Your guide to: procurement and tendering for practices and services

Securing the Future of General Practice in London
Other guides in this series:

- Your guide to: contract negotiation and relevant contract law
- Your guide to: forming partnerships, limited liability partnerships, companies, and other business structures

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INTRODUCTION

Securing the future of general practice in London is crucially important to all of us at this time. The challenges and opportunities facing practices are, without exception, in today's highly competitive environment, considerable. Practices have to have a good working knowledge of contract negotiation, procurement and tendering and consider what type of business structure they will operate in.

It's not easy. That is why we have commissioned BMA Law to produce three introductory booklets on these subjects. They do not attempt to tell you everything you need to know, as each subject area is vast. But they do, however, introduce these vitally important areas for those practices coming new to the subjects. We hope you find them helpful.

For further information on Londonwide LMCs and all that is happening to general practice in these challenging times, please don't forget to log on to www.lmc.org.uk.

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PROCUREMENT AND TENDERING

The rules covering procurement and tendering are governed primarily by EU Directives which originally date back to 1989, the most recent in 2004. The current applicable UK Regulations are the Public Contract Regulations 2006 which apply in England, Wales and Northern Ireland.

Changes in the way in which primary medical care is being delivered is resulting in larger commercial companies tendering for services offered under Alternative Provider Medical Services (APMS) by Health Boards and Primary Care Trusts. With the competition in the current market being so fierce, many GP practices have decided to set up commercial entities themselves in order to bid for these services. Unfortunately, experience in the bidding and tendering arena maybe, for some, quite limited and with more and more bids being “won” by commercial firms, the feeling is that GPs must empower themselves with enough knowledge to be able to understand how the process works in practice.

Key Message:

Although the tender may be a tender for APMS services, the applicant should ensure that the terms and conditions of the bid do not conflict with any existing GMS or PMS arrangements. This is to ensure:

(a) Security of patient lists.
(b) Protection of long term contracts for patients already registered under those contracts.
(c) Prevention of fragmentation of GP services.
(d) Patient confidentiality.
When may the rules apply?

- The Public Contract Regulations apply to contracts worth a minimum of 211,000 euros. There are some exceptions to this but these are not likely to be relevant to GPs and doctors in the current context. However, some primary care services may be put out to tender, most commonly when there is an opening of a practice or when an existing practice becomes vacant. APMS contracts will be open to private providers as well as traditional GP practices. On a smaller scale, practice splits may result in divided partners having to present a business case, or tender for the original practice. This is usually the case where the partnership split has not been amicable. Other instances of tendering have arisen where a GP practice has been providing primary care via a temporary contract and is forced into bidding for that contract at the end of the temporary contract period.

- Practice based commissioning is another area whereby groups or consortia of GPs have organised themselves into corporate entities and are having to tender or submit bids to Primary Care Organisations (PCOs) to provide local services.

- In the light of the introduction of polyclinics into the capital, groups of organised GPs may wish to tender for the management of those clinics alongside (or in some instances, in conjunction with), private healthcare companies.

Whatever the circumstance, GPs will need to familiarise themselves with the rules of tendering and procurement to ensure that they are empowered with the right information and expertise to put together a professional bid.
Provision of health and social services fall within Part B of the Public Contract Regulations, and therefore it is possible that the context of procurement and tendering that is pertinent to GPs generally will fall within this section. Effectively, this means that PCOs may not always have to go through the full tendering processes as set out in the regulations, although the obligations of transparency and fairness will still be paramount.

The Public Contracts Regulations lay down 4 different types of procurement procedure; they are defined in the Regulations as follows:

**Open Procedure** – where all interested contractors and economic operators may bid for the work or contract. Usually adopted by contracting authorities.

**Restricted Procedure** – where only those contractors or economic operators who are selected may tender for the work/services. This is also commonly adopted.

**Competitive Dialogue Procedure** – where any contractor or economic operator may make a request to participate and the contracting authority enters into dialogue with the interested parties with an aim to developing one or more alternative solutions to the requirements. This is usually reserved for contracts of a particularly complex nature.

