

Maximising Procurement Opportunities

CIPFA North West, Audit, Risk and Governance
Professional Development Group

Annual Development and Training Event

Mohamed Hans

Solicitor

CIPFA Procurement & Commissioning Network

www.cipfa.org/procurement

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Please contact Mohamed Hans, Procurement Advisor for further information:

E: Mohamed.hans@cipfa.org T: 077 17345188

Reminder - New OJEU Thresholds

	Services/supplies	Works	"Light Touch" services contracts
Central Government and specified entities	£118,133	£4,551,413	£615,278
Sub-central contracting authorities (Local Authorities)	£181,302	£4,551,413	£615,278
Small lots (all contracting authorities)	£65,630	£820,370	

Session Objectives

- Navigate through LTR Regulations to deliver real change
- Benefits of using the Light Touch Regime
- “Pseudo framework agreements” or “pseudo dynamic purchasing systems”
- Extent of flexibility - social, health and education services
- Importance of Contract Management
- Update on GDPR and Contracts

EU Directives – from Part B to LTR

- By the late 2000's, the European Commission and some Member States were becoming concerned that some contracts which *ought* to be subject to cross-border participation were being protected from competition due to their classification in Part B.
- Examples (in their view) included high-value fire and rescue, and prison services contracts, as well as larger, longer term hotel accommodation or travel contracts.
- The Commission also felt that certain services had wrongly been classified in Part B and should always be subject to the full rules.
- At the same time, there was a continued recognition that certain social and educational “**services to the person**” had a very national context, and would usually not attract cross-border interest.

EU Directives – from Part B to LTR

- As a result, in the new Directive, and the Public Contracts Regulations 2015, the “Part A” and “Part B” distinction is replaced with a ***Light Touch Regime*** for social and other specific services.
- The UK government has been very supportive of this change.
- The intention is that services in this regime may be procured more flexibly than if the full rules applied.
- **But** some of the requirements for LTR procurements are stricter than they were under Part B.
- It is important to understand the rules that do apply.

Which contracts are covered? (Schedule 3)

- Schedule 3 of the Public Contracts Regulations 2015 sets out, using CPV codes, which services fall under the “Light Touch Regime”.
- See the **handout** for a full list of all the codes.
- As you can see, a lot of services are included.
- Included are **Health, Social and Related Services** such as:
 - ✓ Hospital services
 - ✓ Health and Social Work services
 - ✓ Nursing and Medical personnel
 - ✓ Guidance, counselling and family planning services
 - ✓ Home help services....

Which contracts are covered? (Schedule 3)

- **Administrative, Social, Educational, Healthcare and Cultural Services** such as:
 - ✓ Library and archive services
 - ✓ Youth education services
 - ✓ Adult community education services
 - ✓ Driving schools
 - ✓ Training services (of a very wide scope)
 - ✓ TV and Radio production services
 - ✓ Cultural and festival organisation services

Which contracts are covered? (Schedule 3)

- **Compulsory Social Security Services and Benefit Services**
- **Hotel and Restaurant Services**
- **Legal Services** (not already exempt)
- **Prison, Public Security, Rescue Services** (not already exempt)
- **Investigation and Security Services** *including security guarding and alarm monitoring*
- **Postal Services** *including post, courier and mailbox services*
- **Blacksmithing and Tyre Re-Moulding**

The “Social and Other Specific Services” threshold

- One of the main provisions for covered contracts is a different OJEU threshold.
- This is currently **£615,278** for all contracting authorities
(recalculated for January 2018)
- Above this threshold, the “Light Touch” regulations set out in Part 2, Chapter 3 of the Public Contracts Regulations 2015 apply.
- Below the threshold, only the *treaty principles* will generally apply.
(Although you should also take note of any Statutory Guidance, and other rules such as the NHS regulations, where they apply)

How much flexibility is allowed?

- Regulations 74, 75 and 76 lay out the principles of the Light Touch Regime.
- Less than two pages – out of 127!
- The Regulations primarily cover:
 - a) Publication of notices (Reg 75)
 - b) Principles of awarding contracts (Reg 76)

Publication of Notices

- More flexibility is allowed about how you publish OJEU notices under the LTR. When you initiate a procurement process, you are still required to advertise – but this can take more than one form:
 - A **Contract Notice** (as usual in a non-LTR procurement)

Or:

- A **Prior Information Notice (PIN)**
 - Rather than one PIN for each procurement, this may be “published continuously” and may group multiple forthcoming procurements.
 - As long as you provide details about how interested parties can express interest, no further advert is required.

