

Challenging tender processes

Rachel Rhodes, Commissioning and Procurement Adviser at NAVCA, explains what you can do if you think a tender process is unfair.

NAVCA's Local Commissioning and Procurement Unit (LCPU), funded through the Big Lottery BASIS programme, works to support the development of a diverse local third sector that can influence service planning, win contracts, and deliver quality public services.

We provide practical advice and guidance to local infrastructure organisations (LIOs) to help local groups to transform and, where appropriate, deliver public services. By working with and for LIOs we will assess the impact of competitive tendering processes on local third sector organisations, specialist provision and disadvantaged communities.

One way we help LIOs is by providing an enquiries service. An issue that our enquiries service has been asked on a number of occasions is "how can we appeal the process of an unfair tender procedure?" This article looks at some of the options available.

The golden rule – act immediately

Whatever option is used, the golden rule is that you must act immediately if an issue arises when the tender documents are published or during a procurement process. You must not wait until a contract is awarded before you challenge the procedure as being unfair. Action may result in the tender process being suspended and the issues being resolved before a contract is

awarded. If the complaint relates to a breach of the Public Contracts Regulations and progresses to the High Court, case law also highlights the importance of raising an objection at this stage and not waiting until the tender is lost before starting proceedings.

In the case of *Gerard Martin Scott & Ors v. Belfast Education & Library Board* (2006) the judge rejected a complaint that GMS had only received three working days notice to attend interview in breach of the five days notice that should have been given. Although this was non-compliance by the public body, the complaint was not successful because GMS had attended the interview and not raised an objection at the time.

This is also the case if proceedings are brought through judicial review. In judicial review *Hammersmith and Fulham Council* won a challenge brought by a local law centre following a change to funding criteria. Claims that the council had not consulted appropriately and had given no reason for its decision were not accepted because the judge said a challenge should have been made earlier rather than after the law centre had sent an application form explaining how it met the new criteria. It should be noted that influencing at an earlier stage in the commissioning cycle, when commissioning and procurement strategies are being developed is of great importance. Challenging processes at

this point could lead to greater benefits for the third sector, local communities and service recipients by ensuring that tender specifications when released consider social value and do not unnecessarily exclude third sector bidders. Challenges through public law at judicial review have been successfully used to contest changes to policy and funding decisions.

Kaur and Shah v. London Borough of Ealing (2008) saw a High Court victory for BME women's group Southall Black Sisters. Following a change to grant funding by the local authority, a challenge was made under the Race Relations Act as well as on the basis of failure by the local authority to follow its own guidance and carry out an appropriate Equality Impact Assessment. This resulted in the council conceding defeat half way through the second day of the hearing and agreeing to go back to the drawing board on the commissioning of domestic violence services. Support was provided by the Public Law Project¹.

Freedom of Information

While some breaches of procurement regulations may be apparent, such as failure to advertise in the *Official Journal of the European Union* (OJEU) or publish evaluation criteria (for Part A above threshold contracts)², it may be less obvious if the public body has acted with objectivity and equality of treatment during the evaluation process. While there is only a duty under procurement rules to provide detailed feedback to bidders in Part A tenders, it is good practice for public bodies to debrief bidders in Part B and below threshold tenders also. If not, or if further information is required, the Freedom of Information Act (FOIA) can be utilised. The FOIA gives a person or organisation the right to ask for information held by a public body. More information on the Act can be found on the

Information Commissioner's website. The Office of Government Commerce (OGC) has published useful guidance looking at the application of the FOIA to procurement³.

The main ways you can challenge a process

A number of options are open if the decision is made to progress with a challenge.

Internal complaints procedures

If discussions with the named commissioner/procurement officer have not resolved the issue, the public body's internal complaints procedure (details of which should be on their website) can be utilised. Awareness of the different stages of the procedure and how long it will take should be considered, as some of the other procedures (including judicial review and High Court proceedings) must be brought promptly and within three months of the event. As illustrated in the examples above, this means that challenges should be brought when the breach occurs rather than waiting to see if a bid is successful before acting.

