PROCUREMENT LAWYERS' ASSOCIATION

RESPONSE TO

EUROPEAN COMMISSION QUESTIONNAIRE FOR IT STAKEHOLDERS ON PUBLIC PROCUREMENT

2 October 2014

Contents

About this Response

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

A wide range of IT requirements are subject to public procurement and UK contracting authorities approach such public procurements in a variety of ways.

The PLA was pleased to receive the Commission's Questionnaire for IT Stakeholders from the Directorate General for Internal Market and Services to which responses were sought by 20 September 2014 ("Commission Questionnaire"). We note the Commission is conducting an analysis of how public procurement rules function in a number of different economic sectors including the IT sector.

We trust that our Response contributes to an improved understanding of the IT sector and to identify best practices as well as common problems. We note this in context of the adoption and transposition of the new Public Procurement Directives by the Member States.

Scope of Response

This Response to the Commission Questionnaire considers the procurement of IT in the United Kingdom in compliance with Directive 2004/18/EC ("the Public Sector Directive").

References to the "Regulations" are to the Public Contracts Regulations 2006 (as amended), the domestic measures implementing the Public Sector Directive in England and Wales and Northern Ireland.

For the purposes of this paper we believe the law is correctly stated as of September 2014.

1 Good IT Procurement Practice

Commission Questionnaire Question 1

Could you provide examples of good IT procurement practice? (By good practice we mean practices which led to the contracting authority transparently getting what it needed for a good price).

1.1 A wide range of measures and considerations help the contracting authority get what it needs for a good price, although often they have a combination effect and the specific combination and impact may vary as between different types of procurement.

1.2 From members' experience, some of the most common themes include the following:

1.2.1 The contracting authority needs to have a clear understanding of its requirements and articulate them clearly to the market place.

1.2.2 The contracting authority needs to ensure that it articulates the full range of its requirements. There is a tendency for contracting authorities to focus on the functional requirements, i.e. the tasks that they require the IT to perform, and to give insufficient attention to the following:

- the contracting authority's existing ICT, which the new IT must be compatible with;
- interfaces/ integration between the new IT and their existing systems, and any third party systems (often required in the public and not-for-profit sectors to support multi-agency services);
- the specification of the *services* that the contracting authority requires the new IT supplier to provide, such as software updates, regular maintenance, and incident and problem management services;
- the KPIs and service levels that the contracting authority wants to use to monitor the new supplier's services; and

- where the new IT forms part of a programme of significant change for the contracting authority, a clear description of the "current" scenario and the "to be" scenario.

1.2.3 The contracting authority needs a good understanding of the technology available and what is realistic for the money. This may necessitate supplementing internal knowledge with good quality external assistance and with supplier engagement and market soundings well before the procurement starts.

1.2.4 The contracting authority needs to make good use of professional advice, recognising that regulated procurement law and practice is complicated.

1.2.5 As a general rule, the contracting authority should not have unrealistic expectations in terms of what bidders and the competition will produce in terms of helping it make decisions about what its requirements are. Otherwise (in particular in procurements not allowing in depth discussion and dialogue/negotiation with bidders) there is a very high incidence of mismatch between proposals and requirements, often leading to inappropriate or bad value for money proposals (which itself can lead to procurement problems trying to address this), as well as (from the legal perspective) problems evaluating bids.

1.2.6 The contracting authority needs to establish a comprehensive and effective set of award criteria. This can be extremely difficult and challenging for IT procurements.

1.2.7 Although it can be harmful (and in some cases illegal) to be over-prescriptive about solutions, in most cases (in particular in smaller procurements or those under the restricted or open procedures or under frameworks) this should not be taken too far in the direction of just having very general or imprecise requirements.

1.2.8 Similarly, it is usually better for the contracting authority not to look for too much flexibility and multiple either/or options (either in the procurement/pre-award phase or during the contract itself) – doing so can have a number of adverse impacts, including in particular:

1.2.8.1 uncertainty from bidders in what to propose (particularly in mini competitions and open and restricted procurements) – sometimes leading to sub-optimal or more expensive proposals, sometimes to ones which are simply non-compliant;

1.2.8.2 a nervousness from bidders in terms of the authority's commitment to the project (often leading to higher priced bids to reflect this uncertainty); and

1.2.8.3 problems in developing evaluation models which work effectively (and indeed in a legally compliant way).

1.2.9 Not changing requirements or approaches during the process.

1.2.10 Using the right procurement mechanism for the nature of the procurement is essential. In the UK there is a high incidence of procuring complex requirements (e.g., a retendering of an IT outsourcing) through frameworks and open or restricted procedure procurements. Using these can create real problems in terms of ensuring understanding of requirements, the production of proposals which meet one's needs in a value for money way and in terms of ensuring compliant bids. It is not absolutely impossible to get a good value for money outcome in a procurement under one of these mechanisms, but it is challenging and makes it even more important to provide appropriate information, be clear about requirements, keep the structure of offers as simple as possible etc.

