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PROBATION
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The Voice of Probation Employers

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Dear Colleague

Regional Procurement – Lessons Learnt

Last summer Yorkshire & Humberside region undertook a procurement exercise for waking night cover for approved premises. They produced a “Lessons Learnt” review of the process which we felt would be of wider interest to colleagues.

A copy is attached and will also be posted on the Probation Association and Probation Chiefs’ Association websites.

Yours sincerely

Sue Hall
Chair
Probation Chiefs’ Association

Christine Lawrie
Chief Executive
Probation Association

Y & H Region Partnership Board

Regional Procurement: Approved Premises (AP) Night Waking Cover Services

1. Introduction.

1.1 The purpose of this briefing paper is to highlight the lessons learned from the recent procurement for the region's AP Waking Night Cover services. TUPE and the contingent pensions and Two Tier Workforce (2TWF) issues were features of the procurement process for two of the four areas in the region and have had a substantial impact on the procurement process.

1.2 The procurement was led by West Yorkshire Probation Board on behalf of all the four probation areas in the region, but it was agreed at the start of the procurement process that each Board or Trust would have its own contract with the successful provider for its area. The EU's 'Restricted' procurement procedure was deployed, with advertising of the contract opportunities was via Official Journal of the European Union (OJEU).

2. Key 'lessons learned'.

2.1 Where Boards/Trusts seek to outsource a service which involves the transfer of their staff to a new provider under TUPE regulations and the Government's requirements relating to pensions and 2TWF, there is a requirement on areas to devote substantial amounts of senior management and support staff time in order to ensure the procurement process is deployed effectively

2.2 The negative impact on the procurement process of TUPE/Pensions and 2TWF issues in terms of achieving a Best Value outcome to the procurement is significant.

The key impacts are:

a) many tenderers will withdraw from the procurement process as soon as they become aware of the TUPE, pensions and 2TWF issues because of the anticipated long term financial risks to their organisations.

b) the 'market' is therefore restricted to:

(i) a small number of large organisations who believe they can either absorb the costs and risks or believe they can successfully transfer them back to the contracting authority (see 2(c) below, and

(ii) to those who don't fully understand the risks at the point of submitting a tender. many VCS and medium sized private tendering organisations lack full awareness of the TUPE, pensions and 2TWF implications. Bids are submitted which appear on the surface to offer a Best Value result for the procurer, but problems then arise after short listing or even Contract Award if such issues are not fully understood by the contracting authority themselves and investigated with bidders at the earliest opportunity. Some Boards and Trusts

however are often lacking in the legal and HR expertise needed in order to manage these issues as part of the procurement process.

c) those tendering organisations that do not fully understand the implications for them of the TUPE, pensions and 2TWF will factor these into their bid price and also seek to transfer risks back to the contracting authorities. They will attempt to mitigate their risk by seeking to insert alternative contract clauses into the Invitation To Tender (ITT) Form of Agreement that would bind the contracting authority into long risk sharing commitments which are advantageous to the bidder (via Bonds, Indemnities etc). This can make it impossible for the contracting authority to achieve a Best Value outcome.

3. Pensions and Public Sector Procurement involving staff transfers.

3.1 Unless a tenderer has either obtained Admitted Body Status (ABS) to a Local Government Pension Scheme (LGPS) or has a Government Actuary Department (GAD) certified 'Broadly Comparable' private pension scheme they will not be able to meet the Government's requirements on pensions for the transferring staff. Such provision must be in place to avoid disadvantaging the transferring staff, and the unions naturally seek to ensure that all of the government's pensions requirements for transferred staff are met. This can delay considerably the Contract Commencement, or lead to no signing of the contract at all. In the current economic climate most tenderers will not be able to achieve the pension provision for transferring staff public sector staff as required by the Government.

3.2 Contracting authorities need to be aware that if a tenderer has, or is seeking, ABS to the LGPS, the LGPS will seek to make the Board/Trust a party to this agreement and to bind the Board/Trust in to long term risk mitigation to protect LGPS – normally via Bonds, Indemnities etc.

3.3 The LGPS will also require the Board/Trust to obtain a GAD report on the proposed new provider and its ability to meet its pensions obligations to LGPS if the staff do transfer – the cost of obtaining such a report will be the Board's/ Trust's – and they can take a very long time to be prepared.

3.4 Following any transfer of staff to a provider which has ABS with the LGPS, the LGPS will also normally wish to see annual assessments of the new provider's ability to continue to meet its obligations via a GAD report – again at the Board's/ Trust's expense.

3.5 it should be noted however that each LGPS take a different view to how it assesses risk to its scheme and therefore resolving such differing arrangements across a region becomes incredibly complex and time consuming for management and support staff. If the procurement is to proceed however Boards/Trusts must be prepared to invest senior management time in this process to avoid problems coming back to haunt them in future years.

4. Lessons learned for future procurement exercises where Board/Trust staff transfers are involved.

4.1 There should be a 'meet the potential bidders' briefing for all expressing an interest in the contract opportunity in order to allow the contracting authority to fully inform possible bidders of the TUPE, pensions and 2TWF implications for them.

4.2 At Pre Qualification Questionnaire (PQQ) stage of the procurement process those attempting to pre qualify should be asked to fully detail their understanding of TUPE, pensions and 2TWF issues. They should be asked to evidence any ABS/LGPS agreements or GAD approved alternative pension provision. Failure to have such provision in place should normally lead to exclusion from the procurement process at the PQQ stage unless the contracting authority is assured that bidder arrangements to secure such provision is well advanced and is likely to be successful.

4.3 At the ITT stage of the procurement process the contracting authority must fully document and describe in detail the TUPE, pensions and 2TWF implications for the successful bidder. It is not sufficient to state in the ITT the projected number of posts involved (along with the salaries and employer's contributions etc) nor to inform bidders they should take them into account and that it is their own responsibility to understand the issues and seek their own advice. The contracting authority can save a considerable amount of time if it takes responsibility for assisting all short listed tenderers to understand the full impact of such issues right from the outset.

4.4 We must not underestimate the amount of Board/Trust management and specialist support staff time required in procurement processes that involve the transfer of Board/Trust staff.

5. Conclusion

5.1 I am aware that our region's experience as describe above is repeated across the country by Boards and Trusts that seek to outsource where staff transfers are involved.

5.2 To avoid these problems Boards/Trusts are seeking to redeploy staff from the service to be outsourced to other duties before the procurement process begins, or at the latest before the contract is awarded. With shrinking probation budgets however the redeployment option is increasingly not available to many areas.

5.3 If the current TUPE, pensions and 2TWF requirements remain the market will be increasingly restricted. Only a minority of VCS or Private sector organisations will be able to meet TUPE legislative regulations and the Government's additional requirements for pensions and 2TWF. One monopoly will replace the other and we will not achieve the mix of providers that NOMS wishes see.

5.4 All the above must be full considered by ministers if they are to press ahead with their commitment to 'market testing' significant elements of services currently provided by Boards and Trusts.

5.6 I am aware that the EU is currently considering some of the issues above (e.g. 2TWF) in terms of any inherent anti competitive implicatuions for public sector procurements, and so in the longer term UK Government may have to revisit its position.

Peter Johnston
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