



EU Procurement – Tenders: When is the lowest bid the worst choice?

Last year Connaught Partnerships Ltd, a company with many, often large, repair and maintenance contracts with social housing providers went into administration.

What does this have to do with low tender bids?

Before Connaught went into administration, Morrison Facilities Services Ltd sought a court injunction against Norwich City Council to prevent a contract award to Connaught, arguing that Connaught's bid should have been rejected as "abnormally low".

The court granted the injunction given the strong arguments that the bid was abnormally low and that, as a low bid, the Council did not undertake sufficient investigation to satisfy itself that the bid should not be rejected. The Council reached a settlement with Morrison so significant details, such as what enquiries the Council carried out before awarding the contract to Connaught, are unknown.

Thereafter, the administrators failed to find a buyer for the Council's contract with Connaught, taking the Council back to square one in its search for a contractor.

In hindsight, if the Council had taken the view Morrison presented in court, that Connaught's bid was unsustainably low, they might have been saved considerable inconvenience (and associated costs).

invites, "lowest price" or "most economically advantageous" criteria are chosen. In either case, Regulation 30(6) provides that if a bid is "abnormally low" (that term is not defined) it may be rejected only if the contracting authority has:

- (a) requested written explanation of the bid (or parts) that it considers are abnormally low. Information sought may include: the economics of services provided; technical solutions proposed by the bidder; favourable conditions available to the bidder; compliance with employment protection matters; whether State aid is available to the bidder;
- (b) taken account of evidence provided in response to (a); and
- (c) subsequently verified with the bidder that the bid (or parts) is abnormally low.

A bid may still be accepted if a Regulation 30(6) investigation verifies that the bid is abnormally low, though Connaught provides an example of risks that might arise with that approach.

Rejecting a bid as abnormally low is a difficult decision. The bidder may want to challenge that decision, particularly if the tender was on a "lowest price" basis. The unusual nature of rejection on this basis is underlined by the Regulation 30(9) requirement to report and justify any rejection to Scottish Ministers, who forward that report to the European Commission.

Conclusion

If a bid looks too good to be true ... it probably is! If you have suspicions that a bid is not sustainable, because it appears low, consider whether it is abnormally low and, therefore, if investigation under Regulation 30(6) is appropriate.

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When can a bid be rejected as "abnormally low"?

Regulation 30 of the Public Contracts (Scotland) Regulations 2006 sets criteria for awarding a contract. Initially, with tender

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Does Social Networking Suit Social Housing?



In a modern paradox, people will spend hours connecting with almost complete strangers all over the world using the internet, whilst scarcely a winter goes by without press reports of an elderly resident suffering serious injury or death completely unknown to their immediate neighbours.

Registered Social Landlords (RSLs), through guidance and otherwise, are being encouraged to realise innovative community strategies, for example, through internet, texts and web groups.

A web group example is www.neighbo.com. This is a network to empower the community, allowing tenants and housing managers to communicate. An RSL example of mainstream social networking is Wherry Housing Association's very active Facebook page, where the "discussions" section invites questions about services (ranging from wallpaper, through repairs, to antisocial neighbours).

Wherry's page is moderated, with offensive posts removed, although remaining, presumably, on the Facebook wall of whoever made them. As a result, others might be able to identify someone complained about. A small online community serving a small geographical area increases possible unwanted identifications.

This highlights a drawback: once comment is made it is difficult to remove completely from the internet. "Post in haste – repent at leisure" can be painfully appropriate with adverse comments often replicated on more than one website.

bto has considerable experience of dealing with contentious reputational internet matters. **bto** recently obtained what we believe is the first Prevention from Harassment Order in Scotland based solely on behaviour in cyberspace, rather than the more usual neighbour and family disturbances. For advice on social networking please contact:

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Watch this Space: The Property Factors (Scotland) Bill

The Property Factors (Scotland) Bill was passed on 3 March 2011. The Bill is scheduled to become effective on 1 October 2011 and is to *'protect Scottish Homeowners who contract with Property Factors and to establish a system of dispute resolution between the parties'*. The Bill is split into three parts, two of which are substantive dealing with Registration of Property Factors and Dispute Resolution, with the last part being headed simply Miscellaneous General and which allows the Scottish Ministers to delegate functions under the Bill.

Part 1 requires Scottish Ministers to prepare and maintain a public register of all property factors; it will be an offence under the Bill to operate as a Factor without being registered. All registered factors will have been judged to be a "fit and proper person to be a property factor". The Scottish Ministers will also be charged with drawing up a code of conduct to lay out minimum standards across the board.

All registered factors will require to adhere to this code.

Part 2 provides for referral of complaints to the homeowner housing panel and appointed committees. They will consider complaints from homeowners who feel a Factor has breached their contract or the code of conduct. Complaints upheld will see the issue of a "property factor enforcement order" detailing works to be carried out and/or financial awards in favour of homeowners. It will be an offence to fail to comply with such an order and appeal against the issue of such orders is limited.

It remains to be seen what impact the introduction of yet another regulatory regime will have on RSLs' willingness to undertake Factoring responsibilities against a background of increasing financial challenge.

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Watch out for...

Component Accounting

Now recommended for Registered Social Landlords (RSLs) and can have knock-on effects if an RSL previously used a different accounting approach.

Equality Act 2010

Will be seen operating in practice this year and some organisations may require policy review and / or further training.

Bribery Act 2010

The much talked about Bribery Act, which was due to come into force in April 2011 has been shelved meantime. Commentators believe that there is unlikely to be any amendment to the Act itself, but rather more detailed guidance will be forthcoming.

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