

### **LIABILITY IN RESPECT OF DAMAGE TO UNIVERSITY PROPERTY**

*Requires contractor to indemnify the University against damage. To be included where contractor has access to government property.*

### **CONTRACTOR'S PROPERTY**

*Ensures that the University has no liability for loss or damage to contractor's property other than through neglect or default of a University member of staff.*

## **PATENTS**

*Ensure that all royalties, licence fees etc. are included in the contract price and requires the contractor to indemnify the University against any claims, which may arise.*

## **DEFAULT/UNSATISFACTORY PERFORMANCE**

*Provides that in the case of unsatisfactory contractor performance the University can use another party to carry out the work and to recover any additional cost from the original contractor.*

## **INDEMNITIES & INSURANCE**

*Requires the contractor to maintain adequate insurance cover.*

## **DUTY OF CARE**

*Makes the contractor responsible for exercising reasonable skill, care etc.*

## **PERSONAL INJURY AND LOSS OF PROPERTY**

*Requires the contractor to indemnify/reimburse the University against such loss or injury. Essential if a contractor is working on University premises.*

## **OCCUPATION OF UNIVERSITY PREMISES**

*Provides the contractor with a licence to use University premises and provides the University with the power to ensure that the contractor leaves the premises when the contract ends.*

## **CONTRACTOR'S ORGANISATION**

*Ensures that all personnel employed under the contract have appropriate qualifications and competence. Changes in key personnel require University approval.*

## **TERMINATION**

*Empowers the University to end the contract at any time by written notice. Consideration will need to be given to the appropriate period between giving written notice and the termination.*

## **DURATION OF CONTRACT**

*Identifies the period for which the contract remains in force and provides for the University to extend the contract beyond this period.*

## **VARIATION OF REQUIREMENT**

*Provides the University with a right to vary the requirements of the contract.*

## **VARIATION OF CONTRACTS**

*Provides that any amendment to the conditions of contract shall be agreed with the contractor and issued in writing by the University.*

## **CONTRACT DOCUMENTS**

*Provides that these conditions take precedence over other parts of the contract documentation.*

## **MONITORING AND LIAISON MEETING**

*Makes the contractor responsible for the performance of the contract. It also provides for the University to call liaison meetings to monitor the contractor's performance.*

## **PRICE**

*Relates to a firm price contract.*

## **PAYMENT**

*Identifies payment procedures but will need adjustment/amendment to meet individual requirements.*

## **PAYMENT OF SUB-CONTRACTORS**

*Sets out timescale for payment of sub-contractors by contractors.*

## **AVAILABILITY OF INFORMATION**

*Requires the contractor to keep records for a period of two years after final payment of the costs incurred in the execution of the contract. Also provides for access of audit staff to contractor's premises.*

## **TRANSFER OF RESPONSIBILITY**

*Requires the contractor to cooperate in the transfer of the contract to a different organisation at the expiry or termination of the contract.*

## **INTELLECTUAL PROPERTY RIGHTS**

*Ensures that all rights resulting from work undertaken for the purpose of the contract vests with the University.*

## **PROVISION OF EQUIPMENT**

*Provides that all government property issued in connection with the contract remains the property of the University.*

## 7. Managing The Contract

### 7.1 INTRODUCTION

If purchases of goods or services are to provide best value for money, it is essential for there to be an efficient and effective regime of contract management. Effective contract management will ensure that:

- *the contractor's performance is maintained;*
- *problems and changes required are anticipated;*
- *the contract terms and conditions are met;*
- *documented evidence of good performance is recorded to demonstrate the achievement of value for money;*
- *documented evidence of bad performance is recorded to allow the University to exercise its rights under the default provisions detailed in the contract.*

### 7.2 CONTRACT MANAGEMENT

Contract management is the process, which ensures both parties to a contract fully understand their respective obligations and that these are fulfilled as efficiently and effectively as possible. Effective contract management does not start from the award of contract. The process runs from the identification of the requirement through to the completion of the contract.

7.3 During the course of a contract the University's involvement falls into two main categories:

- (i) **Contract monitoring** - the procedures for checking on the contractor's performance and confirming whether or not it is in accordance with the contract; and
- (ii) **Contract control** - the procedures for keeping that performance up to the mark and for dealing with any lapse; this may include arranging contract extensions or variations.

