



A Guide to...

Letting Low-Value Contracts

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Letting Low-Value Contracts

There is no 'if' or 'but' any longer; the European Commission (EC) has made it clear you **MUST** advertise your low-value contract notices.

In July 2006 the EC issued an INTERPRETATIVE COMMUNICATION on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. The following guidance is designed to assist public authority buyers comply with both European Court of Justice (ECJ) case-law and the EC guidance.

Introduction

While the most recent Public Procurement Directive 2004/18/EC and Utilities Directive 2004/17/EC for the award of public works, supplies and services contracts set EU-wide competitive tendering procedures rules, these rules do not apply to all public contracts. There remains a wide range of contracts that are not or only partially covered by them, such as contracts below the thresholds for application of the Public Procurement Directives and those services listed in Annex II B to Directive 2004/18/EC.

The Commission recognises these public contracts present significant opportunities for businesses in the Internal Market, particularly for SMEs and start-up companies. The Commission also considers that open and competitive award methods help the public administrations to attract a broader range of potential bidders for such contracts and therefore can contribute towards delivering better value for money, thereby ensuring the most efficient use of public money – of particular importance to public authorities in view of the budgetary problems encountered in many Member States.

The Commission further considers that transparent contract award practices are a safeguard against corruption and favouritism.

Equal Access

Public authorities should be careful not to impose conditions causing direct or indirect discrimination against potential tenderers, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity.

With regards to contracts covered by the EC Directives, if applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the principle of mutual recognition of diplomas, certificates and other evidence of formal qualifications.

Even for low-value contracts the rules for such a pre-selection procedure must be formulated and applied in a transparent and non-discriminatory manner. The number of applicants shortlisted for the final round should be such as to ensure genuine competition. In the view of the Commission, in as much as there is a sufficient number of requests to participate from suitable undertakings, genuine competition is generally ensured when three or more candidates are invited to tender.

Basic Standards for the Award of Contracts

Over the years the European Court of Justice (ECJ) has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the EC Treaty.

The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law, "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed."

These standards apply equally to the award of services concessions, to contracts below the thresholds and to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC in respect of issues not dealt with by the Directives.

The ECJ has stated explicitly that "although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty."

Contracts Relevant to the Internal Market

It should be noted that the standards derived from the EC Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. However, the Commission has set the barrier for determining such contracts at a low, not high, level and most contracts, other than those very low in value, are captured.

In this regard, the ECJ considers that in individual cases, "because of special circumstances, such as a very modest economic interest at stake", a contract award would be of no interest to suppliers located in other Member States. In such a case, "the effects on the fundamental freedoms are... to be regarded as too uncertain and indirect" to warrant the application of standards derived from primary Community law.

It is the responsibility of the individual contracting authorities to decide whether an intended contract award might potentially be of interest to suppliers located in other Member States.

In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as:

- a) the subject-matter of the contract
- b) its estimated value
- c) the specifics of the sector concerned (size and structure of the market, commercial practices, etc) and
- d) the geographic location of the place of performance

If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Community law and ensure adequate advertising, and the higher the contract value or the more specialised the requirement, the greater the exposure.

It is also UK Government policy that contracts of a value under £100,000 be openly competed to ensure SMEs have greater access to public sector contracts.

Very Low-Value Contracts

The European Court of Justice stated in the Coname judgment, it might be considered in individual cases that "because of special circumstances, such as a very modest economic interest at stake", a contract award may have no interest for suppliers located in other Member States and that "the effects on the fundamental freedoms are... to be regarded as too uncertain and indirect" to warrant the applications of standards derived from primary Community law.

In the view of the Commission, the conclusion that a contract is not relevant for the Internal Market and may therefore be awarded without observing the basic standards derived from primary Community law cannot be based on abstract criteria unrelated to the circumstances of the contract award at issue, on simple assumptions, or on a past practice not corroborated by objective elements.

It must also be remembered by UK public authorities that the Government policy is that public procurement is based on value for money principles. It could be argued that contracts of a low value could not be let using open competition without incurring such costs as to render the achievement of value for money impossible. However, this should not be used as a mechanism for avoiding publication as most costs attributable to contract advertising can be controlled; and if electronic processes are put in place, current costs can even be reduced, even after introducing open advertising.

Based on the Commission's experience in infringement cases, it can

reasonably be assumed that contracts with a value that amounts to only a minor percentage of the Directives' threshold values are in general of little interest to suppliers located in other Member States and therefore can be let without advertising.

In an earlier EC discussion document the Commission proposed that in view of these factors, it would, as a general rule, not institute proceedings either upon application or on its own initiative with regard to individual contract awards where the contract value does not exceed 10% of the threshold values provided for in Directives 2004/18/EC and 2004/17/EC.

