

A DYNAMIC WHOLE-CYCLE APPROACH TO PUBLIC PROCUREMENT: A PRACTITIONER'S PERSPECTIVE ON BEST-PRACTICE METHODOLOGIES

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ABSTRACT

In a world where social, environmental and health crises are becoming more common we need to find strategies to respond to sudden changes without compromising important principles such as transparency, integrity and accountability. If every day presents a new crisis, do we end up in a perpetual 'fire-fighting' and 'emergency' mode or do we adopt an adaptable procurement methodology that helps us swiftly address any challenge?

This paper advocates for a dynamic whole cycle procurement model as an effective way to adjust to ever-changing circumstances and remain relevant for the future. The model adopts a holistic approach to public procurement, starting from needs identification and design of successful strategies, building on effective procurement processes and leading to good contracts and ability to review and reflect. The dynamic interaction between the different stages, the suggested key governance checkpoints, as well as the adoption of the 'right process' and multidisciplinary perspective are the core themes of the paper.

The article synthesises procurement practice and methodologies in a pragmatic, yet comprehensive and engaging way and encourages interdisciplinary dialogue. An important feature of the proposed model is that it is powered by constant flow of feedback and is subject to adjustments when circumstances change, within permissible limits. In addition, it suggests a distinction between formal checkpoints and informal self-governance at various stages of the cycle.

Most importantly, the paper aspires to showcase procurement as an inspiring and dynamic profession rather than a bureaucratic administrative function and offer some practical tips and reflections on how to master the 'art' of procurement.

A DYNAMIC WHOLE-CYCLE APPROACH TO PUBLIC PROCUREMENT: A PRACTITIONER'S PERSPECTIVE ON BEST-PRACTICE METHODOLOGIES

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1 The art of procurement¹

Art is the expression or application of human creative skills and imagination.² It requires both talent and hard work to master the talent. It is this ability - to create and use our imagination - that is unique to humans. Procurement can be described as applying our creativity to help us obtain something and achieve a goal - public or private; personal or organisational. And similarly to an artist painting within the limits of their canvas, there can be certain limiting factors in the procurement art too: regulatory, financial, and political. Such constraints should not, however, automatically trigger a formalistic perception to procurement (and in particular, public procurement) as a bureaucratic process followed for the sake of mere compliance or misconstrued transparency.³ They define the framework within which our creativity to design

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¹ Defined as the process by which an organisation obtains goods, services or works.

² <https://en.oxforddictionaries.com/definition/art>.

³ The Internet, as any other tool created by humans, can be used in two diametrically opposite ways – to enable transparency (when information and documentation are published in a clear and accessible way) or to harm transparency (when information and documentation are 'hidden in plain view' in the corners of the endless internet space).

impactful procurement processes meeting public objectives and needs, can still be applied. Any other attitude to public procurement would undermine its underlying purpose: to satisfy a public need by doing ‘the most good with what we have’⁴ in a principled and transparent way.

2 Objective and introduction

The aim of this article is to make the case for a holistic approach to public procurement by proposing a dynamic procurement model consisting of several stages constantly interacting with each other. This dynamic interaction between the different stages, the suggested key governance checkpoints, as well as the adoption of the ‘right procurement process’ and the multidisciplinary perspective are the core themes of the paper.

A holistic and dynamic approach to procurement is often challenging to implement in practice, especially by public sector organisations that are bureaucratic with high degree of formality and linearity. In reality, way too often, teams which need to work together, end up working in isolation. Governance gateways for holding decision-makers to account are missing or introduced at the wrong place. Laws and regulations are disregarded, cleverly misused or considered either ‘too complex’ or ‘too light’.

The novelty of the model presented in this article is its ‘dynamism’. A dynamic model powered by constant flow of feedback is essential because models ‘built for today will work a bit worse tomorrow’.⁵ Moreover, standard methodologies and practice ‘will grow stale if not constantly updated’⁶ and improved. This paper wholeheartedly invites the readers to engage in creating a dynamic procurement model that can be easily adjustable to fit everyone’s needs and help us achieve the ultimate objective we aspire to as procurement professionals - serving the public better through procurement.

In the following sections, I share a dynamic procurement model⁷ which, if adopted and constantly improved, has the potential to become the ‘practice canvas sheet’ for many

⁴ Rosling 2018:128.

⁵ O’Neil 2017:22.

⁶ O’Neil 2017:22.

⁷ The model builds on the author’s own observations and experience and models advanced by professional organisations such as the Chartered Institute of Procurement and Supply (CIPS) and develops these further.

talented public procurement and other professionals worldwide. The model is unique in that it promotes transparency and calls for real-time feedback in order to stay relevant and useful in rapidly changing environments. In this sense, this is not a static, 'standard' whole cycle model. It is an admittedly imperfect, yet dynamic, procurement model with the potential to achieve long-lasting, sustainable impact through feedback and constant improvement. There is one important condition for the model to succeed - when 'practising' the model⁸ one should be led by the principles of developed procurement systems such as integrity, accountability, transparency.⁹

In Section 3, I will re-affirm the case for such a holistic and dynamic approach when procuring in a public-sector setting. The article will mainly focus on procurement in the public sector, but the model can be adapted and applied in private sector procurement too. Section 4 considers some of the central themes of the paper - the importance of simple processes, multidisciplinary working and clear governance structures. Section 5 will focus on the most important stages in any procurement – needs identification, project justification,¹⁰ robust preparation and meaningful engagement. Choosing the most appropriate procurement route and designing an effective procurement strategy is discussed in Section 6. This is followed by a stage concerned with running the actual processes and implementing the outcomes, examined in Section 7. In Section 8, I address key aspects of the contract and relationship management stage focusing on contract modifications. A critical stage for a dynamic procurement model, which is often neglected in practice, is the stage on reflecting and learning from the activities at each stage, considered in Section 9.

The concluding section summarises the key points of the article, describes the next steps in developing the model and provides practical tips to facilitate immediate model adoption in practice.

⁸ As well as accepting that real growth requires hard work, persistency, experimentation (with some risk-taking) and willingness to learn from mistakes and start again.

⁹ This is by no means an exhaustive list and will depend on the procurement system of the particular country.

¹⁰ Running a public procurement exercise as a 'project' rather than a simple, isolated stage ('tendering stage') will help us recognise public procurement as unique 'whole' comprising of several sub-parts (which is partly the definition of 'project'). Therefore, as a 'project' each procurement requires unique approach to managing it.

As the model is truly 'dynamic', Sections 4 to 9 offer an opportunity for brainstorming and interactive discussion in the section 'Feedback loop'. This is to remind us that the model is not static and can be improved.

Figure 1: Dynamic whole cycle procurement model



3 The case for holistic and dynamic approach in public procurement

In astronomy, star-enthusiasts are usually interested in both, the individual stars forming a constellation and the constellation itself. In fact, constellations were created to connect individual stars in a meaningful shape that would help with navigation, sky mapping and agricultural planning. Applying this analogy, when implementing the various procurement stages in practice, we should be constantly pointing and re-pointing our procurement 'telescope' on both the distinctive procurement stages and

their interplay as part of the whole. From the start, the activities we are planning to perform at each stage should be considered holistically in the light of the remaining stages and re-assessed if the circumstances change. Reflecting on these potential interactions in advance and building opportunities for collecting feedback at each stage allows us to see the full picture and prepare better for strategic procurement planning and for building the multidisciplinary teams we need to deliver the desired procurement outcomes.

For example, public procurement officers may be tempted to focus their efforts and expert 'lenses' on the procedural stage of the procurement cycle as it is one of the more regulated stages, rather than more fundamental questions such as needs assessment or contract management – questions that often need to be discussed in collaboration with contracting or commissioning¹¹ teams. Although this procedural focus can ensure strict legal compliance during the process, without thorough consideration of all other stages of the procurement cycle and without the ability to 'adjust the magnification' in response to environmental changes project objectives cannot be achieved. To the contrary, such 'silo', reactive approach can lead to missed opportunities to review, re-assess and decide on the best procurement route in each case. A more integrated and dynamic approach to procurement is becoming increasingly important, especially in the current fast-paced economic development climate. Without constantly considering the full picture and the way the individual stages fit within, it may be difficult to provide answers to some challenging questions: should we organise a whole new public procurement process if the service demand under our contracts changes slightly? What if the change is significant and the service is no longer the same? What if the circumstances for a 10 year-motorway contract change dramatically in year 6 due to severe weather? The answers to these and similar questions are not always straightforward. For example, by gathering up to date information and examining the relationship between the contract management and the procedural stage we will be able to address the challenges faced by the public authority when varying a contract. I argue that only by adopting a dynamic, whole-

¹¹ Commissioning' is a wider concept than procurement (encompassing needs identification and assessment, prioritisation and allocation of resources in a broader organisational sense). However, for the purposes of understanding the role of 'commissioning' as part of the procurement cycle, the two terms can sometimes be used interchangeably in this paper.

cycle procurement approach in which the parts are in constant interaction with the whole and where constant feedback is welcome, one can build in the necessary flexibilities and address future uncertainty.

4 As simple as possible, but not simpler¹²

4.1 *The right process*

The bad reputation and ineffectiveness of public procurement often stems from unnecessary procedural complexity, perceived lack of flexibility to organise the right process and misapplied proportionality. This can be attributed to a number of factors including the way we sometimes approach our work.

