

Handling of Workforce Matters in Local Government Procurement

The Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001

(SI 2001 No 909) made under Section 19 of the Local Government Act 1999 provides, in respect of best value authorities, for the workforce matters described in Part II of the Local Government Act 1988 to cease to be defined as "non-commercial matters" to the extent that they are relevant to the achievement of best value, and also in circumstances where they are relevant for the purposes of a Transfer of Undertaking Protection of Employment (TUPE) transfer.

Section 17 of the Local Government Act 1988 was designed to prevent authorities from introducing political or other irrelevant considerations into the contractual process. It did this by defining certain matters as "non-commercial" and prohibiting authorities from having regard to them. However, it later became evident that these restrictions, by preventing authorities from considering how contractors managed their workforces, presented an obstacle to the achievement of best value. For example, the restrictions could inhibit the introduction of more innovative means of procurement.

Under Section 17 the following matters are prohibited:

- a) the terms and conditions of employment by suppliers of their workers or the composition of the arrangements for the promotion, transfer or training of or other opportunities afforded to their workforces (Section 17(5)(a))
- b) the conduct of suppliers or workers in industrial disputes between them (Section 17(5)(d))

The 2001 Order allows authorities to now consider the above matters to the extent that they are relevant to the delivery of best value or for the purposes of a TUPE transfer. Restrictions on other non-commercial considerations listed in Section 17 of the Local Government Act 1988 remain in place.

Authority Perspective

Many authorities welcome the ability to consider workforce matters during procurement, as they feel it will allow them to make more informed choices about contractors, and so raise the quality of services provided. Authorities also believe it will improve competition for their contracts.

Authorities anticipate that, as a result of the legislative changes, they will feel more comfortable about entering long-term partnerships and believe that this will promote more partnership working with suppliers. They believe the Order will allow them to have greater confidence in the recruitment and retention of suitable employees responsible for delivering public services. Authorities also support the legislative changes because it will help them to be sure employees will be protected – especially in the case of staff transfers. Similarly, it should help allay the concerns of transferring staff.

Supplier Perspective

Suppliers may also welcome the legislative changes, as they will give them greater opportunity to demonstrate strong approaches to workforce issues, believing that being able to demonstrate how they manage workforce arrangements, particularly in respect of training offered to staff and health and safety policies, would enable them to “compete more effectively” for local authority contracts in the future. Suppliers are little more divided over whether providing information on their policies for promoting employees and their industrial relations records will enhance their competitiveness.

Some suppliers, however, disagree, believing that the consideration of a particular workforce matter is irrelevant in the tendering process. Some expect the Order to actually cause a decline in some interest and innovation in service delivery and authorities’ willingness to outsource.

Many authorities are particularly concerned about the complexity of making a value-for-money decision based on an evaluation of

non-financial considerations. Authorities are worried that the Order may increase the time and complexity involved in tender evaluation. Authorities also have concerns about the additional skills that will be required for evaluating tenders as a result of the Order and the knock-on cost implications.

When it comes to quality evaluation there is a requirement for a multi-disciplinary team. In addition to professional buyers, accountants and lawyers, there must be someone with a comprehensive grasp of all the technical issues involved in the service and someone with up-to-date experience of front-line operations.

Tender evaluation methodologies are evolving, albeit slowly. The Order should encourage some authorities to review their approach in line with best value, if they have not already done so. However, both authorities and suppliers express the view that budget concerns might continue to dominate and limit the scope for considering broader procurement issues, such as how workforces are handled.

Whilst some of the larger suppliers may expect to gain from wider evaluation as they have strong approaches to workforce issues, they are unsure as to whether authorities have the expertise to make judgements.

Suppliers are concerned about the risks and costs of simply being asked a lot more questions during the tendering process without authorities having given careful consideration to the practical implications of non-financial factors.

This suggests that authorities need to develop evaluation criteria relating to workforce matters that are clearly and identifiably linked to the performance of the contract, and base their criteria on them.

Information and Support

Authorities have some concerns about the additional requirement of evaluating tenderers' workforce arrangements. To address this extra work, authorities seem to favour a number of different approaches for obtaining information or support. Most commonly, they propose drawing on public sources of information (e.g. internet or library) or seeking advice from other organisations.

