

Tendering Procedure and Construction in Europe — The Works Directive

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Philip Webster

Philip Webster LLB, Diplômé de l'Institut Européen des Hautes Etudes Internationales (Nice) is a Solicitor at Norton Rose.

ABSTRACT

Under the Single Market initiative, various directives have emanated, and continue to emanate, from Brussels concerning building development and the construction industry. This paper provides an outline of some of the most important features of the recently updated Works Directive which is likely to have a significant effect on tendering procedure within the European Community.

The Works Directive 71/305/EEC (as amended by Directive 89/440/EEC) provides rules governing the award of works contracts whose estimated value is not less than ECU5m (approximately £3.31m). The Directive applies in the UK not only to local authorities and Crown bodies but, in certain defined circumstances, to works contracts let by private companies. A contracting authority which ignores the Directive's terms, even where the proposed works are confined to the host country, or which breaches directly effective articles of the Treaty of Rome 1957 (as amended by the Single European Act 1986) upon which the Directive is based, runs the risk of paying

substantial sums in damages and/or having the tendering procedure reopened.

The Directive aims to ensure that contracting authorities will be obliged to give Community-wide publicity to their tendering contracts by way of compulsory publication in the Official Journal of the European Communities. It is designed to encourage the use of non-discriminatory and Community-standardised technical specifications. Provision is also made for the adoption of objective criteria for selecting participants and awarding contracts.

'Contracting authorities' are described *inter alia* as being 'the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

In the UK there is no separate system of 'public law' and therefore further reference should be had to annex 1 to the Directive which provides a list of bodies deemed to fulfil the public law requirement. The current UK list (which member states are under an obligation to review periodically and which has recently been amended by Directive 89/440/EEC) includes *inter alia* education authorities, National Health Service authorities, the National Rivers Authority, the Welsh Development Agency,

the Commission for the New Towns, the Scottish Special Housing Association, the Northern Ireland Housing Executive, the Merseyside Development Corporation and the London Docklands Development Corporation.

Of particular concern to the private sector is the obligation on member states 'to ensure that the contracting authorities comply or ensure compliance with the Directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves'. Certain joint ventures between contracting authorities and private sector contractors will, therefore, be covered by the Directive. However, this 'private sector extension' of the scope of the Directive concerns a specific class of civil engineering contracts (listed in Annex II of the Directive) as well as the construction of roads, bridges, railways etc, works contracts relating to hospitals, sports and leisure facilities, together with contracts for university buildings and buildings used for administrative purposes.

Further evidence of 'encroachment' into the private sector is given by the coverage of 'public works concession contracts'. These are defined as contracts where the 'consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'. Where such contracts arise, the contracting authority may require the body awarded the concession, ie the concessionaire, to award at least 30 per cent of the total value of the work to third parties or request a candidate to specify the percentages of the total value of the work awarded which it is intended shall be assigned to third parties.

Therefore, provided the ECU 5m threshold criterion is satisfied, the Directive would cover a 50-50 joint venture between a local authority and a private developer to construct a public road or bridge; or a works development project put out to tender by a company substantially owned or con-

trolled by a member state; or a contract under which a private property developer agrees with a local authority (or any other body listed in appendix 1 of the Directive, eg the London Docklands Development Corporation), to forego in part or in whole immediate monetary consideration in favour of income arising under a lease once a building has been constructed; or the granting of rights over land by a local authority to a developer, with a view to the developer constructing and subsequently running a motorway service station.

Member states are under an obligation to ensure that concessionaires apply the Directive's advertising rules in respect of contracts which the concessionaire awards to third parties when the estimated value of such contracts is not less than ECU5m.

A concessionaire, which is itself a contracting authority, is obliged to comply with all the terms of the Directive in the case of works to be carried out by third parties. In this case, the primary obligation is not on the member state to ensure compliance, but on the contracting authority itself to comply.

If a works project is divided into several lots each of which is the subject of a separate contract, the aggregate value of each individual contract must be taken into account when determining whether the ECU5m threshold is reached. If the threshold is reached, the Directive applies to each of the contracts. In order to encourage small and medium sized enterprises, lots whose individual estimated value net of VAT is less than ECU1m (£662,000 approx.) are exempt in cases where the total value of lots so exempted does not exceed 20 per cent of the total value of all lots (exempt or otherwise). However, this exemption is only applicable where contracts are not split up with the intention of avoiding the application of the Directive. When calculating the threshold, reference should be made not only to the amount of the public works contracts but also to the estimated value of the supplies needed to carry out the works which are

made available to the contractor by the contracting authority.

A contracting authority covered by the Directive will need to ensure that it complies with the prescribed tendering procedures, ie open, restricted or negotiated. Under open procedures, all contractors interested in the contract can submit tenders following an advertisement in the Official Journal of the European Communities. Under restricted procedures (the preferred form of tendering in the UK), only those candidates selected by a contracting authority may submit tenders. Under negotiated procedures (which are only to be used in limited circumstances), contracting authorities may consult contractors of their choice and negotiate the terms of the contract with one or more of them. As distinct from open or restricted procedures, when negotiated procedures are used prior notice in the Official Journal is not always necessary.

Official Journal notices are published in the 'Works Directive' section of the supplement to the Official Journal at no charge to contracting authorities. The publication office in Luxembourg is required to publish the notice within 12 days of dispatch together with summaries in the other official languages. There also exists an accelerated procedure under which publication has to be within five days. Voluntary notices may also be published in the Official Journal by contracting authorities in circumstances where the estimated works value is below the prescribed threshold.

