1.1 Introduction

All projects consume goods and services as part of their execution. Increasingly these goods and services are provided less and less entirely in-house i.e. by the organisation which is sponsoring the project.

In many circumstances, there will be a need to bring in goods and services from outside the sponsoring organisation, so a contractual relationship will be created between an ‘Employer’ and ‘Provider’. An internal project manager needs, at a minimum, to have a basic awareness and understanding of the relevant law and contractual arrangements used to procure these standard goods and services. This Guide will provide these basics.

In this Guide, we have tried to use terminology which is compatible with that European Union Procurement legislation ¹:

- Goods are standard manufactured items, which have little or no uniqueness about them. They can be bought ‘off the shelf’.
- Services are standard services which are incidental to the delivery of a project. They can be for year on year services like accounting, legal services etc.
- Works is the term used in European Union Procurement terminology to effectively describe a project or part of a project i.e. a sub-project. These can be both for services to deliver a unique output e.g. a building design; a tailored on-going service e.g. an outsourcing arrangement; or a physical output e.g. a building.

However, this Guide focusses on the procurement of ‘works’ by which we mean contracted out parts of a project or sub-projects, which typically have a higher level of uncertainty associated with them compared with goods and which can form a substantial part of the main project. Indeed, the spend on these contracted out sub-projects may outweigh all other project spend. For instance, each of the following examples may account for over 90% of the total project spend: a contract for construction of physical asset; a contract to develop, install and manage an Information Technology capability; or a contract for the supply of complex machinery designed and manufactured specifically for an Employer.

As large sub-projects in themselves, the Employer needs to be contracting with organisations that can and want to deliver to the time, cost and performance parameters set in the contract. In addition, projects rarely run completely as planned being subject to risk and change, so both the Employer and Provider need to anticipate risk and change and the contract between them needs to allow for it. Consequently, the abilities of both the Employer project manager and the selected Provider, as well as the contract in place

¹ The difference between ‘goods’, ‘services’ and ‘works’ is represented legally by difference processes and thresholds of value which apply to government purchases under European Union Procurement legislation.
between the organisations will largely determine the success of the sub-project and hence overall project.

Poor contract management and administration will undermine good work done earlier in the procurement process. However, the earlier decisions and actions will have a larger effect on the success or failure of these contracted out sub-projects. Unfortunately, no amount of good contract management and administration will save or fully recover poor procurement decisions made earlier in the project life cycle. Yet the response of many Employer organisations is to put significant professional resource in once in contract or, even worse, to defend their position when the contract is in delay and they are threatened with having the time and cost liability transferred to them through a contractual claim.

?Insert Funnel Diagram?

1.2 Who is this Guide not written for ? And who is it written for ?

This Guide is not aimed at those who want a guide on the procurement of standard manufactured goods or standard consultancy services. While it will give relevant law and contractual arrangements for the procurement of basic goods and services, there is a wealth of good information available from elsewhere.

The interests and expertise of the Contracts & Procurement SIG lies in the procurement of externally sourced sub-projects or, in European Union Procurement language, ‘works’. We do not think that there is a wealth of accessible and practicable information available on how to procure projects and programmes of work. This is the void we hope this Guide will fill. Consequently, the intended audience for this Guide is:

- Project managers and project procurement professionals who want or need a ‘how to’ guide for procuring externally sourced projects and programmes.
- Stakeholders – both internal and external to the project team - who need to increase their awareness of how projects and programmes can be procured e.g. finance, engineers etc.

1.3 Background to this Guide

Procurement covers a wide range of activities which can range from buying new paper clips, installing a new IT system or building a new shopping centre. However, most definitions of procurement limit the definition to that of purchasing goods and services.

In a simple contract, the specific goods and services to be bought are contractually specified in terms of, for goods, the make and model of the item to be purchased e.g. a hundred paperclips.

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2 For free material and some you have to pay for go to the Chartered Institute of Purchasing’s (CIPS) website at [www.cips.org](http://www.cips.org) and click on resources. Alternatively, a book specially for project managers on this topic is by Garth Ward, titled 'The Project Manager's Guide to Purchasing – contracting for goods and services' (2008), Gower Publishing Ltd, ISBN-13: 9780 5660 869 22.
For more complex purchases, goods would traditionally be specified and combined to give something unique e.g. a works contracts for a completed asset such as shopping centre asset. A works contract implies that goods and services are being integrated to form something greater than the sum of the individual parts. Indeed, the traditional approach to purchasing a new building was to try to design or specify all the component parts of it.

