

CJC RESPONSE TO THE DRAFT CIRCULAR ON BEST VALUE AND PERFORMANCE IMPROVEMENT

- 01** The CJC warmly welcomes the undertaking (in paragraph 57.a) to legislate to enforce the provisions in the Cabinet Office Statement of Practice on Staff Transfers; and also the statement (in paragraph 57.b) that the government expects all local authorities in England to include the Code of Practice (attached at Annex C) in service contracts.
- 02** We also note a number of differences between the draft and previous Circulars in their provisions for procurement and the commissioning of work and services. We believe that the main differences reflect appreciation of practical considerations in competition and procurement.
- 03** We do however suggest a number of changes in the draft. These suggestions now follow. For ease of reference we have added an annex comprising all the passages in the draft which we now comment on.
- 04** We have no objection to the publication of our response.

The proposed Code of Practice

- 05** The Code is clearly intended to effect major changes in competition for local authorities' work. We therefore accept that many details will still have to be worked out. There are however three points of clarification which it might be helpful to raise straight away.
- 06** Firstly, does paragraph 57.b mean that the Code will apply only to **contracts for services**, and not those for **works**, even term maintenance contracts ? If so it is hard to see any reason for such a restriction.
- 07** Secondly, does paragraph C7 mean that it will apply only to contractors' **joiners**, and not to any of their **existing staff** who transfer to the local authority contract ? If so, this will give contractors a perverse incentive to appoint all their joiners to other contracts, to facilitate sideways transfers to local authority contracts. These contracts will then be served by steadily ageing workforces.
- 08** Lastly, paragraph C10 reads as if employers' pensions contributions may be fixed at below 6% **so long as they are not less than employees' contributions**. We hope this is not intended.

Procurement policy & strategy

- 09** We **doubt the practicality or usefulness**, suggested in paragraphs 45, 46 and B8, of any one local authority having a **single comprehensive strategy for the whole of its procurement**. Multi-purpose authorities procure far too heterogeneous a range of works and services. Their procurement is in any case increasingly effected through a wide range of agencies, including purchasing consortia, framework agreements made by lead authorities and others, and brokers appointed by the holders of devolved budgets. If these different agencies did not have their own distinct approaches, there would be no point in using them. Any authority-wide strategy would either be an unnecessary and inappropriate constraint on many of the practitioners involved, or so tolerant of diversity as to be unlikely to have any effect.
- 10** We accept entirely that local authorities need, as a matter of good housekeeping, practical guidance and instructions for their own staff and clients' agents for managing and conducting their procurement. They also need to lay down explicit strategies for achieving their ESEWeb and other wider objectives, so that their procurement and all their other activities can be carried out with these objectives in mind. Nobody has however seriously suggested that authorities do not already have such guidance, instructions and strategies; and our own experience is that in general they do have them. The draft circular therefore appears to be asking for something more, without explaining what this extra might be, or making a case for asking for it.

The scope for SMEs

- 11 Paragraph B13 makes clear that Ministers are anxious to help SMEs. We and most local authorities share this anxiety. The obstacle is of course the terms of Treaty of Rome, and their preclusion of any special preference for SMEs. **What SMEs need is not therefore generalised expressions of support, but practical advice** as to how they may lawfully be supported, without infringing the Treaty.
- 12 Our own advice is that authorities are free to use specifications (and tenderer selection and tender evaluation criteria) which may offer good openings to small or local firms; provided these specifications and criteria can be shown to be for the purpose of securing good service, and not just to help any particular type of firm. There is for example nothing to stop authorities specifying working times which would be advantageous to service-users but which in practice only small local firms or workforces could operate within.
- 13 It would be helpful if the Circular could make the same point.

The use of objective measures

- 14 We agree entirely that authorities need to be objective when making all the assessments and decisions required by procurement. We hope this is what the draft means, in paragraphs B8 and B29.
- 15 **Being objective** is not however the same as **using objective measurable criteria**. These are always easy to find for inputs, and often for outputs. But, even for outputs, measurements can only be **estimated** measurements, so do not appear to 'constitute objective criteria'. Usually only the most banal of outcomes can be stated in terms of objective or measurable criteria.
- 16 Whole-life costing, sustainability, and most other forms of ESEWeb, will therefore be unattainable if, in tenderer selection and tender evaluation, authorities are required to think only, or even primarily, in terms of objective measurable outcomes. We hope the Circular will not be worded in such a way as to suggest that authorities have to do so.

