PROJECT DEVELOPMENT & SUPPORT LTD

30 Gritstone Road • Matlock
Derbyshire • DE4 3GB

Tel: 01629 57501
Fax: 01629 584972

info@tenderingforcare.com
www.tenderingforcare.com

Tendering for Care RoundUP

January 2012

EU Plans to Make Tendering Easier for Small Providers

A committee of MEPs has proposed a passport that could make tendering for public procurement contracts easier and less costly for small firms. The proposal has won the support of the European Parliament's Internal Market and Consumer protection Committee.

The committee of MEPs approved a non-legislative resolution that calls on the European Commission to promote an EU-wide passport that proves the holder complies with EU rules on public procurement. Such a passport would eliminate the need for providers to complete PQQs. It would also make tendering less complicated for small and medium-sized enterprises (SMEs)*, according to the Committee which voted in support of the resolution.

It was in response to the Commission's green paper to revise EU public procurement rules, published in January that the passport was proposed by Heide Rühle, MEP for Group of the Greens/European Free Alliance. The proposal said: "The lowest price criterion should no longer be the determining factor in awarding contracts. It should be replaced by that of the most economically advantageous tender in terms of economic, social and environmental benefits, taking into account the entire lifecycle costs of the relevant goods, services or works." She pointed out that this broader criteria and admission of alternative tenders would help tenderers propose innovative solutions, which could also strengthen the position of smaller providers.

After the proposal was backed unanimously by the committee Heide Rühle said: "The commission will have to recognise the strong view among MEPs that the rules should be simplified, to make them more flexible and give small providers better access."

Her report is scheduled for a plenary vote by all MEPs. Small providers which can be categorised as SMEs* currently win 31-38 per cent of public procurement contracts by value. MEPs also said dividing up public contracts into lots would give small providers a better chance of tendering success. ◘

Contents

**The New SME Definition:User Guide and Model Declaration* can be found at: http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf

TfC says....

The suite of services which TfC has been offering since July 2007 has provided the company with a unique perspective on the growth and development of public sector tendering for Health and Social Care Services across the UK. An average of 500 tenders have been reviewed each year and during the past year alone information on over 2,000 tenders provided to our Members. This gives us an unrivalled view, not only of current requirements, but how tendering has changed and is changing over time.

Trends and Tips

As individual providers struggle to survive in the new, competitive environment we offer the following short items from our extensive archive of information and knowledge of the sector .

Technical Tenders

When we compare tenders which were successful three to four years ago with those which are awarded contracts in late 2011 perhaps the most significant change we have seen is the move towards technical quality in tender preparation. This was exemplified in the case of one member who, with TfC's help, had been accepted into two significant shire county frameworks three years ago, only to find when they were re-tendered in mid-2011 that they failed to be accepted into the new frameworks.

Whilst there are notable exceptions (see items below) the vast majority of local authority procurement is following developmental trends in its tenders which become altogether more demanding as time progresses. Typical of the demands is the almost ubiquitous word limit requirement in method statements. This can sometimes mean an answer limit of 500 words; or even as few as 250 words. This requires tenderers to develop methods of referencing the requirements of the specification linked with evidence. The result is that all generalities and wide claims such as "we have a robust management system" must dissolve into specific objective statements. The bullet point has come into its own in these types of answer; the "pretty prose" and claims which are not supported by evidence must disappear. No longer is the preparation of a method statement an "art" where the writer makes claims without seeing that real written evidence exists for statements made.

Successful tender writers are now technicians who work from the specification; providing links as evidence of detail to the finished method statement. ◘

The Quality of Purchasing

From the evidence TfC has seen, the purchasing by more than 80% of Local Authorities, probably 50% of PCTs and an unknown number of Clinical Commissioning Groups (CCGs) complies fully with the Public Contract Regulations, or the principles they espouse for Part B contracts. However, in recent months there have been some real howlers. Here are just three:

1. A tenderer was told following a full tendering process that they had not scored the highest marks following appraisal, but the contract would be awarded to them "for the sake of continuity";
2. A London Borough published a tender with no indication whatsoever of any appraisal criteria, either top level (quality:price) or sub-criteria. No less than six providers asked for these criteria during the clarification questioning stage only to be told that these would be decided when all the tenders had been received;
3. In terms of unfairness during the week before Christmas 2011 two local Authorities published tenders with a deadline of just a single day to express interest. Elsewhere in this issue we describe short deadlines as one of the iniquities of the Part B exemption. The continuation of this practice does lead to questions regarding the intentions of the purchaser which might benefit the incumbent provider. ◘

More Trends and Tips - >>>

More Trends and Tips

Purchasing extends to Contracting

Situations are tending to arise whereby public bodies are seeking to retain unfair control over their contractors, apparently forgetting that a contract is, at its base simply an exchange of promises which is enforceable in law. Just as the supplier can be found to be in breach of contract following a complaint; so can the purchaser.

One local Authority sought to re-establish a framework agreement after the earlier agreement reached its term. The procurement proceeded and the new list of providers was published. The new framework agreement made it clear that no contract to deliver services existed until an Individual Financial Assessment (IFA) had been completed for each service user, and naturally, the hourly rate to be paid would be considerably less than under the earlier agreement! A provider was continuing to provide services agreed under the previous framework two months after the start date of the new agreement The fact that the Commissioning Officer had asked the provider to continue to provide services until the new arrangements could be put in place was taken to mean that an implied extension to the previous contract was in place on the earlier terms. Invoices were submitted for the two months in question based on the prices agreed in the earlier agreement. The Authority sought to argue that the new prices came into force with the start of the new framework. In doing so they completely ignored the term in their own, new agreement that a contract did not exist under the new framework until both parties had agreed an IFA.

Several strongly worded letters set out to challenge the Authority's position. The result was that the purchaser finally agreed that payments would be made on the basis of the terms agreed in the previous framework until such time as IFAs could be put in place. The result for the provider was the gain of a considerable amount of time before reductions in payments would be introduced.

Many providers do not like the thought of challenging public sector purchasers because they think that this will result in some kind of damage to the ways of working. This completely ignores the reality that contracting is a straightforward business relationship, based on an agreed set of rules which both parties should follow. ◘

Interview versus Presentation

Sometimes a tender process will include the requirement for tenderers to make a presentation. If this is the case it is important to clarify what proportion of the overall score will be attributed to this part of the process. One tender awarded 0% to price (the amount to be paid for the service had been fixed by the purchaser), the entire 100% being allocated to quality 65% for the Method Statements; 10% for Business Continuity Planning; and 25% for the presentation. These scores were broken down further on the basis of a set of sub-criteria. So if there is to be a presentation this should be stated in the tender information documents and both the high level score, the sub-criteria and the relevant weightings provided.

The interview is altogether different. Purchasers are at liberty to "seek clarification" of items raised and evidence quoted in a tender. Indeed in one tender applicant were told not to attach any documentary evidence, but that appraisal officers would visit in order to view all evidence relevant to the tender. So tenderers may be invited to an interview for this purpose. The purchaser may not raise any new matters, or ask for a presentation. They may simply ask for a clarification of statements made. It therefore follows that when invited to an interview it is important for those attending to have detailed, line by line knowledge of the tender, and to take to the interview both copies of evidence, marked up for easy reference, and a set to be left with the purchaser. ◘

Scoring during Appraisal

Back in the early days of tendering the scoring ranges used at appraisal were generally: 0, 1, 2, 3, 4, 5. Sometimes the range was widened slightly for some criteria to include minus numbers. More recently a significant change in the systems employed is starting to occur.

Score ranges of 0, 1, 3, 5, 9 and -1, 0, 3, 9 are not that unusual. This is placing a very heavy weighting on excellent answers which are well evidenced and meet all of the requirements of the specification. ◘

Tendering Success

TfC would like to congratulate its 300+ membership who, with our help, are between them known to have been awarded contracts with a total value of £71million during the period 1st April to 31st December 2011.

Can our membership reach £100million by the end of the financial year? We shall see.

Please note that not all members let us know when they are successful!! ◘

The Bribery Act and Regulations for Tendering

The Government has published changes to Regulation 23 of the Public Contracts Regulations 2006 (the PCRs) to reflect the implementation of the Bribery Act. This Regulation addresses the standards of probity and compliance by individual members of Boards of Companies and Charities. TfC has been warning for some time of the need to address the requirements of the Act in Policy for tendering purposes. An urgent task now is to ensure that policies and procedures are in places which address the requirements of the Act.

