



STANDSTILL PERIODS AND PART B CONTRACTS

Federal Security Service Ltd. v Chief Constable for the Police Service of Northern Ireland and Resources Group Ltd.

Some Part B services contracts may need to be let with a standstill period

At the end of a procurement process a standstill period before signature of the contract allows the unsuccessful tenderers a chance to take action if they believe that the rules have been breached. Once a contract has been entered into The Public Contracts Regulations 2006 (the "Regulations") say quite clearly that the only remedy available is damages so the opportunity afforded by standstill periods is a significant procedural safeguard.

Under the Regulations it is quite clear that a standstill period must be used for Part A services contracts, however, by contrast in relation to Part B services contracts there is no requirement for a standstill period. It would seem to follow therefore that standstill periods are never required in relation to Part B contracts, however, this is not the case. The recent case of *Federal Security Services Limited v Chief Constable for the Police Service of Northern Ireland and Resource Group Limited* ([2009] NICH 3) serves as a timely reminder that there are circumstances in

which Part B contracts will need to be let with a standstill period.

When should a standstill period be used with a Part B services contract?

Part B contracts are those which, under the Regulations, are subject only to limited regulation as compared to Part A contracts which are fully regulated. In particular, according to the Regulations Part B contracts do not need to be advertised or let with a standstill period. Part B contracts are subject to limited regulation on the basis that, at the time the underlying European directives were drafted, it was thought that such contracts would be less likely to attract cross border interest.

The Northern Irish Police Services case concerned a Part B contract for the provision of security, guarding and associated services to the Police Service in Northern Ireland. The contract for services had been awarded to Resource Group Limited and the previous incumbent Federal Security Services Limited, clearly dissatisfied with the result, successfully sought an injunction to prevent the Chief Constable from implementing the contract. One of the main breaches of the procurement rules raised was that the Chief Constable had failed to use a standstill period.

The judge noted, in line with the European Court of Justice's ruling in the *Alcatel* case (C-81/98), that in accordance with the general principles of European law contained in the EC Treaty unsuccessful tenderers must be given an opportunity to have decisions reviewed. The judge went on to note that in relation to Part B contracts, even though there was no express requirement in the Regulations for a standstill period, it was possible therefore that, in accordance with the *Alcatel* case, one could be required in certain circumstances. In this case the judge found that a standstill period should have been used. It is important to note that general principles of European law apply where the contract in question would or may be of cross-border interest. The judge in this case did underline that as a general rule use of a standstill period was not required for Part B contracts and that therefore that this case was an exception to the rule.

So, essentially the question of whether to use a standstill period in relation to a Part B contract can be resolved by determining whether it may be of interest to tenderers outside the UK. In the Northern Irish Police Services case the judge looked at a number of factors that may be of use to assess whether a standstill period must be used, most notably, the following:

- III Cross-border interest - the contract in question clearly could and did involve multi-national suppliers and was of a large financial value.
- III The Chief Constable was aware that there were elements of uncertainty about the procedure and that the incumbent was not happy with aspects of the process implying that there was a real possibility of a challenge.
- III The previous contract had already been extended due to the uncertainties relating to the procedure - which underlines the point made above.
- III Use of a standstill period would not in this case have altered service levels as the incumbent was already providing the service and there was no "new" service to be delayed.
- III The Chief Constable did actually consider a voluntary standstill period which does suggest that he thought that the issue was close to the line.

This point about using a standstill period is just one aspect of a contract having cross border implications and therefore being subject to general principles of European law. Therefore, it is important to note that if a Part B contract is of cross border interest then the contracting authority should also consider whether there are any other procedural implications. If it is decided that general principles of European law do or may apply then the contracting authority will need to decide whether to require advertisement of the contract and the operation of the procurement in line with some or all of the procedures and safeguards that are applied to procurement processes falling within the Regulations.

Implications if a standstill period is not used where one is required

What is also noteworthy about this case is that the contract in question had already been signed when the injunction was awarded. One of the defendant's main arguments was that the court had no power to grant an injunction in relation to a Part B contract because the contract had already been awarded. This conclusion would indeed seem to follow very naturally from Regulation 47(9) which provides that "[I]n proceedings under this regulation the Court does not have the power to order any remedy other than an award of damages in respect of a breach of duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into". Clearly in this case the contract had been entered into and so it seemed obvious that an award of damages would be the only remedy available. However, the judge concluded that, because no standstill period had been used, Regulation 47(9) either does not apply to a contract which breaches the requirements of Community Law or that it must be set aside to allow the injunction to be granted.

At first sight this judgment seems to contort the clear wording of the UK Regulations in a most remarkable way. However, the judgment is a good example of the Northern Irish courts applying a purposive approach to interpretation and so looking at the text of the Regulations in the light of the overall objectives of the procurement rules.

Conclusions

Not all Part B contracts will require a standstill period, indeed in the Northern Irish Police Services case the judge made a point of saying that generally Part B contracts will not require one. However, an assessment

still needs to be made as to whether or not the contract in question may be of cross-border interest and therefore whether a standstill period should be used.

In making this assessment the Northern Irish Police Services case does provide some useful guidance; most notably that contracts with a high financial value and with incumbents that are part of a multi-national network may well be of sufficient importance outside national boundaries to trigger the need for a standstill period. Another major thrust of the guidance is that where there is uncertainty, complaints have already been made by the participants and there is a looming threat of a challenge it may be as well to include a standstill period. In practice, in the majority of cases, it should be possible to make a fairly robust assessment simply based on the size of the contract and identification of any cross-border characteristics.

If the conclusion is that a standstill period may be required for a Part B contract consideration should also be given as to whether the contract should be let in line with some or all of the procedures and safeguards set out in the Regulations and in particular whether it should be advertised.

This bulletin contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

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