However, the sheer technical complexity of many unique project based purchases mean that not only is it almost impossible to specify every ‘nut and bolt’, but it is also not appropriate as the technical expertise to do so does not reside with the Employer or designer. As a result, requirements are now commonly expressed in a contract as performance or functional specifications e.g. the bytes that the IT system has to be able to handle expressed in measurable units, leaving the selection of the individual goods and services to deliver these requirements to the Provider or the specialist parties they contract with down their supply chain.

These performance or functional requirements have led to contracts expressing the end capabilities or outputs that the client wants from the project. For instance, combining an IT system with a help desk gives a customer service capability. This capability could be expressed in measurable units of response times and customer satisfaction etc. and is typical of how many outsourcing arrangements are specified.

These new or enhanced capabilities should lead to new or improved outcomes or benefits which align with the sponsoring organisation’s mission and business objectives. In order for them to be meaningful, the outcomes or benefits need to be expressed in objective or measurable terms i.e. success criteria, which can be incorporated into a contract and the Provider paid against. Indeed, we are now seeing the emergence of contracts where the Provider is paid on the basis of business outcomes or benefit delivered.

The above concepts are illustrated in the Figure 1a below:

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3 Note that in our experience there is a grey line between what is performance or functional specification and what is an capability or output specification.
The NEED or OPPORTUNITY space

Benefits to stakeholders
Sponsoring organisation's success criteria for project
Define the 'how' and 'what':
Capabilities are delivered to stakeholders and enable benefits to be achieved.
Deliverables are the end products or measurable results of the project
Goods and Services that make up the Deliverable

Typically in:
- Business Case
- Project Brief
- Project Scope Statement
- Technical Spec

Figure 1.3a. A hierarchy of detail reflecting how requirements can be expressed in a works contract.

Other developments in Procurement over the last 15 plus years include:

- The expansion of the Project Life-Cycle to include Operation & Termination (illustrated below), so as well as thinking of benefits in the operations phase, organisations are increasingly thinking and specifying requirements in terms of whole life costs.

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Extended Life Cycle

Project Life Cycle

Concept | Definition | Implementation | Handover and Closeout | Operations | Termination

Figure 1.3b - APM’s project life cycle (APM BoK 5th ed.)

A contracting strategy where the Provider is paid on the basis of capabilities or even benefits delivered in the operation phase is the Design, Build, Finance, Operate route more commonly known as the Private Finance Initiative or Public Private Partnerships.

- As technology & society become more complex, there is an increasing need for collaboration to deliver projects as no single organisation can do it all.
Providers being selected, in some cases almost wholly, on the basis of their culture and technical capabilities as the end 'product' can often not be fully defined or is a moving target. Therefore, what you are buying is the capability to develop a solution to an ill-defined or changing start and end points.

Consequently, conditions of contract need to align motivations and be more relationship based i.e. define how parties work together, as opposed to try and often fail to define illusory fixed end states. An example of this trend is the growing use of the NEC3 family of contracts in the engineering and construction industries and elsewhere.

The emergence of programme management – defined in the APM’s Body of Knowledge 5th edition as ‘the coordinated management of related projects, which may include related business as usual activities, that together achieve a beneficial change of a strategic nature for an organisation’ – as a closely related discipline of project management. More recently, portfolio management has arrived on the scene.

All of the above developments apply to procurements supporting projects and programmes of work, more so than to the purchases of manufactured goods and standard services. In this evolving context, limiting definitions of procurement to “the process by which the resources (goods and services) required by a project are acquired” – as per the APM Body of Knowledge fifth edition and previous guide – are outdated 4.

Consequently, the Contracts & Procurement SIG's focus in this Guide is to cover the procurement of ‘sub-projects’ with the above characteristics, not just goods & services as per the last publication by SIG in 1998. By ‘sub-projects’ we mean that

- A project or programme is broken down into packages of work, some of which may well be delivered internally by the sponsoring organisation and some delivered by external Providers;
- If the package is to be delivered by an external Provider, then there will need to be some sort of selection process and there will be a contract;
- Unless the package is for already manufactured goods or standard services, the contracted out package of work will have a degree of uniqueness to it. It will be, to a greater or lesser degree, a project.

