



30.1.2015

NOTICE TO MEMBERS

Subject: Petition 0021/2013 by John Savage (British), on the excessive costs of Allerton Waste Recovery Park

1. Summary of petition

The petitioner, a North Yorkshire County Councillor, is protesting against the local authorities' decision to award the municipal solid waste treatment contract to the company AmeyCespa at the Allerton site. He believes that this particularly onerous contract, with its overly strict clauses and 25-year term, could be a form of indirect State aid, thereby seriously harming competition and local public finances.

2. Admissibility

Declared admissible on 10 September 2013. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 28 February 2014

The petitioner, a North Yorkshire County Councillor, is protesting against the local authorities' decision to award the municipal solid waste treatment contract to the company AmeyCespa at the Allerton site. He believes that this particularly onerous contract, with its overly strict clauses and 25-year term, could be a form of indirect State aid, thereby seriously harming competition and local public finances.

The Commission's observations

The Commission welcomes the information submitted by the petitioner on the excessive costs of

the Allerton Waste Recovery Park.

The Commission understands that the projects related in the petition are at the planning stage and no construction permit has been granted, as yet.

As regards the application of the waste hierarchy, the Commission observes that according to EUROSTAT statistics on municipal waste management published in March 2013, in 2011 the landfill rate in the UK is still very high (49%) and needs addressing, with increased re-use and recycling being the preferred options followed by incineration with energy recovery.

Incineration with energy recovery can, in certain cases, be an acceptable waste treatment option, especially to divert non-recyclable waste from being disposed of in landfilling sites. The Commission holds information that suggests that the UK as a whole is far from reaching incineration overcapacity, with the incineration rate of municipal waste in 2011 amounting to around 12%.

As regards the competition aspect of the petition, the Commission has received two State aid complaints regarding the same matter which are currently under assessment. The Commission is currently investigating whether State aid is involved, i.e. whether there is a selective advantage granted to the winner of the tender, Amey Cespa. In principle, the award of the contract brings no State aid concerns provided the contract was awarded following an open and non-discriminatory public tender procedure respecting the applicable national and EU rules.

As a preliminary note the Commission would like to stress that the public procurement Directives provide a common framework for public purchases by laying down procedural rules on "how to buy", and leave the contracting authorities free in their basic decision of "what to buy", to define the characteristics of the works, products or services that best fit their needs and to put in place the conditions which are the most appropriate for their desired policy objectives (as long as they are transparent and non-discriminatory). Therefore from a public procurement point of view the Commission will not comment on the specific technological solution retained by the North Yorkshire County Council for the treatment of waste at the Allerton Waste Recovery Park.

Project Finance Initiatives qualify under EU law either as public contracts or as concessions. Concessions are contracts similar to public contracts except for the fact that the consideration for the works or services to be carried out consists either solely in the right to exploit the work or services or in this right together with payment (Article 1 (3) and (4) of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (L 134/114, 30/04/2004). The award of works concessions for waste treatment is submitted to Articles 56 to 65 of Directive 2004/18/EC. The award of services concessions and of works concessions in the "Utilities" sector is submitted to the principles of equal treatment and of transparency of the Treaty on the Functioning of the European Union which imply, in particular, *'an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.'* (cf. Teleaustria and Telefonadress judgment, C-324/98, paragraphs 61 and 62).

A contract notice for waste treatment PFI contract was published by the North Yorkshire

County Council in the OJEU on 04.09.2007 (UK-Northallerton: refuse services 2007/S 169-208874). The contract was qualified by the contracting authority as a public contract and the award was to take place under Directive 2004/18/EC on the basis of a competitive dialogue.

The petitioner claims that the contract notice refers to the treatment of residual municipal waste, with no mention being given to commercial and industrial waste (C&I). According to the petitioner these facts underline the important role that C&I waste would play and therefore the absence of adequate and complete information on the needs of the contracting authority which *“distorted and impugned the procurement process, e.g. by denying other companies in the tendering process the opportunity to amend their tenders or by discouraging other waste management companies to bid.”*

On the basis of the information provided by the petitioner, the Commission cannot detect a violation of EU public procurement law.

The contract notice made reference, under point II.1 6) to CPV codes 90120000 (Refuse services), 90121000 (General waste services) and 90121300 (Refuse-treatment services). It seems clear therefore that it covered general waste treatment services and not only residual municipal waste as provided for in the short description of the contract under point II.1.5). Moreover, under the latter point the contracting authority announced that it reserved the flexibility to require the private sector partner to treat waste arising from other local authorities if to do so offered best value. Finally, under point VI.3) the contracting authority stated that bidders were encouraged *“to offer solutions that take into account or exploit any or all of the aspects of the waste related functions contained in the Environmental Protection Act 1990 and other legislation affecting waste disposal authorities.”* Hence, it is unlikely that any potential tenderer for the contract has been denied or discouraged from bidding for the contract at issue on account that the contract notice did not make an explicit reference to commercial and industrial waste. In any event, more detailed information on the needs of the contracting authority is normally provided for in the descriptive document of which no information is to be found on the petition.

