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BRIEFING

PROCUREMENT UPDATE – OCTOBER 2002

INTRODUCTION

This briefing is designed to bring to the attention of officers engaged in procurement significant changes that have been shaping this key Council activity since March 2002.

The application of best practice and the knowledge of up to date proposals are necessary if the Council's procurement is to be economic, efficient and effective. Officers need to read it so that they can identify key commercial issues and take advice where necessary.

Colleagues in the commercial world will be more confident of dealing with and competing for contracts with an authority that understands and applies best practice in procurement.

The bulletin covers: -

- **Part II Local Government Act 1998** – Limitations on the use of approved lists. Where the Council joins in joint commissioning / procurement by a consortium, it has to be in a position to justify the selection of a particular tenderer.
- The **Two Tier Workforce** document produced by the Secretary of State for Transport, Local Government and the Regions in March 2002. This underlines the importance of identifying TUPE

issues in a contract where the Council is the employer / bidding for the work.

- The proposed **Code of Practice** in the draft circular on **Best Value and Performance Improvement** issued by ODPM in July 2002. If this code is implemented, the Council's TUPE clauses in its contracts will require updating, and a monitoring regime established.
- Recent case law advocating **ADR** and the changes in the Council's adjudication scheme emphasise the application of best practice for dispute resolution.
- The use of the **Pre-Action Protocol for Judicial Review** under the Civil Procedure Rules. Prompt action is required to respond to claimants if the Council's ability to defend a challenge in a Judicial Review is to be protected.
- The draft **Local Government Bill** proposes to give local authorities wider powers to charge and trade, but this is dependant on their Comprehensive Performance Assessment. This will affect the Council's ability to provide services to private companies and to charge for a range of economic, social and environmental initiatives.

- A recent decision under the Competition Act 1998 makes it clear that a public authority engaged in procurement is subject to the **Chapter II prohibition (abuse of a dominant position)** under the Competition Act 1998.

PART II LOCAL GOVERNMENT ACT 1988

1. DTLR issued guidance to local authorities on Part II Local Government Act 1988 ('1988 Act') on 22nd February 2002. This focused on the **use of approved lists**, in particular Constructionline, and the position of contractors who are members of an industry or trade association. The Secretary of State's view on the issues included the following:-

- The prohibition in Section 22 (1) 1988 Act on public authorities requiring a person to pay any sum as a condition of his inclusion or continued inclusion on a select list only applies to public authorities and therefore it does not apply to commercial list providers. However where an authority contributes to the design or contents of a list then this could be construed as "maintaining" a list and so falling in the scope of Section 22 (1).
- There is **no prohibition on the private sector for charging for any list** they maintain nor is there any prohibition of the local authority using an approved list drawn up by another organisation such as Constructionline.
- The use by authorities of appropriately recognised databases such as Constructionline does not obviate the need to follow **European Public Procurement procedures** ('European

Procedures') where relevant. The presence of a firm on the database does not automatically mean that it should be invited to tender, nor can the absence of a contractor from a database preclude a potential contractor from consideration.

- Where the European Procedures apply inclusion on any list does not automatically pre-qualify any firm so that they can simply be invited to tender - firms must respond to the advertisement if they wish to be considered. Nor may a firm be excluded from tendering because it is not registered on any list.
 - The Treaty principles of **equality, transparency and freedom of movement** apply even where the European Procedures do not. Local authorities should not, therefore, discriminate against firms from other Member States or knowingly make use of lists which do so.
2. Contracting authorities should not effectively delegate the selection of tenderers to the list providers. It is the contracting authority who must take this decision although, in reaching its decision, it can take account of relevant information from a list provider.
 3. DTLR also reviewed one particular non commercial matters which can be taken into account in selecting a tenderer in Section 17 (5) (f) 1988 Act namely:-

"Any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees."
 4. The Secretary of State does not consider the 1988 Act should be interpreted as excluding tenderers from the tender process simply because they are members of an

industry body. However whilst membership of a trade association may be taken as fulfilling certain pre-qualification conditions, local authorities should be aware that this route cannot be used to exclude non-members from a contracting process if they can demonstrate the ability to meet the same conditions. This is in the absence of any other statutory requirement on contractors to hold membership of an industry scheme.

