Procurement in the British Virgin Islands

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Introduction

The BVI Public Accounts Committee and the Auditor General published a series of reports raising concerns over BVIG procurement procedures in general and specifically certain high profile major projects namely The Roadtown Cruise Pier Development and the Sea Cows Bay Project. The Auditor General had also issued reports on the Peebles Hospital and Greenhouses development projects. The Premier with the support of the Governor commissioned the Caribbean Development Bank (CDB) to review and where necessary make recommendations for improving the current procurement process.

Whilst the initial view was that the CDB report provided a way forward, the Governor requested further expert advice to determine whether it addressed sufficiently the specific issues raised by the PAC and/or Auditor General in relation to the concerns regarding certain major projects.

In producing this report, a number of documents were reviewed including reports issued by the BVI Public Accounts Committee, BVI Auditor General, CDB report “Country procurement assessment report for the British Virgin Islands”, relevant laws and procedures together with a consideration of the Auditor General’s reports on the Peebles Hospital and Greenhouse Development Projects plus any other document considered appropriate by the Governor.

This additional report, based solely on the information contained in the various documents, is intended to consider whether:

- the CDB proposals are likely to both achieve the desired robustness in the procurement process and adequately address the specific concerns of the PAC and Auditor General;
- the actions taken in regard to the Roadtown Cruise Pier Development and the Sea Cows Bay Project project were compliant with existing procurement procedures and whether the CDB proposals are sufficiently robust to ensure compliance going forward.
- Make any recommendations for further strengthening that the expert considers appropriate.

Summary of Findings

Governments globally must apply the highest professional standards when they undertake spending on behalf of their taxpayers. All reputable jurisdictions have procurement rules and there are many off the shelf examples of international standards of best practice on procurement, including those from the World Bank, EU, and professional bodies. In smaller jurisdictions, rather than simply adopting one of the above, it is better to consider a specific procurement law that includes the relevant standards but sets them in the context of the jurisdiction concerned and ensures compliance with related laws, especially those of a financial nature which will normally take primacy over the procurement law. In creating such a law, it is important that the key principles that underpin best practice are not overlooked.

Current best practice in terms of public procurement requires that ALL procurement is undertaken in an open, transparent process, achieving best Value for Money (VfM), appropriate quality and service to meet business needs, and appropriate governance.

The procurement approach and procedure must be relevant and appropriate for what is being procured and the market must be able to provide it at an affordable price. For larger or more complex projects especially those that have an impact on the wider public, social issues should also be incorporated into the procurement where they are relevant and proportionate to the subject matter of the contract.

It is suggested that there are four key principles that should be applied when undertaking procurement:

(a) the need to ensure that appropriate competition and propriety are present in government procurements and the award of contracts;

(b) the need to secure best value for money from procurement through the consideration of both financial and non-financial costs and benefits;

(c) the need to maintain fairness, transparency, equality and integrity in government procurements;

(d) the need to ensure that the highest standards of probity are observed by officers involved in the procurement, award and management of government contracts.

Governance

In terms of good governance, one principle that is considered relevant in procurement matters is the need for clear separation between political /policy making and operational delivery. In particular, those responsible for commissioning, designing, planning and delivering public services are not only clear about their own roles and responsibilities but are clear about the roles and responsibilities of others.

Actions taken can mean that an individual becomes both the political and administrative master, dealing with the development of policy and engaging in operational management. This results in a significant weakness in governance arrangements. It is critical that an effective separation of political and administrative accountability is realised.

As with some major projects that have been examined in other OT's it is clear from the reports issued by the BVI PAC and Auditor General that the following issues had arisen:

- No clearly defined requirement
- Lack of transparency
- Political interference
- Environmental issues not fully examined
- No effective Project & Programme Management
- Potential for partner to drive agenda and achieve maximum profit at cost to taxpayer
- Control and ownership
- Length of PPP: 25, 30, 50 years and associated issues, i.e. was the term of the project in the best interest of taxpayers.

Report by the Caribbean Development Bank dated December 2014.

