

Public procurement contracting as a collaboration process

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ABSTRACT

One of the main obstacles to successful procurement has appeared to be that public procurement contracting is often not identified as contracting, not to mention collaboration to produce good procurement. Instead, it is commonly perceived as a series of legal formalities which are to be fulfilled accurately. This prevailing attitude and its reasons arising from theoretical understandings constitute the core of our paper. The alternative we advocate is public procurement contracting as a collaboration process whose goal is good procurement. The essence of contracting is here seen as enabling collaboration which is mainly understood as the enhancement of knowledge sharing. As a research outcome, we present a general process model of public procurement contracting.

KEYWORDS

Public procurement, Proactive Law (PL), Proactive Contracting (PC), triological learning, boundary object

INTRODUCTION

The economic and social value of public procurement is huge, as are its frequently discussed problems. Many of the problems are directly or indirectly caused by the legal influence. Public procurement is defined by legal rules and on the case level by legal contracting documents. Laws and contracts are in general formulated for legal interpretation purposes and business contracts have mostly become to be considered as legal documents. Public procurement is nowadays commonly understood as a competitive tendering system instead of purchasing i.e. as contracting about a business deal. The ultimate goal of public procurement contracting should be to produce successful procurement.

The competitive tendering system, originating from EU, emphasizes free competition and seeks to prevent favoritism. The regulation is, thus, expected to benefit European companies and public procurement. More often than not the actual consequences of legislation are not seriously pondered and unwanted implications occur. The public procurement regulation has induced a complex, formal system. In companies and in public sectors, mastering the competitive tendering system has become the ends itself and the ultimate target, successful procurement, is left aside. Likewise, when business contracts are seen as legal documents most effort is used on legalize and the ultimate goal of contracting, i.e. a successful business deal, becomes secondary. Due to the legal and administrative control and command tradition, public procurement processes and documents are usually difficult to understand and forbidding. They have not been developed for furthering collaboration. Public procurement following the logic of collaboration provides a better platform for buying and selling products and services that are suited for their purpose. In collaboration, the focus turns to enabling knowledge sharing, motivating and inspiring. In this paper, we attempt to give a new turn to thinking towards the logic of collaboration in public procurement contracting.

METHODOLOGY AND DATA

We have studied five public procurement cases in two municipalities. The research approach in our study was a combination of action research (Gummesson 2000) and case study. We have conducted three developmental process simulation projects according to the SimLab process simulation method (Smeds et al. 2006) to reveal practices in public procurement processes and related contractual practices. The main data collection methods have been semi-structured interviews (66), participation in and observation of the process simulations and workshops which all were audio and/or video recorded and the recordings transcribed. In addition we used secondary written documentation.

As a research outcome, we have developed together with our studied partner organizations a general public procurement contracting process model. The adopted action research approach has enabled this co-development as systematic data collection and analysis is combined with the usage of practical experience. The model clarifies the process as a contracting process based on the Proactive Contracting (PC) thinking. Additionally, it includes slides with further 'what to do' information. In procurement practice, it can be used for training and information sharing

as well as a check-list. The functionality of the model as a facilitator of knowledge sharing was tested by some municipalities during spring 2013.

THEORETICAL GAZES

In our scientific traditions, concepts have often been understood as conscious, literal and disembodied. Like seeds, words and thoughts have been seen as something which may be transferred in containers, as more or less unchanged. Legal language and its ideal of clarity are largely based on this understanding. It has, though, been argued that human thought processes are largely metaphorical and that our conceptual system is mostly metaphorically structured (Lakoff & Johnson 2003). Metaphors are imaginative rationality, uniting reason and imagination. Besides being linguistic and conceptual, metaphorical thought is embodied. Metaphors are open-ended and thus more whole than definitions. When metaphors are understood as our way of having a reality, the question will not be what they mean but how they *work*. A metaphor is not asked to validate a rule of logic, the question is what logic and reality it constitutes and *enables* (Winter 2001, 58, 65-66).

