

strategic vendor responsibilities:

**why new court rulings mean that
strategic vendors must take more
responsibility to ensure that your
business objectives are met**

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executive summary

In today's economic climate, private and public sector organisations find themselves with ever increasing pressure. They are tasked with maintaining or improving service delivery whilst creating significant cost efficiencies. These somewhat contrary goals require a fresh approach to service provision, and many organisations turn to outsourcing, managed services and service commissioning as the solution.

But in spite of this mass adoption, a British Computer Society survey found that up to 87% of strategic vendor partnerships go off track. The Standish Group concluded -- on objective criteria -- that 73% of strategic vendor services ran more than double over time and cost or failed outright.

However, the most common challenges faced by client organisations entering into (and maintaining) strategic vendor partnerships can be prevented. Recent court rulings require strategic vendors to take responsibility to ensure that the services you commission from them achieve your business outcomes. As a result, organisations can cut significant costs whilst improving service delivery, and they can do so by working with their vendor in a mutually beneficial partnership.

In this white paper we focus on how Courts have interpreted the 'implied' (expert) strategic vendor responsibilities in the recent past, and how the lessons learned from these court rulings can help you and your strategic partner to get both your commissioned services and your relationship back on track. Furthermore, we will illustrate how both parties' behaviour, rather than contract terms, can make or break the critical elements of a strategic vendor partnership.

vendor responsibilities

As we alluded to in the executive summary, one of the key factors in creating a successful vendor relationship is to understand that the written contract terms with your vendor do not represent the final word on how your partnership should be maintained.

If your vendor represents itself as an “expert”, legal precedence has established a raft of implied responsibilities that it must adhere to. Note also, that if your vendor acts as a specialist, it cannot “contract out of” being an expert. If it tries to, a court would probably still uphold its “expert responsibilities” in the event of a disagreement.

If your vendor acts as a specialist, it cannot “contract out of” being an expert

how do I know if my vendor is an “expert”?

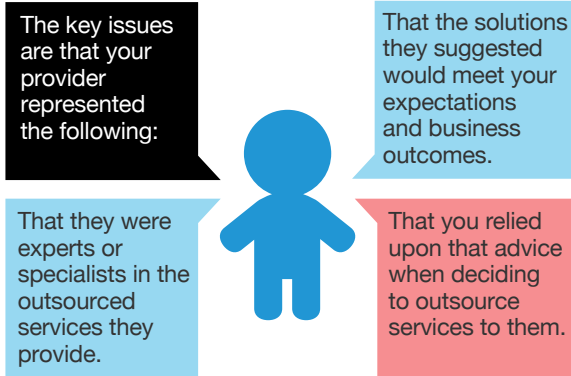
In simple terms, your vendor is an expert if they have represented to you that they have undertaken delivery of similar outsourced/commissioned or managed services for another organisation at some point in the past.

represented that they can provide a solution to your operating problem within your organisation. What precise solution they propose isn't particularly relevant. What matters is whether they have proposed a solution or not.

From a self-promotional standpoint, it is in a vendor's best interests to represent themselves as an expert. Their original proposal to you probably included details of services they have successfully outsourced from other organisations. Your vendor may well have extolled the benefits of their expertise relating to the specific services you want to outsource to them.

It is important to note that the type of services that your vendor has claimed to be a specialist in do not have to be identical to the services you outsourced -- they just have to be “similar enough”. Each type of outsourced service carries its own unique idiosyncrasies, so differences in service delivery experience are expected.

There are many levels of ‘experts’. What is fundamental is to understand whether your strategic vendor has



In terms of identifying your vendor as an expert, no further considerations are required.

what does an expert vendor have to warn me about at the pre-contract stage?

The case of Stephenson Blake (Holdings) Limited v Streets Heaver Limited helped set the scene for organisations that rely on strategic or professional advice from expert strategic vendors. The judgment confirmed vendor responsibilities upon entering into an outsourcing agreement with a strategic vendor in which you relied on their professional advice pre-contractually.

The case helped to clarify that an expert vendor is under a duty to:

1. Validate what their advice covers - and separately, what the solution they provide to you covers.
2. Validate what their advice and solution does not cover.
3. Validate the consequential impact on the outsourced service and business outcomes relating to what their **advice** does *not* cover and, separately, the

consequential impacts of what their **solution** does *not* cover.

