

APSE Environmental Services Seminar 2013

The Green Stuff: An Integrated Approach to
Environmental Services

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A Horizon Scan of Legal Issues and What It Means for You

- Changes to procurement law and the changing scope of Teckal and collaboration exemptions
- Delivering statutory duties with reduced sources
- The general power of competence and how to use it to your advantage

Procurement law changes on the horizon

- General principles: equal treatment; non-discrimination; and transparency
- The new Directives:
 - To be formally agreed in January 2014 with 2 years for member states to implement
- Thresholds
- Timescales
- 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

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

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(2) more than 80% of the activities 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

- It is uncertain whether “activities” is a reference to volume or value. However, volume seems more appropriate
- Purchases made on behalf of third parties under a central purchasing arrangement will not count towards the percentage calculation

(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)
- Payment and finance

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

Delivering statutory duties with reduced resources

- DCLG statutory duties list
 - Red tape task force
- Income generation ...
 - Audit Commission “Income from Charging” report
 - Audit Scotland “Charging for services: are you getting it right?”
- Scope for more shared services
- Prevention is better than cure; or early intervention

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

The general power of competence

- Have you exploited the green agenda, in particular renewables?
- How far can you negotiate with local businesses (e.g. town centre suppliers to reduce waste and packaging; improve local areas etc)?
- How far can technology be developed to reduce costs?

The future

is smaller..... but more challenging



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