

The Court of Appeal has analysed and applied recent Court of Justice case-law on the definition of “services concession” contract and made an important ruling on the availability in procurement litigation of claims based on an implied contract created by an invitation to tender. Jason Coppel analyses the judgment.

The case of *JBW Ltd v Ministry of Justice* [2012] EWCA Civ 8 (16 January 2011) involved a claim arising out of a tender procedure for the services of bailiffs, who were needed to enforce fines issued by magistrates courts. The vast majority of work consisted of enforcing distress warrants, seizing the goods of defaulters, selling them and retaining the proceeds up to the amount of the outstanding fine, together with an enforcement fee. The fees to be charged to defaulters were fixed as part of the tender process.

The Claimant was not successful in winning any of the contracts being tendered by the Ministry of Justice (“MoJ”) and issued proceedings complaining of, amongst other things, collusion between the MoJ and one of the successful tenderers, lack of transparency in the invitation to the tender and a failure to provide essential information. The Claim was pleaded as breach of the Public Contracts Regulations 2006 (“the Regulations”), alternatively, breach of an implied contract created by the invitation to tender read with JBW’s tender in response to it, which (it was said), like the Regulations, imposed obligations of transparency and equality of treatment. JBW did not allege breach of EU Treaty rules as there was no inter-state interest in the contracts.

The MoJ applied for summary judgment on, alternatively strike-out of, the Claim on the basis that the contracts were service concessions which were excluded from the scope of the Regulations by reg. 6(2)(m), and that no contract could be implied as alleged by JBW. Master McCloud gave summary judgment in favour of the MoJ, but also gave permission to appeal, and another Master directed that, exceptionally, the appeal should be made to the Court of Appeal.

A services concession contract is a public services contract under which the consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract (reg. 2(1)). The MoJ relied on recent ECJ decisions in *Wasser* (C-206/08) and

Stadler

(C-274/09) to argue that it was sufficient to satisfy the definition of services concession that payment to the contractor came from third parties rather than the contracting authority, and that some risk was transferred from the contracting authority to the contractor, even if that risk was

small having regard to the nature of the services to be provided.

Elias LJ, with whom the Master of the Rolls and Kitchin LJ agreed, held (§42) that the contracts at issue lacked many of the typical features of a concession contract in that, for example, the third parties making payment were compulsory recipients of services rather than customers to whom the contractor was truly exploiting the relevant services; the contractor had no opportunity to exploit the services by developing the market/customer base; and the MoJ retained close control over the way in which the services were provided. However, the Court went on to hold that the contracts were services concessions excluded from the scope of the Regulations on the basis that there was some transfer of risk from the MoJ, there was no direct payment by the MoJ, a service was provided to third parties, and it did not matter that they were unwilling recipients of the services (§53).

The Master had ruled in favour of the MoJ on the implied contract claim on the basis that since the legislature had excluded service concession contracts from the scope of the Regulations, it could not have been intended that exactly the same obligations as are imposed by the Regulations – transparency and equality of treatment - should be implied by the common law. The Court of Appeal rejected that argument: it would have been open to the parties expressly to contract to abide by obligations identical to those set out in the Regulations and there was no reason why an implied contract ought not to cover the same ground (§60).

However, the Court went on to rule in favour of MoJ on other grounds. In accordance with the Court of Appeal's decision in *Blackpool Aero Club v Fylde BC* case, there could be implied a private law contract to consider tenders submitted as required by the invitation to tender, and also to consider them in good faith. However, there could not be implied a contract containing the fuller set of obligations, mirroring the Regulations, which were alleged in this case, for three reasons (§62). First, those obligations were not necessary to give efficacy to the contract. Second, there could have been no common intention to imply these obligations as the MoJ had always proceeded on the basis that the Regulations did not apply, because the contracts were services concessions. Third, a power reserved by the MoJ (in standard terms) to alter the terms of the tender process as set out in the invitation to tender was inconsistent with an implied contractual obligation to act with transparency. Whilst the ruling was concerned with contracts which fell outside the Regulations, much of what the Court said is, at least arguably, applicable to tender processes concerning contracts which fall within the scope of the Regulations.

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