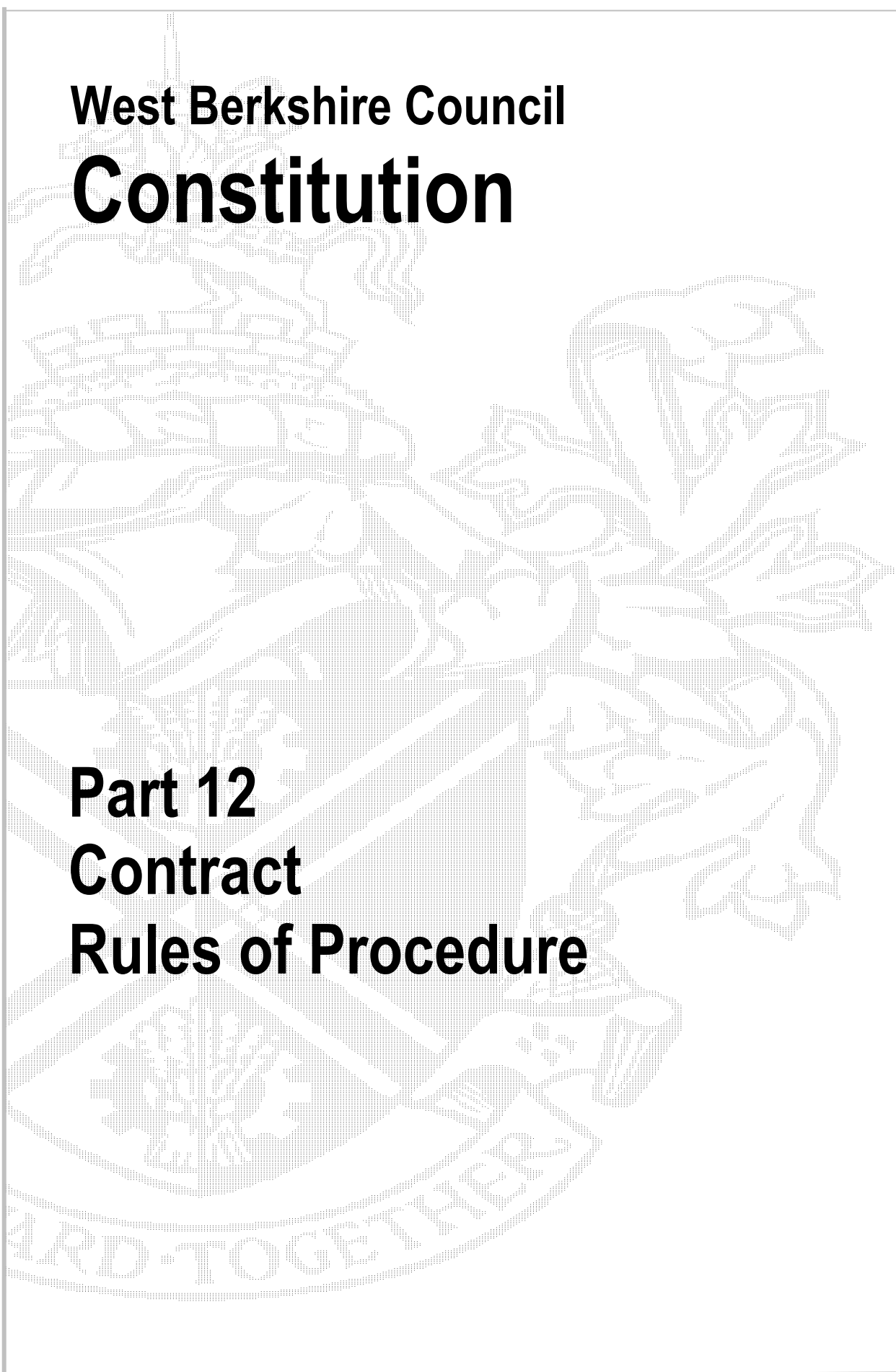


West Berkshire Council Constitution

Part 12 Contract Rules of Procedure



Contents

To be reviewed and added once the document is complete.

12.1 Introduction

12.1.1 Application of Rules of Procedure

Subject to any specific provisions to the contrary, these Rules apply in every case where the Council enters into an agreement with another person for the supply of goods, materials or services to, or the execution of work for, the Council. These regulations apply equally to tenders and quotations.

