

General Staying Ahead – May 2008

A View of the Third Sector

A Procurement Officer from a Shire County recently asked "What is it with third sector organisations? why do we receive tenders signed by people called 'Development Officer' and 'Business Manager', etc. why are the documents not signed by the MD?" The view is that if a tender is signed by the MD (or CEO) then the purchaser has a clear indication that the contract will be "owned" by the Board who will then take responsibility for ensuring that the contractual requirements are delivered. Also there is full compliance with contractual terms and conditions. This position was brought home very firmly in a recent tendering round where, not only was there a requirement for the documents to be signed by the CEO and a Board Member, but the signatories were required to visit a Commissioner for Oaths and swear an affidavit that the statements made in the tender documents were true and accurate. This authority felt that tenders from Third sector organisations, on occasions contained claims which were not accurate and therefore wished to place the responsibility for the delivery of an eventual contract very firmly with the Board. This was a requirement for all who tendered at that time.

Procurement treats all tenders as if they have been submitted by companies. All are treated in exactly the same way, indeed, failure to treat a tender in any way which is different from another might be the subject of a legal challenge. This is the problem which third sector organisations face. This is not a matter for Government Departments or officials, it is a Treaty obligation. Articles 81 and 82 of the Treaty of Lisbon (29.12.07) requires that nothing may be done which in any way prevents, restricts or distorts competition. UK competition law prohibits anti-competitive behaviour. Therefore, if third sector organisations wish to secure contracts from any public sector organisation, Government Department, Local Authority, PCT, etc. it is essential that the full implications of the approach are understood. It is also essential that organisations meet the requirements and prepare themselves function effectively in this harsh and competitive environment. It is important to understand that any other course of action requires a change in the Treaty, agreed by the other 26 European Member States

The Following are a selection of items from Issues 1 to 11 – January to March 2008

1) Planning for the Ultimate

It happened to me once again this week. Whilst talking with the manager of a voluntary sector legal advice service. The organisation had, for a number of years, provided a range of legal advice including benefits, housing, family, etc. for lower paid and vulnerable people. The service paid for by the Local Authority. The contract is coming to an end and therefore being re-tendered. The service is being delivered in city centre premises owned by the Authority. However, the premises are held by the charity on a very long lease, this has around fifty years to run and at a low rent.



This must have seemed like a good idea to all involved at the time when the arrangement was set up ten years ago. Now, the result of the tendering process is that another provider has won, has priced their tender on the assumption that the existing premises will be available to them whilst the Authority is expecting the charity to agree to the termination of the lease. Another organisation had been told that the Authority could tender for the services which were being delivered at any time. The reason proffered was that they are currently under the terms of a "service level agreement" which is not a contract!! Wrong! A definition of contract:

An agreement between two or more competent parties in which an offer is made and accepted, and each party benefits. The agreement can be formal, informal, written, oral or just plain understood. Some contracts are required to be in writing in order to be enforced.
(2) An agreement between two or more parties which creates obligations to do or not do the specific things that are the subject of that agreement.

The essential lesson from both situations is to ensure that in either situation the terms of the lease and/or the contract, regardless of how this is described, are known to all and clearly understood.

The reality of the "new world order" is not tendering, but understanding that now, the contract is king. This is the way in which business functions and those tendering are seeking contracts. It therefore follows that the basis of the tender must be the legal agreements which surround the current work. The procurement process has, since inception, been developed in order to address the requirement to purchase necessary works, supplies and services. Tendering has, until recently, addressed the requirements of new situations. This has extended from the Millennium Dome, St Pancras and Heathrow fifth terminal to the supply of grit/salt for the roads, school stationery, etc. The extension to care, housing, voluntary and third sector means that procurement is generally for existing services, albeit restructured in some way. This brings existing contracts, leases, etc. however described into focus.

How often do those tendering think this aspect through I wonder? Is it reasonable to ask the purchaser for a copy of the contract which covers the existing service? or a copy of the lease if services are to be delivered in premises which do not form part of the procurement? Do we make assumptions in pricing that there are no potential problems which might be encountered at a later stage?

