ADDLESHAW GODDARD

TRANSCRIPTION

WEBINAR SERIES: PROCUREMENT BITES

S, T, U OF PROCUREMENT

Charlotte Parkinson

Good morning everyone, I'm Charlotte Parkinson, I'm an Associate here at Addleshaws in the Commercial Disputes Team specialising in public procurement and I am delighted to welcome you to our next session, our penultimate session in the procurement bite sized series. So before we get started, just a bit of housekeeping, we are recoding today's session and so you can catch up on anything that we talk about today or equally if there's anything that you think would be helpful to share with a colleague, you can pass on the recording and we also have all of the recordings right back to A, B, C last year saved on our website and that's on the "On Demand" page. There will also be a link in the slides to that page if you want to share that around your colleagues and the slides will be shared after the session. So today somehow we have reached S, T and U and we have three great speakers joining us today to talk to you on these topics. We have Paul who's a Managing Associate in our Manchester Office, Jack who's an Associate in our London office and Jonathan who's a Partner in our Manchester office.

Now just before I hand over we do have the ability to take questions today so in your browser you should see a speech bubble with a question mark in and you can pop your questions in there and if we've got time I'll put them to each of our speakers at the end of their session. So I will hand over to Paul now who's going to talk to you about Standstill.

Paul Rowley

Thank you Charlotte and good morning everybody. So yes a few words from me about standstill periods and standstill letters to give you a bit of an overview on this topic and as a procurement disputes practitioner, one of the things which I find makes procurement all very exciting and keeps us all on our toes is the very short window we have for challenging a contract award decision before an authority is able to enter into a contract and that's what we call the "standstill period" and purely be coincidence I'm sure, many authorities often issue contract award notices or seem to do very shortly before Bank Holiday weekends, half term weeks, even the last 2-3 working days before Christmas, just for good fun.

In terms of the standstill period and what is it? Well it provides an opportunity for an unsuccessful bidder to decide whether it has the basis to bring a legal challenge and ideally before it does that, to extract some more information from the authority before it pulls the trigger on court proceedings which would then bring about an automatic suspension. So it does enable a contract award decision to be set aside where an agreed bidder identifies a breach of rules and if the authority goes about it correctly and properly executes it, then it does or should enable the authority to protect itself from potential ineffectiveness claims down the line. It's not to say a procurement process can't be challenged after the standstill period has expired but an unsuccessful bidder in that scenario is likely to be limited to a claim in damages rather than the ability to set aside. It is important to stress at the outset that there's a distinction between the standstill period and the general limitation period, they're not the same although they do run in parallel. Under the Regulations in public procurement contract awards limitation expires 30 days from the date at which a challenger first becomes aware of or should have been aware of acts giving the grounds for a challenge. That's much shorter of course than the general primary limitation period under English law at six years.

By contrast to that the standstill period expires at midnight on the tenth day after the date on which an authority sends a valid contract award notice to all relevant bidders, what we term the "standstill letter". It doesn't have to be ten days, an authority could notify a longer standstill period if it wishes but ten days is the minimum. In the unlikely event these days that the notice is sent only by non-electronic means then it's a minimum of 15 days from the date of sending or 10 days from the date on which a bidder is known to have actually received it. Where the expiry date falls on a non-working day then the deadline will be extended automatically to the end of the following working day.

There's a requirement on authorities to issue standstill letters as soon as possible after a decision has been made and there's no obligation to send a letter to any bidder who has already been definitively excluded from the process. The rules on standstill don't apply strictly speaking to below threshold contracts, call off contracts under wider framework agreements, awards under the light touch regime or agreements by sub-central authorities particularly in situations of urgency. However, many authorities do choose to follow the standstill process on a voluntarily basis as its often termed and notify bidders that that's what they're doing, that's often done as a belt and braces approach or perhaps to seek to minimise the risk of a challenge later on in the process.

