



Legal Issues in Procuring Lean Services

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Optimizing Public Infrastructure

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Main Points: Howard Ashcraft

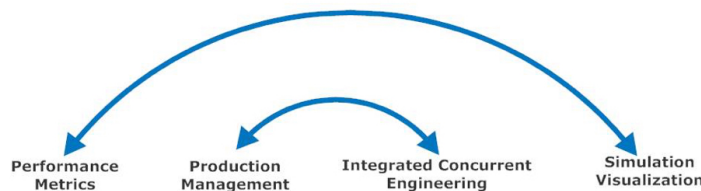
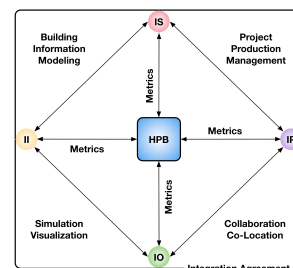
- Technically Similar
- Legally Different
- Practically Different
- Legally Different
 - Public: If allowed, you can do it.
 - Private: If not prohibited, you can do it.
- Practical
 - Broader Stakeholders
 - Avoiding Corruption
 - Social Goals
 - Source of Funds
 - Political Conservatism
 - Bureaucracy



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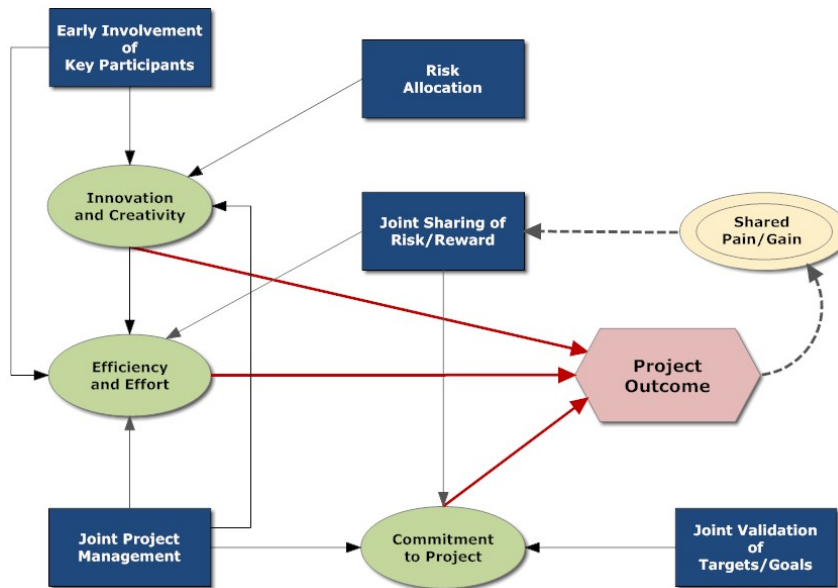
Optimized Project Delivery

Integrated Project Delivery A simple framework



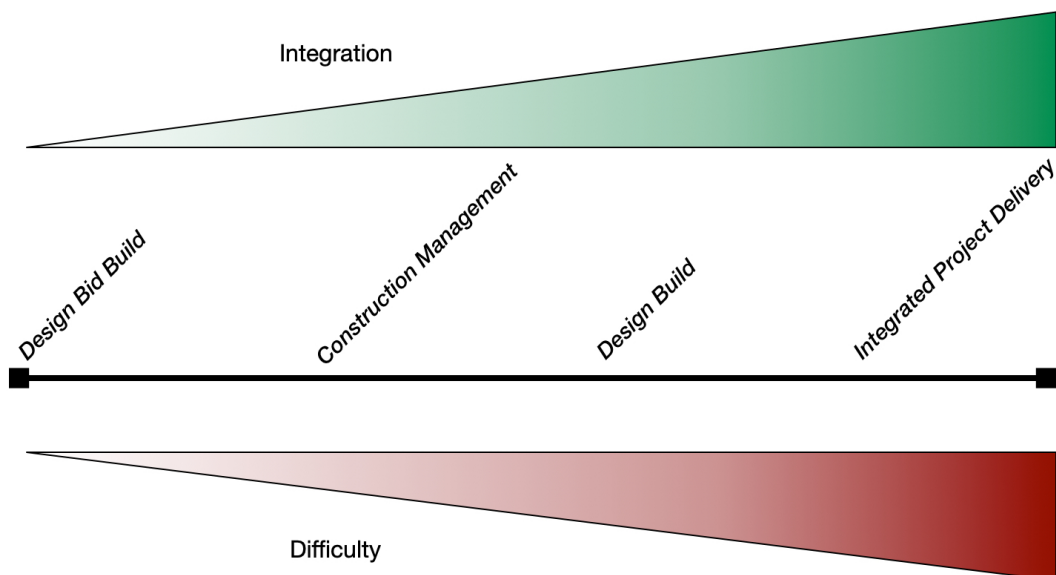
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Implications of Optimization



