

## FINANCIAL REGULATIONS SECTION 16 (PROCUREMENT ARRANGEMENTS) REVIEW, 2017 EXPLANATORY DOCUMENT

### Introduction

The purpose of this document is to set out the detail of the case for proposed changes and assess the impact of each change to Financial Regulations (FRs) Section 16 (Procurement Arrangements) proposed in the 2017 Review.

None of these proposed changes are fundamental. Given the reviews of procurement going on at this time at both Angus and Tayside level, it would not be the right time to do so. In any event, the FRs have been reviewed by the Head of Corporate Finance on a risk basis and have been found to be compliant with relevant legislation / good procurement practice with only minor changes required.

Nonetheless, it is also in line with good practice to keep FRs under regular review and to identify and make minor improvements as and when they are required, hence the proposed changes explained in this document.

### An Overview of Procurement Governance and Financial Regulations

The following offers a quick overview of Angus Council's procurement arrangements and the relationship to Financial Regulations to assist understanding of why changes are being proposed:

- The Council operates a devolved procurement model where authority and responsibility is delegated to chief officers within their Services
- The Council's annual procurement spend is around £115m (capital and revenue). It is made up as follows:

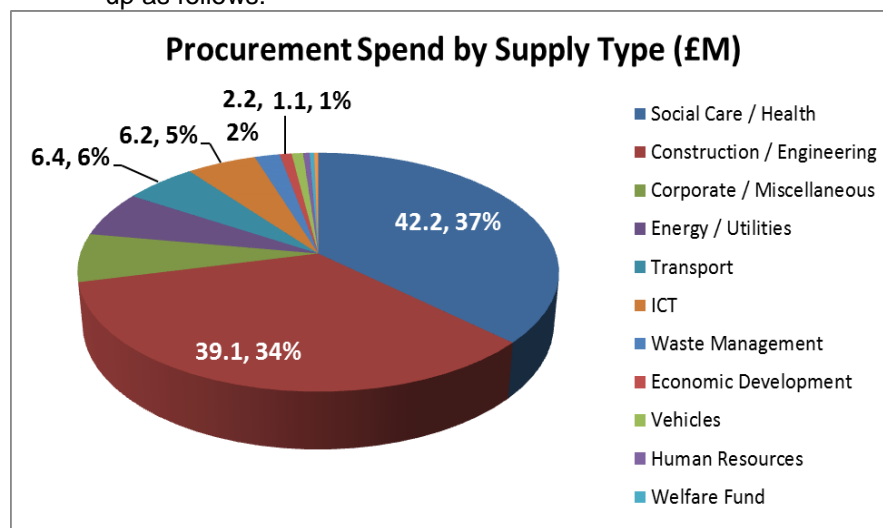


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Supply Type	Spend (£M)	%
Social Care / Health	42.2	37.0%
Construction / Engineering	39.1	34.2%
Corporate / Miscellaneous	7.5	6.5%
Energy / Utilities	7.1	6.2%
Transport	6.4	5.6%
ICT	6.2	5.4%
Waste Management	2.2	2.0%

Economic Development	1.1	0.9%
Vehicles	1.0	0.9%
Human Resources	0.6	0.5%
Welfare Fund	0.4	0.4%
Furniture & Fittings	0.4	0.3%
<b>TOTALS</b>	<b>114.2</b>	<b>100.0%</b>

- Financial Regulations Section 16 are the Council's published standing orders for its contract arrangements (as required by section 81 of the Local Government (Scotland) Act 1973) and they set out (a) the governance framework for Council procurement and (b) the formal delegation arrangements to chief officers referred to above and detailed below.
- The governance model for Angus Council procurement is that elected members set the council's procurement strategy which chief officers must follow in carrying out authorised procurement. The strategy is reviewed and reporting is made on performance against it annually. This is to be reported as soon as practicable after the end of the financial year being reported on (in practice, the target is before the summer recess).
- Committee Reports seeking procurement authority are intended to be limited to relatively major or controversial proposals. Otherwise, procurement of the supplies, services and works required to support the Council delivering public services is delegated to officers, subject always to prior budget approval.
- Procurement authority reports (both Committee and delegated) are presented before tenders are invited / quotations are sought so that compliance with strategy can be scrutinised and assured.
- The basic principle underpinning FRs Section 16 is that open and fair competition should be applied to Council procurement to assure the achievement of value for money in spending public funds. Exceptionally, exemptions may be allowed but value for money must still be assured. FRs Section 16 requires the nomination of an "Exemptions Co-ordinator" to ensure that exemption rules are being applied correctly. That role is held by the Corporate Procurement Manager.

