



“The Handy Guide”

to

**Tendering
and
Procurement**



Project Development & Support Ltd

The Handy Guide to Tendering and Procurement

Guidance from Tendering for Care on the principles which underpin tendering and procurement.

The purpose of this guide is to provide information for those who may not be directly involved in the preparation of tenders, but nevertheless need to be well informed with regard to the legal basis for tendering and procurement. For example:

Trustees and Directors of Charities;

Directors of Companies;

Senior and Middle Managers;

Those engaged in advising other organisations on the tendering and procurement processes.

Whilst this guide offers some indicators to the operation of the processes, as well as a *"Do and Don't"* list, its principal purpose is to offer organisations tendering for public sector contracts a simplified reference to legislation surrounding procurement and related regulations and guidance. It does not set out the full detail of tendering and procurement, but it focuses on the principles which apply most of the time. There are special cases and exceptions when the principles do not apply, and are dealt with in general terms rather than great detail.

Who are the "Buyers"? — Selling to the Public Sector

When your services are purchased by a public sector organisation, or an organisation which receives 50% or more of its income from a public source, then those who purchase your services will have public sector related obligations. Regardless of their job title these then are taken to be the buyers.

It is important to recognise that the rules and regulations which surround tendering and procurement are developing rapidly, with new legislation under development or about to be implemented — at the time of writing this guide in May 2009 an example of this is the Remedies Directive 2007/66/EC, which will be implemented in UK law on 20th December 2009. In addition there is an ongoing series of reviews of European legislation and regulation which can impact on the procurement process, not just as a result of new guidance and legislation but, more importantly, arising from judgements in the UK and European Courts — principally the European Court of Justice (ECJ). It is for the Courts to interpret the law, any other legal opinion provided by a lawyer is just that – an opinion. However, significant changes can occur at any time; it is therefore essential that organisations keep themselves updated on developments on a frequent and regular basis.

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The Treaty of Europe applies to public sector contracts

If you trade with another organisation, that is they pay you to provide goods or services, the word "contract" applies – regardless of whether the agreement to provide the goods or services is in writing, verbal or called something else. This means that contract law applies.

The Treaty, otherwise known as the Treaty of Maastricht, amends and updates the Treaty of Rome and was signed by all of the Member States of the EU, including the UK. It requires the buyers to behave in ways which are non-discriminatory, fair, transparent and even handed with their suppliers or prospective suppliers. Therefore they must:

- not limit the breadth of any market to local suppliers;
- advertise their requirements in forms which are accessible to providers in the member states. Where the full EU rules apply this is in the Official Journal of the European Union (OJEU). Where the full rules do not apply then the advertising must be "adequate". This might be in the press and on an appropriate website.

Special rules apply to State Aid (the use of public funds) if the use of such funds would distort competition. There are exemptions to the use of State Aid, but in general buyers cannot give public money to local providers, through grants for example, although there are specified criteria with which the buyer must comply in order for these gifts to be exempt. If you wish to find out about the rules for grant giving by a particular public authority or body administering public funds it is a good idea to read their Standing Orders. These are the public authority's "rule book" and can usually be found on their website.

Standing Orders set out exactly what the buyers are allowed to do when spending public money.

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The Regulations

The Regulations to be followed by the buyers are set out in a European Directive – 2004/18/EC. The Directive entered into UK law through Statutory Instrument (SI Number 5) The Public Contracts Regulations 2006, dated 9th January 2006 and came into force on 31st January 2006. It is the Public Contracts Regulations 2006 (PCRs) which set out the full Regulations in the UK.

The PCRs place a requirement upon public sector contracting authorities to categorise the services they purchase into two groups. These are known as the Part A and Part B categories. Schedule 3 of the PCRs lists all Part A or Part B services through a set of codes known as the Common Procurement Vocabulary, or CPV codes.

The PCRs and the full EU procurement regulations apply to services designated as Part A. The procurement of those services designated as Part B is required to comply with some of the regulations only. A large proportion of the money spent by Local and Health Authorities is classified under Part B, and includes most services relating to health, education and social care. However, in interpreting the law relating to procurement the UK Courts are increasingly blurring the differences between Part A and Part B.

As the buyers purchasing Part B services have much more flexibility in terms of the procedures they can use, it is important that suppliers understand the system and check from the outset of a tendering exercise that these procedures have been properly applied. If the service has been incorrectly categorised, or not categorised at all, there may be grounds for a legal challenge.

The process for identifying Part B services is described on the TfC website –

<http://www.tenderingforcare.com/news/new-cpv-codes>

from where the necessary documents may be downloaded.

If a Local Authority buyer is purchasing services which are classified as Part A, then all of the PCRs apply if the total contract value is more than £139,893. This is known as the "threshold". If the buyer is acting on behalf of a

Government Department then the threshold above which the PCRs apply is set at £90,319.

