

Charities and local authority procurement

An overview from **Shivaji Shiva**, Head of Charities, and procurement expert **Jason Phelps** of Michelmores LLP, Solicitors.

Smaller charities are becoming used to local authorities' procurement and commissioning officers saying that they need to "go out to tender", even where the sums of money involved may seem very low indeed. Sometimes EU public procurement rules are cited, but when exactly do the rules apply, and what can charity finance directors and others do to try and convince council procurement officers and others that there is no need to launch a tendering exercise or to win a re-tendering exercise where their charity is the incumbent service provider? Some charities will relish the opportunity to compete for work, confident in their ability to deliver added value. The process can, however, cause a large degree of anxiety and concern for smaller organisations.

When awarding contracts for works, supplies or services, local authorities are required to consider compliance with the EU public procurement rules. These rules regulate the way in which local authorities purchase construction works, goods and services and require transparency, objectivity, equality of treatment of bidders and non-discrimination on the grounds of nationality of the contractors. These rules are in addition to the local authorities' own requirements (local authorities will normally have standing orders/financial procedural rules requiring them to obtain a number of quotes for purchases in excess of certain amounts and they will also be required to obtain best value when

purchasing) and purely national rules (in the UK, value for money is to be sought in all public procurement and this is to be achieved through competition unless there are compelling grounds to the contrary).

The EU Public Procurement Rules

The EU public procurement rules apply where a local authority purchases services with a value reasonably expected to exceed £139,893. They also apply where local authorities purchase construction works worth over £3,497,313 and supplies (goods and materials) worth over £139,893, although charities are far less likely to be providing either construction works or supplies to local authorities. Some services are designated as 'Part A' (e.g. project management services, design services and technical services) and subject to the full rules, which impose strict requirements in respect of advertising in the Official Journal of the European Union, as well as in relation to tendering, evaluation and award processes. Other services, including many provided by charities, are designated as 'Part B' (such as certain education, health and social care services) and subject to lighter regulation. In relation to 'Part B' services and also according to the European Commission even for procurements of services by local authorities below £139,893, transparency (e.g. advertising on a Council's website and also often in an appropriate trade journal), non-discrimination on the grounds of nationality and equality of

treatment of tenderers, are still required under EU law. So, local authorities generally do have to advertise contracts in order to be compliant with EU public procurement law.

EU Public Procurement Procedures

There are four types of EU public procurement procedures (the open, restricted, negotiated and the competitive dialogue procedures).

An open procedure is one where a local authority invites providers to bid directly for a contract in response to a contract notice. All interested contractors may submit tenders and the winning provider is selected directly from the bidders. This is suitable for items which are easily specified and likely to be bought on price alone or price plus quality.

The restricted procedure is a two-stage procedure where contractors express their interest following the publication of a contract notice, but only those so invited by the local authority may submit tenders after a 'screening' process. Thus the restricted procedure consists of two distinct stages – selection of suitable bidders and evaluation of tenders. At the first stage, the only criteria which may be used to select prospective bidders are economic and financial standing or technical knowledge or capability normally via a pre-qualification questionnaire. This selection process restricts the number of bidders invited to submit a formal tender. The restricted procedure works best where the local authority is clear at the start of the process as to what it wants to procure, in terms of pricing and other award criteria.

The negotiated procedure is exceptional and may only be used in a limited number of carefully defined cases. The procedure consists of a pre-

qualifying stage, followed by an invitation to negotiate where at least three contractors are invited to negotiate. No negotiation is permitted after Best and Final Offers.

The competitive dialogue procedure may only be used in the case of particularly complex contracts including integrated transport infrastructure projects, computer network projects and projects involving complex financing where the legal and financial make up cannot be determined without dialogue with suppliers. Following a pre-qualification procedure, the local authority discusses the form of contract and the technical specifications of the project with at least three potential bidders before the key tender documents are issued. The dialogue ends when the local authority can identify the solution or solutions which meet its needs. Bidders then submit tenders based on the solution(s) resulting from the dialogue.

Local Authorities Standing Orders and Financial Procedural Rules

Local authorities also have a legal duty to ensure that the procurement of services, goods and works represents the most cost-effective solution and that the best possible value for money has been achieved. Different local authorities have different value thresholds where they are required to obtain written quotes or conduct a tendering process. Incumbent charity service providers should check the published procurement procedures of the council to whom they are providing services (which will normally be available on its website) in order to assess whether they have a chance of success in trying to persuade a local authority not to go out to tender.

Procedures which council officers are required to follow in a procurement process, then, are normally determined by the value of the services contract. We have considered the procurement procedures of three councils in the case studies below.

