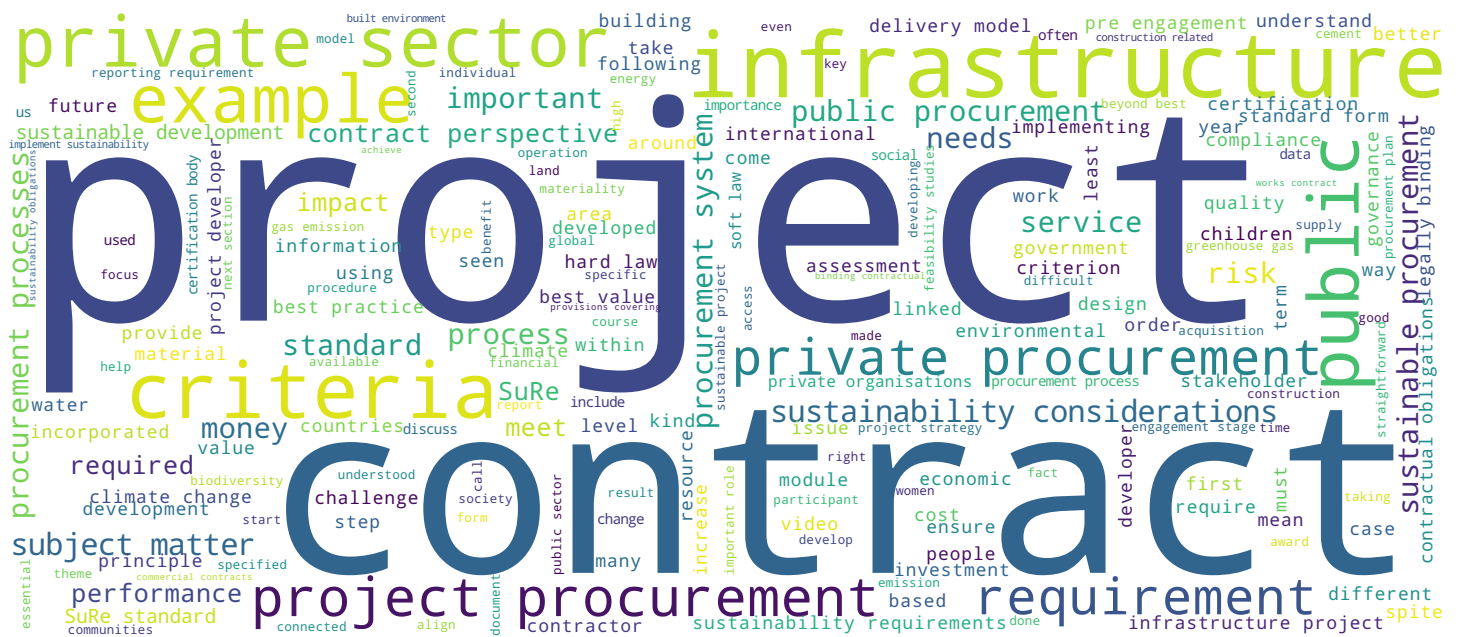


Building expertise on sustainable and resilient infrastructure

Peter Boswell





Module resources available at:
<http://www.fidic.pro>

Hello and welcome everybody. My name is Peter Boswell. My background was in industrial process and plant engineering before I became the General Manager of FIDIC, the International Federation of Consulting Engineers. I now manage my own consulting firm and remain a special advisor to FIDIC. FIDIC represents through national associations in over 100 countries the 80,000 firms that make up the consulting engineering industry. Consulting engineers provide services to plan, design, procure, manage, and supervise the 8.3% of GDP invested in buildings and infrastructure, both civil and industrial. On behalf of the FIDIC Sustainable Development Committee I will be guiding you through sustainable project procurement - primarily how the SuRe infrastructure standard's criteria are incorporated into procurement using appropriate procurement management, delivery models, tendering procedures and contracts. FIDIC is a key actor in defining project procurement. For example, it has for more than 60 years published internationally standard forms of works contracts that underpin most major investments in infrastructure. I shall first say a few words about the module and please note that module's resources are available at FIDIC.pro.