The report, based upon an analysis of the existing procurement system in place in the Government of the British Virgin Islands, applied the established Methodology for Assessing Procurement Systems (MAPS). Whilst the report highlighted areas of good practice, there were a number of areas identified where significant improvement is required in the short term. It is considered that if these are implemented in full, they will go some way to addressing the concerns raised by both the PAC and Auditor General and generally improve control of procurement in BVIG. These areas include:

- The need for a stand-alone Procurement Act, supported by Procurement Regulations;
- Updating, completion and approval of a Procurement Handbook or manual;
- Development of a list of circumstances, justification and procedures permitting the use of waivers of the tendering process.

The Government of BVI is not alone in terms of needing a stand-alone Procurement Act. Prior to 2012, the Government of the Turks and Caicos Islands did not have an effective procurement law or process. This was resolved by the enactment of the Public Procurement Ordinance 2012 which consisted of both law and regulations in one Ordinance, supported by a detailed Procurement Manual. Around the same time, Bermuda was drafting a Code of Practice for Procurement which it is understood was introduced in 2013.

The BVI Auditor General identified in her report of the Port Development Project dated 31 January 2013 that the Protocols for Effective Financial Management (PEFM) which were executed on 23rd April 2012 between the Government of the Virgin Islands and the UK Minister for Overseas Territories were not in place during the early stages of the project. The Auditor General stated “that the provisions of this document however, echo general good practice with respect to major project planning and financing that should have been considered and observed, in the development of the project”.

This view is entirely supported as it likely that at least one of the Principles (11b) set out in the Protocols was not fully achieved and as with a similar port project in the Cayman Islands may well have resulted in the Minister for Overseas Territories calling for a review of the BVI port development project.

Conclusion

Given the various interests that have at one time or another sought to drive the direction of the port project, it is doubtful whether it will ever be possible to demonstrate that VfM was achieved. There was certainly a lack of transparency at key stages of the project and it is questionable whether an open process was maintained throughout.

In terms of general procurement, the lack of clear guidance as identified in the CDB report clearly impacted on the achievement of best practice and again there must be a doubt as to whether VfM has always been achieved. Examples of where best practice may have been compromised include the failure to apply tender requirements even where prescribed financial level have been exceeded. The lack of guidance in terms of what constitutes the condition(s) for waivers has almost certainly compromised best practice and the achievement of VfM and may have allowed contracts to be awarded without open and fair competition.

It is suggested that early action is required to take forward the recommendations contained within the CDB report to implementation. It is considered that this will address many of the concerns contained within the PAC report relating to the port project and the various Auditor General reports.

In an attempt to assist future major projects, Annex A sets out the strategic context of procurement and the key stages of complex project procurement. It is hoped that this will further strengthen oversight of such projects.

Annex A

1. The strategic context of procurement

The starting point for any Government activity is its strategic policy outcomes. It then develops policies to meet these outcomes and in turn uses operational activities to deliver them. The procurement process spans the whole life cycle from the identification of the need; through supplier selection and contracting to the delivery of the required goods or services; and where relevant, to the disposal of the asset(s) or service closure.

There are a number of factors which might make a project complex or high risk:

- It is not possible to define upfront the technical means capable of satisfying the objectives or the financial make-up of the project.
- The specification is complex and/or innovative.
- The procurement is novel to the Government entity or there are high risks in delivery; whether technical, geographic spread or reputational risk.
- The contract will be long term.
- Competition is restricted or there are only a few suitable suppliers.
- The capabilities and skills required to deliver the procurement are scarce or not understood.
- The contract will be funded by non-traditional means such as a PPP or PFI or based on unusual or innovative commercial models
- There are significant integration elements with existing business requirements.

At one end of the spectrum, a low value, low risk, non-repeatable purchase may require minimal process, governance or expertise. At the other extreme, a major capital project or outsourcing will require a strong project structure, considerable and diverse expertise, governance and processes, advanced tools and several years' worth of effort.

Options for financing may include Public Private Partnerships (PPP), which can help with funding but may sometimes also provide options to incentivize project and operational delivery. However, as many countries have found, while PPPs can be a useful mechanism to access finance they do not always remove the financial liability they intend to away from Government. Furthermore, this type of more complex financial arrangement makes following a rigorous procurement process even more important e.g. seeking make changes to the contractual arrangements around a complex capital projects can be costly.

PPPs style financing may offer limited scope for financing given the FFR's requirement that alternative financing mechanisms which do not fully transfer risk to the private sector are treated as conventional debt (because of the contingent liability on BVIG). Without effective consideration of the impact of each of these projects it could result in the British Virgin Islands Government being saddled with significant net debt albeit via contingent liability or otherwise.

