

Convention Centre Audit Report - can Government be sued on procurement problems?

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The Mandatory Rules – a major feature of central Government procurement – increase the prospect of legal claims against Ministries and Departments (but not other public sector agencies).

The Convention Centre is one of the biggest procurement projects that Government gets involved in. The Ministry responsible for All of Government procurement had a lead role in the procurement. All that points to the Ministry following best practice.

Yet the Office of the Auditor-General (OAG) lists numerous failings, mostly of a basic nature. For those that follow Government procurement, such problems, even on a big project run by the Ministry responsible for All of Government procurement, are not surprising. They are the sort of problems that have happened before, and they'll happen again. While procurement standards have improved in Government – in part due to the lead taken by the Ministry's All of Government procurement team - many involved in this area know of these kinds of problems repeating themselves.

NZ Inc loses out

The real pity is that Government loses out on great outcomes. The various Government guidelines and rules are excellent, particularly the Ministry's and the Auditor-General's. They are flexible, strategic and pragmatic, in the right hands. They work brilliantly, if applied correctly, even for complex projects such as the Convention Centre where there are complications such as regulatory trade-offs under the Gambling Act. Government doesn't have to fit complex square pegs into process round holes.

The procurement guidelines and rules don't cut out trade-off solutions such as the solution proposed involving regulatory concessions. Nor do they cut out

consideration of quite different proposals. To the contrary, they facilitate this approach, and can lead to better outcomes as complex alternative options are developed (or better outcomes even if only one provider emerges as the most likely, such as SKYCITY in this case). Follow those flexible processes well and Government gets to learn of and develop the best solutions for NZ Inc.

So this is not just about following process, giving suppliers a fair chance, and complying with New Zealand's international free trade treaty obligations (the Mandatory Rules referred to below implement those treaty obligations).

Why do these problems happen?

We won't comment on media suggestions about what happened between Ministers and officials. Four key things seem to contribute to the problems:

- It seems that it's not recognised enough that, if handled strategically and flexibly, the procurement processes can produce better outcomes for Government, instead of just being process issues.
- Regular suppliers to the public sector often have war stories about how they've had problems with Government sector procurement; multiple variations on the conference centre theme. But they say they won't complain for fear of being blackballed in the future, by getting a bad reputation with the public sector. Therefore not much happens to keep the pressure on. If so many errors are made on this big procurement by the lead All of

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Government procurement agency, what's happening on smaller and less controversial purchases by other public sector entities?

- Relative to other OECD type countries, legal and other remedies are limited. There's little to keep public sector purchasers in line. The courts' intervention into these things is decidedly light-handed. Even an adverse Auditor-General report, based on past experience, is unlikely to lead to major changes across the public sector. Today's front page news: tomorrow's fish and chip paper. Fatalistic resignation flows from what has happened in the past;
- There seems to be pressure to just-get-on-and-do-it sometimes, without leveraging the benefits of a well-run strategic procurement which fully enables a pragmatic approach. Capable procurement and other managers can be gazumped in the haste.

And not to be overlooked is that –if the OAG view is accepted – Government would still have ended up with a great deal with SKYCITY, without all the unnecessary media and other flack.

Legal effect of the Mandatory Rules

One change that could up the ante for Central Government is the Mandatory Rules, a set of requirements central Government must follow in procurements. (They are not obligatory for the public sector outside Ministries and Departments). Those Rules are a restatement of sensible Motherhood-and-Apple-Pie procurement requirements. Like the other guidelines, they are strategic and pragmatic, if optimally used.

The key point is the prospect that, as the OAG notes in its report, those Mandatory

Rules have "legal" effect. That's consistent with the statement by the Ministry's predecessor (MED) that it had received legal advice to the effect that a breach of the Mandatory Rules by central government would be illegal.

This is an important change as other procurement guidelines and internal Ministerial guidelines and processes have limited legal effect in Court, on court review of procurements. Having a legal obligation would change the ballgame and up the risk of Government being sued for failing to apply the Mandatory Rules. And that could encourage Government to apply best practice.

In relation to the conference centre, the OAG rightly indicates that the Mandatory Rules might only have applied in the early stages of the process, although the report does talk about the SKYCITY deal as a concession agreement, which might be covered by the Rules anyway. Subject to that last point, the solution moved away from procurement as envisaged by the Mandatory Rules, to one of no funding by Government and a trade off on regulatory relief. But it might be that the early stages – clearly covered by the Mandatory Rules – have on-going impact and the later stages fall within the Mandatory Rules anyway.

It's perhaps surprising that the OAG expresses some confidence about the outcomes of this process, despite its flaws, given Government has not had the benefits of a well-run procurement. The reasons given don't seem to pass muster; how can it be known what the best outcomes are without the benefits of a great procurement process? But we can also see why the OAG might take its carefully worded approach in the report, to free up moving to resolution sooner than later.

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