The British government passed a statutory instrument relating to debarment, The Bribery Act 2010 (Consequential Amendments) Order 2011. Like the Bribery Act itself, this came into into force on 1st July 2011. As a result, Regulation 23(1) of the PCRs was amended in order to insert references under sections 1 and 6 of the Bribery Act. This means that there is automatic debarment (or exclusion) from public sector tendering where a Board member has committed any offence under Sections 1 and 6 of the Bribery Act. The new legislation does not appear to allow for later rehabilitation of offenders. This statutory instrument does not mention the corporate offence of bribery and it is not clear whether this is still the subject of further consideration by the government.

Contact TfC for Guidance documents to the Act

For the re-drafted Reg. 23(1) go to:

http://www.legislation.gov.uk/uksi/2006/5/regulation/23/made

For the text of the Bribery Act go to:

http://www.legislation.gov.uk/ukpga/2010/23/contents

Part A and Part B Distinction to Disappear

The distinction between Part A and Part B rules are to disappear for all but tenders for "social services". Proposals for new procurement Directives have been published which are intended to clarify and modernise the rules. The public procurement rules will be substantially amended, modernised and clarified to take account of with case law and the needs of society and SMEs. On 20th December 2012, the European Commission presented the drafts of two directives that will adapt existing texts of 2004/18/EC for general public procurement and 2004/17/EC for specific services: water, energy, transport and postal services. There will also be a new directive on works and services concessions. The two texts on public procurement meet stakeholders' expectations resulting from a consultation exercise to a large extent, but do not go as far as some might have hoped.

Clarification

These new directives will apply to contracts above a slightly higher threshold of €5 million for public works contracts (€4,348,000 at present), €400,000 for services (€200,000 at present) and €1 million for social and certain specific sectors .There is considerable clarification of the scope of the directives. Key definitions are stated precisely and include input from case law: the concept of 'acquisition' is added to the concept of 'contract', for example. The distinction between the expression of a need and how it will be met through different public contracts is also clearer.

Reduction in number of Part B services

The distinction between 'list A' services and 'list B' services is to largely disappear, Part B services being currently subject to streamlined procedures. The noteworthy exception to the change is social services procurement. The 'general' directive recognises for the first time the specific nature of these services given their low impact on competition across the EU. The scope of the definition of these services has been widened so that they now cover social and health services, personal services, services for the distribution of various benefits (maternity, family, unemployment, etc.), services related to education and culture, religious services and those provided by trade unions.

Partnerships

A further innovation is the first definition of partnerships between public authorities, also a result of recent case law that limits this exception from this public procurement rules.

(Continued on page 5)

(Continued from page 4) Part A and Part B Distinction to…

More Transparency

Regardless of the Part B exception, there is a new emphasis on transparency in all procurement and underpins the new directives. This is in line with the green paper published on 27th January 2011. It is the Commission's view that that the transparency requirement forms an essential safeguard against corruption or collusion between public and private interests. The Commission's drafts give the impression that it wishes to strengthen guarantees of publication, equality of treatment and non-discrimination between providers interested in public contracts, but that it is more flexible on the implementation of competition. It therefore adjusts procedures to create a ranking of transparency and to enable public procurement to promote certain specific policies.

Electronic Tendering

The Commission requires that the electronic publication of all tenders as the general rule within two years; encourages cross-border tenders; and limits conditions for amending a contract. On the other hand it is more flexible on the choice of procedures and criteria for assessment and appraisal of tenders. The general directive allows member states to choose between open or restricted procedures. It also provides options that introduce more competitive dialogue, such as the negotiated procedure. The publication of contract notices is given a greater place but without becoming the common system, as European Parliament would like. Flexibility is also introduced in framework agreements. The introduction of partnerships for innovation, allows streamlined procedures that can limit tenderers with a view to developing innovative goods, services or works.

Criteria

The Commission has not complied with the Parliament's request on the criteria for the award of contracts. As a result the criterion for an award based on the lowest price has not been eliminated. However, lowest price can include the consideration of cost-effectiveness that takes account of the life-cycle cost of the products, goods or services covered by the contract. The economically most advantageous tender is not given an advantage but the requirements are more detailed, with more elements for the appraisal of scope. The text specifies how social objectives related to the 'Europe 2020' strategy are taken into account. These include the promotion of quality jobs, sustainability, etc. The use of mandatory criteria which were mentioned in the green paper has been abandoned because this risked introducing more limitations upon tenderers. There were also seen to be risks of increased discrimination, restriction of competition and an increase in prices. Environmental costs are taken into account on paper, but in practice the contract award authorities will have to await the development of an ad hoc evaluation method at EU level to include them in their appraisal systems.

SMEs are Favoured

The main objective of the general directive is to encourage increased access to public sector contracts by SMEs since it is believed that they are currently often excluded. There is a proposal to reduce the administrative burden on SMEs through the systematic use of declarations on oath. Only preselected candidates will have to present the original documents. A 'public procurement passport' is also proposed in the form of a standardised electronic registration. The separation of contracts into lots will become the rule for contracts worth more than €500,000 apart from a few exceptions. Non-compliance will this requirement must be justified in terms of the "apply or explain" principle. SMEs subcontracting for large public contracts will be directly remunerated by the contract awarding authority. This is intended to reduce conflicts of interest with the lead contractor. On the other hand, restriction of the duration of the open procedure to 35 days instead of 52 and 30 days for other procedures penalises SMEs because they will have less time to draw up their tenders. ◘

Tendering and Procurement Practice and a Possible Source of Funding

The Tendering and Procurement Practice (TaPP) Course is the only professional qualification available for Business Development Managers and others at senior level in provider companies and organisations who tender for public sector contracts.

Offered with OCN accreditation at level 3 with six credits, this is a substantial course with a focus on Health and Social Care tendering and procurement. Delivered by nine telephone conferences over an 18 week period the course is demanding, requiring a minimum of 60 hours from students. However the subjects are designed to minimise time away from the workplace and with tasks which will contribute to the tendering success of the employing company or organisation.

More than sixty managers from providers, from very large to very small, have graduated with the qualification. This has helped several to progress with their career by obtaining senior posts with national care providers.

For details of the course go to: http://www.tappocn.org.uk/

or contact us on info@tenderingforcare.com

Funding for Leadership and Management

Previous students from the TaPP course have benefited from a proportion of the course fees (including VAT) being paid by means of a Leadership and Management Fund grant. This fund has been closed for applications for the past eighteen months, but is now open again.

Further Information

Funding is available to support leadership and management development; the deadline is approaching, but there is still time to apply. Applications are being taken until the 20th January 2012 (budget permitting), but funding is limited so we strongly encourage businesses to complete the application form as soon as possible.

What is available?

Through the Leadership and Management Advisory Service, business leaders can apply for up to £1000 in match funding (excluding VAT) to develop their leadership and management skills.

For more information on this funding in your area, please visit
http://www.tappocn.org.uk/

It is Easy to Contravene Competition Law!

Late in 2011 TfC was contacted by a small but well established, longstanding charity which had never tendered before and was seeking help to tender to provide services for one of three LOTS which together covered all of an English City. On viewing the PQQ we saw that the model of service the provider wished to offer was that they would provide services for one LOT, subcontracting to another, larger provider; the same larger provider would offer to provide for the two remaining LOTS, sub-contracting to TfC's customer.

There followed a period where we explained to the customer that this arrangement would be likely to amount to collusion and, more seriously, contravene Chapter 1 of the Competition Act. Worse, the result had the potential to impact seriously on the Trustees (Directors) of both organisations. Consultation with a lawyer confirmed our advice and the customer decided to tender as a single entity with the option to sub-contract as necessary. Whilst it is often advantageous for providers to work together in consortium style arrangements, how they go about forming a consortium is crucially important. For example, there are circumstances where merely meeting to discuss such collaboration can contravene Chapter 1 of the Act. Such meetings must be set up in a specific way in order to avoid the charge of collusion. Further, most tenders require a signed "Non-collusion Certificate". Staff and Board members must ensure that this certificate has value and that there have been no discussions between any employee or Board members of another organisation with which collaboration may be a possibility, but which might also amount to collusion. This is particularly important for the protection of Board members as individuals. (For more on consortia please see the link below).

The Office of Fair Trading (OFT) has published new guidance to assist company directors and charity Trustees understand their responsibilities under competition law. Directors and Trustees have an important role in ensuring compliance and face personal penalties in the event if a lack of compliance with the Act.

