

Use of Lawyers in Purchasing and Supply Management



The emphasis within organisations should be on ensuring that purchasing & supply management professionals have the necessary level of competence to deal with routine legal matters and that expert legal advice is taken where it is warranted and where it can add most value.



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Introduction

Where there is a knowledge gap, purchasing and supply management professionals should feel comfortable in approaching legal advisers for relevant advice and information.

The purchasing and supply management professional must be able to manage the relationship with lawyers whether they are in-house or an external resource; they should be the key interface between external lawyers and the organisation as far as purchasing and supply management issues are concerned.

CIPS Positions on Practice

CIPS views, opinions and beliefs are stated throughout the document; however the broad policy statements which underpin the text are as follows:

- CIPS considers that purchasing and supply management professionals have a pivotal role to play in managing the interface between their organisation and external lawyers.
- Purchasing and supply management professionals have a responsibility for assessing the level of risk in given situations; CIPS believes also that purchasing and supply management professionals have a role to play in developing a policy for ensuring that the organisation's lawyers (internal or external) draw attention to the existence, or the threat, of risk; purchasing and supply management professionals also have a responsibility for deciding an appropriate course of action to achieve this objective.
- CIPS considers that purchasing and supply management professionals should collaborate with their in-house legal department when necessary and in particular develop relationships with those members of staff in such departments specialising in procurement.
- CIPS takes the view that purchasing and supply management professionals should have sufficient knowledge of the law to be able to establish whether or not a specific lawyer has an acceptable level of expertise in those areas of the law in which he/she lays claim to expertise.
- CIPS encourages purchasing and supply management professionals to source legal services in a similar fashion as they would any other procurement.
- In view of the relatively high cost of buying legal services the CIPS would recommend seeking the advice of senior management before any significant decisions are made.
- CIPS recommends that purchasing and supply management professionals should seek and obtain as much advice as possible from their legal advisers.
- When a specific legal issue arises and no internal legal advice is readily available, CIPS considers it is legitimate for the purchasing and supply management professional to seek the advice of, say, the Company Accountant or the Company Secretary.
- CIPS takes the view that specific details of the contractual relationship (eg. division/allocation of responsibilities) should appear in the contract schedules rather than in the terms and conditions.

Use of Lawyers

Typical uses of lawyers includes:

- Advising on complex aspects of general legislation eg. Competition Law
- Interpretation of complex legislation eg. TUPE
- Guidance and advice on precedent
- Drafting terms and conditions of contract

- Evaluating tenders as part of an in-house project team
 - Handling disputes arising from the interpretation of terms and conditions of contract
 - Handling disputes arising from performance measurement/monitoring of a contract
- Purchasing and supply management professionals should be aware that lawyers tend to have different perspectives on risk; there may therefore be occasions when purchasing and supply management professionals seek lawyers' advice and nevertheless decide to adopt an alternative course of action.

Further, lawyers often have a different mindset and background to purchasing and supply management professionals; typically they tend to think in terms of litigation rather than mending the relationship with the supplier. CIPS recommends that purchasing and supply management professionals develop a policy that facilitates lawyers being responsible for drawing attention to risk yet it is the purchasing and supply management function that is responsible for assessing the risk and determining an appropriate course of action.

CIPS suggests that purchasing and supply management professionals should carefully manage lawyers' contributions during post-tender negotiation, as by virtue of their role, lawyers can be too prescriptive and inflexible so preventing partnering arrangements from flourishing. However, where knowledge is otherwise lacking in the purchasing and supply management professional, they can prove invaluable in assessing the validity of any resultant proposals/agreements against relevant Competition Law etc.

Providers of legal services fall into two broad categories – inhouse lawyers and external lawyers.

In-House Lawyers

Most large organisations have legal departments in which they employ qualified lawyers or legal advisers.

CIPS believes that purchasing and supply management professionals should work with their in-house legal department and foster relationships with those legal advisers specialising in procurement.

