

Things We Can't Change

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Things We Can't Change

When you are deciding whether bidding for work in the public sector is for you or not, it is helpful to take a look at those things which you cannot change. This will enable you to decide whether you are willing and able to operate within those parameters and, if you are, how you can be prepared.

This presentation considers two key areas of procurement law:-

1. The "EU Procurement" Regime;
2. Other Procurement Requirements (i.e. where "EU Procurement" does not apply).

We will look at these two areas of procurement; what they are and what you can expect as a potential supplier if they apply.

We will then consider ways in which you can prepare if you want to bid for contracts from the public sector.

The EU Procurement Regime – What is It?

- EU Procurement Requirements
 - European Legislation & UK Legislation (*The Public Contracts Regulations 2006*)
 - Often referred to, confusingly, as simply "Public Procurement"
 - Aim is to ensure that public money is spent in a transparent, open way
 - Ensure public bodies get the best value for money
 - Prevents use of same/local suppliers – purchasers need to look to the wider market
 - Detailed procedures which have to be followed when going out to tender for certain contracts.
- Three main requirements for EU Procurement requirements to apply
 1. Purchaser is a "Public Authority"
 2. Contract is for Works, Services or Supplies (Goods)
 3. Value of the contract is over the specified threshold
- "Public Authority"
 - Listed in the legislation
 - General sweep up (this is what catches Registered Social Landlords)
 - Includes:-
 - Local Authorities
 - Universities
 - Registered Social Landlords

➤ Contract for Works, Services or Supplies

- Works Contract – a contract to provide building works, construction, refurbishment etc.
- Service contract – a contract to provide any type of services. This could include cleaning, maintenance, gardening, consultancy, transport services etc.

Service contracts are divided into Part A and Part B services in the legislation:-

- Part A services are subject to all of the requirements of the legislation
- Part B services are subject to a much lesser level of regulation. These include legal services and the majority of support services (which is why supporting people contracts are awarded without following the full EU procurement regime).
- Supply Contracts – contract for the supply of goods – everything from furniture to stationary, food to clothes etc.

➤ Value of the contract over specified threshold

- Protect where a high amount of money is being spent
- Thresholds reviewed regularly
- Current thresholds are:-
 - Works £3,611,319
 - Supplies & Services £144,371 (or £93,738 if the entity is listed in Schedule 1 of the legislation)
- Complex aggregation rules apply to prevent splitting contracts up into a number of lower value contracts in order to avoid the legislation

➤ If the legislation applies there are very detailed requirements to be followed by the Public Authority (the purchaser). The core requirements are:-

- Advertise the contract in the Official Journal (OJEU)
- The purchaser must follow a strict procedure when looking to award a contract. This will include applying prescribed timescales e.g. to allow a certain amount of time for potential suppliers to submit their bids etc.
- The two procedures which are most frequently used are:-

- Open

The purchaser invites suppliers to submit a full bid and makes its selection from all of the bids which it receives

- Restricted

Two stage process. The purchaser invites suppliers to express an interest in the contract first. It then selects a number of suppliers (minimum of 5 usually) to submit a full bid. This might be used where the purchaser anticipates a high number of responses and it is impracticable to consider detailed bid submissions from them all

- There are additional procedures which can be used in more limited circumstances:-
 - Negotiated
 - Competitive dialogue
 - E-auctions
 - Dynamic purchasing
- Minimum Standards will need to be met and demonstrated to the purchaser:-
 - Economic & financial standing
 - Technical or professional ability
- The purchaser must tell the potential suppliers in advance the criteria which it will apply when deciding who to award the contract to. The decision must either be based upon:-
 - Lowest price
 - Most economically advantageous tender (MEAT)
- The decision must then be made based on that criteria only. A scoring system is usually used
- The purchaser has to place a notice at the end of the procedure confirming who won the contract (or that no-one did)
- The purchaser is required to give information to the suppliers explaining their score and that of the winner
- Suppliers have rights to challenge the purchaser if the procedures are not followed correctly

Other Procurement Requirements – What Are They?

Where the EU Procurement requirements do not apply this does not mean that public bodies are free to award contracts as they wish. There are still restrictions and requirements that need to be followed. Public organisations are subject to:-

1. Local Level Requirements
2. National Legislation
3. EU legislation

At a local level, you will usually find that organisations have internal rules and procedures to ensure that procurement is carried out in accordance with legislation and to protect against wrong-doing.