If the vendor does not explain these items appropriately to you during the bidding process, it usually becomes liable to resolve any subsequent related issues at its own cost.

For example, during the bidding process, you may have asked your vendor to suggest ways in which a particular service should be outsourced in order to achieve specific cost reductions or service improvements. Under those types of circumstances, your vendor has a duty to “think for you” and to “warn” you (*before* you enter into the contract) of any issues that might have an adversely material impact on the service provision they are purporting to provide.

your expert vendor’s ongoing “duty to warn”

A separate case (J Murphy & Sons Limited vs. Johnston Precast Limited) recently reinforced the “duty to warn” principle. The key interest is not so much the facts of the case itself but the Judge’s restatement of the general principles of how expert vendors should be accountable for their advice -- and over what time period.

The case set a clear legal precedent in terms of an expert vendor’s “duty to warn”:

- An expert vendor has a “duty to warn” that extends throughout the length of the contract term -- not just at the outset.
- This duty exists independently of (and can often supersede) any written terms in the contract.

There are multiple scenarios under which an expert vendor’s ongoing duty to warn would come into play.

For instance, the aforementioned court case related to a dispute between a construction company (Murphy) and a pipe layer (Johnston). Once the contract had been signed, and the implementation had started, Johnston became aware that the materials stated within the original contract would not be fit for purpose. Despite this knowledge, they continued without informing Murphy of the situation. The Judge ruled that as an expert vendor, Johnston had a responsibility to pass on such information, regardless of the fact that the original contract explicitly stated that the original materials be used.

The practical realisation is this -- your expert vendor is accountable to correct any adverse operational issues at its own cost under either of the following circumstances:

- If it implements changes to an outsourced service that results in said adverse issues it had not warned you about.
- If it knowingly continues with a faulty service delivery method -- even if it is specified in the contract.

This duty exists independently of (and can often supersede) any written terms in the contract.

what implied terms mean for your strategic vendor agreement

In outsourcing/commissioning partnerships, implied terms typically come into effect when one party (usually your vendor) represents themselves as an “expert” in the type of service you wish for them to deliver. Under such circumstances, a Court will assume that the vendor has additional responsibilities that may not be stipulated within the written terms of the contract.

Some vendors will attempt to exclude implied terms by writing contradictory terms within the outsourcing contract. The Courts will usually take a dim view of any expert provider that tries to rely upon such an exclusion (if it is unreasonable for them to do so).

Therefore, when commissioning services from an expert vendor, you should be aware of your partner-to-be’s expert responsibilities (regardless of what is stated in the written terms of the contract). Your partner:

Cannot expect you, the client, to be responsible for establishing fitness for purpose of the service/solution proposed before the contract is signed. Typically, a Court would expect the vendor to be responsible for clearly communicating whether its solution is fit for your intended purpose before it contracts with you for it.

Cannot state that your pre-contractual requirements were ambiguous if challenges arise during delivery of the commissioned services. It is up to your vendor to validate your requirements prior to accepting responsibility to deliver the services.



Cannot “contract out of” being responsible for its advice. If its terms try to exclude responsibility for giving you the wrong advice or misrepresenting its capability or expertise, the Courts would likely deem such terms invalid.

Cannot misrepresent its abilities and the time it will take to implement the solution.

Must ensure that where it provides specific products as part of a commissioned service (say for ICT managed services), that its warranty periods are fair and reasonable.

> Terms Implied by Your Actions

There may be times when you and/or your strategic vendor perform actions that are not actually part of the written contract. Such actions may be completely omitted in the contract, or the contractually agreed process may be different to what is being done in practice.

Either way, if neither party complains about such actions, it is usually inferred that they now form part of the contractual responsibilities each party has to each other. In practical terms, it would be as if the contract was rewritten to include the new process.

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> Terms Implied by Fact

An expert vendor can be held responsible for the cost

of a service activity that is (and always was) integral to the delivery of the agreed services, even if it was not accounted for within the original written contract. This is typically the case if the service being delivered would either fail, or be severely hamstrung, without the inclusion of the aforementioned activity.

The Courts will usually find it to be an activity that should be undertaken within the agreement at no further charge, on the basis that as an expert vendor, your partner should have been aware of the required activity, and factored it into the service pricing at the outset.

> Terms Implied by Law

There are certain obligations that are implied by law under various Acts of Parliament, such as the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Sale and Supply of Goods Act 1994.

