Sector *focus*

The pitfalls of EU procurement

Two recent cases highlight the dangers of breaching EU procurement rules, leaving the door open for contractors to challenge the way in which contracts are awarded.

When work is hard to come by, contractors included in framework agreements are more likely to scrutinise the decisions made by the awarding body. This has been demonstrated by two recent cases heard in the High Court of Northern Ireland.

In the first, the Department of Education for Northern Ireland was found guilty of breaching EU public procurement rules in a £650 million tender. A two-stage competition first selected framework contractors and then secondary selection identified those to be used for individual call-off contracts (to be undertaken using the NEC3 forms of contract). The plaintiffs in Henry Bros (Magherafelt) Ltd & Ors v Department of Education for Northern Ireland, challenged the Education Authority when they were excluded from the framework agreement after the initial competition.

It transpired that framework contractors had been chosen on the basis of the 'most economically advantageous' offer, decided by comparing the fee percentages (overheads and profit) that would be added to the cost of hypothetical contract values. The assumption was made that all contractors would charge the same for the construction work in question.

The judge considered this a major error in the primary competition, compounded by the lack of any full price competition in the secondary competition, as pricing was not to be discussed with the successful contractor until the contract had been awarded. Therefore the judge found the defendant in breach of EU procurement rules. It is not yet clear whether or not this framework will be set aside, with all the associated time and cost involved in re-tendering.

In the second case, in September 2008, the Northern Ireland Department of Finance and Personnel was also found to be contravening EU procurement rules (McLaughlin & Harvey Ltd v Department of Finance and Personnel). The department was judged to have failed to disclose the sub-criteria by which tenders were ultimately assessed and its framework agreement set-aside by the court. This is a key point for clients: it is vital to be clear about and to list the sub-criteria by which you are judging those bidding for work.

The lesson here for anyone entering into a framework agreement is to be explicit about the services being procured and evaluation criteria: ensure you understand the rules and follow them to the letter. If in doubt, seek professional advice.

For some useful tips on meeting the requirements of the OJEU process from Watts' Public Sector team, see page four of this Bulletin, or for more information on these two cases go to www.procureweb.ac.uk

Editorial

With more than £2 billion of public funding anticipated during the next few years, the Higher Education sector represents one of the few areas of growth within a struggling construction industry. This Higher Education Special Bulletin aims to explore some of the key challenges being faced by Estates Directors as they grapple with the demands of an increasing student population on their often diverse and aging property portfolio, in the context of an extremely challenging economic climate.

On the following pages we focus strongly on procurement issues, looking in particular at OJEU and framework agreements. In a market which everyone wants to enter and where competition is now fierce, choosing the right procurement option and sticking to the rules, has never been more important.

In this issue

Visit our stand at AUDE 2009

For the second successive year, Watts Group PLC will be exhibiting at the AUDE conference.

This year's event, to be held at the University of Wales, Newport, takes place over three days from 5-8 April. The conference is open to AUDE members and their guests and will be supported by an exhibition showcasing a wide range of goods and services relevant to the higher education sector. This year, delegates can look forward to a wide-ranging programme, featuring speakers from the Carbon Trust, BRE and the Eden Project as well as from a number of universities around the UK. Topics include building design, sustainability, carbon reduction and estate strategies and master-planning.

If you are attending this year's event, you are welcome to visit Watts' stand at the exhibition. We would be delighted to meet you and give you more information about our business and the services we are able to offer.

For more information contact Mark Few, Director of Watts' Public Sector Team in the London Office on +44 (0)20 7280 8000.

Does your student housing need a DEC?

When the Energy Performance in Buildings Directive (EPBD) came into force in 2008, student residences were exempt from energy certification. Now, it seems this is not the case. Watts' energy specialist Mark Rabbett reports.

UK universities' extensive property portfolios fall into the 'public building' category for the purposes of the EPBD and therefore require a Display Energy Certificate (DEC), or an Energy Performance Certificate (EPC) in Scotland, to be produced for all buildings to which the public has access, including libraries and academic facilities. For this year only, where one set of gas or electricity meters serves more than one building, Estate Managers can obtain one certificate and display it in all their buildings. From 2010, individual certificates will be required for each building.

Until August 2008, university accommodation was considered by the Government not to require energy certification under the directive, as students occupy rooms under license rather than renting them via a tenancy agreement. Since then, there has been a change of heart. In response to the question, "Do halls of residence require a Display Energy Certificate?" the Department of Communities and Local Government website clearly states, "Yes. Friends and relatives will normally visit Halls of Residence and therefore a DEC will be required".

