

DBULLETIN

The Dangers of “In House” Procurement

On 9 June 2009, the Court of Appeal gave its judgment in the case of Brent London Borough Council v Risk Management Partners Limited [2009] EWCA Civ 490.

The Court dismissed Brent's appeal against a finding that it had breached the Public Contracts Regulations 2006 in awarding a contract directly to London Authorities Mutual Limited (LAML), a mutual insurance company set up by various London Borough Councils, including Brent, without the submission of a tender by LAML.

The Teckal Exemption

Brent sought to rely on the principle established in the European Court of Justice case of Teckal srl v AGAC (C107/98) which allows for an exemption from the Regulations for the award of agreements considered “in house”, and applies where:

- 1) the contracting authority exercises a degree of control over the entity to which it awards the contract, similar to that which it exercises over its own departments; and
- 2) the entity awarded the contract carries out the essential part of its activities with the contracting authority.

The Court confirmed that the Teckal exemption did not apply. It held that, whilst the first condition could in theory be satisfied by the joint control of a group

of local authorities, it was not the case here. LAML was found to have a large degree of operational independence, such that it could not be regarded as a department of each of the authorities. Accordingly, Brent lacked the necessary degree of control.

Implications for Local Authorities

It should be noted that the case was relatively fact specific, and that Risk Management having been invited to tender and having been through much of the tender process, before the last minute “in house” award, may well have played a part in the initial finding that Teckal did not apply. However, the Court of Appeal's subsequent judgment confirming as much indicates the level of care that authorities should take when structuring a new vehicle if the Teckal exemption is to be successfully relied upon - without a sufficient level of authority control, the award of a contract will not be considered “in-house”, so falling foul of the Regulations.

Local authorities will have to balance their need and desire to deliver ever increasing efficiency savings via new pooled service arrangements, with the requirements of the Regulations.

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