

**INDEPENDENT INVESTMENT PROGRAMME ADVISORY GROUP**

**PROCUREMENT PROCESS REVIEW**

**Final draft**

**Executive Summary**

The purpose of this review was to identify ways that TfL can reduce the risk of a challenge, and especially a successful challenge, to its procurements by learning from two recent significant challenges.

The review focussed mainly on the experience of the challenges to the Silvertown Tunnel Public-Private Partnership (PPP) procurement and the contract for the procurement of Piccadilly Line trains. It included benchmarking with HS2 and National Highways on actions taken to minimise the risk of successful challenge.

The review addressed four issues:

1. The risk of challenge: The current environment for undertaking major infrastructure procurements and risks of challenge from unsuccessful bidders.
2. Risk raisers: Common themes that compromise robustness and increase exposure to challenge.
3. Current practice: The approach of TfL and other organisations to ensuring robust procurements - through strategy, people, processes, procurement models, and assurance.
4. Our conclusions on TfL's approach and opportunities to further strengthen robustness.

It is clear to us that challenges should be expected from time to time, particularly in the more litigious areas. We consider that the challenges that TfL has received recently do not represent material failings on TfL's part, and indeed the general view we heard was that these major procurements had been well managed.

In general we found that TfL has sound systems and processes, and in our view the most critical thing is applying these effectively, with rigour and with the right resource and experience, to 'do the basics well'. This is especially important when the project or procurement is complex. We have identified some areas where we consider that TfL's approach could be further enhanced, especially in tailoring the approach according to risk, governance and assurance, capability and preparedness for future challenges.

We make one recommendation: that TfL should establish a 'three lines of defence (LOD)' assurance framework for procurements, with the focus largely on LOD1 (first line) and LOD2

(second line). This framework should be risk-based with the level and detail of assurance being proportionate to the size, complexity and risk of the procurement in question.

## **1. The Risk of Challenge**

We heard from TfL interviewees and from outside organisations that the propensity for unsuccessful bidders to mount a legal challenge has been increasing. For a losing bidder the cost of a challenge is often low compared with the potential gain if they were to be successful in their challenge. Losing bidders can claim not only for recovery of bid costs, but potentially for damages/lost profit. On a major procurement running to hundreds of millions or even billions of pounds, the potential prize from a successful challenge can be very substantial. The rolling stock and signalling markets are especially prone to challenges. Both are characterised by infrequent but very high value procurements, where the losing bidders face missing out on market opportunities for many years. The limited number of suppliers in these markets means that there is little risk that the reputation or relationship damage of a challenge will be much of a disincentive.

Some challenges can simply be speculative ‘fishing expeditions’ where there are no apparent weaknesses in the procurement. We heard that bidders sometimes challenge mainly to obtain intelligence about their competitors’ bids. In this context, a procurement with zero risk is probably unattainable and driving for one may reduce value in other ways.

To be successful in their challenge, the losing bidder needs to establish not only that there has been a breach of regulation, but also that it is sufficiently serious and has caused them not to be awarded the contract. The bar is therefore quite high. Nevertheless, any legal challenge whether successful or not entails considerable work and cost for TfL - more so than for the challenger. In addition to the direct financial cost to TfL in defending a claim, there can also be a debilitating effect on the teams involved, and a distraction of effort. A challenge will probably also cause project delays (under current rules there is an automatic suspension to awarding the contract if there is a challenge). There can also be reputational impacts and the outcome of any proceedings is often inherently uncertain. For all these reasons there is a strong incentive for TfL to seek to minimise the risk of challenge.

## **2. Risk Raisers**

For TfL and other client organisations the area which is most likely to provide a potential source of challenge is the design and execution of tender evaluation. The challenges to the Silvertown Tunnel and Piccadilly Line Trains were both concerned with the evaluation of bids.

There was much common ground between our interviewees on the issues most likely to raise the risk of a challenge, and also the factors which can make one more difficult to defend successfully. The main ones are set out below.

