

Example of essay on procurement process contract validity

[Business](#), [Customers](#)



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Procurement Process Contract Validity

Offer – An offer describes the expression of a willingness to enter into a binding contract on given conditions, and as such, it is expressed with the purpose of it becoming binding if the set terms are satisfied. According to *Storer v Manchester City Council* (1974) and *Gibson v Manchester City Council* (1979), an offer must be both specific (time and place, quality, quantity, means and time of communication etc) in its invitation for other parties to enter a binding contract, including without any further negotiations, because it includes the understanding and invitation of a supplier’s assent, which will conclude the contract. Effectively, it is necessary to conduct a thorough needs assessment, which will be used to draw up a comprehensive procurement plan (MacMillan & Stone, 2012). Once the procurement plans are completed, it is critical to obtain the specifications information and other research necessary to allow suppliers to express their willingness to supply them so that you do not offer wrong requirements and end up contractually obligated to purchase wrong supplies. It is also advisable to request that suppliers not only express their interest, but also

offer information about their products. This should be done by requesting quotations, proposals and invitations to tender, which should be provided to the suppliers either directly or by way of advertising (Stone, 2013).

Acceptance – The suppliers' offers and proposals will be evaluated, with pre-qualifications, negotiations, logistics management and supplier liaison etc being conducted. An acceptance to each and every term of the offer will form a binding contract. It can be done by word of mouth, by post or other communication (indicated in the offer) or according to *Brogden v Metropolitan Railway Company (1871)*, by conduct. It occurs when the offering party's conduct causes the objective inference that the supplier assents to the terms of the offer (MacMillan & Stone, 2012). Changing any of the terms means that the initial offer has been rejected, while adding new terms is a counter offer that rejects the former offer and may no longer be accepted, *Hyde v Wrench (1840)*. Effectively, the procurement process must be diligent, with all offers and counter offers being carefully tracked to ensure that the parties only accept what has been offered, which must be in line with the company's needs.

Intention – Both the suppliers and the company must have the objective purpose of entering into a binding contract, as against a simple offer (Stone, 2013). It is necessary that the offer and the tender documents from suppliers include express statements of the willingness to enter into an enforceable, contractual relationship. While such an intention is usually implied, *Harris v Nickerson (1873)*, it is important to include express terms in order to avert protracted court process to determine just that.

Consideration – The tender contract will include an express detriment,

forbearance, responsibility, loss and/or benefits accruing to the promisor/promisor, either as included in the offer or as agreed upon during the negotiations. In additions, the terms that would govern the adjustment of the consideration in the event of delays, foreign exchange fluctuations and other unforeseen events shall be included to avert uncertainties and court processes.

Capacity – It is critical to ensure that the tenders, offers, counter offers, negotiations and acceptances are carried out by individuals who are not only mandated to make such decisions, but are also of legal age, have the mental capacity, and are in control of their senses. Effectively, the company should only deal with the procurement and sales officers/managers or other senior officers that are allowed to represent the supplier in the capacities in which they act (Stone, 2013).

Contractual & Legal Remedies

Damages – damages are available to aggrieved parties as a right, whether they are specifically provided for in the contract or they are implied under common law or any other law. The injured party must demonstrate injury that directly or naturally flows from the contractual breach to receive substantial damages, *Victoria Laundry v Newman Industries*; else only nominal damages may be awarded (Perillo, 2000). This remedy is available in the event of the offending party's actions or omissions did directly, or in the ordinary course of events, breached the contract, and the remedy shall be equivalent to the reasonable losses arising naturally from the breach or as contemplated by the parties when they entered the contract. However, in

Hadley v Baxendale, the court determined that damages shall reasonably compensate the claimant either in value or in cost of cure. In addition, injured parties may not recover losses that they may have mitigated, Chattey and Another v Farndale Holding Inc.

