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

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Cost Drives the Structure of Tenders

Early in 2013 the costs involved in running a tendering exercise became a concern for many public purchasers. As the main costs are those relating to tender appraisal wide ranging attempts have been made to reduce the time involved in appraising tenders and as a result reduce cost. This has led to the now, widely adopted standard practice of the application of strict word or even character limits. Unfortunately the purchasers continue to demand detailed answers to questions which are frequently difficult to answer within limits that may often as low as 200 words.

Whilst the reduction in the cost of tendering is to be welcomed, in many cases a general increase in the sophistication of the questions asked is needed if the questions are to be fair in terms of the ability of tenderers to answer adequately.

That said, the new style of tender writing, which during 2013 has become universal, is very different from that which prevailed, and succeeded, in 2012 and earlier years.

Writing to a tight word, or character, count is a new skill which many involved with tendering have a year to accept and understand, much less to acquire.

We were contacted during the year by a number of providers, saying that they had been requires to re-tender for an existing contract and had used the same approach used that had succeeded in the past, typically three years ago but their tender had failed. When shown how to prepare a tender using the approach which is now necessary they invariably succeeded. In other cases there was a lack of belief, which sadly, led to further failure.

It is now essential that providers accept that to succeed a new tender writing style is required. It is also necessary to acquire the skills needed to present their tenders using the strict limits which are now required. •

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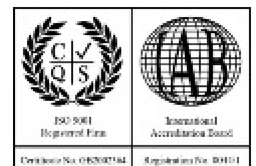

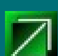
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Tenderers Respond to the New Requirements

The Government has published changes to Regulation 23 of the Public Contracts Regulations 2006 (the PCRs) to As the year ended a new trend appeared which will test the resolve of the purchasers to minimise the cost of procurement exercises and the ability of providers to secure contracts. Recent reports of the results of 12 tendering exercises indicate that the number of tenders received was in the region of 74 to 86. The level of competition is clearly increasing for which there will undoubtedly be a response by the purchasers which is already becoming clear from the feedback available. •

Competition and Increasing Standards

One of the functions of competition is to push up the standard of tenders prepared. Whether this also pushes up the quality of the resulting service delivery is yet to be seen. This, to a large extent depends upon the skill of the purchaser in both the questions which they ask and the way these are appraised and scored. Some years ago Janet Roberts was criticised in the journal Third Sector for claiming that the ISO 9001:2008 is essential for successful tendering. The standard has now become ubiquitous, with a very small number of providers who do not have the standard being awarded contracts.

In 2014, for the purchasers to select from very large fields two things must happen:

The details relating to a wide range of quality standards will increase in importance, with very small variations over a range of quality considerations making the difference between winning and losing;

Those who prepare tenders must be able to provide details, qualitative evidence of their capacity to deliver the proposed contract in particular the delivery of outcomes.

It is this latter consideration which will gain traction as the link between the presentation of a quality tender and the ability to deliver the contract to the same standard is established. •

Learning Disabilities Good Practice Project Report

The report gives people who commission, design and deliver services a better understanding of how to improve the lives of people with learning disabilities. Details of the services were collected by the National Valuing Families Forum and the National Forum for People with Learning Disabilities, as requested by Norman Lamb, Minister for Care and Support, in November 2012. More than 80 examples were received, and 6 services were selected because they demonstrated important indicators of good practice. They are described in detail in the report. •

https://www.gov.uk/government/publications/learning-disabilities-good-practice-project-report

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2014: Where is Health and Social Care Procurement Now?

In many ways 2013 was a year of change for health and social care (H&SC) procurement. Perhaps the most public and obvious change was the arrival of the CCGs in April. But it was the recovery of the purchasing market in early summer which had the greatest impact on those involved in the tendering process. In early June it was clear that changes were happening. The sheer number of H&SC tenders published each week increased relentlessly, peaking during the first week of August with 150 calls for tenders. Although the CCGs were having some impact, the real reason for growth in numbers had more to do with the decision making processes of the public purchasers. The outcome of the local elections in May resulted in firm plans for the structure of local services being confirmed and the resultant tenders issued.

There is one part of the decision making process which has contributed to the growth in the number of opportunities published, but has yet to fully impact upon the majority of providers. All tenders are the outcome of a process which involves building a "Business Case" for the proposed service. A crucial stage in the development of a Business Case, which is a legal requirement, is the public consultation phase. It is at this point where the purchasers must discuss their plans with the public, it is also the point at which providers have a very real opportunity to influence what the final service specifications. Described variously as "meet the buyer" of "soft market testing" and a range of similar titles, these opportunities are frequently dismissed by providers. It is noticeable how widely public purchasers are now complying with the law and embracing this step in the commissioning process. These are opportunities which should also be fully embraced by all those who seek to tender for public sector contracts.

There is another type of engagement with the Business Case development which can have multiple benefits for providers and Service Users alike. Sometimes public purchasers seek support from providers at the earliest stages in the Business Case development process. Providing support of this kind is of tremendous public value and can create real benefits in terms of the eventual contract specification. However, in times when pricing and costing is very tight there are some matters which providers need to keep in mind:

- The time involved in providing the support. Small providers in particular need to ensure these costs are covered in some way; typically by way of an agreement to invoice the public body;
- It is important that provider ensure any information they provide is not used out of context or in any way that could damage their reputation. The best way to achieve this is by ensuring that all contributions are made over the provider's copyright;
- Any information provided for the public body, if not already in the public domain, is covered by terms of strict confidentiality. Providers should always ensure that they have the right to pass on information;
- Even when passing information to a public body the provider should ensure that they comply fully with their obligations under the Data Protection Act;
- Above all it is essential that providers take all necessary steps to ensure that they are not in a position of conflict when the tender is ultimately published and as a result, are excluded from the process.

When negotiating with public purchasers, and before discussions commence, it is essential that providers are clear about the benefit the public body will receive from their contribution. Such a contribution has a value therefore providers should ensure there is an agreement which recognises that value as well as the reimbursement of reasonable expenses. It it important to note that Clinical Commissioning Groups have been allotted a budget for running costs. They have flexibility as to how they apply these funds to procurement support provided they can demonstrate compliance with conditions such as demonstrating value for money and improvement in the quality of services they purchase.

Any risk to which a provider may be exposed can be minimised by having a clear internal policy and procedure in place for information sharing. Having a clearly set out process and ensuring that all relevant individuals are made aware of it saves time and resources when considering participating in an activity of this kind. •

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The Growing Relevance of the Prior Information Notice

Over recent years short notice tenders have led to considerable problems for tenderer for Part B contracts. The increasing use of the "Prior Information Notice" or PIN for such services might ameliorate this problem which causes much frustration. It is a requirement for all public bodies who intend to purchase non Part B services to first set out their plans in a PIN.

