

CJC RESPONSE TO ANNE GLOVER'S REVIEW TEAM

Who we are and why we are responding

- 01** The **Commissioning Joint Committee** is sponsored by CIPFA. Its members cover all the main disciplines involved in commissioning and competition, and also contractors' and third sector organisations. It is an independent forum, and accepts no funding from any source. It meets all its expenses from sales. It publishes guides to many aspects of commissioning, particularly those posing problems needing input from a range of disciplines. These include the different arrangements for securing the provision of services by different types of third sector body.
<http://www.cipfa.org.uk/pt/CJC/index.cfm>

The common ground

- 02** We agree absolutely that there are many types of work and services which small business are usually better able to provide than any other type of service provider.
- 03** It is therefore in the interest of public bodies to help small businesses to win more contracts for such work and services, and all public bodies have two proper and effective ways of making this happen.
- 04** The first is to **exercise their own client discretion** to package the contracts in question small enough for small businesses to be able to take them on; and to draft their selection and evaluation criteria in such a way as to bring out the strengths which are looked for from suitable small businesses. All this necessarily makes it harder for bigger service providers, and all those without the special qualities looked for, to win; but this is a fact of life in competition. It is what intelligent clients do.
- 05** The second way is for public bodies to do everything which helps small businesses and which can be done **without hindering anybody else**. The same should of course be done for any type of serious service provider. For small businesses, positive help may for example include more frequent re-opening of approved lists; and payment mechanisms which modify the financial effect on contractors of sharp and unexpected variations in demand.

Where the Review Team can help

- 06** Anything new along these lines which the Review team come up with will therefore be very helpful and constructive.
- 07** We do not however think it would be proper or helpful to establish targets for the volume or proportion of any public body's total procurement which should go to small businesses, or to urge such bodies to give contracts to small businesses simply because that is what they are.
- 08** We appreciate that ministers believe that **more work for small businesses is good for the national economy**. It is certainly **good for the local economy**, because small businesses tend to be more local than large businesses.
- 09** The Treaty of Rome 1957, and the Competition Act 1998 (section 18) do however prohibit any undertaking from "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature . . . have no connection with the subject of the contracts". Hence the **unlawfulness of 'buy British' policies**, as was established by the Harmon CFEM Façades (UK) Limited case in 1999. This restriction is duly spelled out in the EU procurement directives, but both the Treaty and the Competition Act apply whether or not the directives apply to the contract in question.

- 10 Local authorities have statutory authority under the Local Government Acts to do anything which they consider is likely to promote or improve the economic welfare of their areas, provided this is not explicitly precluded by other legislation. But the statutes just mentioned do however appear to explicitly precluded it as a factor in awarding contracts.
- 11 The Review team will no doubt make up its own mind about this restriction. But, whatever they decide, we hope they address it squarely in their report, especially if they advance the view that more work for small businesses is good for the national economy. Clarification and plain speaking are much needed on the subject; even the EU Public Contracts Directive 2004 provides for authorities to ask tenderers how much work they propose to subcontract, if for the purpose of encouraging SMEs; but does not go on to explain how this information may be used for this purpose.

Publicity

- 12 We have no objection to our response being made public.