

What's new.....



- Teckal and EU procurement
- General Power of Competence
- Public sector 'Spin outs'...



EU procurement

- Proposed EU Directive on Public Procurement
- Published December 2012
- Why?



Main proposed changes:

- No distinction between Part A and Part B services - most will be subject to full regime
- Social care and health: Proposed directive introduces separate rules for tenders concerning social, health and education services. Authorities will only be required to tender service contracts valued in excess of €500,000.



Teckal codified

- **Explicit recognition of “in-house” and other co-operation agreements**

The Teckal case-law (permitting authorities to award contracts to in-house bodies without conducting a full procurement has now been formally recognised and codified)

Other forms of co-operation agreements between local authorities will also be excluded from the tendering requirements in the Directive if they meet certain conditions

Why is Teckal under the spotlight?



- Spain - attempted to exempt all public-public co-operation from procurement and the ECJ confirmed that was unlawful
- Restated that you have to look at the substance of the transaction
- LAML judgment reviewed all the case law in light of *Commission v Germany*
- Concluded no particular form of intra authority collaboration is required

Commission v Germany case



- The court found that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks and
- Such co-operation between public authorities does not undermine the principal objective of the Community rules on public procurement.
- In *LAML* Lord Hope commented that the exact basis for the decision in *Commission v Germany* is not easy to detect from a reading of the court's judgment but that it **does confirm** the conditions that need to be satisfied to fall within the *Teckal* exemption.
- Collective control is enough and public authorities do not require to follow any particular legal form in order to take advantage of it. So long as no private interests are involved, they are acting solely in the public interest in the carrying out of their public service tasks and
- They are not contriving to circumvent the rules on public procurement, the conditions are likely to be satisfied.



Teckal reminder...

- *Teckal* (Case C-107/98) allows an authority to award contracts to its “in-house” company provided:
 - Same/similar control to in-house
 - Company perform “essential part” of its activities for the controlling authority
- *Stadt-Halle* (Case C-26/03) says private sector involvement in company means *Teckal* will not apply
- *Parking-Brixen* (Case C-458/03) says very wide objects and intentions for company means *Teckal* will not apply
- *Carbotermo* (Case-340/04)
 - Control through a holding company not sufficient
 - Other activities must be of marginal significance
 - More than one authority can be involved

Other key points from proposed Directive



- **The new competitive negotiated procedure**
The negotiated procedure has been modified to ensure safeguards against discrimination and unfair treatment are observed.
- **Relaxation of the rules governing the use of the negotiated procedure and competitive dialogue**
Best outcomes for procurement as the driver?

Other key points from proposed Directive



Simplified procedures for authorities outside central government

Contracting authorities outside central government (including local authorities) will benefit from relaxed rules regarding the publication of contract notices and the application of time limits if a prior information notice is used.

NB – changes under Localism Act.....

- **Detailed rules on modification of contracts**

New provisions will define the concept of a prohibited 'Substantial Modification'. *Is it in fact a new contract?*

Other key points from proposed Directive



- **Measures to improve access to the market for SMEs**

Support for SMEs would be provided in the form of encouraging the division of large contracts into 'Lots' and ...

Potentially prohibiting authorities from requiring minimum turnover levels that would **exceed three times the contract value.**



Other matters....

- **Proposed Utility Directive**
- **Proposed Directive on the award of concession contracts**
- Case law on the award of service and works concessions codified so authorities must conduct transparent and fair competitions for concessions valued in excess of €5,000,000.however, the new Directive does not require authorities to follow any specific award procedure

General Power of Competence



General Power of Competence



- Allow local authorities to do anything which is not specifically prohibited by law, allowing innovation in response to local need.
- Anywhere in the UK or elsewhere;
- For a commercial purpose or with or without charge; and
- For the benefit of the Authority, its area or persons resident or present or otherwise

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Why so soon....?





Key issues for GPC?

- Removes uncertainty
- Power of 'Well Being' goes
- Widens charging provisions – The S.93 provisions of the 2003 Act 'power to charge where there is a power to provide' but S.3 and new GPC not limited in that way
- Trading for commercial purpose must be through a company but.. Arguably wider than existing Trading powers

Restraints on GPC?



- Reserve powers to Secretary of State
- Governed by public law principles
- Express restraints – equalities legislation
- General misuse of public funds
- No thermonuclear warfare.....

Public sector spin outs...





Public sector 'spin-outs'

- Awards to cooperatives, mutuals
- Contract awards
- Michael Lloyd - judicial review launched to prevent 3000 NHS staff being transferred into Gloucestershire Care Services, a new social enterprise.
- Use of three-to five-year uncontested contracts to 'kick-start' social enterprise
- Critical test on uncontested contracts
- EU procurement rules AND domestic / local rules
- State aid?
- No guarantees!

Spin outs



Hardly news at all!

Beware!

LOCAL SERVICES

LOCAL SOLUTIONS



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