

# By invitation

## Shivaji Shiva provides an aide-memoire to public services tendering

Working at the sharp end of service delivery, right in the heart of our communities, it is easy for charities to dismiss the rigours of public sector tendering processes as 'bureaucracy'. Knowledge of the procurement rules, however, is becoming an increasingly key part of any charity finance director's skill set, as more and more charitable organisations are forced to tender for their share of the public purse.

This article summarises procurement law that affects charities today and concentrates on critical areas for charities to focus on when tendering to provide services to the public sector.

### Legal background

Broadly speaking, the EU public procurement rules apply where a body which is publicly funded (such as a local authority, college or university) purchases services with a value reasonably expected to exceed £139,893.<sup>1</sup> For services contracts with governmental departments and certain other bodies, the threshold is only £90,319. Some services are designated as 'Part A' (e.g. project management services, design services and technical services) and subject to the full rules, which impose strict requirements in respect of compliance with advertisement in the Official Journal of the European Union,<sup>2</sup> as well as in relation to tendering, evaluation and award processes. Other services, including many provided by charities, are designated as 'Part B' (such as certain education, health and social care services) and subject to lighter regulation.

In relation to 'Part B' services and, also, according to the European Commission even for procurements of services by public bodies below the thresholds, transparency (e.g. advertising on a council's website or in an appropriate trade journal), non-discrimination on the grounds of nationality and equality of treatment of

tenderers are still required under EU law. So public bodies do have to advertise contracts in order to be compliant with EU public procurement law.

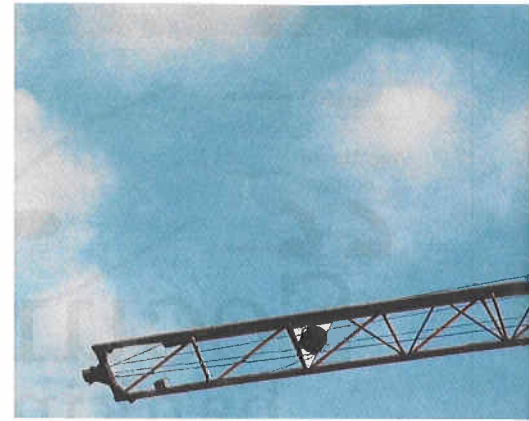
As charities will be aware, public bodies also have a legal duty to ensure that their procurement of services represents the most cost-effective solution and the best possible value for money is achieved.

Procedures which public sector procurement officers are required to follow in a process are normally determined by the value of the services contract. A typical council, for example, requires procurement to take place in the following way:

■ **£500 to £50,000:** Normally obtain three written quotes and purchase on a value for money basis, unless it is more cost efficient or there are good reasons not to do so. It is perhaps for procurements under around £20,000 that an incumbent charity service provider would have the best likelihood of success in trying to persuade a local authority not to go out to tender.

■ **Over £50,000:** A council's standing orders will often require all contracts above £50,000 to be advertised. Normally a tendering process with a minimum of five suppliers is required, where possible. Tenders are normally evaluated in terms of value for money and quality.

■ **Over £139,893:** As discussed above, a full EU public procurement procedure is required in relation to 'Part A' services, whereas advertising, non-discrimination on the grounds of nationality and equality of treatment of tenderers are required in relation to 'Part B' services. Tenders are normally evaluated on a most economically advantageous basis, which typically includes evaluation against criteria such as quality, price, technical merit, cost effectiveness, technical assistance and deliverability within specified timescales.



### In practice

Each stage of a tendering process has particular issues that charities do need to be on top of. The seven main ones are set out below:

#### 1) Where are opportunities advertised?

Opportunities to contract with the public sector may be advertised in a wide variety of places. Contracts below the EU limit are advertised in local daily newspapers and/or in relevant trade publications and public sector bodies also often advertise forthcoming contracts on their websites. Contracts for 'Part A' services above the EU thresholds must be published in the daily supplement of the Official Journal of the European Union.<sup>2</sup>

#### 2) Pre-qualification and tenders.

Charities should focus on the essentials of their tender. When does the final tender document need to be submitted? Are there any particular requirements in terms of the application of the markings on the envelope, the method of delivery or similar? These esoteric-sounding requirements represent a challenging initial hurdle at which many tenders fail.

