



## Procuring success

### Introduction

The UK "no challenge culture" has gone.

Recently more contractors are challenging procurement processes in the courts and winning substantial damages awards and halting contracts.

The European Remedies Directive was implemented in the UK in December 2009. The implications of this are twofold. Firstly, greater obligations are placed on contracting authorities and the remedies available to economic operators are more extensive. The Courts may also, in certain circumstances, declare a contract 'ineffective' which will have a detrimental impact not only for contracting authorities but also winning bidders.

Public authorities and their private sector partners risk losing significant sunk investment costs if a contract is challenged and the court finds the procurement process was flawed. Costs can be significant if the challenge is taken all the way up to the European Court of Justice.



Procurement processes that go wrong waste your time and money and attract bad publicity. Good procurement saves costs and time.

Trowers & Hamlin have national experts in procurement law who have extensive experience in advising contracting authorities, public bodies, RSLs, contractors and other interest groups on:

- competitive dialogues

- restricted and open procedures
- negotiated procedures
- frameworks
- evaluating tenders and equality of treatment
- how to obtain information on contracts award procedures
- bringing and defending challenges to procurement processes
- the potential application of procurement rules to Development Agreements and Section 106 and infrastructure agreements in the light of *Jean Auroux and Roanne*
- public works and public services concessions
- exploiting the procurement rules in the Public Contracts Regulations
- running OJEU processes as a private sector or developer
- tactical use of the Alcatel standstill period
- how to handle enquiries from aggrieved contractors
- interaction between the procurement rules and State Aid rules.

In our experience the public sector succeeds in procuring appropriate and value for money partners, services and goods when it combines sound business practice with an understanding of the procurement regulations. Our role as lawyers is to be pragmatic and focus on our clients' ultimate objectives rather than give narrow legal interpretations of the rules.

### Competitive dialogue

We work with our clients to help them select the most efficient procedure for their procurement and prevent challenges later on. In January 2006 competitive dialogue joined the stable of EU procurement procedures. Its more established companions include the restricted procedure, the open procedure, a number of specialist procedures

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and the now less used negotiated procedure. The competitive dialogue procedure is designed for 'complex' matters. The cause of that complexity can be financial, technical and/or legal.

The practical difference between competitive dialogue and the negotiated procedure is that the public body enters into dialogue with a number of participants rather than with just one preferred bidder. In fact under competitive dialogue once the preferred bidder is selected the ability to negotiate is limited to 'fine tuning'. Without careful planning, multi-party negotiations can be unnecessarily protracted, expensive and unfocused.



### Being prepared

With increasing bid costs and a range of public private projects available, private sector contractors and developments are more selective about the opportunities for which they bid.

It is, in our experience, more important than ever before for public authorities to undertake robust preparation before embarking on procurements. We suggest that this may include,

- clarity about what is being procured
- proper consideration of standards and outcomes
- soft market testing – is there an interest?
- early appointment of advisers

- detailed planning of the procurement timetable

### Legal role

Though it may surprise you, we believe the legal role should be used as efficiently as possible. The technical quality of the bidders' solutions and the affordability of any proposal are in our experience the key issues for public procurement. We believe our role is to translate regulations into plain language, advise on legal documents and share the experience we have gained.

Our experience is strengthened through a number of our firm's experts who have worked as in-house lawyers for both public sector and private sector clients. We believe that this breadth of experience offers our clients unique advantages in the form of a legal advisory team which understands the legislative and commercial pressures faced by public and private sector clients in any procurement process.

### Some of our relevant experience in the sector includes:

**London Borough of Newham** – Advising on the procurement using competitive dialogue of a new fibre optic cable telecommunications network.

**Wolverhampton City Council** – Advising on the procurement using competitive dialogue of a partnership programme. Services to be provided include re-engineering the management and collection of local taxes, council benefits pension arrangements and treasury management.

**Welwyn Hatfield Borough Council** - Advising on the £27 million outsourcing of the Council's ICT, Revenue, Benefits and Contact Centre functions through a strategic services partnership using the competitive dialogue procedure.

**Oldham Council** – Advised on £1.2 billion partnership and joint venture with Mouchel for the provision of a range of corporate and core transactional services including customer services, human resources, revenues and benefits.

**Hounslow Council** – Advised on partnership with Liberata involving the restricted and negotiated procedures with the deal winning Outsourcing Deal of the Year

**Sheffield City Council** – Advised on award winning £270 million strategic partnership with Kier. The project involved the council forming the first local authority

limited liability partnership in England. Winner of the Local Government Chronicle PPP of the Year.

**The Housing Corporation** – We have advised the corporation since its foundation. Advice has included all aspects of this public body's activities. Advised on the change of grant funding competitions being open to Advising on developments affected by Roanne decision.

**Department of Work and Pensions** – Advised on £700 million PPC2000 Job Centre Plus programme, a public/private partnership involving the refurbishment of 700 job centres by an integrated team of 14 constructors using open-book pricing and measured performance. Winner of the Government Opportunities Award 2003 for public procurement excellence.

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Helen is recognised in the Legal 500 and Chambers Guides as a national expert on local government and PPPs.

Helen is a member of Sir Ian Byatt's Procurement Review of Local Government. She has also edited both editions of the Tottel's Guide to Local Government Contracts and Procurement, co-authored Butterworth's Guide to the Local Government Act 1999 and contributed the procurement chapters to Sweet & Maxwell's PFI and PPP Encyclopedia.

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