

CSED's GUIDE TO YOUR OBLIGATIONS IF YOU 'BUY' ON BEHALF PUBLIC SECTOR ORGANISATIONS (Rev 070626)

A simplified guide to Procurement Law and related guidance for the non-professional buyer

Do you 'buy' on behalf of a public sector organisation?

If you pay someone for services, supplies or works then you 'buy'.

If you work directly for a public sector organisation or indirectly for one (receive 50% or more of your income from one) then you have public sector related obligations.

If you are a professional buyer then you should already be aware of the principles contained in this document (and the exceptions and special cases which have deliberately been excluded).

As a single page, this guide must focus on the principles which apply most of the time. There are cases and times where it is legitimate not to apply these principles. If you think this is the case, it is recommended you get appropriate advice (preferably in writing).

The Treaty of Europe applies to public sector contracts

If you trade with another organisation (pay for something) the word 'contract' applies - regardless of whether the agreement is in writing, verbal or called something else.

The Treaty requires authorities to be non-discriminatory, fair, evenhanded, transparent and proportionate in their dealings with economic operators in any member state. So, you must:

- Not limit a market to local supply;
- Advertise requirements in a form accessible to member states – OJEU when the full EU rules apply, relevant press or possibly your web site when they partially apply;
- Be careful about state aid (use of public funds) if it would distort competition. There are exemptions (seek advice), but, in general you cannot give money in other forms to local providers - grants, for example, have to meet specified criteria in order to be exempt.

The Competition Act 1998 as it applies to social care

In general the act says you (an 'undertaking') are prohibited, by UK domestic law, from 'abusing a dominant position' by:

- Imposing unfair purchase or selling prices;
- Restricting production or technical development to the prejudice of consumers;
- Putting other trading parties at a disadvantage by applying dissimilar conditions to similar transactions; and
- Making the conclusion of any contract conditional on the acceptance of obligations unconnected with the subject of the contract.

The act also prohibits any decisions which prevent, restrict or distort competition. This will normally preclude price-fixing and collusive tendering. With regard to public sector collaboration, the position of the Office of Fair Trading is specifically covered overleaf.

The Freedom of Information Act 2000

Whilst there are obvious exceptions around personal and truly confidential information, the Freedom of Information Act generally means that any individual has a right to see information about decisions associated with buying activities.

This puts the onus on you, as a buyer, to ensure transparency and fairness in any dealings with third parties. There is usually little or stop a disgruntled supplier who may not have been awarded a specific contract from being entitled to access to such information.

'Best Value' and the Local Government Act 1999

Regardless of what you are buying, you have a duty under this legislation to demonstrate 'Best Value'. When it comes to buying, the easiest way to demonstrate this is to hold some form of competitive process for the award of a 'contract'.

For very low values (typically less than £5k) this may be as simple as obtaining three quotes from local suppliers. For anything more significant a more formal process is recommended. If the overall contract value has the potential to reach EU thresholds (£100-£150k) the process of award should be fully open and transparent – regardless of whether EU Procurement Directives apply.

Applicability to Charities and similar organisations

In general, the fact that an organisation may be registered as a charity or similar organisation has no bearing on the applicability of the Law covered by this guidance. Third sector organisations should be treated in exactly the same way as other organisations potentially seeking the work.

UK Law and the EU Procurement Directives

It is important to note that the EU Procurement Directives are implemented in UK law as Public Procurement Regulations. The principles underpinning the EU Procurement Directives apply regardless (see opposite). The Regulations put mechanisms in place to ensure that the principles are fully and equitably applied to larger value purchases.

Do the Regulations apply?

The main deciding factor is the likely 'value' of the contract:

EU Thresholds (*as of 2007)	Central Gov	Local Gov
Services and Supplies	~ £100k	~ £150k
Works (e.g. construction)	~ £4m	~ £4m

If the 'value' is above the threshold the Regulations apply – if below – they do not (with certain exceptions).

The key point is that there are strict rules defining 'value':

- It is the value over the duration of the contract (example.g. a 4 year contract at £50k per year [£200k overall] will exceed the limit) [over four years if open ended];
- There is a 'rule of aggregation' which requires authorities to take into consideration the total 'value' of all similar purchases (i.e. It is not acceptable to split up contracts to avoid EU thresholds).

