

WCC/WDC shared legal services

Procurement advice note

Background

Warwick District Council is currently reviewing its shared legal services arrangements with Warwickshire County Council. As a contracting authority within the meaning of the Public Contracts Regulations 2006 the District Council needs to continue to be satisfied that the arrangements do not give rise to a requirement to tender.

The shared legal services arrangements are operated by WCC as the lead partner. WDC lawyers have transferred into the employment of WCC and now WDC and WCC lawyers work alongside each other on a full range of legal matters for both authorities. The only financial aspect of the arrangements is that, in common with WCC internal budget holders, WDC holds a budget for legal work and pays WCC monthly for legal costs incurred.

Procurement case law in recent years has examined a number of scenarios in which co-operation arrangements between public authorities is considered sufficiently distant from the concept of a contract for services of the type which requires competitive tendering. Essentially two models of inter-authority co-operation are permissible: (a) “vertical”: where an institution is created (normally taking the form of a company) which provides services to the authorities as if it were an in-house function – following *Teckal* case law principles; and (b) “horizontal”: where authorities co-operate in the delivery of public tasks for which they are both responsible, but without establishing a separate institution to do this – following *Hamburg* case law principles. Additionally, a new procurement Directive is under development which will seek to codify the principles behind these arrangements.

Set out below are the most relevant aspects of the current and emerging law that apply to the WCC/WDC shared legal services arrangements.

Horizontal co-operation to jointly fulfil public tasks

The key aspects of a “horizontal” shared services arrangement seem to be:

- (i) The arrangement only involves contracting (ie public) authorities, and there is no participation of private capital;
- (ii) The character of the agreement is that of real co-operation aimed at the joint performance of a common task, as opposed to a normal public contract; and
- (iii) Their co-operation is governed only by considerations relating to the public interest.

Applying these principles to the WCC/WDC shared legal services arrangements, it is clear that the first test is met. In relation to the second, the main point here is that both authorities have the same essential requirement for legal advice to support the discharge of a range of statutory functions. The lawyers work for both authorities and there are efficiencies to be gained for both authorities in having a blended workforce which has a broader knowledge base and will often encounter similar legal issues for both authorities. In relation to the third point, the objectives of the arrangement are based on considerations of the public interest, the principal aim being the lawful operation of both authorities. There are no financial transfers between the authorities except for the reimbursement of cost of the arrangements.

Thus the WCC/WDC shared legal services arrangements seems to be a good example of horizontal co-operation, permitted under procurement law.

Forthcoming procurement Directive

The forthcoming procurement Directive in its current draft proposes to codify the existing principles of vertical and horizontal shared services arrangements. This gives an additional level of comfort that the current WCC/WDC arrangements are fit for the future.

Separately, it is interesting to note that the draft Directive also proposes a new exclusion from the procurement regime, which may prove to be of benefit to WDC in sharing its legal services with WCC, although it requires a careful reading. Draft Article 10 of the Directive sets out a list of service contracts which are deemed to be excluded from the scope of the Directive (ie for which no competitive tendering is required). Among this list is:

“..any of the following legal services:

- (i) Legal representation of a client in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of the Directive 77/249/EEC...*
-*
- (iv) Other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority.”*

The “lawyer” referred to in paragraph 1 above is defined as a solicitor, barrister, or advocate. Lawyers supporting litigation therefore appear to be exempt from the definition of services which are caught by the Directive.

The “exercise of official authority” has been interpreted narrowly by the courts and certainly does not extend to all public functions but instead probably covers a subset of judicial and legislative functions, police powers and high level policy. It could be argued that this type of power is exercised by WDC, and in turn is supported by its lawyers, when WDC is acting as enforcing authority (for example, public and environmental health, housing) or planning authority.

The forthcoming Directive therefore offers the interesting possibility that most of the legal services required by WDC would not fall within the scope of the procurement regime in any event. Even if this did not turn out to be the case, it is considered that the current arrangements are consistent with the horizontal shared services co-operation model, which obviates the need for competitive tendering.

Sian Stroud, Senior Solicitor, Warwickshire County Council

8 October 2012