Hence, each contract Package is a ‘sub-project’ of the main project, which is often affected by and interacts with other packages, as well as the environment external to the project e.g. changes in legislation, business environment, politics etc.

4 Indeed, as the Greeks were carrying out procurements for projects and using contracts with many of the features associated with those used today, then there is a good argument for saying this definition is some 2400+ years out of date. See Soames B (2011), Buying Just Like The Ancient Greeks : what ancient Greek purchasing can teach us about procurement now, Buy Research Publications. ISBN 978-0-9551790-9-9

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This implies that the conditions of contracts used to deliver these sub-projects should not just accommodate change, but should also allow the Employer the flexibility to influence outcomes through good project management.

Having a good Provider in place and the conditions of contract which enable you to manage change is unlikely to be enough. It takes competent people supported by good systems and a supportive organisational environment to manage a contract effectively. In addition to other project management competencies, our opinion is that the effective contract project manager needs to:

- Have background knowledge of applicable law;
- Have specific knowledge of the contract they are working under;
- Think through the consequences of actions they take to a greater degree than in a non-contractual environment; and
- Be able to communicate with precision, both to give the Provider clear direction and avoid the common errors and “gotcha’s” where they inadvertently fall into a contractual trap set by a Provider.
1.4. Key definitions

As a result of these developments and the modern practices of procurement, in a project, programme and, to a lesser extent, portfolio management context, we think a more up to date definition of procurement is

“the process by which the benefits, enhanced capabilities, functions / performance or resources (goods & services) required from or by a project or programme are acquired.

It includes deciding the Package Structure and, for each package, the development & implementation of the

- contracting strategy
- contract documents, including the specific scope / requirement
- process and evaluation criteria for selection and award

leading to the effective management and administration of the contracts once entered into.”

A contract is a legally enforceable agreement between two or more parties with mutual obligations. It normally defines the performance or deliverable (called the Requirement in this Guide) that is necessary for the Provider to fulfil his obligations and the corresponding consideration, normally monetary, for this performance or deliverable. In a project environment, which is delivered over a period of time as opposed to simple transactional contract for pre-manufactured goods, it should specify, at a minimum:

- the constraints in which this performance has to be delivered;
- how the contract is administered in terms of when payments are made, quality is assured etc;
- how change, whether instigated through or by the Employer or arising from external circumstances, is administered and ideally managed to minimise the adverse impact on the Employer’s project objectives and outcomes;
- remedies for non- or poor performance by either party; and
- the pricing document.

(For further detail and amplification, see Chapter 2.3)

We also use the following terms:

An Employer is the party who normally instigates the contract and who is receiving the Requirement in exchange for the ‘consideration’, normally monetary.

The Provider is a broad enough term to encompass:

- A manufacturer supplying already designed standard goods
- A manufacturer designing and manufacturing goods to an Employer’s unique Requirements, whether it is a one-off deliverable or 1000’s of units;

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5 The Package Structure is how the project or programme is broken down into contractual packages to be delivered by different organisations, which could include the Employer organisation.
• A consultancy organisation providing professional services, whether these are ‘business as usual’ services, such as accountancy, or project specific services;
• An outsourcing organisation providing on-going services tailored to the Employer’s specific needs; or
• A contractor delivering a works contract, whether the Requirement is expressed contractually as a fully specified design, a performance or functional Requirement, a new or enhanced capability or a business benefit.

1.5 Overview of the Procurement Process

0. Concept & Feasibility: Having identified a potential need or opportunity, there is a need to ensure that the project is viable in two respects

• That it is worthwhile undertaking i.e. it will contribute benefits in line with the sponsoring organisation’s mission and strategy for a sufficient period of time to make it worthwhile. Defined benefits and success criteria should be a result of doing this.
• That it is practicable or feasible to undertake and deliver within the budget, time or other constraints. In assessing this, different delivery options will be identified, explored and, in many cases, discarded. The one left will be the most feasible and will be defined to a certain level.

