

BIG BROTHER IS WATCHING: WHEN PROCUREMENT EXEMPTIONS APPLY AND WHEN TO CHALLENGE

In *Excession Technologies Limited v Police Digital Service* [2022] EWHC [413] (TCC),¹ the English High Court dismissed a challenge brought by an unsuccessful bidder, Excession, for alleged breaches of procurement rules during a tender process which the contracting authority, Police Digital Service ("PDS"), claimed was exempt.

In doing so, the High Court clarified the general test for interpreting procurement exemptions under UK public procurement law and provided guidance on the application of statutory time limits for challenging the outcome of procurement processes.

Procurement exemptions allow contracting authorities to dispense with the statutory procedural rules governing public tenders in limited circumstances (such as extreme urgency or for national security reasons) which lawmakers believe outweigh the need for public contracts to be opened to competition.

The exemptions disapply the statutory rules, but do not specify how exempt transactions should be procured. Rather it is for each contracting authority to determine the process to be followed. Contracting authorities can choose from a broad spectrum of procedural options, ranging from direct awards (i.e. public contracts awarded without any form of advertisement or competition) through to voluntary compliance with the statutory rules in full.

Direct awards and "closed door" competitions are the most contentious options on this spectrum, and are prone to scrutiny and challenge by uninvited market participants. However, as the *Excession* case demonstrates, reliance on exemptions can also be challenged even when the contract has been fully advertised and competed, and claimants have known about the exemption from the outset.

Though the case relates to the Defence and Security Public Contracts Regulations 2011 ("DSPCR"), the principles apply to procurements under the UK's other main pieces of procurement legislation – the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016 and Concession Contracts Regulations 2016.

Key takeaways:

- The High Court affirmed and applied EU case law on the approach to determining the ambit of a procurement exemption: the words used fall to be interpreted strictly and in accordance with the purpose of the Procurement Regulations.
- The decision provides a useful summary of the relevant legal principles for the application of statutory time limits.

¹ <https://www.bailii.org/ew/cases/EWHC/TCC/2022/413.html>

BACKGROUND

In September 2020, PDS commenced a tender exercise, seeking a provider of computer and information technology services for a covert surveillance operation room used by police forces and security agencies to conduct covert surveillance operations relating to organised and serious crime and terrorism.

In October 2020, Excession expressed an interest and received a Selection Questionnaire ("SQ") stating that, while the procurement was being run "under" the DSPCR, the process was exempt from the "full ambit of the DSPCR" by virtue of Regulation 7(1)(b) of the DSPCR which excludes arrangements "for the purposes of intelligence activities". The SQ went on to state that, notwithstanding the exemption, DPS would maintain the structure of a DSPCR process.

In April 2021, Excession was informed that its bid was unsuccessful and brought legal proceedings asserting various breaches of the DSPCR, including of the general obligation to comply with it as well as specific provisions such as the rules on abnormally low bids.

Mrs Justice O'Farrell DBE dealt with three preliminary issues at trial, ultimately rejecting Excession's challenge.

STATUTORY EXEMPTION

The High Court first considered whether PDS was entitled to rely on the exemption in Regulation 7(1)(b). In other words, whether PDS was correct to conclude that the procurement was for the "purposes of intelligence activities".

The High Court confirmed the principles for interpreting procurement exemptions, which it based on Court of Justice of the European Union ("CJEU") case law²:

- the exemption should be given a *strict construction*; however, it must be construed in a manner *consistent with the objectives* it pursues and not so as to deprive the exemption of its *intended effect*.
- the burden of proving that an exclusion is engaged rests on the contracting authority (i.e. PDS in this case).

The High Court analysed the language of the exemption, and whether it should be construed as applying only to contracts for the *direct* provision of intelligence activities (e.g. the activities of police forces and security agencies during the conduct of covert surveillance operations) or whether it was broad enough to capture contracts that supported such activities such as IT equipment and software.

The High Court was satisfied that the ambit of the exemption was not limited to contracts for the *direct* provision of intelligence activities:

"The reference to a contract "for the purposes of intelligence activities" indicates that the exemption is not limited to a contract that directly provides for such activities; it extends to a

² *Fastweb SpA v. Telecom Italia SpA* (C-19/13).

contract of which the object for performance is intelligence activities."

