

From: [Vaughan, Helen](#)
To: [Mills, John \(DETI\)](#)
Cc: [Anderson, Gail](#)
Subject: RHI - DETI/Ofgem
Date: 09 March 2016 14:55:33
Attachments: [DAC NI Renewable Heat Incentive Ofgem.pdf](#)

John,

As discussed, I set out below and attached some thoughts on the basis for the relationship between DETI and Ofgem in relation to the RHI. This note comes with a bit of a health warning in that I am not aware of the full background nor am I any expert on procurement issues – certainly if there are any issues arising which require further consideration, I'd be happy to carry out further analysis and I'm happy to discuss further.

Background – business case and approval

1. On 18 April 2012 David Sterling approved the business case submitted by Fiona Hepper. Fiona's covering email referred to an attached pdf form submitted to CPD as follows: "[this is the standard request for procurement advice for a DAC - which we were advised to send - and the view and approval of CPD that this can proceed on the basis that it is not a DAC, but that a direct approach to Ofgem through a Service Level Agreement is appropriate. This is signed at Grade 6 and Grade 5 level by CPD.](#)"
2. It's clear from Fiona's comment that CPD required this form to be completed in order for them to advise on the DAC issue - the form itself is somewhat unhelpful in that it's drafted on the basis that what is being sought is approval of a Direct Award Contract but that would seem to be the way CPD required the Division to engage with them. I attach a copy of that form and you will note that CPD approval was given on the basis that "***the conditions of Teckal can be met and an exemption can be applied***".

EU caselaw – Teckal and Hamburg (very abbreviated summary!)

3. **Teckal** was a 1998 EU case which established that EU procurement rules don't apply to a relationship between a contracting authority and another legal person where
 - (1) the contracting party exercises over the legal person concerned a **control similar to that which it exercises over its own departments** and
 - (2) at the same time, that **legal person carries out the essential part of its activities with the controlling contracting authority**.
4. This covers situations where there is a contract with a third party that is only formally, but not substantially independent from it. There must be no private capital involved in the third party and it depends in both organisational and economic form on the contracting authority. This one is often known as the 'in-house' exception. (Example – city council providing transport services using wholly owned and controlled transport company).
5. I don't think Teckal is directly relevant to the relationship between DETI/Ofgem. However, there is another case related to this matter which is probably more relevant and I think perhaps when CPD refer to 'Teckal exemption' they are referring to the scope of that case as well. It's the **Hamburg case** and it established that contracting authorities may establish 'horizontal co-operation' amongst themselves which involve the conclusion of agreements not covered by EU procurement law, if
 - (1) the arrangement involves only contracting authorities, no participation of private capital;
 - (2) 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
 - (3) their cooperation is governed only by considerations relating to the public interest.

Legislative basis for Ofgem exercising DETI functions

6. However, the CPD review seems to have been based on CPD's premise that this would be a contractual relationship and I am not convinced that is the case for the reasons set out below. I think the outcome

is broadly the same in that it is correct that there should not have been any requirement for a competition in this case but I think it's important also to reflect on the statutory basis for the exercise of the functions in question.

7. Under the Energy Act 2011, DETI was given the power to make Regulations establishing a RHI scheme which would, among other things, confer functions on DETI or NIAUR (s.113). Section 114 gives express statutory authority for Ofgem [GEMA] and a NI authority (defined as either DETI or NIAUR) ***“to enter into arrangements for GEMA to Act on behalf of the Northern Ireland authority for, on in connection with, the carrying out of any functions that may be conferred on the Northern Ireland authority under....any scheme...established under section 113”***.
8. In these circumstances, I would query whether DETI is contracting with Ofgem at all or there is any 'procurement' of goods, services or works.
9. There is express statutory authority for DETI and Ofgem to enter into arrangements and the 'Arrangements' document (most recent version signed by you 1/12/15) sets out those arrangements and the conferred and retained functions under the legislation.
10. In these circumstances surely any attempt by the Department to 'contract out' this work elsewhere would be ultra vires on the basis of unauthorised sub delegation of functions? That's why I don't think it's a procurement of services, it's the exercise by Ofgem of functions conferred by legislation on DETI, with express legislative authority for doing so.
11. I found a Commission working paper (link below) that sets out some useful background information on Teckal etc. As noted above, I have only taken the most cursory look at this and may have neither the full background nor the complete legislative/caselaw perspective. I'm aware that there are new Public Contract Regulations which cover the Teckal and Hamburg 'exemptions' but I haven't explored this any further at this stage.

http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf

CENTRAL PROCUREMENT DIRECTORATE (CPD)**Request for Procurement Advice in respect of a Direct Award Contract (DAC)**

Please complete this form with all relevant details and send to CPD.