Besides publication requirements, tendering procedures must be carried out within the prescribed time limit. Under open procedures, the contract notice should be sent to the Official Journal. From the date of dispatch of the contract notice to the Official Journal, 52 days should then be allowed for receipt of tenders. Under restricted procedures, the contract notice should be sent to the Official Journal allowing 37 days or more from the date the contract notice is sent to the Official Journal for selected ten-

derers to propose their candidacy. A written invitation should then be issued, allowing at least 14 days for receipt of tenders. Under negotiated procedures, provided that a prior call for competition is required, a contract notice must be published in the Official Journal allowing 37 days or more from dispatch for participants to propose their candidacy. In certain limited circumstances where negotiated procedures are used, a prior call for competition by way of publication in the Official Journal is not necessary.

Whatever procedure is used, a contract award notice is required to be published in the Official Journal within 48 days of the award.

Technical standardisation is an important feature of the Directive. Technical specifications must be included in the contract documents. When there are no European standards, European technical approvals or common technical specifications, the Directive provides that technical specifications 'shall be defined by reference to the national technical specifications recognized as complying with the basic requirements listed in the Community directives on technical harmonisation...'

In the case of the *Dundalk Water Scheme* (45/87R), involving an Irish local authority and the Commission, the European Court of Justice emphasised the importance of the words, 'or equivalent' when stipulating technical specifications whether or not the contract falls above or below the prescribed threshold.

Except where a private sector body is treated as being governed by public law (ie, where it is substantially supervised, funded or controlled by a public sector body and is thereby defined as a contracting authority directly affected by the Directive), control of the private sector is exercised by ensuring that the member state is primarily responsible for ensuring compliance with the terms of the Directive.

That primary responsibility is placed on the member state may affect damage claims

for breach of the Directive. Concessionaires or co-partners under the 50 per cent rule may argue that, in the absence of adequate legislation and enforcement by the member state, private sector concessionaires or co-partners cannot themselves be held to be wholly liable (in the absence of breach of contract) where a breach of the terms of the Directive occurs. Third parties, prejudiced by non-observance of the Directive's terms, may therefore be forced to seek remedies against the member state rather than the concessionaire or co-partner.

However, where two parties or more are acting in close co-operation, it is clearly in all parties' interests, particularly the interest of their financiers, that liability in damages of any of the parties is kept to a minimum. Consequently, a contracting authority which is directly affected by the terms of the Directive would wish to ensure that any joint venture partner or concessionaire abides by the terms of the Directive.

It is also worth stressing that the Directive, as is the case with the majority of the directives introduced by way of the single market initiative under the Single European Act, has as its aim to ensure compliance with, and the more effective working of, the fundamental articles of the Treaty of Rome. These articles, *inter alia*, aim to ensure the free movement of goods, persons and services. Many of these fundamental articles do have direct effect. The articles of the Treaty of Rome are not restricted to 'contracting authorities' and are therefore wider in scope. They may, in certain circumstances, place obligations on and give rights to not only governments and public authorities under the Directive but also to other private individuals and corporate bodies.

In the first recital of the preamble to the original Works Directive 71/305/EEC of July 1971, the coordination of international procedures for the award of public works contracts is, together with the abolition of restrictions, stated to be one of the means necessary for 'the simultaneous attainment

of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other legal persons governed by public law...'. The close link between the Directive and the fundamental articles of the Treaty of Rome is further emphasised in the amending Directive 89/440/EEC of July 1989 which broadens the scope of the original Directive. The preamble emphasises that the Directive has been created 'in order to guarantee real freedom of establishment and freedom to provide services in the market for public works contracts...'. The Directive further provides that if such freedoms are to be guaranteed,

'it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce the disparities in the competitive conditions faced by nationals of different Member States'.

In the European court case of *Gebroeders Bentjes BV v State of the Netherlands* (31/87), the European court, referring to its previous judgment of 9th July, 1987, in joint cases 27-29/H6, *CEI and Bellini* [1987] ECR 3347, noted that, in order to be compatible with the Directive, a condition of tender must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.

The *Bentjes* case is authority for the proposition that provisions of a directive in whole or in part may, where its terms are sufficiently precise and unconditional, be relied upon by an individual against a member state. Whether an individual may rely on the terms of a directive to enforce a

claim against an individual or a company which is not a 'contracting authority' is not clear.

Nonetheless, it is important to note that Community legislation should in each case be viewed on its merits when determining whether it creates individual rights and obligations and the consequences of such rights and obligations. It is a dangerous misconception to assume that only regulations of the council and commission are directly effective and binding in their entirety. Despite the wording of article 189 of the Treaty of Rome, the court has on several occasions indicated that it will interpret the Treaty and subordinate legislation teleologically, as distinct from literally, to ensure that the purpose behind Community legislation is not undermined by a literal approach to interpretation.

In the recently reported case of *Fosters and Others v British Gas Plc* (*The Times* 13th July, 1990), the European Court dealing with the concept of directly effective European legislation states

'... a body whatever its legal form, which had been made responsible, pursuant to a measure adopted by the state, for provid-

ing a public service under the control of the state and had for that purpose special powers beyond those which resulted from the normal rules applicable in relations between individuals was included in any event among the bodies against which the provisions of a directive capable of having direct effect might be relied upon'.

This approach of the European Court is not new. In *Van Duyn v The Home Office* (41/74: [1974] ECR 1337), the court held that it would be incompatible with the binding effect attributed to a directive by article 189 of the Treaty of Rome to exclude, in principle, the possibility that the obligations which it imposed might be invoked by those concerned; the useful effect of the directive would be weakened if individuals were prevented from relying upon it before a national court and if those courts were prevented from taking it into consideration as an element of Community law.

It is clear that contractors and developers, whether in the public or private sector, should not rely on preconceived notions of the limited effect of certain forms of Community legislation, but should endeavour as far as possible to conform both with the spirit as well as the letter of the law.