

Scottish Procurement Directorate



SHARED SERVICES IN THE SCOTTISH PUBLIC SECTOR:

IMPACT OF THE EU PUBLIC PROCUREMENT RULES

Guidance Note issued by:-

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Introduction

1. The purpose of this paper is to provide advice on the complex and evolving issue of how the EU public procurement rules impact on the provision of services between public bodies (bodies governed by public law) and/or between public bodies and delivery vehicles intended to support the provision of shared services to more than one public body. While the paper focuses on services, similar issues arise where one public body provides another with either goods or works.
2. The paper is intended to give direction on the general issue and should not be regarded as a substitute for legal advice on specific cases.
3. In certain respects, particularly where there is no clear case law, it is not possible to provide definitive answers in advance of the European Court's formal position being established or any European Commission guidance. It is, therefore, strongly recommended that legal advice is sought wherever there is a possibility that EU procurement rules might impact on forms of co-operation between public bodies in relation to shared activities.

Shared Services

4. Shared Services 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).

EU Public Procurement Rules

5. The EU public procurement rules consist
 - the EU Treaty
 - EC Directives on public contracts (2004/18/EC and 89/665/EC) and implementing national legislation
 - Caselaw of the European Court of Justice (ECJ)
6. In Scotland, the EU Directive on public contracts is given effect in national law by The Public Contracts (Scotland) Regulations 2006 (SSI 2006 No. 1).
7. The EU procurement rules are intended to promote the European Single Market and to ensure that, where the public sector acquires goods, works or services from third parties, it does so in a manner consistent with the single market (i.e. on the basis of open and non-discriminatory competition)
8. The EU Treaty imposes general principles on the public sector in connection with the acquisition of goods, works or services and/or the award of contracts which consist of the right to provide services to the public (service concession contracts). These principles

include the free movement within the EU of goods and services, non-discrimination on grounds of nationality, equal treatment of suppliers and transparency

9. The EC public procurement Directive and implementing Scottish Regulations place specific requirements on public bodies when awarding contracts for goods, works or services.

Definitions of Service and Service Concession Contracts

10. Contracts for services are defined in the Public Contracts (Scotland) Regulations 2006 (“the Regulations”) 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 but does not include.....” (Regulation 2(1))

11. Even where the detailed procedural rules in the Regulations do not apply, the Regulations require (Regulation 8(21)) that advertising and non-discriminatory competition are considered in all cases where contracts may be of economic interest to other service providers. For example, service concession contracts, which are exempt from the detailed procedural rules in the Regulations (and, therefore, from advertising in the EU Official Journal, OJEU), must nonetheless be advertised in most cases.

12. 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>

13. Service concession contracts are defined in the Regulations as follows:

“services 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))

14. 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.

15. The extent to which the contract must include exploitation of provision of the service is unclear, although in light of the European Court’s tendency to place strict interpretations on the circumstances in which contracts can be regarded as exempt from the procurement Directives, it is SPD’s view 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.

Key Questions When Considering Whether Shared Service Delivery Models Must Be Subject to Competition Under the EU Procurement Rules

16. There are a number of key questions to be addressed when considering whether EU procurement rules require that shared service delivery models or other supporting contracts must be subject to competition:

- Will the private sector be involved in supporting delivery of the service either through new or existing contracts? If so, are those contracts framed in a way that allows the service to be extended to the contacting authorities that will use the service?
- Are the relationships which are to be established between public bodies and/or any delivery vehicle contractual in nature (e.g. are they service or service concession contracts as defined in the Regulations)?
- If they are contractual, are there any exemptions which would nonetheless allow the contracts to be awarded and performed without competition?
- Will the private sector be engaged as an equity stakeholder in the proposed delivery vehicle?

17. If the delivery model involves contractual relationships between the partners which meet the definition of a contract for services or of a service concession contract, then subject to certain exemptions described in this paper, advertising and competition is likely to be required.

