EBU

European Business Institute

LUXEMBOURG

EUROPEAN BUSINESS INSTITUTE OF LUXEMBOURG

Risk Management in Contracting from an In-House Perspective: A Study of Strategies and Best Practices

By

Dr. Irene Robinson-Ayanwale
forobinson@yahoo.com

A Thesis submitted in partial fulfillment of the requirements for the degree of Master of Buisness Administration

Graduate School of Buisness Administration

1st March 2024

ABSTRACT

This study is aimed at highlighting the critical role of the contracting process in risk management. The contracting process for commercial contracts in organizations is often not recognized as a risk mitigation tool by contract owners within the organization, the leadership, and even the owners/implementors of the contracting process themselves. Frictions often arise because it is erroneously regarded as an unnecessary bureaucracy delaying or preventing the organization from achieving its strategic objectives, rather than as an essential risk mitigation tool that protects the organization, and ensures the organization continues achieving its goals and objectives, grows its revenue, remains compliant, maintains its profitability, and meets the expectations of all its stakeholders.

The study therefore seeks to create an understanding that the contracting process is a critical part of the internal control mechanisms of an organization for managing and mitigating risks and acknowledge and appreciate the commendable efforts of the functions engaged in the contracting process for safeguarding their organizations against various risks.

The study was conducted using a qualitative research approach, including unstructured interviews, surveys, case studies, documentary analysis, context analysis and thematic analysis to analysis the various elements of the contracting process, their roles as risk mitigation tools, and the types of risks addressed by the contracting process. Because the triangularization approach was used the findings of this study have been corroborated based on multiple data points, which helps reduce the impact of researcher bias, and the potential bias from using one data point.

The findings show that each piece/component of the contracting process is a risk mitigation tool, shows there are some critical aspects of the contracting process that cut across all organizations, shows a strong correlation and link between the components of the contracting process, the efficiency of the contracting process, and the risk appetite and risk culture of an organization. The findings also show that the contracting process does not mitigate against only legal, compliance or reputational risks. The study shows that all the components that make up the contracting process mitigate against all the risks a business is exposed to.

Since this is the first study on this issue, there is room for more research on the interplay between a low-risk culture, increased inefficiencies in the contracting process, and an increase in the crystallizations of risks.

ACKNOWLEDGEMENT

I am first extremely grateful and thankful to my Heavenly Father, God Almighty for the grace He gave me to start and complete this course during the most challenging period of my life.

I am thankful to my family and other members of my support system, who cheer me up and on, accommodate my shortcomings, and give me the space, time and help needed to follow my dream, one of which is this MBA program.

I am grateful to my prayer partner, spiritual father, mentor, big brother, dearest friend, and inspiration Prophet Olusola Alabi. You encouraged me to start this program (indeed you gave me no rest until I did), and strengthened me through the whole process, continuously and untiringly giving me the inspiration, the faith, the comfort, and encouragement needed to start and finish this race. Your unselfishness, positivity, energy, resilience, and humility always amaze me. May you always find the comfort and strength you need.

I appreciate the support of Ifeoluwa Salako. Your administrative support and assistance in the creation, collation and graphical representations of the data points were crucial. You supported and assisted with grace and positivity. I am indeed most grateful.

Table of Contents

LIST OF FIGURES

CHAPTER 1

1. INTRODUCTION

1.1. General Principles of Contract

A few writers of contract textbooks have described a contract as "a promise or set of promises that the law will enforce" (Sagay, 2007; Chitty, 1980). "An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law" is how the Black's Law Dictionary defines a contract (West/Thomson Reuters, 2004). Humans frequently make commitments to one another, but not all promises have legal power behind them. For this reason, social or domestic agreements are typically viewed as non-binding and unenforceable. Because of the necessity to advance business convenience, commercial and transactional agreements are viewed as legally binding and enforceable. It was acknowledged that trade and commerce would be impossible if contracts from such transactions were not recognized and enforceable by law (Chitty, 1980). So, it can be said that contracts emerged as a tool for the facilitation of trade and commerce, whether by individuals or organizations.

1.2. Focus of the Research

However, the study's focus is on contracts as "tools of risk management," not on how they may be used to facilitate trade and commerce. When analyzing contracts as "tools of risk management," we consider the entire contracting process in addition to the final contract document. "A series of steps an organization follows to develop, negotiate, execute, and assess a contract" is what dealhub (2024) defines as the contracting process. According to SafetyCulture (2024), risk management is defined as "the process of identifying, assessing, and minimizing the impact of risk." In other words, it is a way for organizations to recognize potential threats and dangers and take action to lessen or eliminate the likelihood that they will materialize. If they do, risk management ensures that any negative effects will be minimal or nonexistent.

Partnerships, collaborations, service level, licensing, distributorship, supply, franchise, employer/employee, and shareholder relationships are some of the forms of contractual relationships by which organizations achieve their strategic goals and objectives. No organization can achieve its strategic goals and objectives without interactions with parties who are either internal or external to the organization. Such interactions are captured most times by contracts, most of which are ‘Express contracts’ (i.e. exist in written form), whilst a few may be captured through ‘Implied contracts’ (i.e. construed to exist based on the conduct of the parties) (Sagay, 2007). Contracts are therefore critical to the achievement of organizational strategic goals and objectives. This study examines what risk mitigation tools organizations adopt in these commercial contractual relationships, to ensure the achievement of strategic goals and objectives, or minimize the level of harm to their strategic goals and objectives.

1.3. Statement of the Problem

For this study, the term "in-house practitioners" refers to the following professionals: in-house contract owners, in-house risk and procurement managers, and in-house legal practitioners. They view commercial contracts and the contracting process as a necessary document or procedure that helps the organization achieve its goals and objectives. They also understand that the hiring process brings in external parties who are vital to the company's accomplishment of strategic goals and objectives, and that adding individuals to the mix increases the possibility of mishaps. Renowned risk writer Osborne (2012) correctly noted that "people, being people, sometimes do the unexpected, dangerous, or even stupid things; they don't follow processes; they sometimes cut corners, and often make mistakes." This is why things frequently go wrong. As a result, many of the hazards we encounter are caused by human behavior, and it is frequently possible to stop or lessen the chance that these risks will materialize.

Thus, to achieve optimal performance and value from the business relationship, in-house practitioners understand the necessity of implementing sufficient risk mitigation measures in the contracting process to address risks associated with establishing business relationships with third-party vendors, service providers, and partners, and maintain such risks at an acceptable level for the organization (AudioBoard, 2023). Understanding the hazards involved in standard commercial contractual relationships has led to the development of a process for risk mitigation known as third-party risk management.

A 2021 survey of 1,170 respondents in 30 countries by Deloitte found that “more than half (51%) faced one or more third-party risk incidents while responding to COVID-19, 13% of such incidents were considered ‘high impact’ severely compromising financial performance and profitability, customer service and, in some instances, put organizations in breach of regulations. The survey also found that 27% of organizations that had not adequately invested in third party risk management prior to the pandemic faced a high impact incident over this time, compared to just 2% of those that had” (Deloitte, 2021). In another survey carried out in 2021 by AuditBoard (AuditBoard, 2022) “of 800+ risk and compliance professionals across North America, similar results were found. Nearly 37% of respondents rated their third-party risk management maturity as either nonexistent or simply reactive, with activities performed on an ad hoc basis. Only 3% were at the point of optimizing their third-party risk management”.

In view of the increasing adoption of outsourcing as an effective means of reducing costs and improving efficiency, the increase in alliances, partnerships and collaborations by organizations to achieve strategic goals and objectives, increase in stakeholder expectation that companies monitor and take ownership for their supply chain, and increase in liability for breaches across supply chains, it is necessary for organizations to improve their understanding and application of third-party risk management, and treat the contracting process as not just a tool for the facilitation of trade and commerce but also a risk mitigation tool.

1.4. Research Aim and Objectives

1.4.1. Research Aim

This study researches the efforts of organizations to manage and mitigate the risks associated with the contracting process of their commercial contracts, highlighting strategies and best practices.

1.4.2. Research Objective

(i) To highlight and emphasize the role of the contracting process in the risk management and mitigation efforts of organizations for commercial contracts.

(ii) To create an understanding that the contracting process is a critical part of the internal control mechanisms of an organization for managing and mitigating risks.

(iii) To examine and understand the interplay between an organization’s risk appetite, risk culture and its contracting process, and encourage the use of an organization's risk appetite when dealing with and applying waivers to the contracting process.

(iv) To understand the principles of third-party risk management and its application in the contracting process.

(v) To examine how specific risks to the buisness of an organization are addressed through the contracting process.

(vi) To improve the synergy, integration and handshakes between the legal, risk, procurement, internal control, finance and contract/category owner functions of an organization.

(vii) To acknowledge and appreciate the commendable efforts of the functions engaged in the contracting process for safeguarding their organizations against various risks.

1.4.3. Research Questions

Forty-Eight questions were administered to participants with the aim of obtaining robust information to answer the following:

(i) Is the contracting process and all its components a risk mitigation tool of the organization?

(ii) What are the most critical components of the contracting process and why?

(iii) What are the most critical documents used in mitigating the risks associated with the contracting process and why?

(iv) How important are certain steps, strategies, and processes in the contracting process?

(v) Which risks are analyzed and mitigated during the contracting process?

(vi) What is the relationship between the risk culture and appetite of the organization and the contracting process?

(vii) Is there a difference in perception and understanding between in-house practitioners and external practitioners?

1.5. Significance of Study

"Teams are finding it difficult to control the associated risk volatility, as vendor and business partner vulnerabilities continue to plague many industries" (Audit Talk, 2022). The following is displayed in IBM Security's Cost of a Data Breach Report 2023 (IBM Security, 2023):

(i) Business partner and software supply chain attacks accounted for 15% and 12% respectively of destructive attacks to the systems of organizations in 2023.