Implications for BCC

BCC may join in joint commissioning / a procurement by a consortium. It is BCC that has to be in a position to justify the decision to select a particular tenderer.

BEST VALUE PERFORMANCE IMPROVEMENT – PROCUREMENT PRACTICE

5. The Office of the Deputy Prime Minister (“ODPM”) published on 23rd July 2002 a Consultation Paper on the draft circular on Best Value Performance Improvement. It is intended that ETC Circular 02/2001 is superseded by the new circular when that comes into force. The draft circular at Annex B addresses under the heading of Best Value and Procurement: Handling of Workforce Matters in Contracting a number of issues including the principles of good procurement practice. This Annex when finalised will become guidance issued by the Secretary of State under Section 19 (4) Local Government Act 1999. The content of Annex B is not fundamentally different from Parts II and III of ETC 02/2001. The following however are key differences: -

- **Staff and unions** should be involved in the **option appraisal stage**, and where there is a decision to outsource, staff and unions should be involved in the **selection process** and in the subsequent detailed work around the transfer.
- In the context of good procurement reference is made to **the joint DETR / Local Government Association task force** to review commissioning and procurement practice, chaired by Sir Ian Byatt which reported on June 2001 and the joint Government / Local Government Association’s response published in July 2002.
- The modifications made by the Local Government Best Value (Exclusion of Non-Commercial Considerations) Order 2001 SI 2001 No 909 permit best value authorities to follow the **4ps guidance** to the extent that it is relevant to the performance of a particular contract.
- Reference is made to another model namely the “continuous dialogue” approach by the NHS. NHS trusts have to follow a Code of Practice designed to involve staff and their representatives in a process of continuous dialogue during the PFI procurement process. This recognises that the role of trade unions is important in informing an NHS’s decision but the correct balance must be struck between an informed, constructive dialogue and observing the EU procurement process.

Two Tier Workforce

6. On 26th March 2002 the Secretary of State for Transport, Local Government and the Regions issued a letter proposing changes which are

designed to be effective in stopping abuse in local authority contracting out process and to create a fair approach which would recognise the legitimate interests of all sides. The proposals would ensure that if local authorities select private or voluntary sector partners, it would be on the basis of their ability to deliver high-quality services, not by cutting costs by driving down staff terms and conditions. It would also prevent good contractors with high employment standards from being undercut by those willing to abuse the system. The proposals are:-

- To legislate to make statutory within local government the provisions in the **Cabinet Office Statement of Practice on Staff Transfers in the Public Sector** dated January 2000 and the Annex to it, **A Fair Deal for Staff Pensions**. This would ensure that contracting exercises are conducted on the basis that **TUPE will apply, unless there are exceptional circumstances** and that transferees will be offered either retention of the Local Government Pension Scheme (“**LGPS**”) or a broadly comparable scheme.
- DTLR (now ODPM) to draw up a **Code of Practice** on the treatment of **new recruits** working on local authority contracts alongside transferred staff. The Code would **oblige contractors to offer employment to new staff on fair and reasonable terms and conditions** which are, overall, **broadly comparable to those of transferred employees**, and that take into account the need to recruit and retain quality employees and conditions in local labour markets, and that offer reasonable pension arrangements as described below.

- The Code to include the requirement on contractors to offer **new recruits** working on local authority contracts alongside transferred staff one of the following **pension provision arrangements**, which is intended broadly to reflect the tradition of good pension provision that has been available within local government: -
 - ❖ Membership of the LGPS; or
 - ❖ Membership of a good quality employer pension scheme; or
 - ❖ Employer contribution to stakeholder pensions matching those of the employee to a maximum of 6%.
- The Code to include a requirement for **consultation rights** for recognised unions on the terms and conditions including pensions of new recruits to these contracts.
- The Code to be supported in statutory guidance.
- The Code to be written into individual contracts between local authorities and contractors.
- The application of the Code to be included as part of the **Best Value inspection** and enforcement regime.
 - Best Value guidance to be revised to ensure that staff and recognised trade unions have a role in the contracting out process carried out by local authorities, drawing on appropriate aspects of the continuous dialogue model in place in the NHS.
 - The operation of the package to be kept under review to ensure

that it delivers fair terms and conditions for new recruits.

