

Procurement & Legal Update



Workshop for

Delivering Extra Care

by

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7 April 2011



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Procurement & Legal Update

- The new remedies directive and the consequences of getting it wrong
- The "in house" exemption from public procurement law Brent London Borough Council and Others -v- Risk Management Partners Ltd [2011] UKSC 7



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- Public Contracts Regulations 2006
- Regulation 47(6)



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- Teckal SrL-v-Commune di Viano & Azienda Gas [1999]
- The Control test
- The Function test



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Brent London Borough Council & Others (Harrow London Borough Council) -v- Risk Management Partners Limited [2011] UKSC 7

- Facts
- Ultra Vires
- Breach of the 2006 Regulations





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- Court of Appeal
- Power to enter into mutual insurance arrangements under the Local Democracy, Economic Development and Construction Act 2009



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- Supreme Court
- The Teckal exemption applies
- The rationale for the application of the Teckal exemption



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The Control Test

- Private minority participation?
- Power of decisive influence required
- Joint control?



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The Function Test

- Not market orientated
- Absence of private capital and private customers

Application of the Function test to LAML



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- The Old Regime
- The New Regime
- Mandatory Suspension
- Declarations of Ineffectiveness
- Considerations





The Old Regime – The Problems

- Injunction or damages
- Need to act within the standstill period
- Uncertainty of injunction applications
- When the contract was awarded
- Loss of chance?



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The New Regime

- Public Contracts (Amendment) Regulations 2009
- Transitional arrangements



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The Main Provisions

- Mandatory Suspension
- Declaration of Ineffectiveness
- Damages
- Information Obligations



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New Obligation Requirements

- Authority cannot contract until the end of period; but
- This only applies where there is an obligation to publish the contract award
- Regulation 32



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Mandatory Suspension

- Regulation 47
- Suspension as an automatic injunction



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Ineffectiveness

- Mandatory Remedy
- Prospective as opposed to retrospectively ineffective
- Substantial breach?



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Must be "effective, proportionate and dissuasive"
(Regulation 47 N (4))

The Courts will take account of:

- Seriousness of the breach
- Conduct of the Authority
- Extent to which the contract remains in force





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- Greater onus on authorities to provide information
- Uncertainty!



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THANK YOU



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