At the beginning of 2014 a small, but steady stream of PINs for such services have been published. The purpose of a PIN is to provide advance warning of a future planned tender. These will become much more significant when the new Directive comes into force later in 2014. The Directive contains a requirement that a PIN be published for all services currently classified as Part B. They should therefore not be ignored, indeed they provide a real opportunity for providers to secure crucial time to prepare for forthcoming tenders. Responding to a PIN also enables providers to register with the purchaser and thus ensure that information regarding the tender is received as early as possible.

The PIN notice includes a short description of the nature and quantity or value of supplies or services. The following are examples of such information from recent PINs

Example 1. Here the CCG is using the PIN as a public notification that there is a plan and opportunities to consult before the formal tendering process commences.

As part of the formal engagement process, Manchester CCGs wish to give all interested parties and organisations the opportunity to provide feedback and welcome comments on the draft individual care pathways and how all the services will work with each other.
It is anticipated that the procurement process, subject to final CCG board approval will commence April 2014.

Example 2. In this example the purchaser has decided on the structure of the forthcoming tender, the PIN provides valuable details for providers who are planning to tender.

The Council intends to undertake procurement for this service. You will need to register your organisation on www.xxxx.co.uk in order to access tender documentation once issued.
Information about lots
Title attributed to the contract by the contracting authority:
Lot No: 1
Lot title: Specialist Home support including Housing Related Support / community access / sourcing of accommodation (All Providers)
1) Short description: Lot 1 will be relevant to all providers tendering for this service.
3) Quantity or scope: 4) Indication about different date for start of award procedures and/or duration of contract:
Title attributed to the contract by the contracting authority:
Lot No: 2
Lot title: Autism Service (Specialism area)
1) Short description: Lot 2 is deemed a specialism area, in addition to Lot 1
3) Quantity or scope: 4) Indication about different date for start of award procedures and/or duration of contract:
Title attributed to the contract by the contracting authority:
Lot No: 3
Lot title: Service Users with Challenging Behaviour Needs including Delirium and Dementia (Specialism area)
1) Short description: Lot 3 is deemed a specialism area, in addition to Lot 1

Example 3. In the third example the Council has set out its requirements and the minimum expectation of providers.

Registration of interest is invited which will enable providers to see how the procurement process develops. This can be fed this into providers' own decision making processes with regard to whether or not they will tender for the contract.

Council has a requirement for a small number of service users to be accommodated in a residential unit within the area. The provider will be expected to provide for 24 hour care and support for adults (age 16-64) who have physical and complex disabilities. Service users are likely to have a significant disability such as Multiple Sclerosis, Motor Neurone Disease , Huntington's Chorea, and other degenerative conditions They will require supervision on a 24 hour basis, have high level care needs and require a waking night staff.
This residential accommodation must be located locally in order to allow easy access for families and engagement with the community. The accommodation must also meet minimum building standards for individuals who have access and mobility problems and be registered with the Care Inspectorate.
Please register your interest in this provision. •

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The Role of Credit Reference Agencies in Tendering

Increasingly public sector purchasers are using the large credit reference agencies for external confirmation of the financial standing of tenderers. Recently a number of situations have arisen whereby questionable ratings and reports have arisen, and in some cases these have led to the provider being excluded from the tendering process. This situation highlights a number of aspects regarding the way in which the agencies work and how this impacts upon providers.

The courts have confirmed that there is no absolute or unqualified obligation on a credit reference agency to ensure the entire accuracy of its data.

This was the finding of the *Court of Appeal in Smeaton v Equifax PLC.* The case started when Equifax was found to have breached the Data Protection Act 1998 (DPA) and also the duty of care which it owed to Mr. Smeaton. This arose as a result of the agency failing to take reasonable steps to ensure the accuracy of its data. The agency's records showed that between May 2002 and 2006 Mr. Smeaton was subject to a bankruptcy order. However, the order had been removed in May 2002.

In 2006, Mr. Smeaton asked his bank for finance for his business which was refused. The bank based the refusal on credit information provided by Equifax. Mr. Smeaton's view was that because he was unable to raise the finance he needed, he had suffered business and other losses. As a result he wanted compensation from Equifax as a result of a breach of the DPA. He also asked the court for damages for a breach of the duty of care the company owed him.

The court found that Equifax had a responsibility to consumers whose personal data it held. The Court of Appeal held that it was not just the bankruptcy entry on Smeaton's credit file that had resulted in the refusal of credit. Other adverse data entries were also included. It held that the losses Mr. Smeaton claimed were "too remote".

The details of the removal of the bankruptcy order had not been published in the London Gazette. This requirement had been removed by the Insolvency Act 1986. Since then, it has been the responsibility of those made bankrupt to send notice of removal to the credit reference agencies. Mr. Smeaton had not done so.

The Court decided that as a result it was not unreasonable to assume that Equifax did not know of the removal. Therefore the agency had not acted unreasonably in failing to ensure the accuracy of its data. Credit references do not assume responsibility to every member of the public simply because of the nature of the business they operate. The DPA already provides a detailed code for determining civil liability of such agencies arising out of the improper processing of data.

If there are inaccuracies in the data held, no amount of complaining by the company concerned will result in the removal of the inaccuracy.

A company wondered why it was failing to pass PQQs on financial grounds. It was discovered that there was a County Court Judgement (CCJ) recorded against the company by a credit reference agency. This report had been the basis of the exclusion it has suffered in a number of tendering exercises. In fact the debt had been satisfied within the time limit for payment meaning that the CCJ had not actually come into force. The record of an unsatisfied CCJ had been made in error.

The company's solicitors had at the time when the debt was satisfied, agreed to ensure that the subsequent CCJ was not recorded which the solicitor had failed to do. On presentation of evidence of satisfaction of the debt before the CCJ time limit to the credit reference agency by the company's auditors, the record was removed, and they started to pass PQQs.

It is essential that provider tendering for contracts monitor the records held by the key credit reference agencies. Where errors are identified, then it is necessary to use an external professional as a go between which is able to confirm and evidence the claims being made, typically the accountant/auditor, solicitor or other suitable professional body.

A poor "delinquency" score can result in failure.

As competition increases, so more and more attention is being paid to the financial sustainability of potential contractors. A measure which is increasingly being used I referred to by the agencies as the "delinquency score". The biggest international corporate credit reference agency in the UK Dun and Bradstreet has provided this score over many years. As this is seen as a valuable indicator it is now being offered by other agencies.

The delinquency score provides information on the time taken by companies to pay their invoices. This is usually taken to be an indicator of financial stress and raises questions regarding financial sustainability during the life of their contracts. ●

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Getting to Know the Unknowns

Although Donald Rumsfeld was a US Secretary of Defence, he will probably be remembered for a statement he made in 2002 about the Iraq war which is equally relevant to public sector tendering.

'There are known knowns; there are things we know we know.
We also know there are known unknowns; that is to say, we know there are some things we do not know.
But there are also unknown unknowns – the ones we don't know we don't know.'

We see evidence of this daily, principally amongst the smaller providers in both the private and voluntary sectors and across the entire social care market. One of the reasons is that procurement can be for contracts which run for long periods. A Framework Agreement will typically last for four years, not infrequently with the possibility of a further two year extension. The majority of service contracts run for three years, again with the possibility of a one or two year extension. Indeed one recent care contract was awarded with a termination date in 2025!