(ii) The cost of a data breach due to a business partner supply chain compromise averaged USD$4.76 million, which was USD$530,000 or 11.8% higher than the USD$4.23 million average cost of a data breach that was due to another cause.

(iii) Organizations took an average of 233 days to identify and 74 days to contain a business partner supply chain compromise, for a total lifecycle of 307 days. This average lifecycle was 37 days or 12.8% longer than the average lifecycle of 270 days for data breaches attributed to another cause.

(iv) The cost of a data breach due to a software supply chain compromise averaged USD 4.63 million, which was USD 370,000 or 8.3% higher than the USD 4.26 million average cost of a data breach due to another cause.

(v) A breach due to a software supply chain compromise had an 8.9% longer lifecycle, at 294 days compared to 269, than data breaches due to another cause.

Good contract development and management can increase profitability by the equivalent of 9% of annual revenue, according to research conducted by World Commerce & Contracting (2012). Additionally, over 10% of a company's contracts are lost or misplaced, 70% of executed and active contracts are not followed by business units during operations, 30% to 40% of contracts fail to deliver expected benefits, and 20% of an organization's business transactions are not governed by contracts (World Commerce & Contracting, 2016).

In view of the heightened risks associated with third party contractual relationships, a strong third-party risk management process is needed to alleviate the impact of these risks.

Organizations will be exposed to higher levels of regulatory breaches, data breaches, reputational damage, contract failures, third party claims, delays in contractual performance, service failures, adverse financial performance, increased costs and decreased profitability, and failure or delay in meeting strategic goals and objectives if they do not swiftly alter their perception, understanding, approach, and processes for third party risk management and reflect the same in their contracting process.

1.6. Research Methodology

Qualitative research was adopted to gain an understanding of the approach of different organizations to risk management and mitigation in the contracting process. For this study, three primary qualitative research methodologies were used: online, telephone, and in-person surveys and interviews.

The open-ended and closed-ended questions used in the survey and interviews were designed to extract the data required to respond to the above-mentioned research topics. Additionally, the participants were free to expound on their observations, experiences, and suggestions. To augment the data collected for this study, organizational documents including contracting process flow charts, procurement policies, risk management frameworks, standard operating procedures, contracting guidelines, contracting checklists, template agreements, and other relevant documents were also reviewed.

Key stakeholders were identified using the sample approach for the virtual, and in-person interviews and surveys. This method is employed to choose a particular group of people according to the traits or qualities that the researcher is looking for (Frost, 2024).

The sample for this study had to include contract owners, risk and procurement managers, and legal practitioners from both in-house and external practitioners, as it compares the perspectives of in-house and external practitioners on risk management in the contracting process. This guaranteed that the participants possessed the requisite expertise and real-world experience to make significant contributions to the conversation.

The researcher was able to utilize her personal experience to highlight what she found has worked throughout the years thanks to her ten years of experience working as an in-house lawyer in an organization that interfaces with organizations across different sectors of the Nigerian economy. Triangulation was used to mitigate any potential bias that could result from this. The research is more thorough and reliable when the survey review and documentary analysis are combined. The specifics of the study design, data collecting, sample strategies, and data analysis procedures are described in the methodology section.

1.7. Limitations

The online poll was disseminated worldwide, however the in-person interviews and telephone surveys were carried out with Nigerian organizations. Though the online questionnaire was made available to everyone worldwide, it is unclear whether survey respondents from outside Nigeria took part, and if they did, how many of them did so. The poll questions did not ask participants to indicate which country they were from. Despite this restriction, risk management and mitigation in the contracting process are typically based on universal practices and procedures required to solve risks applicable to all organizations, regardless of the country of operation and the sector or industry.

This position is supported by the documentary analysis also carried out, which showed similarities in the contracting process flow adopted by organizations across the globe.

1.8. Summary of Chapter 1

Chapter 1's purpose is to introduce the research by giving a background of the major principles associated with this study: namely contract, contacting process and risk management.

This chapter also identifies:

(i) the problem this study seeks to solve, and provides data to back it up;
(ii) the focus of the study;
(iii) the research aim and objectives of the study;
(iv) the research questions;
(v) the significance of the study; and
(vi) the limitations.

1.9. Organization of Sections

This study is organized into five chapters to provide a comprehensive analysis of the risk management and mitigation practices and strategies of in-house practitioners in the management of risks associated with the contracting process for commercial contracts.

Chapter 1: Introduction

This chapter presents the focus of the research, the statement of the problem, research aim, objectives and questions and summary of chapter 1. The chapter also discusses the significance of the study given the geometric increase in the volume of third party buisness relationships, and the increase in the risk exposure of organizations because of the failure to adopt and implement adequate third-party risk management strategies and practices.

Chapter 2: Literature Review

This chapter examines the key concepts relevant to the study of the risk management and mitigation practices and strategies of the contracting process of commercial contracts. The chapter also delves into a literature review of current publications on the key concepts and shows how this study combines them together to create an appropriate risk management and mitigation program/ framework/ process.

Chapter 3: Methodology

This chapter presents the research design and methodology used in addressing the research questions, and outlines the selective sampling strategy, data collection method, documentary analysis, and other analysis techniques used in this study.

Chapter 4: Findings

This chapter presents the main findings of the study based on the data collected. The data obtained through the surveys and documents across various sectors and in-house and external practitioners, are examined to determine how organizations identify the risks associated with their contracting process, the difference in risk perception and treatment by in-house practitioners and external practitioners, by legal practitioners, risk managers, procurement managers and contract owners, the best practices and strategies for risk management and mitigation in the contracting process of commercial contracts, and the similarities and/or differences in risk management and mitigation for commercial contracts across four sectors.

Chapter 5: Conclusions

This chapter summarizes the key findings of the study and analyses the best strategies and practices for risk management and mitigation in the contracting process for commercial contracts. The chapter also outlines the limitations of the study and proposes areas of future research.

CHAPTER 2

2. LITERATURE REVIEW

In this section we shall review the existing literature on the following key concepts of this study: third party risk management, the contracting process life cycle, the contracting process documents, key boiler plate terms, risk culture and appetite, and the various types of risks an organization faces.

To effectively mitigate the risks that come with forming business relationships with third parties, an organization needs to have a good understanding of each of these concepts, and combine them into a program, framework or process that makes up the contracting process of that organization. A failure to properly combine these concepts is what often leads to organizations experiencing losses and liabilities because of third-party business relationships.

2.1. Third Party Risk Management

"Organizations need to be proactive and strategic in their approach, as third-party risk management is a relatively new and complex topic with a daunting scale." (Integrated Risk Management Phinity, 2024).

A good number of the literature on third party risk management come from companies licensing third party risk management systems to organizations (Button, 2019) (AudioBoard, 2023) (Contractlogix, 2024) (Phinity Integrated Risk Management, 2024). As such, although such literature contain valuable statistics on third party risks, nature and volume of business relationships with third parties, highlight the guiding principles of third-party risk management, the process flow of third party risk programs, and the challenges faced by organizations in implementing effective third party risk management, they are still based on the work of an external practitioner, and are therefore the external perspective of a service provider. They also don’t fully understand the depth of the contracting process of most organizations, and the role the elements play in mitigating various third-party risks.

Businesses now depend more than ever on written contracts in the twenty-first century. Contracts serve as the foundation of every firm and specify all of its business relationships, including those with shareholders, workers, vendors, consumers, and business partners. According to analysts, the typical Fortune 2000 corporation manages between 20,000 and 40,000 contracts at any given moment. (Button, 2019) (World Contracting & Trade, 2012) (World Contracting & Trade, 2016).

Figure 1- Outlines most of the key parts of the buisness of an organization that create business relationships between an organization and third parties (Phinity Integrated Risk Management, 2024)**.**

“Risk, however, is inherent in every contract, in some cases, it can be avoided, but in most cases, it must be managed and minimized” (Contractlogix, 2024). World Commerce & Contracting reported that “at any given time, more than 10% of a company’s contracts are missing or lost, 70% of executed and active contracts are not adhered to by buisness units during the course of the business, 30 to 40% of contracts fail to deliver expected benefits, and 20% of the buisness transactions of an organization are not governed by contracts” (World Commerce & Contracting, 2016).

Scholarly textbooks have also noted (Macneth, 2012) that "when issues arise, outsourcing does not absolve the brand organization performing the outsourcing of business risk." Customers complain to the brand organization rather than the far-off supplier, whom they frequently do not know or are unable to reach. Risk is therefore NEVER outsourced. Even though the activity may be temporarily outside of the company, there is always a danger to reputation and business continuity, thus the outsourcing agreement needs to be handled even more carefully than it would have been if the activity had remained inside the company. Many well-known electronics brands sell goods that they haven't done much to design or produce themselves. "Designed by Apple in California," for example, is written on the back of an iPhone. Assembled in China. However, it is not mentioned—and it was not widely known until 2011—that the enormous corporation Foxconn was the one performing the assembly in China. A string of worker suicides at the manufacturing facility, followed by inquiries into and reforms to employee welfare and job circumstances, brought it into the public eye.

Supply chain concerns now affect companies across all sectors. From a retailer of clothing created through forced labor to a cosmetics company employing palm oil linked to deforestation, or an electronics corporation implicated in child labor in the extraction of precious metals. The complexity and size of supply networks make it more difficult to identify and reduce risks. Organizations' reputations are at stake.

Furthermore, bad news spreads quickly in our digitally connected world, leaving businesses exposed (Moody's Analytics, 2024).