There is also a wide range of national legislation which impacts upon procurement. For example, local authorities are subject to statutory requirements which require them to achieve best value in their purchasing.

Likewise there is a broad range of EU legislation which effects procurement, not least the EU Treaty which imposes requirements upon public bodies to act transparently and without discrimination whenever purchasing.

The requirements are often much less prescriptive than the EU Procurement rules. This means that the approach to procurement is likely to differ from organisation to organisation.

The downside is that if you work with a number of public organisations (e.g. across a number of local authority areas or with, for example, the health authority and social services in one area) you may find there is a lack of consistency in the approach taken. However there will be a number of similarities as the underlying themes are the same.

➤ Written Procurement Policies

Organisations will generally have a written policy explaining how they purchase goods & services. These come in many shapes and sizes, with different names and approaches, but their content is usually broadly the same.

Examples:-

- Hampshire County Council - Contract Standing Order Procedures
www3.hants.gov.uk/constitution/part3/part3_f.htm
- Portsmouth City Council - Standing Orders
www.portsmouth.gov.uk/media/StandingOrders.pdf
- Southampton City Council - Contracts Procedure Rules
www.southampton.gov.uk/Images/10%20Part%204%20-%20Contracts%20Procedure%20Rules_tcm46-160554.pdf

- Layers of Procedural Requirements
 - Number of different procedures
 - Value of the contract usually determines which procedure is used
 - Lower value contracts will have less formal procedures (if any)
 - Higher value contracts (up to EU Procurement) will have more formal procedures
 - Formal procedures are usually based upon EU Procurement

Example:-

Hampshire County Council

1. *Up to £15 k– no tendering required*
2. *£15,001 to £74,999 – at least three tenders required*
3. *£75,000 to EU Procurement levels – full tender process required*
4. *EU procurement levels – follow EU Procurement rules*

- Advertisement
 - Advertisement at some level is likely
 - EU case law developments require advertisement in all cases
 - Level of advertisement (local, regional, national, international) is linked to value of contract and likely interest in the contract
- Exceptions
 - Areas which are always dealt with outside the rules e.g. care
 - Areas taken outside the rules on a case-by-case basis e.g. emergencies
- Lists
 - Lists of suppliers
 - Meet basic criteria as a supplier (economic standing, competence etc).
 - Revised periodically
- Receipt and Opening
 - Prescribe manner of submission (post, e-mail, no identification of sender on envelopes etc.)
 - Prescribe how, when and by whom bids may be opened
- Award
 - Criteria – best value (price & quality, added value)
 - Keep record
 - Authorised persons
- Contracting Requirements
 - Formal contracts required
 - Certain provisions may always be required (e.g. indemnity and insurance requirements, liquidated damages)

- Compact/Concordat
 - How purchaser will work with suppliers
 - Commitments to fairly advertise, tender, give feedback etc.
 - Non-binding
 - Lever!

Example:-

<http://www.hants.gov.uk/procurement/smallbusinessconcordat.pdf>

What can you do to prepare?

If you are thinking about bidding for a contract, what can you do to prepare?

- Establish and maintain relationships with purchasers
 - Obtain information about tenders and adverts
 - Influence commissioning
 - Influence specifications
 - Influence criteria
- Look for adverts
 - Official Journal Supplement <http://ted.europa.eu/>
 - Other adverts
 - www.supply2.gov.uk
 - <http://www.tendersdirect.co.uk/> - email matches
 - trade press
 - local press
 - organisations' websites
 - meet the supplier events
- Be aware of procedures in advance
 - EU procurement guides to procurement
 - http://www.ogc.gov.uk/documents/Intro_to_EU.pdf
 - Identify organisations you hope to work with & get hold of their published policies and procedures (on-line or ask them)
 - Number of general guides available:-
 - <http://www.fittosupply.net/>
 - <http://www.ncvo-vol.org.uk/sfp/earning/contracting/>
 - <http://www.charity-commission.gov.uk/library/enhancingcharities/pdfs/draftcc37.pdf>
- Prepare for core requirements (which will always be required):-
 - Organisation information:-
 - details of your structure/constitution
 - copies of Trust Deed or Memorandum & Articles
 - management information
 - details of trustees or members
 - Financial Information:-
 - turnover
 - audited accounts
 - bank references
 - Technical Information about what you do
- Get policies and procedures in place:-
 - Health and Safety
 - <http://www.standards.dfes.gov.uk/studysupport/816987/817959/filesandforms/pdfm33>
 - <http://www.hse.gov.uk/smallbusinesses/must/policy.htm>