Often our human nature and the instincts we have inherited from the times when the world around us was far less secure¹³ make us follow the path of least resistance and remain within the comfort zone of what we already know and has worked before. In the name of security, we make no room for trying new approaches and experimentation. However, by adopting an ‘if it ain't broke, don't fix it’ attitude, we often repeat the way we have done things in the past (including our mistakes), even when the circumstances have changed¹⁴. We are caught in a situation in which we are trying to address new challenges with outdated or irrelevant tools – the exact opposite of a ‘dynamic’ approach where we receive feedback, assess, learn and adjust at each stage and after each project. This is a big challenge for the procurement profession as we are not prepared to adjust to the challenges of the modern, fast-pacing world in which circumstances can suddenly or rapidly change. There is a further complication, specific for the public sector. Given the higher degree of public scrutiny in the public sector and the generally risk-averse public procurement culture, changing our mindset and adopting a more dynamic approach to procurement is very challenging and can even be perceived as ‘incompliant’.

¹² ‘Everything should be made as simple as possible, but not simpler’ is a quote attributed to Albert Einstein.

¹³ Rosling 2018: 19-242.

¹⁴ For example, applying the same procurement approach for both complex and simple projects or asking bidding organisation to respond to questions which are not specifically designed to match the procurement requirements.

In other cases, we do not design procurement processes right for the specific circumstances, because we are unaware of the flexibilities to do that provided for in the law or lack the necessary skills to identify and apply these flexibilities in practice.¹⁵ This can be easily addressed by investing in training and development.¹⁶ Another reason for adopting overly-formalistic and static procurement approach is the fear that generally any aspect of the procurement process can be legally challenged,¹⁷ even for minor procedural errors.¹⁸ The debate about procurement practitioners' 'fears' of being challenged is sometimes deliberately ignored, worrying that if we open it, the pendulum may swing in the other direction – giving unlimited discretion to public authorities without subjecting them to effective judiciary checks. The lack of clear and understandable procurement legislation and practical and unambiguous procurement law guidelines is another contributing factor to the ability of procurement professionals to apply the law and design the 'right' processes without fear of overstepping the regulatory boundaries.

At the same time, public procurement and the associated procurement stages and processes should not be overly-simplistic either, as we may lose oversight over accountability and transparency when spending public money. The suggested dynamic model to procurement can be utilised for the public good and be fair only if it is transparent and trustworthy. And when the conditions change, the model must change too¹⁹. Thus, our model can serve as a 'guide' (or a starting point) for organisations and professionals wanting to design simple (but not simplistic) and effective public procurement processes, right²⁰ for each individual case and having the capability to adjust to new circumstances. In illustration, in order to be successful, a

¹⁵ This is, for example, the case with the flexibilities associated with the 'light touch' regime under the European Union (EU) directives for some social and health services.

¹⁶ This problem can be addressed by training the procurement professionals in the practical application of the law, for example, by organising dedicated sessions or workshops to discuss cases studies and projects simulations (including 'mock' tendering processes).

¹⁷ Which can ruin the reputation of an organisation or a procurement professional.

¹⁸ In *Woods Building Services v Milton Keynes Council* 14 July 2015, an English and Wales High Court deals with the question what constitutes 'manifest error'. This statement does not imply that there should not be opportunities to legally challenge a process. It merely points out some of the reasons for adopting a risk-averse approach in practice.

¹⁹ O'Neil 2017:18.

²⁰ I propose a 'sixth right' of procurement especially relevant in public sector procurements - the right process – which complements the 'five rights' familiar to most procurement professionals (right quality; right quantity; right price; right place; right time).

procurement strategy (and procedure) should match the complexity²¹ and value of the project and should be developed in collaboration with relevant stakeholders after identifying current public needs. A simply 'recycled' procurement strategy, used for the same or similar projects five or even two years ago will likely be outdated. A relevant and dynamic procurement strategy will clearly and proportionately determine the amount of time, resources and documentation needed to meet the present needs - for example, proportionate number of bid questions; length of bidders' responses required or weightings allocated to individual questions or sections. Furthermore, a holistic needs assessment in the light of the other procurement stages - such as contact and relationship management - may confirm that the need can be efficiently and lawfully met by utilising an existing contract rather than by running a procurement process, saving time, money and resources.

4 2 *The right experts and multi-disciplinary working*

A truly dynamic approach to procurement acknowledges that even the simplest procurement project requires a degree of collaborative effort and multidisciplinary working. In order to receive timely feedback and expertise, relevant experts should be involved as early as possible in the cycle.²² For example, business intelligence professionals and data analysts can gather helpful information on public needs and market dynamics; finance experts can support financial planning and modelling; legal advisors provide expertise on the applicable laws and assess the risks of legal challenges.²³ Collaborating with experts from other fields will enable the procurement officials to view different perspectives and understand the wider picture which will ultimately result in better informed decision-making during the individual stages of the procurement cycle. Working with finance and other subject matter experts during the initial stages of the procurement cycle can lead to the identification of areas for potential costs or waste reduction in the system or risk-sharing where appropriate. For example, a clinical specialist may advise that for certain surgeries, there is no need for three Magnetic Resonance Imaging (MRI) scans as two MRIs would be sufficient

²¹ A project can be of lower value but of high complexity due to the nature of services/products/works; political sensitivity or other factors.

²² Similarly, procurement experts should be involved as early as possible in projects led by other organisational functions.

²³ This is invaluable expertise when testing the legal boundaries when designing novel procurement processes.

and this would not compromise the quality outcomes for patients. This is a potential cost saving and an opportunity to use vital scanning equipment for other patients. Such specialist view will determine the design of the procurement strategy and the parameters of the procurement process.

The involvement of relevant experts at each stage of the process does not only ensure project support but provides helpful knowledge and insight for the subject matter of the procurement. When building a hospital, for example, the users of the operating theatre (surgeons, nurses) need to be involved from the identification stage to designing the bid questionnaires and evaluation of the bids stages and continue to stay involved even after the implementation of the project to feedback any areas for improvement. The constant feedback flow and the resulting adjustments is what makes the procurement model truly 'dynamic'.

4 3 Collaboration with experts and upskilling procurement teams

A fast-changing world requires agile procurement professionals, who continuously improve, acquire new or upgrade their current skills. The activities at each stage of the procurement cycle can be improved and adjusted to societal and environmental changes only if the expertise and skills of the professionals involved at the various stages of the procurement cycle remain relevant and expand beyond the immediate area of expertise.

Multi-disciplinary expertise (for example, legal and procurement or financial and procurement) will equip procurement teams with unique set of skills and widen their horizons making it possible to identify complex interactions and creatively connect the pieces in challenging projects. It will also help distinguish between simple and more complicated and multi-layered procurement projects (for example, procurements having an international element) for which the procurement lead needs to involve specialist in a particular field (international procurement lawyers).

Multidisciplinarity also demands expertise in what is commonly known as 'soft skills'. Leading successful procurement projects requires self-awareness and the ability to effectively communicate messages of varying complexity to different audiences. In practice, many technically skilled procurement professionals fail at communicating their work and productively working with a variety of stakeholders. As these skills can

be taught there is no reason to invest less amount of time and resources for developing soft skills compared to developing technical skills and expertise. In reality, often soft skills are even more important for gaining support and moving a project forward than technical competence.

4.4 The right governance

For the whole cycle model illustrated in Figure 1, governance is of utmost importance as it can result in two diametrically opposite effects - it can enable the 'dynamism' of the model and facilitate the interactions of each stage or it can contribute to the 'stillness' of the model and become a blocker. For the purposes of this article, governance is defined as introducing clear formal or informal internal²⁴ organisational structures and controls to ensure accountability, clarity of process, and appropriate checks and balances throughout the procurement cycle. If appropriately implemented, the perception of these structures can shift from bureaucratic blockers into facilitative enablers whose coherence and efficiency speed up the procurement cycle flow from one stage to another.

'Right governance' also means that at any stage of the dynamic model, the procurement project proposition is formally tested with key organisational decision-makers and experts (and feedback is collected and implemented) through mechanisms agreed in advance. In illustration, for a project concerned with buying catering services it should be clear from the start which internal body, public authority or budget holder need to formally review and approve: the business case²⁵; the procurement strategy; the commencement of the formal procurement process; the decision to award any contract resulting from the process or the decision to lawfully modify the same contract during its term. In each of these cases, the accountable internal bodies will make an informed decision on whether or not to approve certain plans and actions. For example, the business case will examine the need and context

²⁴ Wider tax/budget allocation, national and regional project prioritisation and governance at ministerial/governmental levels will not be discussed in this paper.

²⁵ The term 'business case' can be replaced by an organisation specific terminology which implements the same idea, namely justification for the project and the project approach (resources, time, benefits, risks).

of the proposed project, any associated project risks and benefits and will put forward options appraisal for obtaining the services.

Although clear governance structures and checkpoints can ensure evidence-based decision making, project buy-in and accountability, the adopted structures should also be appropriate and proportionate. Introducing governance structures and bodies whose membership or functions do not contribute to (but hinder) the flow between the different stages of the cycle should be discouraged. In a public sector setting, the concept of 'appropriate' governance structures is very challenging due to workforce structural issues, resources, internal or external 'politics' or individual desire for influence and power in a particular organisation.

