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The Tendering for Care Report - January 2010

So the end of 2009 and the New Year brought snow and rapid developments in tendering and procurement across the UK and the EU generally. This report is intended to raise the general level of understanding across the voluntary, health and care sectors and set them in the context of public sector procurement in 2010. The report considers trends and the areas where increased levels of competitiveness are appearing.

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1) A Review of Tenders Published during 2009

TfC has been reviewing calls to tender suitable for providers across the voluntary, health and social care sector, every week since July 2006. This unique resource of almost 9,000 calls to tender over a period of three and a half years provides a clear picture of the trends in procurement based on factual information. The tender count includes all those published from all sources including websites and the OJEU. Our count refers to tenders which are all or in part for Part B services, with total values both above and below the advertising threshold.

At a basic level there has been a steady increase in the number of calls to tenders published could be of interested to suppliers in the voluntary, health and social care sectors. From a base level of 1,520 in 2007, the number has increased dramatically over the three years.

2007 to 2008 – increase of 34%

2008 to 2009 – increase of 26%

2007 to 2009 – increase of 96%

The total value of contracts which have been the subject of competitive tendering has increased. The figure for 2009 was in the region of **£8.5 billion** This is an increase from the **£3.7 billion** across the three sectors which was subject to competitive tendering during 2007.. These figures provide a graphic illustration of the move grants to contracts across the voluntary, health and social care sectors during the past three years.

Detail for 2009

All calls to tender provided by TfC are reviewed before they are sent to our Members. We do not rely on key word searches, or codes alone as most tender alert services do. Calls to tender are read in the context of the services which our members provide. This means that we sometimes find tenders from other than the frequently used sources. We follow up tender awards and use this and other sources of information to quantify the value of tenders published.

The highest number of suitable tenders published in one week was 95. These were published during the week of 16th January 2009. This compares with 36 for the same week in 2008 and 17 in 2007. Indeed, 53 suitable tenders were published during the whole of January 2007 compared with 91 in 2008 and 229 in 2009. This pattern of growth in the requirement to tender



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for contracts is repeated throughout the last three years and clearly represents the challenges which are being faced by providers of all kinds of services to the public sector.

It is important to note that over 90% of the calls to tender which we reviewed were for Services contract and almost all were for Part B services. During 2009 the value range for suitable tenders was £20,000 to £20million. Although the majority of tenders were in the range £30,000 to £5 million and for contractual periods of 2 to 5 years, several were for one year and one was for 13 years.

Perhaps the most significant change over the three years has been the number of Part B tenders being advertised in the Official Journal of the European Communities (OJEU). Under procurement law, All Part A contracts with a total value in excess of £156,442 MUST be advertised in the OJEU. In the *Telaustria* case the European Court of Justice decided that buyers not covered by the procurement regulations are still bound to comply with the rules of the EU Treaty. These provide that there is an obligation of transparency. In the case the ECJ stated that all contracts should be sufficiently well advertised to enable the market to be opened up to competition. All part B contracts and Part A contracts below the threshold value must be adequately advertised. But there is no requirement to advertise these tenders in the OJEU. Over 2009 there has been a growing trend for public sector purchasers to advertise Part B tenders in the OJEU.

In all the total number of voluntary, health and care sector tenders for Part B services advertised in the OJEU was 13.89% of the total at 414. The proportion of suitable tenders advertised in the OJEU over the year were:

January to March	– 11.29%
April to June	– 14.00%
July to September	– 16.07%
October to December	– 13.89%

2) Training and professional Qualification

As a result of growth in tendering for public sector contracts the demand for the services which TfC offers continues to grow apace. Training has been an important service which the company has offered during the past three years. The quality of the training delivered was recognised in October 2008 through a National Training Award. The Awarding body said: *The design and delivery of the training is well tailored to meet the [learners'] needs. The support given to the voluntary sector is very impressive and well worthy of recognition.*

Around the same time a Council for Voluntary Action told us:

It is great that this service is being provided for voluntary sector organisations - also good to know that you are there when we or our members need help"

Perhaps the most important initiative taken by the company over the past eighteen months is the creation and of an accredited qualification in Tendering and procurement. The Tendering and Procurement Practice (TaPP) certification body is the Open College Network.

This costly development has been entirely self- funded through investment by Project Development and Support Ltd and has not been the subject of grant funding from public of any other sources.

