

FIGHT THOSE LAST MINUTE DECISIONS!

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Abstract

European public procurement directives compel Dutch government entities to purchase their works, services and products deliveries through mandatory public tender procedures.

One of the biggest practical frustrations/problems government managers face, comes from the fact that these tender procedures prescribe a compulsory minimum processing-time for applicants to forward their proposals.

This minimum processing time may incur conflicts with everyday management decisions (be they last minute). Also, the processing-time issue - more often than not – causes incomplete decisions, and sub-optimal outcome (or even damage) in subsequent phases.

This contribution will address and examine the instruments available to government managers to meet the processing-time challenge, and to improve their own business processes and tender results.

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1. Introduction

Since the early nineties, government entities have to perform their purchases in accordance with the European public procurement Directives 2004/18 and 2004/19. These directives aim at opening up the markets of government assignments to private companies from all over the European Union area.

This contribution is based upon my practical experience as in-house legal counsel in the day to day operations of the computer department of ‘Provincie Zuid Holland’, one of twelve public authorities on the regional government level in the Netherlands. PZH employs around 2.300 civil servants. On a yearly basis, PZH issues around 100 public procurement announcements.

2. Public procurement conditions for Government entities

Procurement principles can be summed up as the obligation for government entities:

- to publish and announce each and every new assignment above specified financial thresholds, for private companies to be able to forward their proposals;
- to specify and publish assignment characteristics and specifications in an open, neutral and non-discriminating fashion;
- to objectively and transparently decide and motivate – based upon the published characteristics – which company to award the assignment to;
- to accept the formal appeal possibility for private companies, who can start legal procedures to protect and preserve their rights under the procurement directives.

All in all, these mandatory procurement procedures impose minimum requirements and conditions on a government entity concerning publication, specification, motivation and minimum processing time periods.

A few examples of conditions that apply in a Dutch public procurement procedure:

- the government entity's obligation to objectively motivate in writing (up front), on which criteria it will award an assignment;
- a minimum period of at least 52 calendar days between the announcement of a public assignment and the closing date for receiving market party proposals on this assignment;
- a period of 15 calendar days between the publication of the intention to award an assignment and the possibility for rejected private companies to appeal this decision.

A steadily growing stream of legal proceedings has made public procurement a risky business for those government entities who trust in their luck, rather than in procedural quality.

3. ... conflicting with day to day operations

Preparing and performing a public procurement procedure causes a significant number of adverse effects on the day to day operations within the average government entity:

1. Accommodating for the processing time of an average public procurement procedure

means that government managers will have to:

- consistently estimate the value of intended assignments in order to assess whether or not the public procurement obligation applies;

- anticipate contract developments at least six to twelve months in advance, in order to be able to decide in a timely fashion on terminating or prolonging contracts;
 - develop and protect the logic and consistency of their procurement – and contract portfolio.
2. Defining a set of requirements for a new assignment means that:
- scarce human resources will have to be gathered for a specific period of preparation;
 - developments will have to be frozen for a while in order to be able to provide a stable description of the assignment;
 - the organisation will have to provide a realistic yet flexible prediction of future developments surrounding the assignment;
 - the organisation will have to provide a logical and consistent set of objective evaluation criteria.
3. Performing the specific procurement procedure means that managers will have to:
- safeguard the integrity of the procedure and of proposals submitted;
 - assure that the necessary experience and competences are available;
 - allocate sufficient resources to perform the procedure;
 - sufficiently motivate their decisions.
4. The correct implementation of a procurement result means that the manager must have arranged in advance in what constellation of roles, tasks and responsibilities the procurement result will be received and maintained.

In his day to day operations, the average government manager finds himself short of time, short of relevant management information, short of competent staff, and filled up with a significant workload from his primary processes, whereas the procurement process ranks as a secondary, supporting process. In other words: The obligation to perform a public procurement procedure seriously affects the ability of the average government manager to decide on last minute insight / priorities. Lack of timely information forces him to compromise on quality - and risk management.

