

WHEN IS A GRANT NOT A GRANT ...

When it is a payment of consideration in the letting of a Public Works Contract;

or to be more precise....

When it is a payment of consideration made by a Contracting Authority for the carrying out of works/services for that Contracting Authority, or for a contract under which the Contracting Authority engages a person to procure by any means the carrying out for that Contracting Authority of works/services corresponding to specific requirements?

On 13 May 2005, the Housing Corporation confirmed that it had received 60 bids from organisations applying for Social Housing Grant under the £200 million New Partnerships in Affordable Housing (NPINAH) Programme. The NPINAH initiative, is the first Housing Corporation funded programme to be open to both the private and RSL sectors in accordance with the provisions of the Housing Act 2004, (which extends the Housing Corporation's grant giving powers to unregistered bodies by the introduction of a s27A of the Housing Act 1996)

Of the 60 bids received, 22 were from single, as opposed to consortia, bidders who are non-RSLs

The Housing Corporation is at present drawing up a short list from whom fully costed tenders will be sought for submission by the end of July, in order for the Housing Corporation to make a final decision in September 2005

The successfully selected bidders will receive payment of NPINAH Grant from the £200 million initial Programme, which is high value public procurement in anyone's language

So, why has the Housing Corporation seemingly ignored the EC Public Procurement Directives? Surely, the Housing Corporation is a Contracting Authority, particularly bearing in mind the announcement by the Office of the Deputy Prime Minister on 10 September 2004, that the Government had accepted the European Commission's view that RSLs fall within the definition of Contracting Authorities

Is the NPINAH Programme unlawful?

The Housing Corporation in its guide to the NPINAH Programme states clearly that it will be awarding grants, rather than procuring housing. The Housing Corporation further states that it is envisaged that the Programme will not constitute procurement activity within the meaning of relevant EC Directives but rather unhelpfully, goes on to explain that organisations that bid under the Programme must obtain their own advice as to whether the Directives apply

Obviously, if the Housing Corporation is simply to award/pay a NPINAH grant to a successfully selected non-RSL bidder, then the EC Public Procurement Directives do not apply. However, is this not too simplistic an approach?

Undoubtedly, the Housing Corporation is a Contracting Authority. It is "an association, (known as the Housing Corporation) acting in the general interest, supervised or mainly financed by another Contracting Authority" ie the Government

The Housing Corporation:-

- (i) performs a public function for and on behalf of the Government;
- (ii) is publicly funded;
- (iii) regulates RSLs as defined under the Housing Act 1996, which are themselves Contracting Authorities

So why will the payment by the Housing Corporation of NPINAH Grant to successfully-selected non-RSL bidders not be the letting of Public Works Contracts?

A Public Works Contract as defined by the EC Public Procurement Directives, is not simply a written contract for consideration, (whatever the nature of that consideration) for the carrying out of works for a Contracting Authority but is also a written contract for consideration under which a Contracting Authority engages a person to procure by any means the carrying out for the Contracting Authority of works corresponding to specific requirements, (for example, Housing Corporation Scheme Developments Standards etc)

On first reading this definition, payment by the Housing Corporation of NPINAH Grant is not payment in consideration for the letting of a Public Works Contract, it is simply a grant and therefore for the reasons set out above, the Regulations do not apply. However, it is necessary to consider EC Jurisprudence. The European Court of Justice adopts a purposive approach and on this basis, it is highly arguable that the payment of NPINAH Grant to a successfully selected non-RSL bidder falls within the above definition and therefore, is the letting of a Public Works Contract ie it is procurement by other means which includes the payment of consideration, but of a different nature to the direct payment of the Contract Sum under a Public Works Contract

For this reason, the explanation provided by the Housing Corporation in its guide to the NPINAH Programme is questionable. Clearly, if it is correct that the EC Public Procurement Directives do apply to the payment by the Housing Corporation of NPINAH Grant, then this will drive a 'Coach and Horses' through the NPINAH Programme to date, particularly, as before commencement, the NPINAH Programme should have been advertised by the Housing Corporation to non-RSL bidders EC-wide via an Official Notice in the European Journal

In the circumstances, the Housing Corporation should make available its own legal advice as to why the EC Public Procurement Directives do not apply to the NPINAH Programme, or urgently seek further legal advice to determine the future of the NPINAH Programme

So does a successfully selected non-RSL bidder who will be paid by the Housing Corporation NPINAH Grant, have to comply with the EC Public Procurement Directives, when it lets subsequent works contracts?

Firstly, it is necessary to consider the main purpose and objects of the non-RSL bidder. If it is to perform a public function, such as “RSL-type” development for the provision of social housing, rather than of a profit-making, commercial nature, then the Regulations will apply. Further, if the non-RSL bidder forms a special purpose vehicle or enters into a joint venture, whereby the main purpose and objects are to perform a public function, then again the Regulations will apply

Secondly, it is necessary to consider the type of contract to be let, particularly as such a contract will be subsidised by public funds for more than 50%. However, non-RSL bidders in this context do not have to comply with the EC Public Procurement Directives, as building works for the provision of social housing, is specifically excluded from the Regulations. Only certain categories of subsidised contracts are affected, namely, contracts for building works for hospitals, sport, recreation and leisure facilities, schools and university buildings and administrative buildings

So, why is there a distinction between the payment by the Housing Corporation of NPINAH Grant to non-RSLs as opposed to a Social Housing Grant to RSLs?

The answer is that there is no distinction. The same arguments apply as to whether a Public Works Contract has been let by the payment by the Housing Corporation of Social Housing Grant to an RSL. However, it is thought that it

is less likely in these circumstances that the Housing Corporation will be caught by the EC Public Procurement Directives. This is because:

- (a) the Housing Corporation is the regulator of RSLs and so, in effect is providing Social Housing Grant to an arm of itself
- (b) the RSL is also a Contracting Authority and therefore, will itself have to comply with the EC Public Procurement Directives and subsequently letting Public Works Contracts and
- (c) contracts for Public Works can be more readily argued for in circumstances where the Housing Corporation pay NPINAH Grant to non-RSL, ie organisations who can directly undertake building work themselves

In conclusion, it is highly arguable that the payment by the Housing Corporation of NPINAH Grant to successfully selected non-RSL bidders, will be in contravention of the EC Public Procurement Directives. Therefore the Housing Corporation must urgently review its position

Interestingly, the Housing Corporation seems to have only fallen short in respect of the EC Public Procurement Directives in one aspect, by failing to advertise the NPINAH Programme to non-RSLs EC-wide, via an Official Notice in the European Journal, albeit that this is sufficient by itself, to contravene the EC Public Procurement Directive. The Housing Corporation has utilised a Pre-Qualification Questionnaire for RSL and non-RSL bidders to complete and is to adopt the Directives' selection criteria

Robert Jennings and Anthony Best