Lympstone Parish Council Contract Policy

The following policy was adopted and agreed by Lympstone Parish Council on 9th January 2023.

The following policy was reviewed and agreed by Lympstone Parish Council on **3rd March 2026.**

CONTRACT POLICY

1. The Creation of Contracts
   It is generally accepted that there are 4 elements to a valid contract. These are:
   - an intention to create legal relationship;
   - an offer;
   - an acceptance; and
   - consideration.

2. The Intention to Enter into Legal Relations
   The main purpose of this requirement is to distinguish contracts (which are formal in nature) from other arrangements which are not intended by the parties to amount to a contract. Such an arrangement may well include all the other necessary elements of a contract but there would be no intention to enter into legal relations and, hence, no contract would be formed.
   This principle is linked to another – namely that parties to a contract should be “of the same mind”. This means that both parties must agree to the same terms. The importance of this requirement is that it distinguishes it from negotiations and statements showing a general willingness to enter into a contract at a later date.

3. The Offer and the Acceptance
   The first part of a contract consists of an offer. Reduced to its simplest components, a Council will make an offer if, for example, it offers a lease of land (which is a type of contract) to a prospective tenant. A contract is not made at the offer stage, however, and the prospective tenant will need to accept the offer before the contract comes into being.
   Most contracts need not be in writing. In fact, the large majority of contracts are likely to be verbal contracts. The main point to note is that if an offer is made by one party and accepted by another a valid contract is made – assuming that there is consideration. Importantly, the parties will be bound by the contract once made and will not be permitted to withdraw from the agreement made unless the other party consents. If a party fails to comply with the terms of any contract he will be in breach and may be sued by the innocent party.

4. Consideration
   Consideration is the final element of a contract which is defined as "some right, interest profit or benefit accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other." A contract is a “bargain”.

One party usually receives a benefit (e.g. goods or a service) and the other suffers some form of detriment (e.g. payment). Each of the parties must pay a price for that which he receives from the other. This price is referred to as consideration. In most contracts it is usually quite easy to identify the benefit to one of the parties. Most forms of detriment usually take the form of the payment of money but there other forms including forbearance (refraining from enforcing a right) and loss.

The issue of consideration becomes more important where it is absent as a lack of consideration tends to suggest that there is no contract. This issue may be of particular importance to Local Councils insofar as they touch upon the use of volunteers. The fact that individuals are unpaid suggests that there is no contract and certainly no contract of employment. Volunteers are not currently covered by most employment legislation because, in the absence of employment contracts, they do not enjoy the status of employee.

5. Contractual Terms

The essence of a contract is its contractual terms as they dictate precisely what each party's obligations are. The terms are important because if one party breaches them he may be sued. The terms of a contract need not be in writing but valuable or complicated contracts usually are. There are different types of terms determined by how important they are to the whole purpose of the contract. A breach of a term which goes to the root of the contract and renders the contract meaningless may entitle the victim of the breach to sue the other for damages and or to repudiate the contract. Repudiation entitles the victim of the breach to consider the contact ended, to be relieved of their obligations under the contract and free to contract with another party. If there is a breach of a term which is ancillary or secondary to the major purpose of the contract, the injured party may only be able to sue for damages. Local Councils are advised to ensure that all contracts entered into are in writing to minimise the risk of uncertainty and disputes as to the parties' obligations thereunder. It is not always easy to ascertain the nature of a term and the remedy available to the victim of a contractual breach. Where there is a dispute relating to a contract or there has been a breach of term of the contract, Local Councils should first seek legal advice from NALC or an independent source to ascertain the legal remedies which may be available to them

Most large companies (and many Local authorities) produce "standard form contracts." Such contracts are usually drafted by one party only and, consequently, are usually favourable to the parties who created them. This can lead to problems when large organisations are pitted against individuals as large companies can, for example, draft "exclusion clauses" which attempt to limit liability in the event of breach. To counter this situation Parliament enacted two statutes to attempt to redress the balance in favour of consumers.

(i) The Unfair Contracts Terms Act 1977

The 1977 Act states that a number of contractual terms will be automatically unfair and, therefore, void. These include terms which:

purport to exclude liability for personal injury (s.2);

purport to exclude liability for death (s.2);

purport to allow one party to fail to meet his contractual requirements altogether (s.3) and

purport to allow one party to "render a contractual performance substantially different from that which was reasonably expected of him" (s.3).

Importantly, the principle of unfair contract terms has been extended by The Unfair Terms in Consumer Contracts Regulations 1999 (SI.2083). Schedule 2 to the Regulations sets out a “non-exhaustive list of terms which may be regarded as unfair.” and which attempt to make 3 the contract bargain fair. The list contains 17 items the most important of which are terms which:

- inappropriately exclude or limit the legal rights of the consumer;
- authorise the seller or supplier to dissolve the contract on a discretionary basis;
- enable the seller or supplier to terminate a contract of indeterminate duration without reasonable notice;
- enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason;
- oblige the consumer to fulfil all his obligations where the seller or supplier does not perform his; and
- exclude or hinder the consumer’s right to take legal action or exercise any other legal remedy.