4. Fight those last minute decisions

To prevent these 'last minute decision' sensations from occurring too often, a number of instruments can be deployed:

- a. a consistent set of roles and processes concerning contract management within the organisation. (see para 5);

- b. a contract management tool, providing a rolling forecast and a database filled with the relevant data of the entire existing contracts portfolio (see para 6);
- c. consistent application of project management methods and tools (Prince2) in procurement procedures. (See para 7);
- d. Standardised decision procedures and documents (see para 8);
- e. The ability to learn from past performances (see para 9).

5. Consistent set of roles and processes in contract management

Contract management provides the trigger for procurement initiatives. It is also at the receiving end for procurement results. Therefore a well established contract management process is a prerequisite for a functioning procurement process. Controlling the quality of public procurement products is based upon established roles and processes within contract management.

Contract management roles / processes

For the purpose of this contribution, contract management is defined as the management of contracts made with product/service providers and/or business partners¹. Contract management includes negotiating the terms and conditions in contracts and ensuring compliance with the terms and conditions, as well as documenting and agreeing any changes that may arise during its implementation or execution. It can be summarized as the process of systematically and efficiently managing (1) contract creation, (2) contract execution and (3) end of contract. In fact, covering the whole life cycle of the contract. In each of these specific domains, a number of roles has to be assigned, for the result to be controllable and useful in the entire system:

1. Contract creation phase

Spanning from initial (product or service) functional requirements up to and including a signed contract.

Roles:

- The party experiencing the need to purchase should define business case, use case, risk analysis, product/service life cycle and exit strategy in order to be able to describe or evaluate the specific contract conditions that will apply for the intended purchase;
- A contract designer/developer will support in translating business requirements into a draft contract;

¹ See also: http://www.ogc.gov.uk/documents/Contract_Management.pdf

- A purchasing project manager to manage the procurement project;
- A specialist to provide support to the project from procurement and procedural points of view.

Input: Documents concerning business case etc, describing all relevant aspects of the product/service to be purchased coming from the purchasing party. These documents will have to be converted in a contract proposal, as part of the set of procurement document to be published.

Process: Conversion of the input documents into a government assignment, that can be published in a EU procurement procedure. The execution of a procurement procedure, resulting in one or more proposals received (preferably without related legal appeal proceedings ;).

Output: A signed contract with a sufficiently developed set of performance indicators, performance measurement tools and periodic reporting obligations. Established contract duration, and procedures to end or change (parts of) the contract.

In most EU public procurement procedures, negotiating a contract is not allowed. This places more emphasis and weight upon the need to give an as exact as possible description of the assignment and of future developments in the initial specification phase. It also adds potential risks, since the contract cannot openly be discussed between the acquiring party and providers forwarding their proposals.

The specific contract characteristics provide input and reference information for the contract management tool/database (see para 6). To name but a few characteristics: Contract duration, acquisition method, advance notice periods for changing or ending the contract, and quality or service levels to be met. All these characteristics provide triggers and reference material for contract management – and procurement processes.

2. Contract execution phase

Spanning the period between signing the contract (where products/services become available for the acquiring party) and terminating the contract.

Roles:

Acquiring (Government) party	
Contract owner	Authorised to decide, to purchase, to change, to end the contract. Budget owner. Responsible for provider contact on a strategic level.
Service level manager	Responsible for the overall service quality of the IT services within the own organisation.
Contract manager	periodic tactical/operational contacts with provider, responsible for monitoring performance indicators on service levels. Provides provider performance reports.
Service desk	First point of contact for reports/requests from internal users.
Procurement desk	Responsible for keeping the contract dossier complete and up to date. Responsible for providing management reports.

