



# Shared Services in Government

## EU Public Procurement Rules Considerations

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## 1. BACKGROUND AND PURPOSE

In November 2005, *Transformational Government, Enabled by Technology* set out a vision for 21st century government, requiring three key transformations:

1. “Services enabled by IT must be designed around the citizen or business, not the provider, and provided through modern, co-ordinated delivery channels.”
2. “Government must move to a shared services culture – in the front-office, in the back office, in information and in infrastructure – and release efficiencies by standardisation, simplification and sharing.”
3. “There must be broadening and deepening of government’s professionalism in terms of the planning, delivery, management, skills and governance of IT enabled change.”

Across each of these key transformations, progress is underway in many government organisations.

Shared services promote convergence and streamlining of functions to ensure services are delivered as efficiently and effectively as possible<sup>1</sup>. Nonetheless, there exist many real and many perceived barriers to achieving the full potential of this vision. This guide focuses on one of the challenges associated with this change; the application of the EU Public Procurement Rules (procurement rules)<sup>2</sup>.

The procurement rules are complex and, as a consequence of emerging case law, still evolving. This paper seeks to explain the scope of these rules, an introduction to their application and to provide references for further, detailed material where needed.

This paper is aimed at programme managers, project managers and key stakeholders considering shared services as an approach to delivering corporate services. It is not, however, limited to this audience.

Section 5 of this paper focuses on “Questions & Answers” and seeks to apply the procurement rules to questions which have been recurring during discussions on shared services.

The information and opinions which this guide contains are not intended to be a comprehensive study and should not be relied upon or treated as a substitute for specific legal or policy advice concerning individual situations.

**Further guidance on the application of the EU rules to shared services arrangements is likely to form part of a planned European Commission “Interpretative Communication” on Institutionalised Public Private Partnerships expected in 2007.**

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<sup>1</sup> Further information on shared services can be found at [http://www.cio.gov.uk/shared\\_services/index.asp](http://www.cio.gov.uk/shared_services/index.asp)

<sup>2</sup> Procurement rules form one part of a set of issues which require consideration as part of the shared services agenda. Others include (but not limited to); the preferred vehicle for the delivery of services; the application of VAT for NDPB) services; funding of investment for cross-government shared services projects; cultural issues involving accounting officer responsibilities.

## 2. CONTEXT

EU rules for the award of public works, services and supplies contracts were brought together in one piece of consolidated legislation for England, Wales and Northern Ireland (the Public Contracts Regulations 2006) and one piece of consolidated legislation for Scotland (the Public Contracts (Scotland) Regulations 2006) – both of which came into force on 31st January 2006. These Regulations bring the European Commission's Consolidated Directive into UK law.

These procurement rules set out detailed procedures and criteria for procurements by contracting authorities which are above set monetary thresholds. For the purpose of this paper we will assume that the shared services arrangements are for services and of monetary values that will make them subject to these rules. Public contracts not covered by these rules are still subject to the EC Treaty principles of non-discrimination, transparency and equal treatment.<sup>3</sup>

It is essential that contracting authorities obtain legal advice as to whether any proposed arrangement for the provision of services is a contract for consideration that falls within the procurement rules. For example, an arrangement for the sharing of services made between two or more central government departments may not be a contract that falls within the procurement rules if all of the departments are part of the Crown. A contract is an agreement between different parties, whereas the Crown is one legal person.

The provision of shared services may give rise to a number of contracting options. In particular:

1. The buying and selling relationship may be within and between public sector organisations and may not necessarily involve the private sector.
2. There may not be a one-to-one relationship between buyers and sellers.
3. One government organisation may buy on behalf of a number of government organisations.
4. One government organisation may wish to extend externally provided services to another government organisation.

For example, a "Crown body" (for the purposes of this paper we mean a central government department) might wish to obtain (buy) shared services from another Crown body, or from a non-Crown body, such as an NDPB or a local authority. On the other hand a non-Crown body such as an NDPB or a local authority might wish to obtain (buy) such services from another non-Crown body, or from a Crown body. The application of the procurement rules in any particular case will depend on which of these circumstances applies.

