

Avoiding the pitfalls of procurement: Develop a commercial approach to public procurement and understand how to avoid falling foul of the rules.

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Contracting in Crisis?

Carillion: 'Fantasy business model' slammed
after £6.9bn liabilities revealed

*Interserve agrees refinancing deal to
ease fears over its future*

UK officials met Capita bosses to discuss
its financial problems

Why has this gone wrong?

- Concentration of market power
- Erosion of competition by consolidation and procurement policy
- Poor governance and management
- Questionable tendering strategies
- Insufficiently robust selection procedures
- Tolerance of low-balling
- Ignorance of supply chain

It's not just outsourcing

£3bn PFI waste deal heads for scrapheap

£30 billion: The cost of Labour's toxic PFI legacy to Scotland

Haringey Labour plans to ditch HDV

Procurement and Contracts

- Each is equally important
- Procurement leads to a contract
- Good procurement leads to good contracts
- But - Public Procurement Law and Contract Law are very different
- Public Procurement is a hard set of statutory rules (plus some overriding principles) set by the EU
- Contract Law is mostly (English) common law interpreted by the courts
- Procurement is essentially a regulatory regime
- Please don't confuse the two!

What is Procurement?

- Public procurement is the process by which public authorities, such as government departments or local authorities, purchase work, goods or services.
- To create a level playing field for all businesses across Europe, EU law sets out minimum harmonised public procurement rules.
- Key legislation: Public Contracts Regulations 2015
- Key underpinning treaty principles are:
 - Equal Treatment
 - Non Discrimination
 - Transparency
 - Proportionality

Remember these!



Why is procurement important?

- Ensures value for money
- Ensures propriety
- Just how important is the procurement function in your organisation?
- How many procurement staff do you have compared to HR staff?
- What training do you or your staff receive on procurement?
- Still a culture of avoidance - exceptions good, compliance bad

Getting Procurement Right - 10 point plan

- Never lose sight of the key principles - equal treatment, fairness, transparency and proportionality
- Ask “how can we make the most of procurement?” not “do we have to?”
- It is all in the preparation
- Remember one size does not fit all
- Have appropriate, accountable and robust decision making in the process
- Understand the difference between selection criteria and award criteria
- Future proof the procurement
- Keep good records
- Ensure lawyers are involved
- Don't be surprised or panic if your decision is questioned

The Importance of Good Contracts

- Protect the commercial bargain
- Codify risk
- Bad contracts can be just as enforceable
- The *contra proferentem* rule
- Void for uncertainty
- Removes the risk of dispute
- Removes the risk of the court asking: “What was the intention of the parties?”
- Outside of consumer protection, you will not be protected from unfair terms

Contract Management

- Keep an up to date conformed copy
- Capture all variations and minor changes (if necessary, keep a separate log of minor changes)
- Understand what “open book” means - if not, agree it with the contractor
- Utilise all rights of audit, inspection and “partnership” working
- Fully understand the rights to challenge monthly reports and invoices
- Use shareholder rights in joint venture arrangements
- Engage with contract management team on issues relating to enforcement, waiver and change management

Improving existing contracts

- Seek to rely upon “clear, precise and unequivocal” review clauses
- Reconsider the risk profile and allocation
- Benchmarking and market testing
- “Best value reviews”
- Gainshare/painshare
- Review price indices
- Make the best use of break and extension clauses
- Work out what you can do to change the contract within the procurement rules.

Getting Contracting Right - 10 point plan

- Call it what you like, but it is a contract
- Avoid legalese and use plain English
- Do not incorporate wholesale your tender documents
- Don't reinvent the wheel but don't put a cartwheel on a bike
- Future proof your contracts
- Understand the contractor's point of view
- Keep under regular review
- Actively manage your contract and your contractor
- Act in partnership but don't mistake that for friendship
- Behave commercially!

How smart is your contracting today?

- Are contracts too long?
- Do long term contracts disenfranchise SMEs, local businesses and social enterprise? Have you explored new models of delivery?
- Small is beautiful but is it too expensive?
- Do you really understand risk?
 - Procurement risk and contractual risk are not the same thing
 - Risk transfer is not necessarily value for money or even effective
 - Do you quantify risk and have plans for ownership, management and mitigation?
- Do you manage your total supply chain?
- How are you incorporating Social Value to *add value*?

How smart will your contracting be tomorrow?

- Rising technological complexity will increase reliance on your suppliers
- Brexit - are you ready for a regulatory Wild West?
- Do you contract for key changes e.g. change of law, demographic change, political flux
- Do we make or buy innovation?
- How good is your futurology?

Any Questions?

Thank you

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