The golden rule when introducing governance structures is to promote proactiveness and self-governance and only add formal governance checkpoints when key decisions need to be made. This will ensure accountability for key decisions while keeping the model dynamic. Figure 1 above proposes formal governance checkpoints and approvals in four cases - business case or project justification; procurement strategy; end of process and contract management and modifications.²⁶ Such checkpoints provide a good balance between certainty and flexibility in a world where uncertainty due to fast-changing circumstances is becoming the norm.

4 5 Feedback loop

The reader can leave ideas, suggestions, feedback and comments for Section 4 'As simple as possible, but not simpler' at www.procurementart.com.

²⁶ However, these formal checkpoints can be organisation specific; for example, if the number of cycle stages are reduced combining business case and procurement strategy stages into a single stage.

5 Definition of needs and project justification²⁷

5.1 Proactive self-governance and formal governance checkpoint

Proactively seeking to understand and define the scope of the public service or product needed, is a self-governance step that public authorities responsible for commissioning can self-initiate to trigger the stages in the procurement cycle. The need can be for a new service or product, or can be identified as a result of the review and lessons learned stage for existing or similar services or products. Ideally, such self-governance structures will include a contract management mechanism for feedback and early indications of expiring contracts and the need to commission new services or products. This notification should trigger contract renewal or extension (if the contract conditions allow for it) or fresh needs assessment if the circumstances have changed, lessons have been learned and gaps have been identified. Proactive and timely self-governance will ensure that the public authorities have sufficient time to address pending needs and make evidence-based decisions instead of rushing a decision to renew or award a contract as a matter of urgency. Most advanced procurement systems worldwide²⁸ do not accept the lapse of time or urgency as a justification for skipping important procurement stages like needs identification and preparation, formulating a fit for purpose procurement strategy and running a compliant process.

Approval of the business case by the accountable decision-makers is a formal governance checkpoint requirement before moving to the next stage of the procurement cycle.

5.2 Key stage activities

The main activities in the needs identification and project justification stages are researching, collating and analysing the evidence that will later help the procurement project team to make a well-informed decision about the procurement strategy and

²⁷ As the emphasis on the model is its 'dynamism', the stages are not numbered in a particular order intentionally as the cycle is not linear and can be triggered, for example, by activities at contract review stage rather than the definition of needs stage.

²⁸ For example, EU Directive 2014/24/EU, Article 32 and UNCITRAL Model Law on Public Procurement, Article 30 (4) (a).

route. This includes gathering information and data, analysing the data, identifying the needs and trends, making projections for the future and mapping the gaps between current provision and future needs as well as performing various needs and impact assessments. For example, in a healthcare procurement project for commissioning kidney-transplant centres, this can be identifying the number of patients who need a kidney-transplant surgery; their age group; locations; case-complexity; how the present data differs from the past data and what the projections for the next 5-10 years are.

For simpler and more straightforward projects, the research and analysis²⁹ can be undertaken by the commissioning³⁰ or procurement teams in collaboration with other functions such as contracting or finance teams for data and financial information on past contracts. In this relation, the new set of skills that procurement professionals can learn, develop and apply are linked to utilising data analysis tools and understanding the opportunities and limitations that artificial intelligence and machine learning present. For complex cases, the procurement leads need to collaborate with dedicated experts with advanced research, analytical and programming skills. This can be a designated role within the procurement function with the sole responsibility of data gathering and analysis or a collaboration with professionals from other departments such as data analysts or business intelligence experts. Such multiskilled procurement workforce and multidisciplinary approach keep the procurement cycle updated and relevant and lays down solid foundations for success at the next procurement stages.

Meaningful engagement,³¹ including consultations³² where relevant or required by law, with external and internal stakeholders is a key activity at this stage providing another excellent opportunity for feedback and stakeholders buy-in. The activity will present us with different perspectives, will allow the team to gather information

²⁹ CIPS use the terminology 'primary' and 'secondary' research and sources; Primary research consists of research undertaken personally and secondary is the research of what has previously been published or gathered by someone else.

³⁰ However, I advocate for early involvement of procurement specialists in commissioning activities especially if the project is complex or sensitive.

³¹ The term engagement is used in a wider sense recognising that there are different nuances (for example, engagement; participation; co-production which are associated with different level and intensity of interaction with the relevant stakeholders).

³² The distinction between 'consultations' required by law and 'consultations' in the meaning of voluntary consulting or engaging with the public is recognised and discussed further below.

complimenting the initial research and will provide helpful insight on subtle project aspects that cannot be identified via 'static' research.³³

The approach to engagement will depend on the engagement purpose and the type of targeted stakeholders. To be meaningful, engagement should make room for genuine interaction with service or product users discussing scope and intentions, contributing to needs identification and specification development. Such shared decision-making process can be realised at dedicated events or meetings where users can have an active role in the way the service or product is designed and delivered. Other forms of engagements include online questionnaires and surveys; drop-in sessions or the combination of face to face and online activities. The key point for any form of engagement at this stage is that, to be helpful and successful, it needs to be meaningful,³⁴ genuine³⁵ and followed up by frequent updates and followed-up actions. Patient engagement and shared decision-making in the healthcare sector, for example, can reduce unwarranted variation in clinical practice and shape a truly patient centred delivery.³⁶

In cases of major service reconfiguration or large-scale infrastructure projects public authorities can also have a legal duty to consult with stakeholders affected by the planned changes. In such circumstances, best practice dictates to engage before the formal consultation, organise a purposeful and accessible consultation process and report and provide timely feedback on the reasons for the decisions adopted following the consultation process.³⁷

A dynamic procurement model requires actively maintained stakeholder engagement at every stage of the procurement cycle. For example, further opportunity to engage, collect feedback and test assumptions is when designing the procurement process

³³ For example, service users' practical difficulties accessing existing services.

³⁴ By providing relevant information, evidence to support that information and by planning for and accommodating genuine interaction.

³⁵ Inclusive and not organised in a way that pre-determines certain outcome.

³⁶ https://www.kingsfund.org.uk/sites/default/files/Making-shared-decision-making-a-reality-paper-Angela-Coulter-Alf-Collins-July-2011_0.pdf.

³⁷ Importantly, 'consultation' does not equal 'engagement'. The engagement process need to continue after the consultation during the next stages of the procurement cycle (for example, during the evaluation process or post contact award).

and lotting strategy. Engaging with stakeholders pertinent to that particular stage via market engagement events is one such example.³⁸

At the need identification stage, existing or new market players or wider stakeholder groups such as research institutes also need to be appropriately engaged to ensure that service or product knowledge and insight is not missed. This can be particularly helpful when, for example, there is a need for new products or services, the specification is outcome-based³⁹ or the project subject matter is something that has not been tried before or is truly innovative.

This stage of the procurement cycle can culminate in a report summarising and analysing the engagement outcomes and outlining conclusions and recommendations for consideration and implementation at the next stages, namely procurement strategy and process design and execution. The report produced at this stage can be added to the business case as supporting evidence alongside other project considerations.

As illustrated in the examples above, the initial procurement stages rely heavily on 'soft skills' and ability to gather, analyse and implement feedback. It is critical to make a compelling case for the project and to convince the decision-makers to provide sponsorship for spending public money to satisfy the public needs in the proposed way. On the business case structure and content, it is sufficient to point out that a good business case will clearly identify the project scope; will describe and assess the alternative options⁴⁰ for obtaining the service or good; will produce thorough contextual and financial assessment; will include external and internal risk and benefits appraisal; and will determine reporting mechanisms, measuring success, resource allocation and governance checkpoints.

5.3 *Dynamic interaction with other stages*

Needs identification and project justification are critical stages of the procurement cycle as they lay the foundations for and define the parameters of all other stages and

³⁸ Engagement with the market is further discussed in Section 6.

³⁹ Some legal restrictions related to engagement and the way it is conducted is discussed in section 'Legal considerations' below.

⁴⁰ For example, a make or buy option.

future activities. Major mistakes made at this stage may have devastating consequences for the entire project delivery. For example, lack of clarity about available project funds or financial modelling miscalculations can compromise the procurement process, if identified too late. Decisions lacking the necessary supporting evidence or that are otherwise inappropriate may produce a domino effect on the remaining stages.

Robust needs assessment and strong project justification will support a smooth transition from these two stages to the procurement route and strategy stage. Later on, it will be much easier to run a procurement process, tailor the procurement documentation and questionnaires and implement the procurement outcomes if the project parameters are clearly defined from the start. The contract and relationship management stage is also dependant on good needs and project definition. Vaguely defined needs, over or under-inflated projections or errors in the business case can result in contract modifications to meet additional needs. For both public authorities and providers, this can be a costly exercise. Needs that are clearly articulated from the outset including the scope of any foreseeable modifications based on trends and projections,⁴¹ will determine the procurement project scope and the degree of and mechanisms for potential modifications during the term of the contract. These initial stages will also set up the framework for monitoring and measuring project success which will help with the review and lessons learned reflections stage of the procurement cycle.

5 4 Legal considerations⁴²

A truly dynamic model with feedback acknowledges the need for formal checks and balances to help maintain order and avoid chaos. Given their importance for establishing key project parameters, the activities during the initial procurement stages can influence and shape the entire procurement cycle. Thus, legislators in some countries have introduced specific legal requirements to ensure transparency and fair

⁴¹ Including margin of errors in the trends and projections.