Specific Performance – Refers to the equitable remedy decreed by a court to compel an offending party to abide by their contractual obligations especially in cases where damages are inadequate, Falcke v Gray (1859). Specific performance is suitable in the event of unique contracts and would not usually be preferred by courts if it requires excessive administrative or supervisory or in the event of vagueness in contractual terms. This remedy is common in building/construction contracts especially since it is most concerned with results and not the processes that lead to them. In the same vein, the remedy is generally unavailable where damages are sufficient; orders occasion undue hardships; order is not enforceable against both parties; the claimant acted unconscionably or unfairly; or for contracts that involve personal services including labor contract because of its restriction of personal freedom, Peter v Ali (1984) and Ryan v Mutual Tontine Association (Cohen & McKendrick, 2005).

Injunction – permanent or temporary injunctions are nearly similar to specific performance, not least because they would only be awarded at the court's discretion. They are available to claimants in the event of damages being inadequate to compensate them for their injury and where the plaintiff wants to stop the defendant from commencing or carrying on contractual breaches. A case in point is the non-complete-clause in the event of a business sale, where courts will generally strike down generally broad injurious covenant

clauses because they are unconscionable or restrain trade. In Warner Bros v Nelson, a contract provision that prohibited an employee from seeking a similar employment in the same industry was set aside as restraining trade and unconscionable. (Cohen & McKendrick, 2005)

Courts take into consideration the balance of convenience test, and in the event that the injunction may engender orders that exceed orders under specific performance. Temporary injunctions may be sought to prevent injuries especially when awaiting the hearing and determination of a court case, One Records Ltd v Britton and Warner Brothers v Nelson (Cohen & McKendrick, 2005).

Other Remedies - Binding legal obligations, which are different from the contractual obligations expressly or implied under a contract, are implied by quasi contracts. Such quasi obligations are available to claimants in cases where remedies are otherwise unavailable or as an alternative to the other remedies where the latter are unsuitable (Cohen & McKendrick, 2005).

Risk Transfer

- Passage of title - This contractual provision requires that the title may only be transferred to the buyer once the said goods are physically delivered. It includes shipment and destination contracts that involve goods being transport goods through carriers to the destinations that are stipulated in the contracts, only after which the supplier will be relieved of the liability and the title transferred to the buyer (MacMillan & Stone, 2012). Effectively, all the risks involved in shipping/transporting and handling goods (including damage or loss) will be borne by the supplier and not the buyer. This is

contrary to a non-delivery contract for instance, requires that a buyer shall assume ownership of the designated goods without the physical delivery of the goods by the supplier, implying that the buyer assumes ownership immediately the contract of sale is concluded. In this way, buyers will be burdened with the liabilities through the delivery process (Stone, 2013).

- Price variation - In the event of a possible variation in prices from the time of purchase and the delivery of the goods, then to transfer such risks to the supplier, a price variation clause should be included in the contract. It may include provisions that prices must not exceed a certain amount under varied circumstances, or may in fact insist on a fixed price regardless of the changes in the business conditions (Perillo, 2000). Under this clause, the supplier is obligated to deliver a specific good or work to the consumer at a fixed, agreed upon price(s). It may include penalties in the event of price changes, delay or non-delivery. As such, the price variation clause shifts the risks away from the buyer, coupled by the management of the burden associated with the same risk. However, any such clauses/contracts must be negotiated, expressly agreed upon and should not result in a considerable imbalance in the obligations and rights of parties, lest the courts set them aside.

- Force majeure – The force majeure clause may require that suppliers do hold and maintain defined insurances. However, a large range of force majeure events cannot be measurably or efficiently insured. In these cases, suppliers may seek protection of the courts because Acts of God are considered a legitimate ground to either terminate or suspend a contract. Effectively, force majeure is extremely limited as a risk management

strategy for a buyer (Cohen & McKendrick, 2005).

- Intellectual property – It requires that the seller possesses all or valid licensing for the intellectual property and takes all adequate measures to ensure that such rights are protected. In addition, the supplier is required to possess own or be licensed use all the necessary intellectual property to carry on business, besides not engaging in activities that infringe third party's rights. Other than these, this clause may also require that no other parties are representing or even infringing the seller's rights (MacMillan & Stone, 2012). As such, this clause will have the effect of shielding the buyer from possible claims of intellectual property infringements, including possible payments to third parties.

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