12.1.2 Section 135 of the Local Government Act 1972

These Contract Rules of Procedure are made under the provisions of Section 135 of the Local Government Act 1972 and govern the making of contracts for and on behalf of the Council. They include provision for competition, and regulate the manner in which tenders are invited.

12.1.3 Statutes

The statutes and statutory instruments that currently affect these Regulations are as follows:

- Local Government Act 1972
- Local Government Act 1988
- Education Reform Act 1988
- Local Government and Housing Act 1989
- Environmental Protection Act 1990
- Local Government Act 1992
- The Local Government Act 1999
 - The Public Contracts Regulations 2006
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12.1.4 Amendments

Any amendments to the above or new legislation will be deemed to be included in these Rules without the need for a specific reference here.

12.1.5 Purpose of Rules

These Contract Rules of Procedure apply to all Officers, and Teachers involved in the letting of orders or contracts for works, services and supplies for the Council, whether funded from Revenue or Capital Sources. They provide a basis for true and fair competition by providing a transparent and auditable procedure, which, if followed, will give confidence that, a fully accountable and unimpeachable contract regime exists within the Council.

These Contract Rules of Procedure have been designed to reduce the volume of work and the need to report to the Executive on contract matters. However, this only works if Members and the District Auditor can be confident that firm procedures and controls exist for the invitation, evaluation, acceptance, managing and monitoring of contracts throughout the Council.

12.1.6 Protection of the Council's Legal Position

These Contract Rules of Procedure protect the legal position of the Council in respect of compliance with EU and UK law and in its contractual dealings with external suppliers and

contractors. They protect the interests of Members, Officers and the Citizens of West Berkshire. The Head of Legal and Electoral Services shall have ultimate responsibility for ruling on and interpreting these Contract Rules of Procedure.

12.1.7 Seeking Advice

Officers who may be letting a contract must seek appropriate advice at the earliest possible opportunity. The Head of Resources and Commissioning or nominated Officer shall make arrangements for the provision of this advice. The Head of Legal and Electoral Services, Head of Resources and Commissioning or nominated Officer, the Head of Assurance and Resources & Commissioning staff (formerly known as the Contracts & Procurement Unit) can also advise on contract matters.

12.1.8 The Council

In these Contract Rules of Procedure the expression "the Council" shall be deemed to include reference to the Executive, Overview and Scrutiny Commission, Policy Development Commission, Regulatory Committees or Area Forums or any person or persons acting in accordance with delegated authority on behalf of the Council. The expression "the appropriate Committee" shall mean the Executive, Overview and Scrutiny Commission, Policy Development Commission, Regulatory Committees or Area Forums responsible for the contract concerned.

12.1.9 Sustainable Sources

Goods or services which are known to be, or where there is strong evidence to believe they could be, harmful to the environment and where there are other adequate options, will not be used. Wherever practical only materials from sustainable sources will be used.

12.1.10 Monitoring Officer

The Council has designated that the Head of Legal & Electoral Services be the Monitoring Officer.

12.1.11 Large Contracts

Where the Council is considering embarking upon a contract of substantial size, and is to do so by way of negotiation (whether by way of competitive tender or subsequent to tendering), it shall be the duty of the responsible Head of Service to ensure that such negotiations are authorised by law and by these Contract Rules of Procedure and are from the outset conducted by a team of Officers possessing the professional skills appropriate to the proposed transaction.

12.1.12 Preparation of Contracts

The Head of Service letting the Contract shall ensure that the appropriate technical specification is prepared, this should clearly set out the works, services and supplies which are required by the Council and the manner in which they are to be provided.

The Head of Service must obtain and make full use of all the necessary professional and technical resources to ensure accurate and comprehensive documents are prepared.

12.1.13 Provision of Appropriate Expenditure

A tender must not be invited unless appropriate provision for the expenditure has been included in the Council's approved capital or revenue budget for the year in which the expenditure is to be incurred (or in budgets approved in draft for the next financial year by the Executive where the expenditure is to be incurred in that year) or unless the alternative financial provision is made by the

Council under Financial Regulations. The budget must cover all preliminary and ancillary costs (which should include annual maintenance costs) and should be in the Budget and Policy Framework approved by Council and should be contained in the appropriate Forward Plan.