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<sup>3</sup> For further information on the EU Public Procurement Rules see OGC Guidance "Introduction to the EU Procurement Rules" which can be found at [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_guidance\\_on\\_the\\_2006\\_regulations\\_.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_guidance_on_the_2006_regulations_.asp)

Shared services may be provided by an “in-house” body<sup>4</sup>, or by an external commercial service provider. This will affect whether the procurement rules apply. If more than one public body jointly owns the in-house organization this may also impact upon whether the procurement rules apply. In each case, there are particular requirements that must be met if a supplier is to be regarded as being “in-house”, based on European Court of Justice case law.

If an external service provider is used to provide the shared services, the nature and circumstances of the contract with that provider will be pertinent. What was the scope of the original OJEU notice and contract? Did this notice envisage the provision of services to other bodies? Is a contract to supply such services being let under a framework agreement or entered into by a Central Purchasing Body? Does the public organization that wishes to provide shared services have the legal authority to do so?

As such, there are two key questions which need consideration in the first instance;

1. In what circumstances do the procurement rules apply?
2. In what way do the procurement rules apply to the provision of shared services?

Sections 3 and 4 below address these questions in more detail.

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<sup>4</sup> Consideration of what constitutes “in-house” is given in section 3.

### 3. EU PUBLIC PROCUREMENT RULES - SCOPE

#### The Rules

Subject to the relevant conditions<sup>5</sup> being satisfied (such as the value thresholds), the rules in principle apply to all contracts for works, goods or services that are entered into by two legally distinct persons.

#### The exceptions

1. The procurement rules do not apply to arrangements where there is no pecuniary interest (i.e. no payment).
2. The rules do not apply to arrangements between organisations which are part of the same legal person<sup>6</sup>. At central government level, legal powers, in general, derive from the Crown. In UK law, the Crown is indivisible; the Crown is a single legal entity and each Crown Body discharges functions on behalf of the Crown.
3. In addition, the rules do not apply to arrangements between organisations who although legally separate are so closely connected that it would be inappropriate to make their dealings subject to the rules, and are, for procurement purposes, considered to be indistinguishable. This is the “in-house exception” which was first established in the case of *Teckal* (Case C-107/98).

#### In-house supply

The two elements of the test in *Teckal* (both of which must be met to take arrangements between a contracting authority and an “in-house entity” outside the procurement rules) are:

1. whether a contracting authority has control of an entity similar to that which it exercises over its own departments – i.e. strategic control and control over its operations (“structural dependence”) e.g. the power to appoint and dismiss the individuals charged with the control and direction of the entity; and
2. whether the entity is funded wholly or for the most part by its controlling authority or authorities and the essential part of the entity’s activities are provided to its controlling authority or authorities (“economic dependence”). That is, the entity’s continued viability is dependent on the custom of the controller.

Both elements of the test are factual and must be applied on a case-by-case basis. The meaning of each element is considered further below<sup>7</sup>.

In order to preserve the required public interest character of an in-house entity, there must in addition be no private sector participation in it.

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<sup>5</sup> It is assumed for the purposes of the paper, that all shared service programmes involving contracts will be within the full scope of this Directive. Further information can be found at [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_practice/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules.asp](http://www.ogc.gov.uk/procurement_policy_and_practice/procurement_policy_and_application_of_eu_rules.asp)

<sup>6</sup> For the purposes of this paper, any reference to a Crown Body is to a Government Department or Executive Agency. Any reference to an (NDPB assumes it is not a Crown Body. For further information on the constitutional characteristics of government organisations see [http://www.civilservice.gov.uk/other/agencies/public\\_bodies/index.asp](http://www.civilservice.gov.uk/other/agencies/public_bodies/index.asp)

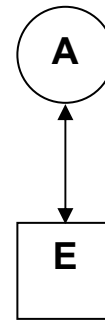
<sup>7</sup> For the purposes of this paper, consideration of this test has not been extended to more exotic variants (e.g. the implication, if any, of a common controller).