George Lakoff and Mark Johnson (1999, 3, 11) present as three major findings of cognitive science - "any kind of mental operation or structure that can be studied in precise terms" - the following: "The mind is inherently embodied. Thought is mostly unconscious. Abstract concepts are largely metaphorical." They attempt to reveal what changes in the deepest philosophical assumptions in our culture would follow if the above mentioned empirical discoveries would be acknowledged. Our basic philosophical beliefs are tied to our view of reason. If human rationality is not what our philosophical tradition has held it to be, rethinking is required as these assumptions determine scientific results. Our conceptual systems emerge from our embodied minds and most of our concepts are metaphorical. (Lakoff & Johnson 1999, 3-8, 552)

When human cognition is seen as metaphoric internalized metaphors enable or disable particular kind of thinking. In this paper, we ponder the influence of the analytic and synthetic frames of mind and their connection on research concerning public procurement contracting. We present them as metaphoric gazes which have their consequences in academic thinking. Ultimately, we seek a functioning balance between these oppositional perceptions on every level of the continuum.

Analytic gaze and attitude. Analytic attitude is here understood as a gaze, which divides wholes into parts to be analyzed separately. Phenomena are

defined and classified as being *either* this *or* that. The biased appreciation of rationality in human reason is a result of the analytic attitude. Observation is accordingly often based on particular rationality and logic through which things are explained. The observer is seen as external and neutral. The ideal is that of objective research. Research is considered objective when transparent research methods are used. Results achieved with the correct use of accepted methods are regarded valid. Validity in relation to real world is secondary. Analytic mind could be seen as active, as forming ways of understanding. It creates worlds of theoretical clarity where the messy practice may be mastered. In analytic research, theory and practice are usually strictly separated and non-analytic aspects are considered belonging to the domain of practice.

Synthetic gaze and attitude. Synthetic attitude is here understood as a gaze, which connects things and sees them forming a holistic and interactive unity. From this wholeness emerges something new which is more than its parts. Phenomena are seen as *both* this *and* that. The observer is part of the process. Her influence and subjectivity are admitted and considered. The adopted research attitude is self-reflexive. The starting point is the researched phenomenon itself as it appears to the researcher in a particular environment. Methods arise from the studied phenomenon and environment i.e. from the real world. Synthetic mind could be seen as passive, as receiving understanding. It attempts to listen to the real world and practice as they appear. Synthetic research includes all aspects of reality in its interest areas.

COLLABORATION PROCESS AS A SYNTHETIC EXPERIENCE

Knowledge sharing faces great challenges in most business contracting processes and networks: People who make the contracts are not the ones who implement them, changes occur, actors with different backgrounds and tasks look at the process from different angles and backgrounds, and so forth. More often than not, the idea of the contracting process is scattered into disconnected details and the sight of the whole is lost. Due to the public procurement environment and legislation the tendency towards this state of affairs is increased in public procurement. The other contracting partner, e.g. municipality, is in itself a many-sided organization where various minds with differing logics and goals are involved, from end-user citizens to policy makers and employees working on separated silos of the organization. Silos tend to operate independently according to their own logic which leads to a drain of holistic operation. The challenge is to promote the ability of collaborators to know what is expected of them in the

contracting process as well as to distinguish the basic idea of the collaboration process and their own role in it. If the basic idea of an activity is overshadowed by unconnected actions, one may doubt whether its goals will be reached.

Collaboration processes are by nature dynamic: they are influenced by their environments and by their actors who are human beings with human mind and emotions. If we see collaboration as a dynamic and holistic process where new value emerges, our thinking is synthetic rather than analytic.

The main stream legal research concerning contracting is dominated by the analytic gaze. Legal thinking is mostly about analyzing texts. Jurisprudence focuses on legal interpretation rules and principles, legal concepts, classifications and systems. Ideal interpretation rules are neutral and transparent. Jurisprudence mostly ignores the world outside of law. Boundaries of law have been widely discussed but the prevailing understanding still emphasizes the independence of legal interpretation from external influence. As legal interpretation serves practical purposes in real world societies, aspects outside of law cannot, though, be completely avoided. This is even more obvious in welfare state and EU law which set social goals to be realized as legal obligations. The social consequences of the fact that statute law is mainly drafted for legal interpretation purposes is an even more ignored aspect in legal discussions. The actual versus intended consequences of legislation are mostly discussed in the margins of legal research, like in the sociology of law, however, laws (and contracts) as working tools, for a social purpose instead of as objects for legal interpretation, have not been seen as a theoretically interesting theme. Even if e.g. clarity and plain language (on this discussion e.g. Assy 2011) as well as visualization (e.g. Brunschwig 2001, Sherwin 2011) have become topics of interest in legal discussions, as long as law is seen as legal interpretation, laws and contracts as working tools are bound to remain in the margins of legal discussions, as merely practical concerns.