1.2.11 If using frameworks for mini-competitions, using the most suitable one available (both in terms of ensuring real competition from the bidders and in terms of ensuring that at least a number of those bidders are likely to do the job properly and reasonably cheaply).

1.2.12 Retenders raise particular difficulties. Authorities need to take particular care to take steps to equalise (at least to an extent) the in-built advantage of the incumbent and to make sure that transition can take place in a controlled, meaningful way. Authorities need to ensure that other bidders can make meaningful proposals which have a real chance of winning and which are deliverable – they also need to make sure that bidders can see that this is the case. Steps include:

1.2.12.1 ensuring proper access to information and assets etc for non-incumbent bidders;

1.2.12.2 ensuring that requirements and service definitions are not specified in a way which sub-consciously favours the incumbent inappropriately;

1.2.12.3 dealing effectively with transition: as a complex transition has dependencies on the incumbent, the authority and the new provider, the authority needs to make sure an approach to this is planned early on. This should address not only transfer of assets and the initial transition plan but also the impact on live services (for phased transfers), changes to plans and questions of liability and how to take matters forward when things go wrong; and

1.2.12.4 making sure that transition is a key part of evaluation.

1.2.13 Taking real efforts to explain things properly to bidders (orally and on paper), in terms of requirements, the background and current arrangements, the deal being required, how the procurement is to operate and how proposals should be structured. This is particularly important in procurements with little or no dialogue/negotiation.

1.2.14 Generally procurements are more successful in terms of getting competitive bids which meet requirements if the procurements are:

1.2.14.1 for smaller (relatively low value) requirements;

1.2.14.2 for simpler requirements; or

1.2.14.3 led by staff who have managed successful procurements in the past, or who have other substantial experience of similar procurements and know the market of suppliers and what they are buying.

1.2.15 In the field of IT the effective authority will carefully avoid being left with the task of managing dependencies between different suppliers and providers. This risk arises in a number of different places: (1) the authority is the only "join" between its existing IT supplier and the new IT supplier, and neither of the suppliers is willing to co-operate with the other or take overall responsibility, (2) the new IT supplier is a consortium with a lead contractor and, either explicitly or by implication, a number of subcontractors.

2 IT "Lock-In" Phenomenon

Commission Questionnaire Question 2

Are you aware of the IT "lock-in" phenomenon, when a contracting authority must for various reasons keep contracting with one company? Does this occur in your Member State and, if yes, how do you deal with it? How do such situations originate?

2.1 We are aware of the IT "lock in" phenomenon in our Member State. In large part, it appears to originate from a lack of choice of supplier in the market. It can however be dealt with (or, on larger projects, at least mitigated) by a rigorous procurement process, a detailed specification and clear and transparent award criteria.

2.2 "Lock in" situations originate due to a range of factors. The presence of just one of these factors for a particular contracting authority can be enough to cause lock-in. Often more than one of the following is present:

2.2.1 a lack of good procurement law practice combined with pressure from suppliers to "migrate" to supplier standard terms and conditions on an annual renewing basis (we see this perhaps more at the local government and education level rather than central civil government (see, e.g., Becta report referred to in Question 6));

2.2.2 the aggregate cost of re-procuring can be prohibitive. Contracting authorities look at the cost of their staff whose time is committed to the procurement and implementation, the cost of project management consultant(s), backfill staff (for large procurements), technical consultants, and professional advisers (including lawyers), in addition to the fees and charges of the supplier who is appointed as a result of the procurement;

2.2.3 concern that the procurement will result in the contracting authority incurring the cost of change without the benefit of improved service or specification. In some sectors this is a real concern;

2.2.4 interfacing and integration requirements. It is often a business/ operational priority that new IT must integrate with the existing ICT used both by the contracting authority and its partners. Contracting authorities are concerned that using a "different" supplier will result in poor interfacing or integration (or both);

2.2.5 the absence of/ lack of awareness of public IT standards for software or services, and a lack of supplier compliance with standards. This

means integration between/ interoperation across different systems can be very difficult and contracting authorities cannot "mix and match";

2.2.6 the market of suppliers lacking the vision, staff or budget to really meet contracting authorities' requirements; and

2.2.7 on complex services contracts, in particular, the complexity of transition and a potential incumbent advantage can lead to something which is not formal "lock in" but which can contribute to continuation of the same service provider. Some of this can be equalised, but not all (e.g., the incumbent's proposals in relation to transition/implementation can genuinely be the lowest risk and most easy to effect).

2.3 Contracting authorities tend to resist "lock in" as a result of the following factors:

2.3.1 new staff joining the contracting authority and bringing new procurement practices with them;

2.3.2 examples of success from other contracting authorities. Shining examples of success are, however, relatively rare because they are costly and difficult to achieve for complex IT;

2.3.3 contract value, which is mainly a qualitative factor, i.e. contracting authorities will resist lock in where the contract is, for them, "a big one". It is important to add here that in most IT supply sectors for complex IT, the value per-purchase of IT is tending to increase, which is leading more contracting authorities to view more of their IT projects as being "big". This is partly due to inflation and partly because authorities find that to achieve good integration they have to buy lots of IT all in one go. The value increase is preventing Authorities from being able to treat purchases as being under threshold; and

2.3.4 being or becoming dissatisfied with the incumbent supplier. This may be because the supplier has misbehaved or got things wrong, or simply that the authority has "outgrown" the supplier's capability.