Relationship management is an important aspect of purchasing and supply management and is particularly valuable for maintaining relationships with in-house lawyers and avoiding potential conflict on roles and responsibilities.

CIPS recommends that the head of purchasing and supply management holds regular meetings with the head of legal services to maintain effective lines of communication and promote team spirit.

CIPS suggests that purchasing and supply management professionals should be able to manage on their own as far as routine contractual matters are concerned. However, where they are at all unsure or where the contractual issue is slightly more complex, they should work alongside their in-house lawyers.

CIPS suggests that purchasing and supply management professionals should as appropriate, on a case by case basis; assess the value for money obtained from their in-house legal team as compared to procuring the services of external lawyers in the same way as any other value-for-money review of services.

External Lawyers

Many organisations do not have internal lawyers and so purchasing and supply management professionals, and other colleagues, have to seek advice from external professional sources. Even when lawyers are employed within an organisation, like purchasing and supply management staff, they too have a multitude of specialist areas and may thus not be the best source of advice for commercial transactions.

Purchasing and supply management professionals should be sufficiently familiar with the law to ascertain whether or not a lawyer is truly an expert in the field of law in which they claim to be most proficient.

It should not be assumed that just because he/she is a solicitor or barrister then he/she should necessarily possess the relevant expertise.

CIPS encourages purchasing and supply management professionals to procure the services of lawyers as they would any other regular requirement, aggregating demand over a specified period of time and negotiating the appropriate hourly rates and terms and conditions of contract.

Some legal firms are surprised at having to enter into competitive tendering for the provision of legal services; purchasing and supply management professionals should question such a response if they are seeking to appoint lawyers who specialise in commercial law.

It is worth noting that a professionally qualified person eg. accountant and of course an in-house lawyer can seek a legal opinion directly from a barrister without first applying to a firm of solicitors. Barristers are often considerably less expensive than City solicitors and all have chosen legal specialities in which they are expert.

As external lawyers can prove an expensive resource, CIPS suggests that all requests for advice in relation to procurement should be authorised, if not organised, by the organisation's most senior purchasing and supply management professional or their nominated representative.

When employing external lawyers in particular, value for money is maximised when the purchasing and supply management professional provides the lawyer with a carefully written brief as to the nature of the problem together with specific questions that require answering.

If that lawyer does not know the answer to the problem he can then discuss the issues involved with colleagues. If however, the purchasing and supply management professional simply provides the lawyer with a generic problem, such as a contract to look at, with no particular context provided or problem identified, the costs may well be excessive and value for money reduced.

Moreover, if the brief to the lawyer clearly specifies the commercial goal in view not only should the lawyers' advice be much more relevant, but if it proves in future to have been seriously inappropriate he will (if an external solicitor) be liable for charges of negligence. Purchasing and supply management professionals should encourage the lawyer employed to train them so that similar issues arising in the future can be dealt with on an in-house basis. Very often external lawyers can be persuaded to provide training free of charge, given that it is to some extent self-promotional.

CIPS advocates that purchasing and supply management professionals endeavour to obtain as much free advice as possible from their lawyers; this aspect could be built into contractual arrangements especially if the contractual period is for a number of years. Conversely, purchasing and supply management professionals should utilise the lawyer's nonchargeable time to train him/her in an understanding of their organisation's business needs.

CIPS suggests that the processes outlined above are also broadly applicable to the use of in-house lawyers.

Other Sources of Legal Advice

When faced with a specific legal concern, and without the benefit of internal lawyers, the purchasing and supply management professional might seek the opinion of other professional colleagues such as one of the company's accountants, internal auditors or the Company Secretary as these professionals may well have had some legal training.

This may help with the production of a brief for any external lawyer who may be appointed.

Conclusion

CIPS has developed a range of documents on purchasing and supply management issues but the reader may find Purchasing and Supply Management Professionals' Competence with the Law of particular use. All published policies are available on the CIPS web site at www.cips.org

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