- A review and monitoring system to be established involving local authorities, contractors and unions.

Implications for BCC

- It is increasingly important to identify TUPE issues arising in a contract where BCC is the employer or is bidding
- The Code of Practice may affect competition for contracts where TUPE applies.

Proposed Code of Practice

7. The principles espoused in the Two Tier Workforce document are expanded on in the Consultation Paper on the draft circular on Best Value and Performance Improvement published by the ODPM on 23rd July 2002.
8. The **Code of Practice** is proposed to apply where in a local authority service contract there is either: -
 - A transfer of staff from the local authority to the service provider (commonly termed a vertical / first stage transfer); or
 - Staff originally transferred out from the local authority as a result of outsourcing are TUPE transferred to a new provider under a re-tender of a contract (commonly termed a

horizontal / second stage transfer).

It is intended then that the Code would form part of the service specification and conditions for all such contracts. Therefore its enforcement will be contractual.

9. The Government now intends to legislate to make the statement in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector statutory within local government. The principal requirement of the statement is that staff will transfer and that TUPE should apply, even though whether or not it applies will as always be a matter of law.
10. The Code therefore addresses treatment of **new joiners** to an outsourced workforce as follows:-
 - The service provider then has obligations to new joiners who work on a local authority contract alongside staff transferred from the local authority. The principles are that: -
 - ❖ The service provider will offer employment on fair and reasonable terms and conditions which are overall broadly comparable to those of transferred employees and that take into account the need to recruit and retain quality employees and conditions in local labour markets and that offer reasonable pension arrangements.

- ❖ The principle underpinning broad comparability is that terms and conditions (except pensions) are assessed as a package.
- ❖ The service provider will consult representatives of a trade union, where one is recognised, or other elected representatives of the employees where there is no such recognised trade union on the terms and conditions to be offered to new recruits.

11. The service provider is then required to offer new recruits taken on to work beside transferees one of the following: -

- Membership of the local government pension scheme where the employer has admitted body status within the scheme and makes the requisite contributions;
- Membership of a good quality employer pension scheme either being a contracted out, final-salary based defined benefits scheme or defined contribution scheme; or
- A stakeholder pension scheme under which the employer will match employee contributions up to 6%.

12. **Monitoring** is achieved through the service provider providing the local authority with

information as requested to allow the authority to monitor compliance with the Code. This would include terms and conditions for transferred staff and the terms and conditions for employees recruited to work on a contract after the transfer.

13. The code advises on an **escalating procedure to secure enforcement.**

- Firstly employees and recognised trade unions should endeavour to resolve complaints direct with the service provider.
- Secondly where the authority considers the service provider is not meeting its obligations or there has been a complaint from an employee or recognised trade union that it has not been able to resolve the complaint with the service provider then the authority will first seek an explanation from the service provider.
- Thirdly if the service provider's response does not satisfy the authority, it can then ask the service provider to take immediate action to remedy this.
- Fourthly if the service provider is still not complying with the Code then the authority will seek to enforce the terms of the contract incorporating the Code invoking any dispute resolution procedures in the contract as necessary.

- Finally where a service provider has not complied with the Code the authority is not then bound to consider the provider for future work.

14. Councils will then have a duty in their **Best Value Performance Plan** to certify that individual contracts comply with best value requirements including workforce requirements in this code and the accompanying statutory guidance.
15. Where a service provider transfers staff originally in the authority's employment to a **sub-contractor** in consequence of the terms of the service provider's obligations to the authority, the service provider is then responsible for the observance of this code by its sub-contractor.

Implications for BCC

The TUPE clauses in the Council's contracts would require updating and a monitoring regime established. The Legal Services Offices will produce the text as and when relevant contract conditions are being drafted.

DISPUTE RESOLUTION

16. Modern commercial contracts need to have a range of dispute resolution procedures, one of which is likely to be Alternative Dispute Resolution ("**ADR**").

Alternative Dispute Resolution

17. The landmark judgement in the case of **Frank Cowl** -v-

Plymouth City Council (2001) in the Court of Appeal sets out the paramount importance of avoiding litigation whenever this is possible. The Lord Chief Justice in that case gave a warning that:-

"The parties do not today, under the CPR [the Civil Procedure Rules], have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The court should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process."