Common examples would be that the services you commission are fit for their intended purpose, are of a satisfactory quality, and that the advice provided by your partner is appropriate for the services that you are commissioning from them.

how implied terms are enforced in practice

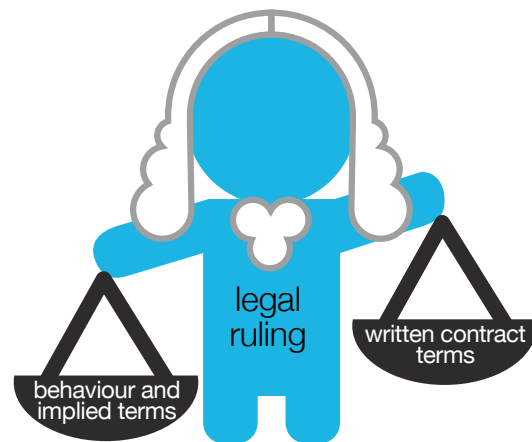
To identify just how powerful implied terms can be in overturning the written terms of a contract, we can return to the aforementioned Murphy vs. Johnston court case. Clause 15(i) of the contract relevant to that case stated the following:

The Customer must rely on its own skill and judgment and recognise good civil engineering practice in relation to the goods and shall satisfy himself that goods specified are suitable for the Customer's intended purpose.

The Judge found that it did not relieve the vendor from its ongoing duty to warn the customer

On the face of it, this term stated that the client was responsible to make sure that any advice it received and any goods/services it purchased from the service provider were suitable for its purposes. The written contract expressly excluded the service provider from having any responsibility in this respect.

Despite this term being expressly written into a contract that both parties had signed, the Judge found that it did not relieve the service vendor from its ongoing duty to warn the customer if it knew (or ought reasonably to have known) about a potential (but relevant) problem with the customer's project.



How implied terms are enforced in practice.

an example “duty to warn” case study for an outsourced call centre

Although an expert vendor's duty to warn both before and during a contract is beyond doubt, many organisations do not still fully appreciate the responsibilities placed upon the shoulders of their vendor. With that in mind, let's consider the following scenario, relevant to local authorities, in which a vendor's duty to warn would be relevant.

Say you have commissioned a call centre to be run by your expert vendor. At the outset of the commissioning arrangement, you specified the necessary quantifiable business outcomes.

One of your objectives was for a 24 hour turnaround on resourcing housing repairs. For such an outcome to be possible, your expert vendor would have planned to populate the call centre with operators of differing “skill levels” -- each level attracting a different pay grade. The majority of issues would be handled by the less skilled

(and less expensive) operators, but more complicated scenarios would quickly be escalated to an operator with the appropriate level of expertise, or perhaps back to the repairs operations team.

During the bid process, the provider would have analysed the nature and types of calls coming into the centre. It would have made recommendations as to the types, skill levels, and support systems that would be necessary for the local authority to improve the tenant's turnaround time in having the problem resolved, the council's business outcomes and lower costs. The responsibility for putting together a detailed implementation plan that would meet the council's business outcomes would have laid squarely on the vendor's shoulders.

Let's say that during the implementation and transition process, the provider identified a fundamental flaw within its original plans -- the planned staff split and/

Strategic Vendor Responsibilities

or the process changes and ICT systems would not be sufficient to achieve your business outcomes.

The only practical way to resolve the issue would be to invest additional funds in more experienced staff and improved ICT systems.

In that scenario, it would not only be your vendor's responsibility to address the issue by making whatever improvements were required, but they would also be fully liable for any additional costs above the original contract value. That responsibility would remain in place for the duration of the contract.

It would not be unusual under such circumstances for your vendor to threaten to break from the contract, and/or insist an increase in the contract value, in order to achieve the original business outcomes. If that were the case, there are a number of legal procedures to force the vendor to honour the contract for the cost agreed originally. However, there are also non-legal and practical measures to address these situations that work for both parties.



Vendors would also be fully liable for any additional costs above the original contract value

how the use of popular project frameworks can erode an expert vendor's responsibilities

It is not unusual for an organisation to discover that the contractual protection they thought that they had is no longer enforceable, due to the way in which their project managers have supported the vendor.

