

Standstill Periods in Awarding Part B Service Contracts

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

The operation of the “standstill period” under Regulation 32 of the Public Contracts Regulations 2006 is now embedded in the operation of UK procurement law. This is a 10 day period between the decision to award a public contract and the actual conclusion of the contract and is intended to give unsuccessful tenderers an opportunity to challenge the decision before their rights to obtain relief other than damages are closed off by the existence of the contract in question. The Regulations made no express provision, though, for such a standstill period to be made available in the case of the award of the large proportion of service contracts that are defined in the legislation as part B service contracts. This is a highly significant category as it includes health, education, legal and recreation services. Given the volume of litigation in Northern Ireland concerning procurement matters it is perhaps no surprise that the first occasion on which this is considered by a UK court should occur in the High Court of Northern Ireland.

Deeny J. had to consider an application brought before him concerning the renewal of a Part B services contract. The contract was for the provision of security, guarding, driving and associated services to the Police Service in Northern Ireland. Towards the end of the contract, which had been concluded between the Chief Constable and Federal Security Services Ltd (“FSS”), the Chief Constable undertook a procurement procedure for the future supply of the services, and decided to award the contract to Resource Grafton Security. The contract was immediately awarded to Resources Group Ltd. The contract was concluded without any standstill period being applied. Despite the fact that the existence of the contract would normally prevent any remedy being made available other than damages, FSS successfully applied for an interim injunction to restrain implementation of the new contract

Obligation to provide a standstill period

The Court held that, notwithstanding the fact that Regulation 5(2) expressly excludes the requirement for any standstill period to be provided for before the conclusion of a Part B services contract, European Community law required a standstill period be applied in a case such as this.

FSS argued successfully that Regulation 47(1), which requires public authorities to comply *inter alia* with “any enforceable community obligation in respect of a public contract”, incorporates into domestic law a requirement that the award of public contracts comply with overarching Treaty obligations, with general principles of Community law, and with the case-law of the European Court of Justice (‘the E.C.J.’). Deeny J. accepted that the implication of the inclusion of Regulation 47(1) in the Regulations, and of the E.C.J. case-law, was that the “community obligation” may be wider than the obligations provided for expressly in the Regulations. The E.C.J.’s decisions in Cases C-458/03 *Parking Brixen GmbH* [2006] 1 CMLR 3, C-231/03 *Coname v Comune di Cingia de’Botti* [2005] ECR I-7287, and C-324/98 *Telaustria Verlags GmbH* [2000] ECR I-10745, and the Commission Interpretative Communication on the Community law applicable to contract awards not fully subject to the provisions of the Public Procurement Directives¹ established that the award of public contracts remains subject to Articles 43 and 49 EC, and the principles of transparency, equivalence, effectiveness, and equal treatment, even when outside the express scope of the Directives. As such, an award procedure may be subject to requirements beyond those to which it is subject under the Directives and implementing Regulations.

In particular, Deeny J. agreed with FSS that Community law may require a standstill period in cases not covered by the express provision in the Directive and implementing Regulations. The Court agreed that the E.C.J.’s decision in C-81/98 *Alcatel v Austria* [1999] ECR I-7671, reinforced by C-212/02 *Commission v Austria* (unpublished) requires Member States to ensure that in all cases the contracting authority’s decision to award the contract is subject to review at the request of unsuccessful tenderers, and to being set aside in appropriate cases. A decision not to adopt a standstill period in this case would be contrary to those rulings, as it would deprive an unsuccessful tenderer of the opportunity to apply to have the decision set aside (paragraphs 19-20). Deeny J. accepted FSS’s argument, by analogy with the E.C.J.’s decision in *Commission v Ireland* [2008] 1 CMLR 34, that just as there may be a duty to advertise Part B service contracts with cross-border interest, so too there may be a duty to adopt a standstill period where such contracts have a cross-border interest. The submission on behalf of the Chief Constable that there was no cross-border interest in a case such as this where all the parties, including all the unsuccessful tenderers, have emanations in the U.K., was rejected. The judge considered that such a conclusion would be a deterrent on establishing subsidiaries in other Member States, as its effect would be to deprive undertakings of their rights under Community law where they had chosen to do so. The judge found that the strong relationship between the short-listed parties and other Member States was sufficient to establish a cross-border interest (paragraphs 11-13).