## Proposed Changes to Financial Regulations

### 1. Increase of Angus Council Delegation Thresholds

**Summary – It is proposed to increase the levels of delegation to chief officers to authorise procurement without reporting to Committee (but fully subject still to budget approval) in the interests of greater efficiency and best use of officer time.**

**The changes would be:-**

- "de minimis" (very small, one-off requirements – minimum bureaucracy): increased from £1,000 to £5,000**
- Social care / health services – new – chief officer can authorise procurement up to £300,000 (about 50% of the EU threshold)**
- Construction – chief officer's authority is increased from £500,000 to £2,000,000 (about 50% of the EU threshold)**
- It is also proposed to raise the contract value threshold where a performance bond is required from £750,000 to £2,000,000**
- Exemption – chief officers remains at £50,000 but exemptions co-ordinators had a "sliding scale" – goods and services £100,000, social care / health £200,000, construction - £300,000 – reflecting typical contract values in these areas.**

Angus Council's delegated procurement authority thresholds are set out in Appendix 1 to FRs. In summary, they are currently:

Table follows with 3 columns and 4 rows including the header

	<b>Chief Officer Delegation</b>	<b>Exemption Co-ordinator (Corporate Procurement Manager) Delegation</b>
<b>Goods / Services</b>	£50,000	n/a
<b>Construction Works</b>	£500,000	n/a

<b>Exemptions</b>	£50,000	£100,000
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There is a further threshold called “de minimis”, literally too minor to merit governance / a bureaucratic process. This is currently set at £1,000. Quotation process (minimum 3 quotes) isn’t required for such small spend but officers are still required to ensure that they can demonstrate achievement of value for money and to follow the ethical practices required of them in the Employee Code of Conduct.

Since these thresholds were set, new Scottish procurement legislation (the Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016) has been enacted to apply new arrangements to a new category of procurement called “regulated procurement”. These new arrangements apply from low value thresholds up to “EU regulated procurements” higher thresholds values. The EU rules and thresholds have also been reviewed (the Public Contracts (Scotland) Regulations 2015) with a new EU threshold for social care (and health) contracting, below which a “light touch” (and service user-centred) regime is applied. There have also been changes to the way the Council works with a greater emphasis on “leaner” processes with fewer people.

The net effect is there is a need to review the Council’s thresholds to:

- Encourage efficient and effective working
- Harmonise better with the regulated / EU regulated thresholds
- Ensure at the same that appropriate elected member scrutiny is maintained.

If approved, the new thresholds, including the legal ones for regulated and EU regulated for completeness, would be:

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	<b>De Minimis Threshold</b>	<b>Chief Officer Delegated Threshold</b>	<b>Chief Officer Exemption Threshold</b>	<b>Exemption Coordinator Delegated Threshold</b>	<b>Regulated Threshold (note 1)</b>	<b>EU Regulated Threshold (note 2)</b>
<b>Goods &amp; (General) Services</b>	£5,000	Up to £50,000	£50,000	£100,000	£50,000	£164,176
<b>Social Care / Health Services</b>	£5,000	£300,000	£50,000	£200,000	£50,000	£589,148
<b>Construction (incl. engineering)</b>	£5,000	£2,000,000	£50,000	£300,000	£2,000,000	£4,104.394
<b>Notes</b>						
1. The thresholds for “regulated procurements” are set by law (Procurement Reform (Scotland) Act 2014)						
2. The EU thresholds are those as currently set with effect from 1 <sup>st</sup> January 2016. They are set by law and updated every 2 years to take account of the movement in value between the £ and the €.						

The rationale and impact assessment for each of these changes is as follows:

#### **Increase de minimis from £1,000 to £5,000**

Feedback has been received from Services consistently over some time now that the de minimis threshold of £1,000 has become too low and that undue burden on staff time is being caused e.g. seeking full quotations for a one-off transaction worth only £2,000 is disproportionate effort to ensure the achievement of value for money and the application of equal treatment and transparency standards.

