

Opinion Letters

Office of Government Commerce (OGC) Advice to Government Departments: Opinion Letters

1. The purpose of this note is to explain why Government departments should not in future, as a matter of general policy, issue "opinion letters" on the powers of a particular department or authority to enter into a contract (usually a PFI contract) or on the authority of a particular official to sign the contract.
2. Lawyers acting for potential contractors or their lenders, as part of their legal due diligence work, have sometimes asked for such "opinion letters". Such requests can come at a very late stage before contracts are due to be signed. These letters are sometimes misleadingly referred to as "comfort letters" which has a specific and different commercial meaning

Background

3. The question whether, in a particular case, a Government department has capacity or powers to enter into a contract on behalf of the Crown, is answered by reference to principles of constitutional law derived from case law and, if appropriate, by reference to relevant statutory provisions. These are openly available to all contracting parties alike and it is for them to consider these and take advice from their own lawyers if this is considered necessary.
4. If lawyers instructed by one of the parties have genuine doubts on any specific issues as to the capacity or powers of the Crown to enter into the proposed contract, these questions should be raised with the department or authority or their lawyer at the earliest opportunity so that the matter may be resolved. The department or authority or their lawyers should always be prepared to be helpful in providing information or a steer which may resolve the issue. Such dialogue between the parties or their representatives is often to their mutual advantage. What the department or authority or their lawyers should not do is, in effect, undertake this aspect of due diligence work on behalf of lawyers instructed by the other parties to the transaction.
5. Similarly, in relation to authority to sign, an "opinion letter" should not be necessary in the light of the principles described below. Where there is reason to question whether an official has status and authority as a civil servant within the relevant department or where there are particular statutory requirements to be complied with, specific evidence may be given of internal authority or compliance

The general legal position with regard to the capacity of the Crown to contract

6. Because the Crown is a legal person at common law, in principle statutory authority is not needed before the Crown can make a contract. The Crown will however be bound by statutory provisions which expressly bind the Crown or which, by necessary implication, do so. For example the effect of statutory provisions may be to limit the purposes for which a power may be exercised or specify the manner in which a power is to be exercised or limit the extent to which a power can be devolved. Each case therefore needs to be considered against any relevant statutory provisions to determine whether the Crown is acting within them.
7. It is likely that the Crown cannot be prevented by an existing contract from exercising powers which are vested in it either by statute or common law, but this is unlikely to have an impact on commercial contracts (see generally Bradley and Ewing Constitutional and Administrative Law 12th Edition at pages 846 & 847).
8. Payments by the Crown require the statutory authority of an annual appropriation by Parliament in an Appropriation Act and no Parliament is able to bind its successors, or even itself, to vote money in future years. The Government presents estimates to Parliament for approval, in order that obligations entered into under contract can be fulfilled out of money voted by Parliament.
9. The effect of sections 1 and 2 of the Crown Proceedings Act 1947 is that the Crown can be sued in contract and tort. Procedurally this is done by claiming against the appropriate Government department listed under section 17 of the Crown Proceedings Act. Where there is no relevant department listed or where it is unclear which department to claim against, claims can be brought against the Attorney General. This generally places the Crown in the same position as any contracting party, but there are some privileges and immunities which the Crown Proceedings Act has preserved. Section 21 provides that courts have no power to grant an injunction or to make an order of specific performance - instead the court may make an order declaratory of the rights of the parties. However this provision is modified in relation to procurement to enable the courts to suspend the procedure leading to award of the contract. The Crown is immune from the usual methods of enforcing a judgment against it - the department is however required by section 25 of the Act to pay the amount certified by the court to be due as damages and costs.

10. Subject to what is said above, the ordinary rules of contract apply to the Crown. In addition, it is a principle of constitutional law that a decision made on a Minister's behalf by one of his officials is that of the Minister. The official acts as the Minister himself or herself and the official's decision is that of the Minister. This is known as the Carltona principle after the case of *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560: see also *R v. Skinner* [1968] 2 QBD 700 at 707 . Except where the express delegation of authority is required by a particular statute, the civil servant's authority flows from the general nature of his or her administrative work and not from formal delegation.

Publicity

11. Copies of this note are being circulated to the Government Legal Service PFI/Procurement Working Group. It will also be placed on the OGC website under "Publications". Where requests for "opinion letters" are received this note may be cited in support of any refusal.

12. Any questions about this note should be addressed to Sukhi Grewal, legal adviser here at OGC (tel: 020 7271 1380).

This note has been approved by the Treasury Solicitor as Head of the Government Legal Service