Providing party	
Contract responsible	Managing the overall provider performance on a management level.
Delivery manager	maintaining agreed product/service levels. Reports service levels.
Account manager	maintaining the client relation and communication.
Helpdesk	processing all incident - and problem tickets, that are not handled within the acquiring party.

Input: The signed contract with all its adjoined annexes.
 All relevant operations information on product/service delivery within the defined contract scope.
 A defined communications structure and reporting protocol between parties concerned.

Process: Use of the contracted products/services. Periodical meetings with providers and users to discuss performance, problems, changes, external developments, expenditure, (strategic, tactical and operational).

Output: A managed product/service delivery environment.
Reporting, based upon smart performance indicators.
Periodical service level reports, periodical meeting reports.
A controlled and transparent system for product/service/contract changes.
Implemented and approved changes.
Input for the contract management tool on service levels and performance quality.

3. End of contract phase

Covering the period between the acquiring party's decision to end, and the actual ending of a specific contract. In this phase of the contract life cycle, the same roles apply as those mentioned in the contract execution phase.

Input: The intention by the contract owner (and no one else) to end, or significantly change his purchasing needs and/or product/service requirements or – specifications.

Changed business needs may call for a different products/service delivery. It may also allow the acquiring party to terminate the contract without the need for a new (or renewed) contract.

Process: Establishing actual business requirements;
Evaluating the existing contract against these new or modified business requirements, in order to decide to change, renew or end the contract;
Establishing the possibilities to extend or change the existing contracts, seen against the Procurement directives and against our own internal procurement protocol;
Establishing conditions and time frame under which contract can legally be ended;
Establishing the need (if any) for a new contract;
Establishing the best fitting procurement procedure to achieve the new contract;
Change management on products/service changes;
Management of exit strategy with the leaving provider.

Output: A well argued decision to change or end the contract, accompanied by the

relevant initiatives to accommodate for the changes involved in a controlled way. End of contract. In a significant number of contract dossiers, this is the most vulnerable phase of the contract life cycle, seen from a management point of view. Where a contract is not adequately incorporated in the contract management tool, the trigger to start the activities for the end of contract phase does not reach the contract owner in time. As a consequence, the process to evaluate possibilities within the contract, or to explore alternative options starts too late and comes into conflict with the time available to obtain a new or modified contract, before the existing one expires.

6. Contract management tool (Contract keeping process)

Existing contracts are considered to be valuable assets that require management and maintenance during the life cycle of the products or services they cover. The same goes for the contract documents themselves. Therefore a contract management tool needs to be implemented, in support of the above mentioned contract management processes. Roles and responsibilities should be assigned. As with any implemented process, quality assurance is required.

Roles within the acquiring party's organisation:

Here as well, a limited number of roles and responsibilities should be implemented:

- **Contract owner:** The manager who is considered responsible to keep the product or service available. This role controls budget and escalation. Decides whether or not to prolong or end contract. Authorisation to edit the contract.
- **Contract manager:** Verifies performance and expenditure under the contract. First line of contact with suppliers, periodic meetings, receiver of performance reports.
- **Contract users:** Authorised to view the contract documents, and to propose contract changes to the contract owner.
- **Contracts keeper:** Administrative support to keep the contract portfolio complete and accurate. Monitors performance indicators, contract end date and other time-related events in the contract. Keeps records of contract management deliverables such as management reports and service level reports. Signalling function towards contract manager and contract owner, where contract margins are being exceeded.

Management possibilities:

Ideally, a standardised, computerised contract management tool allows our organisation access to:

- full registration of all relevant contracts, including metadata and signalling profiles.

- An online communication platform between all different roles within contract management and procurement.
- overview of contract portfolio's for the different organisation entities and levels.
- structured access to – and reporting of performance results and trends.
- automated monitoring and signalling of contract indicators.
- centralized access to performance reports.
- possibilities for contract portfolio analysis.
- possibilities for specific management reports.
- advance signalling of contract end date, where financial thresholds indicate the obligation to perform a public procurement procedure.

