

Workshop 2c:

EU procurement: Practical preparations for the
new Regulations

Speaker: Andrew Millross, Anthony Collins Solicitors

Chaired by: Paul Reader, Morgan Sindall

Room: Packwood Room



National Housing Maintenance Forum

serviced by





EU Procurement Practical preparations for the new Regulations

**NHMF Conference
20th January 2015**

Andrew Millross, Partner

Anthony Collins
solicitors

What is the current position?

3 new Directives - “Classical”, Utilities & Concessions (new)

- Came into force 17th April 2014
- Classical Directive (2014/24/EU) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0024&from=EN>

Public Contracts Regulations 2015

- Consultation draft 17th Sept - still available at <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>
- Consultation closed 17th Oct 2014
- Implementation “Spring 2015”
- Regulation numbers same as the Directive

“The basic principles of the EU Treaty have not changed so contracts still have to be competed and awarded transparently and without discrimination”

**Cabinet Office
PPN 5/13**

What I am going to cover today

Groups structures and collaboration

Part B and (avoiding) the need to tender

New procedures and whether to use them

Contractor reliability risks

Preparing for flexibility over variations

New implied contract terms

What I am not going to cover

New “below threshold” rules

Single PIN covering 12 months’ procurements

Development Agreements

Electronic and collective purchasing

Award criteria and “sustainability”

Record keeping and transparency

Contracts within groups (Reg 12)

“Reverse”, “horizontal” and “multiple”
Teckal now specifically authorised

Concerns over “membership” test

- *Setubal Central Hospital* case - charity
- Position of tenant and individual shareholders?
- Get SLAs signed and consider shareholder membership declarations

New “20% test” for DLOs

- Still more freedom to work for third parties if DLO is part of the provider - test here is “risk to social housing assets”

**“Teckal” test
codified**

“Control test”

**Parent controls
strategic objectives
and significant
decisions of subsidiary**

“Membership Test”

**All shareholders or
members are
contracting authorities**

“Activities Test”

**80% of activities
“entrusted” by parent
authority**

Public sector collaboration (Reg 12)

No automatic exemption for contracts performed by contracting authorities

- *Commission v Germany (Munich)*

Exemption

- No need to rely on this if joint control under Teckal
- Applies only to “public authorities”

Piepenbrock case

- Exemption applies only to “public services” functions – did not apply to building cleaning
- Must be “co-operation” (not just one working for another) – joint performance is essential

**“Hamburg Waste”
test codified**

“Public services test”

**Must be co-operation
over performing public
services**

“Objective Test”

**“Public interest” must
be the sole objective**

“Activities Test”

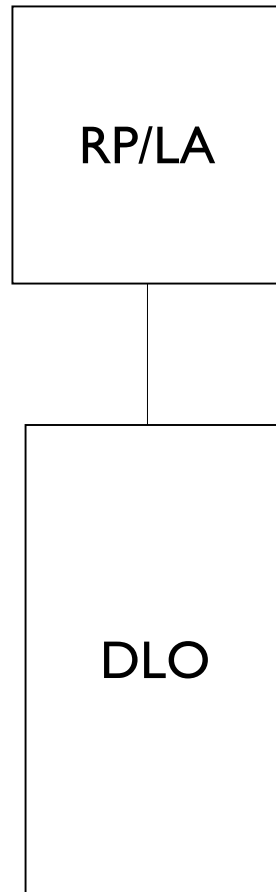
**Less than 20% of
activities must be
“performed on open
market” by
participants**