There are two scenarios which we frequently come across:

1) *A provider successfully tendered for a contract three or four years ago. In some cases providers have even "cut and pasted" answers to previous tenders into the current documents. The contract comes up for renewal, they re-tender and fail. Procurement and therefore tendering is a developing, dynamic process. Therefore answering tender questions is also developing; the style and content of answer which were awarded winning scores will not have the same success today. Similarly the requirements are different. Now the ability to quote qualitative performance such as outcome measures achieved is crucial to success as is the ability to demonstrate the accredited qualifications and skills of the workforce. Keeping up to date with the changes in requirements ensuring that "the unknowns are known and acted upon" is one of the keys to success.*

2) *During extended contracting periods it is very difficult for companies who are new to the market during the contract/framework agreement period to break into the market. Far too often we see new small providers spending time, and sometimes money pursuing commissioning officers to no avail. It is always difficult in the early days for a new company to tender successfully. The trick is, once all of the standards have been met (CQC registration, ISO 9001:2008, etc.) to secure business on a basis which is not directly dependent upon Public money. This could be by providing services for privately financed care users, and/or carers; sub-contracting work from other providers large or small; working with local GP surgeries or even hospitals to offer respite or reablement services. Regardless of the business the purpose in the early days must be to collect evidence of the ability to deliver outcomes based on a support plan. This is what purchasers want to see.*

As ever, successful tendering depends upon the conversion of unknowns to knowns and then providing quantitative evidence of successful performance. Where performance has not been successful, then provide evidence of the action being taken. Continuous Development of People and organisations is central to the new requirements. ●

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Another Disaster = Increased Focus on Business Continuity

Whatever the reasons for the flooding across Southern of England and the political arguments which may be raging, the events of the past December 2013 to February 2014 will inevitably impact on the views of those tasked with drawing up Business Cases, and ultimately tender scoring schemes.

For providers two significant features will need to be considered.

a) Whilst we were hearing about the government's "COBRA" meetings, local councils would have been opening their "Command Centres". These are a critical element of any Business Continuity Management Programme (BCMP). Council centres are usually buildings which are separate from headquarters offices, dramatically referred to on TV news programmes as "bunkers". Such sophisticated centres will have all that is required for the occupants to survive for up to 30 days, in terms of water, food, power, etc. Whilst there is no suggestion that public sector contractors should go to such extreme lengths, BCMP does require that providers have an off-site, independently supported command centre in place. This can be as minimal as a filing cabinet in a private house which is ready to be opened up and operational at a moment's notice. Some BC advisors recommend having a "grab bag" in place on exiting premises. But this misses the point entirely. The command centre has the facilities and crucially the information and data needed to take over operations immediately. The location is known to staff and purchasers so that the transfer of the management functions can occur with minimal discernible effect on service users.

To emphasise expectations the following tender is just one of a number which appeared in recent weeks:

1. *Title: DISASTER RECOVERY CALL CENTRE SOLUTION*
3. *Contract type: Service contract*
4. *Description: The awarding authority is inviting tenders on the terms set out in this Invitation to Tender (ITT) for the supply of a Disaster Recovery Call Centre Solution. The solution should provide cover in the event of failure of the system (the data) and the equipment used (the telephones and voice recorder) and the Council's Call Centre. The solution should complement the Council's Telecare Enabled Monitoring Centre. The complete solution will permit the Council to, during a crisis situation, divert LeicesterCare alarm calls to a remote service that will receive and handle alarm calls generated by vulnerable service users via telecare equipment installed in their homes. There are two key requirements which underpin this. Firstly, the supplier must demonstrate that their solution is able to handle a range of alarm protocols. Secondly, the supplier must ensure that calls are handled using either the same data as that held in the Council's own call handling database.*

It is a very small step from the proliferation of similar contract to the requirement that all providers have similar arrangements in place. Of course as with all BCMP activities, the opening up of the command centre and attendant services must be tested by walk through and by a real time incident scenario at least annually, with a full evaluation, lessons learned and system update in each case.

b) The events in Somerset remind us that the BS29555 Standard does not approach BCMP by "event" but rather by function. It is not the event which is at issue but the effect of the event on the functioning of the organisation. So it is not avian flu or flood which is the issue, although either might be the causal reason; it is the loss or denial of staff, i.e. the loss of contractual function for a limited period of time. A real and recent example occurred in London during the 2012 Olympic Games where some providers experienced a temporary denial of transport and thus staff. This was time limited; the methods for addressing the problem could be both planned and tested.

The situation of the River Thames breaking its banks, on a limited basis may well lead to denial of premises for some providers. Although the effects will take some time to address, the event is a temporary "denial" of premises. For the premises irreparably damaged in the Somerset levels or along the Devon coast the events are "loss" of premises. The effect from the purchasers' perspective will vary.

Where the function is denied, then the provider can be required to provide a timetable for recovery with a target date and the contract continuing with temporary resources and/or facilities in place. In the case of loss of function the reaction of the purchaser is likely to be contract termination. It is for this reason that it is important to be able to recognise both denial and loss across every function of the organisation, from people to finance, premises to facilities; to have plans in place which address both levels of loss and to test the plans on a regular basis. ●

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Take Care What You Submit

When a tenderer mistakenly submitted a blank mandatory form to the Legal Services Commission, the Commission did not act disproportionately or treat the tenderer unequally when it rejected its tender. The recent decision in *R (on the application of All About Rights Law Practice) v The Lord Chancellor (*as successor to the Legal Services Commission) [2013] EWHC 3461 related to an application for judicial review of the Legal Services Commission's ("LSC") rejection of a tender by *All About Rights Law Practice* ("AAR") in the 2010 tender. This was for the provision of legal aid services for mental health work. Due to the smaller number of solicitors specialising in mental health, there was a relatively low level of competition for legal aid funding in the area. It was therefore only necessary for tenderers to pass the Pre-Qualification Questionnaire and essential technical criteria; in order to comply tenderers had to complete and submit a Tender Information Form ("TIF"). AAR inadvertently submitted a blank TIF and its tender was therefore rejected by the LSC.

Permission to apply for judicial review of the LSC's decision was granted on 21 October 2010. AAR's challenge of the LSC's decision on three grounds:

- There was an obligation on the LSC to draw to the attention of AAR the omissions in its tender.
- The LSC failed to use its discretion or unlawfully used its discretion.
- There was irrationality or inequality in the way in which the LSC dealt with incomplete tenders.

In rejecting the application for judicial review that the LSC had never sought clarification from tenderers where they submitted blank responses so there had been no inequality of treatment. However, after the hearing it was revealed that the LSC had sought clarification from other tenderers in the past where blank responses were submitted. On the basis of this new evidence, AAR lodged a notice of appeal and the LSC accepted that the matter should be reheard. During the second hearing, only two issues remained for consideration:

- Whether the LSC's decision to reject AAR's tender was proportionate.
- Whether there was inequality of treatment between AAR and other tenderers.