⁴² This paper will focus on procurement law considerations, but the reader should be aware that other laws, such as competition law; contract law; intellectual property; employment law may also apply to different aspects of the process.

play. Regulated activities at the needs identification and project justification stages include consultations, specifications and engagement.⁴³

5 4 1 Formal consultations

In specific circumstances, public sector organisations have a duty to consult with the public in the event of planned changes to public services or, for example, when building or demolishing infrastructure that would affect motorway users. In a strict sense, this is not a procurement law requirement, yet it is a public law requirement with potentially big impact on the procurement cycle. On a practical level, failing to consult when consultation is required, has negative effects on the procurement project as it misses the opportunity to engage and receive vital feedback. It can also result in legal challenges brought at later stages, jeopardising the entire procurement process. To be effective, a consultation needs to be meaningful⁴⁴. The way public consultations are organised and conducted can be subject to scrutiny too if, for example, the questions are formulated in a manner that pre-determine certain outcomes, such as integrating selected services or building a bridge or a motorway in already determined locations without considering or consulting on other options.

As this aspect becomes more and more relevant for the smooth interaction and transition between the procurement stages, it may be further regulated by procurement law in the future. This would ensure that the way consultations are designed, organised and conducted does not negatively influence the parameters of the procurement project.

5 4 1 1 Specifications and engagement

Drafting specifications or engaging with the market with the view to develop specifications or to provide feedback on other project aspects is another activity that essentially contributes to healthy procurement dynamics. Such activities are encouraged and welcomed as long as they do not disturb core procurement principles.

⁴³ Also discussed in Section 6.

⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216980/Liberating-the-NHS-No-decision-about-me-without-me-Government-response.pdf.

To address this, some legal systems⁴⁵ have introduced requirements aiming at preservation of access to and fair participation in the procurement process⁴⁶. For example, the way the service or product specifications are developed should not favour an outcome that only one organisation can deliver, or refer to particular make or source⁴⁷ or create unjustified obstacles to participation in the process. Any preliminary market engagements or consultations including involvement and advice from market participants on the specifications, should not have the effect of distorting the process or violating transparency.⁴⁸ If a provider has been consulted in the preparation of the process and then decides to participate in it, the law requires from public authorities to take appropriate measures⁴⁹ to ensure fairness and transparency.

5 5 Feedback loop

The reader can leave ideas, suggestions, feedback and comments for Section 5 'Definition of needs and project justification' at www.procurementart.com.

6 The procurement route and procurement strategy

6 1 Formal governance checkpoint

Designing the procurement strategy and defining the procurement route can be subject to a formal governance checkpoint within the procurement cycle. The procurement approach including the actual process design are so critical for the success of the entire project that it requires agreement and formal endorsement from key internal stakeholders. However, as the dynamic procurement model is adjustable to the requirements and structure of an organisation, this formal checkpoint can be merged with the project justification stage formal governance checkpoint.

⁴⁵ EU Directive 2014/24/EU, Articles 40 -45.

⁴⁶ Especially in procurement systems based on the principle of competition.

⁴⁷ EU Directive 2014/24/EU deals with this issues in Articles 42.

⁴⁸ EU Directive 2014/24/EU, Articles 42.

⁴⁹ Such as providing the relevant information exchanged in the context of or resulting from the provider involvement; or fixing adequate time-limits for the receipt of tenders; or even exclusion from the process but only as a last resort measure; importantly, all measures should be documented in a procurement report.

6 2 Key stage activities

This is an indispensable stage of any procurement cycle and sufficient time and resources should be dedicated to undertake the activities described below.

6 3 Project management

Project management knowledge, techniques, tools and skills are helpful aids in the procurement strategy⁵⁰ development stage. Examples of the initial documents to facilitate project start off are project plans, project initiation documents, risk register, action logs, stakeholders' maps and conflicts of interest logs. Such project management documents and tools can be developed either before the procurement strategy stage or in parallel with it. They support the procurement project moving forward by embedding a feedback channel for regular updates and adjustments. Unlike the adopted procurement strategy, which remains relatively stable throughout the cycle, the project management tools keep the project dynamic.

Designing a robust procurement strategy is a key stage activity as it provides justification for choosing the path to obtaining the service or product needed. At this stage, we try to answer the question 'how' to procure, review and assess the risks and benefits of our chosen approach. The level of detail will depend on project objectives and complexity including availability of existing wider strategies for obtaining defined service or product categories⁵¹. However, even in these cases, the existing strategy require review for suitability and should be adjusted if needed.

The procurement strategy will confirm the procurement project scope and will examine elements affecting the next procurement stages, for example, lotting, contractual arrangements; financial, legal or wider political considerations. The strategy will also firm up timescales and resources required for the delivery of the next procurement phases. Such holistic strategy assessment will determine, for example, whether a competitive tender route (and what competitive procedure) is the most appropriate

⁵⁰ 'Procurement strategy' is used in a narrower sense, namely a strategy defining the procurement approach in a traditional procurement process rather than to define the procurement strategy or policy at departmental, organisational or governmental level.

⁵¹ As part of a category management approach, for example.

procurement option. For example, whether the project objectives can be best met by organising a tendering process in one, two or several phases; or if, given the circumstances, a negotiated process can be utilised; or if a framework agreement or a dynamic purchasing system are available.

6 4 Understanding the market

Knowledge and understanding of the procured service or product market is an important activity in this stage of the cycle. A dedicated market engagement plan of action for pre- and during process engagement should also be detailed in the procurement strategy⁵². Market research to understand the market dynamics and structures can inform the decision about the best procurement route. Similarly, proactive market engagement through soft market testing questionnaires; face to face or online events/sessions or via other routes provide opportunities for feedback and evidence based decision-making. The methods, results and conclusions from market research and assessment can be captured in market analysis reports to support the proposed procurement strategy.

The type and degree of engagement will depend on the engagement objectives pursued by the authorities. In illustration, if the objective is to inform the market of future intentions⁵³ and prepare the market by defining the scope of the future procurement, the scope for active engagement and feedback is more limited but there are still benefits to it. Such engagement will discipline the market to plan and prepare for the future opportunity but does not facilitate active participation and exchange of constructive feedback.

Public authorities can also seek feedback from providers on key practical aspects and deliverables of the procurement through interactive market participation events or co-production workshops. Such events are particularly helpful for shaping the 'right' process and spotting and ironing potential process flaws pinpointed by the market.⁵⁴

⁵² The type of engagement (engagement; participation; co-production), for example, can affect project timescales and resource requirements.

⁵³ In the EU system, for example, this can be facilitated via prior information notices.

⁵⁴ Especially if the public authority has identified a public need that requires innovative or unorthodox approaches, for example, for new treatments in the healthcare sector.

For very complex projects, the activities at this stage are a great opportunity to receive feedback and design a process appropriate for the service or product in question while keeping within the legal requirements⁵⁵.

The feedback from the desktop market research or interactive soft-market testing exercises provide a helpful indication of the degree of market competitiveness and if, for example, only one or a small number of providers can deliver the service or product as defined⁵⁶. This will have effect on the way the procurement procedure will be designed. For instance, in markets with many active participants offering the product or service, it may be prudent to integrate a shortlisting procurement stage. A select list of providers, who can pass this shortlisting stage, will then be invited to the next stages⁵⁷. In the other extreme, a market with only one provider capable of delivering a service or supplying a product can be a helpful indication that this market can benefit from further development or raise questions as to why the market is not competitive and if this has been as a result of a mistake at the needs identification stage or of narrowing down the parameters of the procurement intentionally or unintentionally⁵⁸. However, if the market is genuinely restricted to one market player a competitive process is unnecessary. In such cases⁵⁹, the public authorities must focus on designing a good negotiation and contracting strategy to ensure taxpayers' money is well-spent. The market analysis findings, the available options, risks and benefits associated with each option and final recommendation will become part of the procurement strategy which will be formally approved by the relevant governing bodies.

⁵⁵ For examples, the reader can refer to the 'Light touch' regime for certain health and social services under Directive 2014/24/EU or for complex public-private partnerships contracts.

⁵⁶ The challenge with market research and questionnaires is asking the 'right' questions which will allow public authorities to collect relevant information; the market research, for example, can target a broader or a narrower market (such as market structure analysis for mental health services in a particular region or country). Often the questions that the market research will raise will be as important as the answers that it will provide. For example, if only one organisation is currently active in a particular market, a potential question for the public authority may be why this is the case and if the market can be developed to stimulate other organisations to enter the market (opening a conversation about competition/competition law and its interaction with procurement/public procurement law).

⁵⁷ For example, a restrictive procedure under Directive 2014/24/EU.

⁵⁸ EU Directive 2014/24/EU, Article 32.

⁵⁹ In the circumstances where direct negotiation is allowed.