So what is a standstill letter and what should it include? Well it should of course set out the decision that's been made so naming the identity of the successful bidder or provisionally successful bidder. It should set out at a very high level the reasons for that decision and there's an obligation to explain what is sometimes termed "CRAST" and that stands for the Characteristics and Relative Advantages of the Successful Tender so relative to the recipient of the letter and however they perform against the winning bidder. It should set out the recipient bidder and the successful bidder's scores, again often a very high level summary by reference to the main points of the award criteria rather than a detailed analysis of all of the pros and cons. You are not required to set out the relative performance of the bidder to all of the others only to the successful bidder.

Another requirement is that the authority should explain how its calculated the standstill period and when it expects that to end and it should also set out any issues regarding non-compliance with the specification that the authority has identified. In most cases, in practice authorities when faced with a disappointed bidder raising grounds for challenge or arguing there's been a local of information or some other short coming in the process, the authority will often agree to extend the period so as to enable further information or clarification to be provided, the hope being that even if that means a short delay to the contract being entered into, that's better than a bidder being compelled to go off and issue proceedings, triggering the automatic suspension and subjecting everybody concerned to a lot of additional work, costs and lawyers.

It's important to note that there is a distinction between an extension to the standstill period which should directly be notified to all of the bidders, successful and unsuccessful and agreeing with a specific bidder that we won't enter into the contract for a further agreed period. That's not strictly speaking an extension to the standstill period, of course the period still lapses on the date it was originally notified. What the authority is doing is agreeing a further short grace period for the challenger bidder, so as to preserve the ability of that bidder to challenge the contract prior to it actually being signed. We do often see authorities and even their lawyers often referring to the latter scenario as an extension to the standstill period when strictly speaking it isn't.

Going back to our limitation point from earlier, authorities are sometimes happy to keep extending the period in the hope that the bidder or its lawyers will forget about the 30 days' limitation period or quickly get timed out by getting to that date and when we have acted for authorities its often the tactic we've been happy to acquiesce in or it will potentially have some merit on a particular agreement process. At that point even if there is an agreed standstill period still to run the ability to be a court challenge is very likely to be timed out so it's something to be very much aware of and be careful of. There is some ability to extend the limitation period but for a court to do that if there's good reason but that's quite limited and certainly not something you want to be having to argue if you can avoid it.

So to wrap up in conclusion on standstill, the key message on all issues of standstill, limitation, pre-contract challenges and potential remedies is always to seek urgent assistance and advice at the earliest possible opportunity and that applies whether you are a disappointed bidder with questions to ask or an authority facing up to a prospective challenge from a disgruntled bidder.

So that was all I wanted to say on the topic, I think that's the whistle-stop summary but if there are any questions I'm happy to look at any of those that have come in.

Charlotte Parkinson

Thank you very much Paul. We do have one question that's come through and I think we've probably got one minute to respond to you so the question is: What can we do as a losing bidder if an authority refuses to provide information during the standstill period to enable us to decide if there is actually a basis for challenge?

Paul Rowley

Yeah I mean this is, speaking as a disputes practitioner, this is the situation we're often in when we're acting for a disappointed bidder seeking to bring a challenge. You're probably going to have a couple of rounds of correspondence before you come to a conclusion that the information is just not going to be provided or the authority does simply not want to play ball and give it to you, and before you know it you've lost 4 or 5 days of your 10 day window or even more by the time you get to that stage, so I mean what we always seek to do in that situation is hit the authority hard in the first instance with a robust initial letter identifying as may shortcomings as we can really and use that as a basis for in the first instance getting an extension to the standstill period or an agreement not to enter into the contract for the period of whatever number of days we can agree until we have a satisfactory response to the questions we're asking and most authorities will generally agree to that or negotiate rules on what the additional length of time will be, it's in both parties' interests to do that, and doing that will give us more time to then send a whole of letters and really push for more information and whether there could be a court challenge as in you know the timescales are tight, it's not difficult for an authority to try and blow the system and time you out and you know the short answer I suppose if you can't really compel an authority to provide information if they're not willing to do it, certainly not within the times on the standstill period. Pre-action disclosure applications I suppose are possible but are unlikely to get in front of the judge in time for that to be worth pursuing before your request could be made but that's not really much use in the timeframe which you've got so you've really just got the nuclear option I suppose of threatening to issue proceedings and triggering the automatic suspension. There's obviously a carrot and stick approach of encouraging the authority to play ball and give you some proper answers, I think writing some good focused letters is key and that's what we would try to do. The key message I think is just don't hang about, I think it's the importance of getting on with it and acting urgently once you think you've had a standstill notice and it raises more questions than it answers.

