

APSE: Catering & Cleaning Come in from the Cold

APSE Catering, Cleaning and Facilities Management
Seminar 2014

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Future Legal Issues for Catering & Cleaning: Coverage

- Context
- Optimised operations to compete
- Legal considerations
- Changes to procurement law and the scope of the Teckal exemption

Context: What makes local authorities special?

- Political interface
- Ability to deliver corporate priorities flexibly eg public health – linking services to desired outcomes
- Non-profit distributing
- National Terms & Conditions for staff – varied locally & LGPS
- Greater inter authority/schools collaboration & collective buying power
- Opportunities to develop new operating models/brands

What do you want to do and why?

- Reduce costs
- Retain and develop your customer base
- Increase income/surplus
- Manage service demand (up and down)
- Meet new legislative/policy demands
- Deliver on a new political agenda (eg change in administration)
- Meet regulatory challenges
- Promote more choice/value
- Improve operations eg Lean Systems

Does Local Government make the most of its uniqueness?

- Competition law/State Aid considerations frequently seen as a limitation on what can be achieved
- Focus on the cost base of the “business” – what more might be achievable e.g:
 - Bulk buying – national or even international scale?
 - Define the value added elements that can be achieved because you are local authority owned
 - Look innovatively at the linkages between the services provided and public service objectives

The Public Services (Social Value) Act 2012 - Under utilised?

New duty to consider, before procurement:

- How and what you are procuring might improve the economic, social and environmental well being of the local area
- The how you might act during the procurement to achieve that improvement and
- Whether to undertake any consultation

....improve corporate commissioning approach to:

- Deliver better local economic footprint multipliers
- Create more sub-contracting opportunities

Optimised Structures to compete

- In-house
- Shared Services
- Teckal company
- Trading company
- Outsourcing/Insourcing
 - Social Enterprises and Mutuals
- Wholly owned and controlled or Joint Venture eg Staffordshire Schools

Legal Considerations

- 'Mainstreaming' the Public Health/Healthy Communities Agenda
- Flexibility/adaptability & assisting with the curriculum
- Staff
 - TUPE
 - Secondment
 - Living Wage
 - LGPS Pension changes
- Competition Law in a nutshell

Legal Considerations if Companies

- What will the company do that the LA cannot?
- JV or wholly owned?
- Extra legislative controls
- Unable to delegate decision-making
- Need to fund business plan requirements including cash-flow
- Possible tax/VAT issues
- Procurement, unless Teckal applies
- Ensure strong governance & accountability

General Power of Competence

- Local authority has “power to do anything that individuals generally may do” including things “unlike anything” that public bodies do
- Power may be exercised in any way whatever:
 - Anywhere in United Kingdom or abroad
 - For a commercial purpose or otherwise, for a charge or without charge
 - For the benefit of the authority and its area or persons resident/present or otherwise
- Not limited by powers that overlap... but must observe explicit limitations/prohibitions; no wider powers to delegate

Procurement law changes on the horizon

- General principles: equal treatment; non-discrimination; and transparency remain
- The new Directives:
 - Formally agreed in January 2014 with **2 years** for member states to implement
- Thresholds
- Timescales
- Most Economically Advantageous Tender
- Greater use of competitive negotiating procedure

.....amongst other changes

The New Directive – Time limits

	PCR	New Directive
Open	52(40) days	35(30) days
Restricted	PQQ: 37(30) ITT: 40(35)	PQQ: 30(25) ITT: 30(25)
Competitive Dialogue/ Negotiated	Request to Participate 37(30)	Request to Participate 30

Public sector collaboration

- Current Directives/Regulations are silent on contracts/collaboration between two or more contracting authorities
- Exemption developed through case law (Teckal and Hamburg) based upon:
 - **Control:** the public body/ies jointly must exercise control over the provider, as if it were an extension of the body/ies
 - **Function:** the provider must carry out the essential part of its activities with the public body/ies

Public sector collaboration

But Beware: Not all intra-municipal arrangements are outside of the Directives -

- Commission v Spain
- No particular form of collaboration is required – Commission v Germany (Hamburg)
- Piepenbrock – transfer of a contract previously outsourced to a related entity
- Tachie - ALMO

Public Sector Collaboration

The *Teckal* rules have been included in the New Directive and are more favourable

- In order to benefit the following 3 conditions must be met:

(1) the contracting authority exercises over the legal person concerned a control which is similar to that which is exercised over its own departments

Public sector collaboration

(2) *more than 80% of the turnover of that legal person are carried out in the performance of tasks entrusted to it by the controlling authority or by other legal persons controlled by that contracting authority*

- Contracting authorities may still act together
- Can be applied to 'sister' companies owned by the same parent(s)

(3) *There is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation...which do not exert a decisive influence on the controlled legal person*

Making public sector procurement more accessible to SMEs

- Cabinet Office better regulation unit consultation:
 - Eliminate PQQs for low value contracts and use core PQQ with standard questions for high value contracts allowing suppliers to provide PQQ data once (back to approved lists?)
- Transparency: ensuring contract opportunities advertised on line (and spend) Contract Finder
- Whistleblowing – Cabinet Office
- Payment and finance

Reflections

- What do you want to achieve and why?
- Have you maximised the scope for collaboration with other LAs/Public Bodies?
- How far can you negotiate with local businesses (e.g. to supply local produce; reduce waste and packaging)?
- How far can technology be developed to reduce costs – use of apps etc?
- What community benefits can you provide i.e. apprenticeships?
- Have you exploited the green agenda & renewables?
- How far can you achieve under corporate objectives?

The future

For FM is more challenging; Catering may be expanding and cleaning increasingly squeezed?



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