Some public bodies have also set up complaints panels to deal specifically with procurement and competition issues. The NHS has developed a complaints procedure dealing with procurement in order to ensure fair, transparent and well informed decisions are made. Initially complaints should be made through the local PCT Competition Dispute Resolution Process (which may also be known as the PCT Procurement Appeals Panel). This panel will hear complaints and disputes which contravene any of the national *Ten Principles and Rules of Cooperation and Competition*⁴. If the dispute cannot be resolved at this level, the complaint can be taken to the next stage, the SHA Competition Dispute

Resolution Process. The SHA will only consider complaints that have been through the first stage of the process. Where issues cannot be resolved at these levels, there is the possibility of them progressing to the national Co-operation and Competition Panel. It should be noted that this process can only be used if legal proceedings have not been initiated, and the time-scales inherent in the process would probably prevent legal proceedings being pursued following the NHS process.

Compact

A challenge through the Compact will be relevant if a local or national Compact has been breached rather than procurement regulations. It may be appropriate to use this method when challenging changes to commissioning and procurement strategies. A national *Compact funding and procurement code* is available⁵, but many local authorities are also developing local Compacts in relation to funding or procurement. The Compact is not legally binding but is based on trust and mutual goodwill. Therefore a challenge through the Compact may not lead to adequate damages but is likely to improve future practice and assist in maintaining productive relationships with the public body.

Support on Compact issues arising from both central government practice or local practice can be found at the Compact Advocacy Programme managed by NCVO⁶.

Supplier Feedback Service

The Office of Government Commerce (OGC), an independent office of HM treasury, provides a Supplier Feedback Service⁷. Feedback to the service will be accepted when procurement practice has potentially conflicted with OGC guidance. Its aims include providing a direct

route for suppliers to raise concerns about public procurement practice when attempts at resolving issues with a contracting authority have failed, and providing reasoned feedback to enquirers on their concerns. The OGC will work directly with Central Government departments to address feedback from suppliers. When OGC receives feedback relating to the wider public sector, for example Local Government or an NHS Trust, they will contact a designated lead authority who will consider the complaint and may pursue the concerns with the contracting authority.

There are limitations to the remedies that can be achieved through the Supplier Feedback Service and the outcome is likely to be recommendations which are non-binding, although public bodies would be under considerable pressure to accept them. It is not a legal avenue to resolve complaints or to obtain compensation and the OGC will not intervene when legal proceedings have been initiated. However it is a free, accessible service that may result in improved public sector procurement practices.

Ombudsman

It is unlikely that a complaint related to tendering would be accepted by the Ombudsman scheme as it does not deal with matters relating to contractual or commercial transactions. However, it may be appropriate very early in the commissioning process if the issue is related to a breach of public law and includes maladministration that has caused injustice. Further information can be obtained through the Local Government Ombudsman⁸, who deals with complaints about local authorities and the Parliamentary Ombudsman⁹ who deals with complaints about central government departments and agencies. The public body's complaints procedure should be used first before

complaining to the relevant ombudsman and complaints to the ombudsman must be made within 12 months of the breach occurring. A challenge through the ombudsman can be slow and the recommendations are not binding (although the public body does usually follow them). On the plus side, it is not a complicated process and legal advice will not be necessary.

Judicial Review

For public law issues where a public body has acted unlawfully, unfairly or irrationally a challenge through the courts by a process called Judicial Review can be used. It is not completely clear in what situations judicial review can be used in procurement challenges. Previous case law (*Cookson & Clegg v Ministry of Defence*, 2005, Court of Appeal) supports the proposition that a challenge should be made under the Public Contract Regulations rather than judicial review, where the claim is covered by the regulations. However this does not rule out judicial review in appropriate cases – where a breach of public law principles has occurred or where the procurement process is not covered by the regulations. It may be appropriate to use judicial review where only the EC Treaty principles apply, such as below threshold contracts or where only some of the regulations apply, as in part B services.

Judicial Review is a remedy of last resort and while other options should have at least been considered, it may be appropriate in procurement challenges to proceed immediately to this route. A case should be brought promptly and within three months of the decision that is being challenged, so it is important not to get tied into other lengthy complaints procedures if following the Judicial Review route. Benefits of Judicial Review are that it is usually a quicker solution

than other public law remedies and the outcome is legally binding. However, it is a very expensive option and will not be relevant for all procurement problems. Further information and training on Judicial Review and all public law principles can be provided by the Empowering the Voluntary Sector project provided by NAVCA and the Public Law Project. The Public Law Project provides free detailed legal advice to voluntary and community organisations involving public body's decisions and failures and the team of lawyers have taken on many cases on behalf of the third sector⁹.