Charlotte Parkinson

Yeah. No that's great, thank you Paul. It does answer the question yeah, it often a very difficult situation bidders find themselves in isn't it so yes that's helpful. Brilliant thank you very much for that. I will now hand over to Jack who's going to talk to us about the Teckal exemption, so Jack over to you.

Jack Doukov-Eustice

Yeah thanks very much Charlotte. So Teckal, teck-al, potato, pota-to, I mean if anyone does know how to actually pronounce it then please let me know. I've always wondered. But Teckal, what's it all about? What is it? What's the test? What should you be considering when you're looking at this exemption? So first of all when is the Teckal exemption going to be of interest? For a number of reasons I think a public body may want to set up a distinct company or unit to deliver specific functions. One of the advantages is obviously containing liability to a single entity could be quite useful. Another advantage of economies of scale and specialisation so setting up one shared services unit to provide a function to more than one public body. Some proper examples of that is shared HR services or legal services

where they can be provided to a number of different bodies but actually it is quite useful to concentrate the expertise or resource in one place. Now it's obviously going to be impractical or even impossible to do this if the contracts for those have to be put out to tender each time. There will be no guarantee obviously that the in-house departments would necessarily win those contracts and so the exercise of setting up these independent units becomes pretty much pointless. As we all know the contracting authorities have to advertise for contracts for works, services or goods which are over a certain value but then run a procurement in line with the relevant regulations.

So Teckal is an important and a useful exemption to this general requirement and the name comes from the case which established the principles or found the principles back in the 90's, it's an EU case, and broadly speaking this exemption is based on the fact that some arrangements are actually more akin to the in-house arrangements or you know corporate organisation and are not properly seen as a contract entered into between a contracting authority and a third party, which is really what regulations are concerned with. So, assuming you wanted to use the Teckal exemption and its relevant to you, what's the test? What are you going to have to satisfy? It's worth saying that the principles that were expounded in the *Teckal* case were built on over the years and quite usefully its now codified so it has an example, we've got Regulation 12 in the PCRs and that sets out the test. You can see similar in the CCR and UCR as well. So those conditions are first. If the contracting authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments, second more than 80% of the activities of that entity are carried out on a performance task entrusted to it by the contracting authority or other entities controlled by that contracting authority and lastly that there's no direct participation in that entity. So they need a bit of unpacking. I mean what do those different concepts actually mean? First, taking a look at the meaning of "control", what we're told is that this requires the contracting authority or authorities to exercise what's called a "decisive influence" over the strategic direction and significant decisions of the entity. It should also be noted that this is a test more of substance and not of form so if you're a wholly owned subsidiary of a contracting authority that might indicate that there's sufficient control by the contracting authority but it doesn't necessarily mean that its satisfied.

On the other hand, you know even if there's a small shareholding or ownership by the contracting authority that doesn't negate the fact that there might still be a requisite level of control there. So it's always necessary to see what happens in practice. When looking for this level of control and sort of where we can find sort of hints and things to rely on to show this, some important documents are the Articles of Association, so for example the objectives are set out there for the purpose of the entity itself. If they're particularly commercially orientated, then this can militate against claims that the entity is really controlled by its public interest orientated contracting authority. We also look at the composition of the Board and that can have an impact on determining whether the requisite level of control is present. They do look at control on contracting authorities and have the ability to appoint and remove members of the Board and how key decisions are controlled and taken. So they're all key questions that we tend to look at when assessing whether an entity benefits from the Teckal exemption.

It is also worth noting briefly that if there are multiple contracting authorities which control an entity, each of those has to have some kind of say or involvement in the decision making and control if they want to benefit from the Teckal exemption so you know, a silent partner in the background that doesn't really do anything won't exercise that requisite level of control and wont benefit from the exemption.