**Negotiated Procedure** – where negotiation is utilised to determine the terms of the contract by the contracting authority negotiating with one or more economic operators. This is used in very limited circumstances as set out in the Regulations.
Time Limits

Please note the time limits set for each procedure and ensure that they are satisfied in terms of any reply. These may differ depending on what type of procurement procedure is utilised. The deadline for the receipt of tenders in response to an Invitation to Tender (ITT) will, for example be not less than 40 days from the dispatch of the ITT. Also the deadline for the receipt of request to participate in the procurement using the restricted process will not be less than seven days from the dispatch of the OJEU notice (Official Journal of the European Union). If the contracting authority has dispatched a notice electronically, then this time limit is reduced by seven days. Usually tenders which are advertised on PCO websites will have a timeline set out indicating the deadlines for submission of various documents. It is worth taking good note of this when considering a bid.

Tender Notices and where to find them

A useful website is the NHS Purchasing and Supply Agency at www.pasa.nhs.uk. They recommend a list of agencies that provide up to date tender information in a variety of areas and will do the searching for you once you subscribe. The website is extremely useful and contains guidance and information for would be tenderers. It sets out the new EU threshold limit for supplies and services which is £90,319 as of 1 January 2008 and also provides a list of agencies that may be of help.

Many agencies charge a yearly subscription fee of £500 upwards depending on requirements and how specific you want the search. Other places to find notices will include OJEU (as mentioned above) and its supplement, (both of which can be obtained electronically), medical press advertisements, PCO websites etc.
However, serious contenders should ensure they receive the information as soon as possible after it is published, due to the time limits. Therefore PCO websites or search agencies are probably a lot more efficient in this context. Also, note www.supply2.gov.uk, a new government-backed website offering information on public sector tenders.

The Process - First Stage

1. **The process** - starts with the advertisement (see page six). There should be enough information in the advertisement to enable a prospective bidder to decide whether or not they are interested. Advertisements will not necessarily contain as much detail as you would be likely to find in an OJEU notice.

2. **The advert** - more often than not set out on the PCO website and may contain a Memorandum of Information giving more detail about the tender. This enables interested parties to make a more informed decision about whether they wish to respond, and how they are likely to respond.

3. **Expression of Interest** – potential bidders are usually provided with a template of the Expression of Interest document to fill in when they wish to participate in the process.

4. **Pre-Qualification Questionnaire (PQQ)** – this consists of a series of questions for the bidders to answer – it also contains guidelines on how to answer the questionnaire along with more information on the tender itself.

5. **Bidder Day** – there may be more than one day allocated and there may also be a series of speakers that address potential bidders. This offers the opportunity for bidders to be able to ask questions in respect of the bid.
Key Message:

This is the first stage of the bidding process and is subject to strict timelines. Usually the timelines will be indicated very clearly in the advertisement and possibly on other documents. It is important therefore that potential bidders adhere to these and emphasises the fact that serious bidders need to have knowledge of the tender early on in the advertising process.

The Process - Second Stage

1. **Invitation to tender (ITT)** - those shortlisted after submission of the documentation outlined on page seven, may be asked to submit an ITT. This is usually the case where the procedure adopted is “Restricted”, which is one of the common forms adopted by PCOs. Detailed instructions will be submitted with this to enable Bidders to respond as accurately as possible. The ITT is usually a standard form document which ensures consistency in responses to enable easy evaluation.

2. **Presentation** - once submitted, invitations may be sent to those shortlisted to give a presentation.

3. **Contract award** – the successful tenderer will be informed and the contract will be awarded. Unsuccessful bidders will also be informed and there are procedures whereby the unsuccessful bidders may ask for feedback and reasons for rejection.

4. **Contract signing and commencement** – there is a lapse of 10 days between the award and the signing of the contract to give unsuccessful tenderers the chance to be able to challenge the award on a number of grounds, e.g. fairness (see page 14).

This entire process must promote transparency and non-discrimination. It is important to bear this in mind when undergoing this process and particularly when considering a challenge.
Completing the Pre-Qualification Questionnaire (PQQ)

This document is designed to sort out the capacity, capability and eligibility of bidders. At this stage, you should not be providing any information other than that which is strictly asked for. Do not therefore provide any sales literature or supplier contracts etc. The basic PQQ should cover a number of main areas such as:

- Legal and regulations
- Financial
- Clinical
- Health and safety
- Workforce/resource
- IT capabilities

Key Message:
Just because your PCT knows you, and is familiar with your practice, do not assume this when completing the PQQ. You can only be scored on your answers to the PQQ and not otherwise – so pay attention to detail without straying from the questions asked.