The following analysis was carried out on 2014/15, 2015/16 and 2016/17 transactions by value and volume:

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<b>Invoice Range</b>	<b>Average Volume</b>	<b>% of Invoices</b>	<b>Total Value (£M)</b>	<b>% of Spend</b>
More than £5,000	3,081	4%	88.7	78%
£1,001 to £5,000	6,319	8%	13.9	12%
£0 to £1,000 (incl. credit notes)	74,686	89%	10.6	9%
<b>TOTALS</b>	<b>84,086</b>	<b>100%</b>	<b>113.2</b>	<b>100%</b>

This shows a typical profile for any large business, where about 80% of the spend is generated by only a small percentage of the transactions and the bulk of the transaction volume addresses the remaining 20% of spend (the “tail spend”). This analysis indicates that this change would take 8% of

transactions by volume and 12% by value out of formal competitive arrangements. In reality the effect is much smaller than that. Typically and over the course of some years, Angus Council's spend has been c. 87% addressed under the terms of advertised / competed / negotiated contracts. Transactions under these arrangements are therefore controlled and value-for-money tested. It is only the 13% balance of spend which is not subject to full, formal competitive arrangements.

Accordingly, the real impact of this change would be that only an additional 1.04% of transactions by volume and 1.56% by value would be taken out of formal competitive arrangements.

The change is appropriate to keep very low value transaction costs to a minimum and achieve value for money overall.

***Social care / health services – delegation up to £300,000 (formerly £50,000, grouped with general services)***

This proposal is for a new delegation. It reflects and harmonises with the creation of a new EU threshold for social care and specified health services in July 2015. It is proposed that the relevant chief officer can authorise procurement up to £300,000 (about 50% of the EU threshold). It offers greater efficiency and responsiveness to Council officers contracting for social care services which are high spend / cost areas. The combined adults and young persons' annual spend on social care procurement is about £42.2M per annum.

There are sound practical reasons for allowing higher delegations for social care services in that context. For example in the case of a bespoke high cost, high dependency arrangement required for a service user with complex needs. If the delegated threshold is too low and Committee authority is required but an immediate placement is needed, the immediate contract might only be capable of being for an unduly short period pending tie-in with Committee reporting cycles to put in place a more enduring contract. This could cause unnecessary disruption and change of provision for the service user. This new arrangement would allow, for example, quotes to be sought for an interim contract for a reasonable period while a more enduring arrangement is developed.

Scrutiny impact is addressed below alongside construction.

***Construction –delegation increase from £500,000 to £2,000,000***

Like social care services, this new threshold would be about 50% of the EU threshold. It also corresponds with the regulated procurement threshold. The proposed threshold has good internal logic.

Construction works procurement authority reports (PARs) make up the majority of PARs going to Committee. In 2016/17, 8 of the 17 PARs were for construction works and another 4 related to a construction programme. Construction procurement delegation, then, seems to be the area in most need of review.

In terms of Committee scrutiny, analysis of the PARs submitted in 2016/17 indicates as follows:

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No of PARs	17	
No. approved PARs	17	100%
No. of PARs affected by Delegation Changes	4	24%

The 4 reports which would not have been submitted if the new delegations had been in place were all standard and uncontroversial:

Report No 151/16 - Upgrade Curtain Walling – Block A, Arbroath Academy;

Report No 176/16 - Agile Working/Estates Review Programme - Angus House, Forfar and Bruce House, Arbroath Procurement Procedure - Homologation Report;

Report No 78/17 - South Montrose Spine Road – Section 1; and

Report No 80/17 - Appointment of Rating Revaluation Consultants.

The others (which would still be submitted to Committee under the new delegation arrangements if approved) were generally more significant.

Together, this evidence provides a strong indication that the calibration of the proposed new delegated thresholds and the balance of efficiency with due scrutiny is appropriate.

***Construction - raise the performance bond contract value threshold from £750,000 to £2,000,000***

The suggested change to the bond limit contract value threshold takes it to the same regulated procurement threshold value as delegated authority. The current £750,000 figure has been in place for approaching 10 years and even then was recognised as meriting further structural review in the light of experience.