Effectively engaging with the market also has a positive effect for creating goodwill and communicating a message that the procurement process is not a 'mysterious' endeavour undertaken behind closed doors but an open, impartial and fair process intended to serve the public and achieve a public objective. Key aim of the procurement professionals at this stage is building trust, increasing trustworthiness and assuring the market that they are impartial and are there to facilitate the process, and ultimately serve the public. If this aim is truly achieved it is less likely that further down the line an unsuccessful bidder would challenge the process outcome. Trust, for example, can be built by emphasising the role of the procurement lead in acting in the interest of fairness and transparency; helping the market by sharing case studies on good and bad procurement practices and even by switching roles. For example, by inviting potential bidders to put themselves in the 'public authority's shoes' and attempt evaluating particularly poor 'mock responses' against past or planned evaluation criteria. A dynamic interaction with the market at this stage is an opportunity for all sides – public authorities, procurement leads and the market – to adopt a multi-perspective approach, learn from each other and build confidence and trustworthiness in the procurement project.

6 5 Division into lots

The procurement strategy should also address another critical question: whether a contract opportunity should be split into lots and why. Procurement projects are divided into lots for various reasons, for example, procuring the same services or product for different regions or locations; ensuring economies of scale or providing more opportunities for smaller providers.⁶⁰ A dedicated strategy on division into lots as part of the overall procurement approach is highly desirable for several reasons. First, it focuses the attention of the public authority on collecting feedback and evidence to justify the best contracting approach and lotting design to meet the public need. Second, the way lots are divided or bundled together may restrict the ability of some

⁶⁰Helpful brief from 2016 on division into lots with good practical examples is available here: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-36-200117.pdf>.

providers to participate in the process⁶¹ as it may be practically impossible for them to deliver the lots as designed by the public authority.

From economic theory perspective, there may be unwanted market distortions stemming from dividing contracts into lots.⁶² Nevertheless, those distortions can be mitigated by designing and applying objective criteria. For example, the number of lots should generally be lower than the expected number of providers⁶³ participating in the process. Another approach is to provide for a number of lots that exceeds the number of contracts with incumbent providers by at least one.⁶⁴ Apart from these economic considerations, there may be other factors justifying a particular lotting approach. These could be findings at the needs identification stage; requirements related to user accessibility; market capacity and subject-matter expertise perspective;⁶⁵ financial, contract and provider management considerations or the combination and accumulation of any of these factors. There are a number of key questions to consider when developing a lotting strategy. Firstly, is the lotting approach limiting the ability of existing capable providers to participate? Second, is it preventing new providers from entering the market or resulting in providers exiting the market? If so, is this justifiable by solid evidence? A dynamic procurement model provides scope for meaningful engagement with the market to gather feedback and market insight and help design an appropriate lotting approach.

6 6 Procurement documentation and questionnaires

Once the strategy is confirmed and authorised, it needs to transition from a higher level master plan into a detailed and clear procurement process documentation. This demands a 'dynamic' procurement attitude building on collaboration and multidisciplinary working. For example, setting up a project group consisting of

⁶¹ Professor Albert Sanchez Graells in <http://www.howtocrackanut.com/blog/2015/04/division-of-contracts-into-lots-under.html>.

⁶² As argued by Professor Albert Sanchez Graells in <http://www.howtocrackanut.com/blog/2015/04/division-of-contracts-into-lots-under.html>.

⁶³ This once again illustrates the importance of market research and knowledge.

⁶⁴ Professor Albert Sanchez Graells in <http://www.howtocrackanut.com/blog/2015/04/division-of-contracts-into-lots-under.html>.

⁶⁵ For example, developing clinical expertise for a complex surgery in two or three centres in a country, based on number of cases, accessibility or strategy to maintain expertise and cross-cover in very specialised cases.

dedicated multidisciplinary experts meeting on a regular basis⁶⁶ will facilitate exchange of diverse viewpoints and expert opinions relevant to the project. In construction projects for example, such subject matter experts are the project designers and engineers with appropriate knowledge and skills; for healthcare service projects - medical professionals, patient representatives, quality and governance experts; or for project of high complexity - legal specialists. As public procurement is concerned with managing public funds, finance expertise is needed for any procurement project. The role of data protection and information governance professionals is becoming increasingly important in the era of the Internet, artificial intelligence and Big Data.

Collaboration and engagement with multidisciplinary experts at this stage is equally important to engagement with the public, the service users or the market. It is precisely this built-in opportunity for and the quality of such interactions that transform a linear whole-cycle procurement model into a 'dynamic' one and design a relevant, comprehensive, well-rounded procurement approach.

Ideally, the multidisciplinary experts would be involved in most of the activities at this stage and stay involved throughout the entire procurement process: from designing soft market questionnaires, tender questions and evaluation criteria to reviewing and drafting key procurement documentation such as service or product specification, financial modelling, and contractual and quality parameters. Importantly, the subject matter experts should play an active role in developing the procurement evaluation criteria and questionnaires. This will assist with designing appropriately worded and relevant questions,⁶⁷ the number of which is proportionate to the complexity of the procurement project. Importantly, conflicts of interests should be addressed and managed during all stages of the procurement process including earlier stages of the procurement cycle (further discussed in Section 7).

⁶⁶ Face to face project group meetings or via conferencing or teleconferencing in less complex or for some international projects.

⁶⁷ The importance of questions wording is illustrated in the case *Woods Building Services v Milton Keynes Council* 14 July 2015. The court provided some guidance of how to score questions having two parts (or bullet points) concluding that if one part of the question was not addressed the mark should be the lowest available mark.

The number and quality of questions is critical for the procurement in four ways. First, good questions of reasonable length and number will prompt good responses. Second, questions which cannot be subject to misinterpretation by both the bidders and the evaluators, will facilitate fair scoring in line with the evaluation criteria. Third, questions interpretation (or misinterpretation) may become a point of contention and a reason for challenging the procedure.⁶⁸ Finally, tailor-made questions will elicit helpful content and information later used in the contract management stage against which project success will be monitored and measured. In practice, good outcomes are achieved if dedicated time and effort is spent on designing a small number (for example 15 to 20) of questions accurately reflecting the specification requirement instead of relying on available but irrelevant questions, simply copied from previous projects. Nevertheless, there is scope for standardisation in this stage too. Pre-qualification questionnaires⁶⁹ aiming at assessment of organisational capacity, capability and financial position are well-placed for standardisation. A genuinely dynamic attitude, however, would still openly accept feedback and, if necessary, adjust standard questionnaires to fit project objectives rather than blindly mirroring earlier approaches.

An efficient practical solution is building on lessons learned and continuous improvement by collating a well-curated library of quality questions from past projects to serve as a starting point for discussions with the project group members, before collaboratively developing tailor-made project-specific questionnaires. Question weightings determining the importance of each question for the project should also be evidence-based, linking to the project requirements and expert views about the overall question significance in the procurement.⁷⁰ The word limits for provider's responses to the questionnaires can also affect the quality of submissions and can be a dissuading factor for providers not willing to spend time and resources on completing lengthy questionnaires. Imagine a procurement process for which an organisation had

⁶⁸ Again, in *Woods v Milton Keynes Council* 2015 14 July 2015, the court discussed several issues related to questions interpretation and evaluation criteria.

⁶⁹ For reference, standard selection questionnaires and self-declarations in the UK/EU.

⁷⁰ For example, a practical way for determining weightings is by asking the subject matter experts and evaluators to indicate the section and questions importance from their expert point of view. Thus, initially they can allocate these into three categories: category 1 – good to have; category 2 – need to have; category 3 – must have; or can design a similar tool for justifying and allocating weightings.

to complete 50 questions (some of which irrelevant or repetitive), with 1000 words each. A practical trick to manage this is by creating a methodology for determining word limits by, for example, linking these to the question's weighting.⁷¹

6 7 *Dynamic interaction with other stages*

The procurement strategy is strongly influenced by the project scope and needs definition stage as the latter defines the initial procurement parameters forming a bedrock for later stages.

The procurement strategy stage, on the other hand, determines the next stage scope: what procurement procedure to run; how many lots to have; what aspects to evaluate and how to successfully implement the outcomes. The procurement strategy also considers important contracting features such as contracting model; type and number of contracts; contract duration; and relationship with existing contractual arrangements. The contract success at the contract management and performance stage will largely depend on the selected procurement route and whether the process, as designed, had resulted in quality bids capable of satisfying the public needs. The responses to the bid questionnaires and any supporting information submitted as part of the procurement procedure will translate into contractual commitments and performance schedules against which contract performance and success will be monitored and measured. Any fluctuations or performance failures and the reasons for these will be reflected at the review and lessons learned stage. The scope for future contract modifications is also influenced by this stage, thus affecting future contract management, as it will determine any options for extending or otherwise modifying the contract.

6 8 *Legal considerations*

If specific legal regimes apply for particular sectors, services or products or in the event of mixed or collaborative contracts,⁷² any potential ambiguity or conflicts between

⁷¹ For example, a question that is assigned 5% weight may be allocated word limit of 250 words whereas a question weighted at 10% - 500 word limit.

⁷² For example, involving public authorities from different regions or organisations.

applicable legal regimes need to be addressed in the procurement route and strategy stage.⁷³

For activities undertaken as part of soft market testing and engagement, the legal considerations discussed in Section 5 above apply.

Some procurement regulations may incorporate legal requirements with regards to lotting, for example, under EU law⁷⁴ contracting authorities are required to provide an indication of the main reasons for a decision not to divide a contract into lots.