The Court decided that the LSC's decision to reject AAR's bid was not disproportionate. Amongst the reasons given was that the Information for Applicants provided by the LSC to tenderers made it clear that tenderers could not amend or alter any part of the tender after the closing deadline. The submission of a blank form was not a situation of clarification of ambiguity as the TIF had been submitted completely blank and to allow submission of a later completed TIF would have effectively meant allowing the submission of a new bid after the deadline for submission.

The Court also rejected AAR's submission that it had been treated unequally, that each tender process was separate and distinct and it was not possible to make direct comparisons between the LSC's conduct in different tenders. There was no inequality of treatment in the circumstances of earlier tenders could not be carried over to later procurement exercises.

This case makes it clear that purchasers takes a firm line when accepting tenders and are not required using their discretion even when it may be absolutely clear that mistakes have been made in submitting a tender. All tenderers should therefore take great care to submit complete tenders which answer all of the questions in the manner instructed, not to alter or amend the tender form in any way and to double-check what has been uploaded to online portals before finally pressing the button. •

Cautious Commissioning

As the **NHS (Procurement, Patient Choice and Competition) (No 2) Regulations, 2013** [*pause for breath*] bed in, they are at risk of creating an environment of cautious commissioning with some lawyers saying that commissioners are placing too much emphasis on avoiding risk by asking far too many questions in method statements.

Significant resource is being invested in the running of procurement and bidding for contracts despite earlier attempts to reduce overall costs. Cautious Commissioning is spreading from the NHS to Local Authorities. A tender published in December 2013 required over 80 questions to be answered, each of 500 words; a total of over 40,000 word. Just to make matters worse, the method statements are then integrated into the final contract, thereby creating an unwieldy set of contractual terms.

This is completely contrary to the government's preferred approach which is to make tendering for public sector contracts easier for and more accessible to SMEs. Looking back to Winterbourne View, the Chilcott Enquiry and the Francis Report is it hardly surprising that the Boards of purchasing organisations as well as Councils and CCGs feel that it is necessary to protect themselves from public criticism and "trial by media" in the event that something should go wrong during the life of the contract. Sadly, as so often in this world, many suffer for the wrongdoing of a few. All we must hope is that ultimately it is not the Service Users who suffer. •

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"Subject To Contract" The Importance of Those Words In Negotiations

Ensure that ALL communications concerning a contract prior to signature, even emails, are headed with those three essential words. The importance of ensuring the intentions of the parties to the contract are clear during any contractual negotiation process has been confirmed in a recent decision by the High Court.

Newbury v Sun Microsystems [2013] EWHC 2180 (QB). Sun made an offer to settle an outstanding invoice. The settlement was "to be recorded in a suitably worded agreement". This offer was accepted, and Mr. Newbury's solicitors confirmed they would forward a draft agreement for approval. A dispute then arose principally as to how the settlement should be recorded and the timing of the payment. Mr. Newbury applied to the Court for a declaration that a binding settlement agreement had been reached on the terms set out in Sun's original offer letter.

The High Court decided that a binding agreement existed regarding the payment which contained the terms of the settlement. It decided that both parties had intended to create legally based relationship and had agreed upon the terms by which the relationship would be governed:

- The letter from Sun's solicitors was an offer to make payment and set out the terms of that offer. This offer could be accepted by a specific time. The payment was to be made within 14 days of acceptance. The letter was intended to be a binding offer capable of acceptance, which was accepted. The letter did not simply indicate a willingness to consider settlement. There was no reference made to other outstanding matters to be confirmed.
- Sun's letter referred to the settlement being recorded in a suitably worded agreement. No terms were still to be negotiated and agreed, but simply how the agreed terms were to be recorded.
- Sun's letter was not stated as being "Subject to Contract". If those words had been used then it would have been clear that the terms would not be binding until a formal contract was agreed.
- Use of the words "Without Prejudice Save As To Costs" did not have the same effect as "Subject to Contract". •

One of the four key elements in contract formation is whether the parties intend to create a legal relationship. There is a distinction between suggesting terms of a contract which may be accepted with the intention of establishing legal relations, and suggesting terms as a stage in negotiations. This case highlights how important it is for parties to communicate the purpose of the suggestions and proposals clearly.

In all Communication regarding contracts, whether by letter, email, or as part of a verbal discussion it is essential to:

- Use "Subject to Contract" where it is intended that negotiations/ discussions will continue on various matters before the agreement is finalised;
- Where "Subject to Contract" is not used it is essential to ensure that all terms to be included in the final agreement are absolutely clear. After the offer has been accepted it will be too late to negotiate any further terms.

The safest course is that correspondence relating to contracts and other agreements are labelled "Subject to Contract" until all of the terms have been agreed.

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Notify CQC of DoLS Applications

A carer's secretly recorded video footage of widespread abuse in a residential care home led to the successful conviction of two members of staff under MCA s.44 and the removal of a number of residents. The case is of particular interest because the Tribunal stated that a failure to have all the necessary DoLS paperwork could breach regulation 11(2) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010. This was because a failure of this kind would mean that a care home manager did not have suitable arrangements in place to protect service users against the risk of any control or restraint being unlawful or excessive in any way.

There is apparently a real concern that the Care Quality Commission is not being adequately notified of DoLS applications. Regulation 18 of the Care Quality Commission (Registration) Regulations 2009 requires hospitals and care homes to notify the CQC of all DoLS applications. Although there has been an increase in reporting, the CQC has not been notified of a substantial number of applications of this kind. This failing is highlighted in chapter 3 of the report, Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2011/12. ●

http://www.cqc.org.uk/sites/default/files/media/documents/dols_report_-_main_-_final.pdf

Parental Liability has been confirmed for Joint Venture Partners

It is important to be very careful when setting up a Special Purpose Vehicle or other Joint Venture. It now appears that the members of the venture might be required to provide a parental bond for the new company when tendering for contracts. On 26 September 2013, the European Court of Justice (ECJ) dismissed the appeals *by E. I. du Pont de Nemours and Company and The Dow Chemical Company* and confirmed their liability for the involvement of their 50:50 involvements in the Joint Venture (JV) in the chloroprene rubber cartel.

The ECJ decided that the parent companies in such arrangements can be held liable when there is factual evidence relating to economic, organisational and legal links between the parent companies and the JV, the parent companies can be found to have exercised decisive influence over the JV.

The ECJ's judgements are of interest to tenderers: **they confirm that parent companies can be held liable for the actions of their JV even if they are not directly involved in the JV's day-to-day management.** This is a strong message to providers to ensure that competition compliance policies and procedures are in place and implemented regarding a provider participating in a JV arrangement. The ECJ also made clear that the fact that the JV is full-function, that is an independent entity, from a merger control perspective it does not mean that it is independent from its parent when it comes to antitrust infringements.