Even if the analytic gaze is still prevailing, the synthetic gaze is far from non-existing in academic discussion. The phenomenological attitude (our understanding is inspired by Heinämaa 2000) for one could be seen as a largely synthetic orientation. It emphasizes the importance of a freshly experienced observance, inducing us to attempt to release ourselves from the existing belief structures and preconceptions, to see things anew. The researcher is an embodied being in an experience instead of a 'neutral' observer applying transparent, i.e. objective, theories and methods to explain external phenomena.

Through phenomenological lenses human collaboration in an environment is observed with respect to its many-sided nature instead of diminishing it to fit prevailing theories. This means halting to observe things in wonderment instead of hastening to define or interpret them as well as readiness to see others in their otherness. When we label others and their thinking according to our existing categories, we no longer listen to them; we hear them according to some particular pre-understanding. Wondering is connected to enabling – providing space for individual becoming. When philosophy is seen more as wondering, it admits the limits of rationality. An attitude of wonder encourages listening. When collaboration is seen as interaction and knowledge sharing, the importance of listening becomes apparent. In contracting, most problems are due to unquestioned erroneous perceptions or unsuccessful or neglected knowledge sharing.

In phenomenology, focus is on movement like on following the movement of someone's thinking. When the source of understanding is seen to be participation in a reflexive experience, the perfect fulfillment of a plan can be seen as a failure. (Parviainen 2006, 50) That would show that no actual reflexive participation has happened. To view systems as continually-developing processes of understanding and learning increases both the reactive and proactive ability as well as sensitivity of the system. The system becomes more self-reflexive.

PROACTIVE AND TRIALOGIC CONTRACTING

Our research is based on the PC approach (the first compilation Pohjonen ed. 2002) more broadly named Proactive Law (PL, e.g. Pohjonen 2006, Siedel & Haapio 2010, Berger-Walliser 2012). PC takes as a starting point the contracting collaboration in the real world practice as well as questions arising from there. PC attempts to enhance legal expertise which promotes success in contracting collaboration. It has been developed together with cross-disciplinary academic researchers and cross-professional experts in contracting practice. In PC, ideal contracts and contracting processes are seen as user-friendly working tools for enhancing successful collaboration and knowledge sharing. PL attempts to enlarge the scope of legal interest to include the relation between law and legal instruments as realizers of goals in the real world.

The PC approach attempts to counterbalance the (contract) law approach to contracting where contracts are regarded as legal documents drafted for legal interpretation purposes in case of a legal dispute. The consequence of the legal attitude is that legalize either dominates the contracting or as a

counteraction legal aspects are more or less ignored. Most importantly, the contract law-oriented research is not beneficial to contracting practice and does not represent an accurate comprehension of successful contracting. Theoretical legal thinking tends to separate itself from practice that is often identified as the execution of theories which analytic thinking produces. Accordingly, lawyering practice is seen as mastering legal interpretation rules and principles created in jurisprudence. On the other hand, design-oriented research with participatory, experimental and exploring methods is more connected to practice and seen as more innovative and success-oriented than the analytic theory-oriented research.

Holmström, Ketokivi and Hameri (2009) are particularly interested in the relation between problem-solving research and theory-oriented academic research. They present design science in engineering and architecture tradition as an approach which differs from theory-building and theory-testing approaches which model themselves after the natural sciences. Design science research focuses on exploring new solutions and solving problems as well as on an explorative process using, for example, action research and participatory case study methods. In design science, the development of an artifact to solve a problem is searched for. In their article, Holmström et al. call conventional theory-oriented operations management (OM) research explanatory research and problem-solving-oriented design science as exploratory research. In OM research problem-solving research produces the artifacts or phenomena that OM research attempts to theoretically explain.

Rylander (2009) has compared 'knowledge work' and 'design thinking' in management studies. These represent different approaches to problem solving. The former is based on rational, analytic and disembodied epistemology and the latter on an interpretive, emergent and embodied one. Problems are, thus, framed and solved in a different manner from these different perspectives. Design thinking aims at creating something new by experimenting and learning by doing. It is not based on rationality which cherishes theory-guided verbal certainty and control. Design attitude is iterative and practice-oriented and design solutions are holistic by nature. In practice, the differences between these two approaches may not be this categorical. Nevertheless, both could learn from each other.