"When something like this occurs, like it did with Apple or Nike a while back, or the latest incident involving supplier parts for Toyota brake systems, customers want to know more about these business dealings, how they were let to occur, and what steps would be taken to prevent similar problems in the future. This puts at jeopardy the reputation for superior product quality and safety that the brand may have established over many years. Due to the harm to the brand's reputation, costly corrective action is necessary to address the issue, but more crucially, to restore the public's opinion that the brand owners failed to appropriately take into account the values and expectations of their customers when they selected and worked with the suppliers.

Robust and comprehensive third-party risk management programs are therefore needed to provide discipline, structure, and oversight to guide the plans, policies, and processes by which an organization:

(i) "identifies and categorizes the third parties they engage. Risk cannot be effectively managed without a regularly updated inventory of all potential sources.
(ii) understands and prioritizes the risks presented by third parties. All third parties do not present equal risk and should not consume equal risk assessment capacity.
(iii) establishes and enforces key controls for mitigating those risks. Third-party risk/controls assessments should address and prioritize the risks that matter most to an organization. Organizations are expected to set up contracts, expectations, and service-level agreements (SLAs) to hold third parties accountable for effectively managing those risks.
(iv) performs monitoring that tracks and regularly reassesses third-party relationships and risk exposures. Risk is dynamic, changing over time. Third party risk management policies and processes should help an organization to catch and respond to the changes that matter.
(v) responds to real-time issues and communicates third party risk management awareness and accountability throughout the organization. Everyone can play a role in managing third-party risk. third party risk management policies, protocols, and reporting should support organization-wide awareness of key risks, ongoing engagement with third-party relationship owners, proactive third-party risk management practices, informed decision making, and timely, effective issue responses" (AuditBoard, 2022).

The literature on third party risk management practices do not mention or carry out a deep analysis of the policies, procedures and strategies used as controls for mitigating the risks and the role they play in mitigating various risks third party relationships bring.

2.2. Contracting Process Life Cycle

The contractual process is the foundation of all business operations, given the elevated risks linked to the growing number of business agreements with third parties. According to Macneth (2012), the stakeholders in an organization may judge its success or failure based on who it has a contract with and how well they perform.

The procedures an organization takes to create, negotiate, carry out, and evaluate a contract are known as the contracting process (dealhub, 2024). Thus, the formal contract is only one link in the series of actions that constitute the contracting process. Most of the time, distinct organizational roles handle different portions of the chain in order to manage conflicts of interest and offer the necessary checks and balances to reduce the risks associated with the contractual process. The procurement team, the risk team, the internal control team, the legal team, the contract/category owner (an employee), the finance team, and subject matter experts whose knowledge is needed at some point during the contracting process are examples of the different tasks that are frequently included.

Because there is a strong tendency for sub-optimization to occur in many businesses, each of these functions, as well as their roles and duties within the chain, need to be appropriately recognized and handled. This occurs when a portion of the organization performs at its peak, but at the expense of another division or even the overall goals of the company. This demonstrates how something might be effective locally but ineffectual overall in the system. It is imperative for businesses to have a broad perspective and ensure that sub-optimization is prevented. However, this frequently necessitates switching from local to big picture metrics in the performance evaluation process, as it is widely accepted that individuals "act according to how they are measured' or perhaps 'actions follow the bonus criteria'. The purchasing or procurement activity or function sets up the contract, then "throws it over the silo wall" to the people tasked with making the contract live up to the promises made when the contract was negotiated and agreed upon. This silo effect has historically harmed contract management (Macneth, 2012).

Since the contracting process starts from the identification of a need to engage a third party for a specific project or service, and ends with the assessment of the performance of the third party on the said project or service, the chain of events within the contracting process life cycle of an organization have generally more or less been stated to consist of the following (Macneth, 2012), (The University of Arizona, 2024) (Angelo State University, 2024) (University of Houston, 2024) (Stanford Health Care, 2024):

(i) "Identifying and documenting the scope of work which requires a business relationship with a third party. Such identification would include timeline of the project or service, expertise and qualification of the third party, product specification if applicable, e.t.c". Sometimes, depending on the nature of the third-party selection process, such documentation would include the creation of a request for proposal;

(ii) Onboarding potential counterparties with the requisite expertise and competence, but who are not registered with the organization. This includes carrying out a due diligence exercise;

(iii) Sourcing/selecting the third party from the list of registered third parties;

(iv) Negotiating and executing the contract;

(v) Performing the contract;

(vi) Monitoring the performance of the contract; and

(vii) Assessing the performance of the third party. This entails internal reporting, and in some cases provision of feedback to the third party.

Some include in the chain of events renewal of the contract; replacement of the third party; and termination of the contract (Macneth, 2012). These are events which either trigger a new contracting process life cycle, or truncate/terminate the contracting process.

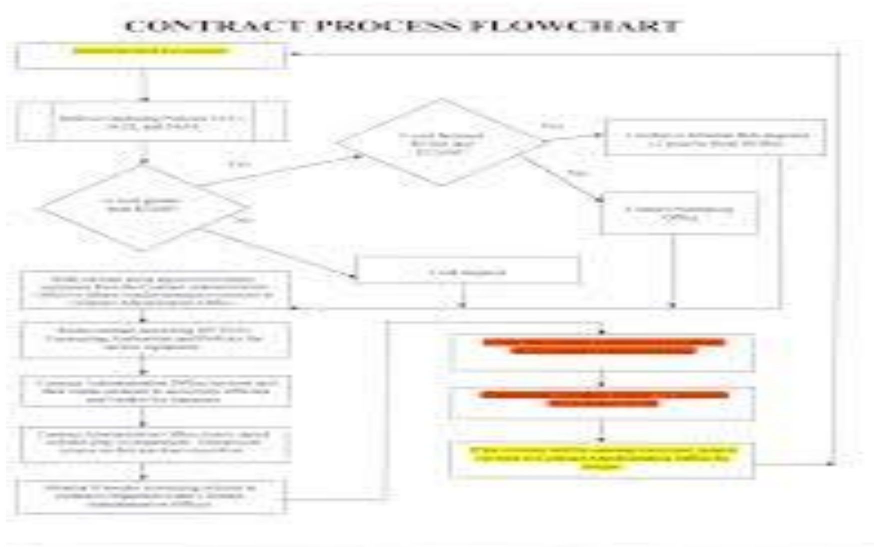


Figure 2- Contract Process Flowchart template (PDfFiller, 2024)

Although Macneth in his textbook does a brilliant job of addressing the disconnect between functions when carrying out their roles and responsibilities in the chain of events of the contracting process life cycle, and provides actionable ways to manage at the system level the activities and functions across the chain to deliver real and improving business benefits, the literature does not delve deeply into the risk management and risk mitigation strategies and practices adopted within each chain to mitigate the risks.

2.3. Contracting Process Documents

Research carried out did not throw up any literature that provided a full list of the contracting process documents used in the contracting process. Various documents, however, mention individual documents used in the contracting process. Individual documents mentioned include:

(i) contract checklist, which helps with contract reviews and creation. It is a list or framework that helps in identifying and organizing critical parts of a contract (Summize, 2024).

(ii) contract risk assessment checklist, which identifies potential areas of risk, quantifies those risks, and helps to mitigate them (Contractlogix, 2024).

(iii) procurement policy, "which ensures the best value and most advantageous balance of price, quality and performance is obtained when purchasing buisness related products and services to minimize fraud, waste and abuse in purchasing. Procurement policies typically address:

(a) competition, by ensuring a competitive process is used to identify, evaluate and select potential vendors, thereby promoting best value and innovation; checking improper influence and nepotism; improving bargaining power; and bolstering funder and public confidence;
(b) negotiation terms of the transaction, by requiring they be at the legally required minimum standard, and in a form appropriate for the transaction category;
(c) proper documentary evidence for services provided/project completed to ensure best value, and for auditing purposes; and
(d) the implementation of adequate internal controls to mitigate against procurement fraud, corruption and anti-competitiveness. Such controls include the existence and use of a written procurement policy, conflict of interest policy, existence of segregation of duties, signing authority mandates across monetary limits, pre transaction approval, budget checks pre vendor selection/contract execution, clear criteria for the vendor selection process of various categories of transactions, clear evaluation criteria, clear criteria for the nomination of the evaluation team, existence of evaluation rules, legal review process requirement, onboarding/due diligence on vendors, standing procurement team, transparent vendor identification process, periodic reporting to senior/executive management, independent quality assurance/checks, inspection of delivered products by functions not closely involved in the initial contracting process, milestone based payments for contracts,

periodic review of recurring purchases and long-standing buisness relationships, periodic training of employees across the chain of activities of the contracting process on the procurement policy and contracting process life cycle, dual signatory requirement for certain transactions, fraud response plans, contract closeout sessions and checklists, and evaluation of vendor performance” (LSC America's Partner for Equal Justice, 2024).

(iv) Standard Operating Procedures, “which provide the clear-cut directions and detailed instructions needed to perform specific tasks or operations consistently and efficiently. They aim to achieve uniformity in execution, reduce miscommunication, and help the organization adhere to regulatory, industry and organizational standards. They deliver in-depth, ground-level perspective, describing the exact steps for the successful execution of a task, serve as reference guides for problem solving, and mechanisms for standardizing performance across the organization. They provide clear and concise instructions for the consistent execution of routine operations within an organization by offering a step-by-step guide on how tasks should be carried out. They ensure the work is performed consistently, efficiently and safely, regardless of who is performing the tasks thereby reducing the risk of errors and deviations. They are crucial in maintaining the operational integrity of an organization as they play a vital role in setting clear expectations, ensuring quality and efficiency, keeping all team members aligned towards the common goals of the organization. They serve as the backbone of any successful organization and are vital for long-term growth and sustainability” (Helpjuice, 2024).

Although the literature showcase how each contracting process document mitigates against risks in the contracting process, they do not provide a comprehensive/robust list of the contracting process documents or indicate which category of risks they address.

