

# Putting People First

## Transforming Adult Social Care

Efficiency delivery - supporting sustainable transformation



### The Use of Frameworks (and Preferred Supplier Lists) within Social Care

There are two myths circulating social care purchasing circles at the moment:

- preferred supplier lists are not allowed under EU legislation; and
- if you use a framework, the process must adhere to the definition contained within the EU Procurement Directive

The purpose of this short note is to provide guidance around this topic and dispel these two related myths.

#### EU Procurement Directive Frameworks

Frameworks have a specific definition within the context of the EU Procurement Directive. There are specific rules concerning such agreements:

- the process of establishing a framework<sup>1</sup>;
- the duration of the framework; and
- how individual suppliers are selected from within the framework prior to an order being placed (via a 'catalogue' mechanism or via 'mini-competition' involving all suppliers who are qualified to carry out the work)

Within the context of this note, however, the most significant of the rules are those which effectively prevent suppliers from being added or removed from the framework without going through a lengthy re-tendering process.

When the legal profession get asked for advice about frameworks, they inevitably turn to the established case law and legal guidance surrounding the EU Directive.

Within Social Services, whilst the underlying principles of EU law apply, the specific requirements regarding the use of frameworks do not. The reason for this is that the majority of social service purchases fall into the Type B services<sup>2</sup> category and many of the process related obligations within the legislation are not mandatory.

Therefore councils are permitted to apply the concept of a 'framework' (or, in this context, a preferred supplier list) without having to apply the complete process.

Much of the EU guidance surrounding the use of frameworks is still relevant and useful as, indeed, are some of the elements related to the use of 'dynamic purchasing systems' (restricted to electronic procurement within the Directive, but equally applicable here).

#### Use of preferred supplier lists

Many councils have operated preferred supplier lists as a means of restricting who is able to provide care services. Such lists are routinely reviewed to determine which suppliers meet the requirements to join or stay on such lists. These are usually a perfectly legitimate form of framework.

#### Key Principles

The general principles which should be followed for any procurement, regardless of whether Type A or Type B under the EU Directives<sup>2</sup>.

Two key principles within this context are that:

- any award process should be non-discriminatory; and
- there should be complete transparency in the way in which the framework/preferred supplier list operates

#### Are you operating a transparent process?

If you would be comfortable releasing details of your selection criteria under a Freedom of Information request to anyone who asked - including providers not on the list, the likelihood is that you are operating fairly and transparently.

If this idea makes you uncomfortable, you should consider reviewing your processes against the points listed below.

#### Key elements of a transparent framework

If you are looking at bringing your current preferred supplier list arrangement into line with the principles underpinning EU and UK procurement law, then consideration should be given to the following points (also see overleaf):

- **Pre-qualification ('must have') criteria** : clarity around the mandatory requirements for a provider to be considered as suitable for being on a list;
- **Limited by pre-qualification or quantity**; Will the list be controlled purely via the pre-qualification criteria or will it be limited by the number of providers via some form of ranking (preferred option)?
- **How many providers?** if the latter option is chosen;
- **Mergers and acquisitions**: how to handle acquisitions during the lifetime of the framework;
- **Measurement and incentives for performance**: how performance, quality and value for money will be measured, what the commercial consequences of under/over performance are and how the agreement will be monitored and reviewed on an ongoing basis;
- **Adding suppliers (and taking them off)**: What is the basis on which this will happen?
- **Levels of commitment**: What volume/turnover guarantees are appropriate - how will these change over time;
- **How a placement is made with a provider**;
- **Obligations on termination and transition**: How will services be transferred from one supplier to another; &
- **Keeping the framework up to date**: What is the process for updating agreement terms and how often? (not covered overleaf, but reasonable to review annually)

If the above elements are clear and transparent it is probable that you have an acceptable preferred suppliers list.

<sup>1</sup> See OGC OJEU Contract Notice Guidance for more

<sup>2</sup> See our companion fact sheet on Obligations / Type B Services

## Expanding on the elements of a successful preferred suppliers list

### Pre-Qualification ('must have') criteria

Selecting suitable 'yes/no' criteria should be a balancing act between limiting the number of providers who are competent to perform the service at the same time as allowing for new entrants (see separate discussion below).