## Contract Monitoring

7.4 All contracts should have a provision for monitoring performance in terms of value for money, quality and making sure the results conform to the specification. Contracts for services particularly can incorporate processes and procedures that will provide clear and unambiguous performance measurements.

7.5 Monitoring procedures should be written into contracts at the outset, indeed they should feature in the specification. The success of any monitoring procedure is dependent on a good specification, which sets out the deliverables against which contractors' performance will be judged.

7.6 The procedures for monitoring a contractor's performance will depend upon the nature of the goods or service purchased. A contract manager should always be appointed. This person would be responsible for monitoring and supervising the contract. Each contract presents its own problems, however, you should also consider the following general monitoring procedures:

### Contracts for Services

- *Regular contact with the contractor (both formal and informal) to discuss progress and solutions to problems;*
- *The use of progress and 'spot check' reports;*
- *Identifying and agreeing milestones with the contractor and using these to gauge progress. For example there might be three milestones in a consultancy contract: gathering information; analysing it; and producing a report. Assessing progress at the information and analysis stages will enable you to make adjustments if refocusing is necessary;*
- *Visual inspection of completed work; in many cases (e.g. a long term cleaning contract) this will take the form of random checks on quality of performance;*
- *Establishing arrangements to facilitate the making of complaints by staff who are expected to benefit from the contract;*
- *Ensuring that complaints are investigated promptly and that the result of the appropriate action taken is fed back to the person making the complaint.*

- *examining work at regular intervals during the contract;*
- *Periodic surveys of users' satisfaction with the service.*

### Contracts for Goods

- *Monitoring delivery arrangements;*
- *Assessing the quality of goods through their use; and*
- *Recording faults and discrepancies.*

### **Contract Control**

7.7 The emphasis should be on trying to prevent problems arising with contracts in the first place. Waiting for problems to occur and then acting is not good practice. It is important, therefore, to:

- *establish a good working relationship with the contractor;*
- *work with the contractor to overcome problems and weaknesses and to resolve technical issues, so that they can provide a better service;*
- *ensure that there is a clear definition of the contractual responsibilities of both parties;*
- *ensure that there are specific and measurable milestones for improved performance as part of the contract.*

### **7.8 UNSATISFACTORY PERFORMANCE**

When performance does fall short of requirements, how you handle the situation will depend upon the seriousness of the failures. If regular meetings are held with the contractor, points of concern can be raised informally before the situation has deteriorated too far. You should always record on file details of such meetings. Serious complaints should always be made or followed up in writing.

7.9 If a contractor is failing or has failed to perform in accordance with the contract, you will need to identify the options available under the contract. In most cases you should inform the contractor in writing and, where possible, give a specific period within which to recover the failure and improve the service.

7.10 Where ever possible, unsatisfactory performance should be remedied through negotiation with the contractor. Termination of the contract is the ultimate sanction and not a decision to be taken lightly. It may be as much a reflection of the quality of the contract management as it is of the contractor. Before terminating you should give careful consideration to the circumstances leading up to the decision and you must carry out a full evaluation of the possible consequences, including whether:

- *there is an alternative supplier able to meet the requirement;*
- *the contractor can sue for damages;*
- *you can withhold payment from the contractor;*

### 7.11 CONTRACT EXTENSIONS

Contract extensions should only be considered in exceptional cases. It may be required:

- *if more time is needed to complete the contract involving no additional cost; or*
- *when additional work or goods are required which exceed the original requirement of the contract.*

7.12 In the second case you will need to ensure that fresh financial and contractual approval is obtained before the completion date of the existing contract.

### 7.13 PRICE CHANGES

It is a principle of University contracting that **firm price** contracts should be let wherever possible. Firm prices are those not subject to any provision for variation. In contracts a price which is subject to variation is known as a **Variation of Price (VOP) contract**. University policy is not to use VOP conditions in a contract with duration of two years or less. Formulae for varying prices and review dates will need to be agreed with the contractor and recorded in the contract.

### 7.14 RECORDS

You should maintain written records of a contractor's performance throughout the term of the contract. It is important that any deficiencies are recorded on file with the date and the name of the person to whom any complaints were made.