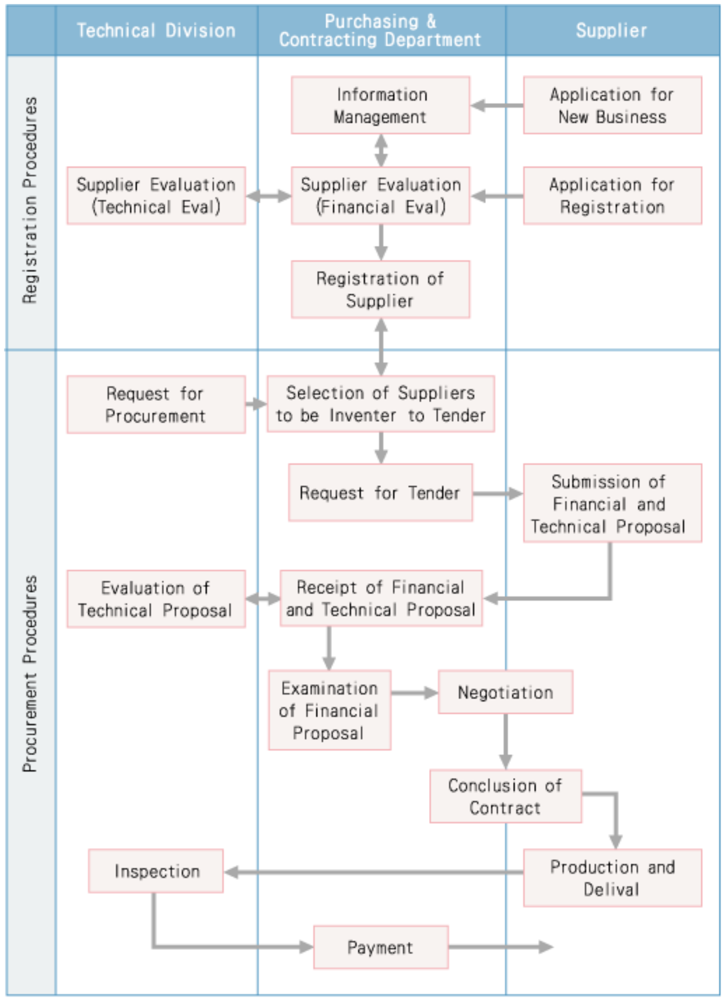


Figure 3- Flow Chart of Standard Procurement Procedures of Hokkaido Electric Power Co, Inc (Hokkaido Electric Power Co., Inc, 2024)**.**

2.4. Key Boiler Plate Terms

"Most commercial contracts share a number of common clauses that govern how the contract will generally operate and clarify the parties' respective rights both during the term of the contract and, in certain situations, after it has expired or terminated. These clauses have nothing to do with the subject matter of the contract. These sentences are commonly known as "boilerplate" sentences. Sometimes when drafting a contract, boilerplate clauses are written with insufficient thought given to their appropriateness. As a result, boilerplate clauses are taken verbatim from an earlier precedent without adequate consideration, which could leave one party unintentionally at a disadvantage in the event of a dispute over how the contract will operate. For instance, a traditional type of arbitration clause may have been included when it might have been more appropriate to provide for dispute resolution by mediation, expert advice, or a court decision. Alternatively, a "entire agreement" clause disclaiming all prior representation by either party may have been included when, in reality, the party drafting the contract wanted to rely on prior representations made by the other party. Because of this, care must be used when utilizing boilerplate terms. A party should consider the implications of such phrases and assess whether they apply to the particular business relationship (Butterworths LexisNexis, 2001).

The Encyclopedia of Forms and Precedents, which contains template contractual language for various types of transactions continues to be a tried and tested companion of legal practitioners when drafting contractual terms. Boilerplate clauses have been identified over the years as great risk mitigation tools in the contracting process, as they have evolved over time to help in allocating and transferring risks, preserving rights, and/or reliving a party of mandatory performance of its contractual obligations. They save time, protect organizations from omissions, errors, and legal mistakes in contracts, and protect parties from exposing themselves to potential risks.

The major point to note with respect to this literature is that whilst the observation is correct that the applicability of each boiler plate clause to the buisness relationship should be examined before use, a party should also assess the boiler plate clauses to determine if they require tweaks/updates to expand their scope to cover new circumstances, trends and developments. For example, "on March 8, 2021, U.S District Judge Laura Taylor Swain issued a memorandum opinion and order in The Gap v. Ponte Gadea New York granting summary judgment in the landlord's favour, dismissing the tenant's complaint which was based on, amongst other things, a Force Majeure boiler plate clause in its lease agreement. The court narrowly read and interpreted the force majeure provision in the lease agreement, noting that the theory of 'impossibility' as a defense to a breach, was only within reach when performance is rendered 'objectively impossible' by an unforeseen event. However, this theory should be applied narrowly and only in extreme circumstances. Referencing the force majeure provision at issue, the court found that the provision demonstrated that the conditions Gap claimed rendered its performance impossible were foreseeable …" (Dovi, 2023).

2.5. Risk Culture and Appetite

It has been recognized by literature (CFI, 2024), (Osborne, 2012) that risk culture refers to "the behaviors and attitudes encouraged by the board and executive management toward risk, as well as the discussions and decisions made on risk management. It is meant to incorporate the shared values and goals embedded into an organization's enterprise risk framework (though this is not always the case as there is sometimes a disconnect between the values and goals embedded in the enterprise risk framework as it pertains to risk culture, and the behavior and attitude of the senior management). As such, the risk culture of an organization may end up being hard to quantify because it comprises of many qualitative elements. To have a strong risk culture the following elements must exist:

(i) the right tone at the top that shows the management and board place importance on managing risks, flowing from this a top-down and bottom-up approach is then adopted where a culture of risk awareness is embedded throughout the business and becomes part of the corporate and business culture. Every employee is given the responsibility for managing risks within his/her respective control and they see risk management as a normal part of the way they do their jobs.

(ii) accountability and ownership which includes an effective three lines of defense models, a strong risk management function and clearly defined processes for escalation and treatment when risk owners observe risk limitations have been reached; and

(iii) remuneration schemes which make bonus payments/promotions/employee performance evaluations based on KPIs which reward behavior that properly align with prudent risk taking".

The Board, the CEO, and executive management set the corporate culture, which in turn greatly affects the organization's willingness to take on risk. These factors also determine how the culture changes over time. The board and top management oversee determining and conveying an organization's corporate risk appetite. The degree of risk exposure or potential negative impact from an occurrence that a company is willing to take without acting is often referred to as risk appetite, also known as risk tolerance (Tamara Bekefi, 2008).

A risk appetite should be documented and included in the organization's enterprise risk management framework. However, some businesses find it difficult to define because it is highly individualized and subject to change based on a variety of factors, including the decision makers' personalities, professional or emotional judgment, past experiences, and the state of the business. A sizable portion of companies don't even bother to define their corporate risk appetite, and an even greater portion neglect to record and disseminate a formal declaration of risk appetite to their managers and employees, which presents challenges for them when it comes to their own risk management initiatives (Osborne, 2012).

The desire to wager, organizational size, financial health, reputation, superior tools, expertise, and agility are some of the elements that affect an organization's decision to define its risk appetite and determine whether it is high, medium, or low. "The kinds and levels of risk that the organization is willing to take or accept when looking to exploit opportunities are then determined by this corporate risk appetite." (Osborne, 2012) Bekefi, Tamara (2008). This in turn determines which risks are accepted, rejected, and countered, as well as the risk mitigation techniques that are used throughout the company.

Since the purpose of the contracting process and its components is to mitigate risks, they must take their cue from the risk appetite. So, a high, medium, or low risk will produce different components and outcomes within the third-party risk management program and the chain of events of the contracting process life cycle. These respective ratings will also determine the types of contracting process documents available, their contents, and which boiler plate clauses are used and what tweaks are made, accepted, or rejected. Risk culture determines the willingness of employees to implement the contracting process in line with the risk appetite of the organization thereby reducing friction and inefficiencies. This willingness is usually determined by whether the risk culture is high or low. None of the literature makes this correlation between the risk appetite, risk culture and the contracting process of an organization. This study, however, shows the correlation.

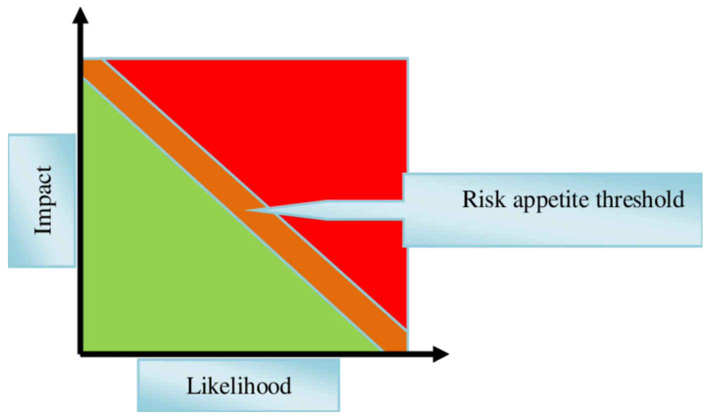


Figure 4: Operational Risk Appetite Matrix (ResearchGate, 2024)

2.6. Types of Risks

Different literature speak to different classifications of risks to a business. Some speak of financial and non-financial risks (CFI, 2024), some speak of strategic, operational, reporting and compliance (Tamara Bekefi, 2008), some speak of systemic and un-systemic risks. For this study we will use the financial and non-financial risks classification.

Financial risks consist of Market; Credit; Counterparty and Liquidity Risks, Non-Financial risks consists of Operational, Model, Compliance, Conduct, Reputational, Cyber Security/ Information Risk, Competition, Investment, Legal and ESG Risks (CFI, 2024).