2. Complex project procurement

This report is focused on the complex end of the procurement spectrum, as this is where it is considered that the proposed Port Development Project naturally sits. This is because it may be considered to be one-off, or at least irregular in nature and these are often the areas where the greatest risks and opportunities lie, where public scrutiny is strongest, and where senior managers who are likely to be non-specialists are most likely to have a key role to play.

The three key stages (described generically) of a typical complex procurement process are shown below:

- Pre-procurement
- Tender process and award of contract
- Management of contract and supplier

Stage 1 – Pre-procurement

a. Pre-Procurement Planning

It is essential that effective planning is carried out prior to any procurement and should include:

- consultation with stakeholders about what is needed and the budget that is available to fulfil the need
- engagement with potential suppliers / partners to understand the solutions that may be available and to get feedback on how the requirement may be best met
- establishment of effective governance arrangements and resourcing plans
- if the government entity does not have the necessary expertise, advisers may need to be appointed to help ensure novel or difficult projects are established on a sound footing.

b. Developing the Specifications

It is important to provide sufficient detail to allow the potential suppliers / partners to respond to requirements, whilst leaving room for innovation where appropriate. Outputor outcome-based specifications should normally be used. The focus should be on what Government wants to achieve, not how a supplier or partner is to provide it.

This challenges suppliers / partners and gives them the scope to develop innovative solutions. In certain circumstances it may be essential to specify exactly what is required in detail. Specifying an accepted industry standard for a technical solution is good practice whereas specifying non-standard or ‘gold-plated’ solutions will always lead to higher costs and should be avoided.

For complex or novel requirements, developing the specification will almost certainly be an iterative process. The starting point is a high-level statement with the requirement progressively refined to arrive at the level of detail needed for the final specification.

This approach, however, does not remove the need for good clarity on the required outputs and outcomes from the start. Suppliers / partners also need to have a good understanding of the key constraints within which they will have to work. Indeed, many failed procurements can be traced back to a lack of clarity on specifications or desired outcomes.

c. Project and Programme Management (PPM) and Skills

Government entities, normally through Accounting Officers who invariably will be the Permanent Secretary if a Ministry or the Chairman if a Public Body, are responsible for the selection and appraisal of projects and programmes and should consider running their major procurements as projects.

A consistent and systematic approach to PPM is essential. An effective PPM approach ensures that the procurement project’s processes are systematically assessed, remain on track or, where necessary, adjusted to maintain progress.

For major or complex projects, a Senior Responsible Owner (SRO) should be appointed at the outset, and PPM best practice tools and techniques applied as appropriate. The SRO is the project's owner and champion and is ultimately accountable for delivery of the project and should clearly define the required outputs of the procurement project, which must contribute to the overall business objectives. The SRO who will report to the Deputy Governor must have access to personnel with the appropriate professional skills, knowledge and experience.

A major procurement will require, as a minimum, skills in project management, procurement, law and finance. It may also need specialist input in areas such as security, HR or risk management. Such resources, if not already available in-house, may need to be bought in-house.

A checklist is provided for the SRO and the Steering Committee to help ensure VfM and a successful outcome not only for the proposed development but it is suggested, for all major procurement activities.

d. Investment Appraisal for the Procurement

A business case evolved from a Strategic Outline Case and possibly an outline business case should justify the procurement activity and expenditure, and communicate whether the investment is worthwhile in VfM terms, assessing objectives, benefits, strategic fit, deliverability, affordability, options and suitable commercial approaches.

Subsequent decisions will focus on whether the investment continues to offer VfM in light of any changed circumstances, and the delivery of anticipated benefits. For major and complex projects, the business case should be continually revisited at key points in the procurement life cycle, to ensure that the project's original aims, objectives, user requirements and benefits continue to be met.

e. Engagement with potential suppliers / partners

It is always useful to involve potential suppliers / partners in the early processes around establishing requirements, procurement strategy and approach. It is essential however, to avoid giving unfair advantage to one or more potential suppliers / partners and to ensure that all exchanges are transparent and compliant with the local procurement regulations. In particular cases, it may be necessary to engage with suppliers to ensure effective competition or to consider long-term capacity issues. The right approach can help, for example, in creating capacity where previously none had existed – perhaps by encouraging potential suppliers / partners in an associated sector to develop the new capabilities required.

f. Procurement Strategy

The procurement strategy should contain options analysis and recommendations around a range of issues depending on the precise nature of the procurement. Typically, for a complex procurement, it would include discussion of the contracting process itself; the number and nature of suppliers required; the length and type of contract as well as contract and supplier management issues.