Buyers may not split or artificially separate elements of a contract in order to avoid meeting the threshold, and therefore the regulations. There is a "rule of aggregation" which requires authorities to take into consideration the total "value" of similar purchases. For these and other reasons there is a current trend towards bigger, broader contracts. For example it is not unusual to see contracts for services which cover "vulnerable people" or be described as a "generic tender". It is reasonable to expect that this trend will continue in the future.

A key aspect for Part A contracts at a value above the threshold is that the tender must be advertised in the OJEU and thus subject to possible cross-border competition. For all service contracts where the total value falls below the threshold the PCRs do not apply. However, regardless of whether a service is classified as Part A or Part B, all public sector contracts remain subject to the provisions of the Treaty of Maastricht (and if and when ratified, the Treaty of Lisbon), in particular to those Articles which relate to competition.

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The Competition Act 1998

The Competition Act is derived from Article 85 of the Treaty of Maastricht. In general the Act says that the buyer is prohibited under UK domestic law from “abusing a dominant position” by:

- imposing unfair purchase or selling prices;
- restricting production or technical development in ways which would put consumers at a disadvantage;
- applying dissimilar conditions to similar transactions thus putting suppliers at a disadvantage;
- making contractual conditions which require the supplier to accept obligations which are not connected with the subject of the contract.

In general the Act prohibits buyers from making any decisions which would **in any way prevent, hinder or distort competition**. All organisations submitting a tender must be treated in exactly the same way regardless of their corporate structure, e.g. plc, private company, sole trader, registered charity, etc.

The Act excludes all types of price-fixing and collusive tendering. This means that in general there should be demonstrable competition for all public money. It may not be necessary for the competition to comply with the PCRs, and may be at a minimal level, depending upon the requirements set out in the purchasing authority's Standing Orders.

There is currently considerable encouragement for organisations to tender in a collaborative way, possibly through various models of consortium. Suppliers should be very careful that their arrangements cannot be interpreted as “collusive”. Because of the potential risks and the rules for tendering as a consortium it is important that Trustees/Directors become involved in discussions and potential arrangements from the outset. The Office for the Third Sector produced a Guide to Working in a Consortium which was edited by TfC and can be downloaded from the TfC website along with the TfC “12 Golden Rules for Tendering as a Consortium”

<http://www.tenderingforcare.com/news/working-in-a-consortium-and-tfc-12-golden-rules>

The Office of Fair Trading provides the definitive guidance on competition law and produces a number of excellent documents which are available on their website. Their "Advice for businesses" section is a good place to start:

http://www.offt.gov.uk/advice_and_resources/small_businesses/

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General Compliance

All purchasing must comply to some extent with requirements of the EU Treaty. The basic principle is that public spending must be undertaken in a manner which is non-discriminatory, fair and transparent. It is important to understand that the regulations are being interpreted and re-defined by the ECJ and the UK Courts on almost a weekly basis. For example a judgement in the UK courts late in 2008 has resulted in the requirement for all buyers to provide the criteria, sub-criteria and weighting which will be used to score the tender. These and other judgements provide options for organisations who feel that they have not been dealt with fairly, to challenge the buyers' decisions. Often this does not mean going all the way to court; a strongly worded letter setting out the perceived failure in compliance may be sufficient to secure procedural changes so that organisations can compete fairly.

All tenders must be selected on the basis of Value for Money (VfM). This usually means that during selection the quality of the tender itself will be scored and the price will be scored separately. Then a proportion of each of the two scores are added together and used to construct the final ranked list. The balance of the two scores can vary considerably, with 60% of the quality score + 40% of the price score being typical. Although selection on the basis of "lowest price" is allowed in the PCRs, until recently this process has rarely been applied in tenders for Part B contracts. In recent months however there has been a discernable increase in the number of tender processes employing lowest price.

Tenders must be subject to an "adequate" degree of advertising – sufficient to enable the services market to be opened up to competition, to ensure an impartial procurement award procedure, and to ensure that buyers achieve VfM. An adequate degree of advertising may vary according to the significance of the eventual contract in the market place. This means that factors will be taken into account such as the subject matter of the contract, the

sector concerned, and the location for the delivery of the service.

Regardless of whether a tender is for Part A or Part B services buyers have to report, by means of award notices, on those contracts awarded which exceed the threshold. The notices for Part B services are not published. Annual reporting is also required on all other contracts. All awards have the potential to be challenged by the European Court of Auditors.

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Specification

There is a formal requirement in the Directive and the PCRs which applies when purchasing Part B services. This confirms the underlying principle that the services which are being purchased should be "specified", that is to say set out in functional terms, where appropriate using European standards and requirements. This means that providers should be excluded from any involvement in the process of the production or writing of a specification unless this is done in an open and transparent way. The principle being that the services as set out in the specification cannot be seen to distort competition.

