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PUBLIC CONTRACTS REGULATIONS 2015

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UTILITIES CONTRACTS REGULATIONS 2016

GUIDANCE ON "PUBLIC / PUBLIC" CONTRACTS

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Guidance on contracts between authorities within the public sector

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OVERVIEW

What is covered in this guidance?

1. This guidance covers the new provisions concerning contracts between one public body and another public body, also referred to as public-public contracts. Some of these contracts are subject to the EU procurement rules, whereas others are excluded.

What has changed?

2. The new provisions on public-public contracts aim to codify, clarify and develop the case law on whether contracts between public bodies should be subject to the public procurement rules or not. Interpretation of the relevant EU case law of the European Court has varied, so leaving uncertainty as to whether, for instance, shared services arrangements between public bodies were excluded or not.
3. There are two strands of relevant case law:
 - i) The first strand stems from the Teckal case (C-107/98) and subsequent related cases, and sets out the circumstances where so-called “vertical” contracts/arrangements (ie between a contracting authority and separate legal bodies that the contracting authority controls) could be excluded.
 - ii) A later strand following the Hamburg case (C480/06), and concerns where “horizontal” contracts/agreements could be excluded (ie contracts where contracting authorities co-operate with one another to perform a public function).
4. Following from these strands of case law, the new rules cover the circumstances where either vertical or horizontal contracts/arrangements fall outside the rules.

Which rules do I need to refer to?

5. Regulation 12 of the Public Contracts Regulations, which transposes Article 12 of the Public Sector Directive (2014/24/EU). Regulation 12 is provided at Annex A. This guidance also draws on recitals 31 to 33 of 2014/24/EU.
6. The corresponding provision in the Utilities Contracts Regulations 2016 is regulation 28, but this regulation only applies to a utility which is a contracting authority.

Key Points

7. Regulation 12 sets out various tests to determine whether a public-public contract is excluded from the rules.
8. Regulation 12(1) sets out the cumulative conditions for the “vertical” exclusion to be met. These can be summarised as:
 - Where the contracting authority exerts on the ‘supplying authority’ a control similar to that which it exercises over its own departments (R12(1)(a)), and
 - Where more than 80% of the activities of the supplying authority are performed for the buying authority or by other bodies controlled by it (R12(1)(b)), and
 - Where there is no direct private capital participation in the ‘supplying authority’ (R12 (1) (c)).
9. Regulation 12 (7) sets out the cumulative conditions for the horizontal exclusion to be met. These are:
 - The participating authorities co-operate to perform public services they provide, meeting common objectives (R 12(7)(a)) and

- The co-operation is for public interest reasons only (R 12(7)(b)) and
 - The participating authorities perform less than 20% of the cooperative activities on the open market (R 12(7) (c)).
10. Regulations 12(4 - 6) set out the conditions where a contracting authority may award a public contract directly to a supplying authority/organisation over which it exercises control **jointly** with other contracting authorities, even though it does not exercise control over the supplying authority/organisation individually.
11. Regulation 12(2) makes clear that a contracting authority may make use of the exemption where it awards a contract to its controlling contracting authority or to another legal person controlled by the same contracting authority.

Frequently Asked Questions

What constitutes "Control" of an organisation?

Control is described as an organisation exercising a decisive influence over both the strategic objectives and significant decisions of the controlled organisation.

There may be tiers of control, for example organisation A may be controlled by organisation B, who in turn is controlled by the contracting authority.

How do I calculate the percentages of activities?

The 80% of activities for in-house contracts and 20% of public-public cooperation are to be calculated by taking into account the previous 3 years total turnover, or an alternative activity based measure such as three years of costs connected with the service, supply or works.

If three years turnover, activity or costings are not available then it is sufficient to show that the estimate is credible.

The maximum percentages for in-house contracts are to be calculated for each participating contracting authority. For the public-public cooperation model the 20% relates to the activities included in the cooperation. This is intended to avoid distortion of the market.

Can we rely on an exemption where some of the funding is provided through Private Capital?

The exemptions do not extend to situations where there is direct participation by a private operator in the capital of the supplying organisation because the direct award of a contract in such circumstances would provide the private operator with an undue advantage over its competitors.

If however the private capital is made compulsory by national legislation and is non-controlling and non-blocking and does not confer a decisive influence on the decision of the controlled organisation, then it is acceptable.

A contracting authority awarding the contract however may have direct participation by a private operator in its capital and this would not preclude it from being exempt from the procurement regime as long as the other conditions were passed and competition within the market was not affected.

Contracting authorities that may have private capital participation may still meet all the conditions of cooperation where the contract is concluded exclusively between contracting authorities.

Does the ‘Cooperation’ between contracting authorities imply a particular Legal Form?

Cooperation can take any legal form – it doesn’t need to be a contract or joint venture. It should be based on a cooperative concept and not require all participating authorities to assume the performance of main contractual obligations, but to commit to contribute to the cooperative performance of the public service in question.

Extract from Public Contract Regulations 2015

Public contracts between entities within the public sector

Award of contracts to controlled persons

12.—(1) A public contract awarded by a contracting authority to a legal person falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(2) A public contract also falls outside the scope of this Part where a controlled legal person which is a contracting authority awards the contract to—

- (a) its controlling contracting authority, or
- (b) another legal person controlled by the same contracting authority,

provided that there is no direct private capital participation in the legal person being awarded the contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the legal person being awarded the contract.

(3) A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of paragraph (1)(a) where—

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or
- (b) the control is exercised by another legal person which is itself controlled in the same way by the contracting authority,

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) shall be interpreted accordingly.

Award of contracts where there is joint control

(4) A contracting authority which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a public contract to that legal person without applying this Part where all of the following conditions are fulfilled:—

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(5) For the purposes of paragraph (4)(a), contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:—

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;

(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities.

Contracts which establish or implement co-operation between contracting authorities

(7) A contract concluded exclusively between two or more contracting authorities falls outside the scope of this Part where all of the following conditions are fulfilled:—

(a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

Determination of percentages

(8) For the determination of the percentage of activities referred to in paragraphs (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the 3 years preceding the contract award shall be taken into consideration.

(9) Where, because of—

(a) the date on which the relevant legal person or contracting authority was created or commenced activities, or

(b) a reorganisation of its activities,

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.