Penwith District Council

Penwith District Council which covers some 116 miles of Cornwall's most westerly peninsula (from Lands End in the West to Hayle in the East) requires council procurements of services to take place in the following way:

- £500 - £20,000: Normally obtain three written quotes and purchase on a value for money basis, unless it is more cost-efficient/there are good reasons not to do so.
- Over £20,000: Normally a tendering process with a minimum of five suppliers is required, where possible. Tenders are evaluated in terms of value for money and quality.
- Over £139,893: As discussed above, a full EU public procurement procedure is required in relation to 'Part A' services, whereas advertising, non-discrimination on the grounds of nationality and equality of treatment of tenderers are required in relation to 'Part B' services. Tenders are normally evaluated on a most economically advantageous basis, which typically includes evaluation against criteria such as quality, price, technical merit, cost effectiveness, technical assistance and deliverability within specified timescales.

Leeds City Council

- Up to £10,000: Three written quotations required, "unless to do so would not represent value for money for the Council".

- £10,000 - £100,000: A minimum of three written quotations is required.
- £100,000 - £139.893: A formal tendering procedure is required, together with a formal evaluation process and documentary evidence that Best Value has been obtained.
- Over £139,893: As discussed above, a full EU public procurement procedure is required in relation to 'Part A' services, whereas advertising, non-discrimination on the grounds of nationality and equality of treatment of tenderers are required in relation to 'Part B' services. Tenders are normally evaluated on a most economically advantageous basis, which typically includes evaluation against criteria such as quality, price, technical merit, cost effectiveness, technical assistance and deliverability within specified timescales.

Birmingham City Council

Birmingham City Council alone spends approximately £800m per annum on goods, services and construction works. This figure consists of approximately £340m on capital expenditure, £140m on social care and health procurement and the remainder on other goods and services. The Council is committed to a mixed economy provision because it considers that services and supplies should be delivered by the public, private or third sector organisation that is best able to meet the Council's standards. According to Birmingham City Council's website, Birmingham City Council requires the council's procurements of services to take place in the following way:

- Approved lists of contractors: Option of using this list for contracts of any value below the European thresholds. The lists "provide a quick and easy way for Council departments

to choose firms who have acceptable levels of technical capability, financial standing, relevant experience, and have been thoroughly checked".

- Council Standing Orders (not published): There are also various standing orders which govern how contracts of different values must be advertised, specified, submitted and reported to members.
- Contracts up to £75,000: Birmingham City Council piloted an electronic tendering scheme for the procurement of certain services up to £75,000.
- Over £100,000: A tender with a value estimated to exceed £100,000 must be advertised, and will be advertised in one or more local newspapers and technical journals.
- Over £139,893: As discussed above, a full EU public procurement procedure is required in relation to 'Part A' services, whereas advertising, non-discrimination on the grounds of nationality and equality of treatment of tenderers are required in relation to 'Part B' services. Tenders are normally evaluated on a most economically advantageous basis, which typically includes evaluation against criteria such as quality, price, technical merit, cost effectiveness, technical assistance and deliverability within specified timescales.

Birmingham City Council has signed up to the National Procurement Strategy which requires local authorities to "encourage a diverse and competitive supply market, including small firms, charities and social enterprises, ethnic minority businesses and voluntary and community sector suppliers". The Council has therefore entered

into a Concordat between its procurement services and small and medium sized enterprises including third sector organisations (such as charities, social enterprises and voluntary and community sector suppliers). This Concordat recognises the benefit of purchasing from such organisations and commits the Council to removing barriers in procedures and processes that prevent easy access to Council contracts.

The Council states that it will encourage a diverse and competitive supply market, including small firms, social enterprises and third sector organisations. It will also ensure that any use of large contracts is due to a genuine business need and supported by a sound business case and options appraisal. The Council will invite bidders, where appropriate, to demonstrate their track record in achieving value for money through effective use of their supply chain, including the use of small firms, social enterprises and third sector suppliers. Finally, Birmingham City Council states that is committed, wherever possible, to structure contracts to ensure that their scale and nature means that they are open to small and medium enterprises, including social enterprises and third sector suppliers.

In conclusion

Charity service suppliers should try to be aware of individual council's procurement requirements and strategies, normally based on different value thresholds. As each local authority's procurement requirements differ, charity finance directors of incumbent service providers may sometimes have success in attempting to persuade council procurement officers that launching a tendering exercise is unnecessary, although clearly results in this regard will be mixed.

The EU public procurement rules and domestic procurement rules are notoriously difficult to apply and charities will find that expert legal advice is often required. Charities can challenge pre-qualification requirements if they consider that they are disproportionate; for example, in relation to minimum turnover or the production of a number of years' accounts or in relation to providing services to similar organisations. Charities may also want to challenge evaluation criteria if they consider that such criteria rule out small or inexperienced, but otherwise very competent social enterprises, require the transfer of excessive risk to the charity or contain contract terms which are not proportionate to the scale and complexity of a project.

This article contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular matters and we will be happy to assist. For further information on the topics discussed, contact:

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