7.15 You should take full minutes of any meeting with the contractor. Telephone conversations should also be minuted. Such records will be particularly important if you need to take formal action under the contract.

7.16 A comprehensive account of the performance of the contractor is particularly valuable if you are considering re-tendering the contract.

### **7.17 ASSESSING CONTRACTOR PERFORMANCE - POST CONTRACT**

Taking steps to formally appraise how a contractor performs a contract is an essential aid to measuring performance. It provides:

- *a means of assessing whether a contractor should be used again; and*
- *evidence of poor performance which can be used to challenge a contractor who is not meeting the contract.*

7.18 Appraising contractors should be a straightforward process. With certain contracts a simple chart based on the main performance aspects of the contract can be used to track progress over time. Alternatively a brief report, highlighting the strengths and weaknesses of a contractor would provide a useful future reference. Copies of appraisals of external consultants should be sent to Procurement Services. Procurement Services would also welcome copies of appraisals of other contractors and would be happy to make information from relevant appraisals available to purchasers.

### **7.19 SUMMARY**

Procurement does not end with the signing of the contract. There is a need to ensure that the contractor delivers all that the contract requires. It may be difficult to formalise appropriate contract management procedures for some contracts, but investing time to do so could pay dividends later. Contract management should not be seen as an afterthought once the contract is awarded, but as an integral part of the specification. This approach will provide a mechanism for tracking progress and make sure that the result is commensurate with the aims of the contract.

#### **Appendix I Glossary of Terms**

**Acceptance** *The act required of the buyer in accepting a supplier's offer that establishes the terms of the contract establishes the terms of the contract between the parties.*

**Call-off arrangement/Framework Agreement** *An arrangement for the supply of goods or services at stated prices for a specified period under which orders are placed for varying quantities.*

**Capital Project** *Expenditure on fixed assets including construction, land, extensions and alterations to existing buildings, and vehicles - having an expected working life of more than a year.*

**Capital Asset** *An asset with an expected life of more than one year, held for use in an organisation, and has a purchase price of over £1000.*

**Competition** *Awarding contracts by giving a number of suppliers the opportunity to offer to provide specific goods or services.*

**Contract** *A binding agreement made between two or more parties which is enforceable at law.*

**Contractor** *A term commonly used to designate a private sector supplier.*

**Debriefing** *The process of explaining to a company why they were not invited to tender or why their tender failed.*

**EU Procurement Directives** *Legally binding regulations governing public sector procurement.*

**Firm Price** *A price which applies for the duration of the contract and which is not subject to any provisions for variations.*

**Fixed Price** *A price which applies for the duration of the contract but which may be varied by the agreement of both parties (eg to take account of inflation).*

**Invitation To Tender** *An invitation to suppliers to offer to supply goods and/or services.*

**Invoice** *A request for payment submitted by a supplier.*

**Offer** *A supplier's description of the goods or services they can provide and the terms (including price) on which they are prepared to provide them.*

**Post Tender Negotiation** *Discussions with a supplier(s) after their tenders have been received, with the aim of achieving value for money improvements.*

**Private Finance Initiative** *An effective means of harnessing the financial and project management skills of the private sector in the delivery of capital projects and associated public services.*

**Pre-Qualification** *A process of establishing whether a supplier is capable, in key respects, of providing the goods or services required satisfactorily (i.e. has a reasonable chance of winning the contract); a short-list is produced of qualifying contractors.*

**Quality** *Those characteristics of an item which it able to perform its specified function.*

**Quotation** *Another term for the "offer" from a supplier in response to an enquiry or invitation to tender.*

**Single Tender/Source** *Inviting only **one** supplier to tender for the provisions of goods or services.*

**Specification** *The formal description in objective and measurable terms of the characteristics of the goods or services required.*

**Supplier** *A public or private sector organisation which provides the goods and/or services.*

**Tender** See 'Offer'

**Tender Evaluation Board** *The people who analyse tenders and take final decisions on the award of contracts.*

**Terms and Conditions** *Statements defining the terms of a contract governing the performance of the contract and providing a legally enforceable framework within which the supplier and customer can work.*

**Value For Money** *The provision of the right goods or services from the right supplier, of the right quality, at the right time, delivered to the right place and at the right price, judged on the basis of a financial evaluation taking account of whole life cost and quality.*