Notes

Summary



0m 05s



Project Procurement:

Public or private developer coordinates the supply of the materials, equipment and services needed to build, upgrade or even demolish a facility.

We are talking about project procurement. This is where a public or private developer coordinates the supply of the materials, equipment and services needed to build, upgrade or even demolish a facility.

Notes

Summary



1m 07s



- The developer will use a procurement system

Public procurement:

- Ministry
- Authority
- Agency

The developer will use a procurement system and for public procurement, the developer may be a ministry, authority or agency.

Notes

Summary





- Infrastructure procurement is a tremendous opportunity to contribute to the sustainable development of the built environment

For the private sector, the developer can be an individual but will generally be a commercial organisation of a certain size, such as a project developer, an investor or a contractor which carries out the construction work. I start by noting that those engaged in infrastructure procurement have a tremendous opportunity to contribute to the sustainable development of the built environment.

Notes

Summary



1m 26s



Assumptions:

- Familiar with construction
- Not sustainable design but the procurement of sustainable design

This video aims to provide a practical overview of how a developer or owner from the public or private sectors introduces sustainability considerations during the procurement of construction-related services for sustainable buildings and infrastructure. The first video will describe the principles underpinning a developer's procurement system to implement sustainable procurement. The second and third videos then discuss the implementation of these principles during the key procurement stages, namely pre-engagement and acquisition. The overall aim is to understand how procurement by the public and private sectors is coming together so that sustainability criteria become enforceable and legally binding contractual obligations and not simply pie-in-the-sky wishful thinking. The module assumes that those using the module's materials possess a basic knowledge of construction. Furthermore, we do not consider the design of "green" or "sustainable" buildings and infrastructure. More specifically, we will not discuss technical design considerations that must be dealt with following a decision to develop or adjust the design of a project with a view to SuRe certification.

Notes

Summary



1m 44s



- Sustainable procurement spills over to the programme level (ISO 37101)

It is assumed instead that participants are familiar with sustainability principles and requirements as specified by the SuRe standard's criteria. The learning objective is straightforward: we hope that procurement practitioners from both the public and private sectors will better understand the principles and implementation of sustainable infrastructure procurement. We turn now to project procurement. The focus on implementing sustainable development at the project level is deliberate. It is chosen because it is difficult to imagine another way to develop and maintain a sustainable built environment. A 'project' may extend from a single facility to a system of physical components within a boundary. It also covers all project phases from the initial idea to solve a need by carrying out a construction-related activity such as new-build construction to the final taking over of the completed asset, and possibly the operation of the asset to provide a service. The programme level is considered to a limited extent because sustainable procurement requires an integrated, holistic, whole-building, whole-system approach where improvements to a specific project spill over into a wider programme of investment into built assets.

Notes

Summary





Public & private sector procurement:

- Face similar challenges

The programme level is also important because individual projects are increasingly expected to align with an overarching community-level management framework such as the ISO 37101 urban management system standard published by ISO, the International Standards Organization. It is therefore not a surprise that procurement is broad concept. It is a system to coordinate the supply of materials, equipment and services in order to meet a specific need such as constructing a hospital to carry out specified functions. The work required to procure a project, and the time programme for the main phases and activities will first need to be outlined by the developed, ideally in a project procurement plan prepared at the pre-engagement stage discussed in the next section. Development of the physical project will then entail several phases and both public and private organisations face very similar questions and challenges when implementing requirements into their procurement plan. This is because: a) public and private organisations must by law implement sustainability considerations into their procurement systems; b) public and private procurement best practices as we shall see are converging.

Notes

Summary



3m 12s



Public & private sector procurement:

- Face similar challenges
- Harmonisation (similar obligations; similar practices)
- Differences since different legal frameworks
- Sustainable procurement integrated into 'business-as-usual' procurement

There are nonetheless some fundamental differences between public and private procurement. The most obvious differences stem from their different applicable legal frameworks. More importantly, these differences become amplified when strategic objectives related to sustainability considerations are incorporated into procurement processes. However, please remember that it is unnecessary to consider sustainable procurement as a specialised type of procurement which is separated from the normal and well-established procurement processes. In general, sustainable procurement involves special practices and procedures that are integrated into normal 'business-as-usual' procurement processes.

