



24.6.2010

NOTICE TO MEMBERS

Subject: **Petition 0863/2005 by Mike Dailly (British), on infringement of EU procurement rules by Scottish Executive and Glasgow City Council**

1. Summary of petition

The petitioner states that in 2003 the Glasgow City Council developed and sold a number of major commercial services and activities to the Glasgow Housing Association Ltd (GHA Ltd). The petitioner argues that in terms of EU procurement law these transactions should have been put to EU wide tendering, because GHA Ltd is a Registered Social Landlord. The petitioner is asking from the Committee on Petitions to consider requesting the intervention of the Commission.

2. Admissibility

Declared admissible on 9 February 2006. Information requested from the Commission under Rule 192(4).

3. Commission reply, received on 12 May 2006.

I. Background

The petitioner submits that on the 7th of March 2003 the Glasgow City Council devolved and sold a number of major commercial services and activities to the Glasgow Housing Association Ltd (GHA Ltd). According to the petitioner, the repair and maintenance services for a substantial number of privately owned homes were transferred to a subsidiary company of GHA Ltd. Furthermore the petitioner adds that a considerable number of commercial shops and retail units in Glasgow were transferred by the Glasgow City Council to GHA Ltd.

II. The complaint

According to the petitioner, the above transactions should have been put out to European wide competitive tendering. Because they have not, EU citizens may be receiving poor value for money and poor services. The petitioner states that arrangements similar to those in Glasgow may be made in other cities, including in Edinburgh. In view of the above the petitioner considers whether the Commission should be requested to intervene.

III. The Commission's comments to the petition's arguments

The matter raised by the petitioner is linked to two recent complaints which the Commission has received and which are registered as case n° 2006/4035. Those complaints also concern GHA and the transfer of social housing which has been taking place in Glasgow. The Commission services needed further and better information about the transfers and thus sent a letter to the United Kingdom authorities requesting explanations of the different steps taken to transfer the housing in Glasgow and how they may relate to EC public procurement rules. The Commission has not to date the information requested. As soon as it does so, it will examine it carefully and decide which is the next appropriate step in the procedure.

IV. Conclusions

The Commission can assure the petitioner that it monitors closely matters relating to the transfer of social housing between landlords to see if there is any infringement of the EC public procurement rules. The Commission would be pleased to receive any additional information that the petitioner has in his possession which may assist it in its current investigations.

4. Further Commission reply, received on 1 June 2007.

As explained in the previous communication, the matter raised by the petitioner is linked to two complaints received and registered by the Commission as case n° 2006/4035.

As already indicated, Commission services needed further and more detailed information about the transfer of social housing in Glasgow. To that effect, they addressed the United Kingdom authorities with a letter requesting explanations on the different steps taken in the social housing transfer in Glasgow and how these may relate to the EC public procurement rules. The voluminous reply of the United Kingdom authorities was received in October 2006 and has since been under assessment by Commission services. A meeting with the competent UK authorities took place on 3rd May 2007 in order to discuss and clarify the wide range of factual and legal issues which seem to be involved in this case. Following this, the Commission services should be in a position to decide which should be the next appropriate step in the procedure.

Finally the Commission expresses its gratitude for the additional information which has up to now been transmitted by the petitioner and which may indeed be helpful in assisting it with its investigations.

5. Commission reply, received on 24 June 2010.

As already indicated in previous communications, the matter raised by the petitioner seemed to be linked to case 2006/4035 which was at the time under the early stages of investigation, and which also involved the Glasgow City Council ("GCC") and the Glasgow Housing Association ("GHA"), a Registered Social Landlord and, as such, a body governed by public law. Nevertheless, as it was explained before the Petitions Committee on 22/11/2007, following the assessment of the voluminous information provided by the United Kingdom authorities, a meeting was held in order to discuss and clarify the wide range of factual and legal issues which seemed to be involved in that case. Following the subsequent provision of clarifications requested by the Commission, it became clear that the issues involved related firstly, to the repair and maintenance works to be carried out for the benefit of the social housing owned by GHA and secondly, to the management services to be provided for this. Given the complexity of the case, the Commission considered that the issues raised by the petitioner should be investigated independently.

In this context, a separate case was opened by the Commission (reference no.2008/2061). The issues raised by the petitioner were put to the attention of the United Kingdom authorities; firstly, in relation to the management of the social commercial property stock which had been transferred by the GCC to the GHA, and secondly, in relation to the factoring (repair and maintenance) services concerning privately owned properties, located in mixed buildings with both social and private houses. It was explained that if the arrangements entered into with Glasgow Housing Association (Management) Ltd ("GHA (M)") were to qualify as a public contract within the meaning of the EU public procurement law, then an obligation might exist for GHA to put this out to competitive tendering.

The United Kingdom authorities informed the Commission that the relationship between the parties is governed by two agreements, namely a Service Agreement concluded in 2003 and an Independence Agreement concluded in 2007. It was submitted that as both conditions laid down by the Court of Justice in case C-107/98, Teckal were met, the relationship between GHA and GHA(M) is not subject to the EU procurement law and therefore there was no obligation on GHA to competitively tender the abovementioned arrangements.

On the basis of the information available, the Commission concluded that GHA (M) remains indeed in an in-house relation vis-à-vis the GHA, as both conditions giving rise to an in-house situation are met. In particular, the 2003 agreement makes clear that GHA is the parent and sole shareholder of GHA(M) and that the GHA(M) Board is comprised of GHA Board members. In addition, the agreement expressly provides that GHA (M) is within the control of GHA. The 2007 agreement provides that it should be used as a guide for both GHA and GHA (M) board members and that the services provided by GHA (M) have to be within the parameters laid down by GHA. It also makes clear that GHA will set the aims and objectives for the services to be provided by GHA (M) and will also approve on an annual basis its Business Plan, approve any significant business development proposals put forward by GHA (M), agree annually on the financial proposals of GHA (M), and monitor its activities. Furthermore GHA (M) is under an obligation to develop and implement its policies, in accordance with the GHA's policy and to seek to achieve the financial targets agreed with GHA. Therefore, the first Teckal condition is met, as the GHA exercises over the GHA (M) a control which is similar to that which it exercises over its own departments. At the same time,

GHA (M) carries out services only for the benefit of its parent, the GHA. Therefore the second Teckal condition, which provides that the controlled entity has to carry out the essential part of its activities with the controlling contracting authority, is also met.

In view of the above, as the above arrangements do not constitute a public contract, GHA, by not putting them out to competitive tender, did not violate EU law. Therefore the case was filed by the Commission in November 2008.

For the sake of completeness, the Commission may inform the Parliament that case no. 2006/4035 was closed in May 2010.