However, this requirement may be less straightforward than it seems. First, DECs are meant to compare how much energy the occupants consume but the university has no control over consumption and no easy way of making improvements. Yes, the university can improve the energy efficiency of the building, but can only promote energy awareness among its students in order to make future improvements. Gathering the required information may also prove tricky. How can the energy assessor determine occupied hours? Will individual students need to be questioned as to their habits or would there be an assumption of full-time occupation?

The question of useable space for the purposes of the EPBD also throws up some anomalies. The directive only applies to buildings greater than 1,000m². Universities with a 'student village' layout may not have buildings greater than 1,000m² and should not require a DEC. However, universities with older style residences may exceed the 1,000m² threshold and require certification. Estates directors and facilities managers should be aware of these requirements and act accordingly.

However, there is an argument for obtaining DECs whether or not it appears necessary under the Directive, both to safeguard against possible penalties for non-compliance and also to enhance green credentials and meet Corporate Social Responsibility principles.

There are circumstances where an EPC rather than a DEC is required. These include:

- sale of individual buildings within university portfolios; and
- renting out premises or parts of premises to external providers as part of a contract for catering, cleaning, retail etc.

Estates departments disregard this at their peril: ignorance is no defence against the penalties levied against those who do not meet their obligations under the act.

For more information contact Mark Rabbett in Watts' London office on +44 (0)20 7280 8000.

Why use framework agreements?

Framework agreements have become prevalent in the public sector in recent years but in the current climate are they still the best way to get value for money from your construction team?

Framework agreements are costly and time-consuming to set up but once they are in place provide a number of benefits to the contracting authority. Not least of these is avoiding going through the tortuous OJEU process each time a contract is let. Other advantages include the ability to call on a pool of contractors or other consultants that are able to carry out the required works and at a price and to a quality that is acceptable to the organisation in question.

However, in the current downturn, consultants and contractors are hungry for work and willing to cut prices to get it. In this climate, do frameworks still represent best value?

Craig Smith, an associate with Hugh James solicitors in Cardiff says frameworks are here to stay. "Research suggests that frameworks do offer contracting authorities best value but in the current economic climate many suppliers will be prepared to offer discounted rates to get onto frameworks with Public Sector clients in the hope of securing a regular flow of work", he says.

So how can you be sure that you will get the quality of service you need if people are cutting costs?

Most modern framework agreements include provisions for monitoring performance against performance indicators. The agreements also tend

Continued on page 3...

to focus on collaborative working and so the parties involved are encouraged to communicate and resolve any problems without resorting to formal dispute resolution such as arbitration and legal proceedings.

Another important question for contracting authorities is whether or not it is possible to get rid of companies if they prove not to be performing satisfactorily.

This is a complex issue and according to Craig Smith, will depend largely on the express terms of the framework agreement. If the framework agreement does not place the contracting authority under an obligation to place orders with the supplier, that authority may wish to consider appointing an additional supplier. However, in doing so the contracting authority must still comply with public procurement legislation, which in itself has a time and cost implication.

For more information contact Mark Few in Watts' London office on +44 (0)20 7280 8000.

How will the Community Infrastructure Levy affect you?

The Community Infrastructure Levy (CIL), is a new charge to help fund much-needed infrastructure development and will apply to most construction projects. The CIL is not expected to come into force until the end of 2009 but there is uncertainty among higher education Estates Directors as to how the sector will be affected by the levy.

Land values generally increase with development. CIL captures part of that increase to fund infrastructure development at local, sub-regional (across more than one local authority area) and regional level. CIL charges will be calculated when planning permission is granted and paid at the commencement of a project and will be based on simple formulae that relate the charge to the size and character of the development in question. These charges will be defined at national level, for example pounds per square metre of floor space for commercial buildings and pounds per dwelling or per habitable room for residential property.

Local authorities will be given the flexibility to set their own charging schedules to determine how much should be paid per unit of development, according to local circumstances and at a level that encourages future development. It will not be mandatory for local authorities to introduce the CIL and they may continue to use section 106 agreements instead. However, where a CIL is introduced, this will be charged on all developments, apart from those with a very low value. The only exemption from the charge will be development undertaken by charitable organisations, which includes affordable housing.

The Planning Act 2008, which came into force in November 2008, provides the framework for the new charge. How the CIL will work in practice will be set out in secondary legislation. The majority of the detail is still under discussion, although a consultation on the draft regulations is anticipated during the first part of this year.

Once the regulations have been finalised, they will define 'owner' and 'developer' for the purposes of the CIL and will provide for joint liability (including joint and several liability) which will permit one or more persons or organisations to assume sole or joint and several liability for the charge.