Notes

Summary





- Aims for 'value for money' on a lifetime basis
- Allows delivering aspects beyond cost savings & quality

So you will hopefully have understood that procurement nowadays is no longer simply about buying the cheapest possible supplies or services of adequate quality. Instead, it is understood to be a process whereby organisations meet their needs in a way that achieves value for money on a lifetime basis and allows delivering aspects beyond cost savings and quality.

Notes

Summary



4m 49s



- **'Value for money'** widely used in public procurement

The term 'value for money' is widely used in national legislation regulating public procurement.

Notes

Summary



5m 08s



“Optimisation of the whole-life costs and quality needed to meet the user’s requirements, while taking into consideration potential risk factors and the resources available”.

- United Nations

The United Nations’ Procurement Manual defines best value for money as the “optimisation of whole-life costs and quality needed to meet the user’s requirements, while taking into consideration potential risk factors and resources available”.

Notes

Summary





- But still no globally accepted legal definition of sustainable development

However, the value for money concept is often seen as a limit to what can be required for a project so there has been a call for “beyond best value for money” in procurement. For example, the European Union’s Most Economically Advantageous Tender evaluation method (or MEAT) can include anything that provides ‘value’ to the procurer. Beyond best value for money also means that sustainability will be and is being continually redefined and re-interpreted. This means that is that there is no globally accepted legal definition of sustainable development.

Notes

Summary



5m 25s



Triple bottom line:

- Public sector at the very least, to align procurement with the sustainability concept
- Private sector to do more than the minimum (CSR)

The Brundtland Commission's triple-bottom line definition namely, "development that ... meets the needs of the present without compromising the ability of future generations to meet their own needs" is the most cited definition. This definition has inspired a wide range of national, international and supranational legal instruments. The main legal implication is that at the very least, the public sector is encouraged to align its procurement activity with the sustainability concept. The private sector is also expected to do more than the bare minimum required by law through instruments such as voluntary engagements reflecting Corporate Social Responsibility, or CSR.

Notes

Summary



5m 58s



Hard law:

- "...legally binding obligations that are precise or can be made precise through adjudication or the issuance of detailed regulations"

While there are efforts underway to increase the so-called 'hard law' regulation of CSR, this regulation remains limited. Thus most CSR regulation dealing with sustainability in private procurement is in the form of meta-regulation namely, regulation that supports private-sector self-regulation. There is also soft law. To explain these terms, hard law means "...legally binding obligations that are precise or can be made precise through adjudication or the issuance of detailed regulations".

Notes

Summary



6m 40s



Soft law:

- Comprises all regulation for which this obligation, precision or delegation is weakened

Hard law also requires regulations that “delegate authority for interpreting and implementing the law.” Soft law comprises all regulation for which this obligation, precision or delegation is weakened.

Notes

Summary



7m 11s



- Comprise legal and management frameworks that aim to ensure corruption-free & fair competition using logically related activities performed in a defined manner

A procurement system incorporating sustainability is therefore a legal and management framework for implementing procurement processes which are underpinned by methods, procedures and operational policies. The framework provides tools around which public, private and international organisations develop procurement systems to ensure corruption-free fair competition between suppliers. It does this using a succession of logically related activities that are performed in a defined manner.

Notes

Summary



7m 24s



ISO 10845 procurement:

- “Process which creates, manages & fulfils contracts”

So the legal regimes and frameworks within which public and private procurement operate are fairly clear. What about the main output of a procurement system, namely the contract or contracts made between the main participants in a project? For the ISO 10845 construction procurement standard, procurement is simply “the process which creates, manages and fulfils contracts”.

Notes

Summary





- Focus on the processes for establishing & implementing a contract that has three key stages

In other words, contractual undertakings are the principle output of any procurement system, at least as regards construction activities. This so-called 'contract perspective' for procurement focusses on the processes for establishing and implementing a contract. Here there are typically three stages.

