

EU & Competition

January 2010

A "somewhat unusual" case?

Scottish court holds that a concluded contract may be set aside if it is entered into in breach of the standstill period

On 9 December 2009, in what was described by Lord Menzies as a "somewhat unusual" case, the Outer House of the Court of Session set aside a contract that had been entered into in breach of the standstill period.

The judgment held that only where the standstill period prescribed in the Public Contracts (Scotland) Regulations 2006 (the Regulations) has been complied with is the remedy for an economic operator limited to damages. For it to be otherwise would deprive an economic operator of an effective remedy.

The case does however leave open the question as to whether the same reasoning could be applied to illegal direct awards (i.e. contracts caught by the Regulations which are awarded without any form of advertising or competitive tender process).

The contract award at issue in this case was the award by Clackmannanshire Council of a contract for the replacement of kitchens and bathrooms in council houses in Alloa and Tillicoultry (near Stirling). The estimated value of the contract was £2.5m, below the threshold for a public works contract to be caught by the Regulations. The Council had not advertised the contract in the OJEU but had advertised it on the Public Contracts Scotland Website and conducted the tender process referring to the Regulations, including the requirement for a standstill period. The contract award decision was sent to the wrong fax address and then re-issued to the pursuer. But two days after sending the re-issued notification the Council had written to the preferred bidder to accept its offer. Interestingly, and perhaps unusually, the Council did not defend the pursuer's action, admitting that the contract was subject to the Regulations and that it made an error in the scoring of the tenders, and by subsequently awarding the contract in breach of the standstill obligations.

The judgment does not explain the uncontested nature of the proceedings, but one possible reason for the Council's approach is the potential threat of legal action from the preferred bidder with whom it had concluded a contract. The preferred bidder had joined the action as the second defender. Did the Council find itself between a rock and a hard place?

With the implementation of the Remedies Directive on 20 December, the ramifications of this judgment will be limited to only those procurements commenced before 20 December 2009. However, it emphasises two points. Firstly, the importance for contracting authorities of complying with the standstill period. And secondly, the position of the third party in any procurement challenge: the preferred bidder. Under the new regime introduced with effect to all procurements commenced after 20 December preferred bidders will take a much greater interest in ensuring that the contracting authority fulfils its standstill requirements before entering into the contract.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

© January 2010, Dundas & Wilson CS LLP and Dundas & Wilson LLP. All rights reserved.

If you would like any further information on this Alert!, or any other EU & Competition issues, please call the person at D&W with whom you normally liaise, or one of the following specialists:

Peter Willis	peter.willis@dundas-wilson.com	020 7759 9962
Graeme Young	graeme.young@dundas-wilson.com	020 7759 3592
Judith Chisholm	judith.chisholm@dundas-wilson.com	020 7759 3526

www.dundas-wilson.com