The PCRs require the purchaser to ask if an organisation which is submitting a tender has ever had a contract terminated. This is crucially important because termination for failure to deliver the terms of the contract – being in breach of contract – can now be a reason for exclusion from a tendering round at PQQ stage. Contracting is a two way agreement. It is tight and legally binding. How far do those tendering for contracts consider the track record of the purchaser in terms of contract termination and/or themselves being in breach of contract. What checks do those tendering undertake on the purchaser and their compliance with contractual requirements? In essence – how straight is the business (the Authority) with whom we are considering contracting?

So the drive is not about procurement, which is but a symptom of the huge movement which is happening around us. This movement is towards business contractual arrangements with the legal certainty that services as described will be delivered within the terms set out in the contract. This aspect of the world in which we find ourselves has not been generally understood, particularly by commissioning officers who are used to making local arrangements outside the contract.



It is possible to foresee future situations whereby a commissioning/contracts officer requests (requires?) something to be done within a service, but the provider refuses because the required action falls outside the terms of the contract. It is important that systems and procedures are in place to address this possibility so that staff at all levels are clear as to the action which should be taken as and when this occurs. Understanding this is important.

Individual staff are used, indeed have been encouraged, to work in a close, often friendly relationship with officers. A careful line needs to be drawn which defines the new relationship. This relationship respects the new rules but avoids extreme, generally uncooperative behaviour. There are therefore new challenges for staff development at induction and for existing staff. Never before has the adage understand "accountable to – responsible for" been more important.

In this world where the contract is king the following basic lessons are clear:

- check the track record for legal compliance of the purchaser prior to submitting a tender. Contracting is a two way process. The rights and responsibilities of both parties are equally important. Commissioning officers from Cambridgeshire have openly said that they are trying to find loopholes in the PCRs! This should be treated as very worrying – if they are trying to do this with one area of legal regulation, what about others?;
- find out how many actions for breach of contract a purchaser has taken over the past five years, and the success rate of those actions. This information is likely to be held in the County Court. Then decide if the Authority is one with whom your organisation wishes to contract;
- survey and summarise all existing contracts, regardless of what they are called, lease, service level agreement, etc. ;
- ensure that all those involved in delivering the service understand the change in emphasis, the importance of the contract and the terms for delivery for each contract with which they are involved. Friendly person to person agreements at an individual level are no longer appropriate, and indeed, might prove to be dangerous for the organisation;
- we suggest that organisations set out all of the terms which relate to existing contracts on a database which is available to staff and easy to understand;
- ensure that staff record the content of discussions with Commissioning and Contracts officers, reporting up the management chain as quickly as possible to ensure that action can be taken at senior level to clarify/rectify possible misunderstandings;
- ensure that a system is in place which provides senior management, and, for contracts over the EU threshold, Board level approval for any action which might constitute a variation to the contract, its terms, requires outcomes and outputs;
- ensure that staff at an appropriate level are directly involved in all tender negotiations. We believe that this task has such potential ramifications for the future safety of the organisation that it should be undertaken by the CEO and the SMT, possibly including a Board member. Each contract should be presented to and ratified by the Board prior to signature. Staff directly negotiating for the purchaser should be at a Senior level. This is not a task for a commissioning officer, who then goes back to obtain approval or otherwise. In the new situation where a poorly drafted document in which a stray word or phrase could lead to the provider being in breach it is reasonable for the contractor to require direct legal input to the negotiations by the purchaser;
- obtain advice from a lawyer specialising in commercial contracts before signing any contract, lease, etc.



2) This item is a short guide to Willingness To Pay (WTP) which Lloyd has prepared.

Determining the purchasers' 'willingness to pay' (WTP) in the context of preparing price for a care related tender submission.