The Guidelines explain that if their company or organisation infringes competition law and a court considers that a director's or Trustee's conduct makes him or her unfit to manage a company it can issue a Competition Disqualification Order (CDO) which disqualifies that person from being a director of any company, charitable or otherwise, for a period of up to 15 years. The Guidelines go on to explain the competition law risks that directors and Trustees should be aware of and the action which they can take to minimise the risk that their organisation might infringe competition law. The OFT recognises that not all directors and Trustees have specific competition law expertise but believes that they ought to have sufficient understanding of the principles to recognise risks and to know when to instigate enquires or take legal action. The OFT takes the view that all directors and Trustees ought to know that cartel activity (i.e. agreements with competitors to fix prices, share customers or markets, rig bids or limit production) will constitute a serious infringement. In other areas, a director's or Trustee's personal liability will be judged against their actual or expected knowledge. For instance, a director or Trustee with responsibility for contracts and strategy is expected to understand the potential risks associated with such arrangements and to identify whether the company may have a dominant position in markets in which it operates and to avoid abuses of that position.

The guidance makes clear that there is no room for complacency in competition law compliance programmes. All directors must understand the principles of competition law, demonstrate a commitment to competition law compliance, and ensure their organisation is taking steps to identify and to assess the exposure to competition law risks, and put in place appropriate steps to mitigate those risks. Senior directors of large companies should take particular note as the guidelines set out the standards expected of them so that they may limit the risk of their own disqualification as a director for infringements that they are unaware of but ought to have known about.

Background to the guidance

In 2003, the OFT was given the power to seek a CDO allowing for disqualification of a director for up to 15 years if a company has breached competition law. The OFT has published new guidance on the use of CDOs. This underlines a more aggressive approach to enforcement. Whilst the guidance did not change the law, the main change was to the OFT's position related to the "knowledge standard" for directors of companies of all types. The guidance made clear that the OFT would assess a director's or Trustee's responsibility on a case-by-case basis, and that a director or Trustee who had reasonable grounds to suspect a breach, but took no steps to prevent it, or was unaware of it but ought to have known that the conduct constituted a breach, could now be susceptible to disqualification. In light of this stricter approach, the OFT agreed that it would be helpful to issue additional guidance aimed at directors in order to minimise the risk of CDOs being awarded against them. This new approach is especially important to the directors of companies in the charitable sector where it is not uncommon for Trustees who are *(Continued on page 8)*

(Continued from page 7)

directors of charitable companies to delegate much or all of the management of the organisation to an individual such as a CEO, or to a committee such as a Senior Management Team.

The guidance

The guidance sets out the requirements for compliance with the standards that the OFT expects of all directors of companies of all types. We will use the term "director" in this article, but recognise that directors of charitable companies are often referred to as "Trustees". It should be noted that the guidance applies to all directors, regardless of their title and to all incorporated entities, whether limited by share or guarantee. The guidance provides information on the principles, types of behaviour and extent of knowledge that will be relevant to directors when considering their responsibility under competition law. Key points to note are:

The OFT expects all directors:

- to understand that compliance with competition law is important and that infringing competition law could lead to serious legal consequences both for the company or charity and for them as individuals;
- to understand that cartel activity (such as price fixing, bid-rigging, limiting production, market sharing, sharing commercially sensitive information) will constitute a very serious infringement of competition law;
- to have sufficient understanding of the principles of competition law to be able to recognise risks, and to realise when to make further enquiries or seek legal advice;
- to demonstrate a commitment to competition law compliance, and to ensure that their organisation is taking steps to identify and to assess the company's exposure to competition law risks and put in place appropriate steps to mitigate those risks, reviewing these activities on a regular basis.

These requirements are particularly relevant to organisations where the certification of non-collusion is delegated to an employee, however senior.

The OFT suggests that all directors should ask the following questions regarding competition law compliance:

- What are our competition law risks at present?
- Which are the high, medium and low risks?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the risks to check they have not changed?
- When are we next reviewing the effectiveness of our risk mitigation activities?

The OFT has different expectations of directors depending on their role, in particular whether the individual has an executive or non-executive role, the director's or Trustee's specific responsibilities within the company or organisation, and the size of the organisation and wider corporate group.

The OFT expects executive directors with a higher exposure to competition law risk to have both greater knowledge of competition law concepts and also to take greater steps to prevent, detect, and terminate the infringement. For example the OFT states that "*a sales director would be expected to be able to recognise whether the risk of cartel activity within a company is high due to its sales staff having frequent contact with competitors at trade association meetings or through involvement in other industry bodies and ensure that appropriate mitigating activities (such as training, policies and procedures) are in place to bring about any behaviour change that is necessary to achieve compliance*".

Non-executive directors and some Trustees are not expected to have an intimate knowledge of the company's day-to-day transactions, but are expected to challenge the decisions and actions of the executive directors. In particular the OFT expects non-executive directors to "*ask appropriate questions of the company's executives, in order to ensure that appropriate compliance measures have been put in place within the company to prevent, detect and bring to an end infringements of competition law*".

The OFT recognises that a company may decide to designate a director with specific responsibility for competition law compliance, but this appointment does not absolve any other directors or Trustees of their responsibilities under competition law. A compliance director is not expected to have any greater awareness of specific infringements by the company or organisation than any other director.

Whilst directors and Trustees in larger organisations are not expected to have an intimate knowledge of all day-to-day activities, the OFT expects them to take steps to ensure that there are appropriate systems, policies and procedures in place to prevent, detect and bring to an end infringements of competition law.

In relation to abuse of dominance or other potentially anti-competitive agreements (not involving cartels), the OFT states that where a director is committed to competition law compliance and has taken steps to mitigate competition law risks in a manner that is appropriate to the level of any identified risk, for example through taking legal advice prior to the conduct being undertaken that *(Continued on page 9)*

(Continued from page 8) constituted the breach, the OFT is unlikely to apply for a CDO.

In assessing whether a director ought to have known of a competition law infringement, the OFT states that it will take into account a number of elements, including whether:

- a director has direct management responsibility for the individuals concerned in the anti-competitive conduct;
- a director is personally involved in the day-to-day activities of the company;
- the extent of the risk mitigation introduced by the director and what evidence the director ought to have seen, had he or she put the appropriate compliance measures in place.

Where a director has overall responsibility for a business area, but no direct management responsibility over the individual directly involved in the infringement, the OFT will consider what evidence that director actually saw, or was presented with, and what evidence that director ought to have seen, having made reasonable enquiries.

Guidance on how companies and organisations can achieve compliance

The OFT has published its final guidance on how companies can achieve compliance with competition law. This sets out the OFT's recommended risk-based four-step approach for creating a culture of compliance within a company or other organisation. It also sets out the practical compliance measures that might be able to taken. The OFT notes that while no automatic discount can be expected from any fine for companies that have undertaken compliance activities, it does state that the amount of the fine may be reduced by up to 10% if "adequate steps" have been taken with a view to ensuring compliance.

The role of NHS Monitor

Just to add to the growing concern in the area of competition law, NHS Monitor has said that *the regulator should oversee care homes and the social care sector, as well as the NHS*. It also said *the DH ruling requires it to promote integration and collaboration as well as competition*.

All in all we can expect to see real action to find the balance between collusion and competition in the future. As a government official commented recently to TfC “we need some good case law”. Our advice is to ensure that your company or organisation understands and complies fully with the OFT guidance and is not the subject of his wishes!!

The guidance documents make references to the “Compliance Director”. This means the Board Member who has given general oversight of Competition matters.

Useful Links

For the Quick Guide to give to your Board Members go to:
http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/quick-guide.pdf

For the Full Guidance Document go to:
http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1340.pdf

For the “How To” Guide go to:
http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf

http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance

The pack includes a film which explains the requirements

WE RECOMMEND that the film is viewed by all Boards of Directors/Trustees

For a Guide to Working in a Consortium please go to:
http://www.tenderingforcare.com/news/working-in-a-consortium-and-tfc-12-golden-rules

Subsidies and Public Sector Contracts

During one week, late in 2011 no less than three members contacted TfC for professional advice regarding a purchaser's requirements in a tender for a contract to deliver services described as being a statutory duty. Tenderers were required to agree a contribution of a fixed amount of money, £100,000 per annum, amounting to approximately one third of the total price, towards the cost of delivering a contract. Failing to confirm this agreement would lead to exclusion from the process. There are a number of questions which arise from this requirement, not least the complete negation of the principles of Full Cost Recovery which ACEVO and others have worked so hard to establish over recent years and are now, it seems, are to be ignored by some public authorities.