Subject to the two part test of dependency (set out above) being satisfied in each case, the procurement rules do not apply:

### Single control of an entity

- a. where an “in-house” entity is dependent on a single contracting authority either directly or indirectly through a holding company;

*A is a contracting authority and E is a separate legal entity which is structurally and economically dependent on A (i.e. within Teckal)*



### Multiple control of an entity

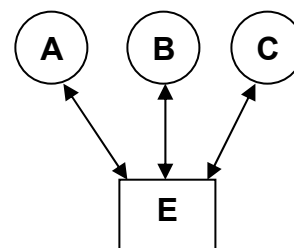
- b. where more than one authority controls an in-house entity. The public character of the controlled entity is more important than the absolute number of controlling authorities. Where there is multiple control, the requisite degree of control would be satisfied if each authority has control over the performance of the function which the entity performs for it and some form of residuary control over the general conduct of the entity.

A cautious approach is appropriate to the structuring of entities with multiple control:

- its objects should emphasise its public interest character;
- its membership should be restricted to contracting authorities;
- each authority should have the right to participate in the entity's management and direction;
- each authority should participate actively (even if that is through a representative).

Consideration should be given to enhancing control by giving each organisation limited rights of veto to preserve the entity's public character and perhaps devising some form of additional control over the entity by an authority when the entity is carrying out a function for that authority.

*A, B and C are contracting authorities and E is structurally and economically dependent on all three*



**Public character of in-house entity**

To preserve the exclusively public character of an in-house entity, there must be no private sector involvement in that entity in the sense of private sector financing or participation.

Private sector directors or observers on the entity's board are permissible if their role is to provide expertise but not if their function is to represent private sector interests. The entity's constitution should clearly specify its public interest function.

Charitable bodies are unlikely to qualify as in-house entities because their charitable objectives will not necessarily be the same as the public interest objectives which contracting authorities must have.

**Pooling, gratuitous supplies and accounting arrangements**

Since the procurement rules require a contract and a consideration, non-contracts and supplies which are made gratuitously are also outside the procurement rules.

**Further guidance on the application of these tests and other aspects of the in-house exception will be issued by OGC in 2007.**

## 4. EU PUBLIC PROCUREMENT RULES - APPLICATION

Where the in-house “Teckal” exemption is not available, and procurement rules do apply, the following considerations should be borne in mind:

1. The scope of the OJEU notice
2. Whether the contracting authority can acquire services from a Central Purchasing Body or under a framework agreement.
3. Failure to comply with the rules
4. *Vires* issues.

### 1. The scope of the OJEU

Goods, works or services must normally be opened to competition by issuing a public call for tenders in the form of an OJEU notice.

Where a contracting authority wishes to purchase goods, works or services under an existing contract, it is critical that the scope of the original OJEU notice allows for this<sup>8</sup>.

Where it does not, the original contract cannot be relied upon to deliver these services.

Specific legal or technical advice should be sought as to the ability to extend service delivery under the original contract.

### 2. Central Purchasing Bodies

A Central Purchasing Body (CPB) is a contracting authority which:

1. acquires goods and services intended for one or more contracting authorities;
2. awards public contracts intended for one or more contracting authorities; or
3. concludes framework agreements for works, goods or services intended for one or more contracting authorities.

OGC guidance on CPBs under the procurement rules can be found at

[http://www.ogc.gov.uk/documents/Guide\\_central\\_purchasing.pdf](http://www.ogc.gov.uk/documents/Guide_central_purchasing.pdf)

Where a contracting authority acquires works, goods or services from or through a CPB it shall be deemed to have complied with the procurement rules insofar as the CPB complied with the rules in the original acquisition or award. This removes the need to repeat the procurement exercise for any such contract where a contracting authority procures through or from the CPB.

However, if the CPB has failed to comply with the procurement rules, the contracting authority procuring through it will not have complied either.

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<sup>8</sup> For example; the OJEU notice makes reference to the possibility of the contracting authority acquiring the goods, works or services, and the scope of goods, works or services being sought.