Principles of Awarding LTR Contracts

- The procedures for awarding under the LTR offer much more flexibility.
- Your procedures must, as a minimum, be **transparent** and ensure **equal treatment** of bidders.
- You may base each LTR procurement on the standard Part 2 procedures – Restricted, Open, Competitive Dialogue, etc.
- But you may amend the usual features of such procedures, to suit your needs.
- Time limits you set must be proportionate
- In particular you may design procedures to take account of **quality, continuity, and accessibility** of services, **specific needs of users**, and their **involvement and empowerment**.

If you change your mind

- Key details such as **timescales**, **deadlines** and the **award procedure** you have designed, should be set out in your Contract Notice or PIN (to the extent possible at the time of publication).
- Your procedure should follow the process that you set out.
- BUT you are allowed to depart from the process you set out, at any time, if:
 - ✓ The “non-conformity” does not breach transparency or equal treatment, and
 - ✓ All participants are informed, and
 - ✓ You record all of this in your Reg.84 report (see later).

What about pre-2015 contracts?

- The Public Contracts Regulations 2015 do not apply retrospectively.
- This means that contracts awarded before February 2015 using the old “Part B” provisions can still be allowed to run to the end of their term.
- However some care should be exercised.
- As we have seen, a contract falling under Part B didn’t mean there were no rules at all.
- If you still have any Part B contracts in operation, what should you consider?

What about pre-2015 contracts?

- Do you have a copy of the contract? Does one exist?
- Do you have a **record** of the contract **award process**?
- Would the contract award process have complied with the **treaty principles**?
- What is the **value** of the contract?
- Was a **contract award notice** posted in OJEU? If not, should it have been?
- What is the term of the contract? Does it have a clear end date?

Mandatory and Discretionary Grounds

- Technically, the Mandatory and Discretionary Grounds for exclusion are not legally required to be checked in a LTR procurement.
- But might it not be sensible to check anyway?

CCS guidance:

"You would still normally exclude suppliers that had been found guilty of the mandatory exclusion offences as a matter of routine and sensible business practice."

Documenting the process – Reg.84

- Even when using the LTR, you should make sure that for each procurement, you keep the formal record required by Reg.84.

- This needs to include:
 - ✓ The subject matter of the contract
 - ✓ The results of any shortlisting process (who was shortlisted, who was rejected, and why)
 - ✓ The reasons for any tenders rejected as abnormally low
 - ✓ The successful contractor(s)
 - ✓ What proportion of the work the contractor(s) intend to sub-contract (where this is known)
 - ✓ Any other issues such as conflicts of interest.

- This report is required for all above-threshold contracts – but don't neglect it just because you're using the LTR.

Government guidance & clarifications

CCS assumes “pseudo framework agreements” or “pseudo dynamic purchasing systems” would often be used by authorities, involving a number of suppliers capable of delivering the services needed, to be “called-off” as and when the authority needs those services.

Where necessary, it may be possible to incorporate an element of user choice at the call-off stage.

For instance, the authority might consider that more than one of the providers could deliver a satisfactory, value for money service to the end-user, and proffer options to the user.

Understanding the Market

- If you are to tailor an effective approach to using the LTR, you need an understanding of the market (or more accurately, markets).
- The LTR can help you remove barriers to doing business with some types of suppliers and providers – as well as opening up opportunities to have a procurement process which better reflects the capabilities of the participants.
- But you can only do this if you have at least reasonable knowledge about:
 - The make-up of the market
 - What the market can, and can't offer
 - What barriers or problems the market might face in dealing with you

Understanding the Market

- For example
 - If in a particular market sector, or category, you know that there are some very **innovative** social enterprises, with new ideas or new models of delivery, you might be inclined to provide for a **negotiation** phase in some procurements.
 - If the main problem faced by suppliers is finding the bidding process too complex, you can seek to **streamline** and simplify the process –
 - BUT in other cases that streamlining is not required, and a more detailed quality evaluation might in fact be beneficial.
- To make these decisions you need market knowledge.

