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Frequently asked questions concerning the application of public procurement rules to social services of general interest

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Frequently asked questions concerning the application of public procurement rules to social services of general interest

In the framework of the consultation process launched by the Commission Communication on Social Services of General Interest (SSGI) of April 2006[1], the Commission received a number of questions concerning the application of the public procurement rules to social services of general interest (SSGI). The present document provides answers to these queries, clarifying the obligations on public authorities when procuring social services on the market. Where possible, the answers refer to case law or to specific provisions of the procurement Directives to guide interested readers who would like to have further information.

This document is a Staff Working Paper prepared by the services of the Commission. It provides technical guidance notably on the basis of a concise and sometimes simplified summary of public procurement legislation and case law related to social services of general economic interest. This document is not binding on the European Commission as an Institution.

[1] Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union - COM(2006) 177, SEC(2006) 516.

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1. DIRECT PROVISION OF SSGI

1.1. Is it still possible for a public authority to decide to provide a SSGI directly? In other words, what is the public authorities' room for manoeuvre when deciding whether to provide a service directly or to externalise it? Is such decision completely left to their discretion?

A public authority has full discretion to decide whether it provides services itself or entrusts them to a third party. Public procurement rules do only apply if the public authority opts to externalise the service provision by entrusting it to a third party against remuneration.

1.2. Community rules concerning the selection of the provider normally do not apply when public authorities provide the service directly or through an internal provider (this is referred to as an "in-house provider" situation). What are the scope and limits of the "in-house" exception?

The "in-house" exception is meant to cover a situation where a public authority decides to provide a service itself, albeit acting through a legally independent entity. In this case the public authority and the legally independent entity are effectively regarded as one. Such a relationship is neither covered by the principles of transparency, equal treatment and non-discrimination derived from the EC Treaty, nor by the public procurement Directive 2004/18/EC (hereinafter, the Directive)[2].

The conditions for the application of the "in-house" exception are that A) the public authority exercises over the legally independent entity a control which is similar to that which it exercises over its own departments and B) the legally independent entity carries out the essential part of its activities with the controlling public authority[3]. The Court of Justice has made it clear that the participation, even as a minority, of a private undertaking in the capital of a company in which the public authority is itself a participant prevents criterion A) from being fulfilled, which means that "in-house" status is then excluded. For further information please refer to the answers to questions 2.9 and 2.10.

2. EXTERNALISED PROVISION

2.1. What is the applicable legal framework when a public authority decides to externalise the provision of SSGI?

If the public authority decides to externalise the service against remuneration it has to follow the Community law rules on the award of public service contracts or public service concessions.

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2 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).

3 Case C-107/98 Teckal [1999] ECR I-8121, paragraph 50.

Two cases have to be distinguished:

A) The public authority concludes a public service contract. In this case the public authority pays the service provider a fixed remuneration. If the applicable thresholds are met[4], public service contracts are covered by the Directive. Nevertheless, contracts for social services are not subject to all the detailed rules of the Directive[5]. It results from Article 21 of the Directive that only certain specific rules of the Directive are applicable to such services. In particular, technical specifications[6] have to be drawn up at the beginning of the procurement process (see answer to question 2.2) and the outcome of the procurement procedure[7] has to be published. Furthermore, the basic principles of Community law, such as the obligation to treat economic operators equally and non-discriminatorily and to act in a transparent way have to be respected for the award of contracts for social services with cross border interest[8]. These principles, however, require only the observation of basic standards developed by the ECJ and not the compliance with the full set of provisions of Directive 2004/18/EC. Therefore, when externalising social services via a public service contract, public authorities benefit already from a larger room for manoeuvre compared to other sectors.

It is to be noted, however, that in case of mixed service contracts, including social services and other services that are fully covered by the procurement Directive[9], such as transport, research, consulting or maintenance, the Directive will apply only to a limited extent – as explained above – if the value of the social service is greater than the value of the other service[10].

For example, ambulance services have a health service and a transport service component. If the transport service exceeds the health service in value, all the provisions of the Directive will apply. If the value of the health treatment is higher, the Directive will only partially apply as described above[11].