The High Court carried out an objective reading of the agreement to determine the object of the procurement.

The High Court rejected Excession's argument that the computer and IT services were incidental to the intelligence activities, concluding that the services formed an "*integral part*" of the surveillance operation room for covert surveillance operations and the purpose of the procurement was intelligence activities. Accordingly, the High Court was satisfied that the procurement fell within the exemption, and as such, the DSPCR did not apply.

STATUTORY TIME LIMITS

The High Court also considered the application of the statutory time limits in the context of Excession's case that the agreement did not fall within the exemption. Under the UK public procurement rules, challenges are required to be brought within 30 days beginning with the date when the claimant:

"first knew or ought to have known that grounds for starting the proceedings had arisen".

In doing so, the High Court provided a very useful distillation of the key cases and legal principles for determining knowledge including:

- **Requisite level of knowledge:** the clock starts from the moment the claimant has knowledge of facts "*which apparently clearly indicate, though they need not absolutely prove, an infringement.*"³ This is a fairly low threshold and likely to be triggered once the claimant has a genuine suspicion of a breach.
- **Time limits does not wait for legal advice:** the clock starts running when the claimants become aware of the relevant facts, not the law.

PDS argued that Excession had the requisite level of knowledge in October 2020 when it received the SQ, which informed bidders that PDS had concluded the procurement process was exempt from the "*full ambit*" of the DSPCR. Therefore, PDS argued that all claims asserting breaches of the DSPCR were time barred by several months.

The High Court disagreed. Though the SQ alerted Excession to PDS's regulatory position (i.e. that the DSPCR rules did not apply due to the exemption), the High Court concluded that there was no clear evidence at that stage of PDS's intention to dispense with the parts of the DSPCR in question and the earliest that Excession could have had the requisite knowledge was upon notification of the outcome of the procurement.

In reaching this conclusion, the High Court highlighted the equivocal nature of the statements made by PDS in the SQ on the application of

³ *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch).

the DSPCR. While PDS asserted its view that the exemption applies, it suggested that it nonetheless intended to comply voluntarily with the DSPCR. Furthermore, while PDS asserted that it was not obliged to comply with the DSPCR "*in full*", it did not specify which parts of the Regulations would apply, and which would not.

IMPLIED TERM

Excession argued in the alternative that the procurement was governed by an implied contract that PDS conduct the procurement in accordance with the indicative process as defined in the procurement documents, and investigate and/or reject any abnormally low bids. The High Court rejected this argument, in part on the basis that the same procurement documents expressly reserved PDS' right to change the process at any time. Such power, the High Court said, is "*inconsistent with the pleaded obligations to conduct the process on particular terms*".

CONCLUSIONS

The case provides helpful guidance to contracting authorities on applying procurement exemptions and the importance of taking care when making statements in procurement documentation about the voluntary application of the statutory procurement rules.

The decision is a reminder of the continuing influence of EU case law in English procurement following the UK's exit from the EU (at least at first instance). Under the European Union (Withdrawal) Act 2018, the High Court is bound by CJEU judgments handed down before the end of 2020 when interpreting UK procurement law. The Supreme Court or the Court of Appeal may depart from EU case law, applying the same test as it would in deciding whether to depart from its own case law.

The decision provides a very useful distillation of the legal principles for the application of statutory time limits, which will no doubt assist practitioners and subsequent courts considering statutory time limits. It provides a useful reminder to tenderers that time limits do not wait for legal advice.

While the UK government is planning to replace the UK's current EU law-based public procurement regime,⁴ we expect the relevance of *Excession* to continue under any new regime.

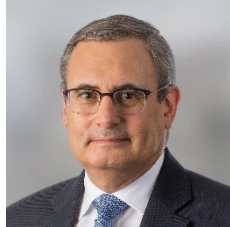
⁴ As to which, see our briefing here: <https://www.cliffordchance.com/briefings/2022/01/update-on-uk-public-procurement-reform-plans.html>.

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