Structures for collaboration – DLO positioning

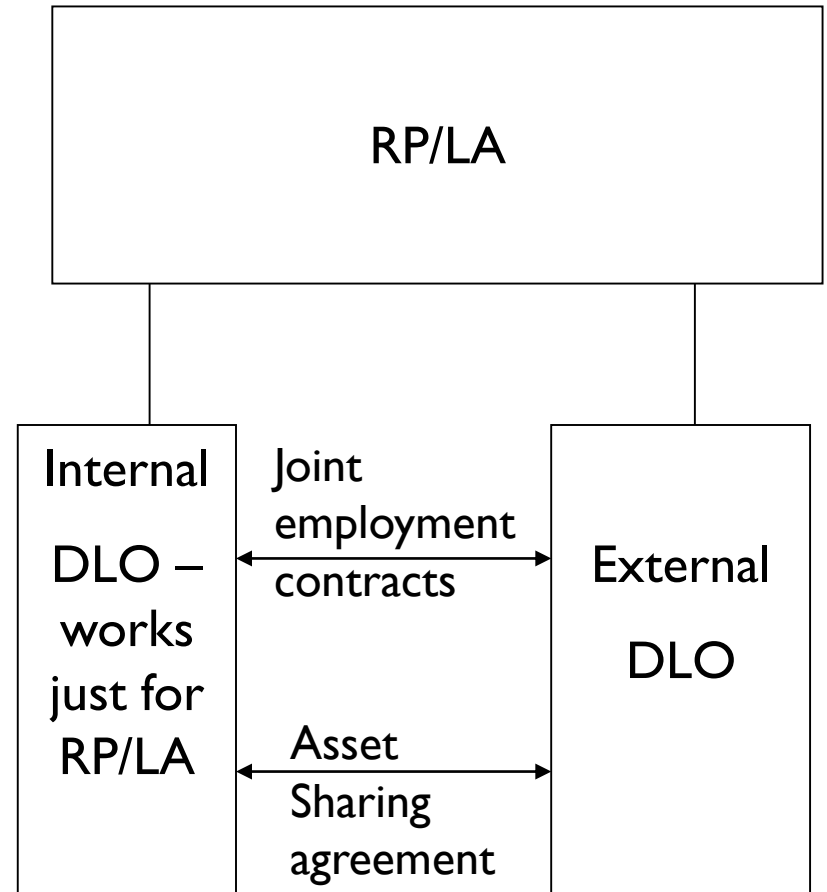
Division



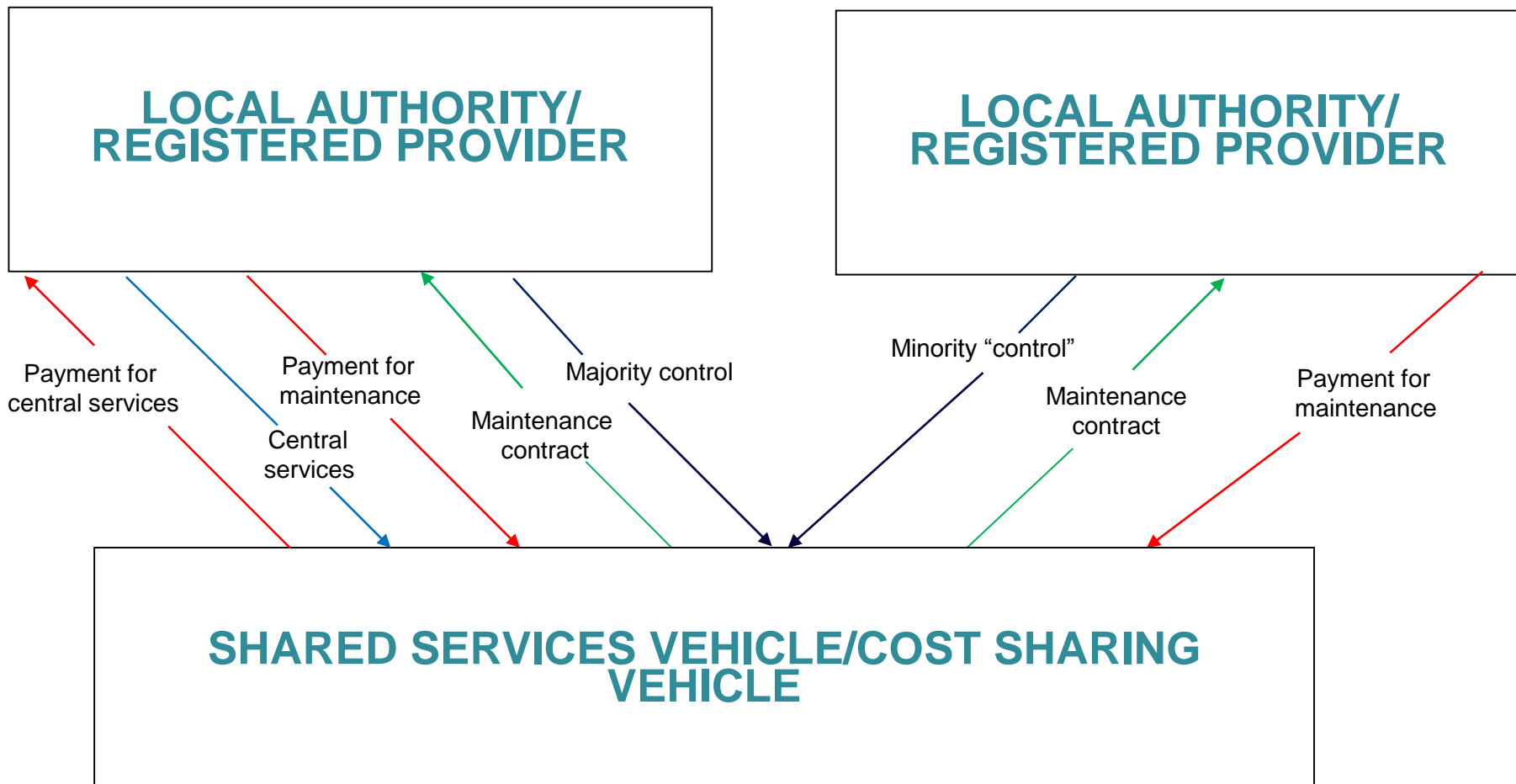
Subsidiary



“2 Subsidiary model”



Collaboration – CSV / Shared services model



Part A & B Services (Regs 74-76)

Abolition of Part B contracts

- Some covered by “light touch regime”

Threshold €750 000 (approx £590K)

Must

- publish OJEU contract notice and CAN
- comply with Treaty obligations (transparency, equal treatment etc)
- follow published procedure and document any (permitted) deviations

“Full” tendering regime

- Grounds maintenance
- Agency staff
- “Other services” – residual category – eg pest control, locksmiths

“Light touch regime”

- Supporting people
- Legal services
- Value over €750 000 (approx £590K)

Part B - actions to take now (Reg 117)

Check all current contracts and framework agreements

- Make sure they are signed and dated
- Check extension provisions and consider exercising them (add a break clause if necessary)
- Consider extending by agreement

Review “spot purchasing” arrangements

- Consider signing contract or framework agreement now before the rules change

Review imminent procurements

- Consider publishing OJEU notice now before the rules change

Transitional arrangements

New Regulations do not apply to

- contracts and framework agreements already signed or being procured
- contracts let under framework agreements already signed or being procured

Procurement documents & e-tenders (Regs 2 & 53)

On-line availability of procurement documents

Procurement documents include (Reg 2)

- Contract, specification, cost model
- ITT, tender submission requirements & “additional documents”

Compulsory e-tendering & communications

- From 18 April 2018 (buying clubs 2017)
- Data integrity system requirements (eg no access to tenders until after deadline)
