



18th February, 2020

Notes from POGO Call 28th January, 2020.

Notes by Ruairi Macdonald, GO Lab Research Associate

By Conference Call

Number of participants: 20

INTRO from Chair (**Anne Davies**)

- Anne thanked the GO Lab for the invitation to chair and welcomed everyone.

ANNOUNCEMENTS / HOUSEKEEPING (Ruairi Macdonald)

- Suggested cycle of the monthly calls.
 - Week 1. Draft meeting notes or blog from previous meeting are written up by Ruairi and distributed.
 - Week 2. Comments on notes/blog and suggested agenda items for next meeting are due from group members.
 - Week 3. Notes/blog from last month's meeting are published on our webpage. Agenda for next meeting is distributed.
 - Week 4. There is a conference call per the agenda.
- Calls agenda would follow similar format each time, including substantive discussion and emerging insights or update on a specific project.
- Upcoming deadlines include:
 - Deadline for Feb Agenda Items: Tuesday 11th of February.
 - February Call: Tuesday 25th 4PM GMT
- Everyone was invited to join the new POGO LinkedIn Group:
<https://www.linkedin.com/groups/12357605/>
- Ruairi introduced **Mark Roddan** as a GO Lab 2020 Fellow of Practice
<https://golab.bsg.ox.ac.uk/community/news/2020-fellows-practice/>.
 - Mark Introduced himself as a procurement practitioner. He is Joint Head of Procurement for North Somerset and South Gloucestershire Councils. Prior to his current role Mark worked in central government. Prior to this he worked in a bank in various finance roles.
 - Mark described a concern that procurement was too focused on the process. He would like to see procurement become more strategic.

SUBSTANTIVE DISCUSSION: Professional judgment – the scope of procurement professionals' discretion in law and practice. (Discussion introduced by Julian Blake).

- Two resources were shared in advance.

- Villeneuve-Smith, F. and Blake, J. (2016) *The Art of the Possible*, E3M, <https://golab.bsg.ox.ac.uk/knowledge-bank/resources/art-possible-public-procurement/>
- Julian Blake, Procurement to Partnership: Step Two in the “Art of the Possible.” Prepared for Catapult Connected Places, <https://golab.bsg.ox.ac.uk/knowledge-bank/resources/procurement-to-partnership/>
- **Julian Blake** offered practical perspective from years providing advice to providers.
 - Procurement practice has become too process orientated.
 - The Art of the Possible was born of a frustration that people who had innovative solutions and wanted to collaborate around solving problems were being forced through a process that wasn’t fit for purpose.
 - Procurement professionals have wide discretion that they do not use.
 - The legal principle of reasonableness is instructive. Procurement professionals must be *unreasonable* (i.e., that “no reasonable person would make that decision”).
 - *[Ruairi thought when preparing notes: Is “Wednesbury Reasonableness” the standard here? If yes, could the three limbs of this standard be illustrated with procurement hypotheticals?]*
 - *[Julian’s response: is ultimately the public law test of reasonableness, subject to any more specific statutory, case law, or official guidance aids to interpretation. But my point really is that reasonableness is bounded by parameters of manifest unreasonableness, which is an approach explicit in EU references and between the parameters there is significant latitude without right/wrong answers, where good faith, considered, professional judgement is the proper legal responsibility.]*
 - There is a fear of challenge based on a misperception. Some companies challenge as part of their regular process. People are afraid of challenges, but challenges *in social services* are not the norm and, anyway, are hard to win. This Julian’s observation from direct practical experience
 - **Anne Davies**, as Chair, asked the first question: If these are the challenges, how can they be overcome?
 - Julian suggested that the Public Service Transformation Academy (PSTA) was working on this. There are several supplier groups and commissioner groups. There should be an increased focus on social value and a recognition that social services are not a regular market, so simply relying on or approaching procurement as a competition in a market is not appropriate.
 - **Mark Roddan** offered comment(s): Some of challenges are culturally ingrained. Too much training delivered by the legal profession with a focus on reducing legal risks. There is insufficient focus on skills like negotiation, strategy, and evaluation. There is too much focus on keeping yourself out of court. Sometimes legal risks are worth taking. For example, if we have a *shortage* of care home providers in our market, why are we worried about a challenge from a hypothetical care home that we don’t know about. If another care home does exist and they challenge, well, great, we’d love to hear from them. But otherwise we need to keep moving.

