Competitive Dialogue – What is a "particularly complex" contract?

The legislative framework for Competitive Dialogue contained in Article 29, Article 1(11)(c) and Recital 31 of Directive 2004/18 leaves many questions unanswered, as does the European Commission's "Explanatory Note on Competitive Dialogue in the Classic Sector", published in January 2006.

Nor has there so far been any case law in the European Court of Justice to assist Contracting authorities and their professional advisers.

One of the main issues is the definition of what constitutes a "particularly complex" contract and there has been a divergence of views amongst legal commentators, and thus possible legal uncertainty, principally about the extent to which the interpretation of "particularly complex" should be broad or narrow.

This divergence has centred on issues such as:

• The meaning of "objective impossibility" (which could, in its strictest sense, mean "absolute impossibility" or "not possible without disproportionate effort", in which case it raises the question of what would be a reasonable amount of time and costs for a Contracting Authority to devote)

• The interpretation of the phrase "without this being due to any fault on their behalf" and how Contracting Authorities can demonstrate this (eg the extent to which they need to use their own resources, those of their networks and/or those of external advisers and/or market consultation with potential bidders and, in the case of PPP, with lenders etc)

• The degree of discretion afforded to Contracting Authorities to determine when "the use of the Open or Restricted Procedure will not allow the award of the contract" and how they can demonstrate this

• Whether or not the formulation of the legislative provisions for Competitive Dialogue means that it is in reality intended to be an exceptional procedure, used rarely, and thus, in practice, unlikely to be any easier to justify than the grounds for using the Negotiated Procedure with prior publication of a contract notice.

Does this matter in practice?

Some early commentators, concluding that the grounds for using the Competitive Dialogue procedure were, in fact, to be interpreted very narrowly, thought that the application of the procedure would thus be relatively rare.

But this has not prevented the extensive use of Competitive Dialogue in the EU, because of the calculation that both disaffected losing bidders and the European Commission would be more likely to challenge the way that the procedure is implemented rather than the choice of the procedure. From the perspective of the European Commission, the risk of challenging the choice of the Competitive Dialogue procedure is that it would re-create the difficult choice faced by Contracting Authorities before Directive 2004/18 between the

inflexibility of the Restricted Procedure and the more flexible but less legally certain Negotiated Procedure with prior publication of a contract notice.

Thus the complexity test may turn out to be more formal than substantive, though the burden of proof nevertheless lies with the Contracting Authority to demonstrate that the use of the Competitive Dialogue has been properly justified.

The elements of a complexity test are likely, at minimum, to involve the Contracting Authority in a process of:

• Identifying the uncertainties which it needs to test by using Competitive Dialogue

• Ensuring that it has followed a process of attempting to determine how its needs can be satisfied without using Competitive Dialogue ie setting out the actions it has taken and plans to take and forecasting the time and costs which would need to be expended in attempting to determine how its needs can be satisfied without using Competitive Dialogue. These will act as evidence that the use of Competitive Dialogue has been taken in the context of the need to demonstrate “absence of fault” and the need, at least, to demonstrate “objective impossibility” insofar as it is defined “as not possible without disproportionate effort”

• Documenting the decision such that it can be explained if challenged by third parties or questioned by auditors

• Obtaining a robust legal opinion to support the decision.

What kind of uncertainties will enable a contract to qualify as “particularly complex”?

A variety of justifications have been used, but not, as noted above, tested in the courts.

One key negative test which can be applied is that, since the principal way to resolve uncertainties during the award process is the dialogue phase, the decision by a Contracting Authority to exclude a matter from the dialogue should be based on an assessment that there was no significant uncertainty or complexity about the matter. Thus, any matter which does not fall with the planned scope of the dialogue foreseen by the Contracting Authority, cannot, logically, be a justification for the use of Competitive Dialogue.

Possible justifications could relate to the existence of volatile market conditions at the time of the launch of the procedure (of which the continuing financial crisis, with its impact on public finances and capital markets is an obvious example), the existence of technically complex and difficult to access geological conditions of a nature which might justify the use of the Negotiated Procedure with prior publication of contract notice on the grounds permitted in Art 30(1)(b) of Directive 2004/18 and the arrangements of candidates for managing contract interfaces.

In any event, Contracting Authorities need more guidance, be it from Member States, the European Commission or the European Court of Justice, who, if a judgment is required from them, could use the opportunity to address in some detail the factors discussed above and thus to clarify the concept of “particular complexity” for Contracting Authorities.

And, of course, more debate and comment via this website would be welcome.

Michael Burnett – November 2010