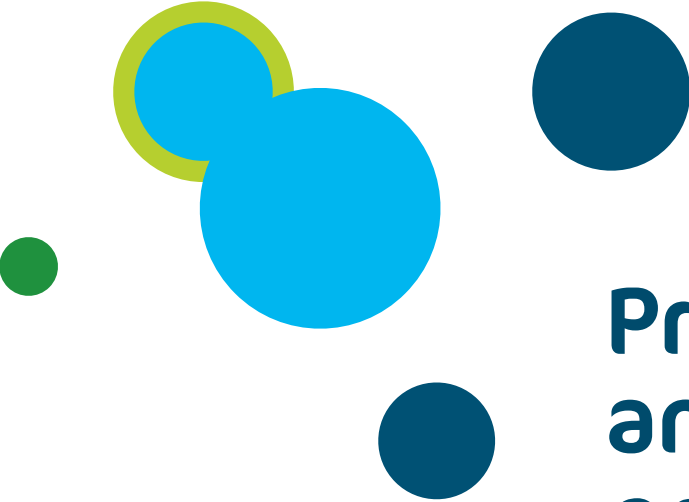




Procurement and tendering: processes and regulation

December 2007

This guide provides a background to the new emphasis by purchasing authorities on tendering for contracts rather than providing grant aid for organisations. This is a new approach for many organisations in the voluntary, care, health and housing sectors, although long established for other types of organisations particularly those providing supplies and capital works for publicly funded authorities.

Procurement and tendering

Commissioning and procurement

Commissioning

- Producing the commissioning plan which will inform the specifications for future contracts, and therefore tenders.
- Making the business case.
- Holding and managing the budget.

Procurement

- Defining the purchasing process and procedure to be used.
- Ensuring the process complies with all relevant legislation.
- Ensuring that accepted tendering organisations:
 - are compliant with relevant corporate legislation
 - are of sound financial standing
 - represent minimal business risk
- Entering into contracts.

Purchasing and procurement

Public purchasing is undertaken in two stages

– commissioning and procurement.

The two functions must be kept separate.

Commissioning identifies the service to be purchased, so the relevant officers often sit within departments with titles such as “Adult Services”.

Procurement is a wholly legal function based on compliance issues, so the officers sit within the purchaser’s legal department with titles such as “the Chief Executive’s Department”.

All tendering, regardless of the precise procedure being used, is operated through a number of phases.

Phase one - selection

This usually involves the submission of a pre-qualification questionnaire (PQQ). It is managed and, more importantly, scored by officers from the procurement section rather than the commissioning department. One local authority used a firm of solicitors to conduct the selection stage. An important lesson to learn from this is that you need to make clear, evidenced statements when completing the first stage documentation, in particular the PQQ.

Do not assume that those making the selection at this stage have any knowledge whatsoever of the service being provided or that they will be commissioning officers

This is crucially important for all organisations engaged in tendering as the selection phase is the entry, or gateway to the full tender award phase. Failure at the selection phase can mean exclusion from the award phase, and thus the ability to sell services to a particular purchasing authority for periods of up to eight years.

Phase two – award

The second or “award” stage deals more with how the service specified is to be delivered, often including a “method statement”. This is usually scored by commissioning officers, although procurement officers will also have an input into the scoring.

Make no assumptions that those reading your documents at either selection or award stage know anything about your organisation, the services which you provide or your quality standards.
EXPLAIN EVERYTHING IN DETAIL - IF YOU DO NOT WRITE IT DOWN AND PROVIDE SUPPORTING EVIDENCE YOU CANNOT SCORE.

Background to public procurement regulation

The purpose of the European Economic Community was to set up a single European, or common, market. This involves the removal of obstacles to the free movement of goods, services, people, and capital between member states of the EU.

An important element is the opening up of public procurement markets.

Contracts to deliver works or supplies were covered by the procurement rules. Since 1993 this also included services. However some services were, until recently, subject to an opt-out. These included health, education and social care and are referred to as “PART B” services. So procurement officers generally have very little experience of purchasing from providers of these services. The majority of their experience to date has been related to the purchase of roads, computers, street lamps, etc. It is these officers who are taking decisions about tender documentation and scoring. More importantly they are responsible for the selection stage, or gateway to the full tender award stage. The regulations have been developed for these areas of purchasing, where providers are almost exclusively commercial companies. More importantly, the scoring which has developed reflects this situation. To bias towards the needs of third sector organisations would have the possibility of excluding companies

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of various kinds. This would be contrary to the level playing field for competition, which is a obligation under European law. Moreover the Public Accounts Select Committee (PASC) has reviewed third sector commissioning.