Section 1. Client Contact Details

Name of Contact	Joanne McCutcheon
Department	Department of Enterprise, Trade and Investment
Branch/Division	Renewable Heat Branch, Energy Division
Address	Netherleigh Massey Avenue Belfast
Postcode	BT4 2JP
e-mail address	Joanne.mccutcheon@detini.gov.uk
Office Telephone Number	028 9052 9425
Mobile Telephone Number	-----

Section 2. Direct Award Contract (DAC) Details

Title of DAC	Administration of the Northern Ireland Renewable Heat Incentive (RHI) by the Office of Gas and Electricity Markets (Ofgem)
What is the estimated value of this DAC?	£386K development costs plus ongoing operational costs estimated to be £136k, £157K, £198K and £249K in each of the next four years.
What is the proposed length of this DAC?	Development phase – 4 months. Operational costs ongoing subject to an Agency Services Agreement

Section 3. DAC Justification**3.1 Technical Reasons or Exclusive Rights**

Is this DAC being justified for technical or artistic reasons or because the supplier has exclusive rights?

Ofgem is the Energy Regulator for Great Britain and has a close working relationship with the Department of Energy and Climate Change (DECC). Ofgem acts as the delivery body for a number of DECC led renewable energy schemes including the Renewable Obligation (and the Northern Ireland Renewables Obligation), the Feed-in-Tariff and the GB RHI.

Over the past 2-3 years, Ofgem and DECC have worked closely to develop administration arrangements for the GB RHI, this has included the development of a sophisticated IT system, development of application, accreditation, monitoring and fraud prevention processes, payments processing and management reporting tools. The system is now fully operational and has been managing the administration of the GB RHI since November 2011.

The proposed NI RHI is very similar to the GB RHI. By contracting with Ofgem for the delivery of the Northern Ireland RHI, DETI would be in position to avail of the systems already developed by Ofgem, at significant cost to DECC, in the design and delivery of the GB RHI. This presents significant economies of scale, ensures consistency in approach with GB in the delivery of the two similar incentive schemes and minimises the risk associated with the implementation of the scheme.

A feasibility study has already been undertaken by Ofgem. This study has shown that it is technically feasible to use the existing GB system and tailor it for the administration of the NI incentive.

Given Ofgem's role in the GB RHI and its expertise in delivering large scale renewable energy projects, it is the view of Energy Division that it is the only viable option for the administrator of the Northern Ireland RHI.

3.2 Legislative Requirements

Is this DAC in respect of a good or service which must meet specific legislative requirements e.g. Home Office Approval

If Yes, please provide details of the legislative justification.

The primary legislative powers which provide DECC with the authority to introduce the RHI in GB lie within Section 100 of the 2008 Energy Act. These powers specifically define Ofgem as "*the Authority*" and refer to them as having the power to make payments under the RHI, enforce the scheme, require information from applicants etc. Ofgem is, within the primary legislation, described as the administrators of the RHI in Great Britain. Subordinate legislation which sets out how the GB RHI will be administered, eligibility standards and regulations, prescribe in more detail the role of Ofgem as administrator.

Northern Ireland was not included under the 2008 Energy Act but the 2011 Energy Bill provides DETI with the powers conferred on DECC under the 2008 Energy Act. Secondary legislation is now being drafted.

Section 4. Current / previous contract**4.1 Was there a Contract which has / or is about to expire? NO**

Please provide the name of the supplier			
Please provide the start and end dates of the contract including extensions	Start Date		End Date
If the contract has been extended beyond the original options to extend please provide details.			
Was this contract awarded under Single Tender Action?	Yes		No
If No, was there an advertisement placed in the local papers and/or the OJEU, if so please provide dates	Date in Local papers		Date in OJEU
What was the actual value of the initial contract at the time of award?			
What has been the actual spend to date from the commencement of this contract?			

4.2 Is this a new requirement? Yes

Please provide the name of the proposed supplier	Ofgem
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Please provide justification for the DAC to this supplier

This is a new requirement. DETI is proposing to introduce a Northern Ireland Renewable Heat Incentive (RHI) and is just finalising the design of the scheme. The scheme will incentivise the uptake of renewable heat technologies to support the achievement of targets set by the Executive and obligations set by the European Union. Further to this, the increase of renewable heat in Northern Ireland will assist in increasing fuel security, reduce carbon emissions and provide opportunities for 'green jobs'. Her Majesty's Treasury has provided £25m over the next 4 years for the introduction of a Northern Ireland RHI.