UK High Court

The other legal route to take, if breaches of the EU procurement rules or Public Contract Regulations have occurred, is through the UK High Court. In order to challenge in this way, the public body must be informed of the breach and of the intention to bring proceedings. Again, a case should be brought promptly and within three months. The outcomes that might result from a High Court action include the suspension of an incomplete contract award procedure or the setting aside of a decision in an incomplete contract award procedure. When a contract has already been signed with the winning bidder, the contract cannot be overturned due to national contract law, but damages can be awarded. In certain situations, this may change when the Remedies Directives¹¹ are revised. These revisions have to be implemented into UK law by December 2009.

The majority of tenders that third sector organisations bid for are Part B services. These are subject to only a limited number of the EU procurement rules and there has been limited case law on how the EC Treaty principles of equal treatment and transparency apply. It is

therefore not clear when a challenge can be brought for Part B and below threshold services. Advice should always be sought from a legal specialist. In an attempt to bring more clarity to this area, NAVCA will publish further guidance in the near future.

Challenge through the High Court is relatively uncommon, due to the tight time-scales and high legal costs involved.

Complaints to European Commission

Finally, a bidder may lodge a complaint directly to the European Commission. The European Commission can take action against the UK Government in the European Court of Justice for breach of its obligations under the EC Treaty. Upon receipt of a complaint from an aggrieved bidder about the UK, the European Commission will consider whether the case is worth pursuing. If considered to be worth pursuing the first stage would probably be an informal letter of enquiry being sent about a possible infraction. If found to be in breach of its obligations under the EC Treaty the UK will be required to take appropriate measures to comply with the judgement. A complaint to the Commission is a cheap and relatively straightforward option to challenge procurement processes, however it can be a slow procedure. The European Direct website¹² provides links to advice lines for all issues relating to the EU.

Finally – always try to negotiate

While it is inevitable that there will be times when formal proceedings need to be taken, it is always preferable to resolve disputes through negotiation. Regular communication and investing the time to build strong partnerships with public bodies will assist in achieving this and can save you a lot of time, money and worry.

Further information

NAVCA's Local Commissioning and Procurement enquiry service can provide further information and clarification on the issues raised in this article as well as other areas of commissioning and procurement. This service is available to all local infrastructure organisations and can be contacted by phone: **0114 289 3989** or email: **lcpu@navca.org.uk**

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The information in this article has been produced as general guidance and involves complicated issues. You are advised to take legal advice on individual matters.

Notes

¹www.southallblacksisters.org.uk/savesbs.htm

²Part A contracts include management consultancy services, advertising services and financial services and are subject to the full EU procurement rules. Part B services include health and social services, legal services, recreational, cultural and sporting services and are only subject to some of the EU rules. However, both part A and Part B services are subject to the EU Treaty-based principles of non-discrimination, equal treatment and transparency. More information on EU procurement rules and a list of Part A and Part B services can be found on the Office of Government Commerce website: <http://digbig.com/4ydw> or www.ogc.gov.uk

³www.ico.gov.uk/what_we_cover/freedom_of_information.aspx and www.ogc.gov.uk/freedom_of_information.asp

⁴www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_0_81098

⁵ <http://digbig.com/4ydwx> or www.thecompact.org.uk
(currently under review)

⁶www.ncvo-vol.org.uk/compactadvocacy

⁷<http://digbig.com/4ydwy> or www.ogc.gov.uk

⁸www.lgo.org.uk

⁹www.ombudsman.org.uk

¹⁰ www.navca.org.uk/services/learningopps/evs
and www.publiclawproject.org.uk

Please note that PLP can only advise on public law matters and cannot provide detailed advice on tendering challenges, for example using the High Court procedure.

¹¹ <http://digbig.com/4ydxb> or www.ogc.gov.uk

¹²http://ec.europa.eu/europedirect/index_en.htm

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