



Preserving Competition and Choice in Contracting – Part 2

Mark Johnson examines some more topical issues in preserving the fairness of contracting procedures.

In Part 1 of this article we reviewed how the EU state aid rules may affect the transfer of services to new providers. In this part, we focus on recent developments in the European procurement rules, implemented into UK law by the Public Contracts Regulations 2006. These rules provide a very prescriptive system designed to open up the award of public contracts for works, services and supplies to competition from firms across the European Union. Most important of these controls are: the requirement to advertise opportunities in the Official Journal of the European Union (OJEU), to use only pre-defined criteria for short-listing and contract award, to provide feedback to bidders and not to discriminate on grounds of nationality. In practice, many contracts escaped compliance with these rules, either because they were below the relevant value thresholds (currently £3,611,319 for works contracts, £144,371 for services contracts awarded by local authorities and £93,738 for services contracts with NHS bodies). In addition, certain services contracts, known as 'Part B' Services contracts, which include many health and social care services, as well as educational services, have benefited from a lighter touch regime – in particular, no requirement to advertise in OJEU, a requirement to use non-discriminatory specifications and to send a post award notice to OJEU.

However, under new guidance published by the EU Commission last year, even low value and Part B contracts could now have to be advertised and comply with the fundamental principles enshrined in the EU Treaties, such as non-discrimination, equal treatment, transparency, proportionality and mutual recognition of qualifications. The Guidance follows a line of cases decided by the European Court, in which the court stressed that the only way to ensure value and fairness in public spending and contracting is to ensure transparency. Transparency of necessity involves 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”. There are 3 main planks to the Guidance: contracts may now need to be advertised even where not formally caught by the Regulations; the process of awarding them needs to be fair, objective and transparent, which usually requires a competition; and thirdly, national courts should give appropriate protection and remedies to aggrieved bidders, which is at least equivalent to those available under the current regulations.

This Guidance is certainly controversial. Why have a value-based entry threshold and a different regime for Part B services if they still need to comply with prescriptive rules? Technically, the Guidance does not have the status of binding law in the UK, but it does provide an indication of the sort of legal argument the Commission might deploy if it decided to challenge the award of contracts by public authorities without any competition. Indeed, the first two joined test cases on this principle are pending against the Irish Government at the moment. One case concerns the provision of ambulance services by Dublin City Council on behalf of the Regional Health authority. The Government argues that this is a long-standing arrangement between two public bodies and not a contract in a contestable market. The second case concerns the arrangement

between the Irish Social Welfare Ministry and the Post Office, whereby benefit claimants can pick up benefits at a local post office. The Advocate General has delivered an opinion which invites the Court to find that these are really contracts and that the Government should have put these opportunities out to a call for tenders. The decision is awaited with some trepidation by procurers.

There is some latitude in the Guidance, however. The Guidance only applies to contracts having a "sufficient connection with the functioning of the Internal Market". What this piece of Eurospeak seems to mean is that, if the public body concludes that, because of the size, nature or location of the contract, it is likely to be of little interest to bidders based in other EU countries, it need not advertise. However, this value judgment will depend on a careful assessment of the relevant market conditions and how they could evolve. By way of example, one could argue that the market for primary care services is now becoming more international, with a number of providers originating from overseas. (out of hours doctors flying in from Germany and Sweden, dentists from Poland spring to mind). Furthermore, there is still no need to advertise if there is extreme urgency (which is not self-inflicted), or where there are genuine reasons why the contract can only be performed by one market player (for example, because he holds an exclusive patent or trade mark).

Another key question is what is a "sufficient degree of advertising"? Publicity can be both passive and active. Passive publicity would include publication on a corporate website, say in a 'procurement opportunities' section. Active publicity means taking more visible and proactive steps to bring the opportunity to the attention of the market place. Examples given of possible channels include web portals, newspapers and media, trade journals, national procurement bulletins or even a voluntary notice in OJEU. The Guidance simply says that the greater the potential interest is likely to be, the wider the coverage should be. The advert should contain, as a minimum, the essential details of the contract opportunity and the proposed process, together with contact details to find out more.

Public authorities contemplating sweetheart deals for Part B services with new providers must beware. It will in future be prudent to use some form of advertising to signpost the opportunity to a wider market. As the Guidance says:

"Ensuring the most efficient use of public money is of particular importance in view of the budgetary problems encountered in many member states... transparent contract awarding practices are a proven safeguard against corruption and favouritism".

This is a developing area of the law which will be watched with great interest by commissioners, new entrants and established providers alike.

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