Consortia

If you are bidding as a consortium, ensure that the consortium knows that you are presenting a bid and that you have the relevant consent of all parties and members of the consortium. If you have already set up as a separate legal entity, then provide evidence as to the set up. It is always useful to nominate a key representative of the consortium as a point of contact.
PQQ Evaluation

The PQQ will be scored against, usually, pre-set criteria. This will include matters such as whether the questionnaire was completed correctly and submitted on time as well as looking at the evidence in support of the facts.

The Invitation to Tender

1. The principle of transparency is extremely important and to achieve this there are certain guidelines that the tender must follow.
2. The technical specifications of the tender must be clear and accurate with details about what the services required actually are. The clarity must be such that they are precise enough so that the person wishing to make a bid can determine the subject of the contract.
3. The tender must afford equal access to all bidders and must make available the technical specifications. The manner in which the tender is created must not have the effect of creating unjustified obstacles to competition.
4. Although in some cases an offer may be submitted which may not completely comply with the technical specifications, if the tenderer can satisfy the specifications in an alternative but equivalent manner, the offer should not be automatically rejected.
5. The tender may also set out a number of alternative procedures which can be followed but the principles are the same.
The Tender

If a tenderer is selected as a bidder, and is in receipt of the ITT then:

- Ensure that the receipt form is signed and returned to the PCT.
- Read the ITT carefully and ensure that you understand correctly what the requirements and specification are.
- Confirm that those in your team or consortium with special expertise whose input may be required are available during the time period before the ITT is submitted.
- If there are matters or issues within the ITT that are unclear you may submit as many questions as you need to, in order to ensure that they are clarified in good time.
- Note that everyone else who has been invited to bid, will also get a copy of your questions and the PCT reply.
- Pay careful attention to accuracy and ensure questions asked are answered. Note that the evaluation process will be marked consistently in a pre-set manner. Anything that is not in the right place will not get evaluated.
- The ITT is the critical document in the entire bidding and tendering process. Remember the PQQ or Memorandum of Information and any other submissions that have been made are now obsolete.
- When presenting your bid in person, consider the best possible person to use, and whether they not only possess the right knowledge but have presentational skills.
- If you will require funding for developments then ensure you have evidence on hand to support the fact that you have the necessary working capital available.
- The cheapest bid is not necessarily the bid that will be successful, PCOs will take a number of factors into account including but not limited to clinical standards, deliverability and expertise.
• Give yourself plenty of time to prepare the bid. The administration process alone, in respect of printing and assembling, could take days.
• Ensure that the final bid is carefully read from cover to cover.
• If submitting CDs or PDF files, then ensure that these have been tested to ensure that they work. Ensure that you submit files in the format requested.
• Bidding and tendering is an extremely strict and regulated process. Anything on the outside of your tender documentation envelope which may identify your practice or organisation will result in immediate disqualification.

**Key Message:**
The rule of thumb is do not consider that being overly helpful will help your bid. Just follow instructions.

**Freedom of Information Requests**
PCOs are public bodies, and therefore are subject to the Freedom of Information Act (FOIA). They may therefore receive requests regarding your bid or any part of it, or your business at the close of the entire process. GPs and other commercial enterprises are not subject to FOIA and therefore, need to be aware that information in the hands of the PCO may become disclosable.

During the bidding process, any request for information may be rebutted by the PCO relying on one of the exemptions under the Act (probably the commercially sensitive information exemption), but after the bidding process it may be more difficult to challenge a request.
There are arguments that can be used to rebut any request, for example, one could argue that information had been provided in confidence and therefore, the PCO has an obligation to maintain that confidence.

It may be important therefore, to submit a statement to the PCT stating that submission of tender documents are subject to confidentiality. Although this may help to preserve any arguments of confidentiality, it may not necessarily be sufficient to rebut a request. The information must have the necessary quality of confidence about it, which is not public property or subject to public knowledge for it to fall within FOIA exemption.

