Themes in procurement: note by the Auditor General for Wales

Introduction and scope

1. In response to a request from the Audit Committee, this note draws out some key themes that have arisen from the work that I, together with the Committee, have carried out thus far in respect of the procurement of professional advice and services from the private sector. Underlying this request is the concern that the public sector - often the Assembly - should not be seen as a soft touch when negotiating, particularly when it contracts with consultants (in the widest sense of the term, to embrace all specialist advisers). These are sentiments with which I wholeheartedly concur. Indeed, the recent Enron affair in the U.S. has thrown the whole question of expert advice into sharper relief.
2. The three issues that I have been asked to address are:

- the repeated use of the same consultants;
- the scope for legal redress in cases of poor advice from consultants; and
- the failure to cap project costs.

I consider each in turn below.

The repeated use of consultants

1. My report *The Arts Council of Wales: Centre for Visual Arts* (published in November 2001) offers an example of the repeated use of a consultant. Paragraph 2.4 of that report describes how a firm of business and management consultants, McCann Matthews Millman, were initially appointed to provide an independent assessment of the sponsor's application for lottery funding. Later in the project, the same firm was also employed to assess subsequent applications for lottery funding and also to monitor its progress (paragraph 3.13 and Appendix 3). In a different context, my report on the *Accommodation arrangements for the National Assembly of Wales* (November 2000) stated that the Symonds Group was the project manager for the Assembly's new building (paragraph 3.20); the short update paper on this project that I presented to the Committee in November 2001 reported that the Assembly had also employed its quantity surveyor from the same firm, Symonds (paragraph 9).
2. Despite the problems that have been evident in both the Centre of Visual Arts and the Assembly's new building project, in referring to them in this note it is certainly not my intention to ascribe any blame to the consultants involved. However, these examples illustrate some of the advantages and disadvantages of repeated use of the same advisers.
3. The main **advantage** in using consultants who have previously been employed in connection with the same project is familiarity: it avoids the need for a new firm to undergo the same

learning curve - context, processes, people - as its predecessors. This can be a significant benefit as one of the criticisms often voiced against consultants generally is their lack of in-depth understanding of the matter in hand. Duplication of the learning curve also incurs additional costs.

4. Another, linked advantage to using a familiar consultant can be speed and cost. One of the drawbacks of using consultants can be the transaction costs on both sides arising from the need to undergo a proper competitive tender process. If organisations can justify re-employment without a competition, on the grounds that the consultants have already demonstrated their worth and have a unique understanding of the issues involved, then they can save themselves the time and cost needed to undertake a competitive tender exercise.
5. There are ways in which organisations increasingly try to minimise the time and cost of contract competitions. These include the use of framework, or call-off, contracts, where, for example, a number of suppliers have already been pre-selected, obviating the need for a further competition in each case. The National Audit Office in England has adopted this approach for the audits it contracts out to the private sector. A small group of audit firms have been appointed to a panel, following a full competitive tender process, and audits may be awarded under a framework contract to one of these firms without the need for any further competition.
6. The main potential **disadvantages** in the repeat use of consultants are corollaries of the advantages: the diminution of competitive edge in the contract - and hence the risk of less than optimum value for money - and the loss of one of the main reasons for employing consultants in the first place: the fresh, disinterested perspective they can bring. These are significant drawbacks which should not be underestimated.
7. Nor should public bodies go to the consultancy market too easily. Within public organisations there is often a wealth of good quality skills and experience in the middle and junior management levels. There will be many occasions where organisations have no option but to bring in consultants, particularly where the work is of a specialist, technical nature. However, organisations should guard against choosing to use consultants rather than trusting their own staff where the latter are fully capable. They should ensure that they make the best use of their own in-house expertise before they seek to purchase services from elsewhere.
8. Against this background, the onus is firmly on the procuring organisation to ensure that in each case perceived advantages of using the same consultant clearly outweigh the potential disadvantages and that value for money for the taxpayer is achieved. There is a tension between making use of the expertise that a particular consultant may have developed in earlier work, and the risk of diminishing returns as the consultant’s input becomes stale. This is not an area that lends itself to hard and fast rules. The merits of opting to persist with the same consultant need to be judged on a case by case basis. It can be all too easy for organisations to stick with the familiar and to avoid the work needed to source alternative expert advice. The decision to re-employ consultants should be an active one, based on good value for money considerations, rather than a passive one as a result of inertia.

Legal redress against poor advice

9. For a contract to work effectively, it is important that there is sanction against poor performance. Where possible, it is good practice to write expected standards of performance into the contract.