Suppliers are anxious about what will be required of them in the future when bidding for local authority contracts. In responding to any additional requirements brought about by the Order, it seems most likely that suppliers will consult their human resources department.

Some suppliers may also refer to public sources of information or seek advice from other organisations.

Impact on SMEs

There are concerns about the impact of the Order on smaller organisations and new entrants to the market, even though the Government Guidance reiterates "the aim of Ministers to encourage Small and Medium Enterprises and in particular small community businesses".

Both authorities and suppliers believe that the Order might make it harder for smaller and new suppliers to compete. As with the authorities, suppliers seem the most divided about the potential impact of the Order on the ability of small and new organisations to compete. They may be disadvantaged not only because of the additional cost/time involved in bidding, but also because they may find it hard to demonstrate good practice in staff management if they are required to produce policy documents, formal registrations and track records, etc. This is because small companies with few support staff may have less documentation in general, although their workforce practices and general management expertise may be perfectly satisfactory.

Workforce Matters

The consideration of workforce matters raises the question of whether procuring authorities should consider the employment record of only the "bidding entity" as distinct from the entire organisation which may lie behind it. Some local authorities argue that the client authority should distinguish between a holding company or policy-making HQ company, and operating companies that are engaged in similar functions to those in the current tender.

Parent companies can vary enormously in the influence that they may exercise on a supplier; in relation to employment they may well set corporate standards which subsidiary companies have to observe. The question here is should a procuring authority look at the workforce arrangements of the bidding entity and/or its parent company?

It is generally agreed that it is important for authorities to discover what are the standards and policies which are centrally controlled, and what freedom the operating companies have within them. However, it is always essential to focus on the bidding company and specifically the people who are being put forward to manage the authority's operations on-site. These are the people who will determine the style of local workforce management.

TUPE Issues

Many parties on both sides of the contract procurement process are concerned to know with certainty whether or not TUPE applies to a prospective contract.

Workforce information is essential for any potential tenderer for the purposes of a TUPE transfer. If the organisation that wins a contract is to take over the workforce that at present delivers the service being tendered, bidders must have enough information about the present workforce to formulate realistic bids.

Bidders require the following workforce information:

- a) numbers, types and grades of workers currently employed to deliver the services and their general organisation;

- b) the cost of employing the workforce, and its detailed components such as pay rates, allowances and pensions (these details must be applied by individual and not generalised across the workforce);
- c) indicators of collective and individual problems, such as skill shortages, sickness/absenteeism, outstanding disciplinary cases and warnings.

In order to enable suppliers to bid for a contract where TUPE regulations apply, authorities need to provide enough information to enable them to assess the cost of running the present workforce. It has to be recognised that authorities operate widely differing terms and conditions and that these are often complex and cause difficulties for bidders who need a great deal of information in order to prepare an accurate tender.

Suppliers express concern about not receiving adequate workforce information. They state that common omissions are the names of managers from the transfer list; records of disciplinary proceedings, disputes and industrial tribunals; sickness and absence levels.

Unions can be helpful intermediaries in TUPE transfers; and bidders often rely on unions to help with the information exchange and employee communication processes.

It is generally agreed that workforce information is a key issue in facilitating TUPE transfers – and that it can vary from excellent to wholly inadequate. The course of some discussions indicate that a few authorities appear uncertain about what information may be legitimately issued to bidders whether in a summary or anonymous format, prior to contract award. Suppliers, who have a good deal of experience in tendering, often rely heavily on indemnities relating to the transferring workforce, to help manage the risk arising from the uncertain information base.

A national proforma on which the incumbent provider should be required to provide key information about the relevant workforce has been suggested.

Secondary transfers between suppliers may involve some additional complications - the organisation in possession of the up-to-date workforce information is a supplier, and the authority might not know what changes the supplier has made to the terms on which the staff originally transferred may now be employed. Both authorities and suppliers state that when incumbent suppliers resist and delay providing any workforce information (on the grounds that they regard this information as commercially valuable) this can cause bidders serious difficulties.

Supplier-to-supplier transfers often require considerable indemnities to cover missing or incorrect workforce information; for example, some incumbent suppliers are said to have deliberately overstated the size of the workforce.

