

#BETTER

ForUs 2021-4

Placing people at the heart of procurement

Knowledge sheet 1

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KNOWLEDGE SHEET 1

Stories from The Procurement Economy - Below the Radar

The Story

In December, days before the break for Christmas, a small social enterprise was informed that it had lost a public services frontline services contract that it had currently been working on for six years, following a private request for quotations by the Authority, initiated three months before, for an annual contract which was scheduled to commence from January 1st 2024.

The social enterprise was told that while it had submitted the lowest prices for the regular services, its call-out rates were higher (although these rates had never been used in the past six years), and it had lost on quality despite receiving regular written compliments from the various public offices that it supports on the contract. A further written reason given was that it had not offered to provide real-time information for its services although this was not a requirement contained within the specification. The social enterprise was not given the name of the winning provider until December 21st 2023, and had to repeat its requests two times for this information. Nor, up to this time, has it been provided with the results of the quality and financial evaluation despite repeated requests. Six years of service were being rewarded by careless procurement practices that appeared to demonstrate little respect for the organisation or its employees from the social business perspective.

The week before Christmas, the social enterprise was desperately trying to carry out its legal duty to consult with employees. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and its amendment in 2014, employees in such a situation have their employment rights protected, should they be asked, and should they agree to a transfer to the new contractor. There are duties for both incoming and outgoing employers to consult with them. While nothing in law states the period for consultation, allowing a reasonable time for consultation should be proportionate in all instances. The regular team of workers who had worked on the Authority's contract since its commencement, and had between them worked more than eighteen years with the social enterprise, were left dangling with their futures in question at a time when they could have expected some respite from their hard work in the procurement economy and the communal stress created by the Cost of Living Crisis.

People should be at the heart of public procurement

Whether carelessness has arisen through a lack of local authority resources, a perception has been given through the procurement process that the employees who work on the contract are expendable rather than vital for the success of the contract. This is hardly a good message for commissioning authorities to send out when there are currently difficulties in finding employees to carry out frontline public services. Nor does it support and uphold well-being in local economies.

When the social enterprise first got the contract, it had been advertised as a three-year opportunity, taking it above the threshold so that it was covered by European procurement

regulation. The new request to quote for a one-year contract took it below the main regulation threshold.¹

While dividing larger contracts into smaller lots does have benefits for smaller organisations, devising contracts so that they are brought below the main regulation radar brings little advantage to small organisations with less transparency and far less accountability, as the experience of this social enterprise appears to show.

Beneath the radar of regulation – will the Procurement Act 2023 change things?

In Scotland, all contracts above £50,000 are currently regulated, and at least, in law, there is some protection for fairness in low-value procurement. Route 2 of the Scottish Procurement Journey provides a detailed journey through the issuing of documents, evaluation, clarification and contract award and implementation for contracts between £50,000 and the current threshold for public contracts. This includes a public notice of the opportunity and advice to the unsuccessful tenderers of the contract award, the name of the successful tenderer, the score of the tenderer and the scoring of the unsuccessful tenderer.

In the UK, changes are afoot with the introduction of the new Procurement Act which is scheduled to replace current law (In England, Wales and Northern Ireland) in October 2024. According to the Government, the Act will benefit suppliers of all sizes, particularly start-ups, scale-ups and small businesses.

Low-value contracts below the threshold will be partially covered by the Act under Sections 84-7. Unlike in Scotland, authorities still will not be required to advertise opportunities for below-threshold contracts, but where they do, they should consider the fact that small businesses may face particular barriers in competing and consider whether such barriers should be removed or reduced. Where a contracting authority does invite tenders through advertisement, they will be required to publish a below-threshold notice under Section 87 of the new Act (for contracts of not less than £12,000 for central authorities and not less than £30,000 for other authorities) as is currently the case now. For all contracts below the threshold, an implied term of the contract is 30 days payment under Section 88 of the Act. These are small changes for small business. With authorities hard-pressed for resources, it begs the question of why any authority should choose to publicise low-value bids and open them up more fully to the market when below the radar are more likely to reduce administration and resource costs. Acting below the radar is likely to continue.