This is labelled ‘Stage 0’ as, strictly speaking, it is not part of procurement. However, we decided to include this within the Guide for two reasons (a) the business case is the output from this stage and is the primary input into the next stage. Without a good business case to support it, almost any project is doomed; (b) where large elements of a project are to be contracted out, we fail to see how the feasibility of different delivery options can be identified and assessed effectively without input from the project procurement and management professions (as well as content experts).
1. **Project Procurement Strategy**: This is where a specialist procurement function should become involved for a project of any complexity. In this stage, the project definition is further developed and divided up into packages. Decisions are then made on which packages of the project to develop or make internally and which to source externally (commonly referred to as ‘Make vs. Buy’).

For the packages that will be sourced externally, the nature of the relationship with a provider is determined to provide direction on the most appropriate contracting strategy e.g. cost plus or fixed price; and the process and outline criteria for how the Provider will be selected. Once this is in place, a detailed procurement schedule, which both informs and is informed by the overall project schedule, can be developed.

The output of this stage is summarised in the Project (or Programme) Procurement Strategy document.

2. **Work Package Contract Strategy**: For each of the likely contract packages the detailed contracting strategy is determined, in terms of how a provider will be paid and how risks will be allocated, rewarded and managed. Central to this, in many cases, is what are the ‘best fit’ standard conditions of contract to use and what, if any, amendments are to be made to them.

3. **Prepare Contract**: The Contract will typically include, at a minimum, conditions of contract, the technical Requirement and a pricing document. The language and detailing of the both the pricing document and the Requirement follow on from the words in the conditions of contract as opposed to them being entirely separate documents. For instance, if the contract strategy has packaged the design as well as the construction of an asset into one contract, then both the conditions of contract and Requirement should reflect this.

4. **Select Provider and Award Contract**: In this stage, a more detailed view is taken on what criteria will be used to shortlist and select the potential Provider given what they will be asked to deliver in the contract, including risks allocated to them, market conditions etc. Selection criteria can include track record, lowest price, quality of personnel etc..

The process and criteria then need to be implemented to fit in with the overall time scales of the project or programme. Discipline must be exercised in interactions with potential providers to avoid prejudicing any competition, entering into a contract inadvertently and / or under different terms than intended.

5. **Manage and Deliver Contract**: For goods, the delivery of the requirement may be a point in time. For works, such as the construction of an asset, delivery happens over a period of time. In projects, change, whether from internal or external sources, happens and a good project manager needs to be able to manage this change on the Employer’s behalf, as opposed to just ‘administrating’ the contract e.g. certifying
payment against progress and collecting records to defend a big claim once the Requirement has been delivered. A good contract allows the Employer’s project manager the flexibility to manage change!

6. Close Out: In most works contracts, the tangible Requirement will now have been handed back to the Employer organisation to operate. From a contractual point of view, common issues that need to be thought through and specified include how the project is to be handed over to operations, on-going maintenance and service requirements, which includes liabilities for defective work or performance and Intellectual Property Rights, so that the Employer is not tied in to the Provider for eternity.

In other contracts, such as IT outsourcing arrangements or Private Finance Initiative (PFI) projects e.g. a toll road, the service or asset is operated by the Provider. In addition to previously mentioned issues, how the asset or service is decommissioned or handed back in a planned way needs to be specified as does how and in what circumstances an asset or service is handed back early. This could either be through the Provider defaulting on the terms of the contract, or a changing environment e.g. the service is just not needed any more.

1.6 Use of this Guide

Lastly, we would stress two things about this Guide:

- Much of this process, however formally applied, will apply whether you are an Employer who will receive the ultimate benefit from the project or programme or the Provider who is having to divide the main contract Requirement down into sub-packages and hence subcontracts.

- It describes a generic process which can be followed regardless of the size of the project or programme. For a small procurement, it may mainly be a thought process. However, the larger the project or programme, the more thought should be applied with more formality in terms of recording the decisions made and reasons why. Indeed, for a major Procurement exercise, this Guide could be used as the starting point for developing the Work Breakdown Structure and subsequent programme to get to contract.

As such, we stress that this is a Guide to procure projects and programmes of work and not ‘the Gospel’. In all likelihood, it will not absolutely fit with how your organisation operates or your particular project, so use it as starting point and adapt it to fit.