12.1.14 Failure to Comply with Rules

Failure to comply with these Contract Rules of Procedure by Officers will be viewed by the Council as a breach of the Officers Code of Conduct contained in Part 14 (Codes and Protocols) of this Constitution and may be considered a disciplinary matter.

12.1.15 Transfer of Undertakings (Protection of Employment) Regulations (TUPE)

All Heads of Service should consult with the Head of Legal and Electoral Services, the and the Service Head Human Resources and the Head of Resources and Commissioning or nominated Officer before any contract is entered into which affects the employment of the Council's staff or the potential transfer of staff to the Council. Statutory periods of consultation (which must be complied with) apply to **all** contracts affected by TUPE.

12.1.16 Claim Arising from a Contract

Any claim arising from a contract, that is not clearly within the terms of the contract, must be referred to the Head of Legal and Electoral Services for consideration of the Council's legal liability and to the Head of Resources and Commissioning or nominated Officer for financial consideration before any settlement is reached. It is also a reportable event within the scope of the Financial Rules of Procedure and must be reported accordingly. "Claim" here does not mean a variation to the contract that is within budget.

12.1.17 Potential for Loss

Financial values are irrelevant when considering potential loss to the Council. Heads of Service need to look at potential for loss. The maximum foreseeable loss must be established by a Risk Assessment and an Indemnity must be sought for that (subject to a £5 million indemnity being the minimum acceptable).

12.1.18 Project Appraisal

A full project appraisal is required for contracts above £100,000 in value Form F018 explains how to complete a full project appraisal and what is expected and is available from Resources & Commissioning.

12.2 Compliance with the Constitution

12.2.1 Compliance with Rules

These rules consolidate all matters relating to contracts. Every order or contract made on or on behalf of the Council by an Officer of the Council, relating to either income or expenditure, must comply with these Contract Rules of Procedure.

12.2.2 Legislation

The Rules of Procedure shall be subject to Directive 2004/18/EC and any other procedures, which may apply by reason of the United Kingdom's membership of the European Union (EU). The extensive provisions of EU and UK legislation, especially the EU Public Procurement Directive, the Local Government Planning and Land Act 1980, the Local Government Act 1988 and associated Regulations, the Local Government Act 1999 and other relevant legislation e.g. Transfer of

Undertakings and Protection of Employment Regulations (TUPE) apply to many of the contracts placed by the Council and must be complied with. EU and UK legislation will always override the provisions of these rules.

12.2.3 Formal Exemption

The Council can formally exempt itself from any of these rules (Rule 12.8 (Exceptions to Contract Rules of Procedure refers). However, it may not exempt itself from statutory requirements (for example the Public Procurement Regulations referred to in [Rule 12.1.3](#) (Statutes)).

12.2.4 Non-Disaggregation of Contracts

Contracts must not be dis-aggregated in order to avoid these Contract Rules of Procedure or EU Directives. The contract value shall be the total cost of the supply, service or work to be procured over the contract term. If a contract has never been in place, then the aggregate value shall be calculated as the total estimated spend over a period of three years.

12.2.5 Maintenance of Records

Adequate records must be maintained by all staff, consultants and agents to demonstrate that the provisions of these Contract Rules of Procedure and legislation have been complied with.

12.3 European Procurement Law

12.3.1 Seeking Advice

Advice must always be taken from Resources & Commissioning in respect of:

- applicability of the regulations to tendering;
- producing and advertising EU tender notices for publication in OJEU (“the European Journal”);
- preparing tender documents;
- award criteria for tender selection;
- evaluation process and debriefing.

Advice from the Head of Legal and Electoral Services or Head of Resources and Commissioning may also be sought with regard to any of the above for which advice is not readily available. .

12.3.2 Public Procurement Regulations

The procedures for the award of public works, public supply and public services contracts have been incorporated into The Public Contracts Regulations 2006 and cover the following categories of procurement:

- Public Supply Contracts
The procurement of goods by purchase, lease, hire, or rental.
- Public Works Contracts
Contracts for the execution of works relating to building or civil engineering activities.

- **Public Service Contracts**

All contracts, which are not covered by the Public Supply, or Public Works Contracts or which are pure Service Contracts. Services under this regulation are classed as either Part A or Part B. The regulations apply in their entirety to Part A services, and only in part to Part B services. If a contract is for both supplies and for services it will be a Supply Contract if the value of supplies is greater than that for services, and a Service Contract if the consideration for the services is greater than the value of the supplies.

