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Our ref: 200902074

Ask for: Sam Ward

☎ 01656 641167

Date: 29 June 2010

✉ Samantha.Ward@ombudsman-wales.org.uk

[REDACTED]
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Dear Mr [REDACTED] A

As you know, I have been looking into your complaint against Caerphilly County Borough Council. I have now carefully considered all the information provided by both you and the Council. This letter sets out the provisional conclusions I propose to make based on the information I have seen.

Your complaint

You complained that the Council incorrectly used the restricted accelerated tender procedure to determine its framework contract for schools transport in May/June 2009. You stated that the previous school transport contracts were due to expire in July 2009 so that the Council would have been aware that a new tender process would have been required. You therefore felt that there was no justification for the argument that economic gain was the reason for using the accelerated procedure. You felt that the use of the accelerated procedure resulted in disadvantage to some operators who were not able to obtain and submit emission data for their vehicles within the timescales. This was compounded by the fact that it was suggested that these operators could have their vehicles tested to gain the relevant CO2 emission data at a Council-run garage. This in fact was incorrect.

The Guidance

As you stated in your original complaint to this office, the European Commission issued a statement in December 2008 that, in recognition of the current economic situation, the use of the accelerated procedure for public procurement was justified throughout 2009 and 2010 for all major public projects. In January 2009, the Office of Government Commerce ("OGC") issued UK guidance on the use of the accelerated restricted procedure. Specifically, it stated that:

"The commission has not defined 'major projects' and has not stated any minimum monetary value for the types of procurement for which it considers the accelerated restricted procedure might be appropriate. In our view, the relaxation should apply to any above threshold procurement, be it works, services or supplies, for which early execution would be of benefit to industry. Authorities should still consider the need to apply the reduced timescales for any specific requirement they might have, but should be aware this will not be suitable in all cases.

Decisions on whether to use the accelerated restricted procedure remain for the contracting authority to determine. However, we advise that any authority considering whether the accelerated timescale is appropriate should first determine whether the procurement in question would meet the fundamental aim of boosting the economy through rapid execution of a contract."

What the Council had to say

As you are aware the Council has consistently stated its view that its decision to use the accelerated procedure was in line with the EC guidance on the relaxation of the rules governing the procurement procedures. I attach a copy of the Council's initial response to me.

Following further correspondence with the Council concerning the use of the accelerated procedures, the Head of Procurement has stated:

"The framework in question was established to replace an arrangement formed in 2007.

The 2007 contract was let as a framework arrangement for twelve months with an option to extend for up to a further 12 months. This option was

maladministratively and secondly, whether this has caused injustice to the complainant.

Clearly the Council gave wrong advice to those firms which were unable to produce CO2 emission details in directing them to its own garage to have their vehicles tested. As such those operators were caused additional delay in producing the correct emission data which in turn initially disadvantaged them in the process. The Council should have given a written apology via the Association to those firms who were advised to get their vehicles tested in this manner, and should now do so retrospectively. I note that the situation was to some extent rectified later in that their bids were reassessed using the correct emission data and included in the framework in December 2009. It is impossible with hindsight to determine whether some of these firms may have been offered some of the longer term contracts, over and above any other firm, had they had an opportunity to produce this information at an earlier point in the process; it would also be unfair to those firms who did provide the relevant data within the timescale and legitimately won contracts on that basis if the Council were to have attempted to look again at this. I also note that there will be a fresh tender process this year, which is what you sought in your letter to Mr Rosser in November last year. Some of the concerns that you raised relate to the 'environmental weighting' which the Council considered in awarding its contracts. As I think we have previously discussed, it is for the Council to determine what criteria it considers important in awarding contracts; it is entitled to consider such factors and this is not something that the Ombudsman can look into.

In respect of the use of the accelerated restricted procedure, I accept that you have concerns about the reason for its use. The Council has stated its view that the accelerated procedure was justified on the basis that its framework widened the participation in terms of the number of participating firms and in addition was used not just for school transport, but also contracts for other Council departments such as Social Services, who would have previously had to use their own contracting procedure in each individual case. Its view, as outlined by the Head of Procurement above, was that the new framework enabled funds to be distributed more quickly and widely in the local economy.

The EC guidance refers to a "presumption" of the accelerated procedure being used for "all major projects" and whilst the OGC notes that "major

projects" is not defined, it suggests that this in fact could be any services, supplies or works. The wording of the statement from the EC and latterly the OGC guidance is sufficiently vague to offer councils considerable scope for using the accelerated procedure. Indeed, as stated above, there is a presumption that it will be used where it would be economically advantageous.

In my view, the Council's argument that the framework provided a "rapid execution of a contract" could be viewed as somewhat tenuous. The ultimate decision on whether the Council's use of the procedure was lawful would be a matter for the courts; the Ombudsman's role is to consider whether the decision was improperly taken or wholly unreasonable. The decision to use the accelerated procedure is one which the Council is entitled to take and I have carefully considered its stated reasons for doing so in this case. On balance, there is probably sufficient justification for the use of the accelerated procedure, taking account of the reasons given by the Head of Procurement and the scope of the guidance. I am therefore unable to reach the conclusion that the Council's use of the accelerated procedure is incompatible with the guidance or wholly unreasonable to the extent that it constitutes maladministration. However, it seems to me that the ordinary restricted procedure could just as easily have been used to the same effect by starting the process earlier, given the fixed timing of the ending of the previous contract and the school year. I hope that this case highlights to the Council the importance of fully considering its reasons for using the accelerated procedure in terms of boosting the local economy through rapid execution of its contracts.