This, however, is only an indicative value, and others' consideration is that this percentage is far too low and that a figure of 20% would be a more appropriate level. This would give rise to an advertising threshold within the UK of approximately £20,000. The Commission nevertheless reserves the right to intervene if the contract award in question corresponds to a widespread illegal practice or if there are concrete indications that a contract of below this threshold is of relevance to the Internal Market.

Obligation to Ensure Adequate Advertising

According to the ECJ, the principles of equal treatment and of non-discrimination imply an:

- obligation of transparency which consists in ensuring, for the benefit of any potential tenderer,
- a degree of advertising sufficient to enable the market to be opened up to competition

The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract.

Selective Approach

The view of the EC is that the practice of authorities contacting a number of potential tenderers is insufficient to ensure compliance with the Treaty principles, even if the authority includes undertakings from other Member States or attempts, without advertising, to reach all potential suppliers.

Such a selective approach cannot ensure the exclusion of discrimination against potential tenderers from other Member States, in particular new entrants to the market.

The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award.

A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising.

Open Advertising

The only way that the requirements laid down by the ECJ can be met is by publication of a sufficiently accessible advertisement prior to the award of the contract.

- This advertisement should be published by the contracting entity in order to open the contract award to competition.
- This advertising should be of an adequate degree in order to enable different businesses to compete so that the contract could be awarded to the tenderer submitting the best bid, thus guaranteeing that public money is well spent.
- The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to purely regional, national or EU-wide potential providers of the service.

Not only must authorities ensure a degree of advertising sufficient to ensure competition, to avoid discrimination on the grounds of nationality, they must ensure that the process allows the impartiality of procurement procedures to be reviewed.

Exceptions

Exceptions to the advertising requirement would be where the public authority concerned has a legitimate business reason for not advertising or where the contract was of such a low value that advertising would incur disproportionate costs and therefore not deliver value for money.

Example 1: Small contract – large supply base

A contract is to be let by a London borough for painting and decorating to the value of £15,000. Given the potential supply market within London, a local advertisement would be appropriate. However, if the contract was worth £120,000 obviously there would be interest beyond the London supply market and a wider advertisement would be more appropriate.

Example 2: Small contract – limited supply base

A London borough requires to let a contract valued at £15,000 for consultancy with regards to flooding issues. The supply market within London is probably very small and therefore even given the low-value of the contract an advert reaching a wider geographical area is required to comply with the Treaty. Only if the authority can demonstrate that advertising a low-value contract cannot deliver value for money or substantiate another business reason can they avoid advertising.

The cost of advertising in newspapers or trade publications cannot be considered a legitimate reason for non-advertising as other communication channels with relatively low or no cost implications are available.

In the new procurement regulations for Scotland, the Scottish Government implemented a requirement that all contract opportunities not covered by the EC Directives should normally be advertised. The Executive believes this obligation on public bodies in Scotland could provide a significant boost for SMEs, as public procurement in Scotland is estimated at around £8 billion a year.

Buying Local

The EC believes contracts of all values are still, in many instances, directly awarded to local providers without any competition. The ECJ has confirmed in its case-law that the Internal Market rules of the EC Treaty apply also to ALL contracts outside the scope of the Public Procurement Directives and that 'buying local' as a policy is a fundamental breach of the EC Treaty, even as regards below EC Directive thresholds.

Means of Advertising

The EC leaves the responsibility for deciding the most appropriate medium for advertising contracts to the contracting authorities. Their choice should be guided by an assessment of the relevance of the contract to the Internal Market, by considering its subject-matter and value, and of the customary practices in the relevant sector. In other words: the greater the interest in the contract by potential bidders from other Member States, the wider the coverage should be.

In particular, for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives, adequate advertising for such contracts will typically require publication in a medium with wide coverage.

Adequate and commonly used means of publication include:

Internet

The Internet offers a large choice of possibilities for advertising of public contracts:

Advertisements on the contracting entity's own Buyer Profile website are flexible and cost-effective. A word of caution: presentation on such a service must ensure that the information is easily identifiable and accessible. It must be easily locatable and not buried deep within a site.

While the publication of award notices arising from low-value contract notices is not obligated by the Commission, their publication is helpful to other small suppliers interested in potential sub-contractor opportunities.

The EC Directives allow for the creation of a Buyer Profile service, and within such a service low value contract award notices could easily be advertised.

Buyer Profile sites are portal websites specifically created for the advertisement of contract information and related information. A Buyer Profile website should include prior information notices, open contract notices, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

Case Study: Buyer Profile – West Midlands Police

West Midlands Police Authority previously placed low-value and specialist contract notices with publications such as the Birmingham Mail and trade publications. These adverts cost, on average, £375 each and over a period of a year the Contracts Unit placed 31 adverts costing the organisation roughly £11,600. Due to requirements to reduce costs and reduce risks of low-value advertising complaints, West Midlands Police Authority decided to develop a web-based Buyer Profile service to act as a medium between them and potential suppliers.