## Framework agreements

A 'Framework agreement' is an agreement between one or more contracting authorities and one or more suppliers that establishes terms and conditions (in particular terms as to price and, where appropriate quantity) under which the parties will enter into subsequent contracts in the period during which the framework agreement applies. There is no defined commitment for the purchaser to purchase but there is a commitment for the supplier to supply under the defined terms and conditions of the contract agreed.

When awarding individual contracts (call-offs), under framework agreements, contracting authorities do not have to go through the full procedural steps in the procurement rules again so long as the rules were followed appropriately in setting up the framework agreements themselves. However, the rules expressly state that framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition. Under the procurement rules, frameworks must not generally exceed a term of four years and the terms of any framework must be determined at the outset. Subsequent call offs must be awarded in accordance with the terms of that agreement. Where there are several contractors, the contracting authority may;

1. Award a contract where the fundamental terms are met; or
2. Where the terms laid out in the framework are refined or supplemented, hold a "further competition" with all contractors capable of meeting the requirement withing the framework contract.

OGC guidance has been issued on framework agreements and can be found at

[http://www.ogc.gov.uk/documents/guide\\_framework\\_agreements.pdf](http://www.ogc.gov.uk/documents/guide_framework_agreements.pdf)

Contracting authorities that act as CPBs may set up and advertise framework agreements on behalf of other contracting authorities. Where the procurement rules have been followed by such CPBs, other contracting authorities may use the framework agreements as required as long as this has been stated in the OJEU notice. The procurement rules recognise that contracting authorities may purchase through CPBs.<sup>9</sup>

## 3. Failure to comply

The procurement rules create a legal obligation (where applicable) for contracting authorities.

Where contracting authorities fail to comply, an aggrieved contractor could (subject to applicable time limits) bring an action in the UK courts for damages and/or for a decision or action to be set aside. An aggrieved party could also, or instead, raise the matter with the European Commission, which could decide to commence action for infraction of the procurement rules.

Contracting authorities are also obliged to allow a standstill period of at least 10 calendar days between the date of notifying tenderers of their contract award decision (which must be in writing) and the date they propose to enter into the contract.

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<sup>9</sup> For examples of types of framework agreements see paragraph 6 of the OGC guidance on framework agreements.

This standstill period is to allow aggrieved contractors to seek further information about an award decision, and an opportunity to bring an action before the contract is concluded if they think they have sufficient grounds to do so.

#### 4. Vires issues

“Vires” is a Latin term meaning “power” and relates to administrative law and the empowerment (or otherwise) of a body to make a legally binding decision. The legality of the decision to buy or sell services may be challenged in terms of the substantive power to make the decision, or the following of due process to reach any such decision.

In relation to shared services, it is essential that both the purchaser and the seller of shared services have the power to do so. An example of this could be – if a body is established by statute, does it have the statutory power to sell services to another legal entity?

Specific legal advice should be sought to ascertain the applicability of *vires* to specific shared service programmes of work.

## 5. QUESTIONS & ANSWERS

This section seeks to provide initial guidance for the application of the procurement rules, as it may affect government organisations considering sharing services. It does not constitute authoritative advice (nor is it intended, nor implied to be a substitute for professional advice) and should not be relied upon in making (or refraining from making) any decision.

The sector planning approach being adopted for shared corporate services envisages that the provision of these services in the future will be from a limited number of providers (internal and external). A consequence of this is that most organisations will, in the future, purchase these services from one (or more) of these providers.

### **1. One Crown Body buys<sup>10</sup> its services from another Crown Body (where one body has its own in-house provision which will be used to meet the other body's requirements)**

Q: Can a Crown Body (let us assume a government department or agency) pay for corporate services (e.g. HR or Finance operational services) from other Crown Bodies (again government departments or agencies) without any further procurement exercises taking place?