Consideration might also be given as to whether an existing contract could be used. This can be an effective and efficient route, saving time and money in the procurement process. However, care must be taken from both a legal and VfM perspectives - can the contract be used given how its scope was originally defined and would a competitive process drive a better deal?

Funding and risk transfer options that may be part of PPP/PFI type arrangements should also be considered. These are often complex due to the financing mechanisms required and specialist advice may be needed to ensure that the requirements of the FFR are maintained.

A PPP / PFI approach may be appropriate where it can be shown to deliver the necessary VfM. It can offer VfM for certain investments through a long-term focus on whole-life costs, risk management or risk transfer expertise, and greater certainty for the Government that services will be delivered to the specified standard.

In all procurements, but most critically in PPP / PFI's, it is imperative that risks associated with the procurement project are borne by the party best able to manage them. Transferring risk for the sake of it, and at greater cost than if it were retained, is never desirable.

Stage 2 – The Tender Process

Government entities engaging in procurement of any type are responsible for achieving VfM, normally through fair and open competition. In addition, they must comply with their legal obligations under any local or where applicable, international procurement rules. The latter is more likely in cases where a development project is funded by a donor agency in which case their requirements will take precedence over local requirements.

The most common process used consists of all or most of the following phases:

- Preparation
- Pre-Qualification
- Competitive Dialogue
- Final Tenders
- Contract Award

Ensuring the same, relevant information is available to all bidders demonstrates that the bid is winnable. Consider optimal contract duration to achieve best competitive leverage. The inclusion of benchmarking provisions within the contract terms so that the supplier / partner is incentivized to minimize costs, respond to market movements and maintain efficient performance levels.

Stage 3 – Contract and supplier management

Contractual relationships play a central and fundamental part in the delivery of Government services. The actions of suppliers / partners are often critically important, and when things go wrong, the failure can be expensive in human, financial and reputational terms.

It is therefore essential that strong and effective management of the operational phase of the procurement is in place to ensure successful service delivery. Contract management activities can be broadly grouped into three areas:

- **Service delivery management** – this ensures that the goods or services are being delivered as agreed, to the required level of performance and quality, and are supporting the business and operational need for the contract.
- **Relationship management** – keeps the relationship between the Government entity and the supplier / partner open and constructive, and aims to resolve or ease tensions and identify problems early.
- **Contract administration & change management** – this handles the formal governance of the contract and any changes to the contract documents.

This phase of the procurement cycle is typically the most lengthy, and for a PPP / PFI type contract can last for 20-30 years. The potential impact on VfM and overall effectiveness can be substantial, and it is therefore vital that the Government entity dedicates the right level of resources, skill and expertise into this critical function.

Even if a contract offers good VfM and performance when it is first placed, the lack of intelligent client capability can destroy that value very quickly as the contract term progresses i.e. BVIG will need to retain on a permanent basis the right expertise, preferably in-house. This is also a requirement of the Protocols for Effective Financial Management.

Deployment of supplier and contract management resources with the right technical and commercial skills should be considered throughout the procurement life cycle. It is considered good practice for the contract manager to be involved from the early phases of the procurement activity, rather than being brought in post contract award.

Continuous improvement in performance and VfM is necessary to generate benefits for Government entity and supplier / partner alike. Simply aiming to maintain performance is the equivalent of standing still and should be discouraged. To achieve this will generally require a win: win approach and a willingness to use processes such as value engineering or value management. This involves examining the function in order to improve the "value" of products or services for instance, when the pier(s) is not being used for cruise ships, consider utilizing them as an additional point to offload cargo thus improving the function but possibly reducing associated costs.

An effective and close relationship from the outset between Private Sector and BVIG Senior Responsible Owner (SRO) is also vital to success. However, senior officials should never forget that private sector suppliers have a primary duty to maximize returns to their shareholders.

The development of good, collaborative relationships with suppliers / partners is the right strategy for many major contracts, but an element of challenge, competition and focus on value must be retained in such relationships – it does not mean doing only what the supplier asks.

3. Undertaking and maintaining effective competition

Competition is the cornerstone of public sector procurement and should be the focus of all procurement. It not only underpins fairness and transparency, it is the main driver for achieving and being able to transparently demonstrate VfM in nearly all procurement exercises.

Key factors to consider in generating competition for public sector contracts are:

- Pre-procurement:
- requirements definition
- engagement
- procurement strategy.

Depending on the contract it can be important to stimulate and encourage competition by maintaining a level playing field in terms of the knowledge of potential suppliers/partners. Mechanisms to achieve this can include establishing a bespoke project procurement website and drawing potential suppliers towards it, market briefings, supplier days, press articles or advertising. An emphasis should be placed on communicating the requirements of a possible tender in simple terms. Furthermore, keeping the financing arrangements simple is also key to generating effective competition and helping to ensure VfM.

4. Why Value for Money (VfM) matters

Due to the limited resources often available to government, ensuring VfM in procurement is essential to ensuring the optimum use of scarce budgetary resources.

Given that VfM is the primary driver for procurement, it will usually mean obtaining the product or service with the lowest whole-life costs that is ‘fit for purpose’ and meets specification. Where an item is chosen that does not have the lowest whole-life costs, it is essential that the additional ‘value added’ benefit is clear and justifiable. Assessment of bids should be conducted only in relation to a published set of evaluation criteria, which must be relevant to the subject of the contract, and any ‘added value’ that justifies a higher price must flow from these defined criteria.

VfM also incorporates affordability - clearly, goods or services that are unaffordable cannot be bought. This should be addressed very early in the process and ideally at the business case stage before procurement commences. In order to address this issue, a change in procurement approach, specification or business strategy may be required.

VfM should always be assessed over the whole life of the project to take into account sustainability issues. This should include disposal (either sale proceeds or decommissioning costs) and also take into account the costs and benefits to society as a whole, not simply those directly relevant to the purchaser e.g. environmental impact.

5. Ethics and propriety

Across the world both Government and private sector procurement suffers from fraud and other impropriety. There have been instances where suppliers have been found to have operated cartels or colluded tacitly to limit competition and drive up prices; there have also been instances of fraud being perpetrated by Government Ministers and officials. It is imperative that senior management remain vigilant and that the governance processes are embedded and continually improved.

Strong processes with multiple checks, adequate transparency and good governance are the best routes to guard against most potential problem areas. Examples of fraud may include falsifying invoices, contracts awarded unfairly in return for bribes or suppliers inflating prices in collusion with staff and/or competitors.

Key points to note include the need to be aware of, and respond appropriately to, conflicts of interest e.g. significant shareholdings in a potential supplying firm and the need for continued caution and transparency regarding supplier hospitality, particularly if a supplier is currently engaged in a procurement process. Where gifts (in-kind or otherwise) are made they should be transparent, and even so they are very rarely acceptable. It is important to note that merely recording gifts or hospitality in a ‘hospitality book’ does not make them inherently acceptable.

CHECKLIST

- Apply Best Practice PPM techniques and disciplines to the procurement process, and ensure that the people responsible for it have the necessary capabilities (procurement and PPM, change management etc.).
- Ensure strong leadership, governance arrangements and scrutiny processes are in place.
- Define a procurement strategy with clear options, deliverables, objectives, outputs or outcomes at the start. Ensure the interests of the Government entity and the supplier / partner are aligned.
- Engage with the market at the earliest opportunity, stimulate and encourage competition.
- Wherever possible, develop outcome-based specifications that encourage innovation to describe the requirements – ensuring that they are as ‘standard’ as possible in the eyes of the market (bespoke solutions have a high price).
- Allocate risk optimally between the Government entity and supplier / partner, with risks carried by the party best placed to manage them.
- Use a competitive, efficient, fair and transparent procurement process, focusing on whole-life costs and with evaluation of bid proposals from a qualitative, as well as quantitative, perspective.
- Agree a fair but flexible contract to ensure that any changes to the original requirements, or changing technology, can be accommodated during the life of the project to ensure VfM.
- Ensure the contract gives the supplier / partner real incentives to deliver, and has strong mechanisms to take meaningful action where they do not.
- Develop a strong ‘intelligent client’ function that can handle contract and supplier / partner management issues professionally, and considers strategic future options well before the end of the contract.