After researching the market, including developing an internal solution, West Midlands Police Authority decided to choose a managed solution, run by BiP Solutions. BiP is an official eSender, allowing them to transmit OJEU notices directly to the Journal using an XML gateway. This feed can be utilised to notify the market in real-time of both high and low value tenders.

The site acts as a first portal of call for suppliers and allows them to see information on how to sell to the Authority and future, current and previously awarded contracts, as well as information that will help suppliers. Over the last 12 months this service has potentially saved the Authority £9000 in advertising costs as well as improving the visibility of West Midlands Police Authority to suppliers.

The site can be viewed at <http://west-midlandspolice.g2b.info>

Case Study: National Portal for Lower-Value Contract Announcements

Supply2.gov.uk

The BIS/ED badged initiative **Supply2.gov.uk** provides a national platform specifically for the use of public authorities to advertise their lower-value contracts free of charge. Suppliers may access local contract notices free of charge or pay a small subscription fee to access opportunities from other areas and other higher-value contracts. The service not only provides an online search capability, but also an email alert service that delivers to its subscribers contract opportunities specific to their market requirements.

Public authorities may post their opportunities on the site free of charge, by completing a simple contract notice form. By so doing they are fully compliant with the EC requirement to ensure adequate advertising.

Other services such as BiP's **Contrax Weekly** publication provide, free to public authorities, contract announcements for publication in print and electronic formats. For details contact www.tendermatch.com

Print Publications

Public authorities are still free to publicise their contract announcements in national trade journals, newspapers with national or regional coverage or specialist publications. The advertising channel used should be appropriate to the size of the contract and its type of market.

Obviously, such advertising can be very expensive and cheaper electronic channels of promotion are more likely to be effective in saving resource time, creating competition and substantially lowering advertising costs.

Local Means of Publication

Contracting entities may still use local means of publication such as public authority newsletters, journals, local newspapers, or even notice boards. However, such means may ensure only strictly local publication, which might be adequate in special cases, such as very small low-value (under £20,000 recommended) contracts for which there is only a local market. Otherwise local online advertising is likely to be non-compliant with the EU Treaty requirements.

High-Value Non-OJEU Contract Announcements

The Official Journal of the European Union (OJEU) is of course the principal advertising vehicle for all contract announcements that require advertising in accordance with the EC Public Procurement Directives. It can also be used for other contract announcements which due to their value or complexity may be appropriate for publication.

Transmission of your contract notices can also be direct to OJEU; however, many, if not most, UK public authorities use an electronic gateway service to create and transmit their contract announcements. Electronic gateways reduce actual and process costs and provide the public authority with a central database of their own contracts so that they have additional management information at their fingertips.

Content of Advertising

The requirement of transparency for non-OJEU contract announcements does not necessarily imply an obligation to hold a formal invitation to tender. The advertisement may therefore be limited to a short description of the essential details of the contract to be awarded and of the award method together with an invitation to contact the contracting entity. If necessary, it might be completed by additional information available on the internet or obtainable upon request from the contracting authority.

The advertisement and any additional documentation should provide as much information as an undertaking will reasonably need to make a decision on whether to express its interest in obtaining the contract.

Authorities may take measures to limit the number of applicants invited to submit an offer. In this case, the contracting entity should provide adequate information on the mechanisms applied to select the applicants shortlisted. Provided such mechanisms do not distort, prevent or restrict competition then they can be employed.

Procedures Without Prior Publication of an Advertisement

The Public Procurement Directives allow, under certain conditions, procedures for the letting of contracts without prior publication of an advertisement. The most important cases concern situations of extreme urgency due to unforeseeable events and contracts which may, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, be executed only by one particular economic operator.

In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives. Therefore, contracting entities may award such contracts without publishing a prior advertisement, provided they meet the conditions laid down in the Directives for one of the derogations. These derogations also apply to the use of the Negotiated Procedure, as limited by the Directives.

Contract Award

The guarantee of a fair and impartial procedure is the necessary corollary of the public sector's obligation to ensure transparent advertising of contract announcements. It follows that the award has to be in line with the rules and principles of the EC Treaty so as to afford fair conditions of competition to all suppliers interested in the contract.

This can best be achieved in practice through non-discriminatory description of the subject-matter of the contract. The description of the

characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words 'or equivalent'.

In any case, it would be preferable to use more general descriptions of performance or functions.

Use of Select Lists

While select lists of suppliers can be used by public authorities as a means of identifying potential suppliers, they cannot be used as the sole source when seeking to identify potential suppliers. The Select online Supplier Information Database allows suppliers to register that information normally requested by a public authority at the expression of interest stage. This information is then made available to registered buyers.

There is no charge for suppliers seeking registration to the Select self-certification service. Nor are buyers charged for accessing supplier information. Select also provides a supplier accreditation service, should suppliers seek to reduce the uncertainty of qualification or the resource cost of applying to tender.