2.4 Dealing with the phenomenon is straightforward from the point at which contracting authorities seek advice.

2.5 It is an issue that arises in the Higher Education sector due to the limited number of IT products available in the market. While this can be countered by a detailed specification, there is a sense that the institution's customers look forward a similar product and standard of delivery across the Member State. It is appreciated that this can lead to "lock in" with a particular group of suppliers as opposed to an incumbent supplier and as a result is kept under review.


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3 Cross-cutting Problems affecting IT Procurement

Commission Questionnaire Question 3

Are you aware of any other cross-cutting problems affecting the possibility of transparent, fair and efficient procurement of IT?

3.1 Many contracting authorities still use the restricted procedure for complex IT. Factors that influence their choice are:

3.1.1 they view the IT as being commodity;

3.1.2 they are comfortable with using restricted procedure and have existing in-house expertise;

3.1.3 for central government, there is a strong Cabinet Office drive towards it;

3.1.4 they have not procured complex IT before and are not aware of the potential issues in terms of effectiveness and efficiency regarding the specification and resulting contract; and/or

3.1.5 they have used restricted for IT before but have not seen the problems, and suppliers have not raised any challenge.

3.2 Authorities are rightly fearful of achieving the "wrong" result. Authorities tend to view competitive dialogue as being "too much", and even a lean, focused competitive dialogue process is likely to demand more of contracting authorities than a restricted procedure, if only because it is less familiar.

3.3 Advice on regulated procurement can be given by anyone, not just lawyers, and a number of consultancy firms small and large hold out as providing procurement process advice but do not give fully informed and truly compliant and effective advice. Contracting authorities will not necessarily notice "the gap" in the context of the procurement process, because IT suppliers tend not to mount formal challenges.

4 SME Participation in IT Procurement

Commission Questionnaire Question 4

Is participation by SMEs in IT public procurement above or below the average share they have in the IT sector? Do they have to form consortia to reach larger tenders? Is there a higher potential for the SMEs participation?

4.1 SME participation is strongly by reference to sectors – the sector to which the SME belongs, and the sector/ specific activity for which the contracting authority requires IT.

Software suppliers

4.2 In the social housing sector (including local authority housing departments) the sector's needs in terms of business-critical software are serviced by some niche software suppliers and the supply market features a good mix of large suppliers and SMEs.

4.3 The same goes for the following sectors: adult health and social care, and charities/ not-for-profits/ social enterprises.

4.4 The big exception to this is Business Management Systems. In each contracting authority sector, larger contracting authorities increasingly demand much more of their ICT and are tending to be dissatisfied with the niche SME-supplier offerings. They are looking at Business Management Systems and in our experience this market is dominated by two particular suppliers.

Managed services

4.5 The supply market for managed services is, compared to software, not so strongly aligned to the sector that the contracting authority represents. In other words, it is generally a "lucky accident" or a "temporary business development priority" if a managed services provider has sector-specific experience.

4.6 In our experience, generally speaking a good mix of large suppliers and SMEs respond to procurements by SME-sized contracting authorities.

4.7 Larger authorities tend only to attract larger suppliers of managed services. SMEs tend not to form consortiums to win the work, and are more likely to participate as subcontractors (if at all). SMEs visibly participate in tenders typically if (1) the contracting authority or the bidder places an emphasis on social value in procurement and contracting, or (2) the contracting authority's requirements include niche requirements that the large supplier feels are best

met/ seen to be met by a niche SME. Otherwise, if SMEs do play a role, it is an invisible role as part of the large supplier's ecosystem of retained partners and contractors.

5 Remedies and IT Procurement

Commission Questionnaire Question 5

What are your experiences with remedies?

REGULATORY REMEDIES

5.1 In our experience IT suppliers are relatively willing to live with low transparency. They are either taking a commercial view (i.e. there is generally a sufficiently strong flow of opportunities in the marketplace that bidders can afford to "shrug" and move on), or they lack the internal expertise or resource (or indeed financial resources given the high cost of legal action in the UK) needed to drive high quality compliance; in addition, higher value projects (which may be more worth challenging) are often subject to lengthy procurements, with many of the potential procurement breaches falling foul of limitation periods. IT procurements with value up to £20m tend to generate informal complaints only.

5.2 It is quite common for IT procurements to be susceptible to challenge (in the sense of risking (or actually involving) breach of procurement law).

5.2.1 It is common for the tendered specification of requirements to need clarification after contract award. This can be prompted by the preferred bidder or by external advisers who become involved at this late stage and who spot "gaps".

5.2.2 IT suppliers like to work on familiar/ comfortable terms and conditions of contract. They will often try to trigger a contract negotiation following contract award.

5.2.3 "Call offs" from frameworks are often carried out questionably.

