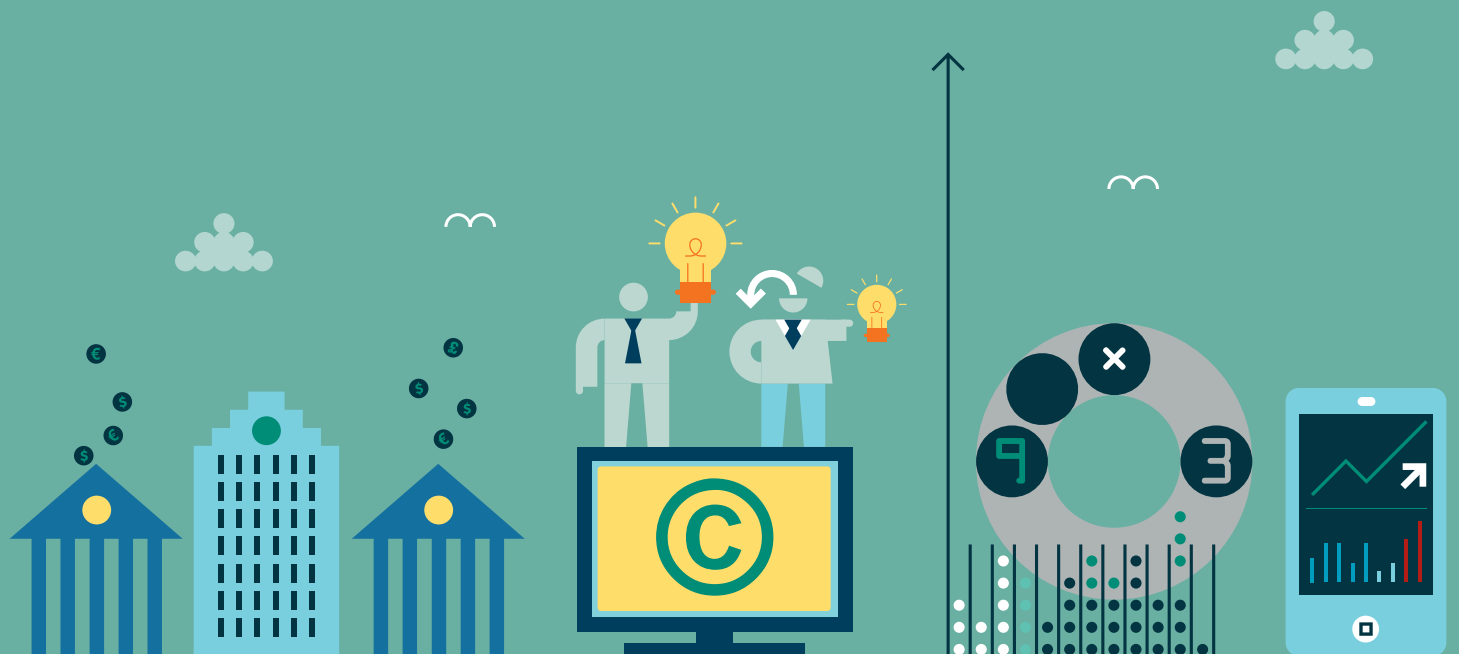


Smart cities in Europe

Can public procurement be used as leverage to drive smart city solutions?



Part of the
Smart cities in Europe
series of reports



Purchasing power

Leveraging procurement budgets to drive innovation

Governments are huge purchasers of goods, services and infrastructure. Across the EU, the European Commission estimates that 14% of GDP is generated directly through public procurement. In the UK alone, 42% of the £6.2 billion worth of outsourcing contracts came from the public sector in 2016, according to consultancy Arvato.

So, given that governments across Europe, both at the central and local level, want their cities to operate in a smarter way, why not leverage this abundant purchasing power to drive innovation? Osborne Clarke and The Lawyer spoke to a number of leading smart city thinkers to find out more.

Changing mindset

Public procurement often happens the same way. A local authority or government agency will decide what it wants and then, within the confines of procurement rules, issue a call for competition. It will evaluate a number of tenders and then, award the contract to the one that scores highest against its published evaluation criteria.

But what if government procurers approached this differently? If, perhaps, instead of drawing up their requirements, they went to the private sector to see what solutions were available. This might significantly alter what they want. They could even engage with a

series of private-sector companies and universities to trial a series of innovative solutions to see what might meet their requirements before issuing a request to actually procure them.

If local authorities and government agencies were joined up in their thinking then the findings of innovative projects could be shared for the benefit of every local authority across the country, even across Europe.

Catherine Wolfenden, Partner at Osborne Clarke UK, outlines a vision for how public procurement could be smarter. "Let's not go to market with an opportunity for a contract to, for example, install a traffic flow system for a city," she said. "That's the old way of doing things. Let's instead go to market with an opportunity to research what an intelligent transport system for the city might be then share outputs, standards and the findings of the research before committing to purchase a system that leaves a city stuck with an outdated solution."

Or, as Iñigo Jodra, Ferrovial Services Centre of Excellence for Cities Director, puts it, "The role of the municipal procurement teams will evolve from being a provider of requirements to a designer of challenges and from assessing whether solutions are best-in-class and robust. We, service providers also need to evolve from a transactional mindset just based on honouring a contract to one of contributing as an innovation partner to cities."



The procurement challenge

This sounds simple enough, but it's just not happening. Why not? For a start, driving innovation in this way requires a level of expertise that many procurement officers simply don't have in the UK. This is evidenced by the fact that hundreds of English civil servants are currently being graded and their pay altered following a series of high-profile procurement mistakes.

Even those procurement officers who do possess the expertise and willingness to explore more innovative procurement processes are constrained by EU procurement rules that do not drive innovation. These often mean that many procurement officials are fearful about discussing city problems and the potential solutions with private-sector providers as it could be seen as providing certain companies with an unfair advantage in later tenders.

What's more, a real obstacle to working with companies in this way is the important question of who owns the IP of any joint endeavour. Local authorities will often want to own the IP so as to avoid paying licence fees should they want to use the technology after an innovation programme, but equally so too will private-sector companies.

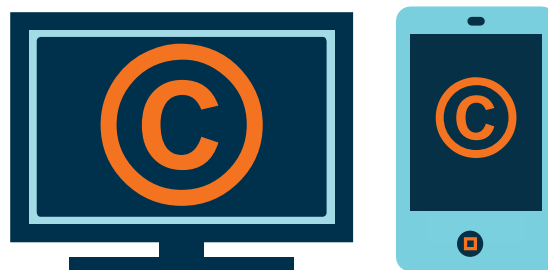
"The question of who owns the IP at the end of a project is absolutely a barrier to local authorities procuring more innovative projects," says Eduardo Martínez Gil, a

consultant at the Indra Centre of Excellence for Smart Cities. "And it's not just the IP of the final outcome, but also companies' products or technology that go into enriching the final solution that the partnership creates, you don't start from a blank page. Sometimes the IP on these projects is very complicated to define. Cities often don't want to own the IP so that they can commercialise the solution, they just want to use the technology without paying a licence fee once the project is finished. But nonetheless this can create problems for private companies. So you really have to negotiate on a case by case basis."

A couple of success stories

Encouragingly, there are a handful of shining examples where these challenges have been overcome. One is the Low Carbon Networks Fund (LCNF), which provided £250 million in funding to British distribution network operators between 2010 and 2015 to invest in innovative pilot projects aimed at improving the efficiency of the electricity distribution network.

The fund was set up in 2010 by Ofgem (the government regulator for gas and electricity markets in the UK) and has since invested in over twenty large-scale projects. Importantly, all of the findings are uploaded to a website and are discussed at annual conferences to ensure that the findings are shared. A recent report by Pöry concluded that the cost savings



resulting directly from the funded projects could reach £7.8 billion should the projects be rolled out across Great Britain.

“Before the LCNF innovation was not a focus area for the distribution network as the regulatory model prioritised driving down costs,” explained Matthew Pringle, Public Relations Officer at the Energy Networks Association. “But with more intermittent renewables generation and electric vehicles coming online, Ofgem and network companies realised innovation would be vital to actively managing the load in the distribution network. LCNF was the starting point.

A condition of the LCNF funding is that the results are shared via the Smarter Networks Portal, which is a website with all of the innovation projects funded through LCNF and some of the new innovation funding streams that have been rolled out since LCNF. The findings are also shared at the Low Carbon Network Innovation conference. The LCNF was deemed very successful by the regulators and the industry because it has stimulated a cultural change towards innovation in the networks. The findings from the LCNF projects are in some cases being rolled out into business as usual for companies and are already delivering significant savings for energy customers.”

Another shining example is the Sheffield Smart Lab, a joint initiative by Sheffield City Council, Ferroviol Services and Amey. The initiative gives organisations the ability to test their smart solutions in Sheffield relating to

energising the city centre and supporting people to live independently in Sheffield.

Innovation partnership procedures – a huge opportunity?

A new procurement procedure has emerged from Europe that could help overcome many of the challenges cities face when trying to encourage innovation through procurement. The Innovation Partnership Procedure, which was introduced as part of the EU Public Procurement Directive in 2014, enables the public sector to select partners on a competitive basis to develop new innovative solutions that are tailored to their requirements. Importantly, the procurement is divided into phases, with the competitive phase occurring in stages, allowing multiple solutions to gradually develop with several private partners and the public authority in parallel. Through the life of the project the best solutions progress, with each phase being paid for and the IP ownership clearly set out. The best solution can then be awarded the contract to deliver the commercial requirement.

Among other advantages, the new procurement procedure provides more clarity to commercial partners on IP protection. “In Spain, we haven’t yet transposed the Public Procurement Directive,” says Luis Castro, Partner at Osborne Clarke Spain. “We expect the Public Procurement Directive to pass in June 2017.



We are very excited about this because the innovation partnership procedure provides all the players in the market with reassurance about IT and IP rights following the partnership. At the moment, innovative projects carry a high risk for the private sector because there are no adequate legal certainties about how IP rights may be used in the context of innovative projects, as they are not treated differently from other service agreements. With the exception of those otherwise stated in the call for competition, public entities can use the IP without the expressed consent of the involved parties.”

The transposing of the EU's innovation partnership procedures into national law is creating a sense of optimism, but in reality this just provides local authorities and government agencies with a better set of tools to wield their purchasing power.

Governments will certainly need to invest in training their procurement staff, but more than anything need to change their mindset to openly engaging with the private sector and academia to explore what innovative solutions are out there.

If you would like to discuss how Osborne Clarke can help your business use public procurement to drive smart city solutions, please contact Luis Castro or Catherine Wolfenden.

For more information on how we are involved in developing smart cities, visit ocsmartcities.com

Contacts

For more information, please contact:



Luis Castro

Partner, Spain
Osborne Clarke
+34 91 576 44 76
luis.castro@osborneclarke.com



Catherine Wolfenden

Partner, UK
Osborne Clarke
+44 117 917 3600
catherine.wolfenden@osborneclarke.com

.....

About Osborne Clarke

We're an international legal practice and our goal is simple: to help our clients and our people succeed in tomorrow's world. We've been around for over 250 years and have a presence across Europe, Asia and the US. Within our eight core sectors, our clients range from market leaders to fast-growth companies. We have 1,450 employees, including more than 225 expert partners and 800 talented lawyers, working across 11 countries. Our offices are located in Amsterdam, Barcelona, Berlin, Brescia, Bristol, Brussels, Cologne, Hamburg, Hong Kong, London, Madrid, Milan, Munich, New York, Padua, Paris, Rome, San Francisco, Silicon Valley and Thames Valley.



These materials are written and provided for general information purposes only. They are not intended and should not be used as a substitute for taking legal advice. Specific legal advice should be taken before acting on any of the topics covered.

© Osborne Clarke LLP 2017

Osborne Clarke is the business name for an international legal practice and its associated businesses. Full details here: osborneclarke.com/definitions.

