Procurement to Partnership: step two in "the Art of the Possible"

The 2016 pamphlet, "*The Art of the Possible in Public Procurement*" ("*The Art*") resonated. Matt Robinson of the Community Development Corporation, for example, wrote: *"in nearly 10 years of trying to understand and navigate UK public procurement it is by far the most readable and positive thing I have ever seen committed to paper; a major achievement". It is cited, among others, by*: the Local Government Association ("*LGA*"); the Government Outcomes Lab; the UK National Advisory Board on Impact Investing, Lloyds Bank Foundation; and the Connected Places Catapult "*Challenging Procurement Link Library*". It is referenced in the Government's 2018 Civil Society Strategy.

The message was simple: far from being an obstruction to creative and innovative commissioning, the Public Contracts Regulations 2015 are, by design, purposive, permissive and facilitating.

I co-authored "the Art" (with Frank Villenueve-Smith, of the leading transport social enterprise, HCT Group - see www.hctgroup.org). A copy is available by return email from JulianBlake@stoneking.co.uk, with a linked paper, also from 2016, championing the "*Innovation Partnership*" procedure.

As the positivity of this "*Challenging Procurement*" series illustrates, there is an increasing recognition that the procurement regulations have indeed been a scapegoat for poor commissioning. In the working environment, attitudes have distinctly moved on from "*we cannot because of procurement barriers?*" to "*we know we can, but how?"*

"*The Art* " provides some direct answers: serious consultation with the user and provider cohorts; the Light Touch Regime; the over-arching principle of "proportionality"; integrated social value specifications; understanding the only selection criterion is the optimum balance of quality, cost and social value.

A deeper answer is: start with "commissioning", not procurement. A deeper answer still is: interrogate the meaning of a "market" in public services.

Tony Judt, the pre-eminent historian of post-war Europe, wrote, in his 2010 cri de Coeur, "*Ill Fares the Land*": *"public services cannot be left to the vagaries of the market. They are, in the overwhelming majority of cases, inherently the sort of activity that someone has to regulate – that is why they ended up in public hands in the first place".* Public service "markets" are actually, quasi-markets, in which competent public authorities are acting, by whatever means, to secure the public service essentials of: requisite quality; full coverage; sustainability; and affordability, which a pure market will not necessarily deliver.

One actual problem with the procurement regime, is that it does not expressly provide for the distinction between public authority market purchasing, for example of IT systems and public service contracts, which may, in whole, or part, be better commissioned through direct delivery, or public benefit partnership and by non-service contract methods, including: investment; co-investment; subsidy; and community engagement, mobilisation and asset transfer.

The European Commission ("*EC*") has, though, been clear that, procurement may be applied to meet social objectives, most obviously in public services. Unfortunately, the UK paid little attention to the

EC's: "*Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, 2010*"; or its "*Social Business Initiative*", which underpinned the 2014 procurement reform; or the provisions of the resulting "*EU Public Contracts Directive 2014*", which promoted socially-focussed procurement, notably the new "*Innovation Partnership*" procedure.

Meanwhile, progressive providers became increasingly frustrated with process over purpose procurement. Repeatedly, innovative propositions were welcomed, but engagement froze when procurement was mentioned. Public law, properly applied, would never prevent good things happening.

Before the 2014 Directive, two commissioning pathways for securing public service innovation were, to recognise that prescriptive procurement does not apply to: a unique service offering, as, by definition, there is no relevant market; or to a co-investment joint venture, because that is a not a service contract. The LGA also highlights the importance of "*pre-commercial procurement*".

However, risk aversion meant concern that "uniqueness", or a "joint venture", might be challenged. An answer to the first concern is that "uniqueness" may be tested by a prior notification ("*Voluntary Ex-Ante Transparency Notice*"), or a prior invitation to express interest ("*Prior Information Notice*"). The EC provided an answer to the second concern, with the Innovation Partnership procedure.

Dispiritingly, it has taken five years for Innovation Partnership to come into focus as, in the words of Christopher Bovis, Professor of Business Law at Hull University: "*a fantastic opportunity to create the business case for innovative service design and a one-stop shop for design and delivery".* It was first ignored; then no one used it "because no one was using it". Now there are pioneers in Leicestershire and Oldham.

In every public service forum, there are the stirrings of transformation. Everyone agrees public services should be delivered with a more relational, less transactional, sense of purpose-driven commissioner/provider partnership. It is a short step to adding: social/impact investors; local anchor institutions and employers, and critically, the user/beneficiary groups, to the partnership concept and a bit of a longer step to realising the aspiration of integrated multi-sector, multi-stakeholder local community, developmental and long-term partnership as the new commissioning norm. All the resources are there.

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