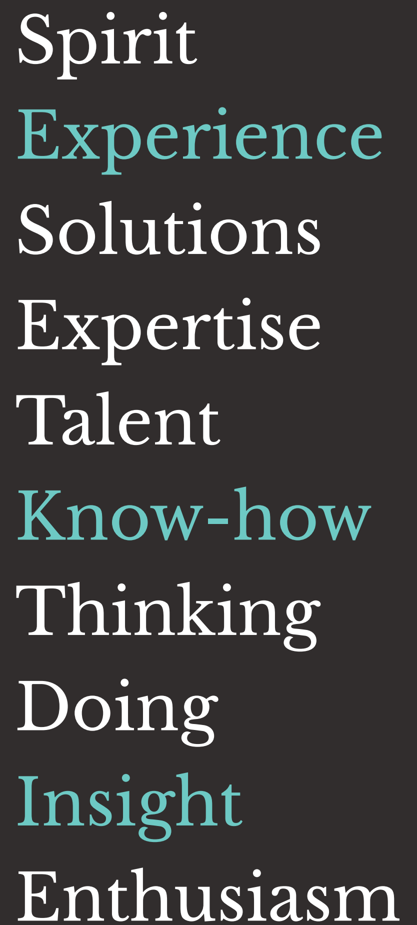

Higher Education Bulletin

August 2017

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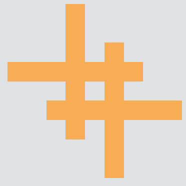

New medical schools in England

HEFCE announced on 9 August the formulaic allocation of 500 additional funded student places to existing medical schools for 2018/19. This is the first tranche of 1500 places to increase the supply of doctors announced by the Department of Health in October 2016. The criteria for a competitive process for the remaining 1000 places will be announced later this year and will be based on the **government's response to the consultation that accompanied the proposed increase.**

The substance of this response makes it likely that there will soon be a wave of new medical schools similar in number to the new foundations at the turn of the century. New schools are likely in areas of low provision of higher education, and where there are medical shortages. Applicants will need to demonstrate how they can increase participation of under-represented groups, and improve social mobility, given the disparity between POLAR quintile scores between medicine and other subjects. The criteria are also likely to favour strategies for the retention in the school's locality of trainee doctors, and how the curriculum and ethos of the new school will aid the filling of specialisms suffering critical shortage, such as general practice and psychiatry. The government's ambitions to promote innovation and market liberalisation will also feature.

We know of several universities which are planning new medical schools in anticipation of the 1000 places and the possibility of more places to follow those, given the forecasts of continued staff shortages in the NHS (there is a possible hint of more places in the government's response). The commitment to establish a medical school is a major strategic decision. It needs the allocation of considerable resources, academic and managerial expertise, and a leadership which can secure the support of the GMC, Health Education England, and partner Trusts. The new school will need an agreement with an established school which will be "the contingent partner" (to safeguard the students' interests if things go awry), and which will possibly provide the curriculum and agreed resources for its delivery in the first instance. It will typically take at least six years from the date of first admissions to the partner school for a new school to qualify for the award of a degree in its own name after a rigorous process of quality assurance conducted by the GMC. Demonstrating financial sustainability to internal and external stakeholders is also essential. This is a journey for the determined and resourceful. There are major benefits for society and the university. But those contemplating a new school or in the process of applying to the GMC need to be aware of the commitment they are making.

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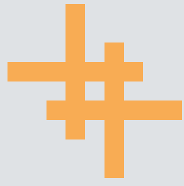

Fundraising Preference Service launched

In September 2016 **we wrote about the Fundraising Regulator's proposals for a Fundraising Preference Service** to enable people to control how they are contacted by charities.

The FPS was launched on 6 July 2017 and can be found at this website. In this article we look at the proposals which made it to the final scheme and consider if there is room for improvement.

Charities affected

The FPS will apply to all charities, including universities, in England, Wales and Northern Ireland, regardless of the amount of money spent on fundraising. Charities which spend more than £100,000 on fundraising annually are required to enrol onto the FPS, and can indicate how they would like to be notified of FPS requests. Charities which spend less than £100,000 on fundraising will be enrolled onto the FPS if a FPS request is made concerning them, in which case an email will be sent to the charity with instructions.