When contracts are considered as enablers of successful collaboration, design thinking could balance legal thinking by emphasizing dynamic flexibility, skills, embodied emotions and the figuring of one's way around constraints. Design thinking is an emerging field also in PC, especially visualization (e.g. Berger-Walliser et al. 2011). Visualization is a core

element in design. Eppler and Platts (2009) emphasize that visualization is a powerful process enabler. Through the eyes of design thinking, contracts can be seen as boundary objects (Carlile 2002), i.e. mediating artifacts or instruments which facilitate the crossing of knowledge boundaries in cross-professional collaboration. In design thinking contracting can be seen as an activity of social prototyping, as an iterative, evolving and innovative process that is grounded on the participating parties' subjective understanding, as opposed to control-oriented and technical approaches, which strive for objective rationality. Paavola and Hakkarainen (2005) have distinguished a *trialogical approach to learning*. It concentrates on interaction through boundary objects which they call mediating artifacts or processes of activity. Interaction is not, thus, seen as an action just between people, or between people and environment but facilitated with the help of a boundary object. On one hand, boundary objects facilitate collaboration. On the other hand, they are further developed in collaboration processes. Inspired by this concept, the contracting process could be called *trialogic contracting* to emphasize the additional need to also reflect the functionality of its working tools and methods, so that they would be user-friendly facilitators of knowledge co-creation and knowledge sharing.

Visualization facilitates the sharing of knowledge. It concretely makes the invisible visible. Visual meaning making is often more effective than textual communication. People are drawn towards visual representations and are able to comprehend their messages at a glance. Emotion is critical for the appropriate direction of attention (Damasio 1999, 273). A much better way to protect the realization of the actual will of the contracting parties is to facilitate their common understanding than to dispute in court afterwards. If people are expected to familiarize themselves with information, according to the principles of user-centered design, the representation of this information should match the needs of its prospective end-users. User-centered information should be easy to find, timely, match the context of use, be catered in the amounts appropriate to the user and context, be presented in a usable format, be written in language comprehensible to the reader, be perceptually attractive, and finally for the user to enable the elaboration and development of the information through participation. (Beyer & Holtzblatt 1998)

In our research project, we have been able to observe the influence of the legal and formal requirements in public procurement: how they have

clouded the actual purpose of the procurement activities and drawn the attention towards avoiding appeals to the market court. As public procurement regulation and the competitive tendering system are complex to comprehend and forbidding to approach they are easily misunderstood, ignored or followed formally and over-cautiously. They rather prevent than enable successful procurement collaboration. To clarify the nature of the contracting process we have developed, together with experts in public procurement practice, a general model which illustrates the planning, implementation and follow-up phases of the public procurement process seen as a contracting process. The visual model aims at wiping the legal mist over the process and illuminating its basic idea. In the model, the competitive tendering phase is in turn shadowed.

Our model (appendix) tends to clarify the public procurement contracting process and its essential features as a whole. The preliminary analysis of the usability tests of the model seems to suggest that the model helps people to form a coherent picture of the process and to place the knowledge they already possess, especially if they are accustomed to abstract thinking. The model helps to build a novel attitude towards procurement activities and thus promotes a change of attitude and culture in public procurement. When procurement follows the general contracting model, it provides fruitful grounds for an innovation friendly public procurement in the bulk of public purchasing advanced by Uyerra & Flanagan (2010).

CONCLUSIONS

Academic thinking is about viewing things through particular perspectives. Analytically-oriented science does not include perspectives outside its comprehension domain. Accordingly, consequences of this choice remain more or less unrecognized. A search for a balance between aspects considered contradictory is required in academic research. If activities which are based on synthetic logic are observed through an analytic gaze, they are not properly understood and their development is not based on their reality. Theoretical approaches are like metaphors: they enable or disable us to think in certain ways. In our traditions, we have various options but the analytic metaphor is a dominating one and apter to cause distortions. Theoretical training may, thus, have serious consequences in various spheres of practice. Into the bargain, these consequences remain theoretically uninteresting as well as the viewpoints which are not included

in the hard core of dominating scientific approaches. These viewpoints and connected skills are left for practitioners to learn in practice the best they can. More than that, they may even need to learn away from their adapted professional gaze to obtain the skills required in their work. There is much demand for innovation and co-creation in today's business and research. The ability of purely analytically-oriented research to enhance these might be seriously questioned as the enablers of innovation and co-creation seem to be located more on the synthetic side.