Moving onto the second limiter test the 80%, you know what is that threshold getting at and how do you calculate it? The aim here to try and make sense of it is essentially to ensure that competition on the open market isn't being distorted which seems reasonable, I think if you think about it, an entity such as an in-house unit is getting contracts directly awarded by the public sector, they're often on favourable terms and this could give them an unfair advantage over the rest of the market who are competing for the work. So by keeping that private market activity to quite a low level the potential for distortion of completion is kept to an acceptable level. So 80% is arguably an arbitrary figure, I think case law has looked at different levels in 90% or 80%, the codification settled at 80% which is actually quite generous.

How do you calculate it though? If you can, a simple turnover test, average total turnover for the previous three years is a straightforward test. Otherwise an appropriate alternative activity-based measure such as costs incurred by the relevant entity or contracting authority with respect to services, supplies or works over the preceding three years can be used. There are different ways to approach that.

The last condition that there's no direct private market [s♦20.02] is self-explanatory I think so I don't tend to dwell on that too much. So now that you have an idea as to what a Teckal entity is and how they're established, what are some of the considerations and limitation of using a Teckal body?

The first thing to note is that the exemption is subject to the overriding requirement that an entity is not set up for the purposes of circumventing the procurement rules so not that anyone ever would be its worth bearing in mind that there are no guarantees even if the test seems to be satisfied, that if you're using it as a ruse to get around the rules, there is that overriding requirement as well.

Funding is also quite a practical issue. Teckal bodies can't really generate a lot of revenue, we saw there's a 20% limitation on activities outside of what they do for the contracting authorities, so how are they going to be funded, you know where is that money going to come from to pay for a provision of services? So it's worth considering how that's going to be satisfied before you go through the other steps of setting one up.

One of the main ones a well that can often be missed actually is that the Teckal body, although it's not guaranteed, it's almost inevitable that it's also going to be a contracting authority in its own right so consideration as to how that entity is going to award its good, works or services needs to be taken into account. In terms of considerations here what can be quite useful is that a Teckal body can award its own contracts so its control of contracting authority, or another entity which is also controlled by the same contracting authority so within the same group. So these are the things that we call "reverse Teckal" and "joint Teckal" as well.

There is a bit of a gap in this so you see the last arrow there we've got Joint Reverse Teckal. This is a bit of a gap as I said in the Regulations where if you have multiple controllers of a Teckal entity it doesn't seem possible or at least it's not put in a codification that the Teckal entity can then award to one of its controlling entities.

So there you have it, a very short summary of what a Teckal entity is. In short, a very sensible in-house-based exemption which allows you to award contracts to a separate legal entity without following a public procurement process so doing away with standstill letters and undisclosed criteria which is always good.

Charlotte Parkinson

Thank you. There was one question but I will save it to the end if we've got time, I'm just conscious of timing so yeah if we can come back to it we definitely will do. So thank you Jack for that, that was very interesting and I will now hand over to Jonathan who's going to talk to us about Undisclosed Evaluation Criteria.

Jonathan Davey

Thanks Charlotte, morning everybody. On this slide I've just set out the relevant cases on this issue of Undisclosed Evaluation Criteria. I promise I'm not going to take you through these but that's there as a resource for you to go back to should you want a ready reckoner of where the relevant case law is. If you read one of those things, Mr Silber's judgment in the *Letting* case is probably to be recommended because he goes through the EC case law there and he also deals with some interesting side issues like how do we distinguish between a sub-criterion and mere methodology that the authority is going to use in applying the evaluation criteria. So I'll move onto the next slide and leave you to look at those cases at your leisure.

Instead what I wanted to do this morning was to take a bit more of a practical view of this issue and to ask ourselves first of all the question why is it important? And then to look at some practical pointers,

both from the point of view of authorities and from the point of view of bidders or dare I say challengers when looking at the undisclosed criteria issue.