Another important question relates to the general principles of Subsidies and Statutory Duties. This question is of considerable importance if the tenderer is a registered charity. There follows an extract from the information provided by TfC to the Members who raised the query regarding subsidies:—

CHARITY COMMISSION DECISIONS OF THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES MADE ON 21 APRIL 2004–Paragraph 6.1.3

The Commissioners noted the Commission's guidance Charities and Contracts–CC37. This deals with a charity's relationship with funding bodies. The Commissioners noted particularly that the CC37 guidance indicates that trustees cannot normally use a charity's funds to pay for services that a governmental authority is legally required to provide at the public expense. However, trustees might use a charity's resources to supplement what a governmental authority provides. This would seem to be contrary to the requirement in question which clearly demands a substantial contribution to actual costs of meeting the requirements of the specification rather than to fund activities which are additional to those set out in the contract.

From CC37:

In those circumstances where a public authority has an absolute legal duty to provide a service and no discretion over the level of service, there would have to be very clear justification in the interests of the charity for subsidising the service.

This appears to be logical as the provider cannot know what the level of demand will be at any time in the future, so the possibility exists for the subsidy to escalate over the life of the contract.
and:
If the authority had an absolute duty, the trustees would need to consider whether the governing document permits the charity to subsidise statutory funds.

A number of subsidiary objects clauses in both Company and Charity Memoranda (powers given to the body at incorporation) includes a clause along the lines of:
"*In the furtherance of these powers but not otherwise*"

If this is the case it would appear to indicate that unless the objects clauses give specific power for the company or charity to subsidise a statutory duty then such an activity would be outside the company's or charity's powers to act. In any case general guidance would be to ensure that the Board addresses the matter before the contract is costed and the tender submitted, and either:

- Gives an overall blanket approval to a subsidy of this kind; or
- Decides to consider each and every tender where this requirement arises.

Competition Law

Of course, should corporate objects specifically disallow contributions of this type, a case for a challenge might be considered under Competition Law. This could be based on the unfairness principle. A claim might consider that the requirement for a contractor to subsidise the costs of meeting the specification would exclude companies and charities whose powers or a decision of their Board prevents them from contributing in this way. The requirement could be considered as amounting to "A Chapter 1 prohibition" i.e. an action by the purchaser which would prevent, hinder or distort competition.

Further Questions

Further questions which arise from this type of requirement by purchasers include:

- It is not difficult to foresee a situation where the level of contribution might be scored as part of tender appraisal, with the highest contribution winning – a sort of reverse, reverse auction, thereby, over time putting ever greater pressure on providers to make larger and larger contributions to the cost of the delivery of statutory duties;
- Financial pressures reduce the finance available to the contractor to maintain the subsidy. This in turn has the potential to affect the contractor's financial sustainability to the point where the contractor finds itself in breach of contract. Whenever an offer is made to contribute to the cost of a service, either directly or by means of "added value" it is essential that a full risk assessment is undertaken before the tender is submitted. This should ensure that the funds which underpin the offer will be available throughout the entire contract period. This will confirm that the tenderer will be able to honour their promise to make a contribution throughout;
- A disgruntled tenderer may view this type of process as a form of bribery, and challenge on that basis. There is little case law as yet relating to the new Bribery Act so it will be interesting to see how this develops.

It is essential that all risk assessments are undertaken, legal certainties established and contractual compliance addressed well before a tender is submitted which responds to a requirement for any financial or other type of contribution.

TfC Support & Training

TfC Support Suite

TfC offers a wide range of services designed to help Health and Social Care providers to tender successfully. We work with providers across the private, public and third sectors (including CCGs): from the very large, with an annual turnover in the range £15m to £200m+, to the smaller providers with an annual turnover of less than £500,000. As a result we are very aware of the many and varied problems each type of provider faces in beating the increasingly stiff competition.

As an example, in December 2011 a provider we supported was accepted into a framework of 12 from a total field of 150 tenders submitted. This provides a fairly accurate idea of the level of competition which may be expected when tendering for Health and Social Care contracts in 2012.

A section of our website provides examples of the areas of help that are typically required, but these are examples and other arrangements can made when required. We discuss the needs of each provider who comes to us for help and tailor our services to their individual requirements.

Please visit the relevant sections on our website at:

http://www.tenderingforcare.com/tfc-tendering-support-suite

or e-mail us to discuss your requirements at:

info@tenderingforcare.com

Training and Mentoring

During the period January 2009 to December 2010 TfC trained more than 9,000 people in aspects of Tendering and Procurement, making us the leading provider of this type of training for Health and Social Care providers.

We continue to provide training in a variety of formats. These include one to three day face to face courses that are open to all, or booked by providers for in-house delivery. More recently short courses have been available by Webinar or Skype, meaning that students are not required to leave their desks or travel to a venue.

Students have come from a wide range of Health and Social Care providers, including charities and the voluntary sector, private companies, GPs, practice managers, SMEs, purchasers, commissioners and procurement officers.

Details of our spring programme of courses will be published in the near future at:

http://www.tenderingforcare.com/understanding-successful-tendering-courses

Please contact us to discuss your in-house training requirements or visit the relevant sections on our website:

http://www.tenderingforcare.com/training-courses-for-delivery-in-house

Road Testing PbR

The components of the payment by results 2012-13 road test package are available. The Department of Health's road test exercise provides an opportunity for the service to test out the new tariff, and support the planning process.

The Operating Framework for the NHS in 2012-13 confirmed the high level plans for Payment by Results (PbR) next year. These plans are intended to:

- increase the link between payment and quality of care and drive integration of services;
- support the expansion of a more transparent rules based funding system; and
- Incentivise best clinical practice and better patient outcomes.

The new road test provides the prices that underpin both the above proposals and the draft guidance providers need to support the implementation of PbR.

As in previous years the main focus of the road test is to gather comments on the draft 2012-13 PbR guidance and code of conduct.

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_131826

Paul Burstow, Minister of State for Care Services, has recorded a video message in which he talks about the caring for our future engagement process. He explains the discussions that took place from 15th September to 2nd December 2011 and the next steps for social care reform.

http://www.dh.gov.uk/health/2011/12/paul-burstow-%E2%80%93-next-steps-for-social-care-reform/

The Use of Social Media in Tendering and Consultations

Luton Borough Council consulted on a major highway project in a consultation exercise which closed 15th November 2011. Written comments and representations on the proposals were invited. There was nothing unusual in that. The consultation invitation notice gave four options, the first two being by letter or email. The third and fourth options allowed respondents to reply via Twitter or Facebook. Apparently it was the first time that these options have been made available by a public body in a tendering process. Is this the way of the future? It is a development which it was thought would be likely to allow more responses to come from some groups who do not normally comment on consultation exercises. The initiative raises some interesting considerations in using social media in the tendering process.

Control

Unlike emails and letters, tweets remain the property of the sender rather than becoming the property of the recipient. So If I send you an email, I can't later change or delete it, by sending it has become your property. If however, I send you a tweet, I can delete it because it is my property. It may therefore be difficult to keep track of what responses have been sent to the purchaser and to decide whether a response has actually been made and what its content might be if it is later edited or withdrawn. However, Facebook provides greater certainty as a message sent to another account cannot later be amended or deleted by the sender. If a message is sent to someone, the sender can delete it at their end, but it does not disappear at the recipient's end. This is similar to deleting something from an email 'sent box'.

Size limitation

There are clear difficulties arising from the limit for a tweet of 140 characters - and if you are tweeting to a particular account, the message will be even shorter, as the account name will take up some characters. Can so few words really constitute a meaningful response? Facebook does not suffer from the size limitation problem as there is no limit to the length of a message. However, on Facebook it is possible to 'like' an organisation or issue (but not dislike one). How far should indications of this kind count in assessing responses particularly when no other option is available?

No subject

Tweets and Facebook messages have no equivalent to an email 'subject' line. Therefore if tweets or Facebook messages are directed to a general account, it is likely to be difficult to identify which are responses relate to a particular consultation or process. This is made more difficult if the respondents do not realise that their responses will be mixed in with other messages. Having to give a reference may be a solution, but it would leave even less room for the text in a tweet. There is an option for the purchaser to set up contract specific accounts on Twitter and Facebook, but these will need monitoring and might take up time thus negating any cost benefit.