An organization is meant to understand how each of these risks affect its buisness i.e. the likelihood and potential consequences of such risks, and take sensible, cost-effective risk mitigation strategies to manage the significant threats that emanate from the risks, whilst identifying and taking advantage of the opportunities equally provided by such risks.

Lots of literature define and describe the above-mentioned risks, and how they affect different types of businesses. Some literature also give examples of risk mitigation measures adopted by some businesses to address each of these risks. In this study, some chain of events within the contracting process are examined to determine which risks they are risk mitigation tools for. None of the literature examined does this. Each risk will be defined below, and then applied to various chain of events in Chapter 4.

Market Risks are volatility risks and risks which arise due to movement in stock prices, interest rates, foreign exchange rates e.t.c (Simpl:learn, 2024). Credit Risks arise when one party fails to fulfil its obligations to the other party(ies). Settlement/Counterparty/Default risk is a type of Credit Risk and is the possibility that one or more parties will fail to deliver on the terms of a contract at the agreed time. Liquidity Risk arises out of an inability to execute transactions, and funding liquidity risk is a type of liquidity risk that arises when an organization is unable to meet its short-term financial obligations i.e. a company is unable to settle its current outstanding bills (CFI, 2024). Operational Risk is the risk of losses caused by flawed, failed or inadequate processes, policies, systems, people, or events that disrupt business operations. Mismanagement, fraud, technical failures, employee errors, criminal activity and physical events can trigger operational risks (TechTarget, 2024). Model Risk is a type of operational risk and arises due to incorrect model applications. Legal Risks arises out of legal constraints such as lawsuits (Simpl:learn, 2024). Compliance Risk is an organization's legal, financial, and criminal exposure if it does not follow industry laws and regulations (Proofpoint, 2024). It's the risk of incurring fines, restrictions on doing business, or damage to its reputation if it fails to follow or breaks the laws and regulations of the countries where it does business (CFI, 2024). Conduct Risk is any action of an organization or individual that leads to consumer/investor detriment, or has an adverse effect on market stability, or even competition (KPMG, 2024). It is the potential risk arising from inappropriate behavior or unethical behavior within an organization that may harm its customers, stakeholders, or the broader market (CFI, 2024). Reputational Risk is a threat or danger to the good name or standing of an organization, and can occur directly as a result of the actions of the organization or indirectly due to the actions of its employee(s) or through the actions of a third party it has business relationships with (Investopedia, 2022). Cyber Security/ Information Risk is the potential for exposure or loss resulting from a cyberattack on or data breach of the organization and involves identifying potential threats and vulnerabilities to the organization's digital systems and networks (SecurityScorecard, 2024). Competition Risk is the potential for a business's competitors to prevent its growth and success or for the actions of a competitor to negatively impact the organization's business. Internal competition risk occurs when the staff of an organization leaves to join a competitor (Indeed, 2022). Investment Risk refers to the possibility that an investment's actual returns may differ from the expected returns, potentially resulting in financial loss (Finance Strategists, 2024). ESG Risks refers to an organization's environmental, social, and governance factors which could create a bad reputation or harm the company financially. It also refers to the risks of any negative financial impact on an organization stemming from the current or prospective impacts of ESG factors on its counterparties or invested assets (Open Risk Manual, 2024).

CHAPTER 3

3. METHODOLOGY

3.1. Introduction

This study employs a qualitative research approach using primary sources whilst adopting the sampling method of data gathering. In this chapter the research approaches, research methods, the data sources, the data collection process, the sampling strategy, and the analyses techniques employed are discussed.

3.2. Appropriateness of Research Approach

This study seeks to examine the risk management and mitigation processes adopted by in-house practitioners in the contracting process of organizations. During the research, the actions of in-house practitioners and the purpose/reason for their actions are also considered and analyzed to discover what those risk mitigation methods are and what risks they are used to mitigate.

The nature of this study therefore requires the adoption of the qualitative research approach, since this approach is used for collecting and analyzing non-numerical data to understand the meanings people assign to their experiences and how people experience the world, and further aids in answering 'why' and 'what' questions (Scribbr, 2023). It has been indicated by some researchers that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them. "Qualitative inquiries seek to shed light on meanings that are less perceptible. They also seek to investigate the complexities of our social world. They are inductive and share similarities in exploring 'what' 'why' and 'how' questions, as opposed to 'how much' and 'how many' preferred by quantitative studies. What's more, qualitative research is designed to study people's life experiences and deliberately shuns quantitative preoccupation with measuring, counting and prediction in favour of describing, exploring, understanding, and interpreting a phenomenon" (L, 2011).

3.3. Qualitative Research Design Approach & Target Population

Unstructured face to face and telephone interviews, online surveys, and case study qualitative research design approaches were adopted in this study. The Case Study method is the most common qualitative design method and is used to examine a person, group, community, or institution who share a unifying factor and have direct or indirect connection to the research question or subject being studied. After the collection of the data the researcher analysis and identifies common or prominent themes (Grand Canyon University, 2021).

This study examines the perceptions, actions and activities of in-house legal practitioners, risk and procurement managers, and contract owners regarding the contracting process of their respective organization’s vis a vis the perceptions, actions and activities or external practitioners regarding the contracting process. This group represents the population on which data was gathered and analyzed. They share the unifying factor of being in-house practitioners involved in the contracting process, and have a direct connection with the research topic, being the ones carrying out the actions and activities being studied.

3.4. Data Collection & Data Sources

The sampling method of data collection has been adopted for this study since it is impossible to gather complete data on the in-house practitioners of all organizations, whether within a sector, country, region, or the world (which represents the population of this study).

Simple random probability sampling and non-probability convenience sampling methods were adopted in selecting the participants who constituted the sample representatives of this study.

Simple random sampling means that every member of the population has an equal chance of being selected. This was achieved by preparing a questionnaire/survey with forty-eight closed and open-ended questions aimed at eliciting robust information to answer the following core questions:

(i) Is the contracting process and all its components a risk mitigation tool of the organization?

(ii) What are the most critical components of the contracting process and why?

(iii) What are the most critical documents used in mitigating the risks associated with the contracting process and why?

(iv) How important are certain steps, strategies, and processes in the contracting process?

(v) Which risks are analyzed and mitigated during the contracting process?

(vi) What is the relationship between the risk culture and appetite of the organization and the contracting process?

(vii) Is there a difference in perception and understanding between in-house practitioners and external practitioners?

The questionnaire/survey was then uploaded to a cloud storage platform and distributed to participants via online channels which cater to both in-house and external legal practitioners, risk and procurement managers and contract owners within and outside the country. Thirty-Seven (37) responses were received from the online survey.

Non-Probability convenience sampling is a method through which individuals are selected based on non-random criteria, which in this case was convenience. Given the short period of time and the need to obtain a reasonable sample size, virtual and face-to-face interviews were conducted with 15 (fifteen) in-house practitioners and 6 (six) questions from the forty-eight questions in the survey were used for these interviews. The six questions asked were:

(i) Do you consider the elements of events within the contracting process risk mitigation tools and if so why?

(ii) What types of risks do you feel each of these events within the contracting process cover? Some people feel they are only restricted to Legal/Compliance and Reputational risks.

(iii) Which 3 or 4 elements/events within the contracting process do you consider most important and why?

(iv) Which 3 or 4 contracting process documents do you consider most important and why?

(v) What is the risk culture and appetite of your organization and what role does it play in the contracting process?

(vi) What functions are involved in the contracting process and how important is the interplay between each of these functions, is the interplay fine, what are the areas of improvement and what is the role of the interplay in the effectiveness of the contracting process?

The data obtained during the interviews were recorded in writing by me, on one occasion it was simultaneously audio recorded with the consent of the participants.

3.5. Triangulation and Researcher Bias

In addition to data collection of primary data through surveys, face to face and virtual interviews, and case studies, documents also formed part of the primary data obtained during the study.

Documents used by in-house practitioners in the course of their work were either obtained from the in-house practitioners or from publicly available information.

Public Record documents are the type of documents used in the documentary analysis.

The addition of documents has enabled triangulation to occur in this study. Triangulation is the 'combination of methodologies in the study of the same phenomenon' (Denzin, 1970). Through triangulation, findings have been corroborated based on multiple data points (which in this case happens to be three different types of data points) which helps reduce the impact of potential bias from only using one data point.

The researcher bias that could be associated with the use of the non-probability convenience sampling and my being an in-house legal practitioner for the past ten years has been reduced with the introduction of documentary analysis.

Triangulation has helped this study establish credibility through a convergence of evidence, as the findings of this study have been corroborated across the different data sets gathered and used in this study.

3.6. Data Analysis Method

Three types of Qualitative Analysis Methods have been used in this study namely: content analysis, thematic analysis, and documentary analysis.

Content analysis is a research tool used to determine the presence of certain words, themes, or concepts within some given qualitative data. In other words, it is used to evaluate patterns within a piece of content or across multiple pieces of content or sources of communication. Using content analysis, researchers can quantify and analyze the presence, meanings, and relationships of certain words, themes, or concepts (GRADCOACH, 2023) (Columbia University Irving Medical Centre, 2024). The Conceptual analysis method of Content analysis has been adopted in this study. Conceptual analysis determines the existence and frequency of concepts in a text (Columbia University Irving Medical Centre, 2024). documents are also reviewed in this study, the content analysis method is also used to identify frequency and patterns between the data obtained from the survey, the interviews, and the documents.

Thematic analysis involves identifying, analyzing, and interpreting recurring patterns of meaning or 'themes' within qualitative data. A defining feature of thematic analysis is its ability to highlight similarities and differences across a data set. It's an unobtrusive method that allows the data to speak, ensuring that the voices and experiences of participants are central to the research findings (GRADCOACH, 2023).

