

TUPE AND TENDERING

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**EXCLUDING
AND
ELIMINATING
CANDIDATES
AND
TENDERERS**

The Principle of Equal Treatment Defined

■ Evropaki Dynamiki (T-345/03) 12/3/2008

142 Equal treatment implies an obligation of transparency.

143 To ensure healthy and effective competition between undertakings [...] all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore ensures that the tenders of all competitors must be subject to the same conditions.

178 The fact that the successful tenderer had exclusive knowledge was liable to confer upon him an unjustified advantage at the opening of the tendering procedure.

Beentjes – Grounds for Exclusion

- Beentjes (31/87) 20/9/1988 (Advocate General's Opinion)

Originally it was considered that a contractor could be excluded only on the basis of one or more of the criteria of suitability or of the award criteria.

This is apparent in an opinion delivered to the ECJ by Advocate General Darmon in relation to the 'Beentjes' case.

#43 A contractor may be excluded only on the basis of one or more of the criteria of suitability concerning the aspects set out in Articles 25 or 26 and specified in the contract notice, or on the basis of one or more of the criteria for the award of contracts contained in Article 29 and specified in the contract notice or the contract documents, where the lowest price is not taken as the exclusive criterion for awarding the contract.

Exclusion of those Receiving State Aid

- **Arge (C-94/99) 7/12/2000**

Where bodies receive subsidies from the State that allow them to tender at prices below their commercial competitors, they can be excluded only if they have been subsidised illegally by the State.

29 In certain specific circumstances, Directive 92/50 requires, or at the very least allows, the contracting authorities to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid.

30 The Commission correctly states in this connection that a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty

Exclusion due to Unfair Advantage



Fabricom (Joined Cases C-21/03 & C-34/03) 3/3/2005

A National rule cannot prevent, without exception, a person who has carried out preparatory work from submitting a tender.

30 A rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paragraphs 29 and 30 of the present judgment [**the attainment of an unfair advantage and a potential conflict of interest**] do not arise.

34 Such a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

The Optional Nature of the Exclusion Provisions



- **La Cascina (Joined Cases C-226/04 & C-228/04) 9/2/2006**

This case concerned the optional nature of the exclusion provisions and the freedom of Member States to decide which grounds for exclusion to apply.

21 Article 29 of the Directive lays down seven grounds for excluding candidates from participation in a contract, which relate to their professional honesty, solvency and reliability. That provision leaves the application of all those cases of exclusion to the assessment of the Member States, as evidenced by the phrase 'may be excluded from participation in a contract'

23 Accordingly, Article 29 of the Directive does not provide in this field for uniform application of the grounds of exclusion mentioned therein.

Are the Grounds of Exclusion Exhaustive?



■ Michaniki v Ethniko (C-213/07) 16/12/2008

The grounds listed in the directives are not entirely exhaustive; entities may exclude to ensure transparency and equal treatment.

49 The first paragraph of Article 24 of Directive 93/37 must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. ***However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.***

- **Assitur (C-538/07) 10/2/2009 (Advocate General's Opinion)**

The grounds listed in the directives are exhaustive only with regard to professional quality; entities may exclude to ensure transparency and equal treatment.

38 The exhaustive list of seven grounds set out in Article 29 of Directive 92/50 does not however preclude Member States from maintaining or adopting other rules which are designed to ensure observance of the principle of equal treatment and the principle of transparency. Those principles must be observed by contracting authorities in any procedure for the award of such a contract and mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority.

Transfer of Undertakings

- The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003
- EU Directive No. 2001/23/EC
- Transfer of Undertakings Directive (77/187/EEC)

- Vendor/Old Employer/Incumbent = “Transferor”
- Purchaser/New Employer/Successful Tenderer = “Transferee”
- Transfer of Undertakings Regs/Acquired Rights Directive = “TUPE”

- Rights and obligations arising out of the Employer/Employee relationship transfer from Transferor to Transferee
- Basically, the Transferee gets the Transferor's employees, with (almost) all their terms and conditions, both good and bad

- Employee cannot be dismissed if Transferor could not have dismissed
- Information and Consultation process

- Essentially the employees are treated as if they had always worked for the Transferee
- This means any employment related issues transfer (except Pensions)
- Liability in tort and common law actions may transfer if part of the employment relationship

- A subject in itself! ECJ caselaw driven. Each case is different.

General principles are

- 1st Generation Transfer, nearly always TUPE
- 2nd Generation Transfer- Suzen principles apply
- Assets transferring/Labour only transfers

Transfer of Undertakings

The Practical Application of TUPE

- Transfer void if Regulations breached
- Obligation to consult with all employees
- Transferee's existing employees don't count
- Property Transactions not liable
- TUPE claims are minor

Transfer of Undertakings Regulations 2003

- 30 day period
- Stock Exchange Listing Rules
- Envisaged Measures
- Union Representation/Election of Representatives

- Pension Rights do not transfer except as defined in:

Katia Beckman –v- Dynamco Whicheloe
MacFarlane Limited, ECJ decision
concerning early retirement benefits

- Accrued Rights protected
- No need to compensate for loss of pension rights
- IR issues if pension rights are lost

- Where a business is purchased within a member state and contemporaneously or subsequently relocated outside that Member State.
- *Holis Metal Industries Ltd v GMB*
(2008) IRLR 187 English Employment Appeal Tribunal

- Fear of Redundancy
- Harmonisation of terms and conditions
- Need to retain key employees/retention bonuses
- Need to avoid rumour and gossip
- Conflict between information and consultation timescale and commercial realities
- Confidentiality issues

- Ensure “problem” employees transfer
- Off load liabilities that the Transferor owes the employees
 - Owner managers who are also employees
 - Opportunity for deliberate mismanagement of staff where staff transferring to competitor

- Info supply/Blind pricing
- HR issues in Target
- Timescales
- Information/Consultation and confidentiality
- Redundancies in Transferee
- Importing Unions
- Impact on Purchase Price/Retention of funds
- Warranties/Indemnities

- Deemed TUPE- Successor Service Provider obliged to take employees even if not TUPE
- Service provider obliged in Tender Contract to provide info to Successor Service provider ...and on Successor Service provider to next Successor...and so on...
- If TUPE in, then TUPE out-matching provisions both on the way in, and way out

- Indemnity from awarding authority to Service Provider up to date of Transfer
- Indemnity from Service Provider to awarding authority from date of Transfer
- Indemnity from Service provider to Successor Service Provider from date of Transfer...and so on...

- Defining the employees who will transfer
- Do any employees who don't transfer on again return to the Awarding Authority?
- Splitting the redundancy payments/contributions from Transferor

- FPP Code of Conduct

Thank you

F P

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