Supplier Accreditation Services

Suppliers and buyers may see advantages of using a supplier accreditation service to reduce administration timescales for tenders. However, accreditation should never be a prerequisite for competing for a purchaser's business.

Public bodies using a supplier pre-qualification accreditation service should be cognisant of the need to avoid creating a 'closed market' through restricting tendering opportunities to only those suppliers on the accreditation service database.

Public bodies must ensure that the tendering process does not prevent other non-registered suppliers from either seeking accreditation to the database or expressing an interest and being considered for a tender. Non-accredited suppliers seeking to tender should only be required to provide the same information as that already provided by those accredited and assessed by the authority to the same standard.

Purchasers using an accreditation service should ensure that the level of assessment to which suppliers are subject is in proportion to the level of risk associated with the business the suppliers are seeking. Assessment should not impose a disproportionate burden on suppliers.

Local authority buyers should also be aware of the legal context as regards the compliance of such a service with S22 of the 1988 Local Government Act.

National Pre-Qualification Services

Buyers should note that Constructionline is the Government-endorsed supplier pre-qualification service for public works contracts, provided under contract to BIS.

BiP's Select service is a national database of self-certified and pre-qualified suppliers and provides significant benefits to both purchasers and suppliers through the maintenance of a single central repository of supplier pre-qualification data.

Both the Constructionline and Select accreditation services are national services to which suppliers are only required to seek accreditation once for use by the whole of the public sector. Some other commercial accreditation services require suppliers to seek accreditation for every public body using their service.

Case Study

A London borough signed up to Constructionline and immediately noted that it made the procurement procedure easier, and allowed the borough to move away from using its own in-house list. This has saved them a great deal of time and resulted in administrative savings alone of £60,000.

Constructionline is the UK's register of pre-qualified local and national construction and construction-related contractors and consultants and is owned and endorsed by the BIS.

Constructionline gathers and assesses pre-qualification information on behalf of public and private sector procurers and provide them with access to over 12,500 fully accredited suppliers free of charge.

In addition, it helps contractors and consultants by reducing the need for them to fill in pre-qualification forms for every tender they seek to express an interest in, and provides them with access to over five thousands of buyers.

Appropriate Response Time-Limits

When fixing the time-limits for the receipt of requests to participate for tenders, contracting authorities must always, no matter what the value of the contract, take account of the complexity of the contract and the time required by suppliers for drawing up tenders, without prejudice to the minimum time-limits set by the Directive.

Failure to do so could result in the authority restricting, distorting or preventing competition and therefore initiate a breach of the EU Treaty principles.

The time-frame for receipt of expressions of interest, in addition to reflecting the complexity of the information being requested, must allow those interested suppliers from outwith the UK sufficient time to supply such information.

Provided the information being requested is easily capable of being delivered electronically via the internet and can be easily accessed by the provider in electronic format, it should not be considered a barrier if all potential providers (no matter where their location in the EU) are required to respond to a tight time-frame. Such a time-frame could, subject to acceptance of receipt electronically, be relatively short; again, this depends on the complexity of the procurement.

Below £20,000 Contract Value

Contracts of a value of less than £20,000 are unlikely to be attractive to suppliers in other Member States and therefore authorities could continue to use their current processes and practices for letting such contracts. They would thereby be unencumbered by considerations of the need for extended time-frames and would be free to set any reasonable time-frame for responses. A period of five days could be considered fair given that the process for suppliers tendering would be simple.

Over £20,000 Simple Contracts

The EC Procurement Directives can be considered of help in determining what an appropriate time-frame could be for contracts valued at over £20,000. The Accelerated Procedure allows for even complex procurements to stipulate a time-limit for the receipt of requests to participate of 15 days from the date on which the contract notice was sent, or ten days if the notice was sent to the OJEU by electronic means.

For lower-value contracts over £20,000 of a non-complex nature requiring limited provision of information it may be appropriate when using a restricted procedure to allow a minimum of five days for receipt



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of expressions of interest and ten days for return of tenders, provided the information is easy to provide and capable of being received by the issuing authority electronically.

Otherwise an additional five days should be provided to ensure suppliers from other countries are not disadvantaged, five days being the period of time the Commission requires if documents cannot be sent by electronic means.

If using the open procedure, provided the ITT is made available from the outset, it may be appropriate to conclude the whole process for receipt of tenders within 15 days, provided submissions can be made electronically.

Be SME-Friendly

Remember: in order to safeguard both the supplier's and the buyer's interest most authorities will not award a contract greater than approximately 25% of a supplier's annual turnover. When making this judgement, the authority should consider the annual value of the contract, not the overall value, when determining whether a small business is capable of satisfying a contract requirement.

Transparency and Selection

All participants in a tendering procedure must be able to know the applicable rules in advance and must have the certainty that these rules apply to everyone in the same way.

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a transparent and non-discriminatory manner. They can, for instance, apply objective factors such as the experience of the applicants in the sector

concerned, the size and infrastructure of their business, their technical and professional abilities, or other factors.

