



Department  
of Health

## Procurement News

### May 2017

Welcome to the new 'Procurement News'. This newsletter is for all colleagues within the Department of Health and its ALBs who have an interest in procurement and commercial activities.

You may forward to colleagues within the health family who have an interest in commercial issues. If forwarded to you, you can [sign up to receive future editions](#),

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

#### **Rick Webb**

Procurement Policy Manager  
Department of Health

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### **Crown Commercial Service customer update: May 2017**

The latest issue (published 4<sup>th</sup> May 2017) is available [here](#).

This edition covers:

- Placing social value at the heart of procurement
- Schools are saving more than 40% via new framework for printers
- Events
- Technology webinars
- Final call: evaluators for Management Consultancy framework
- Book for eSourcing tool training
- Take part in aggregated further competitions
- Latest case studies
- Brochures
- Prompt payment data
- Crown Representatives and strategic supplier update
- Latest Mystery Shopper results
- New contract notices
- Agreements expiring shortly
- Agreement extensions
- Contract variations
- Recently expired agreements

- Sign up for email alerts
  - Quick links
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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.

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## **Purdah for the General Election**

The Cabinet Office has [published guidance](#) for the forthcoming General Election.

The pre-election period (sometimes referred to as 'purdah') began at midnight on Friday 21 April and this guidance was effective from that point.

The basic principle for civil servants is not to undertake any activity that could call into question their political impartiality or that could give rise to criticism that public resources are being used for party political purposes. The guidance advises that decisions on matters of policy, and other issues such as large and/or contentious commercial contracts, on which a new government might be expected to want the opportunity to take a different view from the present government, should be postponed until after the election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.

This guidance applies to all UK civil servants, and the board members and staff of Non-Departmental Public Bodies (NDPBs) and other arms' length bodies.

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## **Crown Commercial Services: Placing social value at the heart of procurement**

On 18<sup>th</sup> April, CCS published a statement outlining how it will do more to help public sector bodies to deliver additional social benefits in line with legislation including the Public Services (Social Value) Act 2012. [Read the story here](#).

CCS Social Value policy statement outlining how CCS will do more to help public sector bodies to deliver additional social benefits in line with legislation including the Public Services (Social Value) Act 2012. [Access the policy statement here](#).

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## **You are what you buy: the first International Standard for sustainable procurement published**

ISO (the International Organization for Standardization) have published [ISO 20400, Sustainable procurement – Guidance](#). It is the world's first International Standard for

sustainable procurement and aims to help organisations develop and implement sustainable purchasing practices and policies

Read [this news story](#) for more information.

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## **Massive Open Online Course (MOOC): 'Contract Management - Building Better Business Relationships'**

IACCM and the University of Southampton are running a Massive Open Online Course on Contract Management – Building Better Business Relationships. This course starts on 19th June 2017 and lasts for three weeks. Registration is now open.

This free online course is designed for anyone who wants to better understand what is involved in commercial business relationships, and the process of managing contractual agreements.

You can register for the course by clicking on [this link to the Future Learn website](#).

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## **CIPS Yorkshire Branch Events**

The local branches of the Chartered Institute of Procurement and Supply organise a number of events for members and sometimes, non members. As the Yorkshire Branch vice chair, I'd like to highlight that we have organised two events in Leeds that might be of interest:

### **TUPE and Procurement**

1<sup>st</sup> June 2017, 9:15am-11:30am, Novotel Leeds (in conjunction with the law firm Hempsons)

[Click here to book](#)

#### Overview

- Provide an overview of the TUPE legislation
- Consider the types of transfer under TUPE
- Consider who transfers under TUPE
- Look at TUPE in practice in procurement – as a bidder and as a contracting authority
- Consider TUPE disputes
- Allow an interactive question and answer format

### **Small Roasters Coffee**

4<sup>th</sup> July 2017, 5:45pm-8pm, Novotel Leeds

[Click here to book](#)

A presentation by North Star Coffee Roasters covering;

- the coffee supply chain
- ethical coffee procurement

- the workings of the coffee market
- the impact of Brexit

CPD hours available for both events.

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## **Government Commercial Function Knowledge Hub**

Over 400 commercial staff have joined the various communities on the GCF Knowledge Hub launched in early February.

The community is being used to share information and news from across the GCF, including Strategic Supplier Relationship Management Guide and Tools.

You can access the Hub here <https://khub.net/gcf>

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## **SME Crown Rep**

Government is Open for Business. That's the Government's campaign to help and support SMEs to become suppliers and to listen to how government can improve the process. There's even a Twitter hashtag, #open4biz.

For more information visit [www.gov.uk/openforbusiness](http://www.gov.uk/openforbusiness).

Recent activity includes [Selling to Government](#), a guide for small and medium-sized enterprises by Emma Jones, published in April 2017.

