

Briefing 07/50 August 2007

Shared services in the Scottish Public Sector:

Impact of the EU Public Procurement Rules

To: All Chief Executives, Main Contacts and Email Contacts (Scotland)

CC: All Chief Executives, Main Contacts (England, Northern Ireland and
Wales)

Key issues

Guidance issued by the Scottish Procurement Directorate relating to EU procurement rules and shared services in the public sector.

Certain exemptions are made from the EU rules, based on the type of organisation and level of private sector involvement.

APSE encourages its local authority members to make themselves aware of how the EU procurement rules may impact on how they organise service provision.

1. Introduction

This briefing discusses EU public procurement rules and how they may affect shared services in the Scottish public sector, and is based on recent guidance produced by the Scottish Procurement Directorate (SPD). More specifically, the briefing details how EU rules will impact on the provision of services between public bodies and/or between public bodies and delivery vehicles which support the provision of shared services. EU procurement is both complex and subject to emerging case law within the EU, and APSE would strongly recommend that legal advice is sought wherever there is a possibility that EU procurement rules might impact on co-operation between public bodies in relation to shared activities. The original Scottish Procurement Directorate guidance can be found at <http://www.scotland.gov.uk/Resource/Doc/1265/0051647.pdf>.

2. EU and Scottish Rules

The EU public procurement directive is intended to promote the principles of the European Single Market within public bodies, namely the free movement of goods and services within the EU, non-discrimination on grounds of nationality, equal treatment of suppliers and transparency. Within Scotland, the EU Directive is implemented alongside the Public Contracts (Scotland) Regulations 2006 ("the Regulations") which, in part, clarifies different types of contract. The Regulations identify a contract of service as follows:

- "public services contract" means a contract, in writing, for consideration (whatever the nature of the consideration) under which a public authority engages a person to provide services... (Regulation 2(1))

A public services contract is bound by the EU public procurement rules. Even where the detailed procedural rules do not apply in the Regulations, APSE believes that advertising and non-discriminatory competition should be considered in all cases where contracts may be of economic interest to other service providers. One exception is "service concession contracts", defined in the Regulations as follows:

- "service concession contract" means 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 (Regulation 2(1))

A service concession contract is thus not bound by the EU public procurement rules. An example of a service concession contract might be a contract to operate a leisure centre under which the contractor derives all or part of its remuneration under the contract from charging the public for services. The extent to which the contract must include exploitation of the service provision is unclear. The Scottish Procurement Directorate's view is that a contract should only be regarded as a service concession contract where 50% or more of the remuneration is to be derived from exploiting provision of the service.

A service concession contract is not bound by the EU public procurement rules, but in most cases they must advertise. Guidance on the requirements for advertising contracts which are exempt from the detailed procedural rules in the Regulations is available from the Scottish Procurement Directorate's website at <http://www.scotland.gov.uk/Resource/Doc/1265/0023351.pdf>.

Agreements which are non-contractual and non-commercial are not subject to the EU procurement rules. Equally, agreements which assign roles and responsibilities between partners with the object of achieving a mutual objective may not be public service contracts as defined in the Regulations. This is in contrast to the acquisition of services by a customer from a service provider.

Local authorities have many other forms of organisation at its disposal that are not bound by the EU public procurement directive. For example, they have the power to set up joint boards, joint committees, or to nominate a lead authority. It is in how the public authority structures its contractual relationship that governs whether the directive is applicable or not.

3. Shared services

Shared services (see Briefing 06-34 'A shared approach to building a better Scotland – Consultation' for further information) in this context means the provision of services from one public body to one or more others either directly (through a lead authority) or via a delivery vehicle (such as a special purpose vehicle).

Where the private sector will be engaged in supporting delivery of the service, either through existing or new contracts, then care must be taken to ensure that those contracts have been advertised and framed in a way that meets the requirements of the EU rules. If not, then fresh advertising and competition may be required. If a contract was awarded before the shared service was envisaged, changes in its scope and value might mean that a new contract must be awarded in order to comply with the Regulations. If it is intended that the private sector will be engaged as an equity stakeholder in a delivery vehicle (e.g. to establish a risk and reward mechanism) then advertising and competition is likely to be required even where the private equity stakeholder is itself selected through advertising and competition. In other words, involvement of a private sector stakeholder would mean that the relationships between the delivery vehicle and parent authorities would need to be subjected to competition in line with the EU rules.

Where the shared service is to be delivered by, or outsourced to, the private sector, the EU procurement rules will require competition. The competition required will depend on the nature of the services to be provided (see the Regulations).

Due to the absence of case law in this area, APSE is of the opinion that it is difficult to offer definitive advice as to whether an agreement (e.g. a service level agreement or funding agreement) meets the definition of a service contract in the Regulations. Great care should be exercised before relying on agreements being non-contractual for the purposes of establishing a shared service delivery model which is not to be advertised in accordance with the Regulations.

4. Exemption: Teckal

The “Teckal” ECJ Case established the principle that contracts between public bodies and other public bodies (including shared service delivery vehicles) can in certain circumstances be regarded as exempt from application of the EU procurement regime.

The Teckal case led to the rule that the EU procurement rules apply when a contract, meeting the definition in the Directive, is concluded by a contracting authority (public body) with another organisation with separate legal identity (“the delivery vehicle”). However the case also considered the circumstances in which such a contract might not be subject to the EU rules. Two key conditions had to be met, as follows:

- The parent authority (or authorities) exercises control over the delivery vehicle which is to be awarded the contract which is “similar to that which it exercises over its own departments”; and
- The delivery vehicle awarded the contract carries out the essential part of its activities for/with its parent authorities.