The 'non-discriminatory' part of general procurement legislation plays a role here. For example, whilst it would be perfectly acceptable to require local presence (given the highly localised nature of social services), in general it would not be good practice to require that such a presence have been established for a long period. This could be seen as discriminatory if difficult to justify as an essential pre-requisite for successful delivery of the service.

### Limited by pre-qualification or quantity

You may opt to have a preferred list limited by the pre-qualification process discussed above. The danger of such approach is that if you get it wrong you could either have too many or too few suppliers on the list. Given that such criteria will normally apply for the duration of the framework the dimension of time adds a further complication (i.e. it might be OK now but not next year).

Whilst requiring slightly more effort at the point of setting up a preferred list type framework, we would recommend you limit the number of suppliers and use ranking to select which suppliers are on the list. This allows you to loosen the 'must have' criteria; thereby making it easier for new entrants at the same time as restricting the number of providers on the list.

### How many providers?

The number of providers depends on a whole range of factors:

- number of capable suppliers in the market;
- nature of the service - in particular the extent to which it depends on local management;
- available infrastructure for transaction processing;
- geographical/demographic nature of the client base;
- added value, over and above basic labour, added by the provider.

We believe that the classical procurement emphasis on 'supply base reduction' can damage most social care markets. Such moves can significantly reduce contestability over the longer term (as has been seen in the area of complex learning disabilities over recent years).

We therefore recommend that councils divide a service covered within a preferred list into 'lots' and aim to have **three** capable providers per lot. In this regard the EU framework principles are equally applicable. The basis for such lots may include:

- detailed sub-division of service (e.g. for specialist care);
- timing of service delivery (night time / weekend services may be able to tap different markets e.g. students); and
- geographical coverage (e.g. zoning for homecare); and/or
- nature of client.

Such an approach encourages a suitably contestable market.

### Mergers and acquisitions

If the aforementioned lots are large, and even if a supplier started off being local, the likelihood is that such providers will quickly become the target of acquisition as the larger players increase their market dominance.

It is worthwhile having mechanisms within any preferred supplier list or framework which provide some protection against the possible adverse consequences of such moves (e.g. the stipulation that there should be three independent suppliers)

### Measurement and incentives for performance

Regardless of the nature of the preferred supplier list, the basis for assessing performance, quality and value for money should be absolutely clear - especially if this is the basis for addition/removal.

For some of the measures it is appropriate to have commercial consequences of failing to meet minimum standards (e.g. performance credits). In some cases, where exceeding agreed metrics adds value, it may be appropriate to link incentives. Such impacts could be in the form of increased / reduced levels of business and/or financial remuneration.

Finally, the mechanisms for discussing performance, remedying poor performance, encouraging continuing improvement, and for escalating issues should be equally clear. We recommend a 360° based feed-back approach.

### Adding suppliers (and taking them off)

We would concur with the EU framework stipulation that such agreements should be formally re-tendered at least every four years (especially in the current climate of rapid change). However, unlike EU frameworks, it is usually a requirement of preferred supplier lists that it be possible to add (or take off) suppliers on a more regular basis as part of the agreement (e.g. as part of an annual review process).

A good preferred supplier list will have a clear basis for doing this - usually based on the performance metrics discussed above. In the case of adding suppliers it would also normally be good practice to reserve a proportion of business for the purposes of allowing new entrants to prove themselves prior to incorporation.

### Levels of commitment

Historically, many councils have opted for fixed commitment levels (implied or explicit block contracts). In order to provide flexibility within a preferred supplier list, serious consideration should be given to forms of dynamic commitment. Such models, where the level of commitment is able to be changed over time, offer flexibility without exposing providers to undue risk (especially in a market dominated by part-time temporary labour and relatively high annual labour turnover rates).

### How a placement is made with a provider

The mechanisms for selecting which provider delivers a specific service are many. You may elect to use EU framework like catalogue and mini-competition mechanisms, a simple take it in turns model or link to the performance framework. Regardless of what model you chose, it should be stated as part of the agreement.

### Obligations on termination and transition

Particularly in the case of Social Care, where vulnerable service users suffer the impact of poorly managed transition, any preferred supplier list arrangement should contain very clear obligations in the case where services are transferred. An area which is not normally addressed particularly well, we would recommend that councils are clear about their requirements and that suppliers are required to produce an exit plan to demonstrate their commitment to such requirements prior to award of any business.

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