Ultimately, you can become the "expert" by inadvertently trying to "do the right thing"

The key to understanding how this can happen is to appreciate that the law is concerned more by actions (your behaviours) than written contract terms. As we have previously mentioned, contract terms can be amended and overridden by the reality of service delivery. And because popular project management frameworks (such as PRINCE2) only take the operational (as opposed to contractual) aspects of commissioned services into account, following such workflows without taking into account the contractual aspects can have a significantly adverse effect on your vendor partnership.

The leading issue is with good practice methods for "normal" project management, such as:

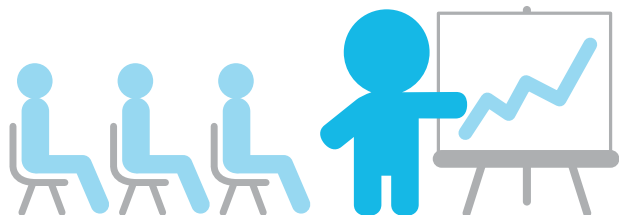
- Directing the project
- Dealing directly with sub-contractors

- Agreeing to changes outside of the contract
- Not following the terms of the contract.

Such methods usually arise when an in-house client project manager feels that they must intervene in the delivery of an errant commissioned service. However, in doing so, they quickly erode your expert vendor's responsibilities. Ultimately, *you* can become the "expert" by inadvertently trying to "do the right thing".

The end result of this is that your vendor can claim that you are no longer reliant upon their advice, and can attempt to charge you for each and every change to the commissioned service, irrespective of who may have been responsible under the original written contract terms (or implied terms).

In essence, as far as the law is concerned, you must let your vendor behave as an expert in order for them to be considered an expert.



why are outsourcing partnerships failing?

We have established that organisations are usually well-protected when using expert vendors. Put simply, a well-managed partnership between an organisation and an expert vendor should result in business outcomes being met if client’s approach contracting with expert vendors in the right way. That typically means a reduction in costs, and an improvement in service delivery.

And yet, as we mentioned in the executive summary, the majority of service commissioning partnerships fail horribly. Given that expert providers have so many clear responsibilities in delivering upon their contractual promises, the question remains -- why is the failure rate so high?

We believe that there are three causative issues.

1. The Expert Vendor’s Failure to Deliver

Research conducted by Technorati revealed a fascinating insight relating to the performance of service commissioning partnerships.



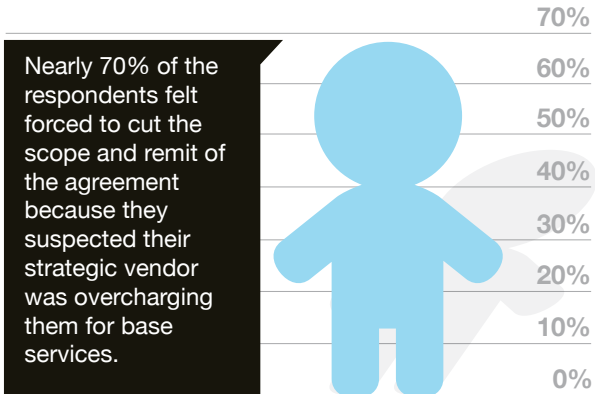
This statistic can of course be interpreted from different perspectives, but it would be fair to state that the majority of organisations polled in this survey were unhappy with the level of performance from their vendor.

When entering into an expert vendor partnership, your contract should include major recourse in the event that your vendor is unable to deliver upon your objectives. This recourse should reflect the gravity of their failure to

deliver. The result of this is that your expert vendor should be appropriately motivated to ensure that your objectives are realistically achievable.

2. The Expert Vendor’s Manipulation of Contract Terms

The same Technorati survey revealed two more statistics of note:



The result of this is that your expert vendor should be appropriately motivated to ensure that your objectives are realistically achievable