Questions to consider

- Do suppliers understand your requirements?
- Do they understand the procurement process? How could the process be altered to improve their ability to participate?
- Is the proposed business model realistic? What else would work?
- What risks does the proposed delivery model contain?
- Are any targets or timescales realistic?
- Are any opportunities being missed?

Risks – and how to mitigate

- Face-to-face engagement must be handled carefully – ensure records are kept, and don't go alone.
- Take care if discussing **costs** – any discussion of costs, fees or prices should be general, and for information only.
- Be willing to respect commercial confidentiality – but ensure all parties understand where the Freedom of Information Act may apply.
- **“This is not a tender!”** Market testing is for information gathering. Make sure participants understand they are not bidding for a contract at this stage.

Why is contract management important?

- Contract management is the *active* management of the relationship between your organisation and a contracted supplier.
- Contract management is important, to ensure that agreed standards are maintained over the term of the contract – ***in other words, to make sure you get what you are paying for, at the price you agreed to pay.***
- Public sector is often lacking – too much “let and forget” syndrome.
- Budget holders are (or should be!) responsible for their contracts.
- Failure to manage contracts exposes the authority to many risks.
- Contracts are by-products of a commercial relationship – and like any relationship, they need managing.

Effective
communicator

Team Support

Motivator

Sir Alex Ferguson

- Longest serving manager of Manchester United with over 25 years
- Hard Negotiator – known to throw cups, saucers, hair dryers to drive better performance
- Very successful
- Good at researching opposition – well prepared
- Gets maximum out of the resources he has through effective relationship management
- Good at rebuilding and transition

Relevance to Contract Management

- Know exactly what you want from suppliers before you go to the market and during contract period

- Be clear and create a definitive requirements brief:
 - Service Improvement
 - Cost Reduction
 - Transformation
 - Innovation

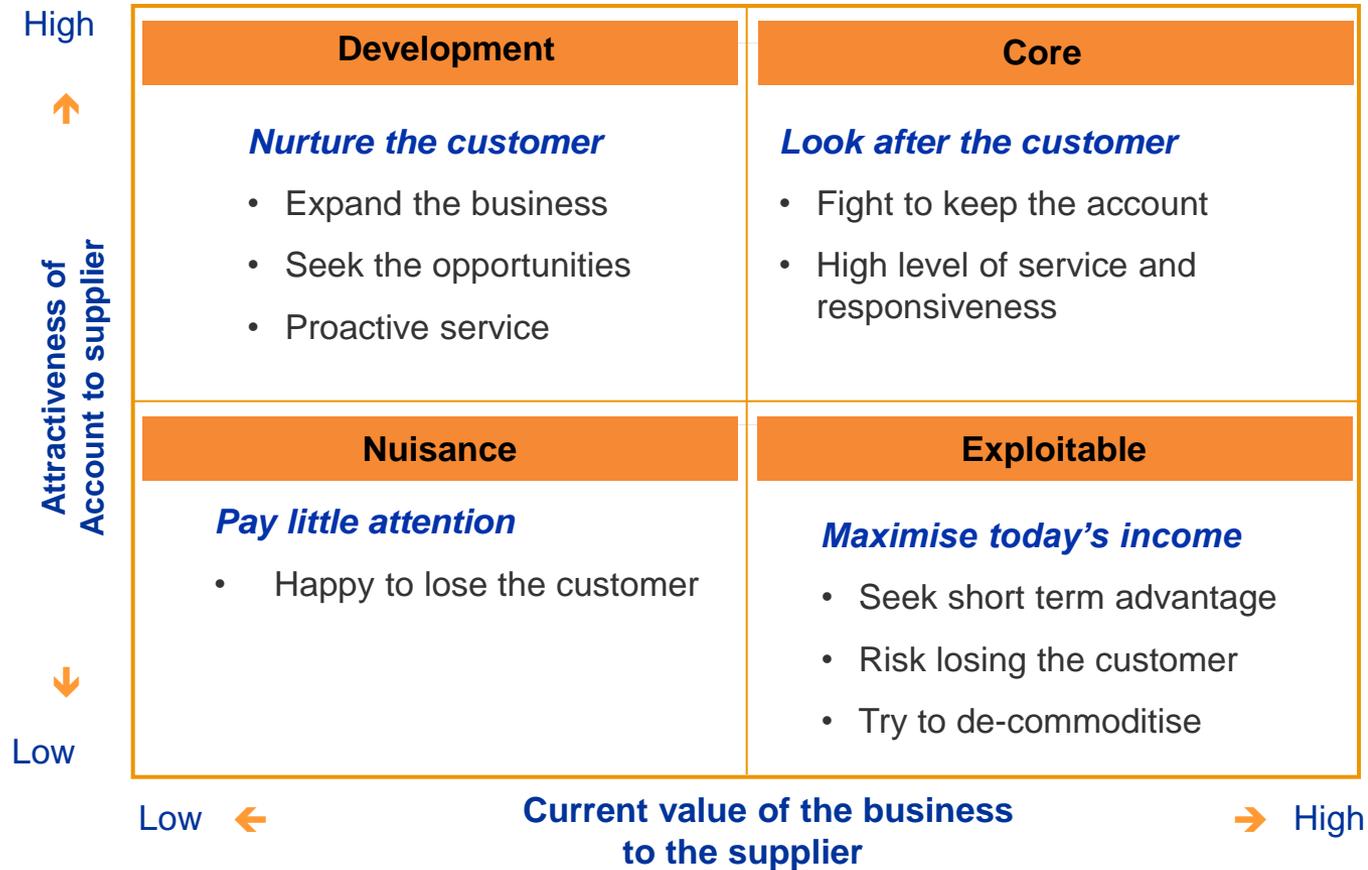
- Gather intelligence regarding suppliers in the market who can provide the service/ products and understand what the deal will mean to them