Failure to meet these standards can then also be dealt with through contractual terms. However, in many instances this may not be practical and the issue of unsatisfactory performance may be a matter of subjective opinion. In two such cases the Committee itself has recommended that organisations consider taking legal action in cases where they have received poor professional advice. The background to these instances is set out in the following paragraphs.

10. Following earlier reports by both the Comptroller and Auditor General and the Committee of Public Accounts, in June 2000 the Audit Committee considered a number of aspects of financial management at Gwent Tertiary College (later renamed as Coleg Gwent). One of the problems that the college had experienced concerned its use of European Union funding: the college was unable to demonstrate from its records that the funds it had received from the European Social Fund had been applied correctly. This led in due course to a phased repayment to the European Union of some £3 million. However, the college's external auditors, Deloitte & Touche, had not undertaken, as part of their audit of the financial statements, any detailed testing of transactions to primary records to confirm that the European Union funding received by the college had been used for the purposes provided. The Committee urged the college to pursue vigorously steps to secure redress from Deloitte & Touche (Audit Committee report 00-07 paragraphs 39-40).
11. Assembly officials subsequently made a formal complaint about Deloitte & Touche to the Professional Standards Office of the Institute of Chartered Accountants in England and Wales. The Investigation Committee of the Institute made an order that the firm be severely reprimanded and fined £30,000 plus costs for failing to conduct its audit in accordance with Auditing Standards (the fee charged by Deloitte & Touche for the audit in question was £8,000). The college is currently seeking legal advice as to whether an action against Deloitte & Touche would be cost effective.
12. The second instance of this sort arose from the Committee's consideration of an irregular payment made to a former Assistant Director at the National Museums and Galleries of Wales. The departure settlement made to the individual was unusual and, under the terms of its Financial Memorandum, the Museum should have obtained prior approval from the Assembly. In recommending the departure settlement, their solicitors did not alert the Museum to the need to obtain prior Assembly approval. The Committee recommended that the Museum consider carefully whether there were grounds for legal action against its solicitors (Audit Committee report 00-02 recommendation (v)). However, legal advice subsequently obtained by the Museum did not recommend this course of action.
13. The most effective way of avoiding the consequences of poor performance is to ensure, through the adoption of sound procurement processes, that all services purchased are of good quality. Nevertheless, it would be unrealistic to pretend that this will always be the case. In such cases I entirely support the thrust of the Committee recommendations outlined above. Where organisations consider that services for which they have paid have not been provided to an acceptable standard, they are fully justified in investigating the possibilities of legal action. This applies in the public sector just as much as it does in the private sector. A successful legal action of this sort in the public arena also has the potential of acting as an effective warning to others, reinforcing the point that public sector organisations should not be seen as soft touches.
14. Organisations should therefore ensure that the contracts they enter into are framed so that they are taut and robust enough to maximise the prospect of good results. In this context I welcome

the moves taken by the Permanent Secretary of the Assembly, in response to a question from a member of the Audit Committee, to consider whether Assembly contracts with consultants were sufficiently robust to facilitate redress in the event of inadequate professional advice. His conclusion, having taken legal and specialist procurement advice, is that "any attempt to define a higher duty of care or more stringent means of recourse than those already set out in the existing general conditions would be difficult to formulate satisfactorily and would be unlikely to strengthen the Assembly's hand in seeking redress." His full response is attached as an Annex to this note.

15. The over-riding issue must remain value for money. No matter how well constructed the contract, the costs of embarking on legal actions can be considerable and it is often difficult to predict outcomes with any certainty. Again, these are matters that can only be judged on a case by case basis.