**Note:** It is strongly suggested that separate legal advice is obtained with regard to this.

**Awards of Public Contracts**

The award is usually based on that submission of tender which is the most economically advantageous from the view of the contracting authority, but this does not mean that the tenderer who offers the lowest price will win. “Advantageous” in this context means “more flexible”, and that is determined by a number of criteria including but not limited to:

- Quality
- Price
- Delivery
- Cost effectiveness
- Period of completion

Whatever the criteria, it should be set out well in advance along with the weighting given to each criterion. When the contract is eventually awarded the score of the successful tenderer should be given to all who competed.
Challenge

There must be a standstill period of 10 calendar days between the despatch of the award decision and the conclusion of the contract. A notice of the reasons behind the award decision is usually sent out 3 days before the end of the 10 day standstill period.

If a legal challenge is brought during the standstill period then the PCO should wait to see whether, for example, an injunction is granted before concluding the contract. It is advisable however, that if during the procurement process you are aware of a potential situation whereby unfairness or prejudice has or may occur, then you should write to the PCO stating your concerns in writing. **Do not wait until the end of the process and do this during the standstill period.** This will be useful as evidence, in any application for an injunction. If during the process, you fail to get an answer from the PCO or the PCO may be unwilling to respond in a timely fashion, you can always use FOIA as a process to speed things up.

In 2007, a new EU Directive was agreed so that an aggrieved bidder may apply to the High Court to prevent the award of a contract by setting it aside or for an award of damages to any provider that has suffered loss or damage as a result of the breach. The UK has yet to implement this Directive. Until it does, then it appears that the only recourse for challenge is Judicial Review or High Court Civil Proceedings.
Method of Challenge

If you believe that you have unfairly lost out in a public contract tendering process, then, if the contract is worth more than 211,000 euros in total, the Public Contracts Regulations (PCR) 2006 apply as follows:

1. Ask promptly for the reasons for your failure to secure the contract and draw the contracting party’s attention to the requirement in regulations that they must allow ten days between award of the contract and concluding the agreement.
2. You have only a maximum of three months to issue any challenge in the courts.
3. To be on the safe side, calculate your three months from the date of the decision (not from anything which came afterwards) and be aware that the courts will expect evidence that you have given the contracting body full notice in writing of the basis of your challenge at the earliest opportunity. You should take legal advice on this.
4. If your aim is to stop that contract from being awarded, and the contracting body will not agree to do that, then you may have to go to court within the ten days mentioned above, to apply for an injunction to stop conclusion on the contract.
5. If your sole aim is to recover the costs of preparing the unsuccessful tender, or lost profit (which may be difficult) then you must still act promptly, but the courts may give you a little more time to bring the challenge.
6. Your local civil court should have power to deal with a claim, but rely on legal advice as to where it is best to issue the proceedings.
7. For contracts worth less than 211,000 euros in total, any challenge may be more difficult and the procedures set out above do not apply. Take legal advice.
Key message:
Judicial Review (JR) was thought to be the only method of challenge, but, an action entered under part 7 and part 8 of the Civil Proceedings Regulations (CPR) is also permitted. This can be more advantageous, as one can enter the action in a local court and subsequently have it transferred to the High Court. Although the issue fee under CPR is £400 and therefore higher than the issue fee under JR (£50), preparation for the JR action is extremely stringent and precise early on in the process. This can result in a higher preparation cost. It is strongly advised that formal legal advice is taken before deciding which method may be more appropriate.

Claim for Breach of Implied Contract

Even if the value of the contract is below the financial threshold for the time being, and the PCR therefore do not apply, there may be an implied contract between the PCO and the tenderers via the procurement process which could be breached, e.g. excluding a tenderer from the procurement process by not considering its bid fairly. The tenderer must also be able to show financial or income loss which results or flows from the breach.

Letter before Claim

A letter before any claim is instigated must be sent to the PCO. This should outline the nature of the breach and require its remedy and/or damages. In effect, it gives the opportunity for the PCO to set things right before court action is commenced.
Useful Websites

www.lmc.org.uk
www.pasa.nhs.uk
www.supply2.gov.uk
www.ojec.com