The design of the competition and evaluation process

- Over-complexity in procurement/contracting/financial models which increases the potential for misunderstandings, inconsistencies and errors.
- The Invitation to Tender (ITT) being insufficiently comprehensive, with poor quality requirements. The specification needs to provide bidders with sufficiently granular information to prepare their bid, and for the subsequent evaluation to sufficiently distinguish between bidders. Furthermore, the less clear the requirements, the more difficult it is to say unambiguously in advance how they will be evaluated. Incomplete or poorly thought through requirements are also more likely to lead to subsequent changes in requirements during the procurement process, which can open up opportunities for challenge.
- Inequalities in information. These can hinder a 'level playing field' between the bidders' and lead to claims of unequal treatment. This is particularly an issue where one of the bidders is the incumbent.
- Inappropriate evaluation criteria, or not being clear enough about what needs to be demonstrated to achieve a particular score. Ambiguity about what is needed to meet pass/fail tests or minimum thresholds is a particular area of risk.
- The overall evaluation design providing an insufficient basis to distinguish, or provide 'separation', between bidders. If final scores are close, the risk of a challenge is greater.

#### The execution of the evaluation

- Unequal treatment of bidders. All tenderers need to be asked the same questions and be given equal opportunities to provide information. Evaluators need to avoid unconscious prejudices and preferences.
- Weaknesses in application of scoring. The areas of evaluation which are most difficult, and which therefore require greatest scrutiny, are technical solutions, quality and deliverability. Risks arise if evaluators do not have the appropriate, up to date expertise, and if there has been insufficient testing and verification of different or novel technical solutions.
- The process and scoring not following closely enough what was set out in the ITT/Evaluation Strategy, for example not producing reports required in the ITT. New aspects of process cannot be introduced if they have not already been signalled in the ITT.
- Weaknesses in record-keeping. Having a clear audit trail is especially important for defending a challenge. The rationale that led to the award of each score needs to be fully recorded. If an evaluator's view changes during the evaluation, the reasons for that also need to be fully documented.
- Weak moderation/consensus processes. The moderation process establishes a 'consensus' score among a number of evaluators. The moderator must facilitate only, with the consensus score still being that of the evaluators. Risks arise if the evaluators rely too heavily on views of a moderator or 'evaluation consultee', or do not use their own words in recording the rationale for the consensus score.
- Lack of robustness around exclusion decisions. Bidders can be excluded at a number of stages during the evaluation, if they are deemed to fail to satisfy the necessary criteria. Exclusions will always present some challenge risk, and are difficult to defend if the justification given for the deemed failure is insufficiently strong. A

challenge can also be mounted over a failure to exclude a bidder when they should have been excluded – for example if their technical solutions are accepted without sufficient scrutiny.

- Inappropriate use of discretion. Discretion may be used to take account of mitigating circumstances a tenderer puts forward for example for not meeting thresholds. Such cases need to be thoroughly investigated and discretion needs to be carefully applied to avoid challenge risk.

We also heard of a number of factors relating to the environment within which the procurement is conducted which can increase the likelihood of these risks arising:

- Project time pressures, leading to elements of the procurement being rushed.
- Inadequate commercial and other resources to deliver robust design and evaluation, and changes of personnel during the procurement.
- Tenderers changing their constitution, which might affect the assessment of parts of their bid.
- The inclusion of new areas of evaluation where there is less experience/established practice (carbon impacts during construction was mentioned as an example).
- Tenderers seeking to contact senior managers outside the tender process to discuss the tender or tender decisions.

In addition we heard of factors that could be a direct cause of legal challenge aside from the evaluation. These were not issues in the two major procurements we have reviewed, and are not considered further in this report (though TfL may wish to consider them further).