Adjudication

18. The Legal Services Office has in July 2002 updated its standard Adjudication Scheme for use on construction contracts. The main changes are:-

- In the absence of a specified adjudicator in the scheme the Specified Nomination Body in default will be the Technology and Construction Solicitors' Association.

TeCSA will appoint an adjudicator of whichever discipline appears most appropriate to the dispute, and therefore may be a safe choice for an adjudicator nominating body.

- There is always an issue as to whether a Scheme will be wholly consistent with the Housing Grants Construction

and Regeneration Act 1996. A “severability” clause has been introduced so that if an adjudicator determines that a particular part of the Scheme is not consistent then that part can be omitted but effect given to the remainder of the Scheme.

provide for a dispute to be resolved within a reasonable time and for a minimal cost is paramount. The application of the same in a fair and consistent manner should assist in reducing unnecessary litigation and legal costs.

- The Scheme provides for the Notice Adjudication and the Response Notice to be issued by e-mail where the Referring Party identifies their e-mail address.
- The Referring Party now automatically contracts to apply for an extension of time for the adjudication process to 42 days from the issue of the Referral Notice and the adjudicator automatically consents to this. As that results in a longer decision making period the timescale for the issue of the Response Notice by the Responding Party is extended to 21 days from the receipt of the adjudicator’s notice that the adjudicator is willing to act.
- The 30 page limit on the length the Notice of Adjudication and Response Notice now only applies to the particulars of the dispute and its analysis, not to the copies of the principal documents and correspondence.

Implications for BCC

Applying best practice is essential for effective and efficient procurement. Applying the design of fair and robust Alternative Dispute Resolution procedures that

Judicial Review and Protocol

19. **Section 31 Supreme Court Act 1981, the Pre-Action Protocol for Judicial Review and Rule 54 CPR** sets out the framework for challenging a decision of a public authority by way of Judicial Review. Judicial Review had suffered in the past on account of unmeritorious claims being granted leave only to fail at the next stage once the respondent had been allowed to submit its defence.

The Pre-Action Protocol should concentrate claimants’ attention on the merits of their claim and enable judges at the permission stage to weed out unmeritorious inappropriate challenges.

20. The Pre-Action Protocol for Judicial Review (**‘the Protocol’**) applies to all claims made under Rule 54 on or after **4 March 2002**. The Protocol sets out a code of good practice and contains the steps which parties should generally follow before making a claim for Judicial Review. However the following points are significant:-

- It does not affect the time limit specified by Rule 54 (i.e. **promptly** and in any event **within 3 months** of when the grounds to make a claim first arose).

- Judicial Review may be used where there **is no right of appeal** or where **all avenues of appeal have been exhausted**. Where alternative dispute resolution procedures have not been used the Judge may refuse to hear the Judicial Review case.
 - The Protocol does not impose a greater obligation on a contracting authority to disclose documents or give reasons for its decision than that already provided in statute or common law.
 - The Protocol will not be appropriate in **urgent cases**, or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so.
 - Where the use of the Protocol is appropriate, the Court will normally expect all parties to have complied with it and will take into account compliance or non-compliance when giving directions for case management of proceedings or **making orders for costs**.
21. The Protocol directs claimants to send a **letter to the defendant before making a claim**. The purpose of the letter is to identify the issue in dispute and establish whether litigation can be avoided. A standard format is provided. The letter should contain:-
- the date and details of the **decision**, act or omission being challenged;
 - a clear **summary of the facts** on which the claim is based;
 - details of any **relevant information** the claimant is seeking and an explanation as to why this is considered relevant; and
 - the **proposed reply date**. The date will depend on the circumstances of the particular case. **Fourteen days is a reasonable time to allow in most circumstances**.
22. The claimant's letter needs to be sent to the appropriate address. Where the claim concerns a local authority, then the Protocol directs that the letter of claim is sent both to:-
- the address on the decision letter/notification; **and**
 - **their legal department**.
- A claimant should then not make a claim until the proposed reply date given in the letter before claim has passed, unless the circumstances of the case require more immediate action to be taken.
23. The defendant, following the receipt of a letter before claim, should normally respond within **14 days** using the **standard format** set out in the Protocol. Failure to do so will be taken into account by the Court and sanctions may be imposed unless there are good reasons.
24. Where it is not possible for the defendant to reply within the

proposed time limit, the defendant should send an **interim reply** and propose a reasonable extension. Where an extension is sought, reasons should be given by the defendant and where required, additional information requested. It is important to note that:-

- This will not affect the time limit for making a claim for Judicial Review;
- A request for an extension will not bind the claimant where the claimant considers this to be unreasonable;
- If the Court considers that a claim is made prematurely by a claimant it may impose sanctions.