Finally, although the parents and the JV are deemed to be a single economic unit for the purpose of establishing the parents' liability for the JV's behaviour, the ECJ clarified that they remain separate entities for antitrust purposes and they will still have to self-assess the competition law compliance amongst them. ●

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Competition Monitoring by Monitor

The NHS Procurement Regulations published in 2013 make it clear that providers now have two possible routes for challenging potentially errant purchasers. The route via the Public Contracts Regulations including going straight to law remains for all health and social care tendering. There is also the option of reporting errors in tendering for NHS, including CCG tendering procedures directly to Monitor. This later option does not require legal costs, but may require assistance in presenting a convincing case. Monitor open up an a third investigation following a complaint by Spire Healthcare Limited that two CCGs (*Blackpool CCG and Fylde & Wyre CCG*) are breaching their regulatory obligations with regard to the purchasing of elective care. The complaint alleges that the two CCGs have attempted to direct patients in need of elective care away from the private hospital to the local NHS hospital.

A number of private providers are likely to take complaints to Monitor in the near future, the chief executive officer of Ramsay Health Care UK warned that she could "almost guarantee" there would be challenges to come. She told a conference that the April switchover to clinical commissioning groups under the government's health reforms had not produced uniform changes in commissioners' attitudes to the private sector. "In one part of the country, where we had almost adversarial relationships and they didn't want to use us at all, they're very keen to work with us now," she said. "In another part of the country, where we've been providing very good services – excellent feedback – for ages, we have a lead commissioner who is very interested in protecting the local trust and has blatantly said, 'We will not work with you, we have told the GPs to direct all the work to the local trust.' "

Monitor has started formal investigations under its new powers into two complaints that NHS England had not made commissioning decisions in accordance with the NHS (Procurement, Patient Choice and Competition)(No 2) Regulations 2013 which were introduced in April of last year. The first complaint was brought by a private provider of gamma knife radiosurgery in Sheffield. The second was brought by two Greater Manchester foundation trusts and was about the purchasing of cancer surgery.

Monitor's executive director of co-operation and competition has said that Monitor has seen a "big ramp up in the number of requests for informal advice, partly because we keep telling people that we're happy to give it". In one case the regulator was currently looking at, she continued, "We have someone who's complained because they've lost a contract, and the winner of the contract was apparently decided on a show of hands in the room." ●

TfC agrees...

As both purchasers and providers get used to operating in the new regime it will be interesting to see how Monitor will apply the new rules and guidance to individual circumstances.

Should you wish to discuss complaining to Monitor, please contact us at an early stage.

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Monitor Licence

All providers of NHS health care services including those in the independent sector will need to hold a Monitor licence from April 2014 onwards, unless they are exempt.

Who needs a licence?

All providers of health care services for the purposes of the NHS need a Monitor licence from 1 April 2014, unless exempt.

The following providers will be exempt:

- Providers not required to register with the Care Quality Commission;
- Small providers of NHS - funded health care services whose annual turnover from the provision of NHS services is less than £10 million;
- Providers of primary medical and dental services;
- Providers of NHS continuing health care and NHS funded nursing care; and
- NHS trusts (which will only be licensed upon authorisation as an NHS foundation trust)

For details please go to:
http://www.monitor.gov.uk/licence

New Model Terms and Conditions

for Major Services Contracts

The Cabinet Office has issued Procurement Policy Action Note to announce that a revised set of terms and conditions (the "Model Services Contract") has been developed for major services contracts to replace the old OGC Model ICT contract.

The Model Services Contract must be used in future procurements run by Central Government departments (including their Executive Agencies and Non-Departmental Public Bodies). The note identifies that the Model Services Contract is designed to be a template for services where the procurement "will typically require some form of formal dialogue with potential suppliers", i.e. a competitive dialogue or negotiated procedure procurement. It is intended that the use of the Model Services Contract will "aid delivery assurance and reduce administration, legal costs and negotiation time.

The Model Services Contract is accessible on the Crown Commercial Services website:
https://ccs.cabinetoffice.gov.uk/about-government-procurement-service/contracting-value-model-services-contract

Sub-contracting?

Employ a Systematic Approach

An ineffective invitation to other providers to act as sub-contractors in a tender process can involve the following risks:

- Opportunity for fraud
- Exposure to unacceptable risks
- Opportunity for a contractor to charge high prices
- Absence of competition
- Reputational damage when contracts go wrong

TfC offers a complete package for those providers who wish to engage in a sub-contracting process. We suggest that a fully developed system is put in place for sub-contracting and at the very least the following questions are asked:

1. Who has the authority to issue invitations to tender?
2. How many contractors have to be invited?
3. At what frequency do tenders have to be issued for repetitive purchases?
4. Do we invite new contractors to tender?
5. What length of time do we give to contractors to respond to tenders?
6. Do we tell tenderers how we will evaluate their tenders?
7. Has our tender system ever been audited?
8. Have we received any complaints about our tender process?
9. How do we quantify the benefits from tendering?
10. What is the highest value procurement we will be tendering in the next 3 months?

Hopefully you won't need a wake-up call: you'll make sure you're nurturing your tendering processes without needing such a shock to the system… or the need to answer any awkward questions from your Chief Exec. and your Board.

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Help with the Pricing of Tenders

A New Service from TfC –

Established in 2006, Valuing Care is a market leader in the analysis of care fees. They have worked with over 100 Councils and NHS organisations to help them achieve value for money in commissioned care.

They have reviewed over 5000 individual packages of care and now possess a comprehensive database of cost averages for placements in Children's, Learning Disabilities, Mental Health and Physical Disabilities.

In addition, for Older People's services, they have undertaken county wide validations of fee rates to help Councils and CCG's set usual prices for residential and nursing packages. They have also created a postcode level Valuing Care Fees Calculator to help self-funders understand the price of private residential and nursing care.

Although primarily a company that supports commissioners, they have also provided support to a number of care providers and investors in the care market to help them:

- Build up successful pricing models for bespoke specialist packages in all client groups.
- Create sustainable price books to supply services to personal budget holders.
- Undertake due diligence on business investments to ensure current fee levels are sustainable.
- Provide efficiency reviews through benchmarking residential and nursing home costs against their national database of cost averages.
- Train providers on how to cost packages of care to an acceptable level for commissioners whilst still achieving profitability.

They have teamed up with TfC to add value to our tender support services by drawing on an extensive range of research and information on the pricing of care across the country to help providers to offer prices which are affordable from the perspective of the purchaser. This is a unique opportunity for providers to have their tender pricing supported and reviewed using the appraisal processes used by purchasers.

To find out more about the pricing services which are available for providers tendering for contracts in the first instance please ring:

01629 57501 or email info@tenderingforcare.com

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The EU Procurement Directive 2014

The Directive received the assent of the European Parliament in January 2014 and the approval of the Council in February. For the document to become law it must be published in the OJEU. This was expected to happen in March and can occur at any time. The next stage is adoption into national law within two years of publication. However the UK government intend to complete this process by the autumn of 2014.

To that end the Cabinet Office has been working on the "transposition" into UK law since October 2013. A number of organisation, including TfC have helped with this transposition process by working on a series of "Discussion Papers" consider which parts of the Directive the government might adopt in the few places where there are options.

