

Preparation for a Procurement Exercise : Guidance 17

Preparation for a Procurement Exercise

Introduction

The DTLR has issued the following Guidance to assist and improve Local Government procurement. Its publication here is designed to assist public procurement officials and their suppliers.

Thorough preparation for the commissioning or procurement by local authorities of supplies, works and, in particular, services pays dividends. It enables the procuring authority to ascertain fully both the nature of the works, supplies or services it wishes to buy, whether these will meet the needs of the members of the community it serves and to evaluate the nature of the obligations and liabilities it will be expecting the contractor to take on.

Proper preparation minimises the scope for misunderstanding and consequent legal disputes between the procuring authority and the contractor as well as disappointment or even legal challenges by stakeholders (the term "stakeholder" is used to cover recipients of local authority services, tenants, community groups, local business, trade unions and employees).

Sufficient preparation for procurement cuts down the number and complexity of commercial, financial and legal issues to be negotiated between a procuring authority and a contractor which, in turn, stimulates private sector interest in transactions for the provision of public services and competition. Some potential providers of supplies, works or services are deterred from doing business with Local Government on the basis of a perception that negotiating with Local Government is too time-consuming to be commercially attractive.

Thorough preparation for procurement helps prevent potential grounds for legal challenge under the European Procurement Directives which can arise, for example, through changes to specifications after publication of the OJEC advertisement or post-tender negotiation in the Open or Restricted procedures. Similarly, many of the recent cases involving application of the TUPE Regulations by aggrieved employees or unions might have been prevented if they had sufficient appreciation of the nature of the employees likely to be affected by the transfer being undertaken before the authority concerned had embarked on its procurement exercise.

It is appreciated that within the Local Government context in particular, councillors will often be anxious to let the contract and secure service improvements within a limited timescale to accommodate the end or beginning of the authority's financial year or an electoral term. Training should, therefore, be given to local authority members to raise their awareness of the important benefits of allowing local authority officers sufficient time to prepare for major procurements or commissionings.

External and Internal Consultation

External Consultation

Under the duty of Best Value (as a result of Section 3 (2) of the Local Government Act 1999) and other legislation (for example, the requirement to consult under the Housing Act 1985 in relation to housing management) and as a matter of ensuring that the procurement, of a service in particular, will meet the needs of its community, local authorities are obliged to undertake consultation with certain stakeholders.

Consultation with relevant suppliers can help indicate how a contract can be packaged (for example, in relation to the duration of the contract or the services/supplies/works to be included within the contract) to ensure the best competitive response from the market.

On the other hand, over-consultation on every aspect of a proposed contract (with the resulting dissemination of responses from the market in general) can lead to "consultation fatigue" within the proposed marketplace and can compromise innovation by failure to respect commercial confidentiality.

Consultation with service users and proposed service users (as is required under Best Value) should be completed in advance of drawing up the specification and subsequent advertisement of a contract. If specific individuals within the community are consulted with regard to the content of any contract, suitable training should be given to ensure that they understand issues of pricing against the specification and the need to maintain commercial confidentiality. Consultation as to the content or specification after the contract has been put out to tender, and particularly after bids have been received, will tend to raise false expectations within the community as to the extent that it can influence and subsequently change the specification, resulting in consequent disappointment. Local authorities should be careful to keep an audit trail of all consultation carried out and ensure that the appropriate media are used for consultation. (For example, there is little point in advertising for comments in a local newspaper unless the newspaper is read by the particular section of the community from whom views are sought.)

Internal Consultation

Unfortunately it is sometimes the case that part way through a procurement, and at worst after bids have been received, the department within the procuring authority which is responsible for letting the contract will be notified by another department within that authority that the requirements for the contract should change in order to reflect a particular corporate or departmental requirement of that authority. Such changes compromise value for money and can give grounds for legal challenge if the legal specification needs to be changed after publication of the OJEC advertisement or if post-tender negotiations are required.

To prevent this, local authorities should complete internal consultation with key departments in advance of completing the specification for the contract and certainly in advance of placing the OJEC advertisement. Key departments would include IT, Human Resources, Financial and Legal departments and any other parts of the authority which will be directly affected by the letting of the contract to an external organisation.