They were:

- Conflicts of interest
- Non-competitive transactions
- Contract extensions

The issues that we have identified in our review echo some of the findings of the 2021 Holliday Report<sup>1</sup>, which looked at the procurement process conducted by the Nuclear Decommissioning Agency (NDA) for the decommissioning of Magnox power stations. In that case the NDA had to pay £90m damages. Factors that contributed to this outcome included:

- Unclear governance, with a lack of clarity in the functions of multiple bodies and in the interrelationships between various boards and meetings
- Lack of robustness and accuracy in contract information, especially regarding the assumed state of the sites set out in the baseline data
- The complexity of the evaluation and errors in the evaluation process, with insufficient checks and balances such as moderation
- Poor record keeping, and lack of transparency and audit trail of decisions

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<sup>1</sup> Report of the Holliday Inquiry. Inquiry into the award of the Magnox decommissioning contract by the Nuclear Decommissioning Authority, related litigation and its subsequent termination. House of Commons 4 March 2021

- Underestimation and poor management of legal risk, with legal advisers having insufficient opportunity to challenge, and legal advice not being communicated to senior decision makers,
- Poor communication of award decisions including the response to a complaint
- Inadequate assurance, with many assurances being narrow in nature, and a lack of effective check and challenge.

### 3. Current Practice

#### Strategy, processes and guidance

TfL and the other organisations we spoke to have put in place systems and processes to minimise the risks of challenge. TfL has guidance for its procurement teams on all the main elements of the process to be followed. Much of the guidance has been updated in recent years. Topics covered in the guidance include:

- Tender Evaluation Strategy
- Evaluation Design
- Tendering Guidance

We have not undertaken a full study of the current guidance, but from our high level review it looks to us that the guidance covers most of the issues which are likely to raise challenge risks. For example, the guidance emphasises the importance of robust and sufficiently detailed requirements, describes approaches to evaluation criteria and scoring, and encourages sensitivity testing of evaluation models. It calls for full recording of rationales and scores, with more detail required for more contentious scores. The guidance provides templates for key documentation such as the Tender Evaluation Strategy.

Those we spoke to emphasised the importance of doing the early stages well – getting the requirements right, setting out in the ITT how the evaluation will be undertaken – and avoiding theoretically perfect but over-complex structures. The key message was ‘set out clearly what you will do, and then make sure you do it’. TfL’s systems and processes generally provide a framework for achieving this.

#### People and capability

All interviewees stressed the importance of ensuring that sufficient competent resource is made available, and that ideally there should be continuity through the life of a procurement, which for the bigger procurements can be several years. We heard that the commercial team needs to have an understanding of major capital projects and their commercial environment and supply chain. It is important that TfL’s Procurement and Supply Chain Directorate (P&SC) is able to retain or access people who have built up skill and experience of the more complex major procurements.

TfL P&SC is currently going through a transformation programme, which is addressing these and other capability issues. TfL is not alone in facing shortages in suitably qualified commercial resource. TfL uses consultants to supplement its in-house commercial team, and

we heard of examples where this works well. However it is recognised that in-house resource brings advantages in knowledge retention and also in bringing understanding of the TfL business and public sector procurement requirements.

Likewise TfL's engineering and legal teams need to be able to retain their experienced and specialist staff. One critical resource issue is ensuring sufficient quantity and capability of evaluators, including technical evaluators. TfL and other organisations suggest 2-3 evaluators per question. One organisation had a large team of 15-20 evaluators for its very largest projects. An inherent risk is that in some very specialised areas of technical evaluation the overall supply of potential evaluators may be very small.

### Governance and Assurance

Whilst many decisions are necessarily delegated to the procurement team, there needs to be a mechanism for senior support and challenge at appropriate points, to help ensure that risks are identified and mitigated as far as possible. The governance mechanism needs to be clearly defined in the ITT to avoid opening an opportunity for challenge. One of the organisations we spoke to described its clear governance structure for consideration/escalation of procurement decisions.

TfL procurement guidance now includes creation of a Tender Review Panel (TRP), usually at Director level, and with representation from the project, Legal and P&SC. The TRP can support the more contentious decisions (such as exclusion of bidders). However it seemed to us that the role and practice of Tender Review Panels is not yet fully understood or established in TfL.