The procurement documentation can be subject to certain legal requirements too. In illustration, EU procurement law contains legal requirements for technical specifications and standards; disclosure of the evaluation criteria in the procurement documents and prohibition of introducing undisclosed evaluation criteria. The actual procurement procedure or the scope for designing a bespoke process is usually legally prescribed too.⁷⁵

A procurement strategy may recommend extending an existing contract instead of organising a formal procurement procedure or a combination of both - modifying an existing contract in the short term and organising a process in the long run. Such recommendation, however, should be supported by solid justification and needs to comply with any legal requirement for contract modification.

There may be other reasons for deciding not run a formal (competitive) process if, for example, an exemption for direct negotiation apply. Such exemptions are narrowly defined by law and can include intellectual property rights, technical or market capability reasons. The procurement strategy should detail the justification and this procurement approach approved at formal governance checkpoint. For both modifying and directly negotiating a contract, there may be further legal requirements such as publishing a notice announcing the public authority's choice and its rationale.⁷⁶

⁷³ For example, EU Directive 2014/24/EU, Article 3.

⁷⁴ For example, EU Directive 2014/24/EU, Article 46.

⁷⁵ Further discussed in Section 7.

⁷⁶ For example, similar requirements exist in EU procurement law.

6 9 Feedback loop

The reader can leave ideas, suggestions, feedback and comments for Section 6 'The procurement route and procurement strategy' at www.procurementart.com.

7 Running a formal (tendering) process, awarding and implementing resulting contracts

7 1 Proactive self-governance and formal governance checkpoint

The governance standards for these two stages can include proactive self-governance requirement for running the formal process and implementing the outcome and a formal governance checkpoint for approving the process outcomes. Both can be summarised in a formal report detailing the activities that have been performed, the outcome and a recommendation to approve the outcome. In effect, the role of the procurement report is to illustrate 'how' the formal tendering process implemented the procurement strategy objectives defined at the previous cycle stage.

7 2 Key stage activities

7 2 1 Notices

When the procurement strategy confirms that a formal tendering process is the best route to meet the public need and necessary documentation and questionnaires have been developed, the next course of action is initiating the process by publishing the contract opportunity in a public journal.⁷⁷ The general principle is that the publication of all relevant information and documents should ideally happen at the time of publishing the notice. However, there is scope for feedback and flexibility to introduce minor modifications and clarifications.⁷⁸ Thus, another key stage activity is responding

⁷⁷ For example, Official Journal of the European Union/Tenders Electronic Daily – in the EU; Contracts Finder/'Find a tender' as from 1 Jan 2021 - in the UK.

⁷⁸ Providers can provide feedback on areas requiring further clarifications or changes; however, any changes to the documentation after the initial publication date should be communicated to all providers in due course.

to providers' clarification queries⁷⁹ and clarifying the public authority's requirement to enable providers to submit improved bids.

7 2 2 Procedure

The procedure adopted at this stage should match the one recommended in the procurement strategy. This may be a formal tendering process, strictly defined by law, with or without compulsory stages such as open or restricted procedures;⁸⁰ processes implementing a dialogue phase or tailor-made processes for sectors demanding more flexibility due to the contract subject matter or the complexity of the procurement.⁸¹

Finally, the minimum deadlines for responses can also be legally prescribed or there may be flexibilities to set out deadlines proportionate to the complexity of the procurement project.⁸²

7 3 *Electronic portals and e-tendering*

Tendering processes can be conducted offline or online.⁸³ In both cases, and as discussed in the previous sections, managing the activities in a procurement process, especially in complex procurements, requires excellent project management skills. In some jurisdictions, it has become a standard to use electronic tendering portals for running and managing the process including communication with providers. Technology provides opportunities for streamlining the process and ensuring transparency and accountability. However, technology in procurement should be utilised in a smart way and be guided by the procurement principles established in the 'offline' world. Otherwise, from facilitators, these IT tools can turn into impediments leaving open the potential for misuse by unethical users. To prevent this, public authorities can offer comprehensive internal (for procurement and other subject matter experts) and external (providers and third sector organisations) training on both the principles and rules of public procurement and how to comply with these when using

⁷⁹ The responses should be published to all providers except in some limited cases in which the information is confidential or commercially sensitive (although, in some cases, this approach may be subject to objections too).

⁸⁰ As understood under EU procurement law or similar processes used in other jurisdictions.

⁸¹ For example, concession/public-private partnerships contracts or 'light touch regime' for health and social services under EU law.

⁸² For example, this is the case for the EU procurement regime for healthcare services.

⁸³ Or in some circumstances - a combination of the two.

e-portals. This will contribute to keeping the entire procurement model relevant and dynamic as it will provide yet another opportunity for wider learning and feedback.

7 4 Evaluation and contract award

The evaluation of bidder's proposals is a critical stage activity as any decision, action or comment can be challenged by the unsuccessful providers. To manage and minimise the risk of challenge, procurement professionals need to skilfully manage the evaluators and the entire evaluation process including the dedicated meetings for discussing the submissions and finalising the scores. Three steps are recommended to help manage the evaluation activities part of the procurement cycle.

First, the procurement process will benefit from carefully selected, multidisciplinary evaluators with relevant expertise, consulted and involved in the procurement cycle from the start. As part of this first step, it is critical to identify and appropriately manage any actual, potential or perceived conflicts of interest⁸⁴ associated with individual members of the evaluation panel. A dynamic approach to managing conflicts of interest requires proactive management throughout the entire evaluation phase by, for example, regularly reviewing and re-confirming the validity of initially completed declarations. A conflict of interest log, regularly reviewed and managed by the procurement lead or, in more complex project, by a conflict of interest guardian is a helpful tool to dynamically manage conflicts of interest. If a serious conflict has been identified and cannot be managed or mitigated against, the subject matter expert should be excluded from further participation in the process.

Second, as experts in their particular field but not in procurement, evaluators will need training in using the evaluation system (online or offline) facilitating the evaluation. Even more importantly, evaluators should be purposefully coached in understanding the principles of public procurement and interpreting and applying these as well as the evaluation criteria consistently. This, however, does not mean training evaluators to score in a certain way or influencing their scores; the purpose is to set up clear expectations for the importance of the procurement procedure and to help evaluators understand the procurement principles and the expected standards of the evaluation

⁸⁴ For reference, EU Directive 2014/24/EU, Article 24.

process. In conducting the training procurement professionals can focus on common mistakes in evaluation and practical evaluation exercises making sure that everyone involved understands the evaluation process, including the evaluation criteria. During the training, emphasis should be put on the need to provide written justification for each score which should be consistent and defensible in court. If evaluators discuss and agree final scores at dedicated meetings⁸⁵ (e.g. moderation meetings) extra care is required as the justification for the moderated scores (and usually the discussions leading to the consolidated score) can be subject to legal scrutiny. In the long run, it always pays off if the evaluators have been properly trained, as this results in: consistency of scores and justifications; reaching consensus and managing moderation meetings more effectively; and ultimately, compliant and successful procurement processes.

Third, after the scores are finalised, the next recommended activity is drafting a report⁸⁶ outlining the tendering and evaluation process that have been followed. The records in the report should match the process recommended in the procurement strategy. However, a dynamic model as the one proposed in this article, also takes into account the need to adapt if any feature of the strategy required adjustment due to changed circumstances, for example. In such cases, the aspect that has been altered and the reasons for this should be included in the report too. The report can also cover individual scores, final ranking and outcomes including the main features of the successful proposals, expected project benefits (linking to earlier procurement stages and in particular project justification and procurement strategy) and potential risks for monitoring during the contract performance and supplier management stage. In order to make the procurement cycle even more dynamic and foster continuous improvement, the report can include a 'lessons learned' section. This will support the dedicated review and learn stage later on and will improve future procurements. Finally, the report should be formally approved by internal decision makers and following this all bidders informed of the outcome.⁸⁷ In order to ensure transparency

⁸⁵ The agreement between evaluators can be based on reaching consensus or some more formalistic approach to consolidating different scores.

⁸⁶ Under EU procurement law, Article 84 similar report is required during and at the end of the procurement process.

⁸⁷ In some countries, 10 days standstill period is applied before moving to the contract conclusion stage.

and public accountability, and generally after the contract is formally concluded, the last action associated with this stage is the publication of a notice informing the public of the final outcome and the decision to award the contract.

7 5 *Dynamic interaction with other stages*

The success of this stage is highly dependent on diligently undertaking all activities at the procurement route and strategy stage and especially market research, route to procurement, lotting approach and procurement documentation. For example, effective procurement strategy will assist with designing and organising the process to meet the strategic objectives; clear and relevant questions and evaluation criteria will facilitate and increase the quality of submissions and the evaluation process. This will result ultimately in selecting the solution that best meets the needs and objectives identified in the needs identification and project justification stages.

This stage also strongly affects the stages afterwards. For example, a quality bid solution will better translate into contractual requirements and will allow for implementation of effective outcome and contract performance measures. Issues and risks as well as lessons learned identified at this stage can be used to improve contract delivery or at the review and learn stage to inform and advance future projects.

7 6 *Legal considerations*

Relevant legal considerations at this stage are linked to ensuring publication of notices with required requisites to trigger a process; any compulsory time limits for publication or receipt of bids; complying with the compulsory procedures as defined by law or as designed and described in the procurement documents. During the evaluation process, legal issues to watch for and consider are related to introducing undisclosed evaluation criteria; relying on model answers; conflicts of interest or favouring a particular bidder; detecting collusion or abnormally low tenders. Unilaterally changing the project scope at this stage can also be problematic from legal point of view. As further discussed in Section 8 below, significantly modifying the initially advertised procurement scope can be legally challenged.