Up to three charities per request

The proposal to include a 're-set' option whereby a person could indicate their wish not to receive communications from all charities has not been implemented. Members of the public can indicate up to three specific charities in a single request, identifying them by their charity number or their name by using the search function on the website. There is no limit to how many requests a person can make.

The 're-set' option proposal was linked to a proposal to give fundraisers who have an existing relationship with a user of the service the right to "check in" with that person and ask them to confirm their wishes. This was intended to balance the goal of enabling users to stop unwanted communications against the interests of the charities affected. However, since users can now only make specific indications of which charities they want to block, there is no longer a need for a chance to question their intentions. Therefore, once a request is received no further communications are permitted, with the exception of necessary non-marketing communications.

Methods of communication

The FPS affects direct marketing only. Users of the service can select whether they want to stop communications by 'Telephone', 'Post', 'SMS', 'Email', or 'All'. An FPS request must be implemented within 28 days from the date of the request. This does not affect door-to-door fundraising and mail which is not directly addressed to the user but is, for example, addressed to "the occupier" (indirect marketing). This is in line with the original proposal which also referred to social media. Although social media is not covered by the FPS (since this is more akin to a broadcast than a direct communication), communications made by means of instant messaging on social media networks would constitute direct marketing and would therefore be contrary to the spirit of the FPS.

FPS vs. other services

Members of the public can still use the MPS and TPS services to stop unsolicited mail and telephone communications. The FPS does not override or absorb these services. As a result there is extensive overlap between the different preference services.

The FPS affects all direct communications (communications addressed to individuals) but not indirect communications (television adverts or mail sent indiscriminately and addressed to the "occupier"). The MPS and TPS affect all unsolicited communications (marketing material will be considered as unsolicited even when consent is given to receive marketing material from an organisation, unless a specific request for a particular communication is made), but do not affect indirect communications.

The FPS can only be used to stop specific charities and cannot be used to stop communications generally in the same way as the MPS and TPS, but it can be used to stop different forms of communication simultaneously, unlike the MPS and TPS.

Members of the public are now faced with a choice between multiple services which carry out similar, albeit not identical, functions. They are required to understand what each service does and choose which best suits their requirements, or else fill in a separate application for each service. Greater integration which goes beyond mere signposting to other services would be preferable for the purpose of enabling consumers to control what communications they receive, with ease.

Period of validity

Although it was initially proposed that a registration would be valid for two years, after which users would be reminded and required to renew their registration to keep it in force, this was not implemented and a registration remains valid until an individual "proactively chooses to re-engage with the charity".

A possible reason why this was changed is because of the decision not to include the wide-reaching 're-set' option which, without having a time limit, would have amounted to a severe hindrance on all charities. The same cannot be said of the service which has been set up, which can be considered to be more effective because it gives users greater control without having to renew their decision every couple of years.

How does this relate to the DPA?

Under the Data Protection Act 1988 any person has a right to prevent the use of his/her personal data (such as contact details) for direct marketing. This means that any person can communicate with the organisation sending the marketing material and demand that it stops. This right is retained under the new General Data Protection Regulation.

The FPS website acknowledges this fact by encouraging people to contact charities directly to stop communications and stating that the FPS can be resorted to when direct communication with the charity has broken down, has become uncomfortable or if there is uncertainty on how to stop communications.

This begs the question – what is the added benefit of the FPS?

The original proposal to have a "big red button" by which users could stop all communications caused concern among respondents to the consultation who feared it could create a risk of individuals unwittingly blocking charities they would be willing to support. The option to block up to three charities in one application and the possibility of filing an unlimited number of applications seeks to strike a balance, avoiding the feared risk by having users list each charity they want to block individually while still making it easier for people to block marketing.

The possibility of achieving this balance in other ways was explored. One suggestion was that charities which already had a relationship with a person who "pressed the big red button" would be able to send that person a one-time communication to confirm their intentions. However, it was felt that it could be frustrating for FPS users to have their decision questioned, and it would have also been difficult to establish which charities had a sufficient relationship with a person to be entitled to send such a communication. Another suggestion was that the FPS should not override existing relationships between charities and individuals. This would have partially frustrated the scope of the FPS and there would still have been the problem of establishing which relationships should not be overridden. The system as implemented warns users of the effects of their application but respects their decision by not allowing charities to further communicate with them.