5.3 At the contract formation stage in an otherwise compliant and effective restricted procurement for IT, the contracting authority is in the position where they have selected "the right" IT solution at "the right" price. It is often commercially unrealistic for the authority to respond to a wilful preferred bidder by reverting to the second placed bidder. Indeed, the second placed bidder is also likely to seek a contract negotiation.

5.4 In relation to regulatory remedies, an important feature of IT supply markets is that suppliers often view their service offering as being a fixed corporate offer, i.e. "this is what we offer in terms of support service scope, KPIs and

service levels – don't ask for anything else". Suppliers are not necessarily prepared to compete over or modify on a per-customer basis.

This is understandable: the suppliers standardise and commoditise their services in order to manage their prices/ profits/ cost base. However it is very difficult to reconcile with the contracting authority's tasks of setting a specification of requirements, setting award criteria, making an "apples with apples" comparison between bids received, and justifying the scores given. Some supply markets have a mix of suppliers who will compete on service specification and suppliers who object or refuse.

CONTRACTUAL REMEDIES

Overview of remedies

5.5 In our experience, the contractual remedies commonly included in outsourced IT service agreement often fail to operate effectively in practice. This can mean that the customer is left without meaningful remedy where contracts are poorly performed. The reasons for this are explored further below, including suggestions about how to improve the effectiveness of contractual remedies.

Compliance with requirements and specification

5.6 Most IT agreements will include a requirement for the service provider to comply with a technical specification. The service provider may also be asked to commit to satisfy the customer's requirements (**solution risk**) and to integrate the services with the customer's other systems and infrastructure (**integration risk**).

5.7 In our experience, too much time and effort is often spent negotiating remedies, limitations and exclusions ("What happens if it goes wrong?") at the expense of clearly articulating what the customer wants and what the service provider is committed to deliver. Focus on the legal terms and conditions will not be time well spent unless the underlying requirements and specification are sufficiently robust and detailed. Where a dispute later arises, the disputed service often difficult to identify, ambiguous or missing altogether from the services description.

5.8 During negotiations, the service provider may resist accepting the solution risk and/or integration risk and ask the customer to rely on the performance of its "standard" offering. The importance of this issue is sometimes overlooked, with the result that the customer is left without a remedy or, at best, faced with a dispute, if the "standard" solution provided by the service provider does not meet the customer's particular business and technical requirements.

5.9 In the context of contract negotiations that are often subject to time, resource and budgetary constraints, the customer is often prepared to, or persuaded to, enter into the contract based upon outline service schedules,

which are to be developed into more detailed versions at a later date. There are a number of risks inherent in this approach which increase the chances of disputes, including:

5.9.1 later detailed analysis revealing gaps in the outline requirements, leading to arguments about increased costs and elongated timescales;

5.9.2 loss of bargaining power by the customer once the contract is signed meaning the customer has difficulty persuading the supplier to address problems or perceived problems revealed by the more detailed documents; and

5.9.3 delay or failure to properly agree the detailed documents, leading to uncertainty about the precise requirements for the services.

Customer responsibilities

5.10 Even where the IT agreement contains a clear set of requirements and a detailed technical solution, the customer's ability to identify and enforce a breach of contract by the service provider may be undermined where the contract contains a long list of broad customer responsibilities.

5.11 Proportionate customer responsibilities are a reasonable and necessary feature of complex IT services arrangements, where the customer needs to provide hardware, software, personnel and/or access to premises to enable the service provider to deliver the contract services. If the customer fails to do so, the service provider should be able to claim relief where this means it cannot fulfil its own service commitments.

5.12 However, too often the list of customer responsibilities is drafted so broadly that the service provider can always point to a breach by the customer and as a consequence these present a significant tripping hazard for the customer and potential "get out of jail free card" for the supplier. Where the extent of the customer responsibilities is unclear, this is likely to lead to a dispute where the service provider tries to use them to claim relief.

5.13 Practically, the best way to avoid this before the contract is signed is to ensure that the customer scrutinises the proposed customer responsibilities very carefully. The customer must be satisfied that each customer responsibility is necessary, narrow, proportionate, achievable, clear, precise, objective, time-bound and measurable.

5.14 Contractually, it is important that the customer responsibilities are subject to a clearly defined, mandatory "**relief event**" process. This should include a number of features, including obligations on the service provider to notify the customer where there is a failure to perform a customer responsibility and to show a nexus between that failure and the service provider's performance. If the customer agrees that the service provider may recover additional

expenditure incurred as a result of a relief event, this should be subject to appropriate caps and/or prior written approval by the customer.

5.15 Following a defined relief event process, as the service provider's exclusive remedy and route to obtain contractual relief, will control claims and reduce the risk of dispute - provided of course that the parties follow that process (see below).

Service credits

5.16 The contractual service levels and service credit regime is often driven by the service provider and not referenced to bespoke performance requirements of the customer (see above regarding the requirements and specification). At the other extreme, driving service providers to accept a large number of service levels can result in service delivery which focussed on any service level that may be failed ("ball watching"), not on those elements of service delivery which are most important to the customer.