Documentary analysis involves evaluating documents to interpret them, gain an understanding of their meaning and develop upon the information they provide.

The category of documents used for this study are Public documents of organizations showing their contracting process activities. The authenticity of the documents used in this study have been verified since they were obtained from the authors and bear identification features. The documents are used as evidence of the practices, actions and activities of organizations; thus the danger of bias is eliminated.

In analyzing the data obtained through survey and face to face/virtual interviews it is presumed that the participant's recollections have value that merit exploration synthesis and intensive description. For the documents analyzed, it is presumed that they are an accurate reflection of the current practices of the organizations, and so are treated with the same degree of confidence as the participant's spoken recollections.

3.7. Ethical Considerations

The key principles of good ethical practice were adopted during this study, the interviews and survey conducted, and in all other steps taken during the primary research.

The principles of non-maleficence (do not harm); beneficence (try to do good); autonomy (freedom of action); and justice (fairness) were adopted.

The right consent and permissions were obtained from participants before interviews were conducted. People who participated in the interviews and surveys were clearly informed that the research was part of an MBA requirement. No underage or person at risk participated in the research.

The selection of the sample size followed the best practice under the sampling principles, and the anonymity of the participants and the confidentiality of the stories they provided have been maintained in line with the assurances provided to participants.

The online survey was designed to preserve anonymity, as no question requested disclosure of identity. The only identifying personal information disclosed by the participants is their profession and whether they work in organizations, this information is therefore pseudonymized enough to preserve the anonymity of the participants.

CHAPTER 4

4. FINDINGS

4.1. Introduction

This chapter shows the data analysis results, and how it has been interpreted. Based on the three qualitative analysis methods adopted:

(i) Themes will be identified using the deductive approach and analyzed to highlight similarities and differences across the data collected from the online surveys and the unstructured face to face/virtual interviews.

(ii) The existence and frequency of certain opinions/concepts will be highlighted and analyzed. Analysis will also be carried out to determine if certain patterns exist across similar participants; and

(iii) Documents will be reviewed and analyzed based on the themes and patterns being considered.

4.2. Demographic characteristics

This section examines the demographic characteristics of participants. The population consists of professionals practicing as legal practitioners/compliance managers, risk managers, procurement managers and contract owners.

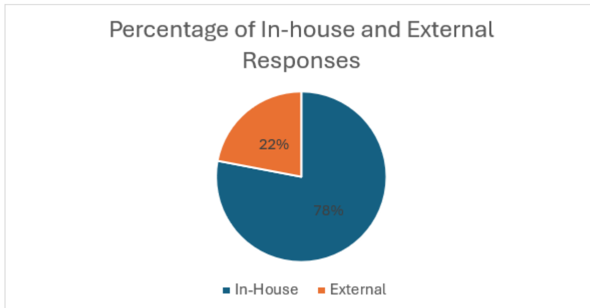
They have been segregated into two categories – in-house practitioners and external practitioners.

Figure 5: Data on In House and External Participants:

S/N	Job Functions	In-house Numbers	External Numbers
1	Legal Practitioner	17	5
2	Risk Consultant	7	3
3	Procurement Officer	3	-
4	Contract Owner	4	-
5	Compliance Officer	2	-
6	Others (Self Employed, Engineer, Business Development officer, Program Director)	2	2
	Total	**35**	**10**

In analyzing the data, those indicated as 'others' have also been classed as Contract owners, since most departments and individuals will enter buisness relationships that require the use of contracts.

Figure 6: Proportion of In-house to External Practitioners:



,

22% of participants are external practitioners, whilst 78% are in-house practitioners. This proportion spread helps the credibility of the data since the primary focus of this study is to understand the perceptions actions and activities of in-house counsel when it comes to the contracting process. The secondary focus is to deduce whether in-house and external practitioners have different perspectives regarding the purpose and impact of the contracting process.

Below is the breakdown of the professionals across the interview sessions and the survey.

Figure 7: Number of Participants for the Survey

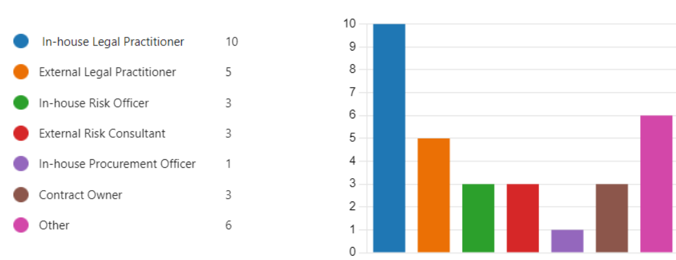
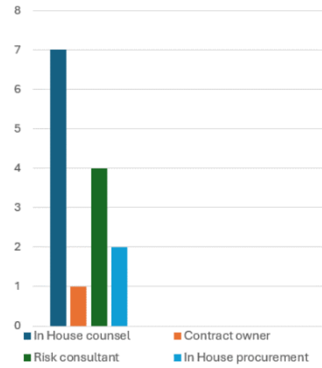


Figure 8: Number of Participants for the Interview



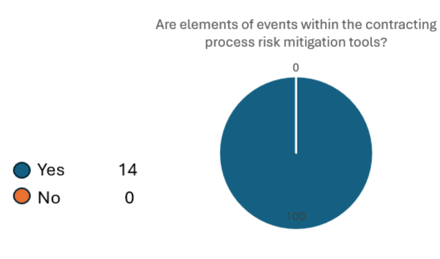
4.3. Themes

4.3.1. Is the Contracting Process a Risk Mitigation Tool/Internal Control Mechanism?

The data shows that most of the participants, although from different professions, agreed that the contracting process is a critical risk mitigation tool and that the legal function, who is erroneously sometimes regarded as the sole owner of the contracting process, is a control function.

Figure 9: Results of the Survey - do you consider the Legal team a control function?

Figure 10: Results of the Interviews – do you consider the contracting process a risk mitigation tool?



4.3.2. Is there a Relationship Between the Risk Appetite/Risk Culture and the Contracting Process

The data shows that a good number of the components of the Contracting Process were based on the risk appetite of the organization e.g. the limits placed on monetary liabilities to third party vendors, the limits on advance payments made to third parties without advance payment guarantees, the types of due diligence/health checks carried out on third parties, the minimum qualification required from third parties.

The data also shows that participants with high-risk culture responded that factors such as 'Adherence to rules, Openness, Confidence, Communication, Tolerance and Cooperation' were prevalent in their organizations and contributed to the efficiency, effectiveness and straight of the contracting process. It was also noticed that participants with high-risk culture were more occasions the stronger contracting party.

Figure 11: Risk Culture Analysis of Participants

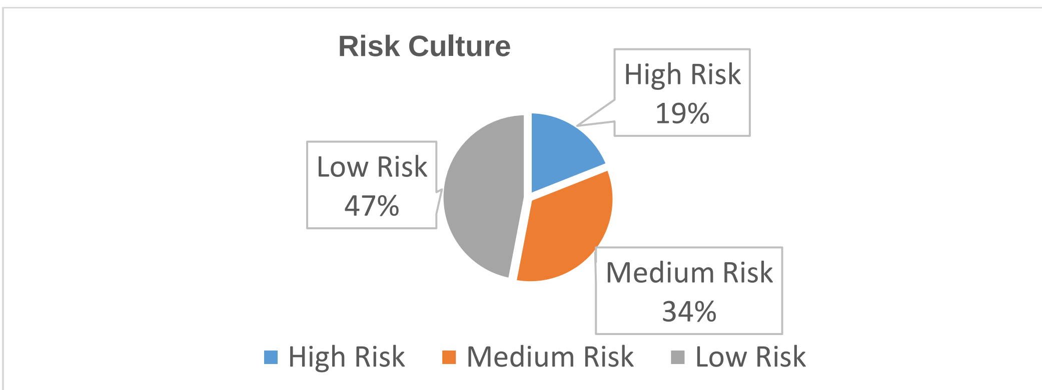
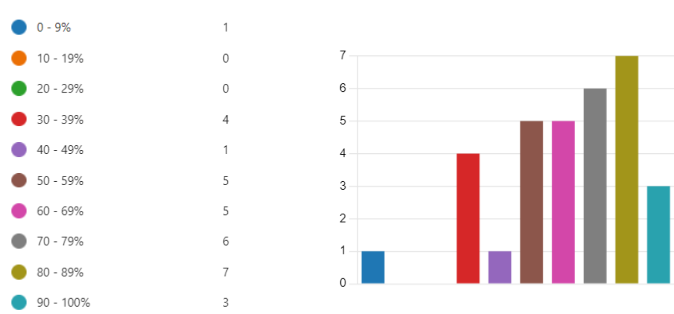


Figure 12: In what percentage of your contracts are you the stronger contracting party?

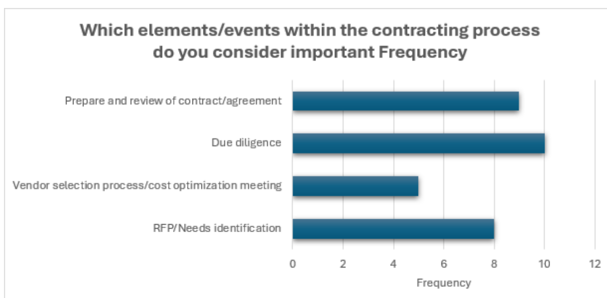


The data also shows that organizations with a high-risk culture have stronger contracting processes and experience more compliance with the contracting processes.

4.3.3. What is the Most Critical Component of the Contracting Process

Most of the participants identified that the due diligence/health checks on third parties was the most critical aspect of the contracting process, as it mitigated against several risks for the business namely: operational risks, credit risks (default/settlement/counterparty risk), legal risks, criminal risks, conduct risks, reputational risks, cyber security/information risks, competition risks and ESG risks.