TfL has established the Commercial Approval Meeting (CAM) to review contracts at certain stages from a commercial perspective. CAM considers a high-level evaluation strategy prior to issue of tender documents, but does not review the detailed strategy which is where any problems are likely to arise. CAM also considers a tender evaluation report as part of the Contract Award Recommendation. For these contracts CAM requires an Independent Review Record Sheet to evidence that a Quality Management process has been followed. CAM is seen as a positive development, but questions were raised about whether sufficient scrutiny and challenge is applied at CAM, and whether there is sufficient input, for example from the project team, to decisions on contracts. This raises questions about how well integrated commercial approval is with Pathway project gate and wider decision making.

Roles and responsibilities of the different disciplines delivering a procurement are set out in TfL guidance, but some interviewees suggested there was a lack of clarity on who leads/holds the ring through the life of the procurement.

At present TfL does not have a clearly defined policy for assurance of procurements, though a new division titled Governance and Assurance has been set up within P&SC, with a remit to create this. Legal representatives are well integrated with procurement teams in TfL on large projects but cannot be expected to provide full assurance. CAM provides some assurance but as noted above it is not detailed or comprehensive. In other organisations we heard of a more formal 'three lines of defence' model, where commercial assurance is

integrated with project assurance and the second and third line are applied to the larger and more risky procurements.

### Engagement/communications

In talking to TfL and other organisations, we heard of the importance of creating and maintaining a perception of a tightly controlled process. Bidders need to have confidence that TfL is doing what it said it would do in the ITT and is being open with bidders about progress and process. This can help reduce the inclination for bidders to go on a 'fishing expedition'.

The quality of feedback to losing bidders can also affect the likelihood of a challenge. The aim should be for clear and transparent feedback on why the bid has been unsuccessful, providing assurance to the bidder that their proposal has received proper consideration. One organisation we spoke to provided full verbatim feedback from the Award system to minimise risks of challenge (although this would consequently increase the focus on the quality and expertise of the evaluation).

Pre-market engagement is used by TfL and other organisations to build understanding of requirements and opportunities. For procurements where there is the prospect of future contracts, building effective long-term relationships with the supply chain may reduce the risk of challenge – though this may not prevent a challenge where final scores are close. Long term relationships will not significantly reduce challenge risk for very big one-off contracts such as rolling stock procurement.

### Other

We heard that some organisations were developing more collaborative contracting models, for a range of reasons. However interviewees all took the view that a more collaborative form of contract did not, per se, lead to any material difference in the risk of challenge at the procurement stage. There was also a common view against payment of bidders' costs, except in exceptional circumstances.

## **4. Conclusions and opportunities**

It is clear that challenges should be expected from time to time, particularly in the more litigious areas. The challenges that TfL has received recently do not represent material failings on TfL's part, and the general view we heard was that these major procurements had been well managed.

In general TfL has sound systems and processes, and in our view the most critical thing is applying these effectively, with rigour and with the right resource and experience, to 'do the basics well'. This is especially important when the project or procurement is complex. There are some areas where we consider that TfL's approach could be further enhanced, especially in tailoring the approach according to risk, governance, assurance, capability and preparedness for future challenges.

### Tailoring according to risk

Whilst overall the systems and processes are sound, they are fairly generic. The guidance is quite high level and applies to a very wide range of types of procurement. In our view more could be done to tailor the procurement process for major capital projects to reflect the size, complexity and riskiness of the procurement in question. We see benefit in having a formal step at an early stage of the procurement to consider the particular areas of potential risk of challenge. This could take the form of a categorisation or characterisation of procurements, with a clear indication of how and when it would be appropriate to go beyond the 'normal' application of the processes for those that carry higher risk. TfL guidance could set out the additional measures appropriate to higher risk procurements, which in our view would include increasing the experience level of the personnel involved, and the addition of explicit governance and assurance steps.

### Governance

We have not seen a clear and comprehensive representation of the governance and decision making framework for major procurements in TfL, including what should be escalated, to whom, and when. For example, we suggest that the escalation requirements for a decision to exclude a bidder should be codified, given the high challenge risk associated with exclusions.