The categories have different threshold values above which the regulations apply. These thresholds are re-valued every two years and published in the Official Journal. The current value can be obtained from the Contracts and Procurement Unit or from the OGC website at www.ogc.gov.uk. The threshold values for 2005 were £153,376 for supplies and services and £3,834,411 for works contracts.

[Note: In relation to changes in European Thresholds on Procurement, the Head of Resources and Commissioning will notify Members of changes by means of an article in the Members Bulletin. Officers will receive communications via a briefing a note, an item in Reporter and the intranet]

12.3.3 Public Procurement Regulations - Process

If the Public Contracts Regulations 2006 (set out in Rule 12.3.2 above) apply because the monetary contract exceeds the above-mentioned limits the Authority must “call for competition” in the European Journal. No advert may be placed in any UK trade journal or newspaper prior to the despatch of the advert to be placed in the European Journal (which will be placed electronically by Resources & Commissioning). All public notices and advertisements issued by the Council in respect of procurement shall be approved by Resources & Commissioning who will maintain a register of all advertisements placed. Furthermore the advertisement to be placed in any UK trade magazine or journal may not contain more detail than the advertisement in the European Journal.

12.3.4 Process Requirements

- (a) Estimates of contract value are net of VAT.
- (b) Aggregation rules apply so that a series of contracts for works of a similar character or services of the same type should be aggregated across the whole Council. If the value of a contract is unknown, the regulations have specific criteria for calculating the value which requires an assessment of either the aggregate value that the Council expects to pay if the term of the contract is less than 48 months or if the term is more than 48 months or over an indefinite period the estimated monthly figure must be multiplied by 48 (please contact Head of Resources and Commissioning or nominated Officer for advice).
- (c) Although there are a number of procedures available under the EU procurement regulations, in all circumstances the Restricted Procedure shall be used unless approval is obtained from the Head of Resources and Commissioning or nominated Officer and/or the Head of Legal and Electoral Services. The Restricted Procedure is effectively “selective” tendering as prospective tenderers who express an interest in tendering are “screened” before being invited to tender. The restricted procedure requires not less than five tenderers be invited to tender (subject to exceptions where the market is too small because of the specialised nature of the work).
- (d) The regulations cover the financial, technical, and economic qualifications, which should be taken into account in selecting those tenderers who will be invited to tender. Officers must be

very careful not to impose conditions, which could be considered anti-competitive, and that a European tenderer could not satisfy, for example, a condition that the tenderer must have a local office or prior inclusion on the Approved Supplier Database.

- (e) Officers are reminded that in tender documentation, wherever appropriate a contract shall require a minimum standard compliance with British Standard Specification or British Standard Code of Practice issued by the British Standards Institution or Public Authority Standard. The European equivalent standard must also be quoted and if there is no equivalent European standard then the words must be added “or other equivalent European standard will be accepted” or International standard recognised in another Member State. All contracts, so far as is practicable, shall require that goods and materials used in their execution shall have been produced in the UK, the British Commonwealth or the European Community or any other Country having reciprocal trading agreements with the European Community. The Council cannot reject an offer from a contractor on the basis that materials, goods or services offered do not comply with any standards set out in the tender documents if the contractor can prove to the Council that what they are proposing will satisfy the requirements of the technical specification in an equivalent manner.
- (f) The practice of nominating suppliers, sub-contractors or consultants in technical specifications must be justified by the subject of the contract and accompanied by the words “or equivalent”. Approval for the use of this method must first be sought from the Head of Resources and Commissioning or nominated officer and the Head of Legal and Electoral Services.
- (g) The award criteria will be “the most economically advantageous tender” The criteria must be set and sent out with the contract documentation together with the weighting of the criteria that will be used. Where weightings cannot be provided, the award criteria must be provided in descending order of importance.
- (h) It is essential that Officers allow sufficient time for replies and vetting of tenders and evaluation of tenders. The procurement regulations provide minimum time periods which will also need to be built into the procurement programme. Timescales for the Restricted Procedure are the time between:
 - (i) the advert in the European Journal and the return of expressions of interest (37 days); and
 - (ii) the sending out of the invitation to tender and its return (40 days).

These timescales can be reduced if a PIN (Periodic Indicative Notice) has been issued (see 12.3.6), the OJEU is sent electronically, or the tender documents are available electronically. Different timescales apply to different procedures. The Contracts and Procurement Unit must be consulted if you wish to use alternative procedures.