Notes

Summary



8m 07s



Stage 1 Pre-engagement:

- Establish what is to be procured (organisation defines & specifies to some extent what it requires in order to satisfy its needs)
- Develop a procurement strategy (mainly the delivery model, type of contract, procurement & selection procedures)

First comes the pre-engagement when the developer specifies to some extent what is required, in other words, establishes what is to be procured and develops a procurement strategy in terms of the type of delivery model, the type of contract and the procurement and selection procedures.

Notes

Summary



8m 26s



Stage 2 Acquisition:

- **Public procurement:**
Competitive tendering and the preparation and award of contract are the most common activities
- **Private procurement:**
A wider range activities may take place, such as negotiation in stages

Then comes acquisition. For public procurement, competitive tendering and the preparation and award of contract are the most common activities. For private procurement, a wider range activities may take place, such as negotiation in stages.

Notes

Summary



8m 41s



Stage 3 Contract implementation:

- Parties to the contract carry out their obligations (may include contract administration & confirmation of compliance so often not included in procurement)

Finally there is contract implementation when the parties to the contract carry out their obligations under the contract. In the case of a works contract this will be the construction, refurbishment, demolition or some similar activity of what the contract generally calls 'the works'. The contract implementation stage may include administration of the contract and the confirmation of compliance with requirements through project reviews and project management activities by authorities that are not necessarily a party to the contract. For this reason procurement usually ends at the second phase namely at the award of the contract. From the contract perspective, project procurement by the public and private sectors is seen through the lens of what must articulated in the contract to undertake construction activities for green-field (typically newly built) or brown-field (typically upgraded) assets. Sustainability obligations are therefore expressed as project criteria which must be transposed into enforceable and legally binding contractual obligations.

Notes

Summary



8m 57s



- Drives the incorporation of sustainability throughout the entire procurement process
- Straightforward to understand how sustainability is incorporated into procurement
- Enables contract management to provide the information needed for SuRe reporting requirements
- Helps harmonise a fundamental difference between public and private procurement

The advantages of the contract perspective are: a) it is straightforward to understand how sustainability should be incorporated into procurement processes; b) it identifies the key procurement stages that must be adjusted in order to introduce sustainability considerations; c) it drives the incorporation of sustainability throughout the entire procurement process; d) it enables contract management of 'performance under the contract' to provide the information needed for SuRe reporting requirements. Finally, and perhaps most important of all, the contract perspective helps reconcile a fundamental difference between public and private procurement.

Notes

Summary



9m 57s



Private procurement:

- Aims to protect business interests
- Contracts cover obligations not linked to the subject matter of the contract

Private procurement has traditionally been tied to protecting the contracting parties' business interests. Contract clauses or 'provisions' in commercial contracts therefore often cover social and environmental obligations that are not directly connected to what is called the 'subject matter of the contract', namely time, cost and the quality of workmanship.

Notes

Summary



10m 30s



Public procurement:

- Depends more on hard law (governments are bound to uphold standards)
- Has established regulatory 'horizontal' or 'secondary' sustainability objectives
- Performance of the contract linked to the subject matter of the contract

Public procurement on the other hand depends more on hard law than the private sector. This is because governments are bound by international treaties to uphold certain sustainability standards and to actively prevent law violations such as excessive greenhouse gas emissions. The result is that public procurement regimes, in addition to the primary objective of achieving the best value for money, have established regulatory 'horizontal' or 'secondary' objectives for sustainable procurement. However, in spite of secondary objectives, public procurement is often much narrower in its scope than private procurement. The main reason is because public contracting authorities often require provisions covering innovation and environmental and social considerations relating to the performance of a contract to be 'linked to the subject matter' of the contract. Public authorities must also balance multiple public interests against the overarching principle of contractual freedom in commercial contracting.

Notes

Summary



10m 52s



- Unlikely that either will be required legally to include sustainability requirements

It is unlikely therefore that public or private organisations will be required by law to include sustainability requirements into their procurement processes.