Before a tendering exercise is undertaken, a specification will normally have been prepared. The specification is a description of what the public body wishes to buy and what the supplier is expected to tender against and to provide. Charity tenderers clearly need to understand the services required from them as the provision of those services will go on to form part of the formal contract between the public body and the winning supplier.

#### 3) Pre-qualification questionnaires.

Procurement processes will often consist of two distinct stages – selection of suitable tenderers through the use of pre-qualification questionnaires and then the submission of tenders by those contractors who have passed the pre-qualification stage. Once a charity has



expressed an interest in providing services to a public body, it may then be asked to provide some initial information about its financial position, previous relevant experience and references. The information provided at these stages will be evaluated and will form the basis of deciding whether bidders will go to the next stage.

Information required at the pre-qualification stage should be proportionate to the scale and complexity of the contract. Charities can consider challenging pre-qualification requirements if they consider that they are disproportionate; for example, in relation to minimum turnover or producing a number of years' accounts or in relation to providing similar services to a large number of similar organisations.

#### 4) Invitation to tender (ITT).

If charities receive an invitation to tender, they are asked to make an offer which may then be accepted by the buyer. The decision about who is chosen is based on criteria, usually listed in order of importance (with weightings) in the invitation to tender documentation (they are likely to include matters such as quality, price, technical merit, cost effectiveness, technical assistance and deliverability within specified timescales). While it is important to concentrate on criteria with the highest weightings, charities should still ensure that they provide relevant information in relation to all evaluation criteria.

Again, charities can consider challenging evaluation criteria if they consider that they rule out small or inexperienced but otherwise very competent social enterprises, require the transfer of excessive risk or contain contract terms which are not proportionate to the scale and complexity of a project.

#### 5) Unsuccessful tenders.

If a charity is unsuccessful, it may ask for feedback from the public body.

Feedback, where requested, is a requirement under EU public procurement rules for contracts above the relevant thresholds. Whilst there is no legal right for feedback to be given for lower value contracts below the EU thresholds, nevertheless the Office of Government Commerce's Code of Good Practice<sup>3</sup> states that government departments and local authorities should provide 'feedback that is as helpful as possible and designed to promote future improvement'. Charities should use such feedback to help with any future bids.

#### 6) Approved suppliers lists.

Many public bodies hold lists of potential suppliers for certain types of work, usually for lower value contracts below the EU threshold limits. Approved suppliers lists should be reviewed regularly to include new suppliers and to make sure that existing suppliers continue to provide best value for money. If a charity is not on an approved suppliers list, it can consider contacting the relevant procurement officers to find out when the next review of the approved suppliers list will be taking place. Public bodies are also required to be transparent about how a business can gain a place on an approved suppliers list and the timescales involved.

#### 7) Frameworks.

Public bodies may also procure framework agreements. These are agreements with suppliers, the purpose of which is to establish the terms and conditions governing contracts to be awarded during a given period, in particular with regard to price and quality. In other words, a framework agreement is a general term for agreements with suppliers which set out terms and conditions under which specific purchases (call-offs) can be made throughout the duration of the agreement. Depending on value, a framework agreement may be a contract to which the full EU public

procurement rules apply and charity providers should therefore regularly review the Official Journal of the European Union to ensure that they are aware of any opportunities where they arise.

- 1 The Public Contracts Regulations 2006 (England and Wales) and the Public Contracts (Scotland) Regulations were implemented in the UK following the European Commission's Consolidated Directive on public procurement, which was adopted in March 2004
- 2 [eur-lex.europa.eu/en/index.htm](http://eur-lex.europa.eu/en/index.htm)
- 3 [www.dca.gov.uk/procurement](http://www.dca.gov.uk/procurement)

#### Further information

This article has set out the main legal points relating to procurement law and other sources of information are available from:

- **The Chartered Institute of Purchasing and Supply.** This has a special interest group: the Charities Sector Procurement Group at [www.cips.org/membership/groups/detail.asp?group=64](http://www.cips.org/membership/groups/detail.asp?group=64)
- **The Charity Commission** has published guidance in the form of CC37 – *Charities and Public Service Delivery – An Introduction and Overview* at [www.charitycommission.gov.uk/publications/cc37.asp](http://www.charitycommission.gov.uk/publications/cc37.asp).



Shivaji Shiva is head of charities and social enterprise at Michelmores LLP.

[www.michelmores.com](http://www.michelmores.com)