They may even opt for drawing lots, either exclusively or in combination with other selection criteria. In any event, the number of applicants shortlisted must take account of the need to ensure adequate competition.

Qualification Systems

Contracting authorities might consider qualification systems where a list of qualified operators is compiled by means of a sufficiently advertised, transparent and open procedure. Later, for the award of individual contracts falling within the scope of the system, the contracting entity may select the operators to be invited to submit an offer from the list of qualified operators on a non-discriminatory basis (eg random generation or by drawing in rotation from the list).

Such systems must at all times be open to suppliers to register and barriers to participation should not be introduced, such as a requirement to be pre-qualified to an accreditation service. Accreditation/pre-qualification services can be used but the requirement for suppliers to be registered must not be made mandatory.

Standardising the PQQ

To simplify the application process for low-value contracts public authorities could adopt a simple, common Pre-Qualification Questionnaire (PQQ) and make it available to suppliers for their online completion. Application onto the PQQ service would require to be accessible to suppliers at all times. When a specific contract



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opportunity arises, the authority can then advertise the requirement and direct interested suppliers to the online PQQ for completion and provide them with a unique contract response number, which when entered would notify the contracting authority of the supplier's interest and allow the buyer to view all interested suppliers as a list. From this list the buyer could then assess and invite suitable suppliers to tender. Such a system is already used by, amongst others, Scotland Excel and the DVLA.

If a supplier has previously registered their information, they only need to access their PQQ entry and enter the specific contract response number.

Contract Award Decision

It is important that the final decision of awarding a contract complies with the procedural rules laid down at the outset and that the principles of non-discrimination and equal treatment are fully respected. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer.

Judicial Protection

Principles

In the *Telaustria* judgment the ECJ stressed the importance of the possibility to review the impartiality of the procedure. Without an adequate review mechanism, compliance with the basic standards of fairness and transparency cannot be effectively guaranteed.

Directives on Review Procedures

The Directives on Review Procedures cover only contracts falling within the scope of the Public Procurement Directives. This means that in the present context they apply only to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC which exceed the thresholds for application of these Directives.

Review procedures for such contracts have to comply with the Directives on Review Procedures and the relevant case-law. These principles remained unchanged in the adopted proposal for a new Directive on Review Procedures.

Basic Standards Derived from Primary Community Law

With regard to contracts below the thresholds for application of the Public Procurement Directives, under ECJ case-law individuals are still entitled to effective judicial protection of the rights they derive from the Community legal order.

The right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. In the absence of relevant Community law provisions, it is up to the Member States to provide the necessary rules and procedures guaranteeing effective judicial protection.

Obligations to Notify Tenderers

In order to comply with this requirement of effective judicial protection, decisions adversely affecting a person having or having had an interest in obtaining the contract, such as any decision to eliminate an applicant or tenderer, should be subject to review for possible violations of the basic standards derived from primary Community law. To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review, either in the decision itself or upon request after communication of the decision.

In accordance with the case-law on judicial protection, the available remedies must not be less efficient than those applying similar claims on domestic law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness).

A breach of the duty owed in accordance with the Directives can be brought by any economic operator which, in consequence, suffers, or risks suffering, loss or damage. In Scotland those proceedings can be brought in the Sheriff Court or the Court of Session, or in England, Wales and Northern Ireland, the High Court.



For consultancy on any of the issues above, or help with a review of your processes and practices for letting contracts or training needs, consult the experts at PASS, BiP's Procurement Advice and Support Service.

Public Authority Buyer Action Plan

The following is a summary of the key actions to consider when introducing policies and practices designed to implement the European Court of Justice's rulings on low-value contract advertising and the EC interpretive guidance:

1. Ensure all relevant personnel are fully aware of the EC and ECJ guidance.
2. Review all processes and practices for advertising and letting contracts.
3. Create a below-£20,000 purchasing process and identify those with the authority to purchase.
4. Review, update and issue new standing orders covering all procurement processes.
5. For the below-£100,000 non-OJEU contract announcements, introduce completely electronic process from advertising to receipt of tenders.
6. If using the restricted procedure, determine suitable timeframe for receipt of expressions of interest and tenders specific to the contract value.
7. Set suitable timeframe for the open procedure.
8. Ensure the timescale set reflects the complexity of tenders.
9. Allow an additional five days if you accept postal delivery.
10. Ensure the process for letting contracts valued at over £100,000, which are not covered by the Directives, still complies with the basic requirements of the EU Treaty and ECJ rulings – open advertising, appropriate timescales, transparency, equal treatment, etc (adopting the OJEU timeframes for such contracts should avoid complaints).
11. Review all contract advertising channels currently used and adopt online media to reduce advertising costs and increase visibility.
12. For low-value contract announcements, advertise free of charge on the Government's low-value portal Supply2.gov.uk – Enterprise Directorate service.
13. Develop your own Buyer Profile to promote all information on how, what and when you buy, and all contract announcement information. Ensure your service is managed properly and updated on a daily basis.
14. Develop your processes so that all responses to your contract notices can be provided by suppliers online.
15. Direct interested suppliers to register their interest online in a Supplier Information Database.
16. Promote pre-qualification to suppliers in order to free both buyer and supplier resources.
17. Train your personnel in the new processes.
18. Adopt a low-value PQQ and deploy within an electronic Supplier Information Database to reduce your administration and process costs.

