

“Public contracts between entities within the public sector”

Background – the “Teckal” test

The “Teckal Test” is a reference to the court case *Teckal s.r.l v the Commune of Viano C-107/98*, 1999 concerning the award of a contract for the management of heating services for certain municipal buildings to a consortium (AGAC) set up by several local authorities (including the awarding authority) and without an EU public procurement tender procedure having been followed.

The court held that EU procurement rules do not need to be complied with by the contracting authority where the winning provider:

- Is controlled by the awarding authority/authorities in a manner “similar to that which it exercises over its own departments”, known as “structural control” AND
- Carries out the essential part of its activities “with the controlling authority or authorities”, known as “economic dependency”

Codification – Article 12, Public Contracts Regulations 2015

The outcome of the Teckal case is now codified in the updated EU Procurement Directives 2014 and applied in English Law under PCR2015, incorporating some amendment and clarification as follows:

1) *A public contract awarded by a contracting authority to a legal person* falls outside the scope of this Part where all of the following conditions are fulfilled:—*

(a) The contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) 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 required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

Further to the above, there is a specific subsidiary Paragraph (#4) which covers awards of contracts where “*the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments*”.

Application of “Article 12” to the East of England LGA

East of England LGA believes that it meets the requirements of Article 12, Para 4 in respect of supplying services, either directly or through our “Talent Bank” to the following organisations in the East of England:

- The County Councils of Cambridgeshire, Essex, Hertfordshire, Norfolk and Suffolk
- The Unitary Authorities of Bedford Borough, Central Bedfordshire, Luton, Peterborough, Southend-on-Sea and Thurrock
- The 39 district and borough authorities within the counties of Cambridgeshire, Essex, Hertfordshire, Norfolk and Suffolk

**in effect, “Legal Person” here and throughout refers to an organisation where applicable*