

FOCUS ON... PROCUREMENT LAW



COLLABORATIVE THINKING

Collaborative procurement is currently a central tenet of UK public procurement philosophy, and looks set to grow over the next few years, explains **Peter Elliott**.

What exactly is collaborative procurement? In its broadest sense it involves different customer organisations working together in their procurements, pooling resources, expertise or purchasing power to achieve a 'better' (usually cheaper) deal. This is hardly a new idea; there has been a conscious focus on the principles underlying collaborative procurement (even if not branded as such) for several years, stretching back to the Gershon review in 1999 and beyond.

What has changed is that the idea has become much more clearly conceptualised and has become a more formal, central part of all public sector procurement. A key development in 2007 was the increased focus on collaborative procurement at central government level, supplementing earlier developments in local government and the health sector. It is one of the main planks of the Office of Government Commerce (OGC)'s drive to implement the *Transforming Government Procurement* report, and the pressure to use it is being increased: central government will now have

to account to the OGC for decisions to procure separately something which could

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be bought under a framework or other collaborative procurement arrangement. *The main collaborative procurement models are:*

- **Framework agreements** – these are set up by one or more bodies which allow both themselves and others to call off

services and supplies from the appointed supplier or suppliers. Examples include the various NHS PASA frameworks, a host of OGCbuying.solutions Catalyst frameworks and Becta's education-specific IT arrangements.

- **Collective tailored procurement exercises** – these occur where purchasers collaborate on a single procurement to cover known and committed-to requirements (rather than call-off facilities), whether those requirements are common or different.
- **Hybrid models** – these exist where one or more organisations procure with an eye mainly to their own requirements but include provisions allowing other public sector bodies to benefit. This is a reasonably common model, especially where the procuring body is keen to press ahead with its own procurement but wants to be seen as offering options to other organisations.

Lower prices

The main benefit of collaborative procurement is the ability to bring increased purchasing power to bear in procurements. The potential savings are huge, but a number of things stand in the way of making the most of this.

In frameworks, suppliers will often not offer their best price. This is particularly the case on frameworks (generally multi-supplier ones) where bidders are not guaranteed any or a suitably sizeable volume of business. The growth in use of collaborative procurement models both mitigates this (an ever-increasing amount of government work gets put through frameworks) and exacerbates this (a similarly increasing number of frameworks and contracts with call-off elements).

Rolling volume discounts (not just per customer but across the framework) can help in part, as can an element of annual refresh across the framework (useful once a framework is known to provide a good volume of business, but labour-intensive). Perhaps one of the best ways of maximising savings is to combine collaborative procurement methodologies by using a framework and then combining with other users to run a combined mini-competition under it (as done by the London Grid for Learning under Becta's Learning Services framework).

The problem exists to a far smaller extent in collective tailored procurements, where the bidders know what level of business they will acquire.

In hybrid models, most bidders will price purely on the basis of the committed service, rather than the chance of additional volumes; and even though a volume-sensitive pricing mechanism should at least offer some savings, this is usually an inherent limitation.

Better terms and levels of supply and service

It is easy to forget that collective purchasing power can also lead to better overall service delivery in terms of timescales, quality, remedies, licence terms and other provisions. The extent to which this applies broadly mirrors the benefits in price terms.

Easier procurements per purchasing body

Collaborative procurements will often also lessen the procurement burden for purchasing bodies, although they can be hard to set up in the first instance.

For frameworks, the main benefit is that purchasers using the framework can place contracts on largely pre-agreed terms without the need to run a full EU procurement. This benefit will apply to most users, but if a purchaser makes substantive changes it will potentially forfeit the procurement law protection offered by the framework. Although, at the moment, there is a low risk of a successful challenge in this event, amendments to the Remedies Directive to be implemented in the UK by November 2009 will increase the risk of other, aggrieved bidders taking action. It is also worth noting that once one strays off the standard path in using frameworks, the

procurement process can become as complicated, time-consuming and expensive as a competed procurement.

Hybrid model procurements raise broadly similar issues, but often with the further problem that the terms and scope are less flexible than under a framework.

Collective tailored procurements will be subject to public procurement law. In theory, even with this constraint, the effort and cost of the procurement process can be shared. In practice, this works where the purchasers have a clear view of what they are purchasing. Huge problems can arise where purchasing bodies working together cannot agree on requirements, structure or the procurement process, and some of the most resounding failures in terms of public sector procurement have come in badly managed multi-purchaser procurements. Collective tailored procurements tend to work most smoothly where relatively commoditised services or goods are being purchased, where the purchasing authorities have an inherently similar requirement, or where the benefits of collaboration clearly outweigh the disadvantage of subsuming individual requirements in the collective. It is perhaps telling that many of the more successful procurements of this nature have occurred in the health sector with NHS trusts purchasing together, and that the greatest problems have tended to occur in central government, where government departments of any size are used to being largely self-controlling.

Support for standardisation

The very fact that many of the benefits of collaborative procurement are most easily achieved where customers have similar requirements and processes can act as a useful tool in making authorities standardise, ideally on the most efficient and effective model, helping lead to better integrated and more efficient public services. This is not a guaranteed benefit, however, and in particular on more complex procurements one needs to weigh up carefully the extent to which standardisation is desirable and realistic. As a general rule, hybrid model contracts will often not be particularly helpful in supporting standardisation, as their main driver is often simply meeting the requirements of the original authority or authorities while only nominally acknowledging collaborative procurement concepts.

Structural issues


In frameworks, each contract called off is usually freestanding and the contractual relationship is relatively simple, with each customer having clear, separate rights and obligations towards the contractor. In collective tailored procurements and hybrid model projects things can get more complicated.

The main complexities here include:

- should authorities be liable for the acts of other authorities

- should some or all defaults by the contractor give rise to remedies for all or only some authorities
- can an individual authority exercise remedies (including termination) unilaterally
- how to handle change control

Conclusion

Collaborative procurements can offer enormous benefits, but badly handled they can fail to deliver benefits or, in extreme cases, be disastrous. Generally, they work best for commoditised goods and services or where purchasing authorities have very similar requirements. As such, they can require purchasers to sacrifice a degree of individual freedom, and it is best for them to weigh this up fully right at the outset of considering their procurement strategy for any particular requirement. 



Peter Elliott

Partner, Commercial Department,
Bird and Bird

In summary...

- A key development in 2007 was the increased focus on collaborative procurement at central government level, supplementing earlier developments in local government and the health sector
- Collaborative procurement is one of the main planks of the OGC's drive to implement *Transforming Government Procurement*, and the pressure to use it is being increased
- At a wider level, awarding major multi-customer contracts (especially frameworks) to relatively few suppliers can have a material impact on the supplier marketplace

Further information

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