1. Use of published comparative data e.g unit costs of health care published by personal social services research unit (www.pssru.ac.uk) Two documents on the TfC website might be useful:
"Service Charges" to be found on the blog section on the TfC homepage; and
"CRAG" under the documents for download of the Members Section.
2. Supporting People Action Plan published by each Supporting People authority
3. By making a Freedom of Information Act request to the relevant Authority during your preparation period prior to the publication of the tender documents
4. By constructing a WTP figure from the details of an actual tender specification.
It is recommended that you do this for actual tenders in addition to the use of sources stated above.

Method

Using the tender specification cost the staff needed to deliver the tender is calculated using the basic, or, if appropriate the required levels of qualification required by statute. The pay scales recommended by the relevant industry body for each level of staff are used in the cost calculation. NB if the statutory requirement for a staff member is a qualification at level 2 then the tender specification should be priced at level 2 on the relevant industry scale, not at the pay level you would normally employ if that is greater than level 2. Other oncosts should be accurately apportioned, using a reasonable and explicable methodology. Simply adding "10% for HQ costs" or "13% for management costs" are NOT appropriate methodologies. The costs should relate directly to the actual work to be done, not an additional percentage of staff cost. When cost has been calculated add your margin, this can be in the form of a "mark-up" usually in the region of 10-12%, in order to calculate price.

When you have undertaken an objective exercise to calculate WTP, then cost for your organisation and see where your price comes in relation to the WTP. Your tender price should be within 10-15% (above or below) the WTP. A tender price of more than 15% or

more below the WTP is likely to be viewed with suspicion, indeed we have two examples of tenders being excluded when priced as follows:

- at more than 10% above the WTP;
- at more than 15% above the WTP.

Tenders priced at more than 10 or 15% below the WTP tend to be similarly treated. Indeed the Public Contracts Regulations Article 30(6) sets out a procedure for the purchaser to follow in dealing with an abnormally low tender price.

LAD/Tendering for Care 27.12.2007

3) The Civil Contingencies Act 2004 requires Local Authorities to ensure, through their procurement contracts, that all suppliers have Business Continuity Plans in place to ensure that they can deliver their critical services and products in the event of an emergency or business continuity incident.



In accepting a contract to deliver a statutory duty the contractor also becomes liable to comply with this legislation. Business Continuity Management is a holistic process that identifies potential threats to an organisation and the impacts to business operations those threats, if realised, might cause and which provides a framework for building organisational resilience with the capability for an effective response

An effective Business Continuity Plan is a pre-requisite for successful tendering.

The following article sets out some excellent guidance for implementing the planning the process. A successful planning methodology, which will assist you not only in recovering, but ensuring continuity of your core strategic revenue-generating business/service units, operations and processes, will include:

PREVENTION

Prevention addresses the positioning of those measures and activities that will lessen the possibility or the impact of an adverse incident occurring in your organisation. The primary goals and objectives of the Prevention phase of a business continuity program are to protect the organisation's assets and to manage risk.

RESPONSE

Response is the reaction to an incident or emergency to assess the damage or impact and to ascertain the level of containment and control activity required. In addition to addressing matters of life safety, Response also addresses the policies, procedures and actions to be followed in the event of an emergency.

RESUMPTION

Resumption refers to the process of planning for and/or implementing the resumption of only the most time-sensitive business operations immediately following a disaster.

RECOVERY

Recovery is the process of planning for and/or implementing expanded operations to address less time-sensitive business operations immediately following an interruption or disaster.

RESTORATION

Restoration is the process of planning for and/or implementing procedures for the repair or relocation of the primary site and its contents, and for the restoration of normal operations at the primary site.

4) European Law and organisations in the UK

Does European Law Override National Law?

Yes it does.

Is this stated in the Constitution? Yes

Is this anything new? No.

The principle of European law overriding national law has actually been around since 1963, when it was decided that European law could not be applied in different ways in the Member States, without fundamentally undermining any chance of achieving the Treaty objectives.

Treaty objectives are agreed by the member governments when a new Treaty is being drafted. The EU can only propose new laws to fulfil the completion of those Treaty objectives, and should not come out with measures outside of that framework.



