Competition and Public Procurement – An Overview

The purpose of note is to offer a general overview of the main points of contact between EC competition and public procurement law and to provide the reader with basic references in this area.

I. Current Rules on Public Procurement in the EU

EC rules on public procurement include:

- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 *coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors* [OJ L 134, 30.4.2004, p. 1–113].
- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* [OJ L 134, 30.4.2004, p. 114–240].
- Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the *effectiveness of review procedures concerning the award of public contracts* [OJ L 335, 20.12.2007, p. 31-46, transposition due by 20 December 2009].
- Directive 2009/81/EC of the European Parliament and the Council of 13 July 2009 on *the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security*, and amending Directives 2004/17/EC and 2004/18/EC [OJ L 216, 20.8.2009, p. 76-136, transposition due by 21 August 2011].

II. Objectives and Scope of the Regulation of Public Procurement in the EU

Under the public procurement rules, the awarding authority must follow transparent open procedures *ensuring fair conditions of competition for suppliers*; see e.g. ECJ Judgement of 12 December 2002, in case C-470/99, *Universale Bau*, [2002] ECR I-11617, at [89] (and part IV).

Public procurement (on works, goods and services) consists of two stages: the tendering process (from the invitation to tender until the awarding decision) and the execution stage (from the conclusion of the contract onwards). Only the tendering process falls in principle (see, *infra* part VII) within the scope of the Directives, subject to certain exemptions which should be strictly interpreted. Such exceptions, *e.g.* certain cases of defence procurement not covered by the Directives, services and concessions and procurement below the jurisdictional thresholds of the EC Directives, are only subject to the EC primary rules and the general principles of EC law. Public procurement law is applicable even in the cases where a contracting authority is to conclude a contract for pecuniary interest with another entity which itself also qualifies as an awarding authority, provided that they are formally distinct from each other and independent in

regard to decision-making and meet some additional conditions; see ECJ Judgement (Grand Chamber) of 9 June 2009, in case C-480/06 – Commission v Germany [2009] ECR nyr. On the contrary, the activity of the awarding authority which exercises over the person concerned a control similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority, is excluded from the scope of the Directives; see ECJ Judgement of 18 November 1999, in case C-107/98 *Teckal Srl* [1999] ECR I-8121 at [50-51].

III. The Means for Opening up Public Markets to Competition

The subject matter and the awarding criteria must be clearly defined from the beginning in the tender documents; see *Commission v French Republic* [2004] ECR I-9845. The contracting authority has the right to choose between the award criteria of the lowest price or the most economically advantageous tender; see Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, in case C-247/02 – *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*. Tenderers must be in a position of equality in the course both of their tenders' formulation and of their assessment by the adjudicating authority; award criteria having the effect of conferring on the adjudicating authority an unrestricted freedom of choice are impermissible award criteria; see ECJ Judgement of 18 October 2001, in case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725 at [34]. Equally unacceptable are criteria not aimed at identifying the tender which is economically the most advantageous, but are instead linked to the evaluation of the tenderers' ability to perform the contract; see ECJ Judgement of 24 January 2008, in case C-532/06, *Lianakis v Alexandroupolis* [2008] nyr at [30].

Similarly, in the context of the assessment of the most economically advantageous tender, awarding authorities are allowed to include in the invitation and apply 'secondary criteria' relating to the performance of the contract, *ie* social and environmental concerns, provided (i) they are linked to the subject-matter of the contract, (ii) do not confer an unrestricted freedom of choice on the authority, (iii) are expressly mentioned in the contract documents or the tender notice, and (iv) comply with all the fundamental principles of EC law, in particular the principle of non-discrimination; see ECJ Judgement of 20 September 1988 in case 31/87, *Beentjes*, [1988] ECR 4635; and of 17 September 2002, in case C-513/99, *Concordia Bus Finland Oy*, [2002] ECR I-7213; now positive law: Art. 38 of the Directive 2004/17/EC, Art. 26 of the Directive 2004/18/EC, and Art. 20 of the Directive 2009/81/EC. The selected awarding criteria (secondary or otherwise) must be weighted by the contracting authority. An award criterion with any weighting is lawful in most circumstances; see ECJ judgement of 4 December 2003, in case C-448/01, *EVN AG and Wienstrom GmbH*, [2003] ECR I-14527 at [66-72]. In case contracting authorities did not weight the award criteria from the outset for justified reasons, they can specify them before opening the tenders, as long as certain conditions are met; see ECJ Judgement of 24 November 2005, in case C-331/04, *ATI EAC and Others*, [2005] ECR I-10109 at [32].

