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ANNEX 4.4 PROCUREMENT

It is important to secure value for money in asset management through sound procurement. Public sector organisations should normally acquire goods and services through fair and open competition, acting on OGC advice. This annex provides an overview of the policy framework for public procurement.

A.4.4.1 The government's procurement policy is to buy the goods, works and services that it needs under a fair and open procurement process, guarding against corruption and seeking to secure value for public funds with due regard to propriety and regularity. EU law and World Trade Organisation (WTO) agreements underpin these principles. The specific responsibilities of public sector organisations are set out in box A.4.4A.

box A.4.4A checklist of key purchasing responsibilities

General

- value for money, normally through competition
- compliance with legal obligations under EU rules and other international agreements
- follow OGC policies and standards on public procurement.

Management approach

- leadership on the importance of procurement in delivering objectives;
- define roles and responsibilities of key staff, with adequate separation of duties;
- promote awareness (including in ALBs) of the importance of procurement policy and the OGC guidance.

Planning and engagement

- consider market structure so as to attract and sustain a diverse supply base;
- clarify objectives of procurement from the start;
- design procurement strategy and engage with the market early;
- consult OGC on any difficult legal issues.

Skills

- use procurement professionals throughout;
- ensure that there is sufficient skills capacity in undertaking procurements and projects.

Review

- apply the OGC GatewayTM review process;
- comply with the procurement capability review process;
- draw issues which may have wider implications to OGC's attention.

A.4.4.2 This guidance is intended to be fully consistent with the UK's EU and international obligations. It does not create any rights or legal obligations.

Value for money

A.4.4.3 Value for money is a key concept running through *MPM* (see paragraph 4.2.3). It means securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought. It is not about minimising upfront prices. Whether in conventional procurement, market-testing, private finance or some other form of public private partnership, value for money will involve an appropriate allocation of risk.

A.4.4.4 Purchasers need to develop clear strategies for continuing improvement in the procedures for acquisition of goods, works and services. Public sector organisations should collaborate with each other, following OGC guidance, in order to secure economies of scale, unless they can demonstrate that better value can be achieved in some other way.

Legal framework

A.4.4.5 Public sector organisations are responsible for ensuring that they comply with the law on procurement (see box A.4.4B). EC Treaty principles apply to all procurement, and there are specific EU rules that apply to most contracts where the estimated value exceeds a specified threshold.

box A.4.4B the legal framework for public procurement

- EU procurement rules (the Treaty and procurement directives)
- international obligations, notably WTO agreements
- specific domestic legislation, including subordinate legislation implementing directives;
- contract and commercial law in general
- relevant European Court of Justice case law
- domestic case law

A.4.4.6 In the event of infraction proceedings by the European Commission, however, OGC will coordinate the response under the arrangements set out in Cabinet Office guidance (*United Kingdom involvement in infraction proceedings and other EC litigation*). There are separate arrangements for cases involving devolved administrations.

The user's requirement

A.4.4.7 Procurement should help deliver relevant departmental and government-wide strategies and policies. It is appropriate to outsource when the goods or services required cannot be provided in house or better value for money can be achieved through third party delivery. The procuring organisation should establish that the supply sought is really needed, is likely to be cost effective and affordable. And the published requirement should specify clearly what is required, since this is crucial to obtaining the supply required.

The procurement process

A.4.4.8 Competition promotes economy, efficiency and effectiveness in public expenditure. Goods and services should be acquired through competition unless there are convincing reasons to the contrary. The form of competition chosen should be appropriate to the value and complexity of the goods or services to be acquired.

A.4.4.9 Public sector organisations should aim to treat suppliers responsibly (see box A.4.4C) to maintain good reputations as purchasers.

box A.4.4C relationships with suppliers

- high professional standards in the award of contracts
- clear procurement contact points
- adequate information for suppliers to respond to the bidding process
- the outcome of bids announced promptly (noting EU standards)
- feedback to winners and losers on request on the outcome of the bidding process
- high professional standards in the management of contracts
- prompt, courteous and efficient responses to suggestions, enquiries and complaints

A.4.4.10 In seeking bids, purchasers should:

- start with the user requirement;
- specify it clearly, bearing in mind that it cannot be extended (though it can be narrowed);
- to leave room for innovation, consider describing the requirement in terms of what is to be achieved rather than precisely how the outcome should be constituted;
- avoid specifying any bias directly or indirectly in favour of UK suppliers;
- set out how bids will be evaluated;
- keep the costs of the bidding process to the minimum necessary for effective competition;
- design a competition which will work for the widest range of sizes and kinds of firms, without discrimination;
- publish procurement and project timetables and stick to them;
- when advertising smaller value contracts that are below EU thresholds, consider using the Government's opportunities portal: www.supply2.gov.uk.