If the contract to be awarded does not meet the threshold for application of the Directive, public authorities have nevertheless to comply with the basic rules and principles of Community law, such as the principles of equal treatment, non-discrimination and transparency. As to the exact meaning of these principles we refer to the answer to question 2.4.

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4 Article 7 of Directive 2004/18/EC.

5 Health and social services figure among the services listed in Annex II B of Directive 2004/18/EC. Contracts for such services are only subject to the a limited number of the provisions set out by the Directive (for the distinction between services listed in Annex II A and II B see Articles 20 and 21 of Directive 2004/18/EC). The annex II B also contains an explicit reference to the health and social services covered. The codes indicated can be found on the DG MARKT website www.simap.europa.eu.

6 Article 21 in connection with Article 23 of Directive 2004/18/EC.

7 Article 21 in connection with Article 35(4) of Directive 2004/18/EC.

8 See judgement of 13 November 2007 in case C-507/03, Commission/Ireland.

9 Services listed in annex II A of Directive 2004/18/EC.

10 Article 22 of Directive 2004/18/EC.

11 See Case C-76/97 Tögel [1998] ECR I-5357, paragraphs 29-40.

B) The public authority grants a service concession. In this case the public authority does not pay for the service; the remuneration consists in the right of the concessionaire to economically exploit the service[12]. The concessionaire assumes the operating risk resulting from the exploitation of the service in question. The Directive does not apply to service concessions[13]. However, public authorities granting services concessions have to comply with the basic rules and principles of Community law, in particular with the principles of transparency, equal treatment and non-discrimination[14]. As to the exact meaning of these principles we refer to the answer to question 2.4.

2.2. How to draft detailed specifications in the context of a public procurement procedure concerning services which (i) are personalised to the specific needs of individual users; (ii) address users multiple needs through an holistic approach and (iii) must be adapted, in the process of delivery, to changing situations in terms of care intensity, users' number, etc.

The Directive provides for a wide range of possibilities to set up specifications[15]. It is up to the public authorities to make full use of these possibilities by requiring bidders to develop tailor-made service concepts taking into account their specific needs in order to obtain the best possible services and the required level of quality. They may, for instance, specify that bidders have to address the particular needs of certain groups of users or that the proposed service concept must be compatible with existing structures set up by the public authorities. It is also conceivable that a public authority requires that the service is operated and evaluated in a way that involves the users. However, the bottom line is that the specifications have to be set in a way that does not discriminate or prejudge the tender procedure at the outset.

Adaptations during the lifetime of the contract are possible to the extent they do not substantially change the terms of the original tender[16]. In particular, adaptations should not be so wide that the competition could have had a different outcome if they had been known from the beginning. This is the case if potential competitors that had not submitted an offer could have been interested in participating in the tender, had they known that such changes would occur.

2.3. How to avoid creating too heavy a burden for small service providers, which are often the best equipped to deal with situations which have a strong local dimension?

It is up to the public authority to structure the tender in a way that gives small operators a chance to participate and succeed. The wider the scope of the service required and the higher thus the economic and financial requirements, the more

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12 See Article 1(4) of Directive 2004/18/EC.

13 See Article 17 of Directive 2004/18/EC.

14 See Cases C-324/98 Telaustria [2000] ECR I-10745, paragraph 62, C-231/03 Coname [2005] ECR I-7287, paragraphs 16-19 and C-458/03 Parking Brixen [2005] ECR I-8585, paragraph 49.

15 Article 23 of Directive 2004/18/EC which applies also to services listed in annex II B of that Directive, such as social services.

16 Case C-496/99 P Commission/CAS Succhi di Frutta SpA [2004] ECR I-3801, paragraph 116.

difficult it will be for small service providers to participate. In the case of bigger contracts (for instance for a bundle of services or for services to be performed at several places), the awarding authority might consider dividing the contract into different lots that are more accessible for SMEs. In general, it is advisable for public authorities to draw up tender specifications with SMEs in mind, keeping formalities at a strict minimum.