5.17 Often contract service levels are subject to self-reporting and analysis by the service provider. As a result, it is often difficult and time consuming for customers to identify service level failures and enforce relevant remedies.

5.18 As with other remedies, recovery of service credits and other remedies driven by service level failure are often heavily negotiated. For example, service availability at 95% for a month would allow for circa 36 hours of downtime. On top of this the service provider may try to exclude downtime for maintenance, subcontractor failures, etc. This can result in service performance thresholds and other limitations being set at a level which undermines the efficacy of the service levels as a meaningful measure of contractual performance.

5.19 The service performance regime should be carefully considered before the contract is executed and subject to regular governance review during service delivery, to ensure this is genuinely focussed on the customer's key service requirements and sets realistic performance metrics to incentivise service delivery.

Continuous improvement

5.20 There are often continuous improvement obligations within IT agreements which require the service provider to report, on a periodic basis, as to how efficiencies and contractual improvement can be effected.

5.21 However, these provisions generally lack "teeth", and improvements suggested by the service provider are often linked to further expenditure on projects or products. The customer may not have further budget to invest in those project and products in order to realise the savings. As above, the supplier may resist a commitment to achieve defined savings, or make this subject to the customer satisfying additional customer responsibilities relating to its own

performance and procedures, which will make it more difficult to identify the reason if a savings target is missed.

5.22 As a result, the customer may see overall service performance decline or the hardware or software used to become out of date or obsolete relatively quickly.

5.23 Technology is fast developing and so it is difficult for a long term provision to be effectively future-proofed to continue to provide market leading performance. However, many long term arrangements have been entered into to reflect high capital costs and investment in IT by selected service provider.

5.24 To ensure more definitive outcomes for the customer regarding value for money, it is preferable for the contract to include:

5.24.1 defined and costed proposals for improvements; and/or

5.24.2 pre-determined service level improvements or charges reductions over time, where the performance and or costs of the technology used to perform the services is anticipated to improve over time.

5.25 However, in our experience service providers are likely to resist the latter option in particular as too risky and uncertain.

Benchmarking

5.26 Many long term public sector contracts allow for benchmarking of costs against relevant comparators by an independent trusted third party during the course of the arrangement. In practice, these provisions are rarely utilised. The procedure is usually time consuming, costly and finding effective comparators can be challenging.

5.27 During negotiations the service provider will also commonly build in a number of gates, checkpoints and opportunities to challenge and intervene in the benchmarking process, with the effect that it is very unusual for the process to operate without a de facto right of veto for the service provider to reject the benchmarker's proposals or finding or, at the very least, to push the matter into a dispute which delays the benchmarking or undermines the process altogether. Defining a benchmarking process which is fair to both parties without introducing this risk is a considerable challenge.

Contractual dispute resolution procedures

5.28 Contract dispute resolution procedures are often treated as "boilerplate" provisions, which are not given much attention prior to the execution of the contract. As a result, these can be less effective when activated to manage a dispute. For example, the contract process may not refer to appropriate personnel or escalation routes, or may include a sequence of relatively long

consecutive timescales, which are not appropriate to effectively manage a dispute which may be urgent. The process in the contract may overlook alternative processes such as expert determination, which may be more suitable to resolve disputes of a technical nature.

5.29 Partly as a result of the issues alluded to above, the parties may not follow the dispute resolution process in the contract properly or at all. Where a dispute later becomes more formal or serious, this can lead to a dispute about the process itself, which is unhelpful and represents a distraction from the main issue.

5.30 More substantively, the parties' effort to resolve disputes on a less formal "commercial" basis can have more serious repercussions for the customer, for example because the opportunity to exercise contractual rights is missed or waived by the customer. Even where appropriate and useful remedies are included in the contract, this can mean the customer is left without the ability to actually deploy them.

Practical problems with exercising contractual remedies

5.31 In our experience, formal disputes where legal proceedings are issued under a long term IT contract are rare. As recognised by the UK Office of Fair Trading's 2014 report on significant IT contracts for public sector clients, switching suppliers is hard, time consuming and costly for customers.

5.32 Disputes usually occur in the context of an ongoing relationship and service provision, meaning there is a strong practical incentive for the customer not to risk souring relations where exit is not a viable option.

5.33 Common disputes include additional service charges raised for services the customer considers are within the standard services scope. For the reasons outline above, the customer is often in a weak position where the service description documents are sub-standard.

5.34 Practically, the customer may also be in a relatively weak position unless it has exercised strong contract management control and retained evidence of performance (e.g. reports, notes of verbal discussions, contract changes and other documents and information) that supports the allegations it wishes to bring against the service provider. The service provider is often better at doing this than the customer, which can lead to considerable frustrations when the customer does not have evidence to support an allegation of failure but the service provider can clearly evidence (for example) all the customer responsibilities that the customer has failed to achieve.