The government plans to publish a "consultation paper" prior to adopting the Directive into UK law. This is expected in early May of this year.

There are a number of matters which are already known concerning the new rules some of which are:

1) Part B services will be replaced by a new category called "Annex XVI". Details can be found on the TfC website at: http://www.tenderingforcare.com/regulations/directive-2014/annex-XVI
2) Purchasing of Annex XVI services will follow a new set of rules. All contracts with a total value of €750,000 [£620,000 approx.] will not be covered by the Directive. However, purchaser will be required to demonstrate that they have secured services in a manner which is transparent, fair and affords equal treatment to all providers.
3) Purchasing of Annex XVI service contracts with a total value of more than €750,000 [£620,000 approx.] will must be advertised in the OJEU and follow one of the methodologies yet to be decided by the government. However the requirements of those tendering in this category are known and are set out in the Directive.

It is clear that the secret to successful tendering under the new rules will be:

1) Thorough preparation, and

2) The presentation of evidence of past performance dating back over several years.

It will be those providers who are well prepared who will be awarded contracts when the new rules are introduced.

TfC is offering a number of online and face-to-face sessions designed to help providers :

Understand the new requirements;

Prepare for the new rules; and

Get ahead of the competition.

Full details can be found on the TfC website at:

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

Booking details are at:
http://www.eventbrite.co.uk/o/tendering-for-care-3792528155

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Links to Government Publications

Every week the government publishes links to reports, guidance and public consultation documents. They provide essential information for providers who tender for Health and Social Care contracts. TfC identifies and selects documents which could be of use to those preparing tenders. The links are to the actual announcements, without comment or "spin" of any kind.

The following is a selection of link to 12 from 234 announcements relevant to Health and Social Care services published in December 2013 and January 2014:

1) NHS Primary Medical Services Directions 2013

These directions relate to the NHS Primary Medical Services Regulations, which came into force from 1 April 2013. As well as being a useful resource for GPs and providers who work under contract to the NHS, they will be of interest to patients who wish to understand the legal obligations of GPs to their patients and service users.
http://www.legislation.gov.uk/uksi/2013/363/contents/made
https://www.gov.uk/government/publications/nhs-primary-medical-services-directions-2013

2) DBS list of offences that will never be filtered from a criminal record check.

https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check

3) Local Healthwatch annual reports: Directions 2013

These directions set out the issues which must be covered in the annual reports of local Healthwatch organisations. Issues include how the local Healthwatch organisation has gathered the views of people on local health and care services. Each local Healthwatch is required to publish an annual report
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262761/local_healthwatch_annual_reports_directions_2013.pdf

4) Think, Act, Report - two years on

Think, Act, Report is the government's campaign to encourage equality in the work place.
The campaign was launched in September 2011 and this report summarises progress 2 years on, which includes information and case studies from companies signed-up to the campaign.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262867/Think_Act_Report_2013.pdf

5) G8 dementia summit agreements

The declaration is the commitment made by the G8 countries to build an international effort to approach the problem of dementia. The communiqué sets out more information on future plans, including 3 legacy events in 2014.
https://www.gov.uk/government/publications/g8-dementia-summit-agreements

6) Outcomes for children looked after by LAs in England

A range of outcome measures at national and local authority level for children continuously looked after for at least 12 months.
https://www.gov.uk/government/publications/outcomes-for-children-looked-after-by-las-in-england

7) Mental health: measuring progress against the strategy

Mental health outcomes information, from a variety of sources, is now being published in one place. For the first time, information about progress on the objectives of the government's mental health strategy is brought together and published in one place.
https://www.gov.uk/government/news/mental-health-measuring-progress-against-the-strategy

8) Social investment: an introduction to the government's approach

This document provides an overview of the government's approach to social investment.
Social investment provides capital for social organisations to provide social and financial benefits. The investment is repayable, often with interest, and is often used to develop new or existing activities that generate income. There are around 180,000 social enterprises in the UK. They contribute at least £55 billion to the economy, create jobs and growth and tackle disadvantage.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264138/CO_Social_investment_background_one-pager.pdf

9) Calculating the minimum wage

The government is strengthening minimum wage enforcement. In future all employers who are found not to comply with national minimum wage rules will be publicly named. This guidance provides practical advice and examples to explain:

what counts and does not count as pay and working hours for minimum wage purposes
eligibility for the minimum wage
how to calculate the minimum wage
how we will enforce the minimum wage

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264579/bis-13-1325-calculating-the-minimum-wage.pdf

10) Cancer services coming of age report published

This report describes best practice in relation to piloting of service delivery to older people with cancer to improve outcomes; to deliver high quality services to increasing numbers of older cancer patients and to ensure quality of access to treatment and information, based on need, not age.

http://www.dh.gov.uk/health/2012/12/cancer-services-report/

11) Payment by Results 2013-14 road test package

The components of the payment by results 2013-14 road test package are provided. The road test exercise provides an opportunity for the service to test out the new tariff, and supports the planning process. As in previous years the main focus of the road test is to gather comments on the draft 2013-14 payments by results guidance and code of conduct.

http://www.dh.gov.uk/health/2012/12/pbr-road-test/

12) DH announces pilot projects to improve severe mental illness services

Care and Support Minister Norman Lamb today announced that 6 local projects have begun work to help improve access to psychological therapies for those with severe mental illnesses. The 6 NHS demonstration sites are already leaders in the mental health field and have been chosen to implement the National Institute of Clinical Excellence's recommended psychological therapies.

http://www.dh.gov.uk/health/2012/12/pilot-mental-illness/

UpDate & StayingAhead

"At an annual cost of £144 the value of the knowledge and insight we get from TfC is out of all proportion to the real benefits we gain in terms of contracts secured"

Our weekly information service is just one of the support services for providers large and small who tender for health and social care contracts.

For full details please go to our website at:

www.tenderingforcare.com

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What is Next for Zero Hours Contracts?

Following widespread public and parliamentary concern over the use of zero hours contracts, the Government has published a consultation to consider whether these contracts are being abused and what action can be taken to tighten up their use. Zero hours contracts, it seems, are far more widely used than most realised, with some surveys suggesting that around a million people are employed under them. They are a type of contract whereby the worker has no guaranteed hours and agrees to be potentially available for work, although not obliged to accept it. The individual is only paid for work actually carried out. As a result, they are useful for creating a flexible workforce. However, they are also ripe for abuse.

Many workers providing their services to the care & support sectors of affordable housing associations do so under zero hours contracts. These organisations often have banks of zero hours contract workers on standby that can be called upon when necessary. The ability to be flexible about when to work does suit some people, especially those who want occasional earnings, but its unpredictable nature means it does not suit everyone. There are legal issues here, the main one being employment status. Is the individual an employee or a worker? An employee has significantly more legal rights (including the right not to be unfairly dismissed, redundancy rights and rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006) than workers do.