Privacy

There are also important matters of privacy. All the traditional methods of communication, including email, are normally private between the sender and recipient. Tweets and Facebook messages may or may not be private, depending how they are sent. A tweet can only be private if the recipient 'follows' the sender. So, to enable the responses to be private the purchaser would need to "follow" those wishing to respond before they could respond privately. Even then those responding would need to frame their response as a Message (the term 'Direct Message' is no longer available) rather than a "Reply". Facebook messages are private, but can only be sent to people. Typically Facebook posts are visible to all. Whilst there are potential benefits in using this open approach during the questions phase of a tendering process; when used in a consultation exercise responses which can be read whilst the process is open for comment has the potential influence others. This could develop a campaign behind a particular idea or line of response, or even mobilising contrary views.

Privacy issues probably give rise to the greatest area of concern surrounding the use of social media in public sector consultation and/or tendering exercises. Accessibility and openness to all are clearly worthwhile goals. But some of the differences between this and more traditional ways of communicating require careful consideration with the likely problems addressed before the social media is used to a great extent at any stage in the procurement process. ◘

Essential information is available regarding improvement tools, examples of good practice and case studies of initiatives in areas and locations where you might be tendering. This is essential knowledge which can be quoted and referenced in tenders. The subjects are areas such as families and children, men's health, mental health, older people's health, etc., and are important as they include those with high impact and high importance on the current government agenda.
http://www.idea.gov.uk/idk/core/page.do?pageId=5889786

New Procurement Thresholds and CCG Development

The new procurement Thresholds for the two years commencing 1st January 2012 have been published.

Remember, these thresholds apply to the *Total contract value*, they are not annual amounts. On 1 January 2012, the financial thresholds governing when the European Procurement Rules apply to Central Government bodies (including the NHS) and other bodies such as Local Authorities, RSLs, etc., procuring services, supplies and works will change to the following amounts:

Figures are net of VAT

PUBLIC CONTRACTS REGULATIONS 2006 FROM 1 JANUARY 2012			
	Supplies	**Services**	**Works**
Entities listed in Schedule (1)	£113,057 (€ 130,000)	£113,057 (2) (€ 130,000)	£4,348,350 (€ 5,000,000)
Other public sector contracting authorities such as Local Authorities, RSLs, etc.	£173,934 (€ 200,000)	£173,934 (€ 200,000)	£4,348,350 (€ 5,000,000)
Indicative Notices	To be confirmed	To be confirmed	£4,348,350 (€ 5,000,000)
Small Lots	To be confirmed	To be confirmed	To be confirmed

Schedule 1 of the Public Contracts Regulations 2006 lists central departments and bodies (including the NHS) subject to the WTO GPA

These new sets of thresholds represent a significant increase on the thresholds which were in force from January 2010 to December 2011.

The purchasing Authorities must take into account the possibility of a cross border interest in a tender, even if the total value of the contract is below the threshold, or if the contract falls under part b of the Public Contracts Regulations 2006 where an advertisement in the OJEU is not normally required. **If the purchaser considers that there is a possibility of cross border interest, then the purchaser may be required to advertise the tender in the OJEU.**

Clinical Commissioning Groups (CCGs) is the name given to the GP practice consortia. As and when these are formed, they will be subject to European procurement rules. So CCGs must also take note of the new thresholds. Whether or not the thresholds for "other public sector contracting bodies" or those pertaining to the Schedule (1) [central government departments] will apply to CCGs will depend on the final conclusion and text of the Health and Social Care Bill when this becomes law.

This information is available in a downloadable leaflet at:
http://www.tenderingforcare.com/eu-procurement-thresholds-2012-to-2013

There are a number of developments at the end of 2011:

- It is claimed that a number of GPs are frustrated and leaving the pilot CCG Boards for two reasons – increasing work load and perceived excessive bureaucracy;
- DH guidance is leading CCGs to conclude that the only way forward is for them to outsource back office functions.

The truth is that with every change comes an opportunity for someone. We will be monitoring these and other CCG tendering developments as 2012 progresses.

Mental Capacity and Tenancy Agreements

The case of *Wychavon District Council v EM* (29th March 2011), has shown that those without sufficient mental capacity cannot enter into a tenancy agreement and the consequences this has for entitlement to housing benefit.

EM, who is the claimant, was born in June 1991. She is profoundly physically and mentally disabled and has been disabled from birth. Her parents had their home constructed specifically to meet her needs. They stated that they could not afford to continue providing this home unless they could receive rent from EM to set against the mortgage and other payments they have to make in order to run the home. A tenancy agreement was set up dated 26th February 2009. This was between EM's father and EM.

In the agreement the father is described as the landlord and the claimant as the tenant. The agreement was established for an indefinite term commencing on 20th December 2008 setting a rent of £694.98 per month. It was signed by the father as landlord, but in the space for EM's signature it is stated that she "is profoundly disabled and cannot communicate at all". Although in February 2010 an order was made in the Court of Protection giving her mother power to act in certain respects on behalf of the claimant, there was no such power in place before that date.

The result was that there was nobody with power to enter into a contract on behalf of the claimant before the date of the Order. The court concluded that EM had no liability to pay rent because she was not a party to the Agreement; further she had no knowledge or means of knowledge of the Agreement. There was no other basis on which any liability for rent could be imposed on her. Therefore, there was no tenancy agreement and EM had no entitlement to housing benefit.

What this means for social landlords

A tenancy agreement requires two parties – the landlord and the tenant. Here the claimant was not, and was incapable of being, a party to any agreement. Regardless of her capacity to consent, she could not and did not communicate any agreement to the tenancy and she could never have been asked to. There simply was no agreement, and therefore she had no liability to pay rent. The absence of a signature is not by itself fatal if there is an oral agreement or a contract to be inferred from all the facts.

The real question was whether the parents could enter into a binding agreement with EM. The problem was that they had no power to do so without the authority of the Court of Protection. This was not in place at the time when the parents entered into the supposed contract. Social landlords should always take steps to ensure that a person who is to become a tenant has sufficient capacity to enter into a tenancy agreement. If the prospective tenant does not have sufficient capacity, then that someone else has appropriate authority to enter into such an agreement on their behalf. ◘

The Future of Outsourcing

A recent survey revealed that those in charge of the outsourcing of many council contracts are concerned about a lack of procurement skills in the public sector. According to a poll of 100 human resources directors by Total Jobs, 57% said negotiation and procurement skills need to be improved, 44% fear contract disputes and 38% have already cancelled outsourcing agreements because of poor value for money.

The potential savings outsourcing can bring to a public body are by no means guaranteed if the procurement process is not properly managed. Outsourcing to social enterprises that have been established from within a local authority is, for many authorities, an unfamiliar process. Those responsible need to take even great care over this type of procurement.

NHS Gloucestershire planned to transfer its community nursing to the newly created Gloucestershire Care Services Community Interest Company on 1st October 2011. But lawyers representing a user of the services in Stroud threatened to begin a judicial review of the decision. The claim was that the trust had not followed proper procedure. It is a well-established principle of EU procurement law that compliance with the PCRs and other tendering rules for public contracts do not apply when an authority is purchasing services from in-house sources. It is less clear, however, whether social enterprises created from within public bodies can be awarded contracts for a specified period of time before those contracts are required to be subject to a tendering process. Cases like this will put similar matters to the test.

The 'right to challenge', in the Localism Bill refers to the need to carry out a procurement exercise if an expression of interest is accepted. Even if they survive these and other legal challenges, social enterprises and procurement professionals still face a number of other issues. One important factor which is faced by all organisations which contract to provide outsource services the cost of public sector terms and conditions including pension provisions. A sustainable approach to addressing the costs of operating under transferred terms I an urgent requirement if outsourcing is to continue to be achieved successfully both in significant volumes and over the long term At many councils the debate is moving on to how to help social enterprises become sustainable and competitive within a timeframe that makes sense for the public purse and is compliant with procurement law. ◘

Illegal CRB Checks

Increasingly jobs are advertised demanding "a current CRB check prior to interview" - this is illegal and could be reported to the CRB. No one should be barred from the selection process because they don't have a current CRB record in place. ◘

Tendering –

Complying with the Requirements

One Latin phrase many people know is *caveat emptor* meaning "let the buyer beware" or, if you are buying something, make sure you know what you are getting. Less well known is the phrase's mirror image *caveat venditor*, defined in one online dictionary as "A tacit warning to sellers that, unless they expressly disclaim any responsibility, they will be held liable if the sold items are found defective in any way or vary from the specifications"; in other words – "let the seller beware". The latter phrase is also true in terms of its application when tendering for public sector contracts.