In view of this, Deeny J. concluded that, although Regulation 5(2) provides that the obligation to adopt a 10 day standstill period, in Regulation 32, does not apply where the contract awarded is a Part B services contract, this does not exclude such a standstill period being required by Community law in an individual case. Deeny J. noted that “*the duty to grant such a standstill period in a Part B case will only occur as an exception to a general rule that such a period is not required*” (paragraph 34). The contracting authority, in each individual case, must decide whether a standstill period is required. Review by the national courts will be available; the test outlined ‘tentatively’ by the Court (‘tentatively’ as the matter was not fully argued before the judge) was that a plaintiff must establish “*there were such exceptional circumstances as should have led the [contracting authority] to conclude that a standstill period was called for*” (paragraph 34).

In this particular case, Deeny J. considered that such ‘exceptional circumstances’ were present, and that a standstill period was therefore required by Community law. The ‘exceptional circumstances’ included:

- (i) There was a cross-border interest;
- (ii) The contract was of a very high value;

¹ (2006)C179/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:179:0002:0007:EN:PDF>

- (iii) There was strong evidence of the introduction of a new criterion/sub-criterion post-tender, the unlawfulness of which was drawn to the Chief Constable's attention by Court's recent decision in *McLaughlin & Harvey No. 2* [2008] NIQB 91;
- (iv) The Chief Constable was already aware that FSS disputed the procedure by which the contract was awarded;
- (v) A voluntary standstill period had been recommended by some of the Chief Constable's advisors, and no reason had been given for not following that advice. This appeared inconsistent with the decision voluntarily to advertise the contract, even though that was not strictly required by the Regulations either.

This conclusion was considered to be compatible with the terms of the incoming Remedies Directive². Although the new Directive does not require a standstill period for Part B service contracts (there being no requirement of prior publication in the Official Journal; Recital (8)), Deeny J. nonetheless had regard to Recital (13), which states that "A contract resulting from an illegal direct award should in principle be considered ineffective.", in concluding that there is no bar in the new Directive to the conclusion, reached here, that a standstill period may still be necessary in an individual cases under wider Community law (paragraph 32).

Interpretation of Regulation 47(9) Public Contracts Regulations 2006

Having concluded that Community law required the use of a standstill period in the present case, the Court proceeded to consider whether it had jurisdiction to award the interim injunction applied for. Regulation 47(9), relied on by the Chief Constable, provides that "*In proceedings under this Regulation the court does not have power to order any remedy other than an award of damages...if the contract in relation to which the breach occurred has been entered into*" (emphasis added).

Deeny J. accepted FSS's argument that Regulation 47(9) was capable of being interpreted in a manner compatible with Community law (Case C-106/89 *Marleasing SA* [1990] ECR I-4135). It held that it should be read "*as referring to a contract complying with the principles of European Community law including transparency, effectiveness of remedies and equality of treatment.*" (paragraph 39). An agreement which breaches the requirements of Community Law is not a 'contract' for the purposes of Regulation 47(9).

In the alternative, Deeny J. held that if that interpretation were not available, he would disapply Regulation 47(9) on the basis of the House of Lords' decision in *Fleming v Revenue and Customs Commissioners* [2008] 1 All ER 1061 and the ruling of the E.C.J. in *Factortame Limited v Secretary of State for Transport* [1991] 1 AC 603. To the extent that a compatible reading of the Regulations were not possible, the sole obstacle to the grant of interim relief presented by the domestic provision would be disapplied.

In consequence of the above, the Court determined to exercise its discretion and grant an interim injunction. It remains to be seen whether the ruling will be appealed, or whether this topic will be addressed in the forthcoming amendments to the Regulations to implement the new Remedies Directive. Subject to these matters, it will also be important to see whether other courts follow this approach, and if so whether they will also take the approach that the application of the standstill period is an 'exception to the general rule'.

Michael Bowsher QC appeared for Federal Security Services Limited.

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² Directive 2007/66/EC, which requires to be implemented by 20.12.2009.