The key principle here is one of proportionality. The Council must balance mitigation of the risk to the public funds in its charge from supplier insolvency on one hand with the negative impacts that excessive risk adversity / transfer will have on both the market and Council costs. These negative impacts are:

- Constraint of access to contract opportunities. This is considered to be a minor issue here. Most contractors with sound credit-worthiness can obtain performance bonds; it is just a matter of paying for it. Indeed if a contractor couldn't secure a performance bond, it's likely that the Council would have concerns anyway about that contractor's financial position.
- Cost to the Council. Although these are not high (approx. £5,000 per £100,000 of bond value or 0.5% of the contract value), they are passed through to the Council as employer and they do mount up. At a rough estimate, the Council has placed about 60 contracts requiring bonds (i.e. above £750,000) in the last 10 years. Assuming an average contract value of £1m, that would be a total "extra" cost of £300,000.
- Efficiency. Putting the bonds in place requires additional work on both Council and contractor staff. This all contributes to the overall contract costs / cost of doing business.

The consequence of this change has been risk-assessed in the above light. The impact is considered to be low. Of those estimated 60 contracts requiring a performance bond in the last 10 years, about 40 (i.e.  $\frac{2}{3}$  or 66.7%) would have still required a bond if the threshold value had been £2m as is proposed.

A key factor in concluding that the impact on no performance bond for that "removed"  $\frac{1}{3}$  is the existence and rigorous application of the Council's payment in arrears policy (30 days' terms). Extra controls are in place so that advance payment require special authorisation (for VAT as well as risk) and it is only even applied to low value, one-off purchases. This means that for construction contracts, stage payment is made in arrears following valuation of the work-in-progress so that, effectively, there is always an element of debt due to the contractor.

Against that low impact, the likelihood of a claim on a bond is low. In the last 10 years, the Council has made only 1 claim on a bond (£150,000) value and that contract was of a value that still would require a performance bond.

The risk-assessed conclusion therefore with due regard to the principle of proportionality is that this change is merited.

### ***Exemption Delegations***

It is proposed that chief officers' delegation remains at £50,000. This is the lower regulated procurement limit and the point at which legal rules (Procurement (Scotland) Regulations 2016) start to apply to Council exemptions. Referring exemption requests to the Exemptions Co-ordinator offers a degree of independent scrutiny and is appropriate risk mitigation.

It is proposed however to change the Exemptions Co-ordinator's current "across the board" delegation limit of "100,000" to a "sliding scale":-

- goods and services - £100,000
- social care / health - £200,000
- construction - £300,000

to reflect typical contract values in these areas and in line with changes proposed to the other delegation thresholds.

It is also proposed to clarify that, for the avoidance of any doubt, if delegated (or Committee reserved) exemption approval is given that no further procurement authority is required.

Exemptions are quite closely managed in Angus Council to ensure that they are exceptional and justified in every case. In 2016/17, only 9 exemption requests were made to the Exemptions Co-ordinator. All of them were justified and approved. Angus Council has a strong culture of procurement compliance and the relaxations proposed are appropriate in that context.

## 2. AHSCP Chief Officer Anomaly

**Summary - The proposed change here is to make the Angus Health and Social Care Partnership's (AHSCP) chief executive a deemed chief officer of Angus Council for the sole purposes of approving "exemption requests" and authorising delegated level procurement. This makes the AHSCP chief executive responsible for authorising the direct award contracts of up to £50,000 in value to specific providers without the publicised competition usually required by FRs and also the delegated social care / health procurements referred to in section 1 above.**

The Angus Health and Social Care Partnership (AHSCP) is a legally separate body from Angus Council. However, the two bodies work together closely. This includes working together on the commissioning of social care services, where the AHSCP is the strategic commissioning body and the Council is the executing body.

From time to time it is appropriate and necessary to directly award contracts for social care services to a specific provider without publicised competition, e.g. for a "spot purchase" outwith the scope of standing contracts to secure interim / short term residential care for a service user with complex needs. Section 16 sets out governance for this by way of "exemptions" authorising departure from the standard "competitive quotation / tender" approach. Chief officers can authorise these for their Service up to a financial limit (currently £50,000 for care services). Those chief officers can also authorise "regular" procurement activity within those delegated limits.

The anomaly is that AHSCP's Chief Executive is best placed to determine such exemption requests but they are not an Angus Council chief officer, given the separation referred to. It was concluded that the pragmatic solution of making AHSCP's Chief Executive a deemed Angus Council chief officer for the specific purpose of social care exemptions was the best one. They are AHSCP's chief executive is best placed to scrutinise these and ensure achievement of the correct balance between value for money assurance and ensuring that the care needs of service users are met.