A.4.4.11 During the evaluation process, it is important for procuring organisations to:

- secure value for money (see box A.4.4D), using relevant and consistent criteria for evaluating the key factors (cost, size, sustainability, design etc);
- assess suppliers' economic and financial standing to gain confidence of their capacity to carry out what the purchaser requires and deliver value for money;
- establish the propriety of candidate suppliers – taking account of the requirement to exclude those convicted of eg fraud, theft, fraudulent trading or cheating HMRC.

box A.4.4D securing value for money

Cost: the key factor is whole life cost, not lowest purchase price. Whole life cost takes into account the cost over time, including capital, maintenance, management, operating and disposal costs. For complex procurements, whole-life cost can be very different from initial price.

Quality: paying more for higher quality may be justified if the whole life cost is better, eg taking into account maintenance costs, useful life and residual value. The purchaser should determine whether increased benefits justify higher costs.

Perspective: each public sector organisation's procurement strategies should seek to achieve the best value outcome for the public sector as a whole, not just for the organisation itself. This should be designed in before the invitation to tender is published.

Contracts

A4.4.12 In drawing up contracts, purchasers should, where possible:

- use model terms and conditions developed in the light of collective experience and which may help avoid prejudicing the position of others using the same supplier;
- avoid variation of price clauses in contracts of less than two years' duration; and
- Include prompt payment clauses.

A4.4.13 Purchasers cannot enter into contracts with other parts of the legal entity to which they belong. So different parts of the Crown cannot contract with each other. Instead internal agreements which fall short of being contracts are service level agreements. These may have all the hallmarks of contracts other than scope for legal enforcement. Since service level agreements between bodies which are not part of the Crown may be subject to the EU procurement rules, it is usually wise to take legal advice when entering into them.

Central purchasing bodies and agencies

A4.4.14 Unless service level agreements exist, central government bodies are not tied to central purchasing bodies or agencies. In seeking value for money, they may, however, choose to enter into contracts under framework agreements put into place by a central purchasing body, such as OGCBuying.solutions.

A4.4.15 If purchasers employ private sector agents to undertake procurement on their behalf they should:

- require compliance with EU rules
- ensure clear allocation of responsibilities; and
- where appropriate, obtain the agent's indemnity against any costs incurred as a result of its failure to comply with the legal framework on its behalf.

Taxation

A4.4.16 Central government bodies should:

- base procurement decisions independent of any tax advantages that may arise from a particular bid;

- restrict contractors' use of offshore jurisdictions, consistent with EU and other international obligations and the government's stated objectives on tax transparency and openness, to avoid harmful tax competition;
- employ internal management processes to ensure that transactions that give rise to questions of propriety of tax arrangements are brought to the Accounting Officer's or, if necessary, Ministers' attention.

A.4.4.17 In the case of bids under the Private Finance Initiative (PFI), it is particularly important to ensure that comparisons of competing bids take account of any tax planning by bidders. The *Green Book* provides for a tax adjusted Public Sector Comparator to allow for the (usually) material tax difference between PFI and the wholly public sector alternative. It would be inappropriate to apply this to bids where tax planning has cancelled out this effect.

A.4.4.18 Public procurement projects involving the transfer of real estate or assets that are likely to appreciate in value can often give rise to specific tax issues, in particular liability to capital gains tax. If public sector organisations are negotiating with bodies that wish to structure procurement proposals in this way, they should consult the Treasury and HMRC at an early stage to identify the likely tax implications and assess the proposal for propriety generally.

Further guidance

A.4.4.19 Central sources of guidance on procurement and related issues include:

- the OGC [www.ogc.gov.uk/procurement.asp]
- the Treasury [www.hm-treasury.gov.uk/]
- the Green Book on appraisal and evaluation in central government www.hm-treasury.gov.uk/Economic_Data_and_Tools/greenbook/data_greenbook_index.cfm ;
- Cabinet Office on market-testing, contracting-out and better government [www.cabinetoffice.gov.uk/] ;
- DTI on state aid rules [www.dti.gov.uk/bbf/state-aid/] ;
- Central Office of Information on media requirements www.coi.gov.uk/services.php ;
- Office of Fair Trading on cartels and bid-rigging [www.offt.gov.uk/advice_and_resources/small_businesses/competing/cartels] ;
- HMRC on tax avoidance issues [www.hmrc.gov.uk] .

Guidance on the EU rules (available on the OGC website) is also published by the Commission, but public sector organisations are advised not to seek advice from the Commission without first consulting their own and their sponsor body's procurement units, who may, in turn, consult OGC.