Strategic Vendor Responsibilities

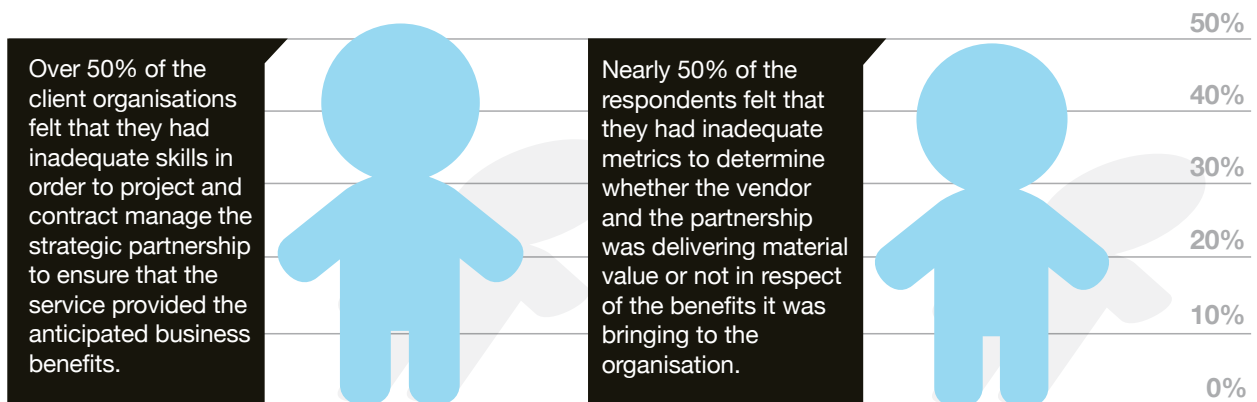
Any contract of worth should make clear the scope and remit of the service to be delivered, along with the direct cost of all elements. The fact that the organisations polled “suspected” overcharging from their commissioned partner is indicative of a poorly-worded contract, a lack of understanding of what their vendor’s responsibilities are and insufficient trust between the parties.

This lack of understanding extends into the second statistic. Being unable to clarify and/or quantify expectations that can/cannot be delivered is a fault of the vendor, not the client. The vendor, as the expert, should be able to help you quantify which of your expectations can be delivered from its own experience with its other clients of what works in these relationships and what does not

3. The Client Organisation’s Lack of Resources

Finally, a vendor partnership may fail because a client organisation simply doesn’t have the necessary inhouse resources to handle such a partnership, competently. Referring again to the Technorati survey:

A vendor partnership may fail because a client organisation simply doesn’t have the necessary inhouse resources to handle such a partnership, competently.



The above statistics are perhaps the most compelling in terms of understanding why so many strategic commissioning/outsourcing partnerships fail. If over half of organisations engaging in strategic commissioning do not even consider themselves capable of managing the partnership, what chance is there of a positive outcome? And that is not even to mention the fact that nearly half of the polled organisations do not actually have a grasp on what a positive outcome would look like.

conclusion

Commissioning managed services and outsourcing can result in beneficial outcomes for both client organisations and expert vendors. But for many, it becomes an expensive exercise, ultimately resulting in disappointment. Service delivery improvements are not achieved, and costs often rise, rather than fall.

The failure of a service commissioning contract can be attributed to any number of potential causes, but

this white paper has focused upon how new court rulings have determined the wide responsibilities that lay on the shoulders of expert vendors. In light of this, many vendors have become adept at “bullying” client organisations into accepting contract adjustments that adversely impact their business outcomes.

With that in mind, although your vendor has a duty to warn throughout a contract, you also have a duty to understand your rights. In the context of this white paper, successful outsourcing contracts are typically borne out of a clear process:

Be clear on your business outcomes from the outset.

Understand your vendor’s duty to warn.

Contract with an “expert” vendor.

Understand your written contract terms, but appreciate that they can be overridden by your behaviours and case law.

Ensure that your staff operate within the confines of the contract.

Work in partnership with your vendor to ensure that the vendor partnership is mutually beneficial.

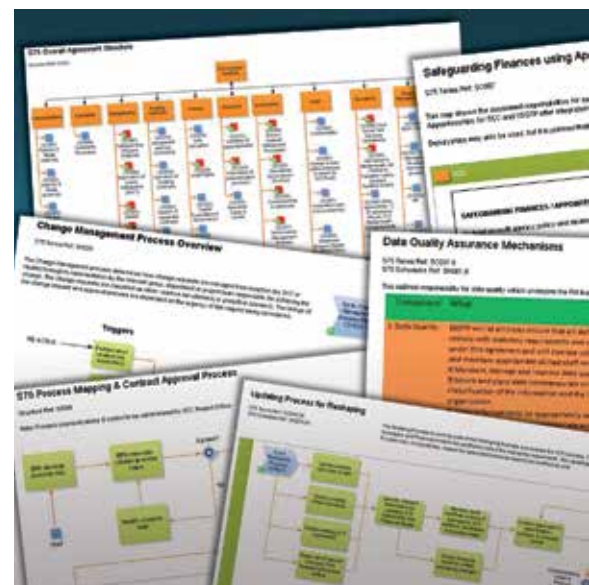
how to reduce costs and improve service outcomes, fast