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Project Delivery Challenges



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Public Procurement



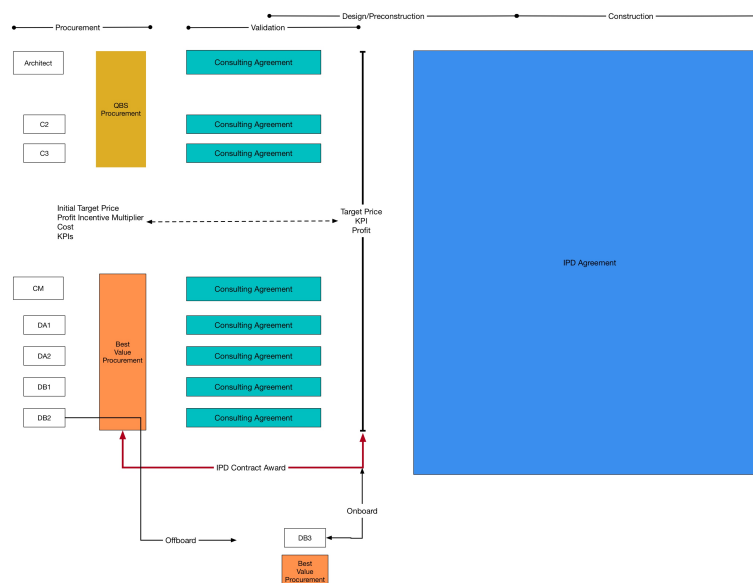
Lots of Pieces...

- Procurement
 - Design
 - Quality Based Selection
 - Construction
 - Lowest Responsible Bid
 - Best Value
 - Competitive Negotiation
- Project Delivery
 - Design Bid Build
 - CM@ Risk
 - Design Build
 - Public Private Procurement



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Putting Pieces Together



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Procurement and Team Formation Challenges under German Law



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Main Points

Issues

- Establishing Pricing and Compensation Formulas
- Compensation of Professionals vs. Contractors
- IPD Team Member Selection Procedures
- Choosing an Award Procedure
- Types of Award Procedures
- Team Formation



Choosing Award Procedures 1

- **Further Considerations**
 - EU public procurement law recognizes 5 Procedures for awarding contracts:
 1. The **Public/Open** procedure
 - *This does not work with an IPD model because a firm price is required for bidding.*
 2. The **Private/Closed/Restricted** procedure
 - *This does not work with an IPD model because a firm price is required for bidding.*
 3. The **Negotiation Procedure**
 4. The **Competitive Dialogue**
 5. The **Innovation Partnership**
 - *Not tested with respect to multi-party contracts.*



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Choosing Award Procedures 2

- **Further Considerations**
 - For public sector employers the contracting authority generally has the initial choice between the public/open procedure and the closed/restricted procedure.
 - The German legislature has abandoned the preference for the open procedure to come in line with the intentions of the EU legislators to allow for freedom of choice with respect to choice of procedure.
 - Procedures 3-5 are only available if the respective conditions set forth in the Act against the Restriction of Competition (ARC (GWB)) §119 are met.



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Open/Public Procedure

- The contract is awarded to the most economical tender.
 - Price is the main criterion considered, in most cases the only one.
- Since for this procedure a price is required, it is not compatible with an IPD Model under German law.



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Restricted Procedure

- This procedure is similar to the open procedure, but limits bidder participation based on selection criteria.
- Also, like the Open Procedure, price is the criterion for award, and is therefore incompatible with an IPD model under German Law.



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Negotiation Procedure

- Best suited for contracts which require a focus on quality over price.
- The contracting authority selects several bidders either with or without a call for competitive bids.
- Also, in this procedure the subject matter of the contract is not laid out in great detail, so the performance targets must be as general as possible.
- Despite the lack of detail, this is still considered an „Ordinary“ procurement procedure, where the general principles of procurement law apply (i.e. competition, transparency and equal treatment).