- Invest in strong due diligence

Determine the resource available to manage the contract

- How critical is the contract to the organisation?
- How serious is the impact of non-performance?
- How much time can be dedicated to managing the contract?
- Is the contract to be used centrally, or by users across your organisation?
- Who will lead the relationship with the supplier?
Consider framework v contract

How suppliers see us!



What can go wrong?

- **Failure** to ensure effective contract management can lead to problems:
 - ✗ Wasting money
 - ✗ Poor quality of services, works or products
 - ✗ Projects not being delivered on time
 - ✗ Complaints from residents, service users, or internal clients
 - ✗ Damage to your organisation's reputation
 - ✗ Contract failure/ early termination
 - ✗ Legal disputes.

Carillion Collapse – Where were the Auditors and Contract Managers?

- Writing on the wall in October 2016:
 - supply chain not being paid
 - money was getting transferred to pay for salaries
 - Write downs
 - Accounts painted an unrealistic picture of the company's financial health

Lessons learnt from South West One

Not to make the contractual agreement too complicated

The contract was over 3,000 pages (lawyers paradise) however this is of no use to operational staff who are tasked with delivering and will not understand complex legal documentation or in fact have the time to read what was originally agreed.

All parties in a shared services arrangement must have similar incentives and understanding of each partner's requirements. This will avoid later confrontation

The arrangement must be flexible to withstand unforeseen eventualities. In this case, the private sector partner had financial difficulties at the outset which made matters difficult and the subsequent public sector austerity exacerbated the already tense situation.

It is important to get the client contract management team right in terms of size and capabilities throughout the contract. One size may not be sufficient as matters may arise require immediate additional resources

Performance indicators need to be meaningful.
The old adage "what can't be measured can't be managed"

Optimum contract period for different services should be varied.
Do not stipulate start and end time the same for all services.

Do not underestimate HR/ TUPE issues

In a multiparty shared services, there will be competing priorities and objectives which are difficult to manage

Do not be too overly ambitious – keep within certain parameters that you can manage.

Contract with Amey

- £272m highways contract, which ran from 2005 to 2012
- Amey responsible for maintaining 4,800 miles of the county's roads, along with 1,700 bridges and 44,000 street lamps
- Council accused Amey of "substandard" work
- Repairs were so poor that potholes formed soon after they were repaired
- Council withheld last 3 payment (£4.6m)
- Amey issued proceedings and claimed £30m
- Council counter-claimed £20.7m plus interest
- Judgment runs to 299 pages - the trial lasted 16 weeks and included leading counsel and 2 junior counsel for each party