For the university sector the CIL raises two issues. First, will the CIL be charged on university development and second, do universities stand to benefit from the proceeds of the CIL?

The Royal Town Planning Institute (RTPI) points out that it is already clear that the CIL will be charged on most types of development. Therefore higher education infrastructure is likely to be included.

Where universities are carrying out development on their own behalf, they will be liable for the charge. Where universities are involved in partnering agreements with external providers, for example to supply student accommodation the charge could be levied on either party depending on the way in which the agreement is set up.

CIL payments will be a deductible expense when calculating profits for corporation tax or income tax purposes. However, where the development in respect of which the CIL is paid is treated as a fixed capital asset, CIL will not be an allowable cost in computing a chargeable gain for corporation tax or capital gains tax purposes.

Part 11 of the Planning Act 2008, which deals with the CIL, includes schools and other educational facilities in its definition of 'infrastructure' that will benefit from the charge. However, until the Levy is finalised there is no indication of exactly what will and will not be included. A spokesman for the British Property Federation, which was instrumental in drawing up the framework for the levy, considers it 'unlikely' that universities will benefit but this will become clear in the next few months.

For more information contact Mark Few in Watts' London office on +44 (0)20 7280 8000.

Air-conditioning inspections now mandatory

One of the requirements of the Energy Performance in Buildings Directive, in force since the beginning of 2008, is that all buildings with air conditioning systems over 250kW should have been inspected by an accredited assessor before 4 January 2009 – and that includes university premises.

Under the Directive, all air-conditioning systems with an effective rated output of more than 12kW must be regularly inspected by an Energy Assessor. The inspections must be a maximum of 5 years apart. By 4 January 2009 all air conditioning systems over 250kW should have had their first inspection. Smaller systems – those over 12kW – must have their first inspection by 4 January 2011.

Also from 4 January 2011, if the person in control of the air conditioning system changes and the new person in control is not given an inspection report, that person must ensure the system is inspected within three months of the changeover. Facilities managers should be aware of this requirement and pass the information on to all staff with responsibility for plant and machinery within their department.

For more information contact Mark Rabbett in Watts' London office on +44 (0)20 7280 8000.

OJEU: Ten top tips

In our experience OJEU can be something of a minefield. The system is complex and as we report on the first page of this Bulletin it is vital to follow procedures to the letter.

To make the whole process less daunting for procurement officers, here are Watts' tips for making OJEU work for you – rather than the other way round.

1. Check the EU procurement thresholds for the services you are seeking to procure. It may not be necessary to utilise OJEU.

2. Allow sufficient time. The OJEU process is not a quick form of procurement. On average it can take 6 months from issuing the Notice to Contract Award (Restricted Procedure).

3. Be explicit in setting your Conditions for Participation. This is the section that should be reviewed first in all submissions to determine whether a complete review is then necessary. In essence, they are preliminary filters. A clear set of requirements here will ensure your time is spent only looking at those suppliers with the right expertise.

4. Ask your colleagues how they would answer critical questions before you publish them – do their answers provide the information you expect?

5. Always prepare an Evaluation Strategy prior to issuing a notice so that there is a common mechanism for the subsequent assessment.

6. Construct your questions in a way that are 'concrete' requiring very specific detail that leaves little to interpretation (and thus a future challenge).

7. Be specific in the way you want the submission returned, so the provider can concentrate on the performance measures vital to the success of the contract. For example, you may want to restrict the word count for general elements more than the technical elements.

8. You must inform all suppliers who submitted an offer of your decision in relation to the award of the contract. This must be done in writing by the quickest means available, as soon as possible after the award decision has been made, and include details of:
- the name of the supplier to be awarded the contract;
- the award criteria;
- the score of the bidder, and the score of the successful tenderer.

9. You must allow at least ten days between the date of despatch of this Notice of Award, and the date on which you enter into the contract (the mandatory standstill or 'ALCATEL' provision).

10. A supplier who is sent a Notice of Award may request a Debrief, and you must provide this information within a predetermined timeframe, dependant upon when the request is received.

For help and advice on procurement contact Robert Staton in Watts' London office on +44 (0)20 7280 8000.

The Watts Pocket Handbook, now available from RICS Books, includes a comprehensive section on the EU procurement rules and OJEU. For more information go to www.ricsbooks.com

The Watts Bulletin is the technical companion to the Watts Pocket Handbook, the essential guide to property and construction, as used by professionals since 1983.

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Comments, criticisms and contributions are always welcome.

The Handbook is available to purchase from www.ricsbooks.com priced £24.95.

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