Input: Notifications of new contracts or contract changes by contract owners, including a indicator signalling profile, on which contract owners wish to be informed by the contract keeper during the contract life cycle. Periodic performance reports, meeting reports, contract changes, etc, to be included in the contract's dossier. Notifications of contract endings/changings.

Process: The contract managers generate and document contract performance information out of their contacts with provider and users. The contract keeper processes this documented flow of contract-related data into the contract management tool / database. The tool and/or the contract keeper generates management reports for contract owners and contract managers.

Output: Relevant management reports and process triggers on a timely basis.

Timing considerations

In general, all purchasing decisions require preparation time: Assessing (changes in) business requirements, formulating expectations for future developments in functionality, performance and other quality aspects, involving the right circle of stakeholders, establishing budget availability and management approval.

In addition, the start up of a public procurement initiative takes time: involving the right skills in the procurement team, approval of the purchasing plan and setting up of the necessary procurement documents and initiating the procurement procedure.

Taking all necessary preparations into account, the needed minimum preparation time for renewal of a contract can be estimated by:

Complexity of the subject matter	Preparation time before starting a Procurement procedure
Simple	3 months
Average	6 months
Complex	12-24 months

Where procurement procedures themselves – on average – require additional – almost mandatory - processing time for their execution:

Type of procedure	Minimum processing time
Request for Proposal (RfP) only	3 months
Request for Information, followed by an RfP:	5 months
Negotiation procedure	6-24 months

E.G.: The combination of an RfP only procedure for a simple subject amounts to a processing time of approximately six months. The other extreme would be around 48 months to arrive at a new contract for a very complex products and services deal.

These “best practice” estimates of the necessary processing time for renewal of contracts should be used as a generic baseline within the contract management tool. Input from contracts, contract owners and contract managers can then be combined to provide a timeline-based signalling ‘rolling forecast’. This can provide a type of advance warning system, in order to start new initiatives in a timely fashion, and in order to conclude new contracts on schedule and in time before the old contract expires.

7. Procurement projects run under Prince2

Procurement of larger or more valuable assignments is run in the form of a project based upon Prince2 methodology and templates. Generic project stages are translated into a procurement setting for the more complex IT deliverables:

1. description of the products/services to be purchased, approved business case and budget, use case, financial plan, risk analysis. Product/business expected life cycle translated into investment and other financial estimates.
2. design and approval of the context of delivery of the products/services: Selection criteria regarding the provider and regarding the products/services to be purchased. Model contract, performance indicators, indicator monitoring, risk

- countermeasures, exit strategy, next cycle considerations.
Evaluation of purchase impact in the existing contract portfolio.
3. development and approval of the procurement documents to be used.
 4. performing the procurement procedure, starting with publication, and resulting in an assignment award and one or more rejections.
 5. finalising the contract.
 6. transfer of the approved procurement results to the implementation manager and closure of the procurement project.
 7. “post project support”.

Each procurement project is run by a project organisation, specifically installed for that occasion. Within the project, roles and responsibilities are assigned to specific team members. The project board consist of the project sponsor and at least a senior user and senior supplier. In our organisation the acquisition process by the IT department is normally supported by a procurement specialist from the centralised (internal) procurement bureau.

The project board authorises the result of each project stage, before the project team can proceed to the next stage. The project manager carries the responsibility for the day to day management of the project activities. Quality assurance for the procedure comes from the procurement bureau.

The service organisation that intends to take the result into operation /service, in the early stages has the opportunity to specify its requirements and acceptance procedure. The procurement project team thereby knows, against which parameters it has to deliver, in order to obtain acceptance and approval for its deliverables from the service organisation. The contract with the provider of products/services being one of the main deliverables from the procurement project.

Each of the project phases (from 1 up to and including 7) has a different profile, and requires different forms of co-operation between the acquiring party and procurement support within our organisation. In addition, each project phase produces standard deliverables, based upon generic document templates.