(ii) Implied Terms

Another method employed by Parliament to ensure fairness is to ensure that certain basic terms are to be read into (i.e. implied) into consumer contracts or contracts made in the course of a business (which would include the activities of a Local Authority). This is done under a number of pieces of legislation including:
The Sale of Goods Act 1979; and
The Supply of Goods and Services Act 1982.

Many of the provisions are detailed and complex and it is not possible to give a comprehensive guide here but they provide that:

- goods will be fit for the purpose;
- goods will be of merchantable quality; and
- materials used in the provision of services will be of merchantable quality.

The Ultra Vires Doctrine

As with everything Local Councils do, Local Councils must ensure that they have the appropriate power to enter into a contract. If a Local Council enters into a contract without the requisite power the contract will be ultra vires and void.

6. Procurement

S 135 of the Local Government Act 1972 is in the following terms:
“135.
A Local Authority (which includes Parish and Community Councils) may make Standing Orders with respect to the making of contracts by them or on their behalf.
A Local Authority shall make Standing Orders with respect to the making by them or on their behalf of contracts for the supply of goods or materials or for the execution of works.
Standing Orders made by a Local Authority with respect to contracts for the supply of goods or materials or for the execution of works shall include provision for securing competition for such contracts and for regulating the manner in which tenders are invited, but may exempt from any such provision contracts for a price below that specified in Standing Orders and may authorise the Authority to exempt any contract from any such provision when the Authority are satisfied that the exemption is justified by special circumstances."

The effect of section 135, in NALC's view, is as follows:
Local Councils must make Standing Orders in respect of contracts for:

- the supply of goods;
- the supply of materials; and the execution of works

the Standing Orders for the 3 items mentioned above (i.e. goods, materials and works):

- must include provision for securing competition; and
- must regulate the manner in which tenders are invited; and
- may state that the Standing Orders are not to apply to contracts which:
    - are below a specified price; or
    - the Council would be justified in exempting from the normal requirements due to special circumstances (e.g for execution of emergency repair works,).

Local Councils have the power (but not a duty) to make Standing Orders in respect of all contracts they enter into.

On a practical note, Local Councils should ensure contractors proposing to execute works are competent to undertake the work and request, where appropriate, that they have public liability insurance cover.

7. High Value Procurement
   A number of European Directives govern high value procurement matters. The Public Contracts Regulations 2006/5, in force from 31 January 2006, implement the provisions of Directive 2004/18/EC of the European Parliament and Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services written contracts. Article 2 of the regulations confirms a:
   - "public works contract" means a contract, in writing, for consideration (whatever the nature of the consideration)—
   - for the carrying out of a work or works for a contracting Authority; or
   - under which a contracting Authority engages a person to procure by any means the carrying out for the contracting Authority of a work corresponding to specified requirements
   - for the purchase of goods by a contracting Authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or
   - for the hire of goods by a contracting Authority (both where the contracting Authority becomes the owner of the goods after the end of the period of hire and where it does not);

     For any siting or installation of those goods, but where under such a contract services are also to be provided, the contract shall only be a public supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services;
     "service contracts" are defined by reference to schedule 3 of the regulations.

   By virtue of articles 3(2) and (3) of the regulations, Parish and Community Councils are "contracting authorities" and subject to the regulations and will need to comply with

them if any contract they intend to award exceeds the permitted threshold. The thresholds, with effect from the 1st January 2010, are as follows:

Type of Contract	Threshold
Public Works	No less than £5,000,000
Service	£160,000
Public Supply	£160,000

8. Unfair Contract Terms Act 1977
   The aim of the 1977 Act was to regulate two contractual principles which had developed prior to the introduction of the Act. The two principles enabled:
   - contracts to contain clauses which exempted one party from any liability to the other even where the other had been killed or injured by the fault of the first party; and
   - notices to be used to disclaim liability for actions or situations not arising from contract.

   These rules had been used to impose unreasonable contractual conditions on consumers and to avoid liability in cases where any ordinary person would have thought it fair that liability should exist. The Act attempts to redress the balance.

9. Negligence
   Liability By section 2(1) of the Act no one can exclude or restrict their liability for the death or personal injury of another resulting from their negligence. By s.2 (2) liability for negligence in other cases of loss or damage can be excluded or restricted only if it is reasonable so to do. (See below for 'reasonableness').

10. Liability in Contract
    Were the first party is a 'consumer' or where the first party deals on the second party's written standard terms the second party cannot by a term of the contract exclude or restrict his liability for a breach of the contact by him or for failure to perform the contact at all except where the exclusion term is 'reasonable'.
    Pursuant to s.12 (1) of the Act, a party is regarded as a consumer in relation to another party if he does not make the contract in the course of business and the other party does make the contract in the course of business (which includes a profession and the activities of local authorities) and the goods passing under or in pursuance of the contract are of the type ordinarily supplied for private use or consumption.
    If the party inserting the exclusion clause in the contract wants to argue that the party subject to the clause is not a consumer, he must in accordance with s.12 (3) prove it.