The Government's consultation resulted from a recent information-gathering exercise which flagged a number of issues of which two are:

1) The use of exclusivity clauses in zero hours contracts which prevent workers working for more than one employer. In reality, a worker could be on a zero hours contract, rarely ever called upon to provide work, but restricted from securing additional employment. The consultation is seeking views on whether these should be banned in contracts where there is no guarantee of work or whether guidance and/or a code should be published on the fair use of such clauses; and
2) Evidence that some individuals are unclear on their employment rights under these contracts. The consultation is seeking views on how to improve the transparency of these contracts, including improving content and accessibility of information, advice and guidance on zero hours contracts, encouraging a code of practice and possibly providing model clauses for these contracts.

The consultation closed on 13 March 2014.

Although unlikely to be banned outright, the Government seems set to tighten zero hours contracts significantly to reduce risk of abuse. Provided they are carefully drafted and managed, zero hours contracts can be of great benefit to social housing providers, creating a flexible workforce in times of need but without overstaffing for the remainder of the time. •

EU-wide Contract Law Receives Strong Approval

An optional EU-wide contract law moved a step closer last week when the European parliament approved the measure by a strong majority.

A plenary session backed the Common European Sales Law (CESL) by 416 votes to 159, with 65 abstentions. Conservative MEPs had opposed the law, claiming it is based largely on civil rather than common law, and that the City of London would lose out to the US if the law became a default for cross-border contracts across the EU. The Law Society said it does not believe that a need for a single law has been demonstrated.

The European Commission vice-president and justice commissioner said the law 'will cut transaction costs for small businesses while giving Europe's 507 million consumers greater choice at cheaper prices when shopping across borders'. •

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Caste

was deemed to be a protected characteristic for discrimination purposes

In the recent employment tribunal case of *Tirkey v Chandok and another (ET/3400174/2013)* the judge held that caste already falls within the protected characteristics under the Equality Act 2010 (the Act), despite the fact that section 9(5) of the Act - which provides for caste to be made a protected characteristic under the Act - has not yet been implemented. The Government has indicated that a public consultation needs to take place before this happens so it is unlikely that caste discrimination will be prohibited under the Act until at least summer 2015.

Ms Tirkey (the claimant) was employed by the respondents, Mr and Mrs Chandok, as a domestic servant. She was hired in India and stated that her new employers were aware from their first meeting that she was of a low caste because of her darker skin tone and Bihari dialect. She was asked about her caste at interview but said that the respondents were already aware that she was of a lower caste than them, as she was not invited into their house.

The claimant is an Adivasi German Christian. Historically the Adivasi have been outside the Hindu caste system but they are in fact treated as being of the lowest caste, akin to the Dalits, the so-called untouchables.

This case is very interesting because it demonstrates willingness by the tribunal to expand the protected characteristics under the Act to include caste, even where the Government has not yet elected to make caste discrimination unlawful. The Government has made it clear in section 9(5) of the Act that it is prepared for the possibility of making caste a protected characteristic but that it would not do so without full public consultation. The tribunal decided that consultation was unnecessary, the characteristics of caste being such that it is already covered under the protected characteristic of race. This is an employment tribunal decision so it is not binding. It will be interesting to see whether it is appealed and, if so, what the EAT decides. The EAT may take the more orthodox position of stating that caste has been identified as a separate and distinct area of potential discrimination and that it is obliged to wait for the Government to invoke section 9(5).

In the meantime we have an interesting new development in discrimination law, as the definition of race has been expanded. With the caste system playing such an intrinsic role in the cultural life of South Asia and other similar societies, it will be interesting to see whether this decision will lead to a raft of claims from those whose status, and therefore their treatment at work, has been defined by their inherited place in the caste system. •

King's Fund Calls for 'Urgent Shift' in Elderly Care

Budget-squeezed health and care provision for a rapidly ageing population needs to change urgently, a leading health charity has warned. By 2030 one in five people in England will be at least 65 years old. The King's Fund claims that health and care services have not kept pace with huge demographic changes.

Its report, Making Our Health And Care Systems Fit For An Ageing Population, argues that meeting these needs will require a "fundamental shift". The fund envisages a future revolving around individual requirements rather than single diseases. A system that prioritises prevention and supports older people's independence will also be key, the authors found. The report identified nine care components that need improving. These include allowing older people to live well with stable long-term conditions; improving partnerships between the NHS and social care to enable patients to leave hospital quickly after treatment, with good community-based support; giving older people fast access to emergency care.

The study also highlights the key role that local innovation could play. One example it highlighted was a Staffordshire GP surgery, which offers over-75s a yearly patient health review and uses experienced "elder care facilitators" to support patients. David Oliver, visiting fellow at the King's Fund, medical consultant, and a former Department of Health national clinical director, said changes are needed "at scale and at pace", adding: "The health and care systems have a long way to go to adapt to the twin challenges of an ageing population and tighter funding." David Oliver: Don't see older people as a 'burden' on the NHS. •

[Making Our Health And Care Systems Fit For An Ageing Population]

[David Oliver: Don't see older people as a 'burden' on the NHS]

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New Online Pathway to Ethical Procurement and Supply

This new strategy will probably take a while to feed through to commissioning. But it is important to be aware that the requirement is coming and to consider the implications for your own sourcing. For example what do you do when securing supplies and services to ensure they are ethical in nature? One immediate course of action might be to check out your agency staff supplier and secure written assurances regarding pay, Human Rights, exploitation as well as visa compliance in the UK. Now, with the launch of a new online pathway to ethical procurement and supply, the CIPS is fighting back and asking procurement professionals and organisations to do the same. As a recognition that better awareness and education are needed to help eradicate supply-chain malpractice, a two-hour eLearning course will take participants through content on corruption, fraud, bribery, exploitation, human rights and forced labour, as well as understanding morale and social conscience. When the learning is complete, an online test will allow participants who demonstrate their understanding to acquire a certificate of achievement. Holders of the certificate will be recognised on the CIPS website as being trained in ethics.

The new pathway will be made available to individuals as well as organisations wishing to demonstrate their commitment to ethical procurement and supply. The CIPS recommends that organisations review and adopt the CIPS Corporate Code of Ethics and ensure that all staff responsible for sourcing and managing suppliers take the test. Once the eLearning is completed by staff, organisations will be asked to sign the CIPS Statement of Commitment, to reinforce publicly their commitment to ethical behaviour and practices.

They will also be listed on the CIPS Corporate Ethical Register and receive the Corporate Ethical Mark. CIPS group CEO said, “This is a key step forward in arming our professionals with a toolkit to enable them to understand and take action on unethical practices in their supply chains. Awareness and education is key in managing issues such as fraud, corruption or even evidence of modern-day slavery. We have recently called for a licence for our profession and are asking both our members and organisations to commit to a self-regulated approach to procurement and supply by ensuring the right people with the right skills are in the right job. This ethics test underpins that activity and is just the start of the journey.” •

Need to Get Competition Right

The House of Commons Health Committee has published a report on public expenditure on health and social care. Amongst other issues, it discussed the Competition Commission's prohibition of the merger of Bournemouth and Poole hospitals. The Committee recommends "that the Government should examine the background to the Bournemouth and Poole proposal in order to ensure that unnecessary barriers to necessary change are removed."