IV. A Different View of Competition?

Competition concerns in public procurement are primarily internal or restricted to each of the tenders or 'competitions' and only focus on the effects in the markets concerned sparingly. Nevertheless, there is an increasing trend to take 'pure' competition considerations into account when analysing procurement cases under EC law. For discussion on the role of competition under EC public procurement rules, see Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, in case C-247/02 – *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* at [28-40].

V. Application of EC Competition Rules in the Context of Public Procurement

Arts. 81 and 82 ECT

A significant number of cartel offences take place in public procurement markets. This situation is not surprising, in light of the pro-collusive features of public procurement regulation (which increase the transparency of the market and establish a clear set of rules that facilitates monitoring and retaliation, particularly in repeated interaction amongst bidders). For a recent case, see *Competition: Commission fines members of gas insulated switchgear cartel over 750 million euros*, Press Release IP/07/80, 24/01/2007, *available at* http://europa.eu/rapid/searchAction.do. See also OECD Observer—Policy Brief—*Fighting Cartels in Public Procurement*, Oct. 2008, *available at* www.oecd.org/dataoecd/45/63/41505296.pdf.

Abuses of a dominant position against the public buyer are rare, since public buyers are usually power buyers and can countervail the market power of firms in a dominant position. Nevertheless, they cannot be excluded automatically. The analysis, however, tends to mix issues regarding the dominant position of tenderers and that of the contracting authority. For an account of a recent case, see *Prosecutor Examines Public Procurement Interim Measures Claim*, 30 April 2009, *available at* http://www.internationallawoffice.com/Newsletters/detail.aspx?g=2c5b830f-b8a7-4d79-a4d9-6dad9c11156a.

Notwithstanding the above, public buyers are substantially excluded from the direct application of articles 81 and 82 ECT by the case-law on the concept of 'undertaking' for the purposes of EC competition law unless they develop *subsequent* economic activities; see Judgement of the Court (Grand Chamber) of 11 July 2006, in case C-205/03 P – *Federación Española de Empresa de Tecnología Sanitaria (FENIN) v Commission* [2006] ECR I-6295. So, in carrying out an activity that is well connected with the exercise of public powers and so not in itself economic in nature, the organisation is not an undertaking; see Judgement of the Court (Second Chamber) of 26 March 2009, in case C-113/07 P – *Selex Sistemi Integrati SpA v Commission and European Organisation for the Safety of Air Navigation (Eurocontrol)* [2009] ECR nyr.

Art. 86 ECT

Public procurement considerations are relevant in the analysis under art. 86 ECT, as it is involved in one of the key conditions included in the *Altmark test—ie* compliance with public procurement regulations is seen as a guarantee that the compensation satisfied to the undertaking that renders economic services in the general interest is not excessive. See Judgement of the Court of 24 July 2003, in case C-280/00 – *Altmark Trans GmbH* [2003] ECR I-7747.

Art. 87 ECT

The interrelation between State aid and public procurement is twofold. On the one hand (and building up on the conceptual basis underneath the *Altmark test*), compliance with public procurement rules excludes the existence of an 'undue economic advantage' in the award of a public contract and, consequently, determines the inapplicability of art. 87 ECT—*ie* the award of the public contract will not constitute State aid. See Assessment of the Commission of 30 May 2007, in case N 46/2007 – *Welsh Public Sector Network Scheme*, C(2007) 2212 final; and Nóra Tosics & Norbert Gaál, *Public Procurement and State Aid Control — The Issue of Economic Advantage*, 2007(3) EC COMPETITION POLICY NEWSLETTER 15 (2008).