What this means is that it's vital that tenderers make sure that they make no mistakes in complying with the tendering process because any that they do make are likely to be held against them. TfC has previously warned of the perils of e-tendering systems and what happens if tenderers are not sufficiently careful about answering questions online or uploading documents by the stated deadline. One such example was in the *J B Leadbitter v Devon County Council* case. A tender submitted by a building contractor was rejected by the purchaser on the grounds that the tender had not been submitted in accordance with the authority's express instructions. The tenderer had left the uploading of required documents to the Council's server until close to the deadline. Pressure on the server resulted in these being received after the deadline. The court held that the authority was within its rights to reject the incorrect tender.

More recently, tenderers engaged in various procurement exercises managed by the Legal Services Commission (LSC) found, to their cost, that the responsibility lies with the tenderer to make sure that the correct documents are submitted with each tender. Purchasing authorities can apply strict rules preventing the correction of even simple or obvious errors, as the following items illustrate.

Correcting a Genuine Mistake

In late 2009 the LSC managed a Public Contracts Regulations compliant procurement exercise which invited law firms to tender for publicly funded immigration work. Two losing tenderers (Harrow Solicitors & Advocates and Hoole & Co) challenged the results, alleging that the LSC should have overlooked procedural mistakes in their tenders.

Harrow Solicitors & Advocates

One of the LSC's selection criteria referred to the operation of legal services drop-in centres. Harrow submitted a tender but mistakenly entered "no" to a question about its ability to offer a drop-in service. If it had answered "yes" as it should have done, because the firm did offer and advertise twice-weekly drop-in sessions, the tender would have been awarded a higher score. The result would have been the award of significantly more work under the contract. The key issue was whether the LSC was obliged to allow Harrow to amend its tender after submission in order to correct a genuine error. The court decided that the LSC was within its rights when it refused to allow Harrow to correct a mistake in its tender following submission, even though the error could be verified.

The mistake did not result in any ambiguity which the purchaser might have considered necessary to clarify. The court noted that it was an established principle of procurement law that all tenderers in a public procurement process must be treated equally and in a non-discriminatory fashion. It would be a violation of the principles of equal treatment if one particular tenderer were permitted to change its tender after the deadline for submission had passed.

The court commented that there are circumstances when a purchaser may allow tenderers to *clarify* information about a tender as long as that does not amount to a *change* in the content. A court should not interfere with the exercise of discretion by the purchaser unless it is applied unfairly or unequally across affected tenderers. The court may interfere where the purchaser refuses to exercise its discretion even though clear that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved. However, this does not lead to any suggestion that a tenderer has an entitlement to rectify a mistake. If a purchaser does not see any obstacle to considering a tender, that is to say, if there is no ambiguity or other obvious deficiency, then it is entitled to consider the tender as submitted, despite the possibility that the decision may have unfortunate consequences for the tenderer. Therefore, the LSC had not acted irrationally or disproportionately in refusing to allow Harrow to correct its tender.

(Continued on page 16)

(Continued from page 15) Correcting a Genuine Mistake

Hoole & Co.

Hoole made a similar mistake to Harrow in its response to the LSC procurement exercise through its e-tendering system. Hoole's mistake came as a result of selecting the wrong option from a drop-down list. Several tenderers had technical difficulties in relation to the different forms of text entry even though the LSC had provided technical support via advice lines. Hoole had problems because there was a difference between the screen version of the answers it selected and the paper version.

Following tender appraisal the LSC did not award a contract to Hoole. This was partly because the tender actually received by LSC from Hoole contained some sections that were blank in the screen version. Hoole argued that there was a failure on the part of the LSC online system which resulted in options it had chosen not being saved electronically. Hoole claimed that the LSC w had a duty of fairness either to alert tenderers where information was missing or to complete the missing information from the data submitted via other sources. As in the Harrow case, the court concluded that the fault was Hoole's. It could not see conclusive evidence of any fault in the LSC's e-tendering portal.

In practice, faults of this kind, even where they do exist are very hard to prove. The difficulty in this case was that it was not technically possible for there to be a difference between what had been saved on screen and what had been printed out. The court decided that the most obvious explanation was that Hoole had simply failed to complete and save the selection criteria and this was not a result of technical failure by the LSC.

The judge also decided that all tenderers had been provided with clear instructions as to what needed to be done and that Hoole had not used the available technical support line for assistance.

The Submission of Wrong Documents

April 2011 was a busy time for the LSC because, during that month, the High Court also dismissed an application by a tenderer for the judicial review of a separate contract award decision by the LSC stemming from a tendering process in relation to services in the field of mental health.

All About Rights Law Practice

As in the Harrow and Hoole cases, the LSC rejected a tender and found itself challenged by the disgruntled tenderer, the All About Rights Law Practice. However, unlike the Harrow and Hoole cases, the losing tenderer in this case had submitted a blank version of a mandatory form in error when electronically submitting its tender documents.

The case arose because the LSC refused to allow the tenderer to provide missing information when the tenderer realised its mistake after the deadline had passed. Unfortunately for the claimant, no-one disputed that it fulfilled the criteria to be awarded a contract and would have been successful if the tender documents had been submitted correctly as at the time it was the only firm specialising in mental health cases in the relevant area.

As in the Harrow and Hoole cases, the LSC procurement terms required that tenders be submitted in electronic form only, using an e-tendering portal. The claimant submitted its tender documents but, by mistake, one of the submitted mandatory forms had been blank.

In assessing the submitted tenders, the LSC took the approach that it would seek clarification from applicants where the information provided in a tender was ambiguous and where the tender was not capable of being appraised without clarification or where attachments were received in a corrupted format that could not be opened. However, the LSC considered that those situations were different from cases where a provider had failed to provide any information at all. The court concluded that the LSC's approach was rational and consistent; and that it accorded with the principle of equal treatment. It found that the error was solely that of the claimant. There was no requirement of proportionality or equality which would justify the form being completed and accepted after the stated deadline.

The LSC was not obliged to point out the error or to accept submission of the missing information after the deadline. If it had done so, it would have been unfair to other tenderers and would have breached the principles of equal treatment and transparency.

Missing the Deadline

Azam & Co is a firm of solicitors working in the area of immigration. The firm held a contract with the LSC which was due to expire on 13th October 2010. The LSC began a re-tendering exercise but the law firm missed the deadline for the submission of its tender. The LSC refused to allow Azam to submit a late tender. Azam claimed that its failure

(Continued on page 17)

(Continued from page 16) Missing the Deadline

to submit a tender in compliance with the deadline was due to LSC's failure to tell Azam itself about the deadline; that is to say to inform Azam specifically and directly and not merely to include the date in the procurement documents.

Azam argued, unsuccessfully, that the LSC breached the basic principle of proportionality by refusing an extension of the deadline and so allowing the firm to submit its tender. In doing so, Azam contrasted the serious commercial damage likely to be caused to the firm by the refusal, and the fact that the LSC would have suffered no prejudice in allowing the extension. The High Court ruled that this was Azam's problem, not that of the LSC. The Court of Appeal agreed.

Both courts found that the LSC had not created a legitimate expectation that Azam, as an existing supplier, would directly receive any further information about the tendering exercise. The LSC had acted appropriately in not extending its deadline to accommodate Azam. If the LSC had extended the deadline, it would have acted unfairly in relation to other tenderers and would have breached its obligations of equal treatment and transparency as required by the PCRs.

Lessons to be Learned

As the cases above illustrate, it is very important for tenderers to check their tenders before submission and especially before uploading onto a portal. As the cases above illustrate, it is very important for tenderers to check their tender documents before submission and especially before uploading onto a portal. Particular care is needed when completing electronic tender documents. There is a risk of the simple error of clicking the wrong box; in selecting the wrong field for the right answer; or making the wrong choice from a “drop-down” list.

Meeting the deadline time is absolutely essential. Servers can get very busy as deadlines approach, so very late at night or very early in the morning, well outside of normal business hours, are good times to submit electronic tenders.