The value of references

- 17 We agree entirely with paragraph B21 if it means that **performance during the past 3 years** (or 5 for works) is the best guide to future performance. References do however need to be from previous clients who have passed through the usual honeymoon period. Waves of euphoria often follow voluntary changes of service provider. Correspondingly, harsh words often follow shotgun marriages. This suggests that it is best if all contracts selected as a basis for references **are contracts awarded more than 3 years ago**. In other words, the best guide to future performance is the current performance of mature contracts.
- 18 **Site visits** also provide reliable evidence of track records. Practitioners can then observe contractors in operation, and talk to as many of their clients' staff as possible. We suggest that the Circular should bracket them with references. Site visits too are more telling if made where contracts have been in force for several years.

Annex - passages in the draft circular which are quoted above

- 45 The Byatt Report also recommended that authorities should have a clear policy which sets out how procurement is to be managed across the authority
- 46 The joint Government/LGA response to the Byatt Report fully endorsed these recommendations and authorities should consider their procurement practices in the light of this report, to ensure they are getting the maximum value from their procurement activities.
- 57 Key measures include
- a . . . new legislation to enforce the provisions in the Cabinet Office Statement of Practice on Staff Transfers and the Treasury annex on pensions

- b** fairness for new joiners taken on to work on service contracts beside transferred workforces. The Government has produced a Code of Practice (attached at Annex C) which it expects all local authorities in England to include in service contracts . . .
- B8** All decisions should be based on objective measures that are justifiable in terms of the performance of the service specified under the contract. Authorities should therefore have clear procurement strategies, procedures and written policies for evaluating tenders.
- B13** Some common principles of good procurement apply in all circumstances
- ¥ The Government recognises that firms/organisations of different sizes (by number of employees) may satisfy purchasers' requirements in different ways. This is consistent with the aim of Ministers to encourage Small and Medium Enterprises (SMEs) and in particular, small community businesses. The Government's aim is to take proper account of the circumstances of small businesses and also to help best value authorities discern the best contractor to carry out the work. Quality small businesses stand to benefit as much as larger ones
 - ¥ . . . in order to be able to demonstrate that procurement has been undertaken in an open and transparent manner, authorities should ensure that . . . all stages of the procurement process can be audited satisfactorily with reference to a clear, written policy on evaluating tenders and awarding contracts, which is publicly available and made available to all bidders.
- B21** In terms of information that will be relevant to the handling of workforce matters, best value authorities may wish to consider enquiring about the following matters . . . experience and track record over the past three years (five years for works contracts) in providing similar services, and referees that can be called upon to vouch for performance
- B29** The purpose of tender evaluation is to select the bid that meets the authority's requirements and delivers best value. It is essential that this is undertaken fairly and is seen to be so. The evaluation should be systematic, objective and well documented to provide a clear and logical audit trail.
- C7** Where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the local authority, it will offer employment on fair and reasonable terms and conditions which are, overall, broadly comparable to those of transferred employees . . .
- C10** The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements . . .
- ¥ For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished; and
 - ¥ a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

DRAFT ODPM CIRCULAR ON BEST VALUE AND PERFORMANCE IMPROVEMENT

A draft note for ODPM about terminology

The need for the circular to spell out which stages in procurement it is addressing

- 01** The draft introduces some excellent objectives for adoption in procurement. All have some legal or practical difficulties, and authorities have to set about them carefully.
- 02** It would therefore be helpful if the draft could be amended to make clear in all cases whether it is talking about **pre-selection enquiries, tenderer selection, tender evaluation, or specifications**.
- 03** At present readers are forced to guess. For ourselves, we assume that paragraphs 54, B35 and B40 are about tenderer selection; that 46, C2 and C4 are about tender evaluation; and that 53 is a matter of specification. If we are right, it would help readers if the Circular could say so. But if we are wrong about any of these, there must be more to the draft than we had picked up, and it might be prudent for the Circular to explain the missing points.

- 04** Further confusion is often caused by the notoriously ambiguous term 'pre-qualification'. Paragraph B19 uses it to mean (or to include) **pre-selection enquiries**, whereas B11, B16, B38 and B39 use it to mean **tenderer selection**. We suggest that the Circular should avoid the term pre-qualification altogether.
- 05** We suggest that a distinction also needs to be made between the different stages of tenderer selection. These stages are the rejection of **ineligible applicants**; then the rejection of **eligible applicants who are below minimum requirements**, and finally the selection as tenderers of **those who best meet such requirements**. Paragraph B17 uses the jargon of the rejection stage, but apparently to describe the second stage, while making no mention of the third. This gives the impression that all applicants who meet minimum requirements have to be invited to tender, however numerous they might be. This is of course incorrect, and would in any case often be impractical for clients, and unduly burdensome for tenderers, given their small chances of success in such an event.