Supporting Contracts

18. 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 they do not meet the changed circumstances of the shared service, then fresh advertising and competition may be required. For example, where a contract has been advertised and awarded as being only for a single authority, it may not be capable of being extended to cover new shared service partners. There may be ways of addressing this issue, e.g. by the contract only being accessed by the original awarding authority, but the new requirements of the shared service must be within the scope of the original advertisement and contract (subject to any derogations that may be available in the Regulations). The advertised scope and value of the contract will be important. If the 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.

19. 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 the “Teckal” exemption will not be available and advertising and competition is likely to be required (see paragraphs 24-31 below) even *where the private sector 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 (see para 29 below).

Are the Relationships Contractual?

20. The EU procurement rules apply to contracts for services (and service concessions) for consideration. Agreements which are non-contractual and non-commercial may not be subject to the rules. Equally, agreements which have as their object the assignation of roles and responsibilities between partners with the object of achieving a mutual objective (as opposed to the acquisition of services by a customer from a service provider) may not be service contracts as defined in the Regulations.

21. In the absence of case law on these issues it is difficult to offer definitive advice on the circumstances where an agreement (e.g. a service level agreement or funding agreement) does not meet the definition of a service contract in the Regulations, except in the case of in-house agreements (i.e. where the agreement is between two or more parts of the same legal entity). The terms in which agreements are set out and the precise nature of the relationship must, therefore, be examined carefully on a case by case basis in order to determine whether it is in fact a service (or service concession) contract. 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.

22. In the case of agreements between bodies who have the same legal personality, such agreements cannot, in most cases, be legally binding and, therefore, providing that they are clearly non-commercial and are clearly expressed in terms which make it plain that they do not create a legally binding agreement they do not need to be advertised under the EU procurement rules.

Private Sector Delivery/Outsourcing/Partnership

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

“Teckal” ECJ Case and The Circumstances in Which Contracts Between Contracting Authorities May be Regarded as “In-House”

24. 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 exempt from application of the EU procurement regime.

25. The case concerned a consortium with separate legal personality, “AGAC” established by a number of Italian local authorities to, amongst other things, purchase and supply fuel oil for its parent authorities. AGAC bought the fuel oil and then resold it under separate contract to its parent authorities. The ECJ was asked to rule on whether contracts under which AGAC’s parent authorities bought fuel oil from AGAC were subject to the EC Directive on public supply contracts (although the case concerned supplies, the same principles apply to services and works contracts).

26. The Court ruled that the Directive applies 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, in its judgement the ECJ also considered the circumstances in which such a contract might not be subject to the EU Directive. The Court said that the Directive would not need to apply in cases where two key conditions were met:

- i. That 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
- ii. That the delivery vehicle awarded the contract carries out the essential part of its activities for/with its parent authorities.

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

28. The second element of the Teckal criteria was that the delivery vehicle should carry out the essential part of its activities with/for its parent authorities. This should be read as meaning that the delivery vehicle's predominant purpose must be undertaking the relevant activity for/with its parent authorities. If, say, less than 80% of the delivery vehicle's activity was in respect of its parent authorities then it is doubtful that the Teckal exemption would be fulfilled.

29. Subsequent cases have reinforced and 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" for the purposes of contracts between it and its parent authorities, it cannot involve private sector equity stakeholders and it cannot be sold to the private sector.

30. Also, it is clear that the delivery vehicle should not behave as if it is a commercial provider in terms of actively seeking new customers or users. That is not to say that new users of the service cannot be introduced, but this should be through discussion and agreement through parent and potential parent authorities and must not be driven by marketing by the delivery vehicle of the delivery vehicle's services.

31. Details of key ECJ cases are set out in Annex A.

Regulation 6(2)(1) – Exemption for Services Provided by One Contracting Authority to Another on the Basis of a Published Special or Exclusive Right.

32. Regulation 6(2)(1) of the Public Contracts (Scotland) Regulations 2006 provides that services provided by one contracting authority to another are exempt from the requirement for advertising in OJEU (and by implication from the general Treaty requirements for adequate publicity) where they are provided on the basis of a special or exclusive right by virtue of any published "law, regulation or administrative provision".