The courts will typically side with purchasers in these “tender error” cases and regularly apply the principle that the requirement for a purchaser to apply equal treatment across all tenderers is more important than any obligation of fairness in relation to one particular tenderer. There is a clear difference between situations where a purchaser has a duty to clarify any ambiguous terms in a tender; this is particularly true in circumstances where, if it did not do so, it would unfairly exclude a tenderer from the process; and one where the authority is under no obligation to rectify a genuine mistake made by the tenderer.

The Purchaser is Not Always Perfect

Tender Appraisal and Equal Treatment

The following two cases illustrate areas where the LSC got it wrong in managing its appraisal process and therefore failed to comply with transparency and equal treatment principles.

Public Interest Lawyers v Legal Services Commission

In this case, the High Court found that the LSC tendering exercise for mental health law services breached the PCRs on the grounds that the LSC had breached the principle of equal treatment. The decision was that the LSC’s verification that the successful tenderers had complied with essential award criteria prior to entering into the contracts was flawed and inadequate.

This case arose out of a 2010 tendering exercise and involved a number of areas of law, including public law and mental health. The LSC's tender documents stated that tenderers should meet minimum standards of supervision. However, as part of its appraisal procedure, the LSC did not objectively verify that those standards were met. Instead, following the award of the contracts, the LSC commenced a self-certification verification process to ensure that the successful tenderers met the supervision criteria by the date the contracts were due to commence. In the end, the new contracts were entered into before the verification process had been completed.

The *Public Interest Lawyers* group challenged the LSC's award decision on various grounds; notably because the LSC failed to verify the quality standards met by tenderers and that, it was claimed, was a breach of the principle of equal treatment as required by the PCRs. It is accepted law that award criteria must be applied objectively and uniformly to all tenderers and that there is an obligation of transparency on the purchaser: i.e. to verify that each tenderer has complied with each criterion.

Objective and transparent appraisal of tenders depends on the purchaser relying on the information and proof provided by tenderers and being able to verify effectively whether the tenders submitted meet the award criteria. Where the LSC got it wrong was that it set out an award criterion upon which it neither intended, nor was able, to verify the accuracy of the information supplied by tenderers. That approach was deemed to infringe the principle of equal treatment because the criterion did not ensure the transparency and objectivity of the tender process. *(Continued on page 18)*

The NHS Standard Contract should be used by commissioners and all public sector purchasers when buying acute mental health and learning disability or community services. The contract sits alongside the Care Homes and High Secure Services Contract and along with the 2012/13 NHS Operating Framework can be downloaded from the following link:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_131988

(Continued from page 17)120 Day Limit …

In principle, an omission to verify a qualitative award standard is as much a breach of duty by a purchaser as the setting of unverifiable criteria. The court did not completely rule out self-certification as a legitimate approach. A purchaser is entitled to take the view that it is legitimate (at least initially) to rely on statements made by a tenderer. Purchasers can expect tenderers to be bound by obligations of integrity and to decide that it would not be a sensible use of resources for it to seek to independently verify all compliance by tenderers. The problem the LSC had in this case was that the plan for verification fell short of the requirement for objectivity. This was especially so as the self-certification procedure had not been completed at the time the contracts were let. The self-certification form itself was also deficient and far too general.

Law Society of England and Wales v Legal Services Commission

In this case, the High Court decided that an LSC tender for the provision of family law services was unlawful. This was because the LSC had failed to tell tenderers about their requirements for caseworker accreditation as a selection criterion in sufficient time for caseworkers to become accredited. In its tendering exercise the LSC had planned to use two types of selection criteria:

- Essential criteria: i.e., the minimum qualifications which had to be reached before a contract would be awarded, sometimes referred to in terms of a "threshold score";
- Selection criteria: i.e., the criteria by which the LSC would identify the best qualified tenderers in order of merit. In order to obtain the maximum score, at least one caseworker at the tendering firm had to be accredited under two different accreditation schemes.

Following tender appraisal, the LSC confirmed that the number of tenderers providing family law services would be reduced from 2,480 to 1,300. This was a reduction that was far greater than expected or anticipated. A large number of tenderers lost out because they did not have a caseworker who was accredited by both of the required schemes.

The problem faced by tenderers and thus the LSC was that it was not possible to obtain such accreditation within the timeframe of the eight week tendering process; that is from the date of the advertisement and announcement of the criteria to the deadline for submission of tenders.

The Law Society applied for judicial review of the LSC's decisions on the basis that the process adopted by the LSC was seriously and unlawfully flawed. It was claimed that the LSC acted unlawfully by failing to make it clear that the accreditation by two schemes would be necessary for maximum points to be achieved; and that the LSC should have given tenderers the opportunity to demonstrate that they had the necessary qualities by applying for, and acquiring, accreditation. The court agreed that the LSC had acted improperly and that setting out a selection criterion which is effectively unachievable by a broad cross-section of otherwise well-qualified tenderers is inappropriate. The LSC should have made it clear at a much earlier stage that the accreditation requirement would be so important. Doing so only when it was too late to allow unaccredited firms to achieve such accreditation is wrong. ◘

Developing and Tendering as a Consortium

As purchasers widen the requirements of the services specified and seek to reduce the number of contracts they are managing so the need for collaborative working grows more urgent. The Regulations (Reg. 28) define a consortium as two or more providers tendering together. However there is the ever present concern of contravention of the Competition Act 1998 and what this might mean for Trustees/Directors. Quite unknowingly a recent tender openly proposed such a contravention which amounted to collusion and possibly also the formation of a cartel and were lucky to avoid censure. The risks are growing as the Office of Fair Trading (OFT) takes an ever greater interest in purchasing in the health and social care sectors.

The TfC paper "*Collusion or Competition"* sets out information on Competition Law and the risks involved if care is not taken in collaborative tendering: http://www.tenderingforcare.com/system/files/Collusion%20or%20Competition.pdf Great care is therefore needed in forming and tendering as a consortium.

TfC has had considerable success in helping providers to develop consortia and tender successfully, including working towards merger and forming the necessary corporate structures. Our knowledge and expertise in this area was recognised when we were asked to edit the Cabinet Office publication "*Working in a Consortium"* http://www.tenderingforcare.com/system/files/Working%20in%20a%20consortium%20fnl.pdf

We provide a range of services for providers who wish to collaborate to tender successfully. This may be by acting as a prime or lead contractor and sub-contracting, forming a consortium with each member retaining their independence by the formation of a Special Purpose Vehicle (SPV) or Joint Venture (JV) or through to full merger. Please contact us to discuss your requirements or look at the relevant sections on our website at:
http://www.tenderingforcare.com/developing-a-consortium

Collaboration to Bulk Buy and Reduce Costs

Can collaboration by Health and Social Care providers to bulk buy reduce costs? When it comes to buying, providers will need to move out of their comfort zones. A fiefdom mentality can no longer achieve the tough new targets and back office savings demanded by austerity measures. It's time to put individual agendas aside and concentrate on aggregating demand. Buying consortia can support this process, but they do need to keep their sector focus. The benefits of collaborative procurement are evident in Liverpool. Here housing providers across the city have joined forces with the local authority to combine demand to maximise revenue. They are working together to buy and install photovoltaic panels on the tens of thousands of homes managed by the social landlords involved.

Procuring solar panels, and the labour to fit them, collectively is intended to drive down costs, and also enhance the payments they receive. It is intended that this income will fund a large scale cross-provider retrofit programme, boosting future co-operation between associations and providing thousands of job and training opportunities for local people.

Bulk Buying

Consortium buying is all about collaborating and building demand. There is a general view that economies of scale generate cost savings. Costs per unit can fall as scale is increased, no matter whether that unit is a solar panel, the hire of a fleet vehicle or the recruitment of an employee. But once demand is there, consortia must decide on a common specification for each product or service to be purchased which can be a struggle. Getting a large number of providers to agree on the same brass door knob for all their homes and offices, or the person specification for a particular group of employees, will involve a culture shift in many organisations. But once the door knob has been decided upon, or the employee appointed, the consortium can identify local demand for that fitting or type of employee elsewhere and bring together local supply chains, driving costs down further.

Barnet Homes recently saved £700,000 when it started buying through the same energy framework as other landlords via Procurement for Housing, a buying consortium with 730 members set up by the Chartered Institute of Housing, the National Housing Federation and HouseMark. Another consortium, Fusion21, set up by social landlords in Merseyside has generated £45m in savings. The group has also used its procurement muscle to generate local jobs. For every £650,000 of work awarded to a supplier, the consortium secures employment for a trainee with that supplier.