“Discussions focussed on key issues such as whether the third sector should be given special treatment due to the difference in its status when compared with public authorities and private companies. This was rejected [by third sector representatives] who said all organisations could work alongside each other to share the burden of providing services. ... there are inconsistencies in how the third sector is treated in comparison with private bodies – for example, private firms are more likely to be offered long term contracts and gain full cost recovery.”

Government Opportunities August 2007

Why is regulated procurement being introduced now?

The changes which are being seen by providers in the health, education and social care fields, and indeed all publicly funded providers are a direct result of a new EU Procurement Directive. Signed on 31st March 2004, implemented on 1st February 2006, and entered into English and Welsh law, The Public Contracts Regulations 2006.

The new EU Directive has a number of key features:

- it is a consolidated Directive covering, works, supplies, services and utilities;
- an emphasis on matters affecting the environment;

- an expansion in the use of ICT, and thus the adoption of systems for e-procurement, e-auctions, etc;
- the introduction of a new procurement methodology called Competitive Dialogue;
- a tightening of the regulations regarding the purchasing of previously opted out “Part B” services. The end result of which is that, even though a public purchaser has opted out of the Directive, the systems used for purchasing must, in a number of areas be fully compliant with the Directive.

Alongside the introduction of the new regulations there has been the effect of European case law on purchasing. Decisions made by the European Court of Justice (ECJ) impact on public purchasing in the UK and so this impact is on-going. It is possible to challenge procurement decisions in some circumstances. Indeed the European Commission has recently stated that UK providers of Part B services are showing an increasing willingness to challenge these decisions.

A new Remedies Directive was approved and published in autumn 2007, with an allowance of two years for the UK government to adopt the Directive into law. This addresses a range of issues, including the remedies available to those tendering for contracts where there is an infringement of the Directive which affects the chances of the tenderer to obtain the contract. Under the existing Directives, and supported by ECJ case law, there are options for providers who have been the subject of infringements to sue for damages from the purchasers, regardless of whether or not they were the contractor prior to the procurement process.

Advertising tenders

Regulations for the advertising of tenders are complicated and pose some problems for purchasers: they need an article of their own. To this must be added interpretations and case law from the European Court of Justice. The following table sets out the total value of contracts over which tenders must be formally advertised across Europe as set out in the Regulations.

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European procurement thresholds

One of the many rules relating to the Europe-wide advertising of calls for tender in the Official Journal of the European Union (OJEU) is governed by the Total Contract Value. These values are known as “thresholds”. A call for tender that will result in a total contract value above the threshold must be advertised in the OJEU. The thresholds for 2006 and 2007 are as follows:

Works contracts

Contract value: €5,278,000 £3,611,319

This threshold applies to Government departments and offices, local and regional authorities, and other public bodies.

Supplies and services contracts

Contract value: €137,000 £93,738

This threshold applies to Government departments and offices.

Contract value: €211,000 £144,371

This threshold applies to local and regional authorities, and public bodies outside the utilities sector.

Thresholds are agreed annually and apply for that particular calendar year.

The new world of selling to public authorities

There are some new realities to be faced and with these realities new skills to be acquired and structures to be put in place. Firstly, no-one forces any organisation to tender for anything. For voluntary sector organisations and charities, this is a time for review and a clear decision to be taken at trustee level – Do we wish to tender and thus contract to deliver statutory services? It is essential that organisations take a good hard look at the procurement process and decide whether or not it is for them. If it is decided to proceed down this route, there are implications which go to the very heart of the voluntary and charitable sector in England. In order to be successful it may be necessary for:

- organisations to make significant changes to the way in which they operate;
- trustees and governance structures to cope with new demands at levels well in excess of the current expectations;
- organisations to function in ways which are similar to those operated by private companies;

- the quality and standard of a wide range of management functions to be improved in order to demonstrate that all areas of risk have been effectively addressed;
- policies and procedures which are not currently necessary to be put in place;
- senior management and trustees to be involved in the tendering process. This function cannot be left to the fundraiser.

Tendering procedures

Advertisement

- Expression of interest (Eoi)
- Issue of tender documents to those who have responded

The selection phase

- Submission of pre-qualification questionnaire (PQQ)
- PQQ is scored

The award phase

- Applicants successful at PQQ notified
- Invitations to tender (ITT)
- Submission of tender documents, probably including the method statement.
- Tender documents scored.

Contract

Either:

- The contract is awarded

Or:

- Short-listed applicants are invited to make a presentation and then the contract is awarded

This process will be varied according to the actual procedure being used, i.e. open, restricted, negotiated or competitive dialogue, but these elements feature in all tendering procedures.

Opportunities exist for smaller organisations to tender successfully

The difficulties having been addressed, it is clear that there is a window of opportunity which will exist in the short to medium term. With the exception of some situations, where the “lowest price” selection methodology is used, the scoring of tenders does not depend on price. The more frequently used system is known as Most Economically Advantageous Tender (MEAT). First of all the price is scored. This contributes between 10% and 40% to the overall score. The rest

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of the tender is then scored against a set of criteria which together make up the “quality” element. Each criterion is assessed separately and then brought together to make up the balance of the total score.