Progressive procurement laws also introduce a requirement to document the progress of the tendering procedures by keeping sufficient record of the justifications for the

decisions taken at different stages of the procurement including the evaluation stage and the moderation meeting discussions.⁸⁸

Legally challenging a procurement process is usually time barred and it is always helpful to be aware of these time limits and their potential effect on the process. Overall, even if the risk of legal challenges substantially decreases if all stage activities of the procurement cycle have been properly conducted, I recommend to always keep such statutory time limitations in mind when planning the procurement project and monitor it throughout the entire procurement cycle.

7 7 Feedback loop

The reader can leave ideas, suggestions, feedback and comments for Section 7 'The procurement route and procurement strategy' at www.procurementart.com.

8 Contract management and relationships management

8 1 Proactive self-governance and formal governance checkpoint

The procurement cycle does not finish with the end of the formal tendering process. Effective contract and supplier management is equally important for achieving the desired outcomes, performance targets and realising the projected benefits. This is a very dynamic stage, strongly relying on interpersonal skills and self-starting. In terms of governance, therefore, contract managers should proactively seek to ensure contract compliance and management including activities such as documenting and agreeing adjustments to contractual arrangements and contract performance targets and measures.

⁸⁸ For example, EU Directive 2014/24/EU, Article 84.

A formal governance checkpoint, however, is proposed for substantial contractual changes during the contract lifetime such as significant⁸⁹ changes in scope, price or duration.

8 2 Key stage activities

Transitioning from procurement process into contract and supplier management is the next step of the procurement cycle. The key activities at this stage are related to aspects associated with contract and providers' relationships management. Thus, both technical contracting knowledge and soft 'supplier management' skills are critical during this stage.

In illustration, activities at the contract and supplier management stage include: having in place robust processes for contract reviews and regular meetings with providers; producing contract progress reports and forecasts; risks monitoring; management and engagement with suppliers and subcontractors; incentivising and developing key providers; or in the event of non-performance - triggering and managing the processes for rectifying failures and non-performance; managing assets and intellectual property; negotiating any permissible amendments to current contracts and managing termination and exit clauses.

An essential activity with serious legal and procurement implications is the extent to which a contract can be modified without being perceived as completely new and subject to a separate tendering process. Modifications of longer term contracts⁹⁰ are particularly intriguing as the lifespan of such contracts can vary from 2 to over 100 years. Generally, providing that all previous stages of the procurement cycle have been accordingly supported (in terms of time, effort and resource) and appropriately conducted, during the contracting stage there should not be a need to materially change the contract during its term. Legally, the scope for substantial modifications at this stage is limited with only minor aspects of the contract subject to (permissible) modifications or if specific legal circumstances exist. This is a good illustration of the

⁸⁹ The law will often not allow any substantial modifications. However, if the changes have been envisaged in the initial procurement documentation, in certain circumstances, these could be considered acceptable.

⁹⁰ For example, in long-term traditional procurements or public-private partnerships or concessions type contracts.

need to have a legal framework that is in itself dynamic and, as such, provide legal certainty.

However, an even more dynamic procurement model would have considered feedback about the project scope, future projections and plans and would have built in flexibilities for future contract modifications from the start of the procurement cycle. In the section 'Legal considerations' below, I will outline the EU approach to contract modifications illustrated by selected case law examples.

8 3 *Dynamic interaction with other stages*

The activities at this stage are conditional on robust needs analysis, accurate projections and comprehensive scenario analysis about the state of the contract in the immediate future and in the long term. In illustration, the expected change in service scope or demand and the impact of such changes on the contract should be considered at the preparatory stages of the procurement cycle. Similarly, the availability of funds (now and in the future) to address any fluctuations should also be known from the start. In a genuinely dynamic procurement model, flexibilities for such circumstances should be built in at previous stages of the procurement cycle, in order to plan for and address future uncertainties.

For example, if modifications are required during the term of the contract, the adjustment mechanisms for such modifications needs to be stated in the procurement and contract documents. Importantly, all these issues need to be considered in advance, at the needs identification and project justification stages, and later on confirmed in the procurement strategy and route stage. For example, the contract duration including any options to extend the contract during its term should be explicitly stated in the published tender documentation. This will help bidders in determining their interest in investing effort and resources in the opportunity. It will also form the basis for developing the financial modelling and evaluation. The approach will stably establish what is in scope for the contract, and leave room for adjustments and feedback.

This stage will also influence the review and lessons learned phase of the cycle as it will generate contracting and performance data and feedback that can be compared

against the initial needs assessment, business case and contract and procurement objectives.

8 4 Legal considerations

Public procurement law generally prohibits awarding public contract without being through the key stages of the procurement cycle. The modification of an already awarded contract can be so substantial that it can be considered a new contract opportunity that has not been advertised, or in other words, an unlawful contract award. This can go against the logic of the procurement cycle that is to be a dynamic but robust practical tool for managing public money and serving the public in the best possible way. For this reason, some legislators (and courts) have adopted a pragmatic approach to contract modifications during the term of the contract. For example the EU procurement law explicitly lists the various scenarios⁹¹ in which a contract modification can be made without the need to run a new process and restart the procurement cycle.

A new procurement procedure would not be needed, for instance, where the modifications, irrespective of value have been considered in the initial procurement documents with clear, precise and unequivocal clauses.⁹² Thus, the scope, nature and conditions of the possible modifications need to be provided and the overall nature of the contract not changed. In practical terms this means that the procurement documents and the notice shall make any scope for modification as clear as possible⁹³. The degree of specifying this, however, can be challenging and subject to interpretations. Earlier EU case-law⁹⁴ confirms that it is not sufficient to only reveal the mechanism for amending the contract⁹⁵ - the precise arrangements for the

⁹¹ EU Directive 2014/24/EU, Article 72 and associated CJEU case-law.

⁹² In EU Directive 2014/24/EU, Article 72 and, *Succhi di Frutta* (2004), C-496/99 P, ECLI:EU:C:2004:236 where the Court of Justice of the European Union (CJEU) made it clear that all the conditions and detailed rules of the award procedure be drawn up in a clear, precise and unequivocal manner in the notice or contract documents.

⁹³ In this regard, Recital 111 EU Directive 2014/24/EU does not allow for unlimited discretion; price indexations or communications equipment to be delivered over a given period can be suitable as well as changing communications protocols or other technological changes; adaptations of the contract which are rendered necessary by technical difficulties during operation or ordinary and extraordinary maintenance interventions to ensure continuation of a public service can also be considered acceptable.

⁹⁴ *Succhi di Frutta* (2004), C-496/99, ECLI:EU:C:2004:236.

⁹⁵ *Succhi di Frutta* (2004), C-496/99, ECLI:EU:C:2004:236).

modification should be also be disclosed. On the other hand, even if the changes are part of the original procurement documents, this does not mean that all amendments should have been drafted from the start.⁹⁶

Modifying a long-term, complex contract is even more challenging as it is difficult to predict all possible changes with enough precision. For example, how precise can the public authority be about the scope of contract that is supposed to last for more than 10 years? In the EU context, if the circumstance triggering the change was predictable (regardless of the nature and complexity of the contract), the procurement documents should have included an express provision about it⁹⁷. A generic review clause is not sufficient. The review clause should refer to the scope and nature of the potential modifications, the conditions under which it can be used and should not alter the overall nature of the contract⁹⁸. The same contract modification rules would apply regardless of whether there is an increase or a reduction in contract scope as a smaller contract could have attracted and be of interest of smaller providers.⁹⁹ Furthermore, external factors such as a financial crash¹⁰⁰ or Brexit¹⁰¹ will not necessarily satisfy the specificity requirement. Although still challenging, it may be possible to meet the specificity test in the event of technological or legislative changes.¹⁰² For instance, in a recent English case, the court interpreted the specificity test more broadly and provided indication of clauses that could meet the test.¹⁰³

The EU regime on contract modifications also permits minor changes without the need to start a new procurement procedure.¹⁰⁴ However, any change that renders the contract materially different in character; would have attracted different bidders; changes the economic balance in favour of the contractor or considerably extends the

⁹⁶ *Pressetext Nachrichtenagentur GmbH v Republik Österreich* [2008], C-454/06, ECLI:EU:C:2008:351 and *Edenred (UK Group) Ltd v HM Treasury* [2015] UKSC 45.

⁹⁷ *Finn Frogne* (2016), C-549/14, EU:C:2016:634.

⁹⁸ Heard, Emily. 2019, article at <https://emlawshare.co.uk/resource/articles/procurement-contract-change-provisions/>.

⁹⁹ *Finn Frogne* (2016), C-549/14, EU:C:2016:634.

¹⁰⁰ *R (on the application of Kim Alexander Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin).

¹⁰¹ *Channel Tunnel Group LTD & Anr v. The Secretary of State for Transport* (2019) where the English and Welsh High Court did not accept Brexit as a justification for urgent contract award (due to unforeseen event).

¹⁰² *Commission v France* (2000), C-337/98, ECLI:EU:C:2000:543 and in Recital 111 of EU Directive 2014/24/EU.