This requirement means that it is the service "as specified" which is being purchased.

It may be the case that a service has been delivered by one provider for a number of years, but the specification used in the tendering process for a contract to continue to deliver the service does not match the historic content of that previously delivered.

A rough measure over recent months, on a contract by contract basis, has been a reduction in the level of services specified at re-tendering of around one third.

It is often the case that organisations that previously delivered re-tendered contracts fail to retain them and are informed at feedback that they were "too expensive". Such a result can usually be attributed to proposing to deliver and pricing the service as historically delivered rather than "as specified".

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Risk

For a service provider, the successful outcome of a tendering exercise is entering into a commercial contract with the buyer. Such contracts come with a multitude of areas of potential risk. Failure to comply with any one contractual condition may give rise to the possibility of a breach of contract action in the courts, with a further risk of a requirement to pay damages plus the opponent's costs if the court finds against the provider, or, even if successful, a requirement to meet a considerable level of cost in successfully defending any action. Trustees, Directors and Senior Managers should be acutely aware of the risks and dangers in this area and take appropriate action to protect themselves personally and their organisation. There is currently a spate of threats of breach of contract actions arising from contractors failing to comply with contractual terms.

For the foregoing reasons a high proportion of the tendering process involves an assessment of the ability of an organisation to accept responsibility and liability for the delivery of a public sector contract. This has little to do with the size of the organisation. Very small providers can often compete very successfully with large and even very large organisations. The process is more about the ability of the organisation when tendering to demonstrate, and evidence, that they have both the capacity and the capability to accept and manage all aspects of risk. For these reasons it is usually the strength of governance and quality of management which scores highly, and is often looked at with much more care than the delivery of the service itself.

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Do's

- Do** ensure that you have an accredited quality management system in place which is recognised by the majority of buyers;
- Do** have insurance cover in place sufficient to cover as many risks as possible;
- Do** ensure that tenders are priced on the basis of the services specified;
- Do** ensure that all tenders are signed by a Trustee or Director;
- Do** have arrangements in place for legal advice to be obtained as soon as the draft contract is received.

Don'ts

- Don't** assume that the specification for a re-tendered contract will be on the same basis as the service historically being delivered;
- Don't** engage in activity which could be construed as collusion, price fixing, or otherwise anti-competitive;
- Don't** sign a contract unless you are certain that your organisation is able to ensure that it will be able to meet all of the stated conditions;
- Don't** assume that a contract has been correctly classified. Always check using the CPV codes;
- Don't** wait to question. Always consider taking legal advice/action if you feel that there has been a failure in compliance.

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Accredited Training

Project Development and Support Ltd are proud to announce the first accredited professional course for individuals involved in the preparation of tenders for public sector contracts. The course has been developed over the past year and successfully piloted with staff from small organisations and large national charities.

Accredited by the Open College Network (London Region) OCN
The course is at level 3 with six credits
Delivered by distance learning

Full details and information on possibilities for significant financial grant support to help with fees are available from 15th June 2009.

Go to our website and follow the links: www.tenderingforcare.com



Training from TfC

In 2008 TfC received a National Training Award for excellence and quality of training delivery. In order to win the award we were required to demonstrate that the training is having a positive effect on the effectiveness of the tendering activities of those trained. The organisations with whom we work have established outstanding track records of success with their tendering.

The training courses available can be modified to meet the requirements of specific groups and can be delivered:

- internally to staff in larger organisations;
- on behalf of organisations such as umbrella bodies arranging events such as one off training days or conferences;
- for specialist groups such as Trustees.

Our "How to Win Tenders" course list includes:

- Understanding tendering and procurement (basic course)
- Preparing effective tenders (practical, group work based)
- Tendering as a consortium (basic course)
- Presentations for tenders (practical, group work based)
- Tendering Masterclass (an advanced course for those who have attended our Understanding tendering and procurement basic course)
- Preparing an effective PQQ
- How to work in a Consortium (includes model documentation for setting up a consortium)
- Membership of a tender appraisal panel



Services from TfC

TfC provides a wide range of services and support for Third Sector Organisations who are tendering for public sector contracts. These include:

- a weekly tender alert service;
- two weekly e-journals called upDATE and Staying Ahead.

In addition we provide support for organisations engaged in the preparation of tenders for public sector contracts:

- tender review prior to submission, of after submission;
- mentoring for the team preparing the tender;
- appraisal of accounts to demonstrate how they are likely to be scored;
- appraisal of accounts to demonstrate the effect on scoring of future loans and other borrowing;
- full organisation review for tender appraisal;
- a legal helpdesk for specific queries and initial legal advice.

Contact

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