The need to identify which participants in competition are being talked about

- 06** We appreciate that the directives create a difficulty for the authors of the Circular, and for all commentators, by using jargon so obscure that it is a waste of time for any of us to repeat. They never refer to 'tenders', for example, only to 'offers'. This is of course sometimes incorrect in terms of English contract law, in which the offer may come from the client. The directives also refer to 'bids', but only when they mean **in-house** tenders. The draft rightly avoids the term 'offer' but refers at least 20 times to bids, although obviously intending them to signify **all** tenders. We suggest that tenders is normally the best term to use.
- 07** So is the term 'tenderers'. Unfortunately the directives never use it. They refer instead sometimes to 'persons who have made offers'. Each directive has in addition its own term (service provider in the case of services, supplier in the case of supplies, and contractor in the case of works) which it uses indiscriminately for respondents, applicants, tenderers and contractors. But in at least 25 instances the draft uses the term 'service provider' as an alternative to 'tenderer' or 'contractor', even when the subject of the contract might be works or supplies. We suggest that confusion is minimised by sticking to respondent, applicant, tenderer or contractor, depending on the stage in competition.
- 08** The term 'service provider' also has a special UK meaning, covering providers in all sectors of the economy, including those not doing so under contract. This is of course a useful and necessary term, given the importance now attached to making the best use of all such sectors. We therefore think it is best to reserve the term service provider for this comprehensive all-sector meaning.

Avoiding exaggerating the restriction in the directives on the evidence available in tenderer selection

- 09** Paragraph B20 rightly points out that the Services Directive restricts the evidence to be used for assessing financial standing and technical capacity. It wrongly includes the assessment of ability in this restriction.
- 10** In fact authorities are free to use any evidence for this purpose, provided as always that this evidence is identified in notices, and provided ability is defined as comprising skills, efficiency, experience and reliability. This freedom is widely used in procuring intellectual services, and it would be unconstructive for the Circular to give rise to any doubt as to its availability for this purpose.

Annex - passages in the draft circular which are quoted above

- 46** Successful procurement strategies are likely to be based on whole life cost considerations that include subsequent revenue implications, and not simply the lowest initial tender price.
- 53** Sustainability should be taken into account in a structured way. Non-financial or performance based criteria intended to meet sustainability objectives should be clearly defined.

- 54** Bidders . . . need to be able to demonstrate that they understand and can manage their obligations under TUPE
- B11** Under European Public Procurement legislation, workforce matters may come into consideration at the pre-qualification and tender evaluation stages of the contractual process.
- B16** Ideally the service specification will be largely finalised before the pre-qualification stage . . .
- B17** For most contracts it is good practice to follow a pre-qualification process. The purpose of pre-qualification is to produce a shortlist of organisations that have the capability to perform the contract. Candidates who do not meet the minimum requirements can be rejected, and the contracting authority can then invite the best of those candidates who do meet the minimum requirements to tender.
- B19.** For certain classes of contract, pre-qualification shortlisting could be simplified by using appropriately recognised databases such as Constructionline, although this does not preclude the need to advertise the contract and follow other European Public Procurement procedures where relevant. Such a database can be used to identify contractors who are fitted to carry out the work and to ensure that there is a sufficient core of likely or possible tenderers. For all contracts a database can also reduce the burden on clients and contractors of issuing and responding to requests for information in any advertisement, including OJEC, or a pre-qualification questionnaire. However, the presence of a contractor on a database does not automatically mean that it should be invited to tender, nor can the absence of a contractor from a database preclude a potential contractor from consideration.
- B20** The European Public Procurement rules set out the criteria and the nature of the evidence for assessing potential bidder's suitability and general competence, including their economic and financial standing, technical capacity and, for service contracts, ability to perform a service.
- B35** Authorities are required by legislation to take reasonable steps to satisfy themselves that contractors have the ability and resources for managing health and safety in relation to the work being carried out.
- B38** Contracting authorities should during the pre-qualification stage seek information as to the general competence, track record, details of criminal offences and acts of grave misconduct (as set out in the European Public Procurement rules) in relation to legislation on sex, race and disability. Contractors should be excluded from the tendering exercise if they have been convicted of a criminal offence or have committed an act of grave misconduct.
- B39** At pre-qualification this should provide sufficient information to make a proper assessment as to whether an individual contractor should be invited to tender.
- B40** Six approved questions were set out in Department of the Environment Circular 8/88. Authorities will continue to be able to ask the six questions specified in Circular 8/88 although they are no longer restricted to these six questions as the sole means of taking account of racial equality. In addition, and where relevant to the contract, and for the purposes of achieving best value, the authority will be able to ask some further questions in relation to racial equality.
- C2** The intention of the authority is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract.
- C4** In its contracting-out of services, the local authority will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. The service provider will be required to demonstrate its support for these principles and its willingness to work with the local authority fully to implement them.