



Briefing 17-07

February 2017

To: All Chief Executives and Main Contacts

Key Issues:

- This briefing considers the award of contracts, including small contracts in compliance with the EU procurement thresholds.
- It considers in what circumstances an assessment of pros and cons will inform a decision as to whether a competitive tendering exercise is required.
- It also considers the UK and EU legal issues and risk of challenge considerations

Introduction

Local councils procuring goods, services and supplies need to ensure compliance with both EU law and UK domestic legislation, including adherence to statutory duties like Best Value in the way in the award work or contracts. Whilst there are some regulatory differences in England, Scotland, Wales and Northern Ireland this briefing primarily considers compliance with EU procurement rules, which, regardless of Brexit, must continue to be considered in the current form.

The current thresholds are:-

- Works - £4,104,176
- Supplies and most services - £164,176
- Social and other specific services - £589,148

Sub-threshold contracts

Many authorities routinely need to procure ad hoc services supplies and works that fall well below the EU threshold levels. Many authorities feel very uncomfortable about awarding a small contract without a competitive process even when an assessment of the pros and cons of the situation suggest that competitive tendering would be overly costly in terms of the authority's own resources. This briefing looks at the legal requirements in these circumstances.

In developing its procurement strategy, you should first consider whether this is a recurrent requirement i.e. the same type of work/services as previous contracts. If this is the case, then

the aggregation rules may apply and bring the overall requirement within the EU regime. Secondly, you should look at whether it has a framework in place to cover the requirement. If neither aggregation rules nor an existing framework applies then there are three basic options:

- Advertise the contract and run a tender process.
- Ask for quotes from known suppliers.
- Directly award the contract to a supplier.

All local authorities are well aware of their duties for procurement above the EU thresholds. However, there is a degree of uncertainty about what the law requires when a contract is below the relevant threshold level. We will consider what EU law and UK law requires.

EU Rules

Where the full Regulations do not apply, the only other legal requirement at the European level; is that authorities must comply with the European Treaty principles of equal treatment, non-discrimination, proportionality, mutual recognition and transparency if there was a "cross-border interest". However, neither the Commission nor the Court of Justice has ever set out exactly when a cross border interest might arise. The Commission has advised that it is the responsibility of individual contracting entities to decide what might potentially be of interest to economic operators located in other Member States. This may of course differ from authority to authority dependent on its accessibility to and from another EU state.

The following factors have been identified as significant:

- The subject matter of the procurement.
- The estimated value of the procurement.
- The place of performance or delivery.
- The size and structure of the relevant service market

If a local authority reasonably forms the view that the type of contract, where it is being delivered and the value of the contract is such that interest is likely to be limited to the local, regional or national market then it strikes us that this authority would have a fair defence to a challenge under EU law to a decision not to competitively tender the contract provided that it complied with UK law and its own standing orders.

UK Law

Although not as prescriptive as the EU based rules there are legislative provisions within UK that still need to be taken into account for sub-threshold contract awards. The Local Government Act 1972 (s135) and the Local Government (Scotland) Act 1973 (s80) both require local authorities to have in place contract Standing Orders which for the supply of goods or materials or for the execution of works (but not services) must include provision for securing competition and for regulating the manner in which tenders are invited. However, the Standing Orders may exempt contracts below a specified price and any other contract when the authority is satisfied that the exemption is justified by special circumstances.

Standing Orders

The starting point for an authority therefore is to look to their own standing orders (aka Contract Procedure Rules) for how to deal with these lower value contracts. It is likely that the standing orders will require them to advertise and run competitive tender processes for contracts above a certain value. For some authorities there may be bands of value that require different procedures, for example £25,000 to £50,000 might require three quotes, and above £50,000

might require a competitive tender. Smaller value contracts may have different rules, for example, requiring approval or sign-off by the head of finance or a director.

It should also be noted that it is normal for there to be a procedure under the Standing Orders to permit exemptions to the standard position. This does give more flexibility for sub-threshold procurements as it is basically in the authority's discretion. However, it is important if the authority does wish to exempt a procurement that it complies with the governance requirements under its own rules and any substantive condition for such an exemption and also that it acts reasonably.

Whilst the Standing Orders can give an authority considerable flexibility to waive its requirements for competition, like any decision by an authority it is potentially subject to review by the Courts, or its auditors or other bodies. As well as a general test of reasonableness, such a decision would also be tested against the general duty of an authority to act in the best interests of the public in spending public money and also for, English Authorities, to comply with its Best Value Duty.

Best Value Duty

An English local authority has a statutory duty in relation to "best value" that is to "*make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.*"¹. Whilst this duty applies wider than simply to procurement the test could apply in these scenarios.

We would suggest that local authorities consider the following in their assessment:

- The costs of procurement (both in terms of management/employee time and advisory costs (if any) compared to the value of the contract – would a competitive tender be proportionate and a good use of public funds?
- The type of works, services or supplies being purchased and the authority's knowledge of the market – are there a very limited number of people or companies that have the expertise to deliver the contract? Would it be appropriate to contact 3 or 4 providers for a quote?

Also, it should be borne in mind by English authorities that if your contract is the subject of any advertisement then the UK Government inserted some extra obligations in the Public Contracts Regulations 2015 for sub-threshold contracts. If you are required to advertise a contract by your own Standing Orders or by law then you must also publish the opportunity in Contracts Finder if it is above £25,000 in value. The 2015 Regulations also gave rise to some other restrictions and obligations in relation to sub-threshold contracts: prohibition on the use of pre-qualification stages; and a requirement to publish the contract award decision on Contracts Finder.

The risk of challenge

The last point to take into consideration is the actual risk of challenge. If you are aware that there is a supplier that might be interested in the contract then a direct award might be ill-advised. Even if the grounds for challenge are unclear, it still can create political and practical problems for authorities - campaigns in the local press, challenges at meetings, bombarding you with FOIA requests and requiring you to expend significant management

¹ Section 3 of the Local Government Act 1999 (as amended by s137 of the Local Government & Public Involvement in Health Act 2007).

time dealing with the issue. However, this risk may well be mitigated without running a full competitive tender but by asking for quotes from known suppliers. If there is no known potential complainant then authorities should bear in mind that combined costs of legal fees and court fees in legally challenging a contract award may well be disproportionate to the value of the claim. A legal challenge to a sub-threshold award is likely to be complex. It will likely involve either judicial review relating to the propriety of the authority's decision (which may be very tricky if all standing orders have been complied with) or arguing that the contract has cross border interest.

Conclusion

Authorities should be mindful of balancing the potentially costly approach of awarding small contracts, using a competitive process, when other approaches may be more proportionate and perfectly justifiable under a local authority's standing orders. Consideration of the relative pros and cons of the procurement approach should be made at the start of the process. Ideally this early stage decision should involve the manager or team for whom the procurement process is being undertaken to ensure the procurement requirements are fully understood.

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