As part of internal consultation, local authorities also need to bear in mind that the consultation under Regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations should be undertaken by the authority as early as possible. Again, an audit trail for any consultation processes undertaken will help prevent later disputes and may be a crucial requirement of the contractor's due diligence process before the contract can be completed.

Preparation for Transfer of Employees

If this information is not gathered in a complete form before the contract is let, bid prices will not be accurate and value for money and probity will be affected

detrimentally. In addition, there is a possibility that aggrieved employees may bring a claim against the authority and/or the incoming contractor.

Transfer of Land/Property

Occasionally a local authority will be transferring either the ownership or the right to occupy land or property to an incoming external contractor (for example, a depot or surplus land which a contractor will develop in order to generate income to supplement payments by the authority). In these circumstances, before a procurement is embarked upon, the local authority should ensure that it has confirmed the boundaries and nature of the legal or equitable title to the land, has undertaken a survey to ascertain the extent of any environmental contamination or instruction defects and has commenced steps to secure vacant possession of any land to be transferred where this is to be required. Failure to do this will inevitably delay the completion of the contract or lead to subsequent claims or disputes under the contract.

Transfer of Assets (including ICT)

Many local authorities hold equipment and other assets under leasing agreements and will have a right to use ICT equipment by way of exclusive licence from the ICT supplier. If, as part of the procurement, the authority proposes that the incoming external contractor should use any of the equipment or ICT systems, the authority should ascertain the terms on which the equipment and ICT can be used (before embarking on the procurement) and whether the agreements can be transferred or novated to the contractor. Again, failure to do this will tend to prolong the transaction and/or lead to subsequent claims or disputes under the new contract or the existing contracts with the equipment/ICT supplier. It is also advisable to undertake an audit or survey of all equipment and ICT systems in order to produce an inventory that can be attached to any Invitation To Tender/Invitation To Negotiate.

The Procurement Process

A local authority embarking on a major procurement or commissioning exercise should ensure that it has drafted its specification for the works/services/supply before placing its advertisement in the OJEC. Otherwise, there is a risk that the specification may need to be changed following advertisement and the local authority will have the invidious choice of deciding whether to bear the risk of possible challenge under the European Procurement Directives or to backtrack on the procurement process and to readvertise the contract to avoid challenge.

There is a tendency to confuse the stages of assessment of prospective tenderers' financial and economic standing and technical capacity and ability, with the evaluation of bids. These phases are quite distinct under the European Procurement Directives and, to avoid challenge, should be kept entirely separate.

A local authority when setting tender evaluation criteria should ask itself (if using the "most economically advantageous tender" option) why each tender evaluation criterion is important and what evidence the authority expects the tenderer to provide to demonstrate that it meets the particular criterion (which should be listed in order of importance). The tender evaluation criteria should not be changed after the Invitation To Tender/Invitation To Negotiate has been sent out.

Careful records should be made of the entire procurement process and in particular the tender evaluation, in order to fend off any legal challenges. This will also assist the contractor or the contractor's financier in carrying out its due diligence.

Conclusion

These proposals have been made on the basis of extensive experience of advising on local authority outsourcings for supplies, works and services. If taken into account, the efficiency of local authority procurement would be improved considerably, with the additional benefit of securing better value for money and an enhanced perception of Local Government procurement by the commercial and voluntary sectors.

As a supplement to the above proposals, the importance of ensuring the opportunity for taking into account the lessons learnt from any procurement by way of feedback, and the incorporation of those lessons within the next procurement undertaken by that authority, should not be underestimated. Nor should the importance of adequate project management skills. Sufficient preparation for procurement may appear to be time-consuming at the outset but will reap dividends in time, cost and market perception in the long term.

Guidance issued by the Department for Transport, Local Government and the Regions

Part B

Government's Code of Good Customer Practice

Working with Suppliers

About the Code of Good Practice

The Code demonstrates government's commitment to becoming a better customer, for the mutual benefit of government and its suppliers.

What is the Code?

The Code of Good Customer Practice sets out central civil government's core values for working with suppliers. It is a Code of conduct for central civil government and a commitment to suppliers.

The Code encourages central civil government to become more consistent in its approach to working with suppliers and is a commitment that government is serious about wanting to be a better customer - one that suppliers want to work with and where relationships can bring mutual reward.

The Code has been produced by the Office of Government Commerce and agreed with departmental representatives. It is consistent with EC Rules and Procurement Policy Guidelines. The Code is not intended to have legal effect.