This change regarding exemptions of itself has nil impact on Council / AHSP business levels. It neither increases nor decreases the amount of cases liable to be reported to Committee and does not diminish scrutiny of these cases. The impact of the change regarding the new delegation level is addressed in section 1 above.

This change is readily addressed by amending the FR 1.11 definition of chief officer. This was already approved by the Head of Corporate Finance to take effect from 28 July 2017 so the Council is asked to retrospectively homologate that decision and backdate its approval of this change to that date.

## 3. Procurement Authority Reports

**Summary – the proposed change here is to update the required content of Procurement Authority Reports (PARs) to require reference to consideration having been given to the "sustainable procurement duty". At the same time, the reporting frequency will be changed from 6 monthly to annual. This will achieve a better fit with the Procurement (Reform) Scotland Act 2014.**

As noted already, Procurement Authority Reports (PARs) are used by chief officers seeking authority to procure from Committee outwith their own delegated authority. PARs are also recommended for chief officers to record the basis on which their procurement staff are undertaking procurement on their behalf. FR 16.8 sets out the framework for PARs content (required for Committee and recommended for chief officers) and stipulates 6 monthly retrospective reporting of contract awards proceeding under delegated authority.

The Procurement (Reform) Scotland Act 2014 imposes a sustainable procurement duty on all public authorities in Scotland undertaking regulated procurement. The sustainable procurement duty (section 8(2) of the 2014 Act) requires that, before the Council buys anything, it must think about how it can do so in a way which improves the social, environmental and economic wellbeing of the Angus area, with a particular focus on reducing inequality. It also requires the Council to consider how its procurement processes can facilitate the involvement of SMEs, third sector bodies and supported business and how public procurement can be used to promote innovation.



The sustainable procurement duty must be considered in all regulated (incl. EU regulated) procurement, i.e. above £50K in value. It should be addressed in PARs. FRs are not in conflict with the 2014 Act as such because they stipulate minimum content (i.e. can be added to, already addressed in guidance to Services) but it is appropriate to include reference to sustainable procurement in PAR minimum content. PAR content also makes passing reference to lowest price evaluation, which is no longer applicable. The 6 monthly reporting frequency should be changed to annual to be consistent with the 2014 Act annual reporting duty.

#### 4. Tender Evaluation

***Summary – an update to FRs is required to move away from lowest price tender evaluation and to encourage more flexibility in the application of price / quality weightings rather than the Council norm of 70/30% price / quality.***

FRs currently refer to the option of awarding a contract on the basis of lowest price evaluation. This is no longer available for EU regulated procurement. The “Most economically advantageous” test must always be applied. It is also recommended good practice for regulated procurement. This is equivalent to value for money as being an appropriate balance between cost or price, quality and sustainability. FRs should reflect this requirement for EU regulated procurement as well as recommending the approach as good practice for regulated procurement.

FRs state that the Angus Council “norm” is to apply a price / quality split of no less than 70% price and no more than 30% quality unless the Corporate Procurement Manager approve a proposal to depart from that “norm”. This seems to act as a barrier against Services seeking to depart from the standard. This doesn’t accord well with the flexibility offered in national guidance / legislation so FR 16.14 should be updated. The change made in the actual FR is to only require Corporate Procurement Manager approval for price / quality split criteria below the 70/30% level. However the accompanying guidance will also be reviewed to ensure improved alignment with national guidance / legislation and re-issued with the new FRs Section 16, explaining the approach sought from Services.

#### 5. Exemption Provisions

***Summary – although the current FRs exemption provisions were designed to align well to the EU legal provisions regarding justifiable exemption from competition, given the effective replication of those legal exemption rules down to £50,000 value by the Scottish procurement legislation, it is appropriate to update the FRs exemption provisions to fully harmonise with the legal framework.***

The “exemption procedure” is set out in FR 16.24. It provides a process for approval of non-competitive action whereby direct award of a contract may be legitimately made without the open competition which FRs normally require. It is important that such a direct award approach is scrutinised closely because it risks not achieving value for money and challenge / complaint by aggrieved suppliers denied the chance to bid. Scrutiny here is technical and must be rigorous. It is best conducted at officer level. The Exemptions Coordinator has this role.