- Must document verbal communications impacting on tender submission or evaluation

“Contracting authorities shall by electronic means offer unrestricted and full direct access [on the internet] free of charge to the procurement documents from the date of publication of the OJEU notice”

Reg 53(1)

Open & restricted procedures – minimum timescales (Regs 27, 28, 47)

Procedure	Situation	PQQ	Tenders
Open	normal	N/A	35 days
	with PIN	N/A	15 days
	accelerated	N/A	15 days
Restricted	normal	30 days	10 days (except central government)
	with PIN	30 days	10 days
	accelerated	15 days	10 days

Accelerated procedure available where:

- state of urgency “*duly substantiated by the contracting authority*”
- makes normal time limits “*impracticable*”

Time limits must be sufficient to complete PQQs/tender (Reg 47)

New procedures CPN, CD & IP (Regs 26 & 29-31)

Competitive procedure with negotiation (CPN)

- Negotiations based on initial tenders, leading to “improved tenders”
- Deadline for “new or revised tenders” (effectively BAFO)

Slightly greater flexibility with competitive dialogue (CD)

- eg post tender negotiations

Innovation partnership

- Tendered procedure – similar to CPN for products “not already available on the market”

CPN and CD both available where

- requirements “*cannot be met without the adaption of readily available solutions*”
- contract “*includes design or innovative solutions*”
- contract cannot be awarded without negotiations eg on “*legal or financial make-up*” of contract

Contractor reliability- prequalification(Regs 56-65)

New terminology

- Reg 58 - minimum standards
 - To prequalify “suitable” bidders
 - Pass/fail questions
 - Called “selection criteria”
- Reg 65 - tender list selection
 - Can limit the number of bidders “meeting the selection criteria” that are invited to tender
 - Scored questions
 - “Invitation criteria”?