Basically, the governments agree a 10 year plan, which is then put into Treaty form. They then tell the Commission to implement these policies by coming out with legislative proposals to fulfil the agreed Treaty objectives. Once a law has been passed, the different countries agree to implement it, and allow it to override national law.

Does the UK accept this principle?

Yes, and it has done since 1972, when Parliament passed the European Communities Act. Since then, if there has been a conflict between national law and European law, the UK courts have to give priority to European law.

What happens if they don't?

If a country joins the EU, then part of that package means it is fundamentally obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of a Treaty.

Equally, member states are fundamentally obliged to implement any laws agreed in Brussels, which means that it is up to governments and businesses to get the best deal they can when new acts are proposed by the Commission.

Any government must abstain from doing anything which could jeopardize the completion of the agreed Treaty objectives. If a government does break this fundamental obligation, then they can be taken to court and fined. To give you a topical example, the French government hasn't been fulfilling its obligations under the common fisheries policy, and it has been proposed to impose on the French government a lump sum fine of EUR 115.5m, with EUR 58m becoming payable for every further six months that it fails to comply.

Just to show that nothing actually changes in politics, here is a quote made by Lord Denning in 1979. "If the time should come when Parliament deliberately passes an Act with the intention of repudiating the Treaty, or any provision in it, or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty."

The adoption by Parliament of a law repudiating a Treaty would, of course, put the UK in breach of its fundamental obligations under European law.

Most recent Treaty – Treaty of Lisbon, signed 29.12.2007

5) LATEST DEVELOPMENTS

a) e- Auctions During our Workshops we describe the tendering methods which are allowed as set out in the Public Contracts Regulations 2006 (PCRs). In explaining restricted tendering we describe the possibility for e-auctions, sometimes referred to as "reverse auctions". These are explicitly allowed in the PCRs. Indeed in the December 2006 review of the original review, Gershon said "the take up by local authorities of e-auctions has been pathetic". We warn that this approach, which was first used for care services in Autumn 2006, would be adopted more widely at some point. The option to use this approach being stated in two calls to tender over recent weeks has highlighted the willingness of the purchasers to use all of the procurement tools available to them as set out in the PCRs.



The following is an extract from the call to tender published earlier this week. This clearly demonstrates that despite the "light touch" for the purchase of Part B Services which was the intention of those drafting both 2004/18/EC in Europe and the PCRs in the versions for England and Wales and the version for Scotland, this less stringent approach is a minimum requirement. As time passes we are likely to see the purchase of Part B Services moving more closely to compliance with the full PCR requirements:

Title attributed to the contract by the contracting authority: Northamptonshire Child and Adolescent Mental Health Services (CAMHS).

THIS CONTRACT WILL BE AWARDED AS A PART B SERVICE.

The Contracting Authority intends to use an eTendering system in this procurement exercise and reserves the right to use a reverse auction.

It would be as well to be prepared for the use of this option to spread more widely in coming months.

b) Administration Fee As the number of those tendering for each contract increases, so the purchasers are looking for ways of reducing the field to those organisations who are "serious". Increasingly the use of "gateway" questions is being introduced. These are a set of questions which can be checked against a positive yes/no answer as a first filter, prior to PQQ scoring.

Principally when using the negotiated tendering process it has been practise over the last 20 or more years for purchasers to ask prospective tenderers to pay for the tender documents. There is nothing currently to prevent this approach. This week saw the first use of this purchase of documents approach for a third sector contract. This is an extract:

Title: CARERS SERVICE

Awarding Authority: Redcar & Cleveland Borough Council,

Providers wishing to receive tender documentation should apply in writing enclosing a cheque for £50 for administration fees (made payable to the awarding authority)

It is to be expected that there will be an increase in the use of this approach. At a time of budget setting, it might be advisable to ensure that funds are available for the purchase of tender documents. This requirement also tends to encourage tenderers to draw up a checklist against which tenders can be assessed for purchase.