The TaPP course is set at level 3 (roughly the same as A level) and has six credits. This means that over 60 hours of learning is involved. During 2009 the course was piloted with a group of people from national and local charities, and infrastructure organisations. Eleven people completed the course and recently received their certificates. For the most part the course is delivered through a series of telephone conferences which means that travel away from the office is not necessary. In January 2010 there were 54 people who had started or were about to start the course. Individuals wishing to undertake the course may be eligible for

funding from the Train to Gain – Leadership and Management Programme. This can reduce the course fee to between £300 and £400. Details are on the website at www.tappocn.org.uk
TaPP is the only professional qualification currently available for those who prepare tenders and manage the resulting contracts.

Bookings are now being taken for courses starting in April/May 2010.

3) ISO 9001:2008 – Facts and Fallacies

In a document published by an umbrella body on 9th December entitled "Do I need an ISO" there are a number of errors and omissions. The document which is intended to provide advice and guidance for members infers that ISO relates to ISO 9001:2008 only, there is no mention of ISO 14001:2004 which is also becoming increasingly important when tendering, or the crucially important ISO 17021:2006. The document is misleading, even suggesting that organisations should collect as many management certificates as possible – like "football cards" thereby ignoring the real purpose and range of certification in the tendering process.

ISO 9001:2008 is external, independent verification that a company or organisation is being managed to a defined set of standards. These standards are understood and recognised across the world. Therefore if a company or organisation is competing with a company from Europe, as is increasingly the case (please see item 1 in this report) or from America, as is happening in the health and care sectors, holding ISO 9001:2008 and ISO 14001:2004 provides immediate confirmation of the overall and environmental management standards being employed. This makes comparisons in these areas clear and straightforward for the purchaser. Some organisations are promoting their own internally approved Quality Standards. These could be useful in providing evidence of the quality of service provided, for example by a Local Infrastructure organisation..

Regardless of these disagreements which have led to a degree of confusion, 2009 was the year of the quality standard. In comparison with 2008, at the end of the year:

- there was a general increase in the requirement at least for an Environmental Management System with organisations holding or working towards ISO 14001:2004;
- the expectation that Health and Safety policies and procedures would be registered with CHAS;
- companies and organisations tendering would have a Business Continuity and Disaster Recovery Plan in place;
- the evidence for ISO 9001:2008 becoming a standard requirement was growing.

By the end of December five public sector purchasers had published a call to tender for a company to provide ISO 9001:2008 certification for small companies and organisations in their area. These purchasers are willing to spend public money to help companies to achieve the standards. The following example is from Denbighshire:

SECTION I: Details of the Request for Quote

Description of the RFQ

ISO9001 & ISO14001 Certification

1. Introduction & Objective

As part of its strategy of responding to the effects of the recession, Cyngor Gwynedd Council (the client) is inviting quotations from suitably-qualified consultants to work with SME's in Gwynedd in supporting them to achieve the ISO9001 and ISO14001 certifications. The objective, as noted in Gwynedd Council's 'Responding to the Recession' Action Plan, is to assist local businesses to achieve these certifications to enable them to be more efficient and effective by supplying quality products and services. This should lead them to being more competitive, and in a better position to respond to future tendering opportunities with Gwynedd Council, other local authorities, government organisations and the private sector.

The message that the standards are important does appear to be getting through. During the second week in January we receive enquiries from no less than five CVS or Voluntary Actions

seeking advice as to how certification could be achieved quickly and at a reasonable price as local Commissioning Officers had been advising that these would not just be useful in a forthcoming tendering exercise, but requirements during both the selection and award stages of the tendering process.

For the TFC paper ISO 9001:2008 – Facts and Fallacies please go to <http://www.tenderingforcare.com/news/iso-9001-2008-facts-and-fallacies>

4) The Remedies Directive 2006/77/EC

The Directive came into force on 20th December 2009.