Before I make a final decision I would be happy to consider any comments you may have on this letter or any other relevant information, although I should say that this may not necessarily lead me to change my conclusions. I am giving the Council the same opportunity to comment. If you have any comments, please let me have them by **Wednesday 21 July**. If you need longer to respond, please let me know. If I have not heard from you by then, I will assume that you do not wish to respond. Once I have considered any comments, I will reach a final conclusion on your complaint and I will write to you again at that time.

Y.S.

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Our ref: 200902074

Ask for: Sam Ward

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Date: 5 August 2010

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Dear Mr [REDACTED] A

I am writing to you once again about your complaint against Caerphilly County Borough Council. May I thank you for your letter of 20 July and the additional emailed documentation. I have carefully considered the comments you have made and I have discussed some of the points that you have raised with the Director of Investigations, who is the Ombudsman's legal adviser.

It seems to me that there are three main strands to your response to the provisional findings. These are that:

1. You would like the Ombudsman to consider compensatory payments to those operators who were potentially disadvantaged in the process by being wrongly advised about the emissions test. In addition, you felt that the operators should be reimbursed the £85 fee to alter the V5 document.
2. Linked to 1 above, whilst you acknowledge that the tender criteria is a matter for the Council, you would like the Ombudsman to consider the consequences of introducing environmental criteria in 2009 only to drop it a year later. You feel that this has resulted in expense to some

operators who have invested in environmentally friendly vehicles as a result.

3. Your view is that the use of the accelerated procedure was unreasonable and inappropriate and you feel that its use does constitute maladministration by the Council.

1 and 2. In my previous letter I outlined the Ombudsman's findings about the Council's incorrect advice to operators concerning the testing of vehicles at their garage. I recommended that the Council should give a written apology for this. In its response, the Council stated that it had apologised verbally to the Association on several occasions for this mistake, but that it agreed to the recommended written apology. You have requested compensation for those who may have possibly have lost out as a result of the incorrect advice about the testing. I should at first state that the Ombudsman is not a compensatory body per se, though he can award, if he feels it is warranted, financial redress in order to put complainants back in the position that they would have been in without the maladministration. As I think that I stated in my previous letter, it would not be appropriate or practical at this late stage to re-examine the tender process to identify whether there are operators who would have been offered contracts during the period of September to December if that information had been available. I note that you state that you feel that the Council should have retrospectively looked at the issue at the time, but it was not open to the Council to reallocate tenders which had already been awarded as this would have been unfair to those who won and were carrying out those contracts. I am not persuaded that financial redress is warranted in this case particularly as your request is based on the possible award of a contract prior to December.

You have also requested compensation in terms of the inclusion of the environmental criteria last year (and then its removal), that is for those who obtained emissions data and amended the V5 certificate and those who may have invested in alternative vehicles. I am afraid that as I explained to you in my previous letter, it is up to the Council to determine the criteria used for the award of its tenders. It is not unreasonable in the case of transport to include an environmental weighting or necessarily to remove it. Indeed I note that your organisation had raised concerns with the Council about solely relying on emissions criteria. Whilst I accept that you feel that the Council's change of

criteria in this case has had a detrimental effect for some operators, it remains that the Council is entitled to set or vary its own tender criteria. This is not an issue that the Ombudsman can become involved in unless there is evidence that the Council has acted wholly unreasonably. I cannot see that there is evidence to that effect in this case.

3. I have reconsidered your arguments about the use of the accelerated tender procedure. I have already stated that in my view the Council's argument in terms of the rapid execution of a contract was tenuous. I have discussed this issue with the Ombudsman's Legal Adviser who is also of that view. However, I note your strong view that the Council's actions were such that they were incompatible with the guidance. I cannot concur with this view. The reason for this mainly relates to the wording of the guidance which was designed to give maximum scope to authorities to consider using the accelerated procedures for all procurement, including services. It seems that the central point here is whether there was economic benefit as a result of the contract. That is a difficult point for me to judge, but the Council has presented arguments that it considers this to be the case. As I stated previously, the question as to whether the Council's use of the procedure was lawful is ultimately a matter for the courts. On the basis of the evidence that I have seen and having looked closely again at the words of the guidance, I remain of the view that the Council's use of the accelerated procedure was not incompatible with the guidance nor wholly unreasonable.

I accept that you will be disappointed by my further conclusions but this is my final decision. This letter and my previous letter of 29 June 2010 constitute the final report of my findings and conclude the investigation of your complaint. I will be sending a copy to the Council. The decisions I have reached are based on evidence provided by you and the Council. There is no appeal available against this decision unless you can provide additional evidence that I have not previously had available to me.

The Ombudsman's office prepares an anonymised summary of every case investigated. The Ombudsman is obliged to report on the work of his office and the summaries can be used in information published by the Ombudsman from time to time, and may be placed on his website. I attach a copy of the summary prepared about your complaint. As you will see, you cannot be identified from the information contained in the summary.

Please let my office know if you want any documents you have provided to be returned to you. We routinely destroy our files 15 months after the case is closed.

Yours sincerely,

Sam Ward
Investigator

FOOTNOTE

This letter constitutes a report under section 21 of the Public Services Ombudsman for Wales Act (2005) and is issued under the delegated authority of the Ombudsman.