For contracts below the threshold for application of the Directive, public authorities in general have to comply with the principles of transparency, equal treatment and non-discrimination derived from the EC Treaty[17]. However, under certain conditions small local service contracts may even be awarded without complying with the principles of transparency, equal treatment and non-discrimination on the ground that they have no relevance to the Internal Market. This can happen if, in view of their particularly low value (well below the threshold for application of the Directive which amounts currently to 211 000 EUR) and of the characteristics of the social service and the market concerned, it cannot be assumed that there is any potential interest by economic operators from other Member States to provide the service in question[18].

For instance, the Commission considered in cases involving contracts for legal services with an average value around 5 000 EUR[19] or planning services between 6 000 EUR and 26 500 EUR[20] that, in view of their low value (below or about 10 % of the threshold for application of the Directive) and the individual circumstances of the cases, the contracts in question were not relevant to the Internal Market.

It is up to the public authority to evaluate the potential interest from economic operators located in other Member States on a case by case basis, unless the national law provides for specific guidance. For evaluating the potential Internal Market relevance, public authorities can refer to the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives[21]. This Communication encompasses contracts only partially covered by the Directives, such as contracts for health and social services[22]. Since the Communication contains a general interpretation of the internal market relevance under the EC Treaty, it can also be used as guidance for concessions.

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17 Case C-59/00 Bent Mousten Vestergaard [2001] ECR I-9505, paragraph 20, Case C-264/03, Commission/France, ECR [2005] I-8831, paragraphs 32, 33, Case C-6/05, Commission/Greece, judgment of 14 June 2007, paragraph 3.

18 See Case Coname, paragraph 20, in respect of service concessions.

19 See Press Release IP/07/357 of 21 March 2007.

20 See Press Release IP/06/1786 of 13 December 2006.

21 OJ C 179/2006, p. 2.

22 Mentioned in annex II B of Directive 2004/18/EC.

2.4. What are the obligations deriving from the principles of transparency and non-discrimination?

According to the case-law of the European Court of Justice the principles of transparency, equal treatment and non-discrimination require an adequate publicity of the public authority's intention to conclude a public contract or a concession. The advertisement may 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 public authority. It is essential that all potentially interested service providers have the possibility to express their interest in bidding for the contract.

The public authority may then select in a non-discriminatory and impartial way the applicants to be invited to submit an offer and eventually negotiate the terms of the contract or of the concession. During such negotiations all operators should be on an equal footing and receive the same information from the public authority.

In accordance with the ECJ case-law on effective judicial protection[23], at least decisions adversely affecting a person having or having had an interest in obtaining the contract, such as any decision to eliminate a bidder, should be subject to review for possible violations of the basic standards derived from primary Community law.

When applying these principles the public authorities can inspire themselves by the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. As already stated, this Communication also encompasses contracts only partially covered by the Directives, such as health and social services[24]. Since the Communication contains a general interpretation of the principles of transparency, equal treatment and non-discrimination, it can also be used as guidance for concessions, bearing in mind that these usually represent a value well above the thresholds of the public procurement Directives and therefore normally require a publicity in a medium with European-wide coverage.

2.5. How to reconcile public procurement procedures, which limit the number of providers selected, with the preservation of a sufficient degree of freedom of choice for SSGI users?

Public procurement procedures do not aim at limiting the number of service providers selected. Contracting authorities have full freedom to choose one or several operators to satisfy their needs. Public authorities can for example entrust the same service concession to several operators, if this is practically feasible, thereby guaranteeing a larger choice for users of the service.

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[23] See Case C-50/00 P Union de Pequeños Agricultores, paragraph 39, and Case 222/86 Heylens, paragraph 14.

[24] Mentioned in annex II B of Directive 2004/18/EC.

2.6. Is it allowed to introduce as a criterion for the selection of a service provider its familiarity with the local context, this aspect being often essential for the successful provision of an SSGI?

EC public procurement rules aim at ensuring fair competition among operators across Europe to provide better value for money to the public authority. A requirement of familiarity with the local context might lead to an unlawful discrimination of service providers from abroad. At the same time, it risks reducing the public authority's choice to a small number of local operators and consequently diminishing the beneficial effect of European wide competition.