There are two aspects for consideration:

- does the Directive apply to Part B services – these are a wide range of services to which much of the Regulations do not generally cover and include Health, education and social care;
- what are the changes for supplies and Part A services

Part B Services

The legislation is generally unclear, as to whether or not the Directive applies, especially in the light of recent case law. It is not possible to state absolutely whether or not the Directive applies to these services. It is likely that we will have to wait for the courts to interpret the rules before there is absolute clarity. The following is an explanation as at January 2010:

The Directive was implemented in UK law on 20th December 2009. Although the coverage of Part B services was an area for possible derogation (the government could opt out on behalf of the UK) this did not happen. Indeed there is a lack of clarity in the documents with regard to Part B services. For example it is clear that that element of the Directive which requires the purchaser to published full details of the award and how the tender was scored for ALL services contracts with a total value in excess of £156,442 does apply to all tenders for services (Part A and Part B) It has therefore been essential not to jump in and claim categorically that the Directive does not apply to Part B services, as has been stated by some umbrella bodies. But just how far the new Regulations apply to Part B services remains a matter for interpretation. A number of Opinions have been published over the past few days and the situation is becoming more clear as follows

i) The Standstill period as described in the Directive applies to tenders for Part A services but not to Part B tenders – but see below:

ii) The remainder of the Directive, including the Regulation around contractual effectiveness and the associated remedies DO apply to Part B services. The rules requiring the purchaser to inform the tenderer as soon as the tender has been eliminated from the process; and for the process to be halted when there is a legal challenge until such time as the challenge has been resolved, also apply;

iii) The requirement in the Directive for the full details of awards of all contracts over the current threshold applies to both Part A and Part B contracts.

A recent case in the Northern Ireland Courts may help to clarify the Standstill rule This concerned a tender for the award of a contract by the Northern Ireland Police Service. The services in question fall under Part B under the Public Contracts Regulations. The contract was awarded to a tenderer without any standstill period between the award decision and the contract being entered into. The Regulations imply that Part B services contracts are exempt from the obligation to provide for a 10 day standstill period, between notification of the award and the conclusion of the contract. This is to give a disappointed tenderer the opportunity to challenge the award. However, in this case, the judge ruled that although there was no automatic standstill obligation, this could apply under the general Community law principles of transparency, equal treatment and non-discrimination. He concluded that that there were

circumstance in this case whereby the exemption of a Part B service from the standstill requirement did not apply. - these included:

- the contract was high value;
- it was of cross border interest.

As the contract was the subject of a re-tender and the service was already being provided adequately a standstill would not delay the delivery of the service. The new Remedies Directive 2007/66, which was implemented in the UK 20th December 2009, also includes an exemption of Part B services contracts from its express standstill obligation. But the judge found that this did not bar the need for a standstill period under the general principles of European Community law.

So the crucial question arising from this judgement is:

- is the contract in question likely to be of cross-border interest?

The European courts have already ruled to answer this question. They say that if a similar contract has EVER been advertised in the Official Journal of the European Union, then the tender in question is likely to be of cross border interest.

In these circumstances the standstill period would therefore apply to tenders for Part B contract

In item 1 of this Report we state that **414 of the 2,980 tenders published during 2009 and of interest to care and voluntary sector organisations were published in the OJEU**. That is 13.98% of the relevant tenders. In the light of this, TFC will shortly be making a review of the subjects of the tenders published in the OJEU during 2009 available to its members.

A further consideration lies in the CPV code. Contracts are identified under one or more CPV codes. It is important to remember that if one of the codes falls under Part A, then the entire contract is treated as Part A. It is therefore essential that the codes are understood, and the classification of the contract as Part A and Part B identified by CPV code in every tender. Go to <http://www.tenderingforcare.com/news/new-cpv-codes> to find out how to do this.

The Remedies Directive including the standstill period will apply to tenders for combined Part A and Part B services.

It would be a brave person who advised that the Remedies Directive does not or is unlikely to apply to Part B Services. Advice to Procurement Officers has been published which states that, for safety, it would be wise to assume that all of the rules set out in the Directive do apply to Part B services and to act accordingly. It is important that all suppliers are able:

- to identify which of the services they deliver are Part B and which are Part A;
- whether or not each particular contract is solely for Part B services or combined with Part A;
- to identify whether or not the new rules apply to every tender which is submitted.

5) Considerations for 2010

One of the main considerations for 2010 must be how procurement is likely to play out in the context of the levels of reduction in public spending which most people are expecting, regardless of who forms a government after the election. We are already seeing a foretaste of what is likely to come:

- a public purchaser has cut all of their contract values by 50% and are starting to tender for contracts with the volume of the services to be purchased reduced by a half;
- a county council has decided not to tender for a range of services, to extend the existing contracts for one year and then to no longer purchase the services in question;

- across the country as a whole we continue to see the volume of activity being purchased on re-tendering being reduced by at least one third.