Time will tell if the FPS will be successful

A Google search of the phrase "stop charity mail" does not return the FPS website on the first page of results, although it does return articles which refer to the service. This may be because the service is very new. Although marketing the service should make it more accessible, it is arguable that integrating the different marketing preference services should be a greater priority than encouraging people to use the FPS.

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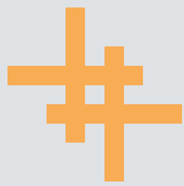


Procurement: models for price evaluation

This is another one of interest to procurement professionals who, like me, enjoying playing with spreadsheets. I thought it interesting to reflect on two different models that I have seen recently, including one *cough* following a tender on which were invited to quote. These examples demonstrate the problem of evaluating price in the context of a procurement exercise and follow a couple of discussions on price evaluation in tender exercises.

It is usual to evaluate price so that the lowest price bid achieves the highest score, which would be the most attractive financial tender. This can then be balanced against more qualitative aspects of the tender.

This price evaluation can be done in a number of ways. The most typical methods are to score the bidders against each other, e.g. on a 1 – 5 point scale (Example 1) or against each other on a relative scoring scale, which is more common (Example 2).

Example 1

Consider a fairly typical procurement evaluation, where the quality/price weighting is scored 40:60. Of the pricing scores, the tenders are ranked on a sliding scale where the lowest priced tender scores the most points (which are then weighted out of the available 60%), as follows:

Lowest price	5	60%
	4	48%
	3	36%
	2	24%
Highest price	1	12%

This is straightforward, linear and easy to understand. The tendered prices in ascending order are: £999, £1,000, £1,250, £1,500 and £2,000.

In this case the cheapest bid of £999 achieves the full 60%. The second cheapest bid, of £1,000, is only £1 (i.e. 0.1%) worse on price, but scores 12 points less. The second bidder would need to have a quality score which was evaluated as more than 12% better than the cheapest in order to win.

The most expensive bid of £2,000 is more expensive than the cheapest by a factor of 100% but it scores, in relative terms, 20% of the score of the cheapest. These scores do not seem to really reflect the value differential between these bids. This is because there is a fixed scoring difference between the bids even though the actual value differential between the bids can be either much less or much greater.

Example 2

In the second model the price evaluation methodology follows a common “cheapest bid/other bid” methodology, as set out on the Crown Commercial Service’s Digital Marketplace. The lowest price gets the highest score, and each of the other prices are marked relative to the lowest priced bid as follows:

“Fixed quotes

To score fixed price quotes, you must divide the cheapest quote by each supplier’s quote.

Example:

- supplier A’s quote is £15,000
- supplier B’s quote is £10,000
- supplier C’s quote is £30,000

To calculate a score for supplier A, divide 10,000 by 15,000. Supplier A scores 0.667.

To calculate a score for supplier B, divide 10,000 by 10,000. Supplier B scores 1.

To calculate a score for supplier C, divide 10,000 by 30,000. Supplier A scores 0.333."

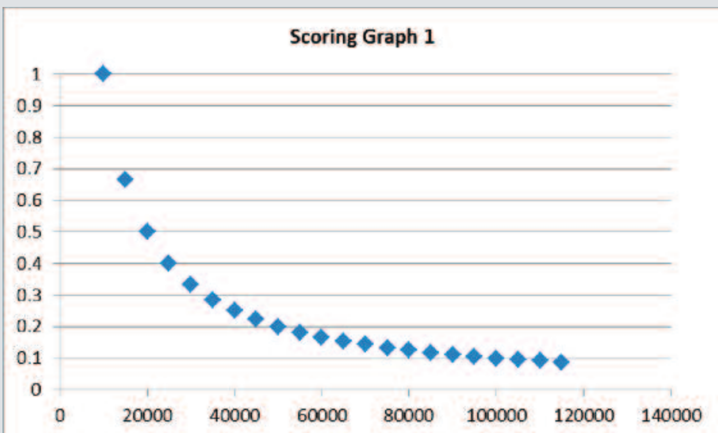
This goes part-way to solving one of the problems identified in Example 1. Using the figures from our first example, the second bidder would score 99.9%, which accurately reflects the difference in prices. But the puzzle arises when the gap gets wider.