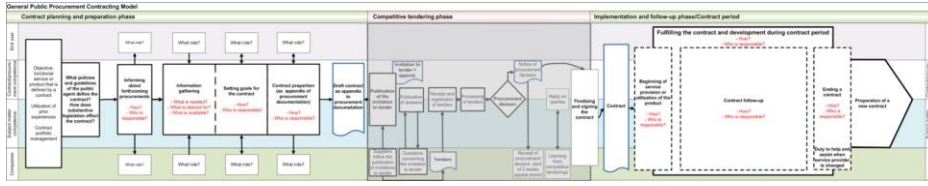
Contracting practice is, accordingly, continuous search for a balance between freezing and flowing. Success of contracting collaboration is largely based on the ability to form secure frames as well as to create space for flexibility and change. Contracting collaboration is both business target-oriented planning and a dynamic learning process. Target-orientation as well as control and command attitude are encouraged by the analytic gaze. Interactive and contextual collaboration processes flowing towards new innovations are instead encouraged by the synthetic gaze. The logic of contracting practices and tools has enormous social significance which should not be ignored and left solely to serve the needs of legal interpretation.

LIST OF REFERENCES

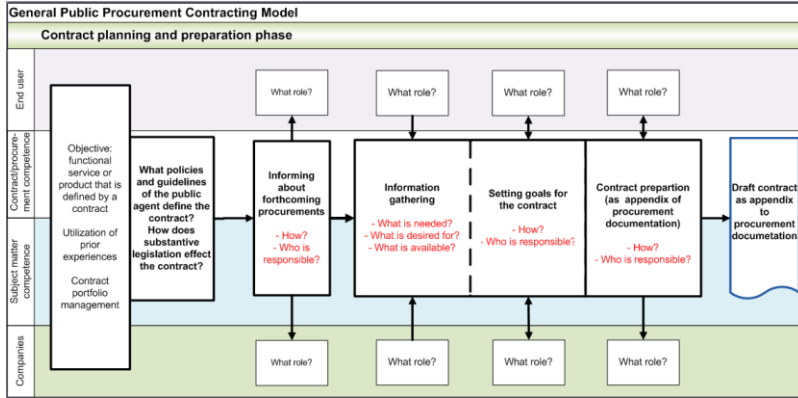
- Assy, R. 2011. Can the Law Speak Directly to its Subjects? The Limitation of Plain Language, *Journal of Law and Society*, Vol. 38, September 3, pp. 376-404.
- Berger-Walliser, G., Bird, R. C. and Haapio, H. 2011. Promoting Business Success Through Contract Visualization, *Journal of Law, Business & Ethics*, Vol. 17, January 20.
- Berger-Walliser, G. 2012. The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement, in *Proactive Law in a Business Environment*, eds. K. Østergaard & G. Berger-Walliser, DJØF Publishing, Copenhagen, pp. 13-31.
- Beyer, H. & Holtzblatt, K. 1998. *Contextual Design, Defining Customer-Centered Systems*, Morgan Kaufmann publishers, San Francisco.
- Brunschwig, C. R. 2001. *Visualisierung von Rechtsnormen – Legal Design*. Züricher Studien zur Rechtsgeschichte, Vol. 45. Rechtswissenschaftliche Fakultät, Universität Zürich, Schulthess Juristische Medien, Zürich.
- Carlile, P.R. 2002. A Pragmatic View of Knowledge and Boundaries: Boundary Objects in new Product Development, *Organization Science*, Vol. 13. No. 4. July-August, pp. 442-455.