The Judgement

- Judge upheld most of Amey's claims
- Court award Amey £4.616m for part 1 of its claim of £7.915m
- Recovered only £296,000 for part 2 of its claim of £19.774m
- The Council recovered £1.214m of its counterclaim
- Judge awarded Amey £3.698m, plus contractual interest of £1.697m
- Judge awarded £6.2m (£8.9m) towards Amey's legal costs
- Cumbria's own costs were said to amount to £10.037m.
- Total Bill - £26m

Lessons learnt from Cumbria v Amey Litigation

“the contract documents are voluminous” –
The Judge

Poor contract management and inconsistent
contract relationship management

Key Performance Indicators (KPIs) were
not effective

- Documents difficult to interpret
- Gaps and inconsistencies
- No Exit arrangements
- No MoA between Council/ Amey and Capita
- Specification was full of holes
- Lack of appropriate contract terms and conditions
- more robust risk transfer and / or risk sharing arrangements
- Too much emphasis on ‘Partnering’ and not much on effective contract monitoring and performance management
- specific dispute provisions not routinely applied
- Change orders not resolved
- Council’s client side capacity and capability was weak
- Capita Agency agreement not resourced
- Gaps in ensuring robust and accurate data quality and data assurance arrangements resulted difficulty accessing and monitoring accurate contractor records

Recommendation
need for independent peer with significant expertise in commercial contract documentation

Recommendation
Client side capacity must be stronger with legal and financial support

Recommendation
Agency arrangements must be stronger with clarity of roles and responsibilities

Recommendation
robust performance management arrangements for all new contracts

Recommendation
Key Performance Indicators (KPIs) should be in place for all significant contracts

Lessons learnt from Cumbria v Amey Litigation

the contract culture of the Council at the time was to manage issues within a siloed way

legal advice should have been sought at the earliest opportunity, not later in the process

Relationships between some Amey and Council staff was not strong

- Lack of corporate responsibility and accountability
- Slow or minimal response to issues of concern being raised by front-line employees
- Council did not respond promptly enough to recommendations from internal audit reports or some elements of externally commissioned reviews

Recommendation
one team' culture should operate

Recommendation
System in place to escalate issues to more senior managers quickly

Recommendation
staff should feel confident to 'speak up' knowing that their views will be listened to

Recommendation
non-contractual' relationships with contractors are constructive, strong and effective

Recommendation
Key Performance Indicators (KPIs) should be in place for all significant contracts

Lessons learnt from Cumbria v Amey Litigation

Be careful before you trigger to withhold payment

'the Council consciously chose to make very substantial deductions from what it would otherwise have paid Amey and that position has been shown to be erroneous'

legal advice should have been sought at the earliest opportunity, not later in the process

Relationships between some Amey and Council staff was not strong

- Do not withhold payments from assessed amounts wrongly
- No documented evidence that the totality of the risks and benefits of the option to withhold were considered and shared in full - **a significant omission**
- Risks were not shared with senior elected members or all senior officers in full
- No minutes of an Executive Decision to withhold payment, or written record of who made the final decision to deduct payment from the final account

Recommendation

Make sure all relevant information is provided in a timely matter to understand and consider the full extent and consequences of a potential risk

Recommendation

All action to be taken (or not taken) and the reasons for the decision, should be documented

Recommendation

Have clear governance arrangements regarding withholding or adjusting a payment to a contractor

Recommendation

Key Performance Indicators (KPIs) should be in place for all significant contracts

Lessons learnt from Cumbria v Amey Litigation

Council's Corporate Risk Register, Annual Governance Statements and associated action plans need to be live documents that are continuously updated

Do not under-estimate how Commercial Companies operate

Effectiveness of Negotiation and Mediation Process

- Risk of a material contractual dispute must be identified
- Limited awareness by the Council of the totality and consequences of the worst case scenario outcome occurring
- Council made a number of attempts to reach settlement out of court and through a 'drop hands' offer
- Cost implications of insurance cover and / or third party funding options must be considered
- Clear service specification (legal support) with a documented options appraisal considered and recorded

Recommendation

More comprehensive risk assessment and analysis required – including all potential consequences (financial, reputational and legal), and understanding of the worst case scenario

Recommendation

In future must assess strengths, weaknesses, opportunities and threats of litigating against a contractor before taking next steps.