Termination rights

5.35 Exercise of termination rights for material breach of contract is not normally an attractive option given ongoing requirements and costs and uncertainty of transition. Similarly, step-in rights are commonly included as contract

remedies but prove impractical or unattractive to exercise in practice due to the risk, cost and complexity of stepping into a service delivery role or appointing another third party to do so.

5.36 Another important external consideration for customers is the adverse publicity which may flow from terminating a contract and bringing a formal claim against a service provider, in the context of a number of high profile IT project failures in the recent past and the concomitant media attention these have generated.

5.37 All of the above factors can mean that the service provider is actually in a reasonably strong position to manage a dispute or a potential claim, even where a breach of contract is fairly clear, as the customer will be incentivised to reach a negotiated settlement which may result in compromising its legal and commercial position.

6 Studies and Data on UK IT Procurement

Commission Questionnaire Question 6

Are you aware of any studies or data on IT public procurement in your Member State?

6.1 In addition to a number of studies at the EU-wide level[1], of which you will be aware, the following are more specific to the UK:

6.1.1 Office of Fair Trading (March 2014) Supply of Information and Communications Technology to the Public Sector (along with Annex A: Outsourced IT)

6.1.2 Becta (UK Government body in relation to educational ICT): (September 2010) School Management Information Systems and Value for Money.

6.2 The UK Government (in particular the Cabinet Office) also compiles a range of data on IT public procurement and spending which it makes available but in un-analysed form.

[1] E.g., Guidelines for Public Procurement of ICT Goods and Services – Commission of European Union, Communications Networks, Content & Technology Directorate-General; Guide for the procurement of standards-based ICT: Elements of Good Practice - Commission of European Union, Communications Networks, Content & Technology Directorate-General; and Guideline on Public Procurement of Open Source Software – iDABC European eGovernment Services.

7 Problem Sectors for IT Procurement

Commission Questionnaire Question 7

What are the sectors where you encountered most of the problems with IT procurement?

7.1 There is no particular sector of the UK's IT market that is more problematic than others from a procurement perspective.

7.2 IT procurement in the UK is not particularly litigious when compared with other economic activities. There are relatively few IT procurement disputes that have resulted in legal proceedings being issued. In other sectors (such as construction or waste), procurement disputes are more common.

7.3 We can discern some sector-specific problems which can undermine the effectiveness of procurement processes:

7.3.1 There is a tendency for contracting authorities who have "niche" software requirements to have to contend with the following problems:

7.3.1.1 there is no stand-out offering that meets the contracting authority's needs. Bespoke software or modifications are not a realistic option because the bespoke/ modified items can be "broken" by subsequent maintenance releases of the core software;

7.3.1.2 suppliers do not support interfacing/ integration between their competitors' offerings. In some cases suppliers seem specifically make it difficult for competitors to interface/ integrate;

7.3.1.3 suppliers set out to offer a "standard" service description (including service levels) which can conflict with the contracting authority's specification or the tendered contract; and

7.3.1.4 extremely variable quality, and range/ depth of functionality, which can be difficult to "tease out" during the procurement process because there are no prevailing standards in the niche software sector.

7.3.2 Contracting authorities who require managed IT services are particularly likely to:

7.3.2.1 have difficulty in identifying or attracting bidders who have prior experience of similar organisations to the contracting authority (this is particularly the case for contracting authorities which are SME-sized);

7.3.2.2 find a supply market with extremely variable standards of quality, particularly where the "lead" supplier is dependent on subcontractors to assist with niche hardware or applications;

7.3.2.3 there is perhaps a trend for larger procurements to be procured in what is meant to be a compliant way, but which through complexity lead to procurement problems arising during the process, at which stage the authority does not feel able to re-start the procurement, with more conscious decisions to single source where this may not be justifiable tending to arise with smaller requirements; and

7.3.2.4 framework agreements give rise to considerable uncertainty in the process around award of specific contracts and seem to us to be an area where considerable procurement risks are taken.

8 Problems when participating in IT Procurement

Commission Questionnaire Question 8

What problems do you face when participating in IT public procurement?

8.1 Our response is written from the perspective of our clients – both public bodies who award IT contracts and the economic operators who bid for them.

8.2 Clients typically face a number of difficulties as follows.

Late/ insufficient expert input

8.3 Authorities do not always get expert input to help document their tendered requirements. DIY specifications generally do not work.

8.4 The market of suppliers of expertise in IT technical consultancy (for developing requirements specifications) is difficult, with considerable inconsistency in the level of expertise actually offered.

8.5 Authorities sometimes publish ITTs/ IPDs without seeking advice and without publishing the tendered form of contract. The resulting contract is either extremely costly or an overly pragmatic compromise, as well as the process being impaired.

Inertia on part of public body

8.6 Public authorities sometimes suffer from organisation inertia when it comes to IT procurement. IT systems are often deeply embedded in the technical infrastructure. They have often been developed incrementally over a number of years to suit the specific requirements of the client. They can be intertwined with numerous other hardware and software packages. Public bodies are often highly dependent on these systems; over time, they will have become familiar with the architecture and with the supporting suppliers. See response to Question 2 above for more in relation to the 'lock-in' phenomenon.