Figure 13: Most important component of the Contracting Process?



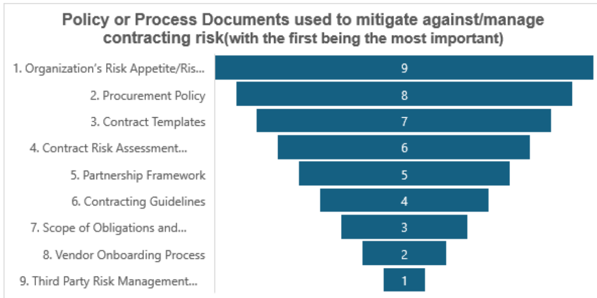
They indicated that these risks were mitigated because the due diligence/health checks confirmed things like whether the third party is a legal entity, the identity, background and status of its shareholders and management, the operational capability, track record and reputation in the market of the third party, the financial capacity of the third parry, whether there is any conflict of interest in respect of the third party, its compliance records with regulators, its ESG compliance history, its licenses, permits and authorizations, its propensity for litigation and disputes, its technological capabilities/strength of its cyber security/information security systems and its interactions with competitors.

Figure 14: Do you carry out due diligence or pre-registration onboarding/checks for counter parties before entering a contract with them?

4.3.4. What is the Most Critical Document to the Contracting Process

Although it was a close race between the Enterprise Risk Management (ERM) Framework of the organization (which contains the risk appetite statement), the Procurement Policy, and the Contract Templates, the ERM Framework edged ahead. What was further noteworthy is that it was not only the risk professionals who chose the ERM framework as the most important document in the contracting process, other professionals especially the legal practitioners chose the ERM framework.

Figure 15: Most Critical Contract Processing document:



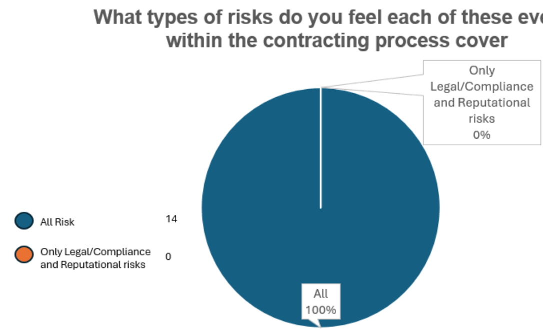
Reasons given for this include that it is the bible for activities across the organization, as it indicates how the organization wants to play and operate, it therefore sets the thresholds to be applied across the components of the contracting process. For example, it determines what should be included in the due diligence and health check lists, it determines what exceptions to be applied when complying with the components, it indicates how stringent or relaxed requirements for certain transactions should be, it indicates what type of third parties to engage e.t.c.

This finding buttresses the position that the contracting process is a major tool for risk mitigation in an organization.

4.3.5. What Risks to the Business are protected by the Contracting Process

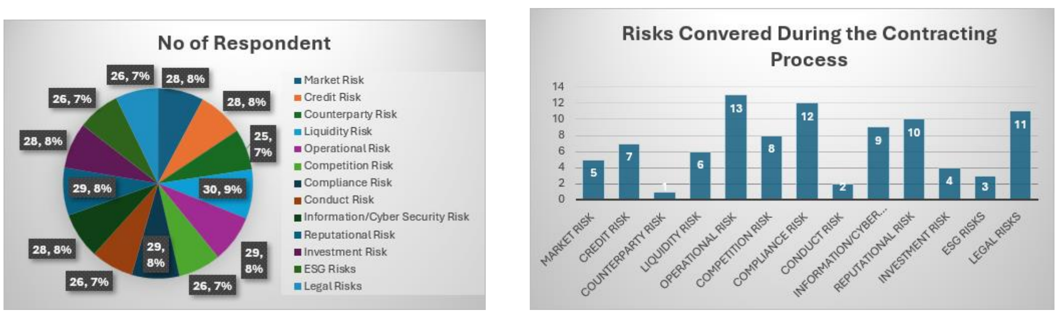
All the participants interviewed, irrespective of their profession, confirmed that the combination of the components of the contracting process help mitigate the various buisness risks an organization is exposed to.

Figure 16: Types of Risks covered by Components of the Contracting Process – Interviews:



Some participants of the survey also confirmed that the various components of the contracting process protected the organization against other types of risks beyond the assumed Legal, Compliance and Reputational risks.

Figures 17(a) & (b): Types of Risks covered by Components of the Contracting Process – Surveys:



The following were some of the examples given:

(i) Requiring a specific minimum timeline within which the organization’s payment obligation arises after receiving an invoice, and requiring a specific maximum timeline within which a client’s obligation to pay for a service arises help the organization mitigate Liquidity risk.

(ii) A requirement to check the relationship between a potential vendor/partner and the organization’s competitors under the due diligence checklist/ KYC, the vendor selection process, the Blacklist, and an exclusivity clause in the final signed contract help the organization mitigate Competition risk.

(iii) The pegging of payment obligations to local currency, the capping of a foreign exchange obligation to a maximum amount in local currency, the removal of an interest rate penalty, or a requirement that the price increase is benchmarked against an interest rate mitigates Market risks.

(iv) The due diligence and health check carried out on a third party before engagement, the vendor selection process, the advance payment guarantee requirement for large advance payments, the Blacklist, the restriction on the type of institution that can provide advance payment guarantees, and the minimum qualification requirements for third parties that can do buisness with the organization help the organization mitigate Credit/ Default/ Settlement/ Counterparty risks and Legal risks.

(v) The needs identification and request for proposal process, conflict-of-interest policy, the goods receipt process, the goods inspection process, the procurement policy, the Blacklist, and the pre-approval process before engagement of vendors help an organization mitigate Operational risk and Conduct risk.

(vi) The health and due diligence check on the third party's licenses, permits and authorizations, the needs identification/pre-requisite scoping of the service requirements, the creation of a request for proposal before the third-party selection process, the standard agreement making form, the contracting guidelines, the Blacklist, and the interactions between the contract owner and the legal team during contract preparation and negotiation help the organization mitigate Compliance risk and Model risk.

(vii) The conflict-of-interest policy, the procurement policy, the due diligence/health checks on third parties, the vendor selection process, the Blacklist, and the partnership framework mitigate Reputational risk.

(viii) The due diligence/health check on third parties, the vendor selection process, the Blacklist, access control policy, acceptable use policy for third party connection, confidential data policy, data protection and confidentiality provisions mitigate against Cyber Security/ Information Risk.

(ix) The contracting guidelines, the contract templates, the risk appetite, and the investment policy help an organization mitigate against Investment Risk.

(x) The due diligence/health check on third parties, the contracting guidelines, the contract templates, the Blacklist, and the vendor selection process help an organization mitigate ESG risk.

4.3.6. Differences in Perspectives Between In-House Practitioners and External practitioners

22% of the participants were External practitioners, the data however does not show any marked difference in the perceptions or opinions of In-house practitioners and external practitioners on any of the issues considered in this study.

4.3.7. Evaluation of Documents

Numerous public documents relating to the contracting process of organizations were obtained from in-house practitioners or the website of organizations. These documents either indicated the end-to-end contracting process life cycle of organizations or were part of the contracting process documents used by organizations.

4.3.7.1. Contract Processing Documents

The interviews and surveys corroborated the contents of the documents reviewed. The documents reviewed include:

(a) Process Flow of Contracting Process.
(b) Procurement Policy
(c) Enterprise Risk Management Framework
(d) Partnership Framework
(e) Contracting Guidelines
(f) Contract Templates
(g) Vendor Onboarding Documentation (made up of due diligence checklist, KYC form, health check checklist)
(h) Contract Risk Assessment Checklist
(i) Standard Agreement Making Forms
(j) Standard Operating Procedures
(k) Conflict of Interest Policy
(l) Information/Document Checklist
(m) Contract Signing Mandate
(n) Needs Identification Template/Buisness Requirement Template/Bill of Material/Bill of Quantity Template
(o) Request for Proposal/Request for Quotation Template
(p) Vendor Selection Sheet
(q) Third Party Risk Management Program
(r) Performance Monitoring Report Template
(s) The Blacklist

(t) Contract Annexures (on Access Control, Confidential Data and External Parties Information Security Procedure Policies) - setting out additional provisions on critical issues relating to confidentiality of information, access control and usage and information security) that counterparties are required to comply with. may also include codes of conduct such as anti-money laundering polices, human rights policy, slavery policy and the like.