    Similarly by reference to s.4, a 'consumer' cannot be made by a contract term to indemnify someone else (whether or not a party to the contract) in respect of that person's liability arising from negligence or breach of contract except where such indemnity is 'reasonable'.

11. Reasonableness
    By s.11 of the Act the test of reasonableness of a contract term is whether it was a fair and reasonable term to be included having regard to the circumstances which were, or ought reasonably to have been known to, or in the contemplation of the contracting parties.

For a notice which does not have a contractual effect the test is whether it is fair and reasonable to allow it to be relied upon having regard to all the circumstances at the time when the liability which is to be restricted or excluded arose.

12. Application to Local Councils

Councils should take out of their standard agreements and notices any references to limiting their liability for causing death or injury by negligence. Phrases such as "liability howsoever caused" are too wide because they exclude liability for negligence as well as other situations.

Councils should look at their standard agreements and notices and consider whether the extent of the exclusion or restriction they are seeking to impose is reasonable. This is necessary because if the whole contractual term is ruled unreasonable by the courts it will not normally then be possible to rely on the "reasonable" part.

It is not possible to give guidance on what is "reasonable" because

i) the concept depends on the circumstances of each case;
ii) there have so far been no useful leading cases on the meaning of the Act.

It is therefore possible only to advise that exclusions for negligently causing death or injury must be taken out of documents and that in all other cases Councils should ask themselves whether the restrictions are reasonable.

13. The Unfair Terms in Consumer Contracts Regulations 1999

In 1999 the Unfair Terms in Consumer Contracts Regulations 1999 (SI.2083) came into force. The regulations strengthen the principles behind the 1977 Act insofar as they set out a number of other terms which will automatically be considered to be unfair. As the name suggests, these Regulations relate to consumer dealings and provides that an unfair term is one which has not been individually negotiated and which contrary to good faith, causes an imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." A consumer is defined as "any natural person who is acting for purposes which are outside his trade, business or profession. A seller and a supplier is defined as " any natural or legal person (e.g a local Council) who sells or supplies goods or services and who in making a contract is acting for the purposes related to his business or profession whether publicly owned or privately owned."

14. Lympstone Parish Council Tender Process for Contracts in excess of £25,000

Financial regulations shall confirm that a proposed contract for the supply of goods, materials, services and the execution of works with an estimated value in excess of £25,000 shall be procured on the basis of a formal tender as summarised in standing order 18(d) below.

Subject to additional requirements in the financial regulations of the Council, the tender process for contracts for the supply of goods, materials, services or the execution of works shall include, as a minimum, the following steps:

a specification for the goods, materials, services or the execution of works shall be drawn up;

- an invitation to tender shall be drawn up to confirm:

(i) the Council's specification
(ii) the time, date and address for the submission of tenders
(iii) the date of the Council's written response to the tender and

(iv) the prohibition on prospective contractors contacting Councillors or staff to encourage or support their tender outside the prescribed process;

- the invitation to tender shall be advertised in a local newspaper and in any other manner that is appropriate;
- tenders are to be submitted in writing in a sealed marked envelope addressed to the Proper Officer;
- tenders shall be opened by the Proper Officer in the presence of at least one Councillor after the deadline for submission of tenders has passed;
- tenders are to be reported to and considered by the appropriate meeting of the Council or a Committee or sub-Committee with delegated responsibility;
- neither the Council, nor a Committee or a sub-Committee with delegated responsibility for considering tenders, is bound to accept the lowest value tender;
- where the value of a contract is likely to exceed £138,893 (or other threshold specified by the Office of Government Commerce from time to time) the Council must consider whether the Public Contracts Regulations 2006 (SI No. 5, as amended) and the Utilities Contracts Regulations 2006 (SI No. 6, as amended) apply to the contract and, if either of those Regulations apply, the Council must comply with EU procurement rules.

15. Contracts with organisations where Children are involved

Extra requirements should be in place in any contract involving provision of facilities, supplies or services to children.

All organisations must provide evidence that all persons involved in the control of such facilities, supplies or services have up to date clearance to work with children and that the organisation has an acceptable policy to check and maintain such clearance

The organisation must have an acceptable policy for dealing with complaints or accusations from any child.

The organisation must be fully insured and provide evidence of that insurance

If the organisation involves 10 or more members it must be either a limited company with acceptable memorandum and articles, a charitable Incorporated organisation with an acceptable constitution or a registered charity with an acceptable constitution.

All workings that have any association or interface with children must be open to inspection at all times.

Lucy Tyrrell, Clerk and RFO to Lympstone Parish Council

Date of next review: **March 2028**