8.7 The prospect of implementing major changes to the IT infrastructure/supplier base can be off-putting, particularly when existing systems and relationships function well and are provided at competitive rates. When there is no technical or commercial reason to go back to the market but the procurement is primarily driven by Procurement Law considerations (e.g. as a result of the

contract term expiring), it can be particularly difficult for IT personnel to accept the need to conduct a procurement process.

8.8 Dependence on existing systems/suppliers and the potential disruption caused by a public procurement process can lead to inertia within public bodies.

8.9 Furthermore, it is often not transparent what systems a public body uses and what supplier relationships it has. It can therefore be difficult for prospective suppliers to find out about new opportunities.

Procurement process

8.10 Public authorities and bidders alike can be frustrated by the time and cost involved in procuring IT systems. This is particularly the case when the requirements are complex and the procurement necessitates use of the competitive dialogue or negotiated procedures. These procedures often require significant internal and external resourcing. They can take years to complete, involve significant management time and be difficult to conduct efficiently. They can sometimes involve work which in retrospect may appear nugatory. In financial terms, it can also be very expensive for a public authority to conduct these complex procurement processes.

8.11 From a bidder's perspective, the time and cost involved in bidding for complex IT projects can be extremely significant and this means that they have to assess potential opportunities more prudently than they would if there was less at stake. If bidders anticipate a protracted tender process they may not participate or may withdraw at an early stage, which can impact on the competitiveness of the process.

8.12 The open and restricted procedures are often used by awarding authorities for less complex procurements; however the rigid prohibition on negotiations in these circumstances can at times be frustrating for the buyer which is often faced with a choice of 'take it or leave it'. Defining contract requirements and specifications accurately becomes very important when these procedures are being used as this can reduce the risks of ultimately procuring a system which does not fulfil the requirement precisely.

8.13 Open or restricted procedures are also sometimes used for relatively complex IT procurements. The prohibition on negotiation conflicts with IT suppliers' needs (i.e. a clear specification) and wants (i.e. modifications to the tendered contract to suit the bidder's own attitude to risk. There is a lack of "shining examples" of lean competitive dialogue and many contracting authorities are put off by their officers' experience of participating in other authorities' long, costly and complex/ many-staged dialogue procedures.

Incumbent advantage

8.14 The advantages enjoyed by an incumbent supplier can be quite significant in IT procurement. It is commonly the case that incumbent suppliers will have a superior knowledge of the existing IT infrastructure and systems and will have the benefit of knowing precisely how the buyer likes to operate. This is usually an advantage for the incumbent – particularly when there is a requirement to transition from the legacy systems of the incumbent to a new environment – and it can be difficult (if not impossible) for buyers to neutralise it completely.

8.15 Nevertheless, in order for the awarding authority to ensure a fair and competitive procurement process it will be necessary for it to address this issue from the outset. This requires the authority to do more preparatory work than it may otherwise have to and it will have to monitor constantly the situation throughout the process to ensure equal treatment among bidders and avoid claims that the process was conducted unfairly or was lacking in transparency. It can be a challenge for public bodies to determine the extent of the background information (already in the possession of the incumbent) that it ought to disclose to non-incumbent bidders who often feel that they are at an inherent disadvantage when competing against a supplier who has long been embedded with the authority.

8.16 Another difficulty that can arise for an awarding authority that is very dependent on its incumbent supplier is that the authority may simply not know enough about the detailed operation of existing systems in order to answer the questions of other bidders during the procurement process. This is particularly the case when there is a requirement to migrate from the incumbent's system to a new system and detailed knowledge of interfaces and database infrastructure can be important. Sometimes 'ethical wall' arrangements can be put in place to facilitate the procurement process, but these can be difficult to manage and police effectively and there may be a natural reluctance among non-incumbents to engage with representatives of the incumbent or ask questions to which representatives of the incumbent would provide the answer.

8.17 While it is usually considered to be an advantage to be the incumbent, it is worth pointing out that it can sometimes be a burden also. It may on occasion be a disadvantage for an incumbent supplier to know everything that it does about the buyer and its requirements as these can cause the incumbent to 'over-commit' in its tender and seek to address (and price in) issues that it is not strictly required to.

Future proofing / material change

8.18 IT requirements in large buyer organisations are constantly changing as business needs and the policy environment change. It can be a challenge for public bodies to procure IT systems and contracts that are flexible enough to withstand change and adapt to it. Contract specifications need to be future-proof to some extent and specific changes need to be anticipated in order to reduce the risk of adaptations or modifications later constituting a material

change which gives rise to a requirement to go to tender again (ref: Case C-454/06 Pressetext Nachrichtenagentur GmbH v Republik Österreich [2008] ECRI-4401).

8.19 This requires buyers to look into the future and anticipate the needs of their organisation in years ahead. Often, inadequate time and attention is devoted to this during the tender process as the authority is usually most concerned with the fulfilment of its most immediate and obvious requirements. It is hoped that the new Procurement Directives 2014/24/EU (Public) and 2014/25/EU (Utilities) will encourage procuring authorities to do more to future proof their contracts through greater use of specific change clauses.