For the scheme to be successful, accessible and not subject to fraudulent activities, it is vital that an administrator is put in place to process applications, make payments, monitor the scheme, enforce standards and eligibility, ensure accessibility and provide audit and management information.

Ofgem has been appointed to administer the GB RHI and DETI wish to also appoint them to administer the Northern Ireland RHI. Ofgem is the energy regulator in GB and is governed by an Authority, consisting of non-executive and executive members and a non-executive chair. For funding, Ofgem recover costs from the licensed companies it regulates. Licensees are obliged to pay an annual licence fee which is set to cover Ofgem's running costs. Ofgem is independent of the companies it regulates.

Ofgem has vast experience in administering large scale energy programmes and has a dedicated team, known as E-Serve, which currently deals with a range of energy schemes including the Feed-in-tariff, Smart Metering, the Renewables Obligation and the GB RHI. E-Serve is also responsible for the administration of the Northern Ireland Renewables Obligation (NIRO).

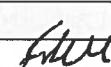
Ofgem has considerable in house expertise and this team will be mainly used in delivery of the NI project. If additional legal or financial expertise is required by Ofgem this will be procured via the OGC Framework Agreement to engage external services. This would be work specifically required by Ofgem in delivery of its responsibilities to DETI. If any work is directly required by DETI (eg drafting of the regulations) this will be undertaken by Arthur Cox; a legal firm previously appointed through open procurement competition.

There are a number of reasons for appointing Ofgem to this role;

- Economies of scale due to Ofgem's role as GB administrator, DETI would be benefiting from existing expertise, guidance documents, IT systems etc. The feasibility study showed savings on the development to be between £3m and £5m.
- Consistency of approach with GB, the GB RHI and Northern Ireland RHI are largely similar, discrepancies in administration could cause confusion and prevent uptake.
- Ofgem has a track record in delivering large scale energy projects

such as the roll out of smart metering, the Feed-in-Tariff and the Renewables Obligation (including the Northern Ireland element). Furthermore the administration of the GB RHI is already operational; the risks associated with the implementation of the NI scheme will therefore be significantly reduced.

APPROVALS		
Requestor		
I hereby declare that I do not have an external personal or monetary interest in the company to which this DAC will be awarded.		
Print Name Joanne McCutcheon	Signature	Date 26/3/12
Recommended by Head of Branch		
I hereby declare that I do not have an external personal or monetary interest in the company to which this DAC will be awarded.		
Print Name Fiona Hepper	Signature	Date 26/3/12

CPD ADVICE – For CPD Use Only
Based on the information provided CPD is satisfied that the conditions of Teckal can be met and an exemption can be applied in this case.
The authority therefore may make a formal arrangement with Ofgem through a Service Level Agreement for the services required without a call for competition.
Signed: 
Print Name: Tom Gilgunn <i>T. G. GILGUNN</i>
Grade (Grade 6 and above only): 6
Date: 17/4/12
Signed: 
Print Name: R Bell <i>Roy Bell</i>
Grade (Grade 6 and above only): 5
Date: 17/4/12

ACCOUNTING OFFICER DECISION		
I hereby declare that I do not have an external personal or monetary interest in the company to which this DAC will be awarded. I have read CPD Policy Guidance Note 02/10 and the comments provided by CPD.		
a) I request CPD to progress this DAC on behalf of the Contracting Authority with -----.		
Name: David Sterling	Signature:	Date:

From: [Vaughan, Helen](#)
To: [Mills, John \(DETI\)](#); [Wightman, Stuart](#)
Cc: [Anderson, Gail](#)
Subject: DETI/Ofgem - RHI
Date: 10 March 2016 14:02:12

John, Stuart,

Further to conversation this morning, I had a wee look at the 'Arrangements' document re duration.

In both versions I have seen – the one John signed on 1/12/15 and the version from December 2012 the duration and termination arrangements are as follows:

Arrangements to continue indefinitely until terminated by either:

- (i) written notice of at least 60 days (unless otherwise agreed) or
- (ii) if the Regulations are amended and parties haven't been able to agree the necessary changes to the Arrangements to reflect the amendments, then they are deemed to be terminated from day after Regs come into operation.

The budget and charging methodology for calculating the Administration costs are expressly stated as being subject to separate agreement between the parties.

So the Arrangements themselves don't hinge on a set approval period or review requirements. Wouldn't it be fair to say though that they do have an inherent review process, in that they envisage ongoing dialogue and engagement between the parties and indeed a formal review of the Arrangements in the event of any legislative amendments?

Helen