- Damasio, A. 1999. *The Feeling of What Happens, Body, Emotion and the Making of Consciousness*, Vintage, London.
- Eppler, Martin J. & Platts, Ken W. 2009. Visual Strategizing, The Systematic Use of Visualization in the Strategic-Planning Process, *Long Range Planning*, 42, pp. 42-74.
- Gummesson, E. 2000. *Qualitative methods in management research*, 2nd edition. SAGE, Thousand Oaks. CA.
- Heinämaa, S. 2000. *Ihmetys ja rakkaus, esseitä ruumiin ja sukupuolen fenomenologiasta (Wonder and love)*, Nemo, Helsinki.
- Holmström, J; Ketokivi, M. & Hameri, A-P. 2009. Bridging Practice and Theory: A Design Science Approach, *Decision Sciences*, Vol. 40. No 1. Feb., pp. 65-87.
- Lakoff, G. & Johnson, M. 1999. *Philosophy in the Flesh, The Embodied Mind and Its Challenges to Western Thought*, Basic Books, New York.
- Lakoff, G. & Johnson, M. 2003. *Metaphors we live by*, The University of Chicago Press, Chicago and London.
- Parviainen, J. 2006. *Meduusan like, Mobiiliajan tiedonmuodostuksen filosofiaa (The movement of Medusa, Philosophy of knowledge creation in the mobile time)*, Gaudeamus, Helsinki.
- Pohjonen, S. ed. 2002. *Ennakoiva sopiminen (Proactive Contracting)*, WSOY Lakitieto, Helsinki.
- Pohjonen, S. 2006. Proactive Law in the Field of Law, in *A Proactive Approach, Scandinavian Studies in Law*, Vol. 49, ed. P. Wahlgren, Stockholm Institute for Scandinavian Law, pp. 53-70.
- Rylander, A. 2009. Design Thinking as Knowledge Work: Epistemological Foundations and Practical Implications, *Design Management Journal*, pp. 7-19.
- Sherwin, R. K. 2011. *Visualizing Law in the Age of the Digital Baroque, Arabesques and entanglements*, Routledge, London and New York.
- Siedel, G. & Haapio, H. 2010. Using Proactive Law for Competitive Advantage, *American Business Law Journal*, Vol. 47, Issue 4, Winter, pp. 641-686.
- Smeds, R., Jaatinen, M. Hirvensalo, A. & Kilpiö, A. 2006. SimLab Process Simulation Method as a Boundary Object for Inter-Organizational Innovation, *10th International Workshop on Experimental Interactive Learning in Industrial Management*, Trondheim, Norway, June 11-13.
- Yarra, E. & Flanagan, K. 2010. Understanding the Innovations Impacts of Public Procurement, *European Planning Studies*, Vol. 18. No. 1, pp. 123-143.
- Winter, S. L. 2001. *A Clearing in a Forest, Law, Life and Mind*, University of Chicago Press.

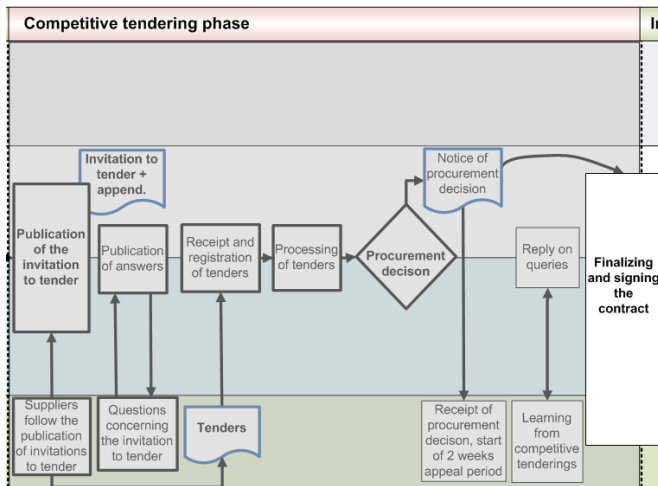
APPENDIX. The General Public Procurement Contracting Model



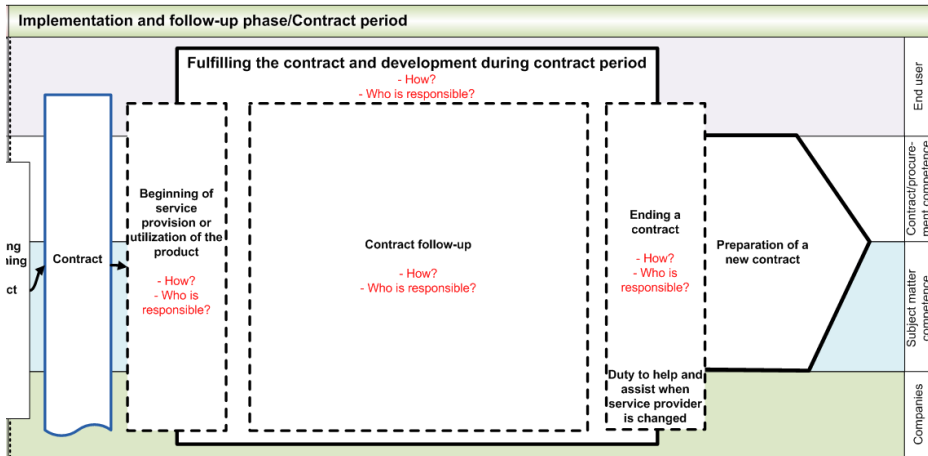
Complete model



First phase: Contract planning and preparation



Second phase: Competitive tendering



Third phase: Implementation and follow-up/contract period