Recommendation

Council need different personalities, teams or skills to negotiate with contractors

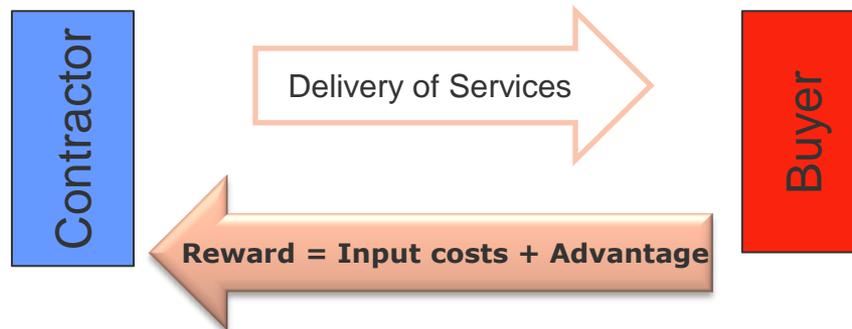
Recommendation

specific subject matter expertise required for Project Teams to defend the authority

Contracting Rules

Rules:

- Risks should be allocated to the party best placed to manage the risk
- The party accepting the risk (giving advantage) should be rewarded for taking on the risk
- Profit should only be earned because Contractors deliver an “advantage” to the buyer
- Risk transfer very important to contracts as delivery models become more complex – the contractor can enlarge its advantage and resulting profits
- The public sector cannot transfer ultimate risk



Reasons to pay contractors on time

- Fosters good relations, especially in a recession
- Complies with contractual terms - avoids breach of contract
- Ensures your organisation is not responsible for contractor failure
- Supports cash-dependent contractors and sub-contractors

Service credits

These are pre-specified financial amounts which the customer becomes entitled to whenever a service level is not achieved

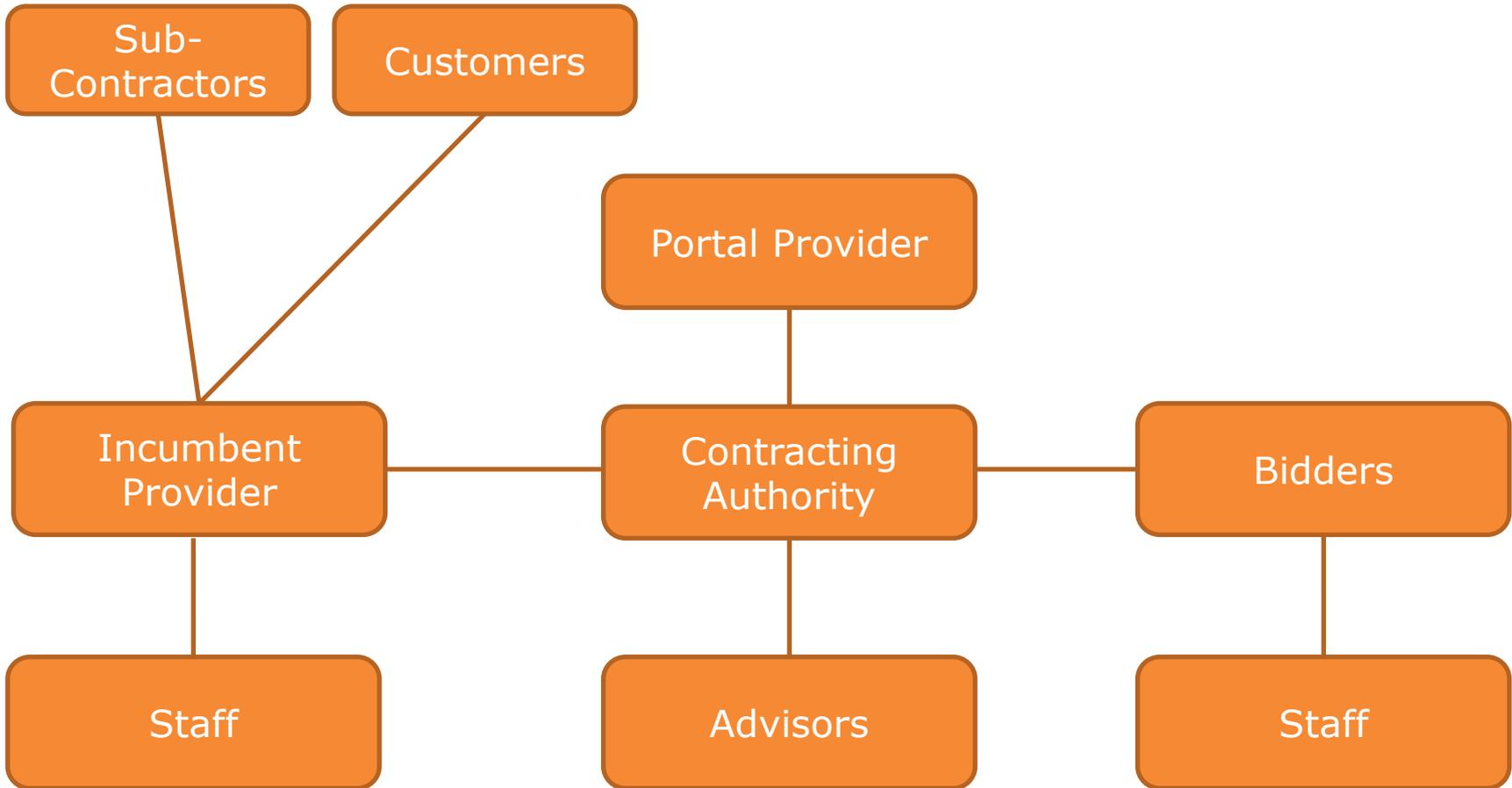
Calculated:

- as percentage rebates from the service charges for each percentage point that the service provision falls below the service level target: or
- Use of service credit 'points' across a range of service level measures which are then converted into service credits based on a formula, usually on a monthly basis
- Capped at % of total contract value

GDPR

- Finally a note on the General Data Protection Regulation (GDPR).
- The GDPR will enter force in May this year.
- It clarifies existing Data Protection law and introduces new obligations for Data Processors.
- Increased rights for people over their personal data.
- Social care contracts tend to involve the use of sensitive personal data about service users, their families, etc.
- Are you ready?

Typical Procurement Structure





The Chartered Institute of
Public Finance & Accountancy

If you have any questions please contact:

CIPFA

Mohamed Hans

Solicitor

Advisor

CIPFA Procurement Network

Tel: 01924 461825

Mobile: 07717 345188

Email: mohamed.hans@cipfa.org

Twitter: [@Cprocurement](https://twitter.com/Cprocurement)

CIPFA Procurement - further support options...

Solutions-based Support from CIPFA Networks

CIPFA is not just here to provide training for your staff – we can help support your organisation in finding solutions to the many challenges you face. Network advisors can come to you and/ or assist in putting together an on-site package of support using CIPFA's wealth of knowledge and public sector procurement expertise to support your needs. If this is of interest please contact one of our network advisors for an informal discussion.

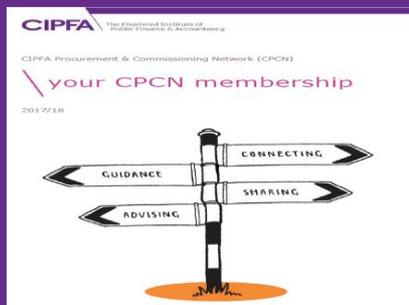
<http://www.cipfa.org/services/networks/meet-the-network-advisors>



Alternative Bases of Service Provision

Authorities have never been under so much pressure to find alternative bases of service provision, and there have never been so many available at the same time.

<http://www.cipfa.org/policy-and-guidance/publications/t/the-commissioning-joint-committee-guide-to-alternative-bases-of-service-provision>



CPCN Subscription

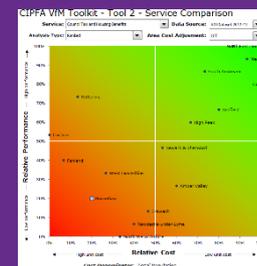
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<http://www.cipfa.org/services/networks/p/procurement-and-commissioning-network/subscribe-to-the-procurement-and-commissioning-network>

Recent Support

- Financial Assessment of Bidders
- Category Management
- Procurement Review
- Tender Moderation
- Contract Management Review

E: Mohamed.hans@cipfa.org



Value for Money – Toolkit

An easy-to-use visual tool that allows you to track the costs and performance of all your services and compare them to your peers. Find out more at:

www.cipfastatistics.net/vfmtreekit

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