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- DELTA e-tendering, incorporating aXcess, Project, Select Supplier Self Certification Service and Vault: www.delta-ets.com
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Addendum

Commission Interpretative Communication

on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

INTRODUCTION

The European Community has recently adopted new directives for the award of public works, supplies and services contracts¹. They set up detailed rules on EU-wide competitive tendering procedures. However, the Public Procurement Directives do not apply to all public contracts.

There remains a wide range of contracts that are not or only partially covered by them, such as:

- Contracts below the thresholds for application of the Public Procurement Directives²;
- Contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives.

These contracts present significant opportunities for businesses in the Internal Market, particularly for SMEs and start-up companies. At the same time, open and competitive award methods help the public administrations to attract a broader range of potential bidders for such contracts and to gain from better-value offers. Ensuring the most efficient use of public money is of particular importance in view of the budgetary problems encountered in many Member States. One should also not forget that transparent contract awarding practices are a proved safeguard against corruption and favouritism.

Yet, such contracts are still in many instances directly awarded to local providers without any competition. The European Court of Justice (ECJ) has confirmed in its case-law that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives. On various occasions, Member States and stakeholders have asked the Commission for guidance on how they should apply the basic principles deriving from this case-law.

This interpretative communication addresses the two above mentioned groups of contracts not or only partially covered by the Public Procurement Directives³. The Commission sheds light on its understanding of the ECJ case-law and suggests best practices in order to help the Member States to reap the full benefit of the Internal Market. This communication does not create any new legislative rules. It should be noted that, in any event, interpretation of Community law is ultimately the role of the ECJ.

1. LEGAL BACKGROUND

1.1. Rules and principles of the EC Treaty

Contracting entities⁴ from Member States have to comply with the **rules and principles of the EC Treaty** whenever they conclude public contracts

falling into the scope of that Treaty. These principles include the **free movement of goods** (Article 28 of the EC Treaty), the **right of establishment** (Article 43), the **freedom to provide services** (Article 49), **non-discrimination and equal treatment, transparency, proportionality and mutual recognition**.

1.2. Basic standards for the award of contracts

The ECJ has developed a set of **basic standards for the award of public contracts** which are **derived directly from the rules and principles of the EC Treaty**. The principles of equal treatment and non-discrimination on grounds of nationality imply an **obligation of transparency** which, according to the ECJ case-law⁵, *“consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed”*⁶.

These standards apply to the award of services concessions, to contracts below the thresholds⁷ and to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC in respect of issues not dealt with by these Directives⁸. The ECJ stated explicitly that *“although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty”*⁹.

1.3. Relevance to the Internal Market

The standards derived from the EC Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases, *“because of special circumstances, such as a very modest economic interest at stake”*, a contract award would be of **no interest to economic operators located in other Member States**. In such a case, *“the effects on the fundamental freedoms are ... to be regarded as too uncertain and indirect”* to warrant the application of standards derived from primary Community law¹⁰.

It is the responsibility of the individual contracting entities to decide whether an intended contract award **might potentially be of interest to economic operators located in other Member States**. In the view of the Commission, this decision has to be based on an **evaluation of the individual circumstances of the case**, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.

1 Directive 2004/18/EC, OJ L 134, 30.4.2004, p. 114 and Directive 2004/17/EC, OJ L 134, 30.4.2004, p. 1 (“the Public Procurement Directives”).

2 Directive 2004/17/EC.

3 A third group of contracts not or only partially covered by the Directives are concessions. See Article 17 of Directive 2004/18/EC and Article 18 of Directive 2004/17/EC for service concessions and Articles 56 to 65 of Directive 2004/18/EC and Article 18 of Directive 2004/17/EC for works concessions. However, these are not discussed in this communication since they will be included in the follow-up to the Green Paper on Public Private Partnerships.

4 In this Communication the term “contracting entity” covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

5 Cases C-324/98 Telaustria [2000] ECR I-10745, paragraph 62, C-231/03 Coname, judgment of 21.7.2005, paragraphs 16 to 19 and C-458/03 Parking Brixen, judgment of 13.10.2005, paragraph 49.

6 Telaustria case, paragraph 62 and Parking Brixen case, paragraph 49 (emphasis added).

7 See Cases C-59/00 Bent Moustén Vestergaard [2001] ECR I-9505, paragraph 20 and C-264/03 Commission v France, judgment of 20.10.2005, paragraphs 32 and 33.