25. If the defendant's letter of response is conceding the claim in full, it should say so in clear and unambiguous terms. The same applies if the claim is being conceded in part or not at all, in which case the letter should:-

- where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or, give a clear timescale within which the new decision will be issued;
- provide a fuller explanation for the decision, if considered appropriate;
- address any points of dispute, or explain why they cannot be

addressed;

- enclose any relevant documents requested by the claimant, or explain why the documents are not being enclosed; and
- where appropriate confirm whether or not the application for an interim remedy will be opposed.

Implications for BCC – Applying Good Practice

- Clients who receive warning letters referring to a possible Judicial Review claim or to the protocol need to send by facsimile transmission the appropriate papers to the Legal Services Office as a matter of urgency.
- Failure to respond within the 14 day deadline under the Protocol may result in the Council's response being dismissed by the court or unnecessary legal costs being awarded against it.
- Whilst BCC procurement decisions are rarely challenged the consequences are critical if a major contract is about to be awarded.

CHARGING AND TRADING BY LOCAL AUTHORITIES

26. The new proposed powers in relation to charging and trading are set out in the **draft Local Government Bill** published in June 2002.

27. The ability of English local authorities to benefit from the new powers is dependent upon

the outcome of their Comprehensive Performance Assessment (“CPA”). The Bill proposes that the Audit Commission will produce reports on the performance of local authorities in exercising their functions. Where the Secretary of State receives such a report he may then categorise all English local authorities in accordance with their categorisation in the report. Such an order will have effect from the time specified in it and for the period indicated in the order. The Council’s CPA outcome will be published on 12 December 2002.

Implications for BCC

The Council’s ability to pursue more effective partnering and to finance new initiatives by charging will be dependant on the outcome of the CPA.

Power to Charge for Discretionary Services

28. The Council may **not** charge for the provision of a service **without a statutory power which authorises it to charge.**
29. The Bill proposes a new power for a best value authority to be able to charge for a service. A local authority cannot charge for a service which it is under a **statutory duty** to provide. Also the person charged has to have agreed to the provision of that service under any other provision.
30. The new power does not apply if a local authority may charge for the service under any other provision. An authority cannot charge under the new Bill where

it is expressly prohibited from charging for the provision of the service.

31. **The amount which a local authority will be able to charge is then determined in accordance with regulations** which have still to be published. It is proposed that the regulations will limit a local authority from exceeding what will be defined as the “**proper costs**” of carrying on the function of providing that kind of service.
32. Before the Secretary of State makes regulations under the new power he will have first to have consulted with such persons as appear to him to represent best value authorities. In addition the power will obligate a best value authority to have regard to such **guidance** as the Secretary of State may issue.
33. The Bill then provides for the Secretary of State to be able by order to **disapply effectively the charging power** in relation to certain best value authorities. This means that authorities which do not achieve a particular CPA grading will not benefit from the new charging regime.
34. Further, the Secretary of State can disapply the charging power for a particular kind of service either for all best value authorities or for particular best value authorities or particular descriptions (e.g. gradings) of best value authorities. Therefore it could preclude charging for particular types of service e.g. for welfare related functions.

Implications for BCC

- There will be many economic, social, environmental initiatives which the Council may wish to undertake under Section 2 Local Government Act 2000 where the ability to charge a reasonable sum will be crucial.
- Appropriate legislation will need to be checked carefully if a charging policy is to apply to such initiatives.

Power to Trade in Function Related Activities

35. The Council and any public body designated by the Secretary of State may (including any local authority) enter into an agreement under Section 1 of the Local Authorities (Goods and Services) Act 1970 (“**the 1970 Act**”) for all or any of the following purposes: -

- the supply by the Council to the body of any goods or materials;
- the provision by the Council for the body of any administrative or professional or technical services;
- the use by the body of any vehicle, plant or apparatus belonging to the Council and the placing at the disposal of the body of the services of any person employed in connection with the vehicle or other property in question;
- the carrying out by the Council of works of maintenance in connection with land or buildings for the

maintenance of which the body is responsible.

