



Guidance Note on European Procurement Directives (An Outline By The Public Law Project For VCS Groups)

Introduction

This note has been prepared to provide basic, practical guidance on how the European procurement directives work, to voluntary sector organisations tendering for contracts with local authorities. It is intended to give a basic outline in general terms of the key issues that arise. The rules on public contracts are complicated, so this note can only provide general guidance, looking briefly at the following:

- Background to tendering process rules
- EU directive and regulations
- Which contracts these apply to
- What rules apply
- How to challenge a procurement decision
- Key issues
- How does this work in practice

Background

In certain circumstances, local authorities are obliged (i.e. required by law) to seek tenders when entering into a new contract with a service provider. Obligations may arise under European Procurement Directives and national legislation (i.e. UK law), or simply under the standing orders of the local authority itself (i.e. the Council's own rules). The standing orders will regulate the manner in which competition is invited, the type of procedure and the financial thresholds above which competition is required.

It is important to note that even where a local authority is not obliged by law to tender, it may often chose to do so as a means of ensuring Best Value. This is becoming increasingly common, and therefore you may face a tender process even where there is no legal requirement for the council to go down that road.

Given a local authority's statutory obligation to secure Best Value it would be difficult to challenge a decision on the part of a local authority to put a contract out to tender, rather than simply to re-award the contract to an existing service provider. Voluntary organisations should therefore be prepared to engage with any tender process imposed upon or selected by the contracting local authority.

European Union Public Sector Directive and implementing regulations

Public contracts above certain financial thresholds are subject to regulation under EU law. Historically, there have been three sets of UK regulations implementing EU

Directives on public procurement. These dealt with public supply contracts, public works contracts and public services contracts. From 31st January 2006, these separate regulations were replaced by the **Public Contracts Regulations 2006** which implement the new EU Public Sector Directive. Although three sets of regulations have been replaced with one, there are still distinctions between the three types of public contracts.

Public Services Contracts. The contracts that voluntary sector organisations are likely to be tendering for are public services contracts. These are defined by the Regulations as contracts, in writing, for consideration (i.e. some kind of payment) under which a contracting authority engages a person to provide services. This note therefore focuses on the rules that apply to public services contracts. However, you should be aware that if a contract is for the supply of goods or for works, a different set of rules will apply.

Classification of Public Services Contracts. The degree to which the Regulations apply depends on the classification of the services that are the subject of the contract. Those contracts designated “Part A Services Contracts” attract the full breadth of the regulations (i.e. all the regulations apply). In contrast, contracts that are designated “Part B Services Contracts” only attract the regulations to a very limited extent.

Part A and Part B services are defined by Schedule 3 of the Regulations. Anything that is not listed, is covered by the “other” category under Part B of the list. So if your services are not listed by name, it will be classed as a Part B service and only some of the Regulations will apply.

Part B includes services such as health and social services, education and training. Most voluntary sector organisations services are therefore likely to fall under Part B. The rest of this note will therefore deal with the Part B requirements. However, you should be aware that the rules for Part A services contracts are much stricter, and so it is important to check which category the contract falls into.

Value threshold. The rules set financial thresholds to determine whether the regulations apply at all. Basically, they only apply if the value of the contract is over a certain amount. The threshold for the application of the Public Contracts Regulations 2006 to a Part B services contract is 236,000 Euros. Thus, the Regulations apply to any Part B services contracts which have an estimated value over this amount. 236,000 Euros is currently about £163,000 (at January 2006).

Under the Public Services Contracts Regulations 2006, there are only a few specific obligations that apply to the award of a Part B services contract. These relate to technical specifications, award notices and reports to be sent to the European Commission. These rules do not impact significantly on the types of contracts that voluntary sector organisations will be tendering for. Crucially, the rules that relate to the obligation to hold a competition, criteria to be applied and the tender process itself do not apply. Thus, there is no legal obligation on the local authority to comply

with these. However, they are likely to use a process that does have an element of competition, criteria and so on.

Transparency and non-discrimination. Under Regulation 4, contracting authorities have an obligation to treat economic operators (i.e. those tendering for contracts) equally and non-discriminatorily and to act in a transparent way. At the moment, it is unclear how far this “transparency obligation” extends and what it entails. However, it has the potential to be significant in imposing requirements on local authorities seeking to award a Part B services contract. The European Court of Justice has held that this obligation includes ensuring that advertising is sufficient to enable the services market to be opened up to competition, and that the impartiality of any procurement process should be reviewed.

Challenging procurement decisions

There are three potential ways in which you could challenge a procurement decision. If you think a tendering process has gone wrong in some way, you may wish to seek legal advice about challenging the decision, but you need to act quickly.

Judicial review. Local authority decision-making can usually be challenged by judicial review, the court process that looks at public law disputes. However, although local authorities are public bodies, their procurement decisions are often held not to be subject to judicial review unless there has been bad faith or a special public law element (for example, if the local authority has not followed its standing orders). Often procurement decisions are considered to be decisions about the exercise of contractual powers. This means that the local authority has a large amount of freedom in deciding who to award a particular contract to.

Challenges under EU Regulations. A service provider who has suffered loss as a result of a breach of the Regulations, can enforce these rules against the local authority which breached them by taking them to court. Before bringing a court case under the Regulations, the service provider must tell the local authority of the breach owed to it, and of its intention to bring a claim under the Regulations. Any claim must be made promptly and within three months from the date the grounds for the claim arose (usually when the Regulations were breached).

Claim for breach of contract. A procurement process may give rise to an “implied contract” between the local authority and the tenderers. The local authority might be in breach of this implied contract if it had excluded a tenderer from a process, when there was a right to have its tender (submitted on time) considered. Although it is unclear how far this type of contract would extend, there might, for example, be an obligation on the local authority to evaluate bids in accordance with the published tender documentation or an obligation to act fairly during the tendering process. A claim for breach of this sort of implied contract can be brought in the county court or high court depending on the value of the claim, but can only be pursued if some loss actually results from the breach.

Summary

The starting point is to establish how the tendering process will operate and whether the Regulations apply or not. This should be stated in the tendering document, or you should ask the local authority directly.

KEY QUESTIONS FOR TENDERING PROCESS

- On what basis has the local authority decided to use a tendering process? (e.g. standing orders, regulations, etc)
- Do the regulations apply?
- Is it a public services contract?
- Is it part B?
- How much is it for?
- Is the tendering process fair?
- Has it been operated fairly towards all tenderers?

How does this work in practice?

The reality is that the Regulations as such do not necessarily impact on many tendering processes for services provided by the voluntary sector. Many contracts will be below the Part B threshold, and it will not be worth the local authority's while to go through a full tender competition; (particularly if there is only one possible provider). If the local authority wants to use tendering, they probably can, whether or not the contract is above the Part B threshold: there is nothing to stop them, it is a good way to ensure best value, and they may have their own rules requiring tendering in any event.

If the Regulations do apply (i.e. it's a Part B contract over the threshold), they only apply in part and would not impact greatly on the factors of concern to voluntary sector bidders, for example ensuring the local infrastructure services are run by a local organisation. The sector in any event, should welcome the transparency that the Regulations require.

There may be some scope for the sector to lobby local authorities (for example through the Compact) over tendering policies, criteria that are included, timescales and how the process operates, particularly if they anticipate local organisations finding it difficult to bid effectively against national organisations.

The most important factor is for the sector and any tenderers to engage effectively with the process, and to seek legal advice promptly if they suspect something has gone wrong.

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