If you're considering commissioning a service or a managed service relationship with a strategic vendor, talk to Best Practice Group. We have the framework, skills and all the templates you need to help support your team to set up and run either internal or vendor based commissioned services, or both. This includes:

- A proven process for setting specifications to improve performance quickly; as well as a template library of service specifications which can be aligned to your circumstances, thus accelerating construction of specifications
- Template Section 75 agreements when a public sector to public sector relationship is required, as well as agreements for private sector contracts. These agreements ensure accountability, encourage collaboration to innovate, reduce costs and improve services, and which can be aligned to your specific services and circumstances
- A process for performance measurement and management, and for managing service changes throughout the contract
- A reshaping process that drives innovation, collaboration and true partnership working to achieve better outcomes at lower cost.

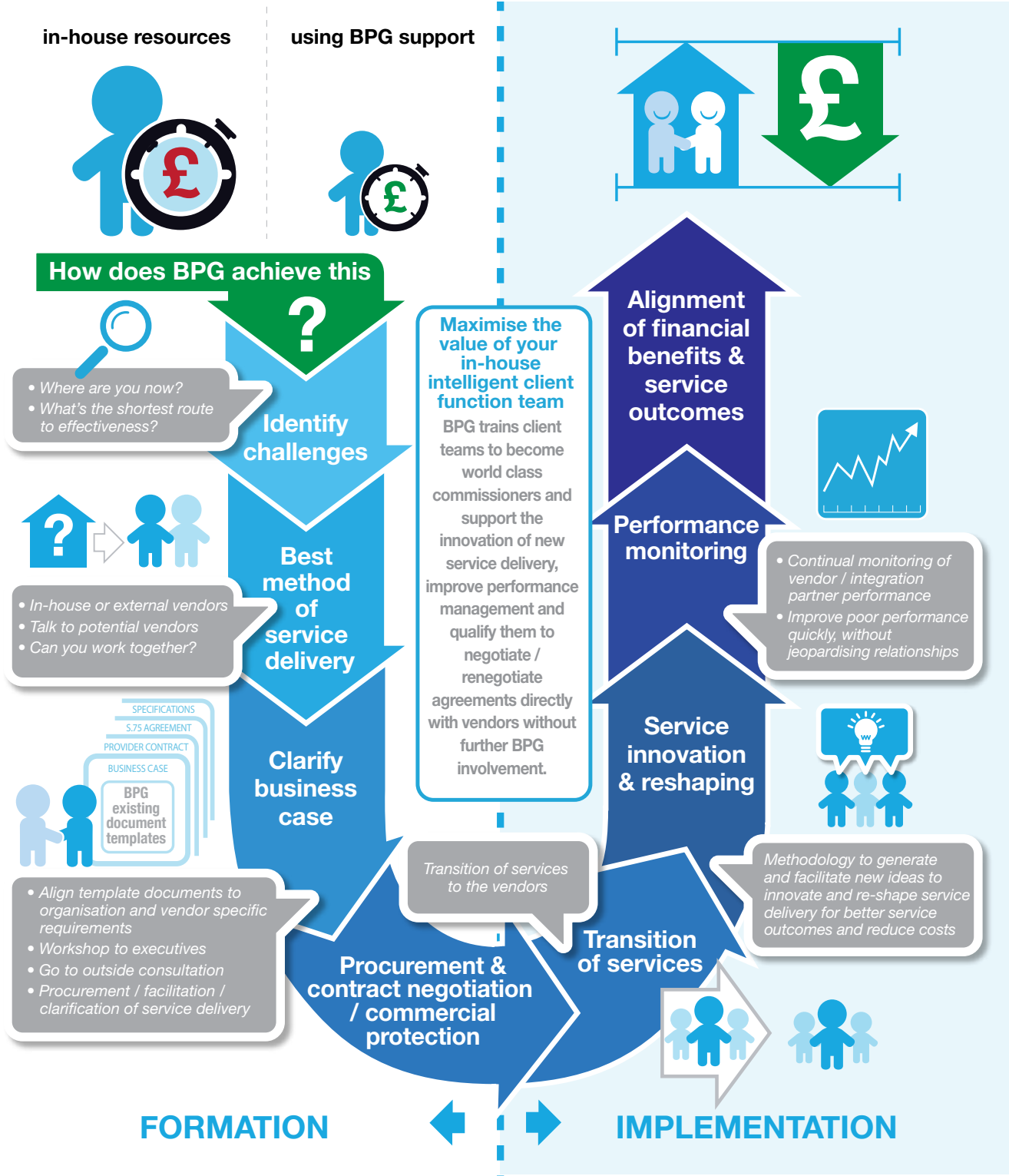
Our framework can considerably accelerate the timescales to achieve beneficial outcomes, and reduce the risks of service commissioning, and ultimately lead to significant reductions in your service delivery costs. We have a deep understanding of both the operational and contractual aspects of service provision, so we are ideally placed to help you achieve your desired outcomes.

