

Legal Implications of Commissioning Environment

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Public Procurement (1)

Who is subject to PP?

- Contracting authorities ie state entities.
- Organisations financed wholly or mainly by the state.
- Organisations subject to management supervision by the state.

Public Procurement (2)

- What is the threshold?
- £3.497m for works contracts.
- £90, 319 for services and supplies procured by Central Government.
- £139,893 for services and supplies procured by other public sector contracting authorities eg local government.
- The thresholds are set for two years.

Public Procurement (3)

Part A Services

- Computer support.
- Financial services.
- Management consultancy.
- Market research.

Subject to the full EU procurement regime.

Public Procurement (3) cont.

Part B Services

- Recreational.
- Cultural and supporting services.
- Social services.
- Healthcare and education and vocational health.

Limited Procurement Rules

- If the contract is for a mixture of Part A and Part B services then the rules attaching to the greater part (the one with higher value will apply).

Part A – Key Features

- The full EU procurement regime.
- Annual indicative notice of public contracts expected to be awarded in the following 12 months must be advertised in the official journal.

Part A – Key Features cont

Procedures

- The open procedure of any party who shows interest in the contract must be invited to tender.
- The contracting authority must allow 52 days for a response to the advert.

Part A – Key Features cont

The restricted procedure

- Pre-selected parties are invited to tender. The contracting authority must allow 37 days for a response to the advertisement or in cases of urgency 15 days. Those who respond are then evaluated usually through a pre-qualification questionnaire. A shortlist is compiled and invitations to tender are sent out simultaneously.
- Most contracts for local and community organisations are awarded under this.

Criteria for the Award of a Public Contract

Regulation 30

- The contracting authority must award a public contract on the basis of the offer which:
 - (a) Is the most economically advantageous from the point of view of the contracting authority; or
 - (b) Offers the lowest price.
- Contract award notice.

Further Public Procurement Obligations

- All public procurements must follow four fundamental principles:
 1. Equal treatment.
 2. Transparency.
 3. Proportionality.
 4. Mutual recognition.

Negotiated Procurement

- A contracting authority selects a number of providers with whom to negotiate the terms of the contract. This can be used in conjunction with Part B Services.

How to Avoid Procurement

- A grant.
- May be state aid but does it distort or threaten to distort competition?
- No VAT chargeable.
- Are they services of general economic interest.

How to Avoid Procurement

The Teckal exemption

- Company 100% controlled by a contracting authority.
- All or nearly all activities supplied to contracting authority.
- Contracting authority must also have a key role in governance.
- If so, this is regarded as in-house procurement and no need for public procurement to apply.

Use a Teckal Company as a Staging Post

Stage 1

- Create Teckal company.
- Transfer staff under TUPE.
- Empower management.
- Grant staff/management a call option to acquire shares in Teckal company at a future date.
- Build up its financial capacity skill etc.

Lessons from the Leisure Trusts

- Over the last 20 years local authorities have hived off leisure services to leisure trusts established as a charities.
- Greenwich Leisure manages over 90 leisure centres.
- Registered Charity.
- Says it has been a beneficiary of constructive procurement.
- Benefits from 10 to 15 year contracts.
- Turnover in excess of £100m a year.

Conclusions

- Public procurement could destroy new entrants.
- Consider sheltering new employee led organisation within the state's protective veil using a Teckal company.
- Only take the service out when you are ready.
- Can you use Part B services?

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