Capping project costs

16. Cost over-runs occur frequently in large public sector projects. Three examples that I have reported on are set out below.
17. My report on the *Cardiff Bay Barrage* (July 2000) described how the then forecast total cost of the project was £220 million against an original budget, set five years earlier, of £191 million, an increase of some 15 per cent. Most of this increase was attributable to unforeseen ground conditions that affected the cost of constructing the barrage. Despite the increase, I noted a number of aspects of the project which had been well managed, including the imposition of a cap on overall cost by the Welsh Office which led the Cardiff Bay Development Corporation to secure significant cost savings (paragraphs 2.4, 2.12 and 2.19-2.20).
18. The report and subsequent update paper on the Assembly's accommodation arrangements, referred to earlier, track the increase in forecasts of the planned new debating chamber for the Assembly from the £12 million originally set aside by the Welsh Office to the £37 million - £47 million envisaged by Assembly officials before the termination of the Richard Rogers Partnership's employment (AGW report paragraphs 5.16-5.21 and update paper paragraphs 6-18). The true reasons for this sharp increase are not at all clear and may yet be the subject of legal action. This is a good example of how costs can rise in high profile landmark projects which are at the cutting edge of design.
19. In my first report on this topic, I set out how the existing fee structure for the Richard Rogers Partnership design team provided no incentive to reduce costs. I recommended that this fee structure be renegotiated in such a way as to minimise the relationship between the base fee and the construction cost (AGW report paragraphs 5.22-5.24). My update paper reported that the Assembly had acted on this recommendation and had agreed with the Richard Rogers Partnership in principle to fix the design team fee to a fixed sum. However, this matter was never finally resolved as the relationship between the parties broke down over other issues (update paper paragraphs 21-22).
20. The third example is the story of the Centre for Visual Arts, an Arts Council of Wales lottery-funded project on which I reported in November 2001. Paragraph 2.32 and Figure 10 of that report describe how the forecast building costs increased from £6.2 million in March 1995 to

over £8 million two years later, a rise of 29 per cent. This increase was due to an inadequate original estimate, arising partly from the omission of some elements, together with design alterations. The cost increase resulted in a further application for lottery funding.

21. The three examples cited above highlight the various kinds of difficulties in which public sector organisations, especially those not very experienced in running large projects can find themselves. It is a fundamental tenet of good financial management, but worth reiterating here, that budgets should be set for projects that are both realistic and firm. The Cardiff Bay barrage provides an example of the benefits that flow from such budgets. Although the budget was exceeded, this was due almost entirely to unforeseen circumstances rather than because it was unrealistic in the first place. And the determination of the Welsh Office to work towards staying within budget succeeded in securing savings.
22. In contrast, the initial building budget for the Centre for Visual Arts proved to be completely unrealistic and was therefore worthless as a management tool. The budget for the design team's fee for the Assembly's new building was effectively uncapped (and provided no incentive for them to minimise the construction cost of the project). In some instances it may not be practical to attempt to set firm budgets, particularly in large, complex projects at the cutting edge of technology – such as, perhaps, the Assembly's new building. In these cases while a contractor may be able to offer cost certainty, the premium charged in a highly unpredictable environment would be unlikely to offer value for money. Alternative contracting techniques including incentivisation are therefore needed to bring to bear the disciplines that fixed budgets provide.

Conclusion

23. The themes that I have drawn out in this note are very straightforward statements of best procurement practice. Nevertheless, I firmly believe that they are worth reiterating. Procurement – and often the services that organisations are procuring – is becoming increasingly specialised. In these circumstances it may be easy for organisations to lose sight of some of the basic tenets of good procurement. However, in complex situations it is often by applying the simple principles of good practice that value for money is most likely to be achieved.

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AUDIT COMMITTEE EVIDENCE SESSION -13 DECEMBER 2001: DRAFT TRANSCRIPT.

Thank you for your letter of 19 December enclosing a copy of the transcript of the Audit Committee's evidence session of 13 December. I have no comment other than the minor typo at the top of page 38 ("Arts Council" in upper case) that David Powell has telephoned through to you.

I undertook to consider, in response to a question from Alun Cairns, whether the terms of National Assembly contracts with consultants were sufficiently robust to facilitate redress in the event of inadequate

professional advice.

The Assembly's general conditions of contract for consultancy services state that the "consultant shall complete the Project with reasonable skill, care and diligence in accordance with the requirements of the specification document". This clause in effect articulates the common law duty of care that any consultant or professional adviser owes to his or her client. The conditions also require that, if any work is found to be defective or in any way differing from the requirements of a contract specification other than as a result of a default or negligence of the client, the contractor shall re-schedule and perform the work correctly to the satisfaction of the client.

I have taken the advice of the Office of the Counsel General and the Assembly's Procurement Unit on whether the general conditions could be meaningfully tightened. I have concluded that any attempt to define a higher duty of care or more stringent means of recourse than those already set out in the existing general conditions would be difficult to formulate satisfactorily and would be unlikely to strengthen the Assembly's hand in seeking redress. Also, they could act as a disincentive to competent consultants doing business with the Assembly.

A successful outcome in any redress proceedings would still depend on the Assembly (and more widely Assembly sponsored public bodies) demonstrating that in all the circumstances of a specific case the consultant had failed in the exercise of reasonable skill, care and diligence.

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