On the 25 years duration of the contract the Commission notes that Directive 2004/18/EC does not provide for a maximum duration of a contract.

Conclusion

Decisions about waste management need to be taken at national, regional and local level taking account of EU legislation including the EU waste hierarchy. On the basis of the information provided by the petitioner, the Commission cannot detect a violation of EU waste legislation.

As regards the award of a public contract to a service provider national and EU State aid and public procurement rules need to be respected. The matter is under assessment from a State aid perspective.

On the basis of the information provided by the petitioner, the Commission cannot detect a violation of EU public procurement law on procedure for the award of a waste treatment PFI contract published by the North Yorkshire County Council.

4. Commission reply (REV), received on 30 July 2014

This additional communication aims to complete the previous reply given by the Commission on 28 February 2014 and deals with the additional information and allegation submitted by the petitioner relating to State aid aspects.

The Commission received two complaints regarding the same matter which are currently under assessment. These complaints have been forwarded to the UK authorities together with additional information submitted in the meantime by the complainants. The UK authorities have provided answers to the complainant's allegations several times while the assessment of the measure according to EU State aid rules is still on-going.

Article 107(1) TFEU provides that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market."

The Municipal Waste Management Strategy for York and North Yorkshire, entitled "Let's talk less rubbish", sets out policies, aims, objectives and targets for the management of wastes and resources to reduce the amount of waste produced in York and North Yorkshire and to promote the value of waste as a natural and viable resource for the period 2006-2026.

The UK authorities confirmed that the procurement process was organised in compliance with EU legislation respecting transparent and non-discriminatory rules. AmeyCespa was selected following a procurement exercise using Competitive Dialogue to identify the Most Economically Advantageous tender respecting the applicable national and EU rules.

Throughout the open competitive dialogue process, tenders (which included a range of technological proposals) seem to have been evaluated against published evaluation criteria (as described in Waste Treatment Contract OJEU Notice Ref 208874-2007- Evaluation approach).

In particular, the evaluation process to select the contractor included an assessment of the technologies proposed by the bidders, to ensure they would be suitable for delivery of the service, but the Council did not specify which technology, or mix of technologies were to be used.

The price to be paid by the Council seems to reflect the outcome of the open competition process, which balanced price against quality and environmental considerations. According to the UK authorities, the base level of waste (the guaranteed minimum tonnage GMT), below which there is a mechanism for adjusting the payment to the contractor, was set by bidders as part of the competitive tender process. The Council carried out detailed sensitivity analysis at the time of contract award to ensure that it would satisfy its obligation to supply waste above GMT level.

This being said, the Commission services are still in the process of assessing the measure, in the light of all available information including information most recently submitted by the UK authorities. Therefore, the Commission cannot yet communicate a final position on the measure, but will inform the UK authorities and the complainants as soon as the assessment is finalised.

5. Commission reply (REV.II), received on 30 January 2015

On the basis of the information available, the competent Commission services have come to a preliminary conclusion that the measures *prima facie* do not seem to constitute aid within the meaning of Article 107(1) TFEU, as no specific advantage could be identified for the beneficiary AmeyCespa.

As recently confirmed in the Commission decision in case SA 38302 (2014/N) – Investment aid to the Port of Salerno, in cases where operators are chosen on the basis of public, open and non-conditional tender procedures organised in compliance with EU procurement rules and using award criteria that are transparent and non-discriminatory, State aid is excluded, as the respective tender procedures exclude any economic advantage to the operator.

The Commission services note that the tender was conducted in compliance with EU procurement rules. The Commission services are of the view that the tender procedure was transparent and non-discriminatory, and therefore excluded any economic advantage to AmeyCespa. It follows that the measure objected to does not, *a priori*, constitute State aid under Article 107(1) TFEU.

In addition, the complainants were informed that the information they provided would be registered as general market information under the Code of Good Administrative Behaviour as they did not qualify as interested parties. Interested parties are parties whose own interests might be affected by the measure; for example competitors or trade associations¹. Only interested parties can submit formal complaints according to Article 20(2) of Regulation 659/1999 as amended².

¹ See Article 1(h) of Regulation 659/1999.

² Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L204, 31.07.2013, p. 15