The most expensive bid of £2,000 is more expensive than the cheapest by a factor of 100% but it scores 49.95%. This means that the second bidder might be twice as expensive, but only needs to achieve 50% better on quality to win.

As Peter Smith, an excellent procurement specialist and avid blogger has identified, this very example demonstrates how illogical the "cheapest bid/other bid" methodology is, and how it perversely rewards the more expensive bidders:

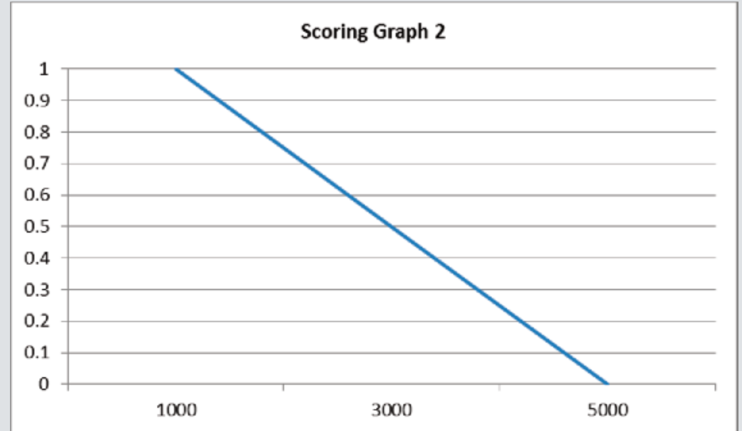
Lowest price	£10,000	1	60%
	£15,000	0.667	40%
	£30,000	0.333	20%

This example shows that the cheapest bid wins all 60 marks. The next bid which is £5,000 worse costs the bidder a score of 20% in the evaluation. The next lowest bidder only loses a further 20%, despite being a further £15,000 more expensive. The consequence of this arithmetic is that the score does not decrease in a way which reflects the increase in cost, as follows:



So what is the solution?

The best price scoring mechanism requires more thought so that the difference in scores accurately reflect the authority's pricing priorities in order that the scores more accurately reflect the difference in prices.



The difficulty with this methodology is that while the theory can be quite easily described and explained, the thinking behind it does not rely on a "one size fits all" approach. The authority will need to consider how much it would consider paying in order to have a better solution and what its overall maximum price would be (and therefore worth a zero, however good the solution would be, on the basis that it is unaffordable). This is more in-keeping with how we buy things in our own lives.

The problem with this method is that it would have to be accompanied with sufficient transparency, which might risk undermining the competition tension between bidders. But this seems, in principle, a much more logical approach to scoring price.

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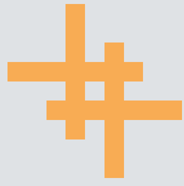

NEC4: Key Changes

An amended version of NEC4, a form of building contract which is highly popular with our higher education clients, was released in June 2017. There have been a number of major changes to the contract, which include:

1. A change of terminology, for example: “Client” replaces “Employer”, “Scope” replaces “Works Information” and “Early Warning Register” replaces “Risk Register”.

2. The NEC contract is brought in line with the JCT forms of contract by introducing a secondary option to cover contactor design; this includes a requirement for professional indemnity insurance and intellectual property rights.

3. The dispute resolution “Resolving and Avoiding Disputes” clause includes a new dispute resolution “escalation and negotiation” step. Senior representatives are sent details of a dispute and given a four week period to try to negotiate a solution. Where the Construction Act 1996 does not apply, a Dispute Avoidance Board (DAB) can be appointed to attempt to avoid litigation.

4. Collateral warranties from the Contractor to third parties and Sub-contractors to the Client and third parties are provided for under the NEC4.

