

## **The Procurement Bill – are you prepared for good news?**

So we left the European Union – where are the benefits you ask? Whether £350m a week has been delivered for the NHS is up to you to decide, but there are potential benefits in the form of the new Procurement Bill which has departed in several areas from the previous EU procurement directives. Whilst not universally acclaimed, the Bill does deliver some opportunities, providing greater flexibility in some areas which could be useful from a highways or waste procurement perspective.

### **Soft market encouragement**

There is renewed emphasis and encouragement in the Bill to carry out pre-procurement soft market engagement – provided this is a transparent process with equal opportunities for all contractors to input, considerable intelligence can be gained by procuring entities about how the strategic priorities set by Members can be best or more realistically accommodated by the market. As long as those involved in the following procurement process have the same information provided in the soft market testing, and sufficient time to digest that information, then soft market testing would not undermine the level playing field needed for the procurement proper.

### **CD or CPN or you decide!**

Typically, current procurement processes used for highways maintenance or waste involve competitive dialogue (CD) or competitive procedure with negotiation (CPN). In CD, bidders bring you ideas about how the service could be provided in response to your high-level requirements and you discuss solutions with them. In CPN, you are supposed to have a service specification and some clearly formed ideas, and you negotiate with bidders to improve their bids in terms of quality and price. If you stray too far in terms of negotiating improvement in CD, or revising your specification when bidders suggest alternative solutions in CPN, you can get into hot water because you are no longer following the process that you set out. This is one of the cardinal procurement sins and can lead to challenge, or at best just causes significant problems when trying to evaluate bids on a like for like basis and then providing consistent feedback.

The Procurement Bill proposes greater flexibility by allowing procuring entities to design a process which works for them. Clearly, any process still needs to comply with the basic principles of equal treatment and transparency (to demonstrate there has been equal treatment), but otherwise there is considerable opportunity. During the process itself, you could have a short period where bidders are able to comment on your ideas for the highways service: after that you could “lock in” a solution – with a further short period for negotiating improvements to bids on the selected solution. As always, the process design must remain commercially attractive to the market – avoiding long and unwieldy processes which are subject to change. Contractors will be increasingly picky about which opportunities to pursue and you need to attract credible candidates other than your incumbent and those with only short track records of being in the sector.

### **And the conclusion...**

Being able to combine the benefits of soft market testing and the current CD and CPN processes could lead to real procurement process improvements. However, even these increased flexibilities will not trump being able to describe cogently to the market your Authority's vision for the future service. Having an accurate picture of your requirements – having involved Members and senior executives – but being flexible about how to achieve them as you navigate the market response will remain crucial to a successful procurement.

We are providing a “lunch and learn” session in April which will more fully explore the benefits available from the proposed changes to procurement legislation. Do look out for more information nearer the time.

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