

Some interesting procurement issues for PPPs and other complex public procurement: the UFB initiative

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In our article, *PPPs and Fibre Broadband Networks*, we outlined the Ultra-Fast Broadband initiative (UFB) structure. Going to the market in this way raises some interesting challenges and opportunities from a public procurement perspective. Using UFB as an example, we cover particularly: (a) changes to the approach during the process; and (b) the use of discussions with bidders followed by further refinement of proposals.

The increasing array of PPPs raises many of the opportunities and challenges that also arise in complex public sector procurement. This applies to acquiring entities ranging from SOEs and Crown companies to local and central government.

Procurement requirements are often seen as a bureaucratic annoyance. In reality, well applied, they can greatly aid excellent outcomes. Procurement requirements generally reflect the best way that a purchasing agency can achieve optimal outcomes (value for money: the best solution and so on). The problem is often the lack of applying the requirements optimally: this is a common problem. Done well, the requirements can be the servant not the enemy of great outcomes. It's essential to consider issues that are much wider than just legal requirements. This is also a common failure point.

This article assumes an understanding of underlying NZ procurement requirements. These are overviewed in the NZ Chapter on Public Procurement we wrote for Global Competition Review's *Public Procurement 2010*.

Issues

The UFB initiative is an example of how challenges can arise.¹ It's interesting to think about issues arising from the following:

- As our PPP article notes, there is a view some hold that the structure set out in the equivalent of the initial RFP (the UFB Invitation to Participate) is not sustainable, and needs to change. What might this mean for the approach if that is so?
- The bidders have submitted initial proposals, which they may be able to amend after discussions with CFH. What are the issues around those discussions?

Change the structure of the UFB initiative?

If the Mandatory Rules applied to the UFB initiative, essential requirements and evaluation criteria can't materially change even if the right to do so is retained, without going back to the market (at least by notice to all bidders with opportunity to make changes in bids). Even if the Mandatory Rules don't apply, there is significant encouragement to apply them, particularly as central

¹ None of this article is a criticism of the approach by CFH or MED, much of which is contained within the confidential handling of confidential bids. Therefore, it is only possible to raise the sorts of issues that can arise, as illustrations of the challenges.

Government is so closely involved. Additionally, there are wider requirements, which can vary from case to case. Wider procurement requirements (beyond the Mandatory Rules) generally apply at least to the network procurement agreement between the LFC and the Partner, and such requirements or related requirements (e.g. as to funding of the CFH) apply more widely in the initiative.

So if the UFB initiative requires a substantial overhaul, how does this happen? Whether this is needed is not known as bids are confidential: change may not be necessary if bids fulfil the requirements and objectives (in particular, if non-compliant bids are not relied upon).

Bidders were able to put in alternative bids. However those alternatives had to show how they would better deliver the stated objectives. Can a changed approach be justified by bids where they don't better meet the original objectives?

Like most RFPs, UFB has clauses allowing some room to move. But how far can they be stretched, without, for example, giving notice to the market? "Catch-all" provisions allowing change can go only so far in this environment.

Change is possible and should happen if that best achieves desired outcomes: the issue is how it is done.

Wider consultation?

This article focuses on public procurement issues. There are potentially wider public sector and maybe public law issues at play too. For example, if the model is to move significantly from that on which Government sought submissions, should it (or must it) go back and seek submissions from all stakeholders: after all, the users of the services have a keen interest in all this. Indeed, as a matter of economic policy, their interests are generally the key determinant for policy making.

An example: by an amendment to the initial RFP document, bidders can submit a higher wholesale price for premises which are more costly to connect. Is it enough for that change to be made in this way? That is a big policy call (compare for example the advice last week in Australia that all connected to the fibre network should receive the base service at the same price).

Discussions with bidders

Currently, CFH is able to discuss issues with bidders on a one-on-one basis, before bidders put in updated proposals (and later steps such as negotiations of terms and conditions). Discussions and then proposal changes are allowed for in the UFB documentation.

Public sector often handles this too conservatively (and loses the benefit of proactive discussions) or too liberally or informally (with significant risks as a consequence). To be remembered is that project risk is far greater than probity risk. Further, taking a too narrow approach in the perceived interests of probity in fact can do the opposite: probity requirements are not met, and project objectives are not met. Crafting the solution calls for a careful and holistic approach.

Correctly set up, discussions as proposed for the UFB can achieve optimal project and probity outcomes. In our view, they are to be encouraged.

Adding a formal step with detailed one-on-one negotiations (with possible major changes to the initial proposal as a result) is relatively novel in New Zealand. Contrast this with the EU with, for example, its Competitive Dialogue process:²

New Zealand does not have a formal process for these types of discussions. The approach needs to be carefully developed by applying the principles, which are derived from a variety of sources, and depend on specific circumstances, as we note in the chapter on Public Procurement referred to above. Having rules of engagement that are carefully crafted and implemented is critical. Off-shore guidance in other regimes has to be treated carefully in undertaking this analysis: it is guidance only and can be misleading.

Issues to cover include the following:

- What is the best way to deliver optimal project results consistent with or enhanced by probity requirements?
- What information is shared with all bidders?

² See for example, E.R. Yescombe, Public-Private Partnerships Para 6.3.1.

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- Can key information be kept from others, and in what circumstances? For UFB, the potential solutions, and the way in which they can be negotiated over time, will vary greatly. As we noted in our PPP paper, the late entry of Singtel into the Singapore NetCo shows how things can change radically. The complexity of UFB makes for challenges in crafting the communication framework. Fortunately there is some guidance from other countries.
- How does this all fit with the issue above: the prospect that the final solution may depart materially from the original objectives and approach?
- How is the complex array of issues to be handled, given that there is no linear solution to this initiative?
- The purpose of the discussions is stated to be only for CFH “to gain a better understanding of [the proposal]”.³ How can CFH, in that context, feed back information and ideas to the suppliers to enable them to refine their proposals, when this is not stated? That is a challenge that needs to be met, in this

³ Although the summary takes a broader approach.

environment where the stakes are high, and therefore parties may be more willing to take action where things go down the wrong path.

- How is probity risk and opportunity balanced with wider project risk and opportunity?
- To what extent should there be an audit and paper trail, and the involvement of probity auditors, etc? Related to this, what level of informality/formality is required or optimal?

Conclusion

These are increasingly important issues as complex procurement becomes more prevalent, and PPPs are more acceptable to government. This is not the place to seek to resolve the issues given: (a) their complexity; and (b) the reality that each situation can differ, as we outline in the NZ Chapter on Public Procurement, noted above.

Absolutely key is that, optimally implemented, procurement requirements can foster better project outcomes, and work both pragmatically and sensibly. Complaints about the bureaucracy usually stem from misapplication of the requirements.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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