Phase	Acquiring party	Procurement support
1. Initiative	<p>Leading in describing the assignment from a business requirements perspective.</p> <p><u>Approved deliverables:</u></p> <ul style="list-style-type: none"> - Project proposal - Business case - Project team structure and resources - Responsibilities structure - Management decision to start the procurement procedure 	<p>Providing context/background, legal and procurement conditions.</p> <p>Information on the broader purchasing portfolio of the entire organisation</p> <p><u>Approved deliverable:</u></p> <ul style="list-style-type: none"> - Purchasing plan. - Procurement project file
2. Project start	Managing project and progress	Leading in translating the business requirements into selection criteria for provider and for product/services, that can be used in the public procurement procedure evaluation process.
3. Procurement documentation	Co-writing on procurement documents: RfI, RfP, contract and SLA model etc., establishing the procurement timeline.	
4. executing the procedure	<p><u>Deliverables:</u></p> <ul style="list-style-type: none"> - Formal decision to procure and invest - Answers to candidates questions - Evaluation of proposals - Formal report of evaluation and - Formal award proposal - Meetings with rejected candidates to provide additional information 	<p><u>Deliverables:</u></p> <ul style="list-style-type: none"> - Formal publication² of the award procedure and procurement documents - Publication of additional Notices - Publication of award – and rejection letters - Accommodating explanatory meetings with rejected candidates

² Generally on www.aanbestedingskalender.nl

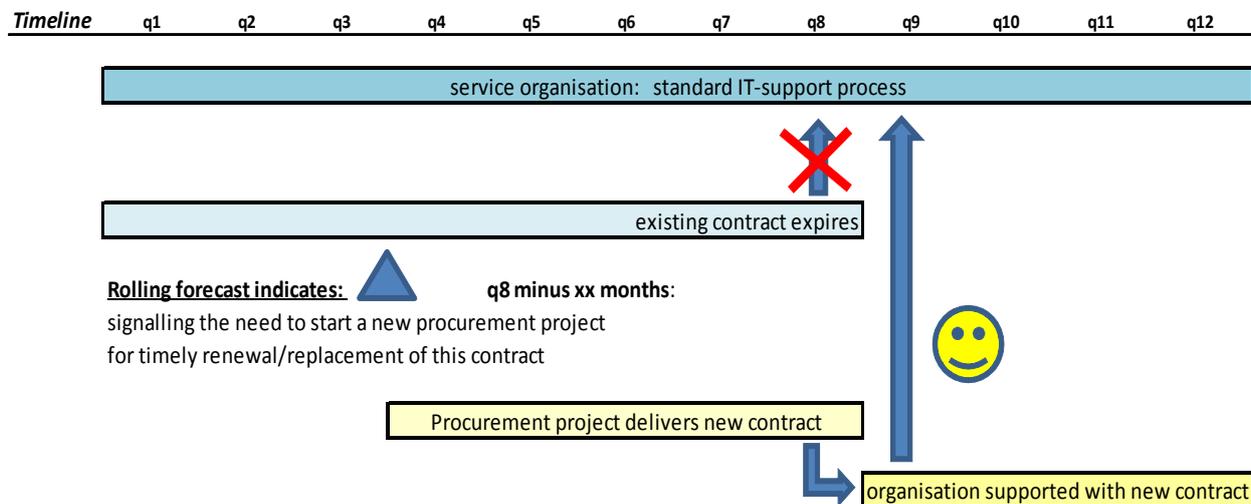
5. Finalising the contract	<p>Holding contract meetings with the best candidate to customise and finalise the contract to be signed.</p> <p><u>Deliverables:</u></p> <ul style="list-style-type: none"> - Meeting reports - Management decision to enter into agreement - Signed contract - New entry into the contract management tool (possibly replacing the older contract) 	Support for the contract meetings.
6. Transfer and project closure	<p>Formal transfer of the procurement results onto the service organisation project manager, responsible for implementation / production of the procured results.</p> <p><u>Deliverables:</u></p> <ul style="list-style-type: none"> - Signed transfer protocol - Procurement project discharge - Project evaluation 	<p>Support</p> <p><u>Deliverables:</u></p> <ul style="list-style-type: none"> - Procurement dossier - Publication of awarded assignment. - Project evaluation
7. "Post project" care	The project manager keeps himself and the project information available for support requests from the new project manager.	Procurement support keeps himself available for support requests.