On the other hand, recipients of State aid cannot be excluded from public tenders automatically and contracting authorities hold discretion to exclude them *exclusively* when the award of the aid was *illegal*—that is, recipients of legal and authorised State aid cannot be excluded. See Judgement of the Court (Sixth Chamber) of 7 December 2000, in case C-94/99 – *ARGE* [2000] ECR I-11037.

Merger Control under Regulation 139/2004

The fact that a merger concerns public procurement markets usually alters the 'standard' market analysis conducted by competition authorities. Since the merged entity is expected to face buyers with significant market power, the regulatory approach tends to be relatively more permissive in public procurement markets (particularly on the conceptual basis that competition is for the market, rather than in the market and that market shares are less telling or reliable in this context). See Decision of the Commission of 21 Jan 2004, in case COMP/M.3304 – *GE/Amersham*.

VII. Continuing the Opening-Up to Competition – Bridging the Two Stages

In the course of the execution of the contract, an unsuccessful tenderer must be regarded as individually concerned by an amendment of a significant condition of the invitation to tender. If, in this stage, the contracting authority is authorized to make such changes at will, the terms governing the award of the contract, as originally laid down, would be distorted. In consequence, the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no longer be guaranteed, which would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers. See ECJ Judgement of 29 April 2004, in case C-496/99 P, *CAS Succhi di Frutta*, [2004] ECR I-3801 at [120-121].

More precisely, changes of the provisions of the contract, during the currency of the contract, which are materially different in character from the original contract, demonstrate the intention of the parties to renegotiate the essential terms of that contract and so qualifies as a new award of the contract; see ECJ Judgement of 19 June 2008, in case C-454/06, *Pressetext Nachrichtenagentur GmbH*, [2008] ECR I-4401 at [34], and Opinion of Advocate General Kokott of 13 March 2008, in case C-454/06, *Pressetext Nachrichtenagentur GmbH*.

Besides, in open and restricted procedures, negotiations on fundamental aspects of contracts whose outcome is likely to distort competition are prohibited; discussions for the purposes of clarifying or supplementing the tenders are allowed provided that this does not involve discrimination; see the so-called *Ban-on-negotiations*, [OJ L 111, 30 April1994, p. 114].

VIII. Discontinuing Competition

Contracting authorities are by implication given the option to decide not to award a contract put out to tender. Such an option is neither limited to exceptional cases nor subjected to being based on serious grounds; see ECJ Judgement of 16 December 1999, in case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 at [23 and 25]; and CFI Order of 19 October 2007, *Evropaïki Dynamiki*, OJ C 315 of 22 December 2007, p. 39, at [51].

IX. Remedies

In cases of unlawfulness of a decision relating to an award criterion, the national review body is granted the option to annul the decision or to award damages (depending on the options made by the member State in the implementation of the remedies Directives). If it annuls the decision, the contracting authority is obliged to cancel the invitation to tender; ECJ Judgement of 4 December 2003, in case C-448/01, *EVN AG and Wienstrom GmbH*, [2003] ECR I-14527 at [89-95].

Member States are required to ensure that, prior to the conclusion of the contract, the award decision is in all cases open to review in a procedure whereby an applicant may have that decision *set aside* if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining a damages award. See ECJ Judgement of 28 October 1999, in case C-81/98 *Alcatel*, [1999] ECR I-7671 at [43]. The setting aside of a decision means that tenders seeking review retain their chances of winning the contract. For this reason a standstill period is required between the award decision and the conclusion of the contract; see Opinion of the Advocate General Mischo of 10 June 1999, in case C-81/98, *Alcatel*, at [38]; now positive law: Art. 2d of Directive 2007/66/EC.

Further Reading

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