8 Case C-234/03 Contse, judgment of 27.10.2005, paragraphs 47 to 49. The Public Procurement Directives provide only a limited set of rules for these contracts, see Article 21 of Directive 2004/18/EC and Article 32 of Directive 2004/17/EC.

9 Bent Moustén Vestergaard case, paragraph 20 (emphasis added).

10 Coname case, paragraph 20 (emphasis added).

If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Community law.

When the Commission becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the **Internal Market relevance of the contract in question in the light of the individual circumstances of each case**. Infringement proceedings under Article 226 EC Treaty will be opened only in cases where **this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market**.

2. BASIC STANDARDS FOR THE AWARD OF CONTRACTS RELEVANT TO THE INTERNAL MARKET

2.1. Advertising

2.1.1. Obligation to ensure adequate advertising

According to the ECJ¹¹, the principles of equal treatment and of non-discrimination imply an **obligation of transparency** which consists in ensuring, for the benefit of any potential tenderer, **a degree of advertising sufficient to enable the market to be opened up to competition**.

The obligation of transparency requires that an **undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be in a **position to express its interest** in obtaining that contract¹².

The Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of “passive” publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising.

Therefore, the only way that the requirements laid down by the ECJ can be met is by **publication of a sufficiently accessible advertisement prior to the award of the contract**. This advertisement should be **published by the contracting entity in order to open the contract award to competition**.

2.1.2. Means of advertising

The contracting entities are responsible for deciding the most appropriate medium for advertising their contracts. Their choice should be guided by an assessment of the relevance of the contract to the Internal Market, in particular in view of its subject-matter and value and of the customary practices in the relevant sector.

The greater the interest of the contract to potential bidders from other Member States, the wider the coverage should be. In particular, adequate transparency for contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives will typically require publication in a medium with wide coverage.

Adequate and commonly used means of publication include:

- **Internet**

The wide availability and ease of use of the World Wide Web makes contract advertisements on websites far more accessible, especially for undertakings from other Member States and for SMEs looking for smaller contracts. The Internet offers a large choice of possibilities for advertising of public contracts:

- Advertisements on **the contracting entity's own website** are

flexible and cost-effective. They should be presented in a way that potential bidders can easily become aware of the information. Contracting entities might also consider publishing information on forthcoming contract awards not covered by the Public Procurement Directives as part of their **buyer profile** on the Internet¹³.

- Portal websites specifically created for contract advertisements have a higher visibility and can offer increased search options. In this respect, the setting-up of a specific platform for low value contracts with a directory for contract notices with subscription for e-mail constitutes a best practice, making full use of the Internet's possibilities in order to increase transparency and efficiency¹⁴.
- National Official Journals, national journals specialising in public procurement announcements, newspapers with national or regional coverage or specialist publications
- Local means of publication

Contracting entities may still use local means of publication such as local newspapers, municipal announcement journals or even notice boards. However, such means ensure only strictly local publication, which might be adequate in special cases, such as very small contracts for which there is only a local market.

- Official Journal of the European Union / TED (Tenders Electronic Daily)
Publication in the Official Journal is not mandatory but could be an interesting option, particularly for larger contracts.

2.1.3. Content of advertising

The ECJ has explicitly stated that the requirement of transparency does not necessarily imply an obligation to hold a formal invitation to tender¹⁵. The advertisement may therefore be limited to a short description of the essential details of the contract to be awarded and of the award method together with an invitation to contact the contracting entity. If necessary, it might be completed by additional information available on the Internet or to be obtained upon request from the contracting authority.

The advertisement and any additional documentation should provide as much information as an undertaking from another Member State will reasonably need to make a decision on whether to express its interest in obtaining the contract.

As mentioned in point 2.2.2 below, the contracting entity may take measures to limit the number of applicants invited to submit an offer. In this case, the contracting entity should provide adequate information on the mechanisms applied to select the applicants shortlisted.

2.1.4. Procedures without prior publication of an advertisement

The Public Procurement Directives contain specific derogations allowing, under certain conditions, procedures without prior publication of an advertisement¹⁶. The most important cases concern situations of extreme urgency due to unforeseeable events and contracts which may, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, be executed only by one particular economic operator.

In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives. Therefore, contracting entities may award such contracts without publishing a prior advertising, provided they meet the conditions laid down in the Directives for one of the derogations¹⁷.

2.2. Contract award

2.2.1. Principles

The ECJ stated in the *Telaustria* judgment that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to

¹¹ *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49.

¹² *Coname* case, paragraph 21.

¹³ See Annex VIII to Directive 2004/18/EC and Annex XX to Directive 2004/17/EC.

¹⁴ See for instance the newly created opportunities portal for lower value contracts in the United Kingdom, www.supply2.gov.uk 20

¹⁵ *Coname* case, paragraph 21.

¹⁶ Article 31 of Directive 2004/18/EC and Article 40(3) of Directive 2004/17/EC.