As we have noted above CAM has a role in reviewing the high level Procurement Strategy and Contract Award stages, but it operates somewhat in isolation. For major capital projects ITT and Contract Award are frequently important decision stages in the development of the project itself, with Contract Award often coinciding with the 'go/no go' decision to proceed with a project. We believe that the procurement approvals process should be more closely integrated into the Pathway process and wider project governance so that these decisions are taken in the round. This would improve decision making more generally but could also reduce challenge risks by involving a wider range of perspectives and expertise than CAM's considerations.

This integrated governance framework should set out the role and scope of the Tender Review Panel. We have also noted that there is some lack of clarity about who 'holds the ring', and we would suggest that this is addressed in TfL's current consideration of the role of the Senior Responsible Owner (SRO), who is the guiding mind and key decision maker providing steer and direction on strategic issues..

### Assurance

We consider that TfL should establish a clear assurance framework for procurements. This should be risk-based and proportionate to the size and complexity of the procurement in question.

At LOD1, given that we have noted that the systems and processes are in place, assurance would be mainly a matter of ensuring that there are competent people who put the systems and processes into practice.

For many smaller procurements LOD1 will be sufficient. For the larger and more complex projects TfL should establish a consistent framework for providing LOD2. The Project Assurance team's commercial lead is already providing LOD2 for some more high profile procurements but PA does not currently have the resource to do this on a wider scale. PA may need to increase its resources, or alternatively consideration could be given to peer reviews or identifying assurance resource from within P&SC Directorate, with oversight from PA.

There may be a few very exceptional procurements where TfL would benefit from external assurance (LOD3), but we think such cases should be rare. IIPAG does not currently have the specialist skill in this area to take this on, and since the need would be infrequent, a better model might be for specialist resource to be bought in when necessary, possibly under the oversight of IIPAG.

### Capability

Given the current market we expect that building and retaining in-house capability will be a continuing challenge. TfL's guidance has a supporting role to play in building the knowledge and capability of existing and new staff. TfL should continue to update the guidance from time to time to reflect experience of areas of challenge and potential mitigations, including the lessons from the Holliday Report. During this review we noted a couple of areas which might benefit from enhanced guidance: feedback to losing bidders, and the role of the 'evaluation consultee'. There is probably more that TfL could do to ensure that existing and any new guidance remains fresh in the minds of TfL staff and bought-in labour, for example through training and refreshers.

We have not considered P&SC's Transformation Programme as part of this review, but the findings in this report reinforce IIPAG's earlier view of the importance of giving due consideration in that programme to the particular requirements of major capital projects. We will consider this further as part of IIPAG's separate review of progress on P&SC transformation.

### Preparing for future challenges

Given the near-inevitability of some future challenges, and the large amount of work that they can impose, TfL should consider how it can best prepare itself for setting up and running a future challenge. As a first step we suggest that TfL undertakes an 'after-action' review on how it conducted and managed the Silvertown and Piccadilly Line challenges, recording for all those involved what went well and whether there are opportunities to make the response more effective or efficient.

### Our Recommendations

We expect that most of these developments can be taken forward as part of continuous improvement and within existing improvement initiatives. We are making only one specific recommendation:

**We recommend that TfL should establish a ‘three lines of defence’ assurance framework for procurements, with the focus largely on LOD1 and LOD2. This framework should be risk-based with the level and detail of assurance being proportionate to the size, complexity and risk of the procurement in question.**

Jonathan Simcock

Alison Munro

IIPAG

February 2022

### **Interviewees**

Craig Keogh P&SC (Silvertown Tunnel)

Andrea Clarke Legal

Philip Hewson P&SC

Stuart Harvey MPD

Collan Murray P&SC (Piccadilly Line trains)

HS2 Procurement and Legal

HS2 LOD3

National Highways Procurement

We were assisted by the Commercial Lead from Project Assurance