



Department
of Health

Procurement News

August 2017

Welcome to 'Procurement News'.

This newsletter is for all colleagues within the Department of Health and its ALBs who have an interest in procurement and commercial activities.

You may forward to colleagues within the health family who have an interest in commercial issues. If forwarded to you, you can [sign up to receive future editions](#).

If you have anything to contribute, feedback or suggestions for future stories please [get in touch](#).

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Crown Commercial Service customer updates: August 2017

The latest issue (published 1st August) is available [here](#). This month there is news on:

- Latest aggregation opportunities
- Fleet e-Auction and customer forum
- Technology webinars
- Case studies: how 3 councils saved £335,000 on office supplies
- Upcoming events
- New frameworks: National Fuels, Demand Side Response and Managed Learning Services
- New contract notices: Public Sector Travel and Venue Services and Vehicle Conversions
- Details of our recently expired and extended frameworks

Procurement Policy Notes (PPNs)

All Procurement Policy Notes (PPN's) are published [on the CCS website here](#).

No new PPNs have been published since the last edition.

Technology and Construction Court (TCC) Guidance

The Technology and Construction Court has issued guidance on dealing with public procurement challenges. The [Guidance Note](#) acts as a form of pre-action protocol and applies from 17 July 2017.

The Guidance Note was approved by the Master of the Rolls and will form Appendix H to the TCC Guide, to be published in the next supplement to the White Book.

The Guidance Note deals with the following:

- Pre-action process and ADR
- Commencement of proceedings
- Judicial review
- Confidentiality
- Redactions
- Confidentiality rings and undertakings
- Suspension lifting applications
- Interested parties
- Expedition
- Trial reporting and judgments

Cartel Screening Tool - Competition and Markets Authority

Together with Spend Network, the Competition and Markets Authority (CMA) has developed a '[Screening for Cartels](#)' tool to help procurers screen their tender data for signs of cartel behaviour. Cartels are where suppliers work together to avoid competing for customers or contracts. One way they do that is to 'fix' tenders for contracts by agreeing what each bidder will bid.

Having a cartel in your supply chain can raise prices 30% or more. Using this [tool](#) could help you spot potential illegal cartel activity and save money for your organisation and the taxpayer.

Crown Commercial Service Aggregation Guidance

On the 21st of August CCS published new guidance covering aggregation.

The guidance explains how CCS use national buying power to bring together customers with the same or similar requirements, making the opportunity more attractive to suppliers.

The CCS aim is to ensure all customers get great value for money. The approach used for each aggregation may vary. The most common routes are national further competitions and eAuctions, or a combination of both. The full guidance can be found [here](#).

Public Call for Evidence: The House of Lords probes the impact of Brexit on Competition Policy

The House of Lords EU Committee and its six Sub-Committees are conducting a coordinated series of short inquiries looking at the key issues that will arise in the negotiations on Brexit.

The inquiry will explore:

- Opportunities and challenges in re-shaping UK competition policy post-Brexit;
- The implications of Brexit for the application and enforcement of competition law in the UK;
- Whether UK authorities have the capacity and resources to cope with additional responsibilities and a greater caseload;
- Potential state aid obligations in any UK-EU free trade agreement;
- Future cooperation between the UK and the EU on investigations and enforcement actions.

The closing date for written submission is Friday 15 September 2017. The Committee will hold oral evidence sessions for the inquiry in September and October 2017. [Click here](#) for further details.

Legal Issue: Who has standing to bring a judicial review claim for a public procurement breach?

The question was considered in **Wylde and others v Waverley Borough Council [2017] EWHC 466 (Admin)**.

Why is this question relevant?

Judicial review is a remedy of last resort so a claimant must have exhausted all other legal avenues before they may ask to bring a challenge by way of judicial review (JR). There are remedies available to bidders/would be bidders under the procurement regulations but those remedies do not extend to third parties. In such a situation bringing a JR may well be their only option.

Facts

In 2003 Waverley Borough Council (**the Council**) and a developer entered into a development agreement for the redevelopment of an area in Farnham (**the DA**). The DA contained two conditions that had to be met before the development could go ahead:

1. there had to be a minimum level of profit for the developer; and the Council had to be paid a minimum of £8.76 million for the land (the **Minimum Land Value**).
2. Between 2003 and 2016 financial appraisals, planning applications, orders for compulsory purchase of property were carried out. The DA was varied a number of times during this period.

In 2016 officers recommended to the Council that the DA be varied again because the land subject to the DA had been revalued downwards. The Council approved changes to reduce the Minimum Land Value to £3.19 million and to the developer's profit.

On 18 November 2016 (after proceedings commenced) the Council issued a voluntary ex ante transparency notice (**VEAT**) to OJEU setting out its intention to vary the DA. The Council received no responses to the VEAT so the DA was protected from the statutory remedy of ineffectiveness.

The Judicial Review

In order to bring a challenge by way of judicial review "the applicant has to have a sufficient interest in the matter to which the application relates"¹. For example a council tax payer challenging a council's financial policy may have standing.

At the hearing the parties asked the Court to decide whether or not the Claimants had standing to bring their challenge. The claimants included two councillors and various other local groups interested in this redevelopment.

The judge applied the test in Chandler². The Court of Appeal in Chandler said that for a claimant to demonstrate standing they have to:

1. be affected in some identifiable way by the decision; and
2. show that "performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him"³.

In Wylde the court held that the claimants did not have standing because, despite being local council tax payers, they had difficulty in showing that any competitive tendering exercise for the varied contract would have produced a different outcome⁴ which affected them directly.

The reason for the court's judgement was that it held any tendering opportunity for the varied DA would be available to suitable developers of which the claimants were not; and because the lack of responses to the VEAT demonstrated that the market was not interested in tendering for such an opportunity.

¹ Section 31(3) Senior Courts Act 1981

² R (on the application of Chandler) v Secretary of State [2009] ECWA Civ 1011 – a Court of Appeal case in which in obiter the court set out a possible test to use to establish standing in respect of claimants seeking permission to bring judicial review proceeds in respect of breaches of procurement law.

³ Para 77 Chandler

⁴ Para 43. Wylde