This is a worthy aim, but it is important to remember that the reason the Competition Commission blocked the merger was that the Trusts had failed to persuade the Commission, advised by Monitor, that the merger would produce improvements for patients. In order to improve and quicken the competition authorities' decision making process for foundation trust mergers, Monitor has written to foundation trust and clinical commissioning group leaders inviting their responses to Monitor's proposed new guidance on Foundation Trust mergers. •

http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/793/793.pdf

Human Rights Act

The Joint Committee on Human Rights says that the Human Rights Act currently does not protect hundreds of thousands of people who are receiving care in their own homes or in residential homes.

All providers of publicly arranged or paid-for social care services must be bound by the Human Rights Act.

Make sure that the Human Rights Act is not just referenced in your Equality and Diversity Policy, but that in the accompanying procedures you demonstrate *HOW* this is put into practice .

Also, ensure that this implementation is as explicit in your monitoring as, say, ethnicity.

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NHS Procurement Guidance

Monitor published its guidance on the NHS Procurement, Patient Choice and Competition Regulations 2013, which implement Section 75 of the Health and Social Care Act 2012. This statutory guidance is required by law and is intended to support commissioners of NHS services in understanding and operating in accordance with the rules around purchasing high quality services for patients. Commissioners can now start to use Monitor's guidance to assess their obligations under these contentious regulations.

Following this the chief executive of Monitor has announced that Monitor will be focusing on the decisions CCGs are making about transforming community services contracts. In 2010-11 Community services contracts were let by primary care trusts, typically to their former provider arms and usually on terms of between three and five years. Consequently a number of them are up for renewal. Monitor is concerned that very few CCGs have begun tendering the contracts and anecdotal evidence suggests many are looking to roll on the contracts or avoid tendering them all together.

Under the Regulations not every contract has to be put out to tender but there needs to be a proper process to decide whether or not to tender a contract. For example, the guidance states commissioners do not have to tender a contract if it is in the best interest of patients not to do so. CCGs must satisfy themselves the services currently being provided could not be improved and that there are not alternative providers that could deliver them. It may also be possible for CCGs to argue that an integrated system is better for patients and it would be difficult to create that through an open tender. However, CCGs will need to be able to demonstrate that these criteria have been met.

Monitor is unlikely "to take a CCG's word for it". •

A Stark Message for all Providers of H&SC Services

Up to 300 staff from Commissioning Support Units (CSUs) are facing redundancy under a job cuts programme being coordinated by NHS England. A 45 day consultation over a new round of job losses began in February and is being run by the overwhelming majority of CSUs. Overall, about 3 per cent of the total CSU workforce is expected to be made compulsorily redundant, although some units will be hit harder than others. Two or three units, including the North of England, are not planning to make any job cuts, while Central Midlands CSU is likely to lay off about 40 staff – 10 per cent of its workforce. The redundancies relate to the disparity between the resources available to CSUs and the size of the workforce they inherited from primary care trusts when they went live in April last year. After nearly a year of operation, CSUs now have a clearer idea of how each service line they offer needs to be resourced, and how many staff they can afford for the income they are receiving.

CSUs are funded predominantly by their clinical commissioning group customers, via the £25 per head of population running cost allowance. However, they also receive income for services provided to NHS England, and other customers including local government and NHS provider trusts. The current consultation is being coordinated by NHS England, but implemented locally by CSUs, based on where they believe redundancies are necessary. NHS England is yet to release details of terms available to staff willing to take voluntary redundancy. The latest round of redundancies only relates to changes in CSU size or structure that have arisen in the last financial year.

It is also expected that some of the 17 existing CSUs could merge, prompted by the procurement framework currently under development by NHS England, which will impose a limit on the number of accredited CSU providers and is thought likely to set a high bar for quality of services. CSU mergers could also result in further job losses as functions are consolidated. •

TfC says:

We have seen the effects of this in recent weeks with CSUs publishing tender for services across up to nine CCG areas. Some providers hang onto the idea that relationships with commissioner affect their success or otherwise with regard to tendering. We are now seeing the start of a period whereby, whilst the local consultation must take place to influence the precise content of the specification, the tendering process becomes more and more remote from the locality. This make the appraisal process more and more anonymous with tenders being about compliance factors. We are already seeing this in scoring schemes which explicitly reward tight compliance with the specification. This will inevitably continue. The new requirement will be to view the specification as written and to prepare tenders in a totally objective manner, locked ever more closely to the precise requirement. Of course the tender as written then becomes a set of contractual terms to be delivered.

The following, from an NHS England spokesman, is a guiding statement which pervades all current tendering and needs careful consideration in terms of what is and what is not costed into an offer.

"We recognise that these are tough decisions that are being taken so that resource is focused on frontline NHS services. CSUs are working hard to ensure that any colleagues affected by changes are fully engaged with and any decisions are subject to ongoing discussions and local consultations in conjunction with trade union representatives."

The implications are now clear. •

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Knowledge and Skills for Successful Tendering

The New EU Procurement Directive will significantly increase the demands upon health and social care providers when tendering for public sector contracts. The Directive was published on 28th. March 2014 and became EU law on 17th. April 2014. EU Member States now have until April 2016 to adopt the requirements into national law.

The UK government has indicated its intention to adopt the Directive in to the law for England, Wales and Northern Ireland within seven months of it becoming EU law, that is to say during the autumn of 2014. However the major purchasing authorities are clearly building the requirements into their tender processes now. This transposition of requirements can be expected to increase in pace as the year progresses. It is already clear that lack of awareness and therefore action to address these requirements is resulting in a number of excellent providers failing to be awarded existing contracts on re-tender, and/or to secure new business.

TfC is therefore offering courses which address the requirements specifically, and courses on preparing tenders to take full account of the new requirements and to acquire the skills needed to win contracts.

The TfC courses for Summer 2014:

Preparing for the New Procurement Regulations (face to face)

4th July from 10am to 4pm at The Euston Office NW1 2FD

An information workshop designed to help participants to gain an edge in the increasing competitive world of public sector tendering.

Preparing for the New Procurement Regulations (online):

18th June from 11am to 12.45pm

and

15th July from 2pm to 3.45 pm

An information workshop designed to help participants to gain an edge in the increasing competitive world of public sector tendering.

This is a very cost effective and highly successful approach to learning – no travel costs and can be undertaken from anywhere where there is an Internet enabled computer and telephone land line.

Preparing Effective Tenders in Health and Social Care (face to face):

23rd June from 10am to 4pm at The Euston Office NW1 2FD

This is a skills workshop which goes through all of the phases of successful tendering in detail, taking account of the requirements set out in the new Directive

Aspects of Winning Tenders in Health and Social Care (face to face)

7th July from 1pm to 4pm

This is a concentrated short course which looks at the features of a winning tender.

For full details including – learning objectives, prices and online booking please go to:

http://www.eventbrite.co.uk/o/tendering-for-care-3792528155