Based on an evaluation of the documents obtained, and the information obtained through the interview and survey it was deduced that a good number of organizations include the following documents as part of their contract processing documents (they may however be named differently or form part of the other documents in the list):

(i) Needs Identification/Business Requirement Template
(ii) Process Flow of Contracting Process
(iii) Procurement Policy
(iv) Enterprise Risk Management Framework
(v) Contracting Guidelines
(vi) Contract Templates
(vii) Contract Risk Assessment Checklist
(viii) Vendor Onboarding Documentation (made up of due diligence checklist, KYC form, health check checklist)
(ix) Conflict of Interest Policy
(x) Vendor Selection Sheet
(xi) Request for Proposal/Request for Quotation Template
(xii) The Blacklist

4.3.7.2.Contracting Process Life Cycle

From a review of the Standard Operating procedures, Contract Processing flow charts, Procurement Policy, Partnership Framework, Contracting Guidelines, Vendor Onboarding Documentation, Conflict of Interest Policy one can deduce the following as the components/chain of events in a typical contracting process:

4.3.7.2.1. Vendor Contracting process.

S/N	Activity
1	Needs identification By Contract Owner
2.	Contract Owner obtains Senior Management Approval
3	Contract Owner sends purchase requisition request for proposal/quotation to procurement with evidence of approval

4	• If new vendors are to be included in the selection process, vendor onboarding/due diligence/health check process triggered and commenced. • Such vendor onboarding includes conflict of interest checks, KYC, e,t,c, • After vendor onboarding/due diligence/health check concluded/ or where vendors in vendor list, RFQ/RFP sent to vendors
5	Vendors submit quotations / proposals to organization
6	Quotations/proposals collated from identified vendors
7	• If quotes above the monetary threshold convene a panel negotiation meeting and go through the panel negotiation process for the selection of the vendor to be recommended for the service. • Panel usually is made up of teams across the organization such as: finance, risk, audit, legal, procurement and subject matter contract experts. • Reports from the panel are shared with the contract owner to obtain approval for the engagement
8	If quotes below monetary threshold, compare proposals / quotes and recommend to contract owner the appropriate vendor to be engaged
10	Contract owner obtains senior management approval for the engagement of the vendor based on the reports received and the contract owner/procurement sends contract preparation request (which includes a completed standard agreement making form) to the Legal team with all the reports, approvals, proposals, RFGs/RFPs. If the vendor's contract is to ne used a copy of the word version of the draft contract is sent to Legal as well.
11	Legal receives the request and attached documents and prepares the draft contract/reviews the draft contract agreement in continuous consultation with the contract owner and sends final version of the contract back to the contract owner/procurement.
12	Contract owner/procurement shares the contract/SLA/Award Letter with vendor
13	Vendor receives the contract/SLA/Award Letter, agrees with the terms, executes, and returns the contract to the organization

14	Contract owner/procurement receives the vendor's executed copy and shares with legal for full execution internally
15	• Where the advance payment meets the threshold that requires an Advance Payment Guarantee (APG), the contract owner will not raise the advance payment request until the APG has been submitted and confirmed valid by the Legal team. • Where APG is needed, the procurement team sends the APG template to the vendor after the execution of the contract, highlighting the institutions that can issue the APG. • Vendor ensures the issuing authority complies with the APG template and sends the draft for the approval of Legal. Any changes to the APG draft must be approved by the Legal team. • Once the APG is approved by the Legal team the original signed copy is issued and the original is given to the Legal team for safe keeping. • Contract owner raises payment request in favour of the selected vendor for contractually agreed advance amount (the percentage of the fees paid as advance amount is dictated by the procurement policy) and obtains line manager required approvals to make the payment.
16	After approvals from the contract owner line managers, payment request is passed for checks and payment to procurement, internal control, and finance under the goods receipt process. Statutory deductions are made before payment.
17	Compliance/Procurement monitor the contract/delivery alongside contract owner
18	• Where goods are physically delivered, internal control carries out the quality/confirmation checks in the presence of compliance/procurement / contract owner invites Internal Control for quality and conformity checks. • Where internal control is satisfied, delivery note is signed off by internal control and the vendor. • Where service is intangible, the contract owner confirms to procurement that the service has been delivered in line with the contract requirements.
19	• Based on confirmation of full delivery/provision of the service procurement triggers final payment for the vendor with proof of provision of the service. • The payment request is passed to internal control, and finance for payment under the goods receipt process. Statuary deductions are made before payment.

20	• During delivery of intangible services, service delivery is continuously monitored and reviewed by the contract owner and the procurement team. • In the case of construction type services, delivery of service is continuously monitored and reviewed by the contract owner and the procurement team, but milestone deliveries are inspected by internal audit and external consultants. • After the delivery of services (whether for tangibles or intangibles) performance review meetings are held by procurement with the contract owner to assess the quality and sustainability of the services provided and the quality of the engagement during the period the services were provided.

It was noted that some:

(i) aspects of the above contracting process may be abridged for low-risk transactions, but such transactions also have their approved documented process to mitigate against abuse.

(ii) of the above contracting process events may not apply to some transactions in which the procurement team is not as involved as indicated above, but such transactions need to still follow some of the events stated above and have their approved documented process to mitigate against abuse.

(iii) business relationships that are partnerships or collaborations have a different contracting process which is based on other documented policies. The requirements for such business relationships include due diligence checklist, risk assessments, approvals by the executive management and in some cases the board of directors.

Data showing Consensus on components/documents included in the contracting process across organizations:

S/N	Questions	Responses
1	Do you consider the Legal team a control function	Yes
2	Provisions you require in the procurement Policy	1. Criteria for Supplier Selection 2. Approval threshold
3	Provisions you require in the Organization's Risk Appetite/Risk Management Framework	1. Risk identification and assessment
4	Provisions you require in the Partnership Framework	1. Objectives and criteria for partnerships.

		2. Partner roles and responsibilities.
5	Vendor Onboarding Process	1. Physical inspection of premises
6	Do you carry out due diligence or pre-registration onboarding for counter parties to a contract before entering a contract with them?	Yes
7	Do you use exclusivity clauses/restraint of trade/non-compete clauses as a risk mitigation tool and in what types of contracts?	Yes
8	Are Political Factors a consideration when entering into or negotiating a contract?	Yes

5. CONCLUSIONS

5.1. Introduction

This chapter uses the findings discussed in chapter 4 to answer the research questions which formed the basis of this study. This chapter also indicates potential areas of further research.

5.2. Summary

The objective of this study is:

(i) To highlight and emphasize the role of the contracting process in the risk management and mitigation efforts of organizations for commercial contracts.

(ii) To create an understanding that the contracting process is a critical part of the internal control mechanisms of an organization for managing and mitigating risks.

(iii) To examine and understand the interplay between an organization's risk appetite, risk culture and its contracting process, and encourage the use of an organization's risk appetite when dealing with and applying waivers to the contracting process.

(iv) To understand the principles of third-party risk management and its application in the contracting process.

(v) To examine how specific risks to the buisness of an organization are addressed through the contracting process.

(vi) To improve the synergy, integration and handshakes between the legal, risk, procurement, internal control, finance and contract/category owner functions of an organization.

(vii) To acknowledge and appreciate the commendable efforts of the functions engaged in the contracting process for safeguarding their organizations against various risks.

The research carried out when working on this thesis does not show there is any other body of work which:

(i) highlights the critical role of the contracting process in risk management; or

(ii) analyzes how each of the components act as a risk mitigation tool; or

(iii) analyzes which business risk each component acts as a mitigant against.

5.3. Application of the Findings

To address these lacunas through the study, the following themes which align with the Research Questions were crafted and analyzed from the data obtained from the interviews, survey, and documents:

(i) Is the Contracting Process a Risk Mitigation Tool/Internal Control Mechanism?
(ii) Is there a Relationship Between the Risk Appetite/Risk Culture and the Contracting Process?
(iii) What is the Most Critical Component of the Contracting Process?
(iv) What is the Most Critical Document to the Contracting Process?
(v) What Risks to the Business are protected by the Contracting Process?

An analysis of the data shown in chapter 4 shows:

(a) it is unanimously agreed across all professional practitioners and contract owners that the contracting process is a critical risk mitigation tool and should be regarded and treated rather than just its individual parts.

(b) that the Risk appetite statement and key risk indictors contained in the Enterprise Risk Management Framework is the foundation and basis of the steps, events and components that make up the contracting process, as such the contracting process is akin to the first line defender ensuring that that the organization in its daily operations and activities keeps within its risk tolerance.

(c) that irrespective of the risk appetite rating, the true efficiency and effectiveness of the contracting process lies in the risk culture rating of the organization and low risk culture impedes the efficiency of the contracting process.

(d) the quickest, easiest and fastest way to encourage and promote adherence within the organization to the risk tolerance and appetite of the organization is to reflect same in the components and events of the contracting process, and same will extend to most parts of the organization, because a reasonable number of the events within the contracting process also form parts of the evens of internal facing processes as well.

(e) the steps, events and components within the contracting process if complied with each and as a whole act as front-line defenders mitigating all the business risks the organization is exposed to.

5.4. Conclusion

This study is therefore novel, and has:

(i) introduced a new perspective to the way practitioners and organizations see and use the contracting process i.e. as a risk mitigation tool.

(ii) provided a valid basis to regard the contracting process as a sum of all parts, as opposed to just one component (i.e. the final formal contract).

(iii) provided the means for better statistical representation of the contribution of the contracting process to the organizations' achievement of goals and objectives (whether financial or non-financial).

(iv) successfully linked and tied each component of the contracting process to a buisness risk that has been mitigated and proven to be a fallacy the position that 'contracts'/the contracting process only mitigate compliance/reputational and legal risks.

The potential limitation to this research using one data point was averted using triangulation by the introduction of documentary analysis as well.

One of the hypotheses that this study was to test is the assumption that In-house practitioners and External practitioners look at the issues considered in this study differently. the data however does not show any marked difference in the perceptions or opinions of In-house practitioners and External practitioners on any of the issues considered in this study.

As this is the first study on this issue, there is room for more research on the interplay between a low-risk culture, increased inefficiencies in the contracting process, and an increase in the crystallizations of risks.

References

Angelo State University. (2024, February 28). *Contract Process Flowchart.* Retrieved from Angelo State University: https://www.angelo.edu/live/files/23301-flowchart

AudioBoard. (2023, June 29). *Third-Party Risk Management 101: Guiding Principles.* Retrieved February 28, 2024, from AudioBoard: https://www.auditboard.com/blog/third-party-risk-management-101/

Audit Talk. (2022, September 9). *Third-Party Risk Managment: What You Dont't Know Today Can Hurt You.* Retrieved February 28, 2024, from AuditBaord: https://www.auditboard.com/blog/third-party-risk-management-what-you-dont-know-today-can-hurt-you/

AuditBoard. (2022). *Effective Third-Party Risk Management - Key Tactics and Success Factors.* AudioBaord.

Butterworths LexisNexis. (2001). *The Encyclopadeida o Forms And Precedents* (5th ed., Vol. