

Model Agreement Launch Event

1 October 2009

Intellect

OGC

Partnerships UK

OLSWANG

Agenda

15:00 Introduction **Mark Pedlingham, OGC & Brian King, Intellect**

15:05 Keynote **Dean James, DWP**

15:15 Model Agreement in context of successful IT outcomes **Mark Pedlingham, OGC & Brian King, Intellect**

15:30 Model Agreement version 2.3 & Negotiations Guidance **John Kenyon, OGC**
Bruce Harmsworth Partnerships UK & Paul Watkins, Intellect

16:10 How to make Model Agreement work **Mark Pedlingham, OGC**

16:20 Q & A All – panel debate

16:50 Closing note **Melanie Collier & Marc Dautlich, Olswang**

ICT Model Contract v2.3

1st October 2009



Dean James CBE -
DWP Corporate IT
Chief Operating Officer

Mature product delivering benefits

- **Welcome and support work by OGC Departments, PUK, Intellect, and the Legal profession on Model Contract**
- **Mature, robust product; supports the wider Supply Transformation Programme target to improve the acquisition process for IT enabled programmes.**
- **Becoming more widely used**
- **Allows time to be focused on project specific issues.**
- **Makes job easier and delivers efficiency; especially welcome in the current economic climate.**

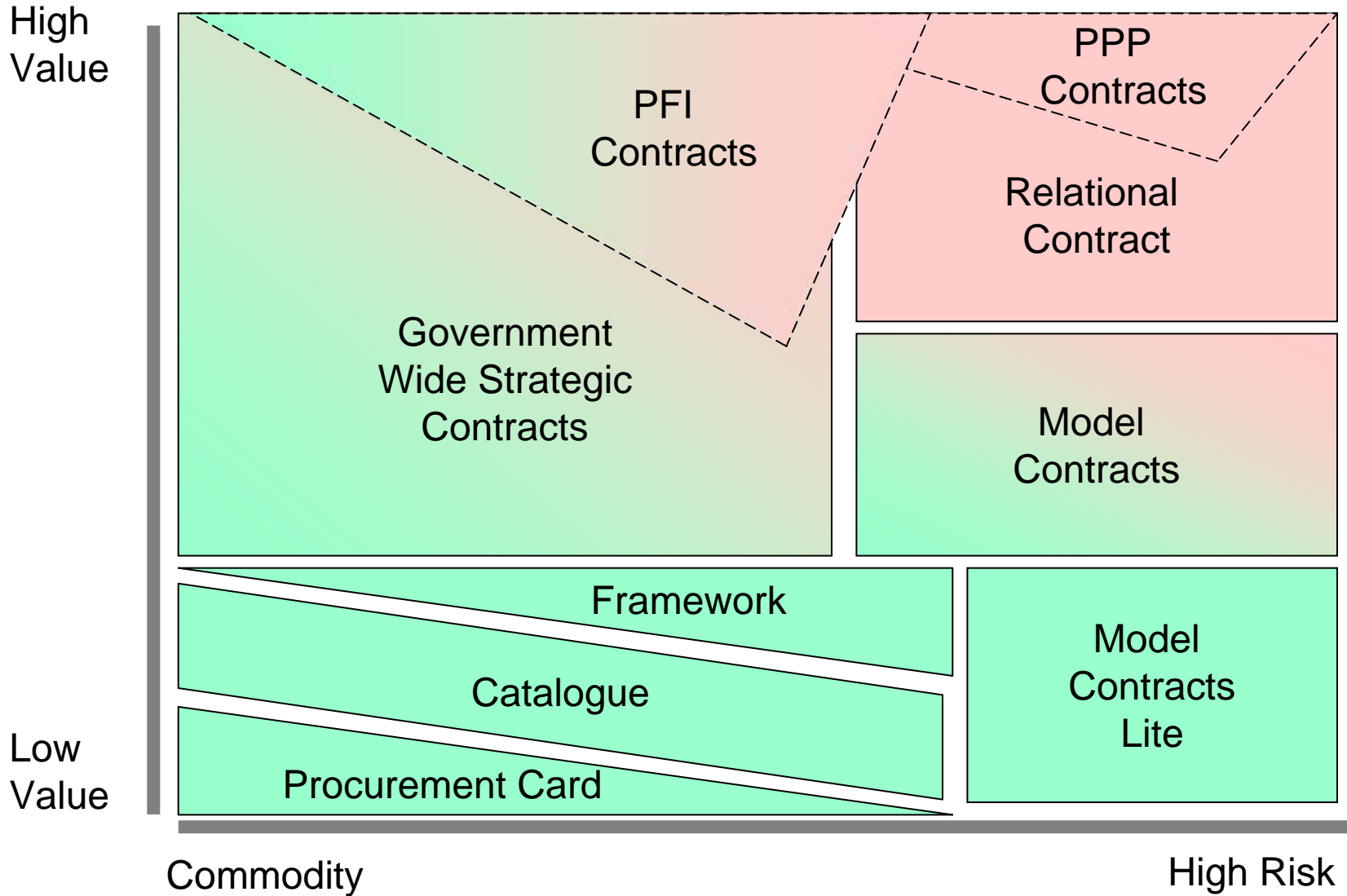
Model contract – Model example of collaboration

- **Excellent example of cooperation between OGC, Departments, PUK, Intellect and Legal Profession.**
- **Has enabled government and suppliers to build a joint understanding which supports the continuous journey of improvement; delivering benefits to Government, Suppliers and importantly Projects.**
- **Excellent progress but need to keep working together to overcome current & future challenges.**
- **This event addresses the challenge of awareness and seeks to embed Model Contract in departmental ICT procurement processes.**

Model contracts in the context of successful ICT outcomes

Mark Pedlingham, Commercial Delivery Director OGC

Contractual Landscape



Joint Initiatives

A Formula for Success

Joint Statement of Intent

Pre Qualification Test

Standard Pre Qualification Questionnaire

Procurement Processes and Timeline

Model ICT Contract:



Introduction:

The policy context

John Kenyon OGC

Introduction

Agenda for this session:

- **Model Contract Background: policy context, what our users are saying (John Kenyon, OGC)**
- **Version 2.3 key changes (Bruce Harmsworth, PUK)**
- **New negotiating guide and how it relates to the model contract (Paul Watkins BT)**
- **Future developments (Bruce Harmsworth, PUK)**

October 2009 – How did we get here?

- **First appeared 2004, several iterations since, has evolved through excellent collaboration with industry**
- **Available free to download from PUK website (helpdesk available)**
- **Complete set of terms and conditions, embedded guidance notes, supporting contract schedules, and further guidance on key topics**
- **Now a mature and effective model for medium to large ICT service contracts**
- **Has broad support (based on survey results, website users, feedback)
.....and is delivering a range of benefits:**
- **Recent emphasis has been on:
Addressing one major issue left over from 2.2 (Financial Distress)
Listening to user feedback (e.g. security and contract structure)
Seeking to improve the way in which the contract is used (e.g. through the joint development of a new negotiating guide)**

What are users telling us now?

Recent survey:

- **More than 90% of users believed it delivered some form of benefit**
- **60% believed its use reduced negotiating time**
- **50% felt its use allowed more time to be spent on project specific issues**
- **About one half respondents changed only a few clauses**

But – some key issues identified

- **Being applied to projects and applications outside its core target (e.g. simple outsourcing arrangements)**
- **Some uncertainty about application of (mandated) security aspects**
- **Mixed client capability leads to inappropriate application of provisions (e.g. due diligence, LoLs, supply chain rights)**
- **Impact of economic downturn. More focus on Financial Distress**
- **Need to incorporate more on sustainability**
- **Need to further address recent initiatives and hot topics (Open Source, Digital Continuity, etc)**

So...the future beyond model contract. How can we maximise our investment?

- **Consider the introduction of a “Lite” version of the agreement for smaller applications**
- **Possible repositioning of contract, guidance and support, alongside PFI in context of “complex procurement”.**
- **A longer term vision of developing a new more flexible model for the most complex projects; Those subject to high levels of uncertainty etc**

ICT Services Model Agreement Overview of Changes at Version 2.3

**Bruce Harmsworth
Partnerships UK**

Main areas of change in version 2.3

- Financial Distress – following the recommendations of an independent Financial Distress Advisory Panel (comprising representatives from the Public Sector, industry, legal advisers, financial advisers, banks and chaired by PUK).
- Security – reflecting feedback from contract users following the 2008 mandation of security provisions by Cabinet Office.
- Change Control – review of fitness for purpose.
- Authority Responsibilities – review of aims and relationship with other Schedules.
- Guidance Note 2 (formerly “Payment, Affordability and Asset Ownership”) – simplification and update.

Financial Distress

- Schedule now exists in two forms:
 - “long” version for projects >£150M, or with annual charges >5% of Contractor turnover or, exceptionally, those otherwise delivering “vital” services;
 - “short” version (to Risk Level 1 only) for all other projects.
- Credit ratings now take primacy over other triggers (where available).
- Level 3 Escrow replaced with retention fund.
- Obligation on Contractor to produce and act on service continuity plan only if Authority reasonably believes services could be affected.
- Clearer provisions on: reverting to lower risk levels; maintaining/terminating continuity plans; organisations with overseas shares listing.
- Reporting/service continuity plan obligations extended to Key Subcontractors’ Financial Distress events.

Security

- **No material change to obligations and responsibilities.**
- **Drafting changes cleared with Cabinet Office and the Schedule, along with other security provisions, remains mandated for projects handling personal or confidential data.**
- Focus of Schedule moved towards the operation and maintenance of an Information Security Management System (ISMS) to improve drafting's alignment to ISO27001 and 27002.
- Clarification of two options for ISMS:
 - Compliance with the “principles and practices” of ISO 27001 (relevant to most projects);
 - Certification to ISO 27001 (for projects involved in high security applications).
- Updated and clearer cross-referencing to the Cabinet Office's 'Security Policy Framework' which replaced the 'Manual of Protective Security' in late 2008.
- Revision to penetration testing process to recognise the complications arising when data is held in shared environments [*this under further review*].

Other Changes

- Review of (original) “data loss” provisions and their applicability to loss of copied data.
- New obligation on the Contractor controlling its personnel’s access to Authority data and requiring appropriate action to be taken in the event of a breach of confidentiality.
- New “light touch” provisions to take account of the needs of:
 - Digital Continuity programme;
 - Carbon Reduction Commitment.
- Marker put in place to recognise the potential impact of Open Source Software.
- Review of the Change Control procedure.
- Review of inter-relationships between:
 - Services Description and Contractor Solution;
 - Authority Responsibilities and Contractor Solution/Implementation Plan.
- A number of minor drafting changes to “balance” the contract.
- Additional drafting on the process to be followed if offshore data processing is being considered.
- Rewrite/update of Guidance Note 2 on payment, affordability and asset ownership.
- *A full list of changes is available at <http://www.partnershipsuk.org.uk/ictguidance>*

The agenda shifts ...

- Over the past 12-18 months, issues raised by suppliers have been less about concerns with the drafting and more about the positions being taken by the public sector when negotiating the contract.
- Industry reported that a small number of clauses repeatedly caused the greatest problems – and hence delays - in negotiating the Model Agreement.
- In response, a decision was made by OGC/PUK and Intellect to draft a negotiating guide for the public sector covering the key problem clauses and which sets out:
 - the objectives of the clauses in question;
 - the issues of concern to industry; and
 - how the public sector should respond so as to avoid unnecessary delay and disruption to the procurement process.

ICT Services Model Agreement Negotiation Guide

Paul A Watkins
(BT, Chair Intellect Contracting Best
Practice Working Group)

► Why the negotiation guide is needed

- The same few clauses regularly consume a disproportionate amount of negotiation time.
- Problems can be caused by unhelpful behaviours:
 - Extreme positions taken;
 - Key clauses deleted;
 - Guidance ignored.
- Problems can be exacerbated by lack of appreciation of the consequences of these behaviours on the Contractor and/or its bid.
- Consequences can include the inappropriate allocation of risk, higher prices leading to reduced value for money and the creation of obstacles to the good working relationship which is so important to successful contracting.