A standardised and consistently applied procurement project allows all involved a clear view of the exact status of the project, and an exact understanding of the deliverables that (should) have been produced in earlier phases, or will be produced in following phases.

8. Standardised decision process and standardised documents

8.1. Decision Process

The above described interactions between the service organisation's regular IT process, the contract management process and – tool, combined with the procurement project can be visualised by the following illustration:



For this interaction to operate in a predictable and timely manner, the decisions needed during this process are identified and - where possible - prepared in advance, using standard templates and reference documentation.

Trigger for review

The contract management tool generates an advance notification on the ending of the existing contract to contract owner and contract manager. Depending on the complexity of the subject matter, and depending upon the procurement procedure to be followed for purchasing a next cycle product/service, the notification comes a number of months in advance, time needed for a sufficient preparation. This advance time is coded into the contract management tool, as a result of best practice experiences.

Management decision cycle

1. Upon this 'end of contract' notification, the service organisation reviews and revises its business requirements concerning the existing contract, and decides whether or not to initiate a procurement project. This initial formal (internal) management decision defines the scope of the new assignment, defines the type of procurement procedure to be applied, and estimates the financial and time budget needed for the new contract.
2. The next management decision validates the outcome of the proposals evaluation, identifies the candidate with the best offer, and communicates to all candidates at the same time the formal intention to award the assignment to the winning candidate.

Other candidates may request for additional explanation in a personal interview.

The 'intention to award' decision also starts off the appeal period for all rejected candidates. For this 15 day stand still period, the possibility of formal appeals must be taken into account. Where an appeal is filed with the relevant court, the procurement procedure is adjourned until after completion of the appeal procedure. Upon completion of the stand still period without appeals, the service organisation may proceed its contract completion with the winning candidate.

3. The final formal management decision authorises the service organisation to sign the new contract with the winning candidate, and gives formal discharge to the procurement project organisation.

8.2. Standardised documents: quality by preparation

The above described decision cycle will be made easier and more robust by using standardised reference documents as a baseline for assessing new business requirements and for contracts to be developed.

Business requirements reference documents

A number of relevant ICT aspects should be kept updated on a regular basis. In this way, agreed reference documents are available, when having to review existing -, or compose new contracts:

- functionality, quality and performance requirements concerning the IT products/services to be delivered.
- conditions concerning the physical and logical surroundings in which the products/services have to be delivered.
- conditions concerning the communications and reporting structures between the two parties
- security and confidentiality considerations regarding information and organisation.
- intellectual property.
- cost, financing, payment conditions.

Contract documents

Based upon the agreed business requirements, preparatory work can be done on specific legal documents, reflecting the PZH company position and its specific risk profile:

- generic draft contracts for different types of products/services.
- different types of service level agreements.

- standard purchasing conditions.

Public procurement document portfolio

On this aspect as well, a relatively large part of project activities can be developed into a standard approach.

- procurement project plan, describing all activities and related responsibilities in each project phase (see para 7).
- standard timelines for each type of procurement procedure.
- template documents for standard reports and standard correspondence.
- reference selection criteria for provider - and product/service evaluation.
- proposal evaluation scripts.
- reference evaluation methods.
- standard procurement dossier and filing methods.