As the quality element makes up between 60% and 90% of the overall total, for those who understand how this system works there are clear opportunities which enable organisations to hold their price. Eventually the time will come when the methodology is well understood and then price will revert to being the main factor.

Common errors made in the tendering process

- Missing the call to tender;
- Failing to express interest and therefore not receiving the documents;
- Failing to submit a pre-qualification questionnaire which debars the organisation from the tender award phase of the process;
- Not providing the information required;
- Not answering the questions but providing information which can be regarded as “marketing”;
- Basing the responses on unsupported assertions rather than evidenced claims;
- Not including the key documentation;
- Failing to adequately demonstrate effective management of risk throughout the organisation;
- Failing to ensure an anonymous response – for example by including the organisation’s logo on the package, or by using a postal system which identifies the “sender” on the package;
- Missing submission deadlines.

Procurement and tendering

Key resources

Guide to Procurement and Contracting (600 KB, .pdf)

http://www.financehub.org.uk/uploads/documents/fh_guide_to_procurement_and_contracting_May07_51.pdf

Downloadable 40 page .pdf (600kb) produced for the Finance Hub by NCVO Sustainable Funding Project. The document introduces procurement and contracting. It includes advice on how to approach agencies who may want to buy your services, assessing whether you have the capacity to deliver a contract, explaining different forms of agreements, and looking at the tendering process.

Tools for Procurement and Contracting (404 KB, .pdf)

http://www.financehub.org.uk/uploads/documents/fh_tools_for_procurement_and_contracting_May07_52.pdf

Downloadable 35 page .pdf (405kb) document produced for the Finance Hub by NCVO Sustainable Funding Project. The document provides a series of exercises and checklists designed to support advisers working with groups on procurement and contracting. It includes materials designed for those just starting to look at contracting (introductory), those ready to explore the topic further (intermediate), and for those wanting to look at contracting more seriously (advanced).

A series of briefings on procurement produced for the Finance Hub by acevo and the DTA.

Tendering and bidding briefing: give your tender a winning chance 980KB pdf

http://www.financehub.org.uk/uploads/documents/Tendering_and_Bidding_Briefing_137.pdf

Negotiation Briefing: Effective negotiating to secure better outcomes. 892kb, .pdf

http://www.financehub.org.uk/uploads/documents/Negotiation%20Briefing_final_148.pdf

Impact Briefing: putting impact at the heart of the tendering process 1324 kb, .pdf

http://www.financehub.org.uk/uploads/documents/Impact_Briefing_135.pdf

Before signing on the dotted line

<http://www.ncvo-vol.org.uk/publications/publication.asp?id=3187>

A guide from NCVO to enable small and medium sized organisations to navigate the complex rules, procedures and practices that constitute the public sector procurement process.

CC37 Charities and Public Service Delivery

<http://www.charitycommission.gov.uk/publications/cc37.asp>

A guide for Charity Trustees, setting out their responsibilities in relation to public service contracts.

National programme for third sector commissioning

<http://www.idea.gov.uk/idk/core/page.do?pagelid=6583598>

This document sets out good practice for third sector commissioning.

NAVCA

<http://www.navca.org.uk/stratwork/procurement/>

The National Association for Voluntary and Community Action are working to support the Third sector's ability to successfully tender for the delivery of public services. You can find information about their work in this area here.

Finding the contracts

<http://www.ncvo-vol.org.uk/sfp/?id=2232&terms=european%20procurement>

Advice from NCVO on finding information about contracts.

Tenders electronic daily (TED)

<http://ted.europa.eu/>

Tenders which have a total value which is above the threshold are published in the Official Journal of the European Union and can be found on Tenders Electronic Daily. This is published six days per week and can be found at;

National e Procurement Project (NePP)

<http://www.localgov.org.uk/default08de.html?sID=1165250535782>

An important feature of the new Directive is the possibility for purchasers to buy using online systems called e-procurement. This is the guidance document on NePP.

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DTI procurement manual section G:

<http://www.berr.gov.uk/about/procurement/buyers-guides/page22751.html>

A guide to the European Union Services Directive July 1993 (92/50/EEC). Whilst this relates to the Regulations pre February 2006, the Guidance is however no less valid as it emphasises how purchasers should handle some of the areas which cause providers concern.

Tendering for Care

<http://www.tenderingforcare.com/>

Provides information, advice and support services for organisations large and small in the care, housing, support, third and voluntary sectors. Although a private company, it was referenced in the Cabinet Office (Office for the Third Sector) report for the 2007 Comprehensive Spending review as providing services which users believe to represent value for money.

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