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Competitive Dialogue

- This is a procedure for awarding public contracts with the aim of identifying and determining how to best meet the needs of the contracting authority.
- There are three phases to this procedure:
 1. Call for tender phase
 2. Dialogue phase
 3. Bid phase
- Tailored for the specific needs of entering into public-private partnerships
- Like the Negotiation Procedure, this approach is intended for situations in which the open or restricted procedure is not expected to lead to a satisfactory result.
- Competitive dialogue is useful in cases where it is not possible for the contracting authority to define the means of satisfying its needs or to assess what financial, legal and technical solutions the market has to offer.
- Particularly suitable for innovative projects, major transport infrastructure projects or projects with complex financing



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Negotiation and Competitive Dialogue Procedures 1

• Design and Planning Fees

- The price term for Phase 1 (design phase) with regard to architects and engineers is based on *Honorarordnung für Architekten und Ingenieure "HOAI"* (Fee Structure for Architects and Engineers)
- Since procurement law requires a price, construction contractors and key subcontractors who are not subject to HOAI must submit a cost proposal for the planning phase and are subject to competition with other bidders.
- If a consortium is commissioned for all planning and construction services, the fee for the planning phase may also be freely agreed and is not subject to the price regulations of the HOAI.
 - Likewise, the HOAI does not apply to project development services.
 - The fee offered by the bidding consortium or a general contractor for the planning phase is therefore also subject to bidder competition.



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Negotiation and Competitive Dialogue Procedures 2

• Construction Pricing Considerations

- The determination of remuneration for the construction phase is considerably more problematic.
- A construction price can only be fixed on the basis of the completed planning. However, since the construction phase is to be commissioned as an option, price elements must also be included in the evaluation.
- Prior to the planning phase, only the general business and transaction costs, as well as profit margin, and the construction site-related overheads are determined as price components.
- The individual costs of the partial service (EKT) represent the purely performance-related costs.
- These performance-related prices are not yet fixed, and can therefore either not be included in the bid evaluation or only on the basis of a preliminary sample calculation.



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Negotiation and Competitive Dialogue Procedures 3

- Further Construction Pricing Considerations

- For example, a fictitious project that calculates costs on the basis of a price per cubic meter of enclosed space (gross room content BRI) or on the basis of a square meter area (gross floor area BGF) is suitable.
 - The surcharges in these approaches are mostly determined as a percentage of cost price incurred.
 - Bidders must give a uniform sum of the initially forecast cost, so that surcharges can be determined and included in the final binding bid and the award evaluation.
- On this basis, the requirement of a price evaluation can be taken into account if, within the framework of the construction phase, the contractor is remunerated based on the prime costs, plus surcharges.



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Example: Ranta Tunnel Project in Finland

- Within the framework of the Ranta Tunnel project in Finland, bidders were given a fixed notional amount as project costs to calculate their non-performance-related and competitive costs.
- Since it can still be assumed that the prime costs are market-dependent, they may also be left out of an evaluation of the price to determine the economic bid, since these prime costs are largely the same for all bidders in the case of a contract.
- Therefore, only non-performance-related costs and performance-related costs, to the extent that they were already fixed in the early stage of the preliminary planning phase, can be evaluated initially.



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Innovation Partnership

- This is a procedure for the development of innovative products, supply, construction, or services not yet available on the market, and for capturing the resulting benefits.
- Following an invitation to tender, the contracting authority negotiates initial and follow-up bids with the prequalified bidders in several phases.
- The innovation partnership thus combines the conclusion of a development cooperation with the subsequent procurement of the innovation developed in the cooperation, without the need for a new invitation to tender.



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Team Formation

- Team formation is a challenge from the point of view of public procurement law for a number of reasons:
 - The right people need to be selected
 - The ability to work cooperatively within a team are desirable characteristics which must be evaluated
- Assessment centers must be set up to ensure that the individuals meet the needs of IPD, while maintaining the transparency required by law.
- According to the ARC, the only factors which may be considered are technical and professional skills, but not personal characteristics.
- This is solved by evaluating these factors as part of an aptitude test, but including them in the overall award criteria, weighted at 25%.



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**IPD: "I see it, I want it"*
(but can a public entity get it?)**

Beyonce - *Formation

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Main Points

- IPD is not created by a legal contract with Lean provisions
- Lean is a philosophic approach based on the collaborative integrity of project team members and true commitment to the success of the Project
- Public agency means to ensure and benchmark IPD and Lean performance
- Procurement Process is Critical
- Contractual terms and conditions won't matter without IPD/Lean ethos
- Ensuring performance (related to the contractual terms and conditions)

"I dream it, I work hard, I go hard . . ."