¹⁷ See Opinion of Advocate General Jacobs in Case C-525/03 *Commission v Italy*, paragraphs 46 to 48.

competition and the **impartiality of the procedures** to be reviewed. The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising.

It follows that the award has to be in line with the **rules and principles of the EC Treaty** so as to afford fair conditions of competition to all economic operators interested in the contract¹⁸.

This can be best achieved in practice through:

- Non-discriminatory description of the subject-matter of the contract
The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words "or equivalent"¹⁹. In any case, it would be preferable to use more general descriptions of performance or functions.
- Equal access for economic operators from all Member States
Contracting entities should not impose conditions causing direct or indirect discrimination against potential tenderers in other Member States, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity²⁰.
- Mutual recognition of diplomas, certificates and other evidence of formal qualifications
If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the principle of mutual recognition of diplomas, certificates and other evidence of formal qualifications.
- Appropriate time-limits
Time-limits for expression of interest and for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer.
- Transparent and objective approach
All participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way.

2.2.2. Limit on the number of applicants invited to submit an offer

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a **transparent and non-discriminatory manner**. They can, for instance, apply **objective factors** such as the experience of the applicants in the sector concerned, the size and infrastructure of their business, their technical and professional abilities or other factors. They may even opt for **drawing lots**, either exclusively or in combination with other selection criteria. In any event, the **number of applicants shortlisted** shall take account of the need to ensure adequate competition.

Alternatively, contracting entities might consider **qualification systems** where a **list of qualified operators** is compiled by means of a sufficiently advertised, transparent and open procedure. Later, for the

award of individual contracts falling within the scope of the system, the contracting entity may select the operators to be invited to submit an offer from the list of qualified operators on a non-discriminatory basis (e.g. by drawing in rotation from the list).

2.2.3. Contract award decision

It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset and that **the principles of non-discrimination and equal treatment are fully respected**. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer.

2.3. Judicial protection

2.3.1. Principles

In the *Telaustria* judgment the ECJ stressed the importance of the possibility to **review the impartiality of the procedure**. Without an adequate review mechanism, compliance with the basic standards of fairness and transparency cannot be effectively guaranteed.

2.3.2. Directives on review procedures

The Directives on review procedures²¹ cover only contracts falling within the scope of the Public Procurement Directives²². This means that in the present context they apply only to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC which exceed the thresholds for application of these Directives. Review procedures for such contracts have to comply with the Directives on review procedures and the relevant case-law. These principles remain unchanged in the recently adopted proposal for a new Directive on review procedures²³.

2.3.3. Basic standards derived from primary Community law

With regard to contracts below the thresholds for application of the Public Procurement Directives it has to be taken into account that under ECJ case-law²⁴ individuals are entitled to **effective judicial protection of the rights they derive from the Community legal order**. The right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. In the absence of relevant Community law provisions, it is up to the Member States to provide the necessary rules and procedures guaranteeing effective judicial protection.

In order to comply with this requirement of effective judicial protection, at least **decisions adversely affecting a person having or having had an interest in obtaining the contract**, such as any decision to eliminate an applicant or tenderer, should be subject to review for possible violations of the basic standards derived from primary Community law. To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review either in the decision itself or upon request after communication of the decision²⁵.

In accordance with the case-law on judicial protection, the available remedies must not be less efficient than those applying to similar claims based on domestic law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness)²⁶.

18 See Case C-470/99 *Universale-Bau AG* [2002] ECR I-11617, paragraph 93.

19 See *Bent Moustén Vestergaard* case, paragraphs 21 to 24 and Commission interpretative communication on facilitating the access of products to the markets of other Member States, OJ C 265, 4.11.2003, p. 2. Contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC have to comply with the rules on technical specifications in Article 23 of Directive 2004/18/EC and in Article 34 of Directive 2004/17/EC if they exceed the threshold for application of these Directives. Technical specifications for such contracts have to be established prior to selection of a contractor and must be made known or available to potential bidders by means that ensure transparency and place all potential bidders on equal footing, see Opinion of Advocate General Jacobs in Case C-174/03 *Impresa Portuale di Cagliari*, paragraphs 76 to 78.

20 However, the successful tenderer may be required to establish certain business infrastructure at the place of performance if this is justified by the specific circumstances of the contract.

21 Directive 89/665/EEC, OJ L 395, 30.12.1989, p. 33 and Directive 92/13/EEC, OJ L 76, 23.3.1992, p. 14.

22 See Article 72 of Directive 2004/17 and Article 81 of Directive 2004/18.

23 Commission Proposal for a Directive of the European Parliament and of the Council 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, COM(2006) 195 final.

24 See Case C-50/00 *Unión de Pequeños Agricultores* [2002] ECR I-6677, paragraph 39 and Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

25 See *Heylens* case, paragraph 15.

26 See for this principle Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paragraph 83 and Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55.

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