Best Practice Group has already worked on over 500 relationships in service commissioning, service integration and managed services. To date we have helped organisations re-align their intelligent client functions to reduce commissioned / integration / managed service costs by 15% to 35% per annum. For more information on how Best Practice Group's approach has helped these organisations make savings and improve services visit www.bestpracticegroup.com or if you would like an informal chat in confidence about the issues your organisation faces, please get in touch. Our contact details are provided overleaf.



how to accelerate your approach

You can accelerate your organisation's approach to reducing costs and improving service outcomes by outsourcing services by adopting Best Practice Group's (BPG) framework.



about best practice group

Best Practice Group is an independent advisor that helps you reduce the cost of working with major outsourcing, technology and shared service partners, whilst ensuring you gain maximum benefit from the solutions they provide to you in a much shorter time frame. We make vendor partnerships work...

A proven track record

The reputation we have achieved for delivering strong working partnerships between client organisations and the strategic vendors, whilst producing direct cashable savings, is based upon a proven track record of working in close collaboration with you. With over 500 previous vendor partnership successes, all of our clients are directly fully referenceable <http://www.bestpracticegroup.com/testimonials>

We help clients in 3 ways:

- Creating new vendor relationships
- Improving existing vendor relationships
- Vendor transition and exit management

Our specialist advisors are unusual in that they have overlapping technical and contractual expertise; they take a proactive, hands-on approach helping your teams get mutual benefit from complex and strategic vendor relationships. Ultimately, Best Practice Group can help you:

- **Cut operating costs by 20%-35%**
- **Achieve business outcomes twice as fast**
- **Turn your vendor into the true partner you always wanted them to be.**

introducing the specialists who can help support your teams

With experience in over 500 strategic vendor partnerships, our specialists have proven track records. Please contact any of the individuals below for an informal chat.



Allan Watton
Director

awatton@bestpracticegroup.com

Allan specialises in the innovation side of re-thinking how organisations contract for outsourced and managed services from both public (Section 75 Agreements) and private sector (Outsourcing

Agreements) vendors. He works to ensure that the maximum possible value is attained from your service partner.



Peter Carter
Associate Director

pcarter@bestpracticegroup.com

Peter ensures that working relationships between client organisations and their strategic vendors are governed correctly. He has a keen focus on ensuring that the relationship between an

organisation and its vendors aligns with the contractual terms and that they are interpreted and actioned appropriately. He ensures that vendors are suitably motivated by your internal teams to reduce costs and improve service delivery outcomes on an ongoing basis.



Richard Kerr
Director

rkerr@bestpracticegroup.com

Richard specialises in helping providers understand how they can offer maximum value to a client organisations desired business outcomes. He works to translate vendors'

promises into firm contractual terms to ensure true innovation, partnership working, and strong relationship management.



Mark Baxter
Senior Advisor

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Mark specialises in the programme management of complex strategic vendor partnerships. He enables the outcomes from these relationships to be realised in an accelerated timeframe, thus

significantly reducing the cost of service delivery whilst increasing service delivery outcomes.



Chris Browne
Director

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Chris specialises in ensuring that your business cases are clearly quantified and aligned with your business outcomes. Furthermore, he works to identify strategic vendors that can

support your culture and innovate your service delivery.



Stephen James
Advisor

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A specialist in the technology field, Stephen has a strong background in software systems that drive service provider performance. He is adept at managing programmes to ensure your business

objectives are met.

*If you're considering
maximising the value you
achieve from your strategic
vendors, talk to
Best Practice Group.*



**Best
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making service provider partnerships work

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