The inevitable result of competition in a market which is being squeezed and reducing volumes are to be purchased is that standards are forced up as only those who are able to provide clear evidence for the claims made in tenders score more points and as a result win contracts. This makes confirmation that there is compliance matters essential:

- ISO 9001:2008;
- ISO 14001:2004 or EMA registration;
- the company or organisation offering any certificate relating to standards hold ISO 17021:2006
- Confirmation by CHAS – this provides health and safety pre-qualification assessments to a nationally recognised and accepted threshold standard;
- Equality and Diversity Policies meet the IDeA Standards

We can expect more to come on:

- credit ratings;
- Business Continuity and Disaster Recovery planning we are already seeing a requirement for these plans to meet specific standards;
- undertaking full due diligence for tendering. For more on this please go to <http://www.tenderingforcare.com/news/due-diligence-for-tendering>
- the country-wide introduction of e-procurement.

Once these standards are in place it is the little things which score points. In order to address these matters and identify the gaps a full due diligence organisation review is required which looks at the company or organisation in the way in which a tender appraisal officer would, identify the gaps and work out how problems and be mitigated and gaps filled.

Winning tenders is no longer about asking a Commissioning Officer what is being looked for in tender appraisal. Competition means that those who are able to provide clearly evidence, ideally certified that all the standards are met who will be awarded contracts. Unfortunately many companies and organisations who are currently providing for the public sector will not survive.

What are the options likely to be?

For over a year government has been promoting the idea that smaller companies might form consortia in order to tender. This can work to a reasonable extent, indeed TfC offers a Consortium Development Programme, please see <http://www.tenderingforcare.com/collaborate-and-tender-successfully> for details.

Perhaps there might be more opportunities in other areas. medium to large companies and charities can face problems when tendering for contracts, especially those which cover a wide range of needs or are for "vulnerable people". A successful tender will address every requirement identified in the specification. There is a possibility that some companies and organisations are focussing too much on tendering directly themselves, rather than thinking what is special about their services which could be offered to a larger organisation. Perhaps marketing specialism to other providers could be beneficial. We do not mean marketing in the promotional sense. Any prospect will need to know that the offer comes from a company or organisation which has all of the standards in place and is able to prove:

- sound management to recognised standards;
- evidence of quality in the delivery of the service;
- financial stability and sustainability;
- capacity to deliver the contract.

A further option for consideration is "sheltering" An arrangement whereby an external organisation, usually a company guarantees the management aspects of the contract, including financial stability and sustainability whilst the company or organisation being

"sheltered" delivers the service. There must be a range of opportunities for larger companies, charities and Infrastructure organisations to engage in this type of business arrangement, particularly those for whom the survival of very small providers is an important priority.

The year of the Contract

Public services are moving rapidly to being delivered within the context and terms of the commercial contract we are already seeing threats of breach of contract action by purchasers, whilst some suppliers are in the process of taking action of various kinds against local Authorities for their breach of contract. The initial areas of action appear to be relating to the purchaser seeking to terminate a contract unfairly and contrary to its terms. The days of "not wanting to upset the commissioning officer" appear to be passing as companies and organisations seek to retain their current business and secure future contracts. The trend is likely to continue with more purchasers opting to advertise tenders for Part B contracts EU-wide in the OJEU.

6) The work of Tendering for Care (TfC)

TfC offers a suite of services designed to help our customers, who are companies and charities providing services in the health and care sectors, voluntary and third sector organisations and consultants, to tender successfully for public sector contracts. The services arose from a need identified in May 2005 and have developed year on year since that date. Tendering and procurement information and advice are available in addition to services such as tender writing, tender reviews both before and after submission, organisation support and due diligence and a large volume of training. Information is available on our website at: <http://www.tenderingforcare.com/>

"How to Win Tenders" 1 day course in London on 26th February.

Full details can be found at

<http://www.tenderingforcare.com/tfc-courses-in-tendering>

the form is at the bottom of the page.

This course is available to Registered charities at a price of £180+VAT total £211.50. Just write your charity number on the line beside the word "invoice" and send the completed form to us by fax.

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