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## **Corporate Governance Code for Central Government Departments 2017**

On 21<sup>st</sup> April, Cabinet Office and HM Treasury published a document that lays out the policy for corporate governance in central government departments.

The principles outlined in the code will also prove useful for other parts of central government and they are encouraged to apply arrangements suitably adapted for their organisation.

The 2017 versions of the code and accompanying guidance update the previous 2011 editions, which can be found on the national archives.

The document [is available here](#).

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## **Legal Issue: When Can Damages Be Awarded When A Public Tender Challenge Succeeds?**

Article provided by Government Legal Department (GLD).

To the above question, the answer has recently been given by the Supreme Court in a unanimous decision in *Energy Solutions (now called ATK Energy) v Nuclear Decommissioning Authority* [2017] UKSC 34 decided very recently on 1 April 2017, which may be found here: <http://www.bailii.org/uk/cases/UKSC/2017/34.html>

Three preliminary issues arose, namely whether a damages award may **only** be made:

1. when a breach of the 2004 Public Procurement Directive (on which the UK Regs. are based) is “sufficiently serious”;
2. under Reg. 47J(2)(c) of the UK Public Procurement Regulations 2006 in respect of any loss or damage suffered for breach, or alternatively limited to when there has been a “sufficiently serious” breach of the Regulations; and
3. under Reg. 47J(2)(c) of the 2006 Regulations, if proceedings were issued during the 30-day period provided in Reg. 47D, being the time limit for seeking a declaration of ineffectiveness (a similar period is in the 2015 Regs).

The Court of Appeal originally determined these issues as follows: A: Yes; B: Yes; and C: No. The Authority appealed to the Supreme Court on issues A and B, who allowed the Authority’s appeal on A, but disallowed it on B.

### **Issue A – The “sufficiently serious” condition**

Energy Solutions argued that EU law requires a remedy in damages for any breach, whether serious or not, was not accepted.

The decision of the Court of Justice in *Spijker* (Case C-568/98) is authority that the liability of a contracting authority under the Remedies Directive for breach of the Public Procurement Directive exists only where the minimum “*Francovich*” conditions are met, the second of which is that the breach must be sufficiently serious.

What is “sufficiently serious?” In *Brasserie du Pecheur and Factortame (No 3)*, the EU Court of Justice explained that the factors to be taken into account when determining whether a breach was sufficiently serious include:

- The clarity and precision of the rule breached.
- The measure of discretion left by the rule to the national or EU authorities.
- Whether the infringement and the damage caused was intentional or involuntary.
- Whether any error of law was excusable or inexcusable.
- Whether the position adopted by an EU institution may have contributed to the breach.

It is clear that the failure to implement a directive within the time limit stipulated is itself a sufficiently serious breach (*Dillenkofer v Germany* (Cases C-178/94) [1996] ECR I-4845).

## **Issue B – The second “Francovich” condition in UK law**

The UK has not by implementing the Remedies Directive into the 2006 Regulations gone further than EU law requires. It does not confer a power to award damages in respect of any loss or damage suffered by a bidder, only for a “sufficiently serious” breach of the Regulations, as above.

There was not ‘gold plating’ of the Regulations.

## **Issue C – Failure to make a claim before the contract is made**

The remedies under the 2006 Regulations gives an unsuccessful bidder the opportunity to stop the wrongful award of a procurement contract to a competitor, but an unsuccessful bidder will not act unreasonably if they do not take advantage of that opportunity.

The Regulations gives both parties choices as to how to proceed and how to protect themselves. The Authority could have delayed entry into the contract under after the 30-day period in which Energy Solutions had to commence proceedings.

The Supreme Court recognised that Energy Solutions could have (but did not) issue its court claim at a time when this would have put an automatic stop on the Authority entering into the contract. The reasoning was that Energy Solutions appreciated that the Authority could seek to lift any stay, and in turn it would have to put up security for any loss the Authority would suffer through the continuation of the stay. Consequently Energy Solutions could not be said to have acted unreasonably in deciding not to pursue a court challenge which would expose it to risks associated with its challenge failing. Energy Solutions was held thus not to mitigate or avoid its loss by its failure to issue proceedings.

### **What this means for us:**

- 1 Damages will not be available unless any breach of duty that is established is ‘sufficiently serious’ within the meaning set out in the well known *Francovich/Factortame* cases.
  - 2 However a claimant will be able to make a claim for damages without having to apply for a stay. Arguments by an Authority that it will have failed to mitigate its loss by not having taken steps to prevent the Authority from carrying its breach of duty will not succeed. Further, a bidder will not be said to have acted unreasonably if it decides not to pursue an action that exposes it to the financial risks if its challenge to the contract award decision is unsuccessful.
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