In practice, therefore, it is almost certain that the EU Regulations will apply to some extent - the question is, to what extent?

Services : Part B or not Part B – That is the question

Within the Regulations there is a distinction between Part A and Part B services. A large proportion of authority spend is classified as Part B (e.g. education, health and social care and recreational services).

The Regulations place a requirement on authorities to categorise services and products using the Common Procurement Vocabulary (CPV) coding system. These codes provide the linkage back to Part A and Part B for services (seek advice to get this mapping).

The key point is that for Part B services (social care spend) there are only two main explicit formal requirements within the Directives:

Statistical obligations and award notices

Regardless of whether Part A or B, or works or supplies, authorities have to report on those contracts awarded which exceed the threshold (note the aggregation rule). For individual contracts exceeding the threshold authorities must submit award notices (which may not be published for Part B services). The remaining contracts which qualify under the aggregation rules are picked up by the obligation to provide annual statistics (which have the potential to be challenged by the EU).

Specifications

The underlying principle around standards is that requirements should be specified in functional terms and/or, when applicable, using European (versus national) standards rather than in a manner which prohibits effective competition across borders or suppliers.

In practice this means that potential providers should generally be excluded from writing specifications – unless involved in an open and transparent way and the resultant specification cannot be seen as distorting competition.

How do the Regulations affect other purchases?

It is not within the scope of this one pager to cover the full details of the Regulations for Part A services other than to say that they:

- State the requirement to advertise requirements in the European journal;
- Impose timescales and conditions on the various forms that the procurement process can take – it is stressed that these approaches are applicable outside of the Regulations; and
- Reinforce the obligations of the Treaty of Europe by ensuring openness and transparency of the tendering and award processes

To Recap – What does all of this mean for you?

The bottom line is that whatever you are buying, you have the obligation to apply a fair, open and transparent approach to award - regardless of whom you are dealing with – there are no exclusions.

Even if the full requirements of EU Procurement do not apply (Part B services) much of procurement law still does apply – if you are at all in doubt consult your local professional procurement function.

COMPETITIVE PROCUREMENT OF ADULT CARE SERVICES

CSED's GUIDE TO PRACTICAL APPLICATION FOR PART B SERVICES (Rev 070626)

INTRODUCTION

This note has been prepared in response to a growing number of queries concerning the application of the EU Procurement rules insofar as they relate to commissioning of care services.

EU Procurement Directives place a requirement upon public sector contracting authorities to categorise services they procure into so called Part A and Part B categories. Schedule 3 of the Public Contracts Regulations 2006 (which implements the Directive) http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf provides a list of categories of service and identifies which fall into Part A or B. This list also incorporates Common Procurement Vocabulary (CPV) codes from which authorities can identify where specific requirements might fall.

As implied overleaf, those services designated as Part A are subject to full EC Procurement advertising & competition procedures whereas those designated as Part B are required to comply with only a subset of specific provisions, namely; non discriminatory specifications; reporting of contract award notices; and inclusion within spend statistics provided to OGC. A large proportion of Local Authority spend is classified as Part B, this includes most spend related to Health & Social Care.

Regardless of whether something is classified Part A or Part B all Public Sector contracts remain subject to the provisions of the EC Treaty. This note summarises what this means in practice and how Council Care Commissioning and Procurement practitioners need to operate in the light of the latest guidance available.

PROCUREMENT GUIDANCE AVAILABLE

OGC published an Information Notice 03/06 31 July 2006, a link to this guidance is provided below. This Information Notice refers out to the EC Commission's own Interpretive Communication which deals with evolving case law on this subject. These notices clarify but do not change any aspect of the legislation.

OGC Information Notice 03/06 31 July 2006

<http://www.ogc.gov.uk/documents/ProcurementPolicyThresholdProcurement.pdf>

EC Commission Interpretive Communication (2006/C 179/02)

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_179/c_17920060801en0020007.pdf

Nothing in this Practice Note shall be seen to over-ride anything contained in the guidance notes referred to above.