The Act also creates new flexibilities for above threshold procurement which could present difficulties for smaller organisations seeking to challenge public procurement procedures and decisions. It will be up to the contracting authority to decide whether to use an open procedure or another kind of competitive procedure of their choice under Section 20 of the Act. While authorities will be bound by new notification rules, including those for mandatory feedback, financial pressures may encourage them to step back to the familiar methods used for below

¹In most of the UK, there is no regulation of contracts under £139,688 for central government and £214,904 for other public services contracts (inclusive of VAT) apart from where an authority advertises an opportunity worth over £30,000 (£12,000) for local authorities it must publish it and the award on the Government's website - Contracts Finder.

the radar, and with more flexibility comes more lack of clarity for businesses within the Procurement Economy to challenge decisions.

The elephant in the room

The Government wants more SMEs and social enterprises to engage in the procurement process. But for SMEs and social enterprises already active within the procurement process, the elephant in the room is that it is virtually impossible to challenge public procurement decisions on an equal footing making the act of engagement a less than mutual one.

There are two ways of challenge under current legislation and the new Act. Firstly, through the High Court, where the average cost of taking a case is up to £300,000, and secondly, through a referral to the Public Procurement Review Service (PPRS). High court costs mean that any small business has effectively no right of recourse within the law. It is debatable whether the Government is complying with its new obligations under the World Trade Organisation Agreement on Government Procurement.² Under Article XV111, the UK Government is required to provide “a timely, effective, transparent and non-discriminatory administrative or judicial review.” There are also questions as to whether it is complying with the Human Rights Act 1988 in failing to provide an effective review process for small businesses.

The PPRS is a route to support suppliers who have concerns about public procurement practice. It cannot provide suppliers with individual remedies. Currently, it can only make recommendations to an awarding authority. Under Section 109 of the Procurement Act 2023, a new expanded authority will be able to serve recommendation notice to authorities, but it will still not be able to enforce a recommendation. In another case earlier in the year, a community enterprise had a complaint investigated by the PPRS only for the authority to award the contract in the middle of the investigation, with the case upheld against the authority after the organisation had lost the contract.

Procurement economy and procedural fairness

A new procurement economy for the UK needs a procurement process which is procedurally fair for all parties, including community businesses and social enterprises. Case law suggests that procedural fairness includes such elements as the right to a public hearing, the right to be heard within a reasonable time, the right to be heard by an independent and impartial tribunal which includes a right to a principle of equality of arms (everyone who is a party to proceedings must have a reasonable opportunity to present their case under conditions where they are not placed at a substantial disadvantage against their opponent), the right to adversarial proceedings and the right to a reasoned decision.

This is not currently available through the PPRS. The community enterprise whose complaint was investigated earlier this year submitted detailed papers only to find a summary version of the findings was provided on the PPRS website with no more reasoned findings supplied.

#BetterForUs is campaigning for an administrative tribunal for small business and community enterprises and for local authorities to set up internal review processes where cases are to be challenged. It believes that the right to challenge will improve the procurement economy and not weaken it. Meanwhile a public services contract commenced on January 1st and the employees have yet to meet with the new contractor at date of writing.

² The UK Government was party to this agreement as part of the EU and then entered into the agreement on its own accord on January 1st 2021

Five Lessons to be learned

- Commissioning authorities should ensure that their commissioning plans provide enough time for effective TUPE consultations that are proportionate and take into account the length of service of current employees.
- Public authorities should fully explain their procurement procedures for below and above-value bids on their websites.
- Public authorities should provide full information to potential suppliers about accessing opportunities for below and above-value bids on their websites.
- Public authorities should have strategies for dealing with all values of bids, which should be publicly available.
- Public authorities should put in place voluntary review mechanisms for dealing with below and above-value bids.

FURTHER INFORMATION

About Aspire: www.aspirecommunityworks.com

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