- Quality Assurance
 - <http://www.businesslink.gov.uk/bdotg/action/layer?r.s=sl&topicId=1074431977>
- Equal Opportunities
 - http://www.cre.gov.uk/gdpract/eop_sample.html
 - <http://www.eoc.org.uk/Default.aspx?page=15408&lang=en>
- Business Continuity
 - <http://www.continuitycentral.com/feature0167.htm>
 - <http://www.londonprepared.gov.uk/businesscontinuity/makingplans/index.jsp>
- **Environmental**
 - <http://www.londonremade.com/mgpc.asp>
- Specific to field:-
 - Protection Against Abuse
 - Criminal Records Bureau Checks
- Insurances:-
 - Check purchaser's requirements (in written document or ask)
 - See if your insurances meet these requirements
 - Ensure have evidence to hand
- For a particular contract identify what the purchaser is looking for:-
 - Criteria (in advert or ask for it)
 - Tailor response to criteria
 - Help the purchaser to "tick the boxes"
- Think about how your service delivery is measurable
 - Demonstrate to purchasers
- Show added value
 - Innovation
 - Flexibility
 - Client focus
 - User involvement
 - Ability to reach certain individuals & communities
- Learn to sell yourself
 - Use your supporters (e.g. stakeholders, regulators, beneficiaries)
 - Prepare references/testimonials
- Look at expertise in your trustees, staff, volunteers etc.
 - Marketing
 - Sales
 - Tendering
 - Health & Safety
 - Contracts

- Consider consortia bids
 - May be able to establish strength across broader area
 - Consider legal structure of the relationship
- Designate someone to coordinate responses etc.
- Compile a checklist
 - Do not get caught out by procedural requirements
 - Deadlines
 - Information required to include in bid
 - Criteria need to demonstrate you have met

Example:-

http://www.ncvo-vol.org.uk/uploadedFiles/Sustainable_Funding/Publications/Procurement_Guide.pdf

- Use Freedom of Information Act 2000
 - What the purchaser may be procuring & why
 - Other suppliers' bids (successful and unsuccessful)
 - Additional feedback
 - <http://www.ico.gov.uk/>
- Enquire about provider lists and how to get on them
- Budget
 - Costs of compiling bid
 - Legal costs

Other Legal Issues

- Charity Requirements:-
 - Within charitable objects?
 - Maintain independence?
 - In the best interests of the charity?
 - Charitable Trading
 - Use of own funds
 - <http://www.charity-commission.gov.uk/library/enhancingcharities/pdfs/draftcc37.pdf>
- Full Cost Recovery
 - <http://www.fullcostrecovery.org.uk/main/index.php?content=home>
 - http://www.hm-treasury.gov.uk/spending_review/spend_ccr/spend_ccr_voluntary/ccr_voluntary_report.cfm
- Tax – VAT

Useful Websites

Local Authority:-

- www.portsmouth.gov.uk/
- www.southampton.gov.uk/
- www.hants.gov.uk/

EU Procurement:-

- <http://www.ogc.gov.uk/>
- <http://ted.europa.eu/>

Adverts:-

- www.supply2.gov.uk
- <http://www.tendersdirect.co.uk/>

Charity/Third Sector:-

- <http://www.ncvo-vol.org.uk/>
- <http://www.charity-commission.gov.uk/>
- <http://www.fullcostrecovery.org.uk/>

General Guidance:-

- <http://www.fittosupply.net/>
- <http://www.businesslink.gov.uk/>
- <http://www.hm-treasury.gov.uk/>

Policies & Procedures:-

- <http://www.cre.gov.uk/>
- <http://www.eoc.org.uk/>
- <http://www.continuitycentral.com/>
- <http://www.londonprepared.gov.uk/>

- <http://www.londonremade.com/>

Freedom of Information:-

- <http://www.ico.gov.uk/>