- A public agency desirous of IPD and subject to competitive bidding procedures must commit to much up-front work unrelated to the contract (and so must potential proposers)
 - Detailed Requests for Qualifications with evidence of IPD/Lean prior implementation, success, "lessons learned" by potential team members
 - Interviews
 - Proof of extensive use of IPD and Lean process tools (Last Planner System scheduling, use of Big Room, Target Value Design/Target Cost)
 - Training, training and more training



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"Prove to me you got some coordination, I slay"

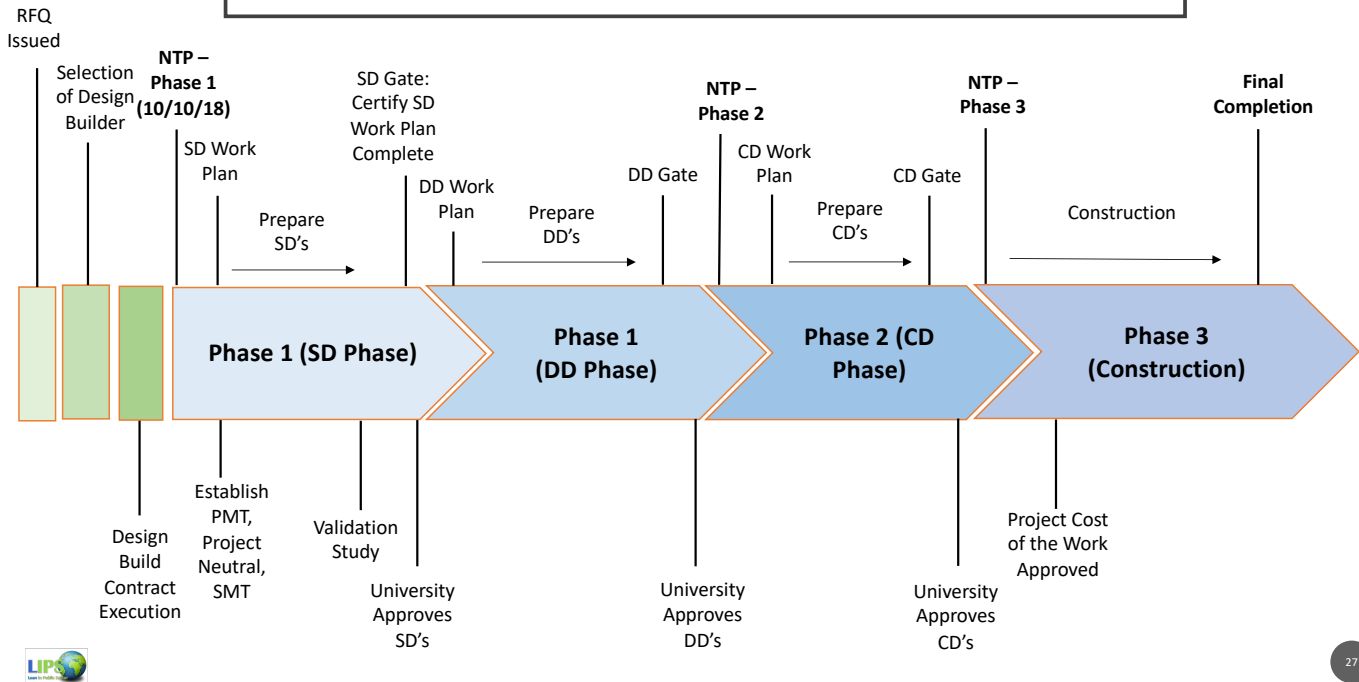
□ Key Contractual Obligations

- Coordination of Project
- Key Personnel and Staffing
- Project Management Team and Alternative Dispute Resolution
- Design Process ("Gating" Requirement and Reconciliation with Project Objective)
- Contract Time (Project Milestone Schedule)
- Subcontractor alignment requirement
- Target Value Design/Target Cost Process
- Design-Builder Contingency
- Shared Savings
- Change Order Process
- Key Contract Abstract and Notice Requirements Handout
- Training on a quarterly basis



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IPD in Process



"Now let's get in formation . . .
Always stay gracious . . . Gon' slay, okay"

- ❑ IPD and Lean implementation means benchmarking, honest assessment, continuous improvement (see below example) and, always, innovation
- UCSF is currently developing a true, poly-party Integrated Form of Agreement (IFOA)
- UCSF is seeking to utilize the California Infrastructure Financing Act, which allows for competitive negotiation of contractors and suppliers





Discussion and Questions

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Thank you!

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