¹⁰³ In *Edenred* (2015) cited above; for example, the initial document clearly mentioned that it can expand to other public bodies and contract value can be up to £2 billion.

¹⁰⁴ EU Directive 2014/24/EU, Article 72 (2).

scope of the contract can be considered substantial.¹⁰⁵ A new procurement procedure is also not required in the case of universal or partial succession or for some 'additional' services or works.

Important legal requirement under EU law is the publication of modification notices for some of the above-mentioned circumstances.¹⁰⁶ Some procurement laws also incorporate provisions allowing for termination of contracts if contracts have been unlawfully modified.¹⁰⁷

Other legal considerations at the contract and supplier management stage are linked to general contract law (or administrative contract law in some jurisdictions); termination of contracts and dispute resolutions.

8 5 Feedback loop

The reader can leave ideas, suggestions, feedback and comments for Section 8 'The procurement route and procurement strategy' at www.procurementart.com.

9 Review and lessons learned

9 1 Proactive self-governance

This is a stage dedicated to reflection, exploration and feedback. As such, during this stage the relevant professional or authority must be proactive and self-disciplined in taking time to gather evidence and reflect on the activities undertaken throughout the entire procurement cycle.

9 2 Key stage activities

It is often either easier or necessary (due to lack of resources) to move straight away from one procurement project to the next one. Thus, we ignore and neglect a good opportunity to identify benefits from our recent procurement exercise and learn from any dysfunctions in the process. Some of the key activities at this stage include

¹⁰⁵ EU Directive 2014/24/EU, Article 72 (4).

¹⁰⁶ EU Directive 2014/24/EU, Article 72 (1); additional works/services; unforeseen circumstances.

¹⁰⁷ EU Directive 2014/24/EU, Article 73 (a).

gathering feedback from project participants and reflecting on the feedback in a constructive way. In a really dynamic model such feedback will also be collected at all relevant stages when the experience is still fresh (for example, after a moderation meeting in a series of meetings) and adjustments can be made immediately (for example, on discussions pace or inclusivity).

Alternative ways to facilitate feedback collection and review is through online surveys, informal or more formal meetings involving different activities and dedicated time for collective reflection and self-reflection on past stages activities. Learnings and positive aspects of the procurement cycle can be captured in case studies; areas for improvement can be documented in lessons learned reports and used when the next procurement cycle is triggered.

9 3 *Dynamic interaction with other stages*

A dedicated 'review and learn' stage allows us to reflect and learn more deeply. In the context of seeing the bigger picture we repoint our 'procurement lenses' from the individual stage to the entire cycle thus observing connections and links between the stages (and activities) that we have not noticed before. From this perspective, the stage is transformational as it converts our experience from the procurement cycle into genuine learning.

The learning captured at this stage will develop the individual procurement lead and the organisational processes by implementing the feedback in the next procurement cycle or individual stages. Capturing and sharing best practices will increase the feeling of a job well done, the enthusiasm and the reputation of the procurement professional and the procuring organisation.

9 4 *Legal considerations*

From procurement perspective, there are no specific legal considerations for this stage.

9 5 *Feedback loop*

The reader can leave ideas, suggestions, feedback and comments for Section 9 'Review and Lessons Learned' at www.procurementart.com.

10 Tips to facilitate the adoption of the dynamic whole-cycle model in practice

10 1 Start with your attitude

To effectively adopt and constantly adapt the procurement cycle in practice, it is important to understand your drivers for working in the field of public procurement. Is it your inner desire to work for a public cause, for example, improving outcomes for patients? Or is it because you enjoy project management? If your profession is also your passion and in your work you are led by fundamentally ethical considerations, your success in the implementation and constant improvement of the cycle is inevitable. The only way to create a state of the art procurement cycle is to respect and treat your work as art and to demand the same respect from others.

Regardless whether you are an enthusiastic professional just entering the profession or an experienced procurement expert, in order to successfully adopt and adjust this model, you need to be flexible, eager to try, fail and learn and be open to constructive suggestions and changing your ways.

As a procurement professional be so passionate and skilled that public authorities, citizens, service users and market players trust you to deliver fair projects and perhaps in the future, even purposefully chose you, to lead public procurement projects.

10 2 Do the pre-process (tendering) work right and the rest will be a piece of cake

- Be clear on project scope and project objectives
- Know your stakeholders and any formal and informal governance checkpoints
- Consider effective engagement strategies suitable for your objectives
- Show your respect for the ultimate addressees of your project (e.g. service users) and the organisations able to meet their needs (the market) by engaging both groups and building bridges between them

- Design a dedicated procurement strategy – start with a short one and improve by adding new aspects with each project
- Treat each procurement as unique – create relevant, easy to understand and interpret questions and documentation.
- The golden rule for number of bid questions is – not too many (between 15-20), not too complex (without any or many sub-parts) and most importantly - project-specific
- Engage and utilise the expertise of subject matter experts. For example, ask experts to review the project requirement and help you with designing bid questionnaires by highlighting parts of the specification for which a question is needed stressing its importance
- Ensure that evaluators are appropriately qualified to assess the questions; fully-briefed on any expectations and there is no conflicts of interest at any stage of the process
- Minimise the scope for questions misinterpretation - both bidders and evaluators should be able to read, understand and interpret the question in the same way
- Train your evaluators in advance on how to apply the scoring criteria consistently (especially important if they have not participated in designing the criteria).

10 3 At the process (tendering)stage: focus and execute what you have meticulously planned for

- Ensure sufficient time and resources are dedicated to finalising and publishing the procurement documents
- Dedicate time to prepare for the moderation meetings and think of evaluator management techniques - this may differ for small evaluation panels and for larger panels

- Adopt a collaborative approach during the moderation meeting by leaving the evaluators to lead the conversations on substance but be the facilitative figure on process; also be ready to switch to a more assertive approach during the meeting if needed. For example, keep the evaluators on track and keep referencing to the published evaluation criteria
- Make sure your record keeping is robust and compliant with any legal requirements; the scores and the rationales for the scores should be recorded in a clear, logical way. For the purposes of future written or verbal debriefs – record key points from the discussions and how consensus was reached.

10 4 Ensure smooth transition from formal ‘process’ to proactive and dynamic ‘contract management’

- Build sufficient time into the cycle for the contracting stage
- Before informing bidders of the outcome make sure that all governance checkpoints have been complied with
- Ensure questions relevant to and facilitating the contracting stage are included in the advertised tender
- If procurement and contracting are separate functions within your organisation, make sure you involve the future contracting leads in the process (including in the evaluation) and keep in touch after the end of the formal tendering process. This will ensure that contract signature, start and end dates are clear and the scope for any future contract modifications is defined and understood
- Make sure the parameters for any further negotiations (or fine-tuning) at the contracting stage are clear and keep re-checking the legally permissible amendments during the contract life
- Adopt appropriate relationships management strategies with providers and proactively manage providers via regular contract performance meetings.

10 5 Remember that procurement demands continued professional development

- Learn from every project and experience
- Add new good procurement technique each time you start a procurement cycle
- You cannot master the art of procurement without practicing - remember to truly master a skill you need thousands of hours of practice¹⁰⁸
- Build from what you have - if you work for an organisation lacking governance structures, help build one; if the processes are flawed make small but consistent steps to improve these
- Don't provide ready-made solutions; lead the project in a way that educates and allows participants to make conclusions and contributions themselves and to co-design the procurement
- Accept feedback from anyone – specialists in your field and especially experts from other fields.

11 Final words: from a model on paper to a model with sustainable impact in practice

In the sections above, I have attempted to illustrate a dynamic whole-cycle procurement model that can be easily understood, applied and adapted. It is intended to be a dynamic and 'useful'¹⁰⁹ model not a perfect one. Our purpose is to start a conversation about the topics addressed in this article and develop an even more dynamic and helpful model overtime. As such it has the capacity to easily adjust to changing circumstances and, through this 'dynamism', stay relevant and impactful in

¹⁰⁸ Ericsson, Krampe and Tesch-Römer, 1993.

¹⁰⁹ Quoting the statistician George Box: 'all models are wrong but some are useful'.

the long term.¹¹⁰ This makes each procurement cycle unique as not all projects will follow the same path and activities. In some cases, stages identified in this model can be altered, accelerated or even skipped, but the activities and governance requirements at the new or remaining stages need to be relevant, robust and compliant.

The model will rely on contributions, not only from procurement professionals, but also experts from other fields such as finance, economic, legal. This multidisciplinary perspective is critical for enhancing the model and opening it up to diverse feedback.

The next frontier is to consistently and enthusiastically practise and adjust the activities at each stage of this model. In order to design a 'dynamic' procurement cycle, one should become comfortable with change, be ready to experiment, reflect, accept feedback, examine deficiencies and learn from the process – all this, while keeping the key public procurement principles in mind and the procurement ethical standards and morals at heart.

Change is a part of life and is inevitable. In procurement we can maintain the status quo and rely on comfort and stability or we can become skilful in embracing change and grow as professionals and individuals. The latter is the only way, as I have learned and illustrated throughout this article, to ensure the best value for end users and taxpayers through mastering the art of procurement.

¹¹⁰ In line with Goal 12 of the UN Sustainable Development Goals: <https://sustainabledevelopment.un.org/sdg12>.

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