- **Patrick Maes** offered comment(s): ~~These comments are based on my experience as a contracting officer.~~ Part of the problem is not taking enough time to design co-design a service in joint effort between commissioner, procurement officer and technical experts. Sometimes, Commissioners (or experts) can fall in love with their own solution that is not always transferable to the market. The need for training is therefore an issue for all parties involved. We need to train people on economic insight, management and negotiation – as well as on regulations. You can tell someone what a hammer looks like and what a saw looks like, but that is not training them to be a carpenter.. On [Julian's] point about social services not being a market: It is a market, but it is one where there is only one or few buyer(s) and so the analysis must be different from other markets.
 - Julian responded to the latter comment with a clarification. Julian's point is/was not that there is no market, but that any market cannot be left unmanaged/overseen/regulated, because a market does not necessarily provide the full quality, coverage, sustainability, affordability and development we need in public services. Julian suggests that means we should regard the status quo as a quasi-market. Julian agreed with Patrick's other points.
- **Ruairi Macdonald.** Towards end of meeting Ruairi mentioned some recent papers from Italy that offered a different perspective on increasing discretion:
 - Coviello, D., Guglielmo, A., & Spagnolo, G. (2018). The effect of discretion on procurement performance. *Management Science*, 64(2), 715–738. <https://doi.org/10.1287/mnsc.2016.2628>
 - Itrunaite, A., Giorgiantonio, C., Mocetti, S. & Orlando T. (2018), Discretion and supplier selection in public procurement, Bank of Italy, Working Papers, No. 1178, https://www.bancaditalia.it/pubblicazioni/temi-discussione/2018/2018-1178/en_tema_1178.pdf?language_id=1.
 - [Ruairi addition while preparing notes:
 - Adding this very recent (work in progress) thesis from a Stanford economics student looking at US public procurement that suggests raising the threshold under which buyers have discretion would benefit the government. Rodrigo Carril (2020) Rules Versus Discretion in Public Procurement. Unpublished, 2020. <http://stanford.edu/~rcarril/carrilJMP.pdf>
 - Adding this old but good book from a giant in the US procurement world: Kelman, S. (1990). *Procurement and public management: the fear of discretion and the quality of government performance*. Washington, D.C: AEI Press.]

EMERGING INSIGHTS / PROJECT UPDATE: #WeBuySocialEU (Discussed by **Abby Semple**)

- **Abby Semple** described a European Commission (EC) project run by Local Governments for Sustainability (ICLEI) on collecting good practices and raising awareness on socially responsible public procurement. See <https://iclei-europe.org/projects/?c=search&uid=siLL25PG>
 - This project runs from September 2019 – February 2021.

- Emerging insight / things they are seeing:
- Popularity of using employment provisions / promises to get more value from procurement.
- Increased confidence in use of reservations (i.e., restricting procurement to for example, social enterprises). [Ruairi: See EU Directive on Public Procurement (2014/24/EU) Article 20.]
- Not seeing a lot of “light touch.” [Ruairi: As above: Articles 74 – 77.]
- Not seeing a lot of social impact bonds or other outcomes-based approaches.
- Not seeing a lot of accessibility provisions in public contracts, but this may change based on EU accessibility reforms, such as the EU Web Accessibility Directive [Directive (EU) 2016/2102]. Accessibility is an issue to watch.
- **Christopher Yukins** highlighted that this was an area where European and US policy makers had been cooperating / learning from each other. This is an area for harmonisation in a TTIP-like context [Transatlantic Trade and Investment Partnership].

UPCOMING EVENTS / ANY OTHER BUSINESS

- **Christopher Yukins** highlighted two upcoming events: Next Meeting Info:
 - King’s College, London – GWU Public Procurement Symposium – March 16, 2020.
 - Transatlantic Conference on Public Contract Administration – University of Warsaw – March 18, 2020.
 - For more info on both events see:
<https://publicprocurementinternational.com/2020/01/28/one-week-in-march-two-european-conferences-on-public-contracts/>.
- **Ruairi Macdonald** highlighted:
 - GO Lab Social Outcomes Conference 3-4 September 2020 at the Blavatnik School of Government, University of Oxford.
<https://golab.bsg.ox.ac.uk/community/events/soc20/>
 - Save the Date: GO Lab Call for Academic Papers ***and Practitioner Presentations***. Abstracts / descriptions due by 30th April, 2020. See
https://golab.bsg.ox.ac.uk/documents/1068/SOC20_CallPapers_200120.pdf

CLOSE by Chair

- Anne thanked everyone and adjourned the call.

[I apologise in advance for any errors in these notes. I hope the notes make sense and are helpful. Thanks, - Ruairi.]