European Single Procurement Document

Self-declaration of compliance

Standard form from Commission

“Verified” just before contract award

Challenge risk if “untrue” and rejected

Exclusion (Reg 24 & 57)

New exclusion grounds

- *“Significant or persistent deficiencies in the performance of prior public contract which led to early termination, damages or other comparable sanctions”*
- Conflicts of interest, collusion, breaches of environmental or employment law etc

“Self-cleaning” provisions

- *“Active collaboration”, compensation & “active measures”* to prevent recurrence
- Default exclusion period - 3 years (for discretionary exclusion)

Exclusion for previous contract delivery problems

- Problems must have been “significant” or “persistent”
- Must be on a prior public contract
- Deficiencies must have led to “early termination, damages or other comparable sanctions” – would not apply if termination was under a “break clause”
- Exclusion lasts for only 3 years maximum

“Selection” - financial (Reg 56, 58 & Annex XII)

Economic and financial standing information

- Bank reference & insurance details
- Published accounts and turnover statement
- Group company info

Impact

- No use of credit reference agencies
- Greater contractor insolvency risk
- Need to identify “special risks” if using higher minimum turnover
- Make financial strength part of “invitation criteria”
- Consider appropriate protections (eg payment in arrears, performance bond, retention)

Financial

- **Annual turnover no more than 2 times contract value unless “special risks”**
- **Minimum turnover in “area” (of work) covered by the contract unless “special risks”**
- **Financial ratios**
- **Minimum insurances**

“Selection”– technical (Regs 56, 58 & Annex XII)

References

- Can be used only to establish a “sufficient level of experience”
- Express ability to exclude for poor performance may limit the opportunity to regard this as part of technical ability

Information

- No changes to information that can be requested – see box

Technical ability

List of previous contracts

- 5 years works “certificates of satisfactory execution”
- 3 years services / supplies

Technicians, technical facilities and workforce & managerial staff

Supply chain management & tracking systems (new)

Environmental management

Quality assurance certificates

Risk mitigation – tender lists and lots (Regs 6, 46, 65)

Must state in OJEU notice

- minimum and (“where appropriate”) maximum number of tenderers; and
- “objective and non-discriminatory criteria or rules” to be applied to select tenderers

Criteria

- Not limited to financial strength or technical ability
- Link to “subject matter of the contract” might be implied by future case law
- Should now include economic strength

Don't throw out the PQQs yet

- Rename “Invitation Questionnaires”?

Lots

OJEU notice can limit the number of Lots a tenderer

- can bid for, and/or
- can win

Regs suggest each Lot is a separate contract

Consider using separate lots to minimise “contractor failure” risk

Foreseeable variations – building in flexibility (Reg 72)

Permitted where variation:

- is provided for in the contract
 - “in clear precise and unequivocal review clauses... stating the scope and nature of possible modifications or options and the conditions under which they may be used”* and
- does not change the overall nature of the contract

Contract drafting pointers

- **Think about all potential developments**
- **Draft as options**
- **Set out when exercisable and include process to exercise the option**
- **Include all drafting necessary to make the change “work”**
- **Leave nothing to discretion/ agreement**
- **Keep an audit trail of changes made**

Variations (Reg 72) - unforeseeable

Permitted where the variation

- is a new contractor “*following corporate restructuring insolvency*” etc
- has a value below both
 - *applicable tendering threshold; and*
 - *15% (works)/10% of contract value (plus inflation if provided in contract)*
- is up to 50% of contract value (with “contract modification” OJEU notice) if
 - *cannot change supplier for technical reasons*
 - *unforeseeable extra need*
- is not “substantial” within *Pressetext*

“Substantial” changes – *Pressetext*

- Changed contract would have attracted other tenderers or changed the tender result
- Variation changes the economic balance of the contract in favour of the contractor in a way not provided for
- “Considerable” extension to scope
- New contractor (other than as left)

Implied contract terms (Regs 73 & 112)

Compulsory termination

- Implied into contract if not included
- But implied terms may not deal with timing and consequences of termination

30 day payment terms

- Apply if invoice “undisputed”
- “Undue delay” in “verifying invoices” is no excuse
- Must be cascaded down supply chain

Actions

- Amend standard contracts to include these terms

Compulsory termination

Must terminate if

- **European Court decides serious breach of Treaty / EU Directives**
- **substantial change occurs**
- **contractor should have been disqualified (mandatory exclusion)**



Questions

Andrew can be contacted at:

**andrew.millross@anthonycollins.com
0121 212 7473**

Anthony Collins
solicitors

Disclaimer: Whilst every effort has been made to ensure the accuracy of these materials, advice should be taken before action is implemented or refrained from in specific cases. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of this presentation.

© Anthony Collins Solicitors LLP 2014