The current grounds are (in summary):

- 1) sole supplier due to intellectual property right, artistic, product rights, technical compatibility;
- 2) urgency in the public interest;
- 3) market-tested within last 3 months and direct award is advantageous;
- 4) temporary contract for max 1 year to allow time for full tendering;
- 5) nil response to tender invitation;
- 6) transport best value case per FR 16.18; and
- 7) Committee catch-all – some other reason not covered above.

The current FRs model is appropriate and meets the following principles:

- segregation of the decision from the Authorised Procurement Officer leading on the procurement;
- a case being made out for the “non-competitive action” on an exceptional basis; and
- provides an objectively justifiable and auditable trail behind the decision not to subject a particular procurement to competition.

However, with the change in the law by the new Scottish procurement legislation, bringing the EU exemptions criteria down to £50,000 value procurement, the FRs exemption criteria need to completely align to non-competitive action / exemption criteria for both EU regulated and regulated procurement. The specific risk areas are with current FRs exemption criteria 3) (market tested), 4) (temporary contract), 6) (transport best value case) and 7) (committee catch-all) which really have no equivalent in the Scottish legislation. The Exemptions Co-ordinator has ensured until now that no exemptions have been granted which would not accord with the underlying law so the Council has not been exposed to risk. The existing criteria can also remain for less-than £50,000 value exemptions which are unregulated and where the Council has more discretion. Nonetheless, the position should now be clarified.

This does mean that there will be a (slightly) different set of exemption grounds for up to £50,000 compared to £50,000 and above. However, given the 3 options available to the Council (1. Have no grounds at all for below £50,000 requests to guide officers; 2. replicate the very complicated and restrictive £50,000 and above grounds for requests below £50,000 as well; or 3. keep the existing grounds (with necessary changes only) for below £50,000 requests), that option was judged to be the best one.

## 6. Miscellaneous Minor Changes

***Summary – the remainder of the changes are minor and / or technical but are worth addressing to ensure that FRs Section 16 is aligned with current good practice and up-to-date.***

FR 16.2.4 offers a shortened summary overview of FRs. It has however caused confusion in the past – being a summary it omits some detail but some users have not read beyond it and have therefore stated a lack of awareness of the omitted detail. Guidance is better maintained, where necessary, outwith FRs on the procurement intranet site. This is to be comprehensively reviewed and tested by May 2018. This FR is removed for now.

FR 16.9 on Invitations to Tender requires competition for all tenders subject to exemption / emergencies. It requires public advertisement for all tenders above the £50,000 low value threshold. It creates a “soft” mandate for use of the Public Contracts Scotland (PCS) opportunity advertising tool along with other media, if approved. The new Scottish legislation however applies a “hard” legal mandates to use of PCS other than for health & social care contracts below EU value and other specified cases similar (but not identical) to the FRs exemption categories. This is not a serious non-compliance with the new legislation but it is appropriate to update this provision to make FRs accord fully.

FR 16.10 on Selection of Tenderers allows the maintenance of approved lists within FRs’ limits subject to public advertisement, 3 years maximum duration and review every 6 months. Approved lists are still borderline compliant and are still used in Technical and Property Services, although they are being phased out in favour of more recognised contractual vehicles such as Framework Agreements and Dynamic Purchasing Systems. As such, a number of references need updating to refer to new procedures but the approved list provisions are to remain in FRs for now.

The limit on term contracts of 6 years without Committee authority is raised to 10 years as the potentially valuable option of longer duration contracts is more commonly applied in current practice.

FRs 16.11 and 16.12 have been updated to reflect the universal practice of Angus Council to now use the e-Tender mailbox functionality of PCS. Provision has been retained for the use of paper tenders on an exceptional and approved basis given the extra cost and risk that paper tendering carry.

FR 16.16.1 sets out the Council’s required minimum insurance requirements. In line with national policy and the good practice already applied operationally by the Council, flexibility on minimum limits should be written in to the FR to allow removal of barriers to participation and application of proportionate requirements where those full insurances are not required.

The term “Low value Threshold” formerly used through FRs is no longer suitable and is replaced by “Regulated Threshold”, “Chief Officer Delegated Threshold”, etc., as defined in the new Appendix 1 referred to in section 1 above and as the context requires.



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