To summarise all of that case law, the issue with undisclosed criteria is of course that they point to a lack of transparency and of course we all know that authorities are required to behave transparently in running award procedures so if we can point to undisclosed criteria we have a lack of transparency and that of course can found a course of action. The problem often as Paul has already hinted is that if we have an issue with the way we were treated at the selection stage or with elements of the invitation to tender, those may well be out of time by the point at which we receive a standstill letter and having lost we decide we might want to do something about it but the valuable feature of an issue relating to undisclosed criteria is that it usually only surfaces when we get the standstill letter so those challenge timescales that Paul talked about earlier the clock starts running afresh and so is a fertile ground for challenges bringing claims.

The other issue is that if you've heard me speak on this subject before you will know it's a bit of a hobbyhorse of mine, what the procurement rules require us to do is something that's pretty counterintuitive and contrary to the way we make purchasing decisions in our private lives. If you're going to buy a new car on Saturday you don't go with a list of pre-decided criteria and weightings before you've even seen the cars, you want to sit in the car, you want to understand the features, you want to test drive, maybe you'll spot a feature when you get to the garage that hadn't even figured in your thinking before you got there and the problem with that type of issue in the context of public procurement is that authorities may find out only after they've launched the process, that the criteria they've laid down don't effectively enable them to choose what is more subjectively the best bid. Of course this is compounded by the fact that whereas you'd expect the bidders to be experts in the field concerned the authorities aren't, the authorities usually aren't as sophisticated in terms of their buying behaviour so they may only see things in bids and decide that actually they're important to the procurement decision.

So having persuaded ourselves this is an important issue, what are the practical implications of this for authorities and challengers? Well the way to avoid that problem if you're the authority is preparation. The number of times I've heard an authority say when I've asked how they came up with the criteria and weightings are "oh they're the ones we used last time" or "we've used them on a different project recently". Well that's not good enough if I may say that. It really is important that authorities ask themselves what criteria are key and do that preparation and something we've often recommended to clients is some modelling of evaluation outcomes. This was recently approved in the 100 and odd page report on the procurement problems with the Magnox, the commissioning project in the nuclear industry. What I'm thinking of here is coming up with some dummy bids, putting them through the evaluation mechanism, maybe take half a day or a day over it and involve the team. Most time when we've done the result of the first round is that the authority representatives conclude that the criteria are not the right ones and we go back in and we adjust them or we adjust the weightings.

The other things for authorities is be careful in the standstill letter wording. It's one thing to have used undisclosed criteria, it's another to perhaps wrongly suggest that you did apply undisclosed criteria because the wording in the standstill letter was sloppy and unfortunately although drafting standstill letters is a lengthy and laborious process, I think the lawyers really must not leave this to their colleagues, including in the technical areas because what you need to do is sit there with the standstill letter wording and compare it to what you said in the invitation document and ensure that you're not suggesting that you took into account things that you really shouldn't have done.

What about the position for challengers? Well if there are inconsistencies or a lack of clarity its obviously best not to wait until the outcome of the competition and then kick up a fuss, raise early clarification questions. In 100's of pages of documentation there will often be inconsistencies and its far better to clarify those and base your bid on the clarification than kick up a fuss in due course, but if you do get to a point where the standstill letter is issued and you have lost, look carefully at the standstill letter wording, both the comments on your bid and on those of the winner. Again, you're looking amongst other things for any criteria that may not have been disclosed. Lastly, bear in mind time limits. The time limits are

tight and the court applies them strictly. You can't sit on your hands for some days deciding whether to do something or not to do something.

I'm going to stop there given time is marching on and hand you back to Charlotte.

Charlotte Parkinson

Thank you very much Jonathan and yes we are crucially running out of time so I will not put any question to you but thank you all very much for joining us today and thank you to all of our speakers. I'm sure if there are some burning questions our speaker will be happy to take them by email if you wanted to drop anyone an email.

So as I mentioned this was our penultimate session and our final session will be coming up next month. An email will be circulated with the details of that. Some of you may have noted that we are left with five letters and we are still deciding what we are doing with those five but we will definitely get some further details out to you later this month.

Thank you very much for joining us today and enjoy the rest of your day.