Although a supplier cannot legally reduce terms to win a contract, there are cases where an incumbent supplier had increased terms at the last moment.

Transfers back to an Authority

There seems to be limited experience of transfers back to an authority. It appears that the problem of getting good workforce information from the supplier might apply in such circumstances as well. Indeed, it has been suggested that, even if an authority knows exactly what questions to ask and provides a pro-forma, this might not result in an adequate response.

Pensions

A letter to local authority Chief Executives from the then DoE in March 1995 stated that all contracting authorities should consider the potential risk that claims for constructive unfair dismissal may arise from failure to provide satisfactory pension arrangements for transferred employees. Such arrangements should be "broadly comparable" with the local government scheme.

Some authorities and suppliers agree that the assessment of private sector schemes can be difficult. They cite the cost of actuaries and the difficulty of comparing schemes. For these reasons, some authorities prefer to preserve the local government scheme.

Staff Consultation and

Information Provision

Staff consultation is a requirement of TUPE. It is affected by the Order because of the opportunity to broaden the agenda during a procurement competition to include matters of direct interest to employees.

Staff being transferred often get very concerned about a transfer away from the public sector into the private sector. Their concerns include uncertainty about their long-term employment, lack of knowledge about private sector practices, loss of the public service ethos (serving their community) and the culture change that would be involved. Several authorities emphasise that staff need to be given good information

about the successful bidder and ideally they should receive some advice about their own individual position.

It is also important to provide an adequate lead-in period during which staff anxieties can be addressed; it has been suggested that potentially difficult transfers are most successful where enough time is allowed for information flow and formal/informal consultation.

Several suppliers and authorities suggest that it is good practice for suppliers to prepare question and answer sheets in advance, to cover common foreseeable concerns.

Working Together During the Contract

Already a few authorities monitor the workforce arrangements of contractors – however, this may become more common once the legislative changes have taken full effect.

Conversely, some suppliers are concerned about authorities starting to monitor their workforce practices – suppliers see it as an unnecessary burden.

Suppliers have concerns about how authorities will interpret workforce practices – for example, levels of retention and recruitment can be influenced by a variety of extraneous factors. Several suppliers state that they expect authorities to monitor outputs and outcomes, like service quality, rather than inputs or methods. They see any direct monitoring of staffing arrangements to be a waste of client time and an imposition on suppliers' contract managers.

Suppliers are slightly wary of having their workforce practices closely monitored. They tend to prefer approaches like submitting regular returns and reports to spot inspections. Similarly, few authorities support the idea of spot inspections – perhaps because of the burden of carrying them out and/or the detrimental effect such an approach may have on relationships with contractors.

Authority-supplier relationship is the key to the successful contract and support for developing an informal approach to contracting, based on trust. Many suppliers suggest that a partnership approach is the best answer, with supplier and authority working together to achieve workforce-related targets. It has been pointed out that many partnerships have now adopted an "open book" approach to sharing essential information.

There can be tensions between some local authorities and suppliers, and a lack of understanding for, and confidence in, the way the other operates – this is particularly true in relation to workforce issues and arrangements. Some authorities express a degree of antipathy towards private sector provision of public services. And some suppliers are critical of the way authorities approach tender evaluation. Where such poor relations exist it is often the case that suppliers are negative about authorities looking into, and monitoring, suppliers' own workforce arrangements – they believe that to do so is irrelevant and intrusive. It is generally agreed that relations between authorities and suppliers must become more open and collaborative if the Order is to successfully promote best value, rather than simply complicating what is often seen as a difficult and expensive process.

Improving Performance

A more open exchange of workforce information between authorities and suppliers might promote partnership working and collaboration on staffing issues – specifically, equal opportunities and training. One idea emerging is that authorities and suppliers should undertake a joint commitment to upgrade the skills of a workforce.

Such collaboration may be difficult because some suppliers are quite sceptical about the ability of authorities to effectively develop their own workforce. And some suppliers are concerned about the problem of having to take over an incompetent and de-motivated workforce from an authority.

This Guidance is based on a report issued by the Office of the Deputy Prime Minister.

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