Who is the Code for?

The Code is intended for all those in central civil government who deal with suppliers, including procurement staff, business and contract managers and senior officers. As a statement of good practice it should be shared openly with potential and existing suppliers.

The Office of Government Commerce will promote the adoption of the Code in the wider public sector.

Why have a Code?

Suppliers increasingly play an important role in delivering central civil government's core business and contribute to its aim of providing high-quality, efficient, responsive and customer-focused services. Therefore, the way in which government works with suppliers and the relationships that are developed are critical.

By establishing a Code of Good Customer Practice, it is believed that central civil government will become more consistent in its approach and in turn better, more creative and successful business relationships will follow.

Who can you contact about the Code?

If you work within central civil government and have an enquiry about the Code you should contact your departmental Head of Procurement. If you are a supplier and have an enquiry about the Code, and how it relates to central civil government, please contact the relevant Head of Procurement in the department you are dealing with or the Office of Government Commerce on 0845 000 4999 or ServiceDesk@ogc.gsi.gov.uk

The Code of Good Customer Practice

when working with suppliers central civil government commits itself to four core values: fairness, honesty, efficiency and professionalism.

Fairness

Central civil government will act fairly towards all suppliers during a competition and towards the successful supplier throughout the business relationship.

It will do this by:

- o Making sure that information given to suppliers is accurate and consistent, provides the appropriate level of detail and is issued in a timely manner.
- o Being objective, even-handed and transparent when making decisions and making sure that each competition is run on a level playing field without favouring any one supplier.
- o Addressing perceived barriers to entry to government markets so that new players, including small and medium enterprises, are encouraged to bid for appropriate work.
- o Applying UK domestic policy and its EC international obligations and rejecting any business conduct that may compromise these.

Honesty

Central civil government will be honest when conducting business with suppliers.

It will do this by:

- o Indicating clearly when inviting suppliers to bid how offers will be evaluated and stating the relative priorities of the evaluation criteria.
- o Dealing with suppliers in good faith, making sure that formal competitions are only launched when there is a clear intent to award a contract. This will be subject to subsequent political decisions or changing investment priorities.
- o On request, debriefing successful and unsuccessful bidders promptly of the outcome of a competition, giving constructive feedback.
- o Providing suppliers with regular feedback based on agreed performance criteria.

Efficiency

Central civil government will work towards improving efficiency when awarding contracts and working with suppliers.

It will do this by:

- o Seeking to reduce the costs involved in doing business with government by simplifying procedures and minimising burdens on suppliers.

- o Working to secure appropriate business relationships with suppliers, including developing longer-term collaborative and strategic partnerships where there is a potential that this will improve value for money.
- o Encouraging and being receptive to innovative solutions from suppliers.
- o Working with a supplier to reduce costs and increase effectiveness.
- o Promptly paying for completed work in accordance with contractual and legislative obligations.
- o Making sure that requirements are specified in the most effective way to elicit the most value-for-money response from the supplier.
- o Meeting contractual and other commitments in a timely manner and making sure, wherever possible, that published procurement timetables are kept to.
- o Utilising electronic commerce techniques to improve the efficiency of the interface with suppliers in line with government targets.
- o Making sure of genuine competition by selecting the minimum practical number of tenderers within the legal requirement.

Professionalism

Central civil government will work to a high standard of professionalism when dealing with suppliers.

It will do this by:

- o Continuing to award work on the basis of value-for-money_ criteria and not simply the lowest price.
- o Making sure that, where appropriate, value-for-money criteria include relevant environmental factors in accordance with _HM Treasury/Department for Transport, Local Government and the Regions.
- o Requiring staff working within a procurement process to declare relevant personal or financial interest so that professionalism is not compromised.
- o Awarding work only to suppliers who observe legally applicable health and safety standards.
- o Effectively managing risks during a procurement process and working with suppliers to reduce risks during the business relationship.
- o Responding promptly and courteously to communications from suppliers and making sure that appropriate contact details are always given to suppliers.
- o Maintaining a high standard of integrity, and being businesslike when meeting and working with suppliers.
- o Actively working with suppliers to solve problems at the earliest possible stage and seeking to resolve contractual disputes using alternative dispute resolution mechanisms wherever possible.

Issued by the Office of Government Commerce 2001.

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