A: Yes. "The Crown" is one legal person, and as such this is an "in-house" service provision. There will not be a contract between different parties. The procurement rules do not apply

### **2. Non-Crown Body buys services from a Crown Body (where the Crown Body has its own in-house provision which will be used to meet the non-Crown Body's requirements)**

Q: Can a non-Crown Body (for example an NDPB) buy its corporate services from a Crown Body (department or agency) without undertaking its own competitive procurement process?

A: From the perspective of the buyer, such an arrangement may fall within the procurement rules unless an exception applies. Buyers should be aware that their buying service from another public body's in-house provider does not necessarily mean that the Teckal exemption applies to the buyer; in many cases it may not. Careful consideration should be given to the in-house exemption set out in the Teckal case and subsequent case law to determine whether an exemption may apply. Where the exemption does apply, the answer is yes.

From the perspective of the seller it is vital to ensure that no vires issues prevent it from entering into the transaction.

Where either or both tests required for the in-house exemption are not met, the answer is no. The non-Crown Body may need to undertake a new competition unless it is able to

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<sup>10</sup> Any reference to a Crown body "buying" or "selling" services from or to another in this paper is to the internal financial and administrative arrangements of the Crown and not to any contractual arrangements - since the bodies form part of the same legal entity

take advantage of any other existing arrangements such as an existing framework agreement.

**3. Crown Body buying services from another Crown Body (where these services would be provided by the selling Crown Body's existing external supplier)**

Q: Can a Crown Body buy its corporate services from a Crown Body that has procured its corporate services from an external supplier without any further procurement exercises taking place?

A: Yes, provided the services obtained from the external supplier are the same as those specified in the OJEU and their volume does not exceed the volume specified in the OJEU.

In other circumstances it is likely that a new procurement exercise would be required.

**4. Non-Crown Body buying services from a Crown Body (where these services would be provided by the selling Crown Body's existing external supplier)**

Q: Can a non-Crown Body buy its corporate services from a Crown Body where the services are obtained from an external supplier without the need for a competition in accordance with the procurement rules?

A: Yes, provided:

- the services supplied by the external supplier do not vary from those specified in the original OJEU notice, and;
- The Crown Body is able to demonstrate that it intended to act as a Central Purchasing Body in the original OJEU notice and the notice identifies the non Crown Body as a potential user of the services.

In other circumstances it is likely that a new procurement exercise would be required.

**5. Non-Crown Body wishes to buy services from another non-Crown Body (where these services would be provided by the selling body's existing external supplier)**

Q: Can a non-Crown Body buy its corporate services from another non-Crown Body where the services are obtained from an external supplier without the need for a competition in accordance with the EU procurement rules?

A: Yes provided:

- the services supplied by the external supplier do not vary from those specified in the original OJEU notice, and
- the non-Crown Body is able to demonstrate that it intended to act as a Central Purchasing Body in the original OJEU notice and the notice identifies the non-Crown Body as a potential user of the services.
- Both parties are certain that there are no vires issues that prevent either party entering into the transaction.

In other circumstances it is likely that a new procurement exercise would be required.

**6. Crown Body wishing to sell services to a Crown or non-Crown Body but with an original OJEU that did not cover this possibility.**

Q: Can a Crown Body that did not make clear that it intended to act as a Central Purchasing Body for one or more contracting authorities in the original OJEU contract notice sell its services to another contracting authority

A: No, it is likely that a new procurement exercise would be required.

**The same answer applies if a non-Crown Body wishes to sell services with an original OJEU that did not cover this possibility.**

## 6. CONCLUSION

The key considerations going forward in relation to the procurement rules are as follows:

Unless the in-house exemption applies, or all the organisations which are planning to share services are Crown Bodies, the procurement rules are likely to apply.

If the procurement rules do apply, a new procurement exercise is likely to be required unless;

1. An original relevant OJEU(s) which covers both the scope of work under consideration for procurement and the entity to receive services: and
2. There is a suitable Central Purchasing Body, and an appropriate contract or Framework Agreement in place.

The buyer should satisfy itself regarding these issues.

The seller should ensure that there are no *vires* issues vis-à-vis the selling of services to another legal body.

Specific specialist advice should be sought to analyse the particular circumstances under consideration in all cases.