Nevertheless, certain requirements related to the local context may be acceptable if they can be justified by the particularities of the service to be provided (type of service and/or categories of users) and are strictly related to the performance of the contract.

Examples:

- A public authority may, for instance, require that the successful tenderer establishes a local infrastructure such as an office or a workshop or deploys specific equipment at the place of performance if this is necessary for the provision of the service.

- A municipal authority intending to put in place a shelter for women in difficulty, mainly addressed to women from a specific cultural minority, may specify in the call for tenders that the service provider should already have the experience of this kind of services in an environment presenting similar social and economic characteristics and that the employees who will be in contact with and/or address the needs of the women in difficulty should be sufficiently familiar with the relevant cultural and linguistic context.

- A public authority that intends to put in place a job placement service focused in particular on young adults from disadvantaged areas and addressing in an integrated way the specific difficulties encountered by the users (e.g. mental health problems, alcohol or drug addictions, social housing and indebtedness) might specify that the service provider should have experience with this kind of services for similar target groups. It may also indicate that the service provider should ensure that as of the beginning of service provision the employees dealing with the users have a knowledge of the already existing networks of social actors with whom they will need to liaise in order to address in an integrated way the needs of the young unemployed adults.

In any event, a restriction of that kind must not go beyond what is strictly necessary to ensure an adequate service provision. The ECJ decided, for example, that in tendering a public contract for health services of home respiratory treatments a public authority cannot require potential tenderer to

have, at the time when the tender is submitted, an office open to the public in the capital of the province where the service is to be provided[25].

It is the responsibility of the public authority to make sure that such conditions are objectively justified and do not result in a discriminatory treatment by unduly favouring certain groups of bidders, in particular local undertakings or incumbent service providers.

The possible direct award of low-value contracts to small local service providers has already been addressed in the answer to question 2.3.

2.7. Is it allowed to limit the selection only to non-profit service providers?

Two situations have to be distinguished.

Individual contracting authorities can not decide themselves to limit a tender procedure to non-profit service providers. The Directive is based on the principle that all economic operators are treated equally and non-discriminatorily[26]. It is therefore not possible under the Directive to reserve tenders to specific categories of undertakings[27], such as non-profit organizations. The provisions mentioned in this paragraph apply to all services, including those only partially covered by the Directive, such as social services[28].

However, a national law regulating a particular activity might, in exceptional cases, provide for a restricted access to certain services for the benefit of non-profit organizations. In this case public authorities would be authorized to limit participation in a tender procedure to such non-profit organizations, if the law is in conformity with European law. Nevertheless, such a national law would constitute a restriction to Articles 43 and 49 of the EC Treaty, on the freedom of establishment and the free movement of services and would have to be justified on a case by case basis. On the basis of the case-law of the Court of justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social welfare system[29].

2.8. Do public authorities still have the possibility to negotiate with service providers during the selection process? This is particularly important for SSGI as public authorities are not always in a position to define very precisely their requirements at the beginning of the process. Discussion

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25 Case C-234/03 Contse [2005] ECR I-9315, paragraph 79.

26 Article 2 of Directive 2004/18/EC.

27 This is why a specific exception had to be introduced in the Directive to allow Member States to reserve contracts to a particular category of undertakings, namely sheltered workshops where most of the employees concerned are handicapped persons, see Article 19 of Directive 2004/18/EC.

28 The distinction between services of annex IIA or IIB is only relevant as from Article 20 onwards.

29 See Case C-70/95 Sodemare [1997] ECR I-3395.

with potential service providers is therefore sometimes necessary to help public authorities to define these requirements.

As described in the answers to questions 2.2 and 2.4, negotiated procedures can be used for procuring health or social services, whether it concerns a public contract or a concession. However, the public authority has to make sure that operators invited to participate in a negotiated procedure are treated equally.