36. **It has long since been recognised that the 1970 Act does not authorise the Council to trade as widely as it would wish.**

37. Under another power in the Draft Local Government Bill it proposed that the Secretary of State may make an order which will authorise best value authorities to **trade with other persons** (i.e. to contract with other persons). However this power to trade has to be for the performance of carrying on any of the authority’s **ordinary functions**. Ordinary functions means any functions of the authority which are not functions under the new power.

This essentially means that the authority could not use the new power to deliver services for third parties, that it does not have power to provide for the performance of its own functions. The order will also make provision about the persons with whom authorities may trade.

38. The new trading power will not regulate the performance of **statutory duties** by local authorities. Nor will it authorise a local authority to do anything which is authorised by another statutory function.

39. The order also may be made to apply to all best value authorities, particular best value authorities or particular categories of best value authority e.g. by reference to their CPA grading. It may also relate to all activity in relation to a function, particular activities or

descriptions of activity. The order may also impose conditions as to how the power to trade is exercised.

40. Finally, the exercise of the power to trade has to be subject to such statutory guidance as the Secretary of State may issue.

Implications for BCC

There are many private companies for whom the Council may wish to provide services (e.g. as subcontractors) or to exploit systems that the Council has developed. It is hoped that any constraints imposed by the Government on the exercise of any such power will be minimal.

Modification of Enactments in Connection with Charging or Trading

41. The draft Bill proposes that the Secretary of State has a similar power to that which he has under Section 16 Local Government Act 1999. If the Secretary of State considers that an enactment prevents or obstructs best value authorities: -

- Charging by agreement for the provision of a discretionary service; or
- Doing for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions;
- he may make an order to modify or exclude the application of the enactment.

42. Further, the Secretary of State can use the proposed modification power to modify or exclude the application to best value authorities of other enactments which make provision for or in connection with power to charge for the provision of a discretionary service.

Implications for BCC

It is important that the Council identifies any statutory constraints that prevent it from realising the benefits that may emerge with these proposed new powers, so that they may have the maximum scope.

COMPETITION ACT 1998

43. The issue of whether the Competition Act 1998 (“**the 1998 Act**”) applies to local authorities has been the subject of debate.

44. The case of **Bettercare Group Limited –v- The Director General of Fair Trading** (2002) which was decided by the Competition Commission Appeal Tribunal determined that a public authority could be an undertaking within the 1998 Act.

45. In that case the North & West Health and Social Services Board (“**North & West**”) in Northern Ireland was both a provider of residential homes and a purchaser of nursing care services and accommodation under an annual contract. Bettercare Group Limited (“**Bettercare**”) complained to the Office of Fair Trading that North & West had abused its dominant position as the sole purchaser of care services from Bettercare by offering unreasonable low contract prices and unfair terms

contrary to the Chapter II prohibition in the 1998 Act.

46. Section 18 1998 Act provides that: -

“Conduct may, in particular, constitute such an abuse if it consists in: -

(a) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

(b) *limiting production, markets or technical development to the prejudice of consumers;*

(c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

(d) *making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.”*

47. The Tribunal decided that North & West's activities in running its statutory residential homes and the engaging in the contracting out of social care to independent providers are for the purposes of the 1998 Act to be regarded as economic activities for the purpose of deciding whether North & West is an undertaking within Section 18 (1). It is therefore now for the OFT to determine whether North & West abused its dominant position.

Implications for BCC

- Commercial activities performed by the Council may therefore fall within the controls set out in the Competition Act 1998.

- If the Council follows good procurement practice and in particular the guidance set out in DETR Environment and Transport Circular 02/2001 (and any revised guidance to be issued by the ODPM) then the prospect of a successful challenge on the basis that the Council has abused its dominant position in a procurement exercise will be minimised.

- In practice, it is more likely that a challenge to a decision made by the Council in a procurement will be by way of judicial review rather than by a complaint to the Office of Fair Trading under the 1998 Act.

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