Notes

Summary



11m 51s



New legal frameworks are using private sector soft law & the meta-regulation of sustainability obligations not linked to the contract's subject matter:

- Contract & project procurement best practice developed
- Process driven by a private sector needing to abide by public sector procurement rules

Fortunately, frameworks for private procurement and commercial contracts are filling the regulatory gap left by governments failing to address sustainability. They are doing this using soft law and meta-regulation to regulate sustainability obligations that are not linked to the subject matter of the contract. A detailed private-sector best practice has been developed to implement and contractually enforce sustainability requirements – a process that is driven by the fact that contractors and project developers must adhere to public procurement rules and requirements if they want to supply to public institutions.

Notes

Summary





Private sector:

- Needs to anticipate how courts will apply contract provisions
- Has developed a detailed best practice
- Relies heavily on standard-form contracts to allocate risk, especially for provisions not linked to the contract's subject matter
- Best practice stems from the need to allocate risk

Public sector uses these forms (e.g., multilateral development banks)

Much of this best practice stems from the need to allocate risk, especially the risk of the credible enforcement of provisions that are not linked to the subject matter of the contract. The best approach is to use standard forms of contract which anticipate how law courts will apply contract provisions. Standard forms do this by setting out detailed rules for implementing sustainability requirements in construction in an international context where legal rights and obligations are weakly defined. The recently updated 2nd Edition of the FIDIC Construction Contract therefore has provisions covering 10 overarching objectives, 10 supply chain activities and nine issues that should be considered jointly by the contract parties that relate directly to sustainability. Many of these provisions are designed to handle sustainability issues that are not connected to the subject matter of a contract. The importance of standard forms is demonstrated by the fact that the multilateral development banks have adopted a lightly modified FIDIC Construction Contract for their projects, thereby confirming that the private sector “....

Notes

Summary





- Contracts play an increasingly more important role in sustainable procurement in spite of a narrow scope of action compared to procurement frameworks
- The convergence between the public & private use of standard contracts will continue:
- Both need to find ways to handle an increasing number of specified requirements

serves as an inspiration to the public sphere”. There is an interesting paradox: contracts now play a crucial and increasingly more important role in sustainable procurement in spite of having a relatively narrow scope of action compared to legal and procurement frameworks and similar instruments. This more important role has arisen because both the public and private sectors need to find ways to handle the increasing number of specified requirements that do not relate directly to the subject matter of the contract.

Notes

Summary



13m 44s



Contracts will increasingly:

- Drive sustainable procurement
- Help in understanding how sustainability should be addressed throughout procurement

Contracts therefore not only formalise the project strategy, decisions taken during the procurement process, and the outcome of the acquisition phase but they also drive ways to harmonise the procurement of sustainability considerations that are not legally connected to the subject matter of the contract. Contracts therefore harmonise the handling of sustainability considerations throughout the entire procurement process.

Notes

Summary



Contract harmonisation is essential



- To adapt project procurement to private-public partnerships which have to become the dominant project delivery model if global infrastructure needs are to be met

This means that the contract perspective will increasingly provide the best way to understand how these considerations should be addressed during procurement. This harmonisation is essential to ensure that sufficient and timely progress is made so that a) sustainable procurement remains robust yet able to respond to sustainability requirements that are constantly reinterpreted and extended into areas such as adaptation to climate change; b) project procurement is better adapted to private-public partnerships which have to become the dominant and greatly expanded delivery model if global infrastructure needs are to be met; and c) procurement processes are better able to translate sustainability considerations into contractual obligations which are enforceable yet reasonable and allocated correctly.

Notes

Summary



14m 34s



The contract perspective:

- Drives the implementation of sustainability considerations throughout project procurement...
- In spite of a challenging legal situation...
- Because both the private and public sectors are learning how to specify requirements that are not connected in law to the subject matter of the contract

In summarising the principles of sustainable project procurement we have seen the growing importance of contracts in ensuring that project procurement is able to implement sustainability considerations effectively in spite of a challenging legal environment. This special role of contracts has come about and is developing further because the public sector is learning from the private sector how sustainability requirements which are not connected in law to the subject matter of the contract can be specified as contractual obligations, especially in the international context where legislation is weak.

Notes

Summary



15m 15s



● In the next section...

The next section will discuss how the contract perspective is best established during the pre-engagement stage of project procurement that consolidates information into a feasibility studies report that becomes the basis for developing the all-important project strategy.

Notes

Summary



15m 49s