5. The new Early Contractor Involvement secondary option incorporates the previous ECI clauses published by the NEC.

6. The NEC4 suite includes a number of new contracts: the Professional Service Subcontract, the Design Build Operate (DBO) Contract and the Alliance Contract.

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Employment law roundup

It has been a busy few weeks in employment law. Here is a roundup of what you might have missed...

Supreme Court rules Employment Tribunal fees to be unlawful

The long running challenge to the Employment Tribunal fees regime, brought by the trade union Unison, reached the Supreme Court earlier this year. In a historic judgment issued last month, the Supreme Court found the fees to be unlawful.

Although the Supreme Court acknowledged that the purposes of the fees regime - transferring the cost of the system to the user, incentivising early settlement and discouraging weak or vexatious claims - were legitimate, the judgment focussed on the common law right to justice. The Supreme Court was troubled by the sharp and sustained fall in the number of claims brought to the Employment Tribunal (down by approximately 70% over the last 4 years). It looked at issues of affordability and noted examples provided by Unison (on a hypothetical basis), which showed that low income individuals could potentially only afford to bring claims if they made cut backs in other areas of their spending (because of the restricted scope of the fee remission system). The Court was also troubled by the fact that it had become irrational to bring claims for small sums, given the relatively high level of fees that needed to be paid in order to bring those claims. The Court therefore found that the fees regime was unlawful as a barrier to justice. For similar reasons, the Court also found that the fees regime was a disproportionate restriction on EU-derived rights.

The practical impact of the decision is that, with immediate effect, claims brought to the Employment Tribunal need not be accompanied by the payment of a fee. Further, the government will now be required to repay all fees that it has received since the fees regime was brought into effect in July 2013.

We can anticipate a rise in the number of claims brought to the Employment Tribunal as a result, although one would not expect this to rise all the way back to the old level of claims, principally because of the new ACAS pre-claim conciliation scheme.

The ending of the fees regime makes it even more important for all universities to ensure that they have robust HR processes and seek to follow best practice and, where in doubt, seek specialist legal advice at an early stage.

Taylor Review published

The Taylor Review of Modern Working Practices was published in July 2017. The review was commissioned by the government and looked at the changing way we work, the so-called "gig economy" (following on from judicial decisions regarding employment status, such as the Uber and Deliveroo cases), issues of taxation and the National Minimum Wage. There appears to be no particularly radical thinking in the report, but it did make a number of recommendations, including the following:

- changing the name "worker" to "dependant contractor" to refer to those who have worker status but do not have employee rights, and not restricting such status to those who are required to perform work personally;
- adapting the definition of Working Time for those who work through apps and other digital platforms to ensure that they are paid

the National Minimum Wage, but reflective of their output rather than the time worked;

- a higher National Minimum Wage for those without guaranteed hours e.g. those on zero-hours contracts;
- giving employees the choice whether to receive "rolled up holiday pay" as opposed to taking leave; and
- giving agency workers the right to request a permanent contract after twelve months' work with a hirer.

The government has yet to provide a substantive response to the report and clearly has other priorities at present. It is therefore very much a case of 'watch this space' in terms of the progress of any of the recommendations of the review and more on this can potentially be expected in the autumn.

Voluntary overtime must be included in holiday pay

In *Dudley MBC -v- Willetts and Others* (UKEAT/0334/16/JOJ) the Employment Appeal Tribunal upheld a Tribunal's decision that regular payments for voluntary overtime had to be taken into account in calculating an employee's holiday pay. Under the EU Working Time directive, holiday pay must correspond to "normal remuneration" and the Tribunal was entitled to conclude on the facts that payment for voluntary overtime was made with sufficient regularity to fall within this definition.

Previous cases had considered the same issue in respect of compulsory and non guaranteed overtime and reached the same finding, but this was the first case at appellate level considering the issue of voluntary overtime (i.e. where there is no obligation on the employer to offer the overtime, nor on the part of the employee to accept it).

For a payment to count as "normal", the EAT said that it must have been paid over a sufficient period of time. This will be a question of fact and degree. However, employers whose staff work overtime, or receive other payments regularly in addition to basic salary, will now need to consider whether payments made to those employees during periods of annual leave reflect those additional sums and, if not, whether this latest case means that they need to look at this issue again.

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