



The first iteration of what we now know as SoPC 4 was released in 1999. Ten years on, the PPP market is groaning under the weight of a multitude of so-called standard forms, covering sectors as diverse as leisure and defence, schools and hospitals, social housing and waste.

The notion that these standard form contracts help to reduce procurement lead times and advisory costs is an article of faith in certain Whitehall circles – the argument being that we should avoid "reinventing the wheel" – but is this justified? Have the wheels come off the push for standardised contracting in PPPs?

In 2003 the Public Accounts Committee referred to the "new standard NHS PFI contract" as a "useful innovation". Also in 2003, the Cabinet Office tasked OGC with developing and adopting "several sets of standard contract clauses". Such standardised contracting was seen as a key part of the measures aimed at streamlining the procurement process, in terms of both time and cost (particularly the cost of external advisers).

Against this background it is, perhaps, surprising that the National Audit Office found that tendering periods for PFI deals that closed between 2004 and 2006 lasted an average of 34 months, and that the comparable figure between 2000 and 2003 was 33 months. Even worse, the majority of the projects studied were in sectors thought to be largely commoditised (with standard contracts to match): education and health.

The same National Audit Office report also highlighted the fact that expenditure on external advisers was exceeding budget by an average of 75%, and that in the health sector (the only sector for which sufficient historic data were available) such expenditure has gone down only "marginally" since the period 1997 – 2000.

What is behind this lack of improvement? Could it be that standardised contracting is not the fix it was perceived to be? If so, is this the time for a fresh look at the dogma surrounding standard forms? The current

slow-down in deal flow, the fact that in-procurement projects are being re-appraised anyway for funding reasons, and the prospect of a general election next year (with the attendant need for any resulting Government to deliver visible efficiencies in public spending) all provide an opportunity (and a reason) for a pit-stop and, maybe, a wheel change.

With high profile high spends on external advisers, and the ineluctable fact that contractual wranglings will always be the most visible aspect of such expenditure, it is easy to see how standardised contracting became seen as the answer. The trouble is, PPPs are, by their nature, complex (and often unique); with that in mind, standardised contracting can only ever be a mirage. The sheer number of standard form contracts available is testament to this – if we acknowledge that different sectors require different standard forms, surely the logical destination is that different projects require different contracts? The fact that maintaining this abundance of standard forms is an industry in its own right further belies their characterisation as time-saving (and the cost of that industry is still ultimately borne by the taxpayer).

We have already seen that standardised contracting's main aims of saving time and money have not been achieved. Instead, which of us with experience of procuring PPPs has not chafed at the time, money and effort expended on the process of obtaining the relevant approvals for derogating from the applicable standard drafting?

An additional aim of standardised contracting was to enable public sector bodies to learn from the experience of those who had gone before them. What we have in place of this is, ironically, a picture of over-specialisation within sectors that prevents lessons learned in one sphere from being gainfully applied in another. Standardised contracting bears much of the blame for this. External advisers are appointed based on their familiarity with the standard form contracts for the sector in question, encouraging bunkers of knowledge that are rarely permitted to cross sector boundaries.

The importance of the ability to cross-fertilise should not be underestimated – for example, we have seen the concept of excusing causes, a key concept in the standard NHS PFI contract, being successfully deployed in defence PPPs to address the issues arising from perceived authority dependency failures (a long-standing source of tension in defence contracting), and have advised on emergency services PPPs that borrowed from the "Measures in a Crisis" regime found in the MoD PFI Project Agreement.

Imagine how much more powerful this could be if the expertise of several advisers was combined, on a regular basis, with the express aim of agreeing and improving the collective picture of best practice PPP contracting. The concept of panels of trusted advisers is nothing new – see, for example, the various Buying Solutions panels. Advisers are sufficiently keen to be appointed to such panels to offer little resistance to being required to commit to (and have their performance measured in) structured knowledge-sharing sessions as a value-added service.

This approach could have two main benefits: current watchdogs of derogations from standard contract drafting (such as Partnerships UK) could, with appropriate reporting controls, devolve some of the approvals process to these

trusted advisers (thus reducing process bottlenecks); and the emphasis on a "one size fits all" standard form contract could be gradually replaced with a scenario where the trusted advisers are the custodians of a flexible range of best practice drafting approaches, with a genuine opportunity to identify and report back on new situations for which a fresh contracting approach is appropriate.

Space constraints prevent a thorough exploration here of the practicalities of the solution proposed above, but suffice it to say that a switch in focus from definitive drafting to normalised knowledge sits more comfortably with HM Treasury's desire to increase skills transfer in PPP procurement than the knowledge-stifling approach of standardised contracting.

Not reinventing the wheel is fine in principle, but in practice the current approach to standardised contracting is the same as limiting ourselves to one wheel – and only clowns ride unicycles.

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