► **Industry's key negotiating issues**

- **Supply Chain Rights**
- **Due Diligence**
- **Authority termination for convenience**
- **Limits of Liabilities and Indemnities**

- **Intellectual Property Rights (still under development)**

► Approach to the Negotiating Guide

- **It was agreed that joint authorship was the best approach. So for each topic:**
 - **Government sets out why the clauses are present and what they are intended to achieve;**
 - **Industry sets out the issues which slow and complicate negotiations;**
 - **Government sets out the Authority approach to minimise unnecessary delays and achieve the best outcome.**
- **An agreed ground rule is that the guide does not pass judgment on the clauses themselves, only on how they should be interpreted and negotiated**

► **Negotiation guide: Limits of liability example - purpose of the clauses**

- **Limits of Liability clauses allocate risk between the parties and set their maximum financial extent.**
- **Each different area of risk has its own limit.**
- **A small number of liabilities cannot be limited by law and are therefore unlimited in the contract. These are:**
 - **death/personal injury**
 - **fraud**
 - **breach of title obligations relating to the Sale of Goods Act or Supply of Goods and Services Act**
- **Liabilities relate to direct costs only.**

▶ **Negotiation guide: limits of liability example - supplier issues**

- **Problems when:**
 - Limits set too high or unlimited (exacerbated if risks are not insurable)
 - Inclusion of indirect and consequential costs
 - Extra indemnities required.
- **Consequences:**
 - Excessive and/or uninsurable risk leads to delays (because of greater corporate scrutiny), higher prices and, in extremis, bidder withdrawal.
 - Problems magnified if unnecessary indemnities required

Negotiation guide: limits of liability

example – Authority guidance

- Having heard and discussed the issues raised by Intellect, the main priority appeared to be to reinforce what is already set out in the guidance:
 - only liabilities not limited by law should be unlimited;
 - limits based on a fair assessment of risk;
 - liabilities should cover direct costs only (not indirect, consequential and special losses).
- Take care over requiring indemnities other than that for IPR infringement.

The negotiation guide

- We are hopeful that the insight offered by the guide will reduce timescales and deliver improved outcomes.
- The approach of joint ownership and the “dialogue” structure of the discussions has helped to ensure that the guide will be fair and balanced.
- Further topics may be added (IPR is under discussion) but will be limited to major negotiating issues only.
- Our next challenge is embedding it.

Work planned for the next 6 months

- Publication and embedding of the negotiation guide.
- The likely publication of a new version of the contract possibly including:
 - revisions to penetration testing; employee indemnity;
 - a number of minor “tidy up” drafting improvements;
 - a new sustainability schedule.
- Possible new guidance on:
 - The implementation phase;
 - Security/ISMS;
 - Building the contract.
- as a way of delivering more benefits from the use of what we believe to be a very good tool, testing the options for moving towards standardisation.

Making the ICT model contract stick...

We don't want model contract to remain on the shelf; we want it to be adopted and used effectively on key projects and programmes

The fact that we've had to create a negotiation guide recognises that there are difficult behavioural issues – and we would benefit from a more controlled regulated environment

One option is to mandate its use

Any questions?

- Should we mandate?
 - Is it mature enough?
 - What to mandate?
(e.g. fixed terms, leaving variable terms optional etc)
 - On which projects should it be mandated, and when?
 - Should variations be allowed; how to manage them?
- What about retrospective application?
- Is there a case for a “lite” model contract

- **Model ITC Services Agreement** is a **TOOL** to assist contract negotiations and thus achieve procurement efficiencies. In most cases the clauses are not mandatory.
- Equally, if not more, important is the **BEHAVIOUR** of both the contracting authority and supplier. In the context of a public procurement procedure which:
 - has been drafted to give *flexibilities* so as to achieve the optimal solution in a particular case i.e. using the supplier's expertise to develop solution (e.g. introduction of competitive dialogue process), BUT
 - *cannot be abused*, from 2010 there will be potentially severe sanctions (contract ineffectiveness) stemming from the Procurement Remedies Directive for inappropriate negotiations – big risk when negotiating with final bidder post-award (in terms of either “new” contract or unequal treatment arguments).

Thank you for attending

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