- (i) When expressions of interest are returned the Officers involved in the tendering exercise will have to leave sufficient time to analyse replies with regard to financial requirements and other technical and economic qualifications for selection. It is also important to ensure that the Officers who need to be involved in analysing the tenders are made aware of the timetable for the letting of the contract as early in the process as possible.
- (j) Where a contract that has been advertised is then let, the Head of Service concerned must ensure that a “Contract Award Notice” is sent to the European Journal within 48 days of the date of award of the contract. Resources & Commissioning will send them electronically on

behalf of services where they are requested to do so. A copy of the advertisement must be forwarded to the Head of Resources and Commissioning or nominated Officer. Officers must follow the Contract Award Procedure issued by the Head of Resources and Commissioning and the Head of Legal and Electoral Services. This procedure is available from the Contracts and Procurement Unit and includes a 10 day cooling off period between the time a decision is made on the winning tenderer and the award of contract. Unsuccessful tenderers must be notified of the tender results prior to contract award and given the opportunity for a debrief and to object to the Council's decision prior to the award of contract. (see note on the Alcatel judgement at Appendix A)

(i)

12.3.5 The Procurement Regulations provide for the following procurement techniques:

- Electronic Auctions – a repetitive process involving an electronic device for the presentation of new prices once tenders have been evaluated
- Dynamic Purchasing Systems – an electronic framework agreement where indicative bids to enter into the framework can be made at any time and each call off is subject to a competitive tender.
- Framework agreements – establish terms and conditions that will apply to subsequent contracts (call-offs) without creating rights and obligations.

Resources and Commissioning will determine the use of these techniques in any procurement process. In all circumstances the Restricted Procedure shall be used unless approval is obtained from the Head of Resources and Commissioning or nominated Officer and/or the Head of Legal and Electoral Services.

12.3.6 Periodic Indicative Notice (PIN)

At the commencement of each financial year, Heads of Service are required to examine projected major expenditure for all goods and services in the coming year and in respect of any project exceeding the EU thresholds as per Rules 12.3.2. They must inform the Head of Resources and Commissioning or nominated Officer by the end of March. The Head of Resources and Commissioning or nominated Officer will then ensure that a "Periodic Indicative Notice (PIN)" is published in the European Journal for all relevant categories. All projected major expenditure should be contained in the Council's Forward Plan. Publishing a PIN reduces the time-scale for return of tenders from 40 to 26 days, providing that the PIN has been issued for a min 52 days (max 12 months) prior to Contract Notice being published.

12.4 Prevention of Corruption

12.4.1 General

The public is entitled to demand of Local Government Officers conduct of the highest standard. Public confidence in their integrity would be undermined were the least suspicion, however ill founded, to arise that they could in any way be influenced by improper motives.

12.4.2 Member or Officer Interests

Where a Member or Officer of the Council has a personal or prejudicial interest, financial or otherwise in a contract or proposed contract, and is also involved in the process of letting or managing of that contract, this interest must be registered with the Monitoring Officer. In the case

of a Member the interest must also be declared at the meeting of any committee or sub - committee at which the Member is present and at which the contract or proposed contract is discussed. If the interest is prejudicial the Member should leave the meeting and take no part in any discussions or seek to influence any decision.

In the case of ownership of shares Members should seek advice from the Head of Legal and Electoral Services as to the current level of share ownership accepted by the Standards Board as being de minimus for the purposes of declarations of interest.

12.4.3 Statutory Provisions

The following statutory provisions govern contracts and other matters:

- The obligations of elected Members to disclose interests in contracts and other matters and to refrain from speaking or voting thereon which are prescribed by Sections 94 to 98 and 105 of the Local Government Act 1972 and Section 19 of the Local Government and Housing Act 1989.
- The duty of Officers to disclose interests in contracts as required by Section 117 of the Local Government Act 1972.
- Section 117 also requires that “an Officer shall not, under cover of her/his office or employment, accept any fee or reward whatsoever other than her/his proper remuneration”
- An Officer who contravenes the provisions of Section 117 shall be liable on summary conviction to a fine and additionally will be the subject of disciplinary proceedings by the Council.
- The duty of members and officers to adhere to the Codes of Conduct contained in [Part 14](#) (Codes and Protocols) of this Constitution.