The exercise of control can be any number of authorities, but each must play an equal or proportionate role in the management of the delivery vehicle. The greater the number of parent authorities, the more difficult it may be to demonstrate, if challenged, that the Teckal criteria are being met.

The second key condition of the Teckal criteria was that the delivery vehicle carries out the essential part of its activities for/with its parent authorities. The Scottish Procurement Directorate is of the opinion that if less than eighty percent of the delivery vehicle’s activity was in respect of its parent authorities then it is doubtful that the Teckal exemption would be fulfilled.

Subsequent cases have expanded upon the Teckal ruling. For example, “Stadt Halle”, “Carbotermo” and “ANAV” have reinforced the principle that for a delivery vehicle to be regarded as “in-house” it cannot involve private equity stakeholders and cannot be sold to the private sector.

5. Exemption: Regulation 6(2)(1)

Regulation 6(2)(1) of the Public Contracts (Scotland) Regulations 2006 provides that services provided by one contracting authority to another are exempt from advertising in the European Union's official journal OJEU (and by implication from the general Treaty requirements for adequate publicity). This is predicated on services being provided on the basis of a special or exclusive right by virtue of any published "law, regulation or administrative provision". A "special and exclusive right" is based on legitimate and objective public policy grounds, a right which prohibits the provision of the service by any other body, and must not be designed simply to avoid advertisement and competition and/or to distort markets or competition.

In terms of the EU procurement rules, delivery vehicles can be divided into two broad categories: (a) Public Body to Public Body Co-operation (via a lead authority), and (b) Delivery via a Special Purpose Vehicle (SPV).

(a) Public Body to Public Body Co-operation is an approach where a lead authority provides services to other public bodies without forming a specific delivery vehicle. The co-operation between the public bodies is distinguished by whether it is on a contractual or non-contractual basis. A contractual arrangement between public bodies for shared services is likely to be covered by the EU procurement rules, unless it is covered by the exemption contained in Regulation 6(2)(1). A non-contractual arrangement is not covered by the EU procurement rules, but great care must be taken to ensure the arrangements are genuinely non-contractual.

(b) Delivery via a Special Purpose Vehicle (SPV) constitutes a separate legal entity, and is established to deliver shared services to participating authorities. Where the SPV operates under contract to its parent authorities the EU procurement rules apply, except where the Teckal exemption or Regulation 6(2)(1) are applicable. The SPV must be capable of supporting the delivery of the shared service to all parent authorities. Where the private sector will take an equity stake (however small) in the SPV, the Teckal exemption cannot be relied upon. Where the Teckal exemption applies, the SPV will be a contracting authority, and will need to comply with the EU procurement regime in respect of any contract(s) it awards.

6. Conclusion

The Scottish Procurement Directorate's guidance on EU public procurement rules provides a useful analysis of the basis on which a public authority/local authority may enter into a shared services agreement through EU procurement. APSE believes that local authorities and public bodies can collaborate in the provision of shared services in many innovative ways utilising existing powers without recourse to potentially expensive and protracted procurement processes utilising the EU directive. The Local Government in Scotland Act 2003 has already enabled local authorities to consider alternate forms of structuring service provision. Joint boards, joint committees, or the nomination of a lead authority are some ways for public authorities to cooperate with one another, and enable them to focus on delivering on outcomes. They also

represent an excellent chance for public organisations to jointly learn from their experiences and share ideas of best practice bound by common values. As a further incentive, they are also not subject to the EU public procurement rules.

The requirements of advertising and competition when tendering a prospective contractual relationship with the private sector can help deliver transparency to the process, but it is in the rule exemptions that Scottish local authorities could consider alternatives to contractual arrangements. The Teckal exemption affirms that where a public authority retains control over the delivery vehicle similar to that it exercises over its own departments, and the delivery vehicle carries out its essential activities for or with the local authority, the EU procurement rules will not apply. Regulation 6(2)(1) details that a contracting authority may be exempt if it holds a 'special or exclusive right' to provide a service based on legitimate or objective public policy grounds. We believe that local authorities must be free to deliver flexible, efficient and innovative service provision, but within a clear legislative framework. In all cases, local authorities should ensure that they seek appropriate legal advice before proceeding.

Put simply, the EU public procurement rules only come into effect when a public authority decides to take services "out of house". They do not apply if you want to carry out the activity yourself or where existing powers permit local authorities to work with a range of public bodies outside of the scope of the directive. APSE however, supports the incorporation of the EU public procurement rules into their appraisal of potential shared services structures which involve contractual and partnership vehicles (see 5 above). APSE will also continue to monitor whether the directive constitutes a major barrier to future organisational structures, or whether it will have a negligible effect on the decision-making of local authorities? Scotland already has positive examples of shared/collaborative service delivery for instance, the Authorities Buying Consortium and Tayside Contracts. APSE is keen to be further involved in how local authorities appraise the different options available to them, and share instances of best practice with our membership. It is through the sharing of experience between all those involved in the public service supply chain that we may continue to deliver excellence in public services.

APSE welcomes any comments from its membership on the issues raised in this briefing, which should be directed to afildes@apse.org.uk.

Pat Taggart
Principal Advisor

Alistair Fildes
Research and Advisory officer