2.9. To what extent do public procurement rules apply to inter-municipal cooperation? This cooperation could take different shapes, e.g. one municipality buying a service from another; two municipalities organising together a call for tender or creating a new entity for the provision of an SSGI, etc.

Public procurement rules apply when a public authority intends to conclude a service contract for remuneration with a third party[30]. It does not make a difference, whether this third party is a private operator or another public authority.

However, as the following examples illustrate, there are situations where public entities entrust economic activities to other public entities or perform such activities jointly with other public entities without being bound by EC public procurement rules.

For instance, public authorities such as municipalities have of course the possibility of organising a common call for tenders. One public authority can for example carry out a procurement procedure for itself and for another public authority[31], provided that this joint procurement is announced at the beginning of the procurement process.

Moreover, several public authorities may create a new entity such as an association to which they completely transfer a particular task. In such a situation the public authorities do not retain any control over the service exercised, which is performed by the new entity in full independence under its sole responsibility. In such a case, no service is provided and therefore neither the EC Treaty nor the Directive applies[32].

In addition, if public authorities establish structures of mutual assistance and cooperation without remuneration, there is no service provision within the meaning of the EC Treaty and Community law is not applicable.

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30 See Cases C-107/98 Teckal [1999] ECR I-8121, paragraph 51, C-94/99 ARGE [2000] ECR I-11037, paragraph 40, C-220/05 Auroux [2007] I-389, paragraph 62.

31 See Article 11 of Directive 2004/18/EC on central purchasing bodies.

32 See Commission press release IP/07/357 of 21.3.2007 stating that In the Commission's view, the complete transfer of a public task from one public entity to another, to be performed by the transferee in full independence and under its own responsibility, does not imply the provision of services for remuneration within the meaning of Article 49 EC Treaty. Such a transfer of public tasks constitutes an act of internal organization of the public administration of the Member State in question. As such, it is not subject to the application of EU law and its basic freedoms.

2.10. To what extent do public procurement rules apply to public-private partnerships (PPPs)?

As already set out in the answer to question 1.2, there is no "in-house" relationship between a public authority and a public-private entity, in which the public authority participates together with a private party. The consequence of this is that services entrusted to the public-private entity have to be tendered in accordance with the procurement rules of the EC Treaty or the public procurement Directives[33] .

When the public authority organizes a public procurement procedure to select the private partner who will perform the service contract or service concession in question together with the public authority within the framework of the public-private entity, there is no need for further tendering the provision of such service. However, any substantial change to the parameters concerning the provision of the service not foreseen in the original tender procedure would require a new tender. A Commission Communication on Institutionalised PPPs which explains the practical ways of carrying out such a tender procedure is currently being finalized and should be adopted before the end of the year[34].

2.11. What is the interaction between public procurement rules and state aid rules? In which situations a public authority which finances a service provider in conformity with state aid rules must also abide by public procurement/transparency rules?

Public procurement rules including those on concessions, on the one hand, and state aid rules, on the other hand, are in principle two different sets of provisions completely independent from each other. Public procurement rules aim at European wide competition ensuring best value for money. State aid rules prevent distortions of competition through state financing or similar advantages.

Public procurement rules apply as soon as there is an obligation to provide a particular service against remuneration. Conversely, the pure financing of an activity, possibly coupled with an obligation to reimburse the money if it is not used for the purpose it was intended for, will normally not be covered by the public procurement provisions. Indications for the existence of a public service contract or a concession are that the type of activity concerned falls within the competence of the public authority, that the terms of the service are set out in detail by the public authority and that the service is wholly remunerated by the public authority. However, these indicators are not as such decisive in themselves, but serve as a proxy to establish whether the subject matter of the contract is indeed an obligation to provide a service.

There are also situations to which both sets of rules could apply. In particular, a tender procedure guaranteeing full competition can be taken as an important indicator that the services entrusted through a public contract or a concession are

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33 For social services this will typically be Directive 2004/18/EC.

34 For further information on this subject, see the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions - COM(2004) 327.

rendered at a market price and that there is no state aid. Complying with procurement rules will in these cases therefore also help in ensuring respect of the state aid provisions.