COMPETITION LAW GUIDANCE AVAILABLE

The Office of Fair Trading is the source for definitive guidance on competition law. The links below provide access to key high level documents. These documents represent a starting point from which, if in doubt, purchasers should consult their own lawyers.

Most anti competition challenges are based on either abuse of a dominant market position and / or some form of collusion / price fixing. The first two links below provide general guidance which deals with the position under both UK and EU law (the regimes are broadly aligned).

Abuse of a dominant position

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft402.pdf

Agreements and concerted practices

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft401.pdf

This third link below looks specifically at public sector purchasers. OGC lawyers confirmed (Q4 2006) that although this Policy note was issued in 1998, it has yet to be withdrawn or updated since the original decision in the case featured was upheld by the European Court of Justice (ECJ). There is always a need to consider localised market concentration factors, however this Policy note makes it clear that, based on current precedent, OFT is much less likely to take forward cases against operators engaged in purchasing and provision of services for non economic, e.g. social, purposes.

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guide/s/oft443.pdf

A general link to the OFT website is provided below; this provides access to many more detailed and specific pieces of guidance, cases and publications.

<http://www.offt.gov.uk/>

KEY POINTS FOR PRACTITIONERS TO NOTE

All contracts must comply with the principles of the EC Treaty in general and the principle of non-discrimination in particular. All contracts should meet the Government's requirement for value for money. In the case of Local Government the achievement of Best Value is enshrined in the Local Government Act 1999 as a legal requirement.

Contracts shall be subject to a degree of advertising sufficient to enable the services market to be opened up to competition, to ensure an impartial procurement award procedure, and to ensure value for money.

An appropriate degree of advertising may vary according to the significance of the specific contracts in marketplace, and whether an intended contract award might be of interest to providers in other EU Member states.

Relevant factors will be the subject matter of the contract, its estimated value, the size and structure of the sector concerned, and the geographic location of performance.

Where the award may be of interest to providers in other member states then it is likely that simply contacting a number of potential tenderers will be considered insufficient advertising. Appropriate advertising may require use of the internet, or portal websites such as <http://www.supply2.gov.uk>

It is possible to limit the number of applicants for a given contract to an appropriate level provided this is done in a transparent and fair manner.

Full use of the Official Journal of the European Union, as per a Part A services, may be considered appropriate in some circumstances but this approach should be considered very carefully for a number of reasons. Firstly, the procedure allows very limited flexibility once embarked upon and must be operated by an experienced professional procurement team. Secondly, it may appear to be overwhelming and daunting to many small & localised providers, some of which may be voluntary third sector providers with very limited capacity to respond in the manner required.

What is an appropriate level of advertising?

Local Authorities will have their own standing orders in relation to the operation of local competitive tendering requirements and relevant EU Procurement Thresholds. For the purpose of this practical guidance, the key criteria is to ensure those requirements that are advertised are done so in a manner that enables non member state companies to bid if they wish to do so.

Local & National press advertising may be sufficient in many cases but the emergence of the internet provides a far more robust solution since it is clearly open to a global audience and therefore "open" by definition. This approach may involve a combination of individual contract notices, complimented by periodic / annual notices that set out the intentions for a given sector / set of programmes & projects.

It is very difficult to provide general guidance as to the definition of a "modest" economic interest that would support the position that another Member State would have no interest. The onus is on the purchaser to consider whether something is likely to have wider interest, recognising the value for money objective alongside local delivery and other issues.

Portals such as <http://www.supply2.gov.uk/> are very useful here, along with web based Departmental Purchaser Profiles.

How often do I need to re-tender?

Contract durations and the frequency of re-competition needs to be carefully considered in the context of specific local requirements. This is very much a value for money consideration rather than something driven by the rules (although the rules generally recommend a maximum term of four years).

Where complex services are being provided then it is quite reasonable to expect that contracts reflect this in terms of duration and the impact of switching providers. Purchasers should, however, protect themselves by ensuring contracts do not generally commit to a specific provider to the exclusion of alternatives, ensure that they contain adequate termination provisions and allow for assistance during periods of transition to a new provider where relevant.

Purchasers should also balance the flexibilities afforded by regular re-tendering with the costs and administrative burdens associated with the process and the time needed for innovation and efficiency improvement under effective provider relationship development.