9. Learn from past performances

Having enjoyed a number of years in the public service, one cannot but notice a number of do's and don'ts in the combination of contract management and procurement projects:

In contract management

For some time now, our organisation has been building its contract management tool and contracts database. Several initiatives have started in decentralised parts of the organisation (bottom up), whereas the need for a solution is felt throughout the whole organisation (top down). We started out, constructing the actual tool, we thought we needed, without consulting all parts of the organisation from the start. At first, we also forgot to think through the roles and responsibilities needed to implement the contract management process. These design and approach mistakes have led to some delay and a few mishaps in durable contract management development.

In procurement roles and responsibilities

A few years ago, the organisation decided to cluster all disciplines relevant to our primary and secondary processes. As one of the results, procurement was centralised, and torn loose from the primary process knowhow. Now, with every new procurement project starting up, we have to sit down, designate and assign the roles, tasks and responsibilities between the primary process party in need, and the secondary process procurement support. The most complexity and the greatest need for support being generated in the first phase of the procurement project, whereas the best support from procurement is being offered in the third and fourth phase.

In information handling

Transforming from paper-based knowledge into a digital process-oriented organisation has forced us to re-invent the value of information and data in its context. Metadata and signalling profiles are being developed on the fly. This leaves us with the sensation of enjoying management reports containing “moving targets”, and battling the increasing “digital amnesia”, because the analogue knowledge-carriers moved on to new careers, whereas the transformation process from paper to digital has not been finalised yet.

In defining business requirements

Being a process-oriented organisation in a process-oriented world turns mistakes made in phase 1 of a procurement project a constant source of happiness throughout the life cycle of the product/service that has been procured.

Not so long ago, we decided to buy and implement a somewhat complex IT-platform for specific purposes. Even though the procurement project was considered to be a sounding success, and even though the entire project team (including myself) considered itself of a professional working level, I would be the first to start this procurement project all over again, because in the first project phases we forgot to take care of a few basic essentials: In the first phase of the procurement project, project management skills were not involved in describing the business requirements and in proposing implementation plans. So, after a fully successful procurement result, the project manager, newly hired to co-ordinate the actual implementation for us had to re-design the already approved implementation proposal. Resulting in a huge delay.

A similar description could be given for the concept service level agreement, attached to the Request for Proposals. We had designed it with one of the best external experts available in the market. We only forgot to thoroughly discuss the achieved service level and performance indicator results with our own support department. As a consequence, the proposed reporting and management structure did not work as it was designed. Also, the performance indicators offered in the contract did not quite meet our own support demands.

All in all, every procurement project offers the real-time and real-live possibility to add just that bit more quality to an already weathered procurement project team. However, it is up to the service organisation to maintain the experience gathered into a knowledge base, that remains available for all future use, even if entire procurement teams evolve into new colleagues.

Resuming and concluding

In this contribution I have presented my views and proposed solutions on fighting last minute procurement decisions. Remedies lie in a combination of preventive actions in different disciplines and processes:

- structural contract management activity within an established structure of roles and responsibilities.
- timely notification of 'end of contract' generated by the contract management tool
- frequent evaluation of the existing contracts against actual business requirements
- standardised roles and responsibilities in preparing for -, and executing procurement
- procurement procedures executed in a standardised project approach
- a transparent and standardised management decision-model, adapted to, and synchronised with the procurement procedure.

By implementing the above mentioned working methods, decision models, roles and responsibilities, business requirement reviews, document and procedure quality, and by promoting a learning curve on procurement effectiveness, 'last minute decisions' can be reduced significantly.

In the end, of course, procurement and contract management expertise flourishes in acknowledgement of expertise and achievements, consciously celebrating success in performance achieved. But most of all, effectiveness will come with constant and consistent management attention, promoting overview and discipline, adding quality in the synchronised application of these different company tools and processes, and in building a consistent knowledge base of procurement expertise.

I wish the IPPC 2010 delegates all the best in fighting their last minute decisions.