Pooling Knowledge

More providers are pooling their knowledge through buying groups, learning from best practice and accessing high level procurement expertise, often for free. In-house buying teams can be streamlined, spend data can be tidied up and risks within the supply chain minimised. Group purchasing can also boost compliance. Providers lose millions each year through rogue spending, when staff buy outside a procurement framework. By joining together to tackle this issue, they can source affordable, effective solutions that plug procurement leakage. Membership of a buying consortium alongside a clear back office savings strategy provides evidence of intention to reduce costs over time and to reflect this in prices quoted.

Staying Streamlined

Buying consortia should not be allowed to get too wide. In the past, the government's procurement bodies have tried to be all things to all men and as a result they have struggled to perform their prime function. The recently established Government Procurement division will buy collaboratively for Whitehall departments only, limiting the more broad ranging operations of its predecessor, Buying Solutions. Sector specific consortia are generally thought to be the most effective. For providers to truly benefit from collaborative procurement they need a shared view of how to tackle wastage, streamline the supply chain and improve existing buying practice. Consortium agreements should be based in Confidentiality and Information Sharing Agreements which set the limits of activity in a clear way which is acceptable to all concerned, whilst sub-contracting policies and procedures as well as monitoring, in compliance with the Merlin Standards, should also be in place. This is not an approach to be entered into lightly and without due diligence checks on other consortium members. Importantly providers should start by agreeing a common view: many organisations begin arrangements with price, but this should really come near the end. Today more than ever before people recognise that collaborative purchasing can help public sector organisations deliver on austerity targets**.** In some providers buying staff are being laid off. The reverse should be happening; in addition the procurement function should be represented at Board level. ▫

For Guidance on Due Diligence for Tendering and Consortia go to:
http://www.tenderingforcare.com/news/due-diligence-for-tendering

120 Day Limit on Procurement Process

Central Government buyers must complete procurement processes within 120 working days from the start of 2012. Under the new directive announced by Cabinet Minister Francis Maude, all central government tendering exercises, excluding those deemed too complex, will be completed within 120 working days, compared with an average of 200 days, from the point they are advertised or posted in the OJEU.

To achieve this, there will be closer and earlier engagement with suppliers and markets to gain a deeper understanding of the opportunities on offer, enabling them to produce improved invitations to tender. He said the government wanted to "bust myths" that it is against EU rules to engage with suppliers at an early stage. "Before a tendering exercise should come commissioning; that is testing and scanning the market to see what suppliers there are and what they can offer," said Maude. "In future, major tendering exercises should only take place after we have spoken informally to our potential suppliers. So we can make swift off-the-shelf purchases where appropriate or quickly choose the right supplier for the job." The executive chairman of Future Purchasing and co-author of a recent report into public sector procurement, welcomed the move but suggested data should be published to enable scrutiny. "This is important because it is actually a proxy for the right type of managerial focus on the effectiveness and efficiency of the tendering process. It would also highlight the parts of the sector that are dragging their feet, so that pressure, and sanctions if necessary, can be applied." It was also announced that the government would:

- Increase communication with current and future suppliers over contact opportunities.
- Mandate that all civil servants tasked with handling major tendering exercises are trained in the new approach.
- Publish details on more than £50 billion of potential contract opportunities initially in the areas of IT and facilities management with more areas being covered in the future.
- Set up a "commissioning academy" to train "capable, confident and courageous" public sector procurement professionals.

Commenting on the decision to publish more contracts, CIPS CEO David Noble said: "Lack of transparency has been one of the biggest problems in public sector procurement so the move to publish details of potential projects is probably the most innovative for decades."

Report Recommendations

The report examines the distribution of procurement spend across the UK public sector in detail, identifying those most in need of reform as defence, NHS trusts, PFI, local government and central government. It makes recommendations with regard to best practice and innovation that policymakers and procurement practitioners can implement.

- Through the adoption of a very different reform model, focused on procurement transformation as a policy goal and with much higher government-wide leadership behind it, procurement-led savings across the whole public sector should deliver £37 billion in the current term of parliament, rising to £75 billion by the end of the next term;
- Total public sector procurement transformation to become a coalition government policy goal, with cabinet-level ownership;
- Reform PFI projects by extracting substantial, multi-billion pound concessions from the industry, renegotiating contracts and imposing claw-backs, thereby securing a sustainable deal for the taxpayer and reducing unaffordable and unfair financial burdens on, for example, hospitals;
- Require all key parts of the public sector to produce their own procurement reform and business plans on a rolling annual basis and introduce systematic annual review and scrutiny of them;
- Set up a network of procurement orientated non-executives and external advisers capable of championing procurement with the most senior executives in the public sector, supporting them in the creation of procurement reform plans and monitoring their successful implementation;
- Inject, as a matter of urgency, stronger and best practice procurement in order to drive procurement productivity, professionalise the function and reduce the unacceptably high failure rate of major procurement exercises. Adopt a return-on-investment model to pay for this;
- Set up a Government Procurement Academy and similarly high-quality performance-based learning initiatives, in alliance with CIPS. Initial focus to be on high added-value staff in order to build category, supplier, contract and programme management skills that can be rapidly deployed on major projects closely aligned with the policy goals of the government;
- Commit to meaningful expenditure data analysis and publication of the UK-wide public sector spend map;
- Accelerate process and procedural simplification of EU procurement regulations and increase SME access to public procurement.

Information is available which describes the new public health system. This link goes to a page which covers the role and responsibilities of local government in public health, the operating model for the new executive agency Public Health England and an overview of how the whole system will work,.http://healthandcare.dh.gov.uk/public-health-system/

Publications by TfC Members

KeyRing: Living Support Networks

KeyRing has been operating Living Support Networks for vulnerable adults since 1990. The model uses layers of support, centred around a volunteer who lives in the same neighbourhood as the service users ('Members') in the Network. Typically, nine vulnerable adults live in properties, in their own names, usually within walking distance of each other. **The Department of Health Care Services Efficiency Delivery (CSED) felt Living Support Networks were 'potentially very cost effective** as they:

- Use the time and skills of a volunteer and of the individual members rather than being overly reliant on expensive professional staff;
- Facilitate access to universal services rather than costly specialist day services; and
- Encourage members to develop their skills and confidence by encouraging them to do things for themselves rather than be dependent on support. Often this leads to additional (to KeyRing) specialist support being reduced/ withdrawn over time.

CSED found that this approach resulted in a reduction in the 'whole life' cost of support, as service users were enabled to become more independent, requiring less support, including to the point of living without any paid for input.

If you would like to know more **please read the case study** at: CSED case study of KeyRing
or contact Mike Wright at KeyRing: mike.wright@keyring.org.

The ExtraCare Charitable Trust

This link is to the interim findings of an osteoporosis project called **Fracture-Free** setup by The ExtraCare Charitable Trust and funded by the Department of Health**. The project is helping our service users reduce the impact of a fracture by identifying those at risk of developing osteoporosis.**

Two years into the project, this is what the report explains:

- Nationally, around 33% of older people die within a year of a hip fracture. For ExtraCare residents, this falls to only 24%.
- 37% of those at risk of osteoporosis are being treated by their GP, as opposed to only 28% last year.
- Nearly 1,600 residents at ExtraCare's retirement villages and schemes benefited from an Osteoporosis Risk Assessment between 1 April 2010 and 31 March 2011.
- ExtraCare will continue its programme of Osteoporosis Risk Assessments for residents into the future.
- Residents who have previously experienced a wrist fracture will be given extra advice, as they are at an increased risk of hip fractures. Studies have shown that identifying and treating people who are in this high risk category can reduce the chances of hip fracture by 50%.

http://www.extracare.org.uk/news-press/latest-news/extracare-releases-well-being-review.aspx

The link below is to some research Extracare took part in alongside Audley and Retirement Securities Ltd **"Establishing the Extra in ExtraCare" - The International Longevity Centre UK 2011**

This is a report of an independent research study that shows that residents moving into The ExtraCare Charitable Trust's housing schemes and villages experience a 24% reduction in social care needs within five years.

http://www.extracare.org.uk/about-extracare/research.aspx

The fourth annual report of the Independent Mental Capacity Advocacy Service was published. This is an innovative statutory service provided by the voluntary sector. It acts as an important safeguard for people who lack this capacity.

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_131958