33. It is clear that, where by law or regulation a contracting authority provides services to another under a special or exclusive right (i.e. a right which would prohibit the provision of the service by any other body), the EU rules do not require advertisement and competition. However any such laws or regulations which establish the special or exclusive right must themselves be compatible with EU law – i.e. they must be based on legitimate and objective public policy grounds and must not be designed simply to avoid advertisement and competition and/or to distort markets or competition.

Shared Service Delivery Vehicles

34. While delivery vehicles for shared services may vary considerably in certain respects, in terms of the application of EU procurement rules delivery vehicles can be placed in two broad categories as follows:

34.1 **Public Body to Public Body Co-operation (via a lead authority)**

34.1.1 Under this approach a lead authority provides services to other public bodies without forming a specific delivery vehicle. In effect, the lead authority's in-house team provides services to other public bodies.

34.1.2 The critical factor here is the terms on which the services are provided and whether they are contractual or non-contractual when assessed against the definitions in the Regulations. Where the terms of the agreement are contractual, advertising will be required unless there is an exemption that can be relied upon.

34.1.3 Where delivery of the service involves supporting new or existing contracts, those contracts must be capable of supporting the delivery of services to partner authorities (see paragraphs 18-19 above).

34.1.4 Non-Contractual Arrangements between public bodies for shared services are not covered by the EU procurement regime, however great care must be taken to ensure that the arrangements are genuinely non-contractual (see paragraphs 20-22 above).

34.1.5 Contractual Arrangements between public bodies for shared services are likely to be covered by the EU procurement regime unless the exemption in Regulation 6(2)(1), for services provided by one contracting authority to another on the basis of a special or exclusive right can be relied upon (see paragraphs 32-33 above).

34.2 **Delivery Via a Special Purpose Vehicle**

34.2.1 Under this approach a special purpose vehicle ("SPV", a separate legal entity) is established to deliver shared services to participating authorities.

34.2.2 Where the SPV operates under contract to its "parent" authorities the EU rules will apply to those contracts unless the conditions required by the "Teckal" exemption (see paragraphs 24-31 above) or Regulation 6(2)(1) (see paragraphs 32-33 above) can be relied upon. However, in light of current ECJ case law, where the "Teckal" criteria are met, EU procurement rules do not require competition in respect of contracts between the SPV and its parent (participating) authorities. However the criteria to be met in terms of the case law is rigorously applied by the ECJ.

34.2.3 It is less likely (than in the case of an ordinary "public body to public body" delivery vehicle) that the argument that relationships between an SPV and its parent authorities are non-contractual can be relied upon, as the SPV will almost inevitably operate on the basis that its major objective is the provision of services to its parent authorities. Therefore it is likely that the relationship between the SPV and its parents will be one akin to a "service provider" and "customer".

34.2.4 Again, any contracts awarded by, or assigned to, the SPV must be capable of supporting the delivery of the shared service to all parent authorities.

34.2.5 Where the private sector will take an equity stake (however small) in the SPV or where the private sector will deliver the services, the Teckal exemption cannot be relied upon.

34.2.6 Where the Teckal exemption applies, the SPV will itself be a contracting authority and it will need to comply with the EU procurement regime in respect of any contracts it awards.

Conclusion

35. Teckal and subsequent ECJ cases, while placing considerable constraints on the delivery of shared services through an SPV, do provide a degree of legal certainty in respect of contracts between the SPV and its parent authorities.

36. There is less clarity in respect of other delivery models for shared services. Non-contractual arrangements between public authorities are not covered by the EU procurement regime and therefore remain a platform for shared services organisation. In addition, specific exemptions may be achieved under Regulation 6(2)(1).

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KEY ECJ CASES

- Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale C-107/98
- Commission v Kingdom of Spain C-84/03
- Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna Case C-26/03
- Coname C-231/03
- Parking Brixen C-458/03
- Carbotermo C-340/04
- Anav C-410/04