



Department  
of Health

## Procurement News

**April 2017**

Welcome to the latest edition of 'Procurement News'. This newsletter is for procurement and related professionals within the Department of Health and its ALBs.

If you have anything to contribute, feedback or suggestions for future stories please [get in touch](#).

**Rick Webb**

DH Procurement Policy Lead

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### Procurement News Distribution

It has been some time since I've updated the distribution list for this newsletter.

It is intended for individuals in DH, ALBs and other related organisations that have an interest in procurement. Feel free to forward to colleagues.

If you wish to be added or removed from the mailing list, please [contact me](#).

If you are a leader in any relevant organisation, feel free to provide me with an updated list of email addresses to which this newsletter should be sent.

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### Crown Commercial Service customer update: March 2017

The latest issue (published 4<sup>th</sup> April 2017) is available [here](#). This edition covers:

- Latest news on how you can choose your water supplier
- New office supplies catalogue launched
- Upcoming events and webinars: don't miss out on free training opportunities at the CCS Showcase or our latest technology webinars
- Wanted: your feedback on the support you need to use our technology frameworks
- Help us develop our new Software Solutions framework
- Get involved: evaluators needed for new Management Consultancy framework
- Help shape our new way to buy energy
- Case studies

- Crown Representatives and strategic supplier update
- Mystery Shopper service update
- New agreements and contract notices
- Details of our recently expired and extended agreements

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## Procurement Policy Notes (PPNs)

All Procurement Policy Notes (PPN's) are published [on the CCS website here](#).

No new PPNs have been published since the last edition.

DH is currently assisting CCS with feedback on the PPNs on:

- The Selection Questionnaire
- Payment Mechanisms
- Innovative Solutions (new)

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## Purdah for the forthcoming local elections

On Thursday 4<sup>th</sup> May elections for the 6 new combined local authority mayors in England (Cambridgeshire & Peterborough, Greater Manchester, Liverpool City, Tees Valley, West Midlands, West of England) will run alongside other local government elections in England, Scotland and Wales.

Central government purdah for the local elections will begin on 13 April. Please see the [May 2017 elections guidance on conduct](#) over this period for further information.

Colleagues should also note that local authorities are already observing purdah. Their pre-election period began on Monday 27 March and it is important that sensitivity is exercised from this date in relation to the impact that government activity might have locally on areas holding elections. If you are unsure whether activity you are planning might be impacted by local authority purdah, please email: [Permanent.Secretary@dh.gsi.gov.uk](mailto:Permanent.Secretary@dh.gsi.gov.uk)

### Non-departmental public bodies (NDPBs) and other arm's length bodies (ALBs)

The above also applies to the activities of all NDPBs and other ALBs whose expenses are wholly or partly met from public funds. Sponsor teams should work with their ALBs to ensure that staff and board members are aware of the guidance.

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## European General Data Protection Regulation (GDPR)

In little over a year the new pan-European General Data Protection Regulation (GDPR) will come into force. It will introduce severe financial penalties for those organisations that fail to adequately protect the data that they hold.

DH sponsor teams will be in touch with ALB Accounting Officers with a questionnaire to act as a base level assurance of preparation for the introduction of GDPR.

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## **Public Accounts Committee Report on Crown Commercial Service**

The [report is published here](#).

This report examines Crown Commercial Service (CCS) which aimed to centralise £13.4 billion of central government spend and carry out direct buying services on behalf of all departments.

The report states that CCS has failed to consistently deliver quality services to departments, and notes that progress with centralising procurement has been slow.

The report notes that CCS still has to develop a full business case and demonstrate how it will add value to departments and advises that it needs to learn the lessons and ensure departments buy in to what it is trying to do.

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## **Legal Issue: New development in the in-house delivery of public services**

*Article provided by GLD.*

In specific circumstances public authorities can enter into arrangements with other public bodies that will not be seen as public contracts and therefore will fall outside the scope of the procurement rules.

Public contracts are contracts for pecuniary interest concluded in writing between economic operators and contracting authorities and having as their object the execution of works, the supply of products or the provision of services. Article 1(6) of Directive 2014/24 provides that agreements that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities and do not provide for remuneration to be given for contractual performance, are a matter of internal organisation of the member state concerned and are not affected in any way by that Directive.

We are already familiar with two such types of agreement:

- (i) The “Teckal” exemption (codified in Article 12(1) of the Public Contracts Regulations 2015 (the “PCR”); and
- (ii) The “Hamburg” exemption (codified in Article 12(7) of the PCR).

The ECJ has recently issued a ruling that points to a new, third type of arrangement, in the case of Remondis GmbH & Co. KG Region Nord v Region Hannover (Case C-51/15).

### **Teckal – in-house contracting**

Broadly speaking, the Teckal exemption (under Regulation 12(1)) applies where:

- (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.
- Regulation 12(3) goes on to define the required level of control under 12(1)(a). Regulation 12 also permits “reverse Teckal” and “horizontal Teckal”, where the controlled company (if it also a contracting authority) awards contracts to its parent and/or any other company controlled by the same parent, as long as there is no direct private capital participation in the legal person awarded the contract.

### **Hamburg – co-operation between contracting authorities**

Under Regulation 12(7), a contract concluded exclusively between two or more contracting authorities shall fall outside the PCR where all of the following conditions are fulfilled:

- (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

The CCS has published summary guidance on Regulation 12, which is available [here](#).

### **Remondis – transfer of competences**

This case concerned a dispute between an undertaking that provides waste disposal services, Remondis, and the Region of Hannover, regarding the lawfulness of the transfer by the Region of waste treatment tasks that were its responsibility to another public body. The relevant body was a special-purpose association for waste management created by local authorities in the Region, which it formed for that purpose with the capital of the Land of Hannover (the City of Hannover).

In December 2016, the European Court of Justice ruled that an agreement between two regional authorities on the basis of which they form an entity with separate legal personality, to which they transfer the powers for the performance of service tasks, which before were the responsibility of the regional authorities concerned, without providing for remuneration to be given for contractual services, does not constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18/EC. The agreement constituted an act which is a matter of internal organisation of the member state concerned, which falls outside the scope of the EU rules on public procurement.

However, such a transfer of competences concerning the performance of public tasks exists only if it transfers both (a) the associated responsibilities and (b) powers regarding decision-making and financial autonomy. There could be no transfer of competence if the newly competent public authority does not act autonomously and under its own responsibility in the performance of its tasks.

This decision appears to establish a third way, in addition to Teckal and Hamburg, for public authorities to organise the delivery of public services, outside the scope of the procurement rules. Of course this decision is not codified in the PCR.

Regulation 12 and the surrounding case law are detailed and complex: we are happy to advise as to whether or not any of these exemptions are applicable in a particular case.

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