Specifying requirements clearly

8.20 Whether the procuring authority uses the open, restricted, competitive dialogue or negotiated procedures, it is always important to establish clear objectives at the outset of the process and specify the contract requirements clearly and unambiguously so as to avoid a situation where these can be interpreted differently by bidders, leading to claims of lack of transparency/equal treatment or the authority ultimately being faced with the possibility of procuring a product or service that does not quite fulfil its requirements.

8.21 It usually falls to technical personnel to specify the IT requirements which are then provided to bidders in the tender documents. Often they are thrust into the procurement process at an advanced stage and without clear definitions of success having been agreed with stakeholders.

8.22 If technical, financial and legal workstreams do not work towards a shared vision of success the procurement process risks being disjointed, complicated and not delivering the required solution.

8.23 The authority's requirements need to be accurate and comprehensive from a technical perspective and clearly drafted using consistent and generally understood terminology. They may need to be structured in such a way as to prompt bidders to respond in a manner which facilitates evaluation by the authority. They also need to dovetail with commercial objectives and the contract drafting.

8.24 As noted above, consideration needs to be given to building flexibility into the specifications so that they are durable and not unduly restrictive. However, at the same time, care needs to be taken to ensure that the parameters of what is permitted are clear.

8.25 In addition, it may be important to encourage innovation from bidders and again, the specifications can play an important part in this (for example, by encouraging technology neutrality).

8.26 Any failure to specify the requirements appropriately can lead to delays, evaluation difficulties, legal challenges and ultimately a poor commercial outcome.

Ensuring equal treatment, proportionality and transparency in complex procurements

8.27 In complex procurement processes, and in particular during lengthy competitive dialogues or negotiations, care needs to be taken by procuring authorities to ensure that bidders are treated equally, the process is transparent (while preserving confidentiality, especially of bidder solutions) and requirements are proportionate. These concepts are fundamental to the operation of the EU procurement regime but they are also nebulous and open to different interpretations, which makes them inherently difficult to apply with certainty and the source of most procurement challenges.

8.28 Awarding authorities are required to bear these principles in mind at all times, and consistently, throughout the procurement process. This may be more easily said than done. For example, during the evaluation of pre-qualification or tender responses it is important that there is absolute consistency in the clarifications sought of candidates/bidders and in the application of published criteria. Also, during dialogue or negotiations it is necessary for the authority to be scrupulous in its discussions with different bidders in terms of the information it discloses and the responses it gives on issues that arise.

8.29 Procuring authorities have to be ever mindful of their legal obligations in this regard and this can be an onerous burden on the individuals involved, particularly if the process is conducted over a long period of time and they are unaccustomed to the technicalities of procurement law and the legal process.

Legal challenges

8.30 Awarding authorities in the UK are cognisant of the risk of legal challenge to any procurement process. This risk varies from one contract procurement to another, depending on what is at stake and the conduct of the authority in question. The threat of litigation is ever present, which adds to the time and expense associated with procurement processes.

8.31 If litigation is commenced – whether it has merit or not - it is usually very time-consuming and expensive and it may delay or result in the termination of the project, all of which can be extremely disruptive to the operations of the authority.

9 IT Procurement awards in relation to Procurement Directive thresholds

Commission Questionnaire Question 9

What is your estimate value of contracts, which your members win, that are below and above the procurement directives thresholds?

9.1 The PLA is a grouping of legal practitioners in the field of procurement law, many of them private practice and with the in-house members mainly working for contracting authorities and utilities. As such, the majority of its members do not, properly speaking, win IT contracts. Also, for private practice members, their involvement tend to be more heavily weighted to higher value and/or more complex projects, rather than in a completely representative cross-section of procurement activity.

9.2 Having said this, our view is:

9.2.1 the majority of new IT procurement overall (in terms of aggregate value) is above threshold and either competed as such or awarded in a more or less compliant form through one of the various frameworks in the UK;

9.2.2 this is particularly true in the UK central government. We see more below threshold procurement in local/sub-central government;

9.2.3 even below-threshold procurement is often routed through frameworks and reasonably frequently competed;

9.2.4 there are a number of government initiatives intended to speed up IT procurement and increase the ability of SMEs to obtain work reasonably easily. Of these, G-Cloud is of particular note: G-Cloud consists of single supplier frameworks (currently in excess of 1,200) and is designed to allow for quick and informal comparison of offerings without the need for formal further competition. It is increasing in use, in particular for below threshold and other smaller size procurements;

9.2.5 it is worth noting that the UK has a range of administrative and policy requirements and arrangements which frequently require competition of some sort and advertisement of opportunities, even of a low value. Members' perception is that they are generally (although not 100%) followed; and

9.2.6 we have excluded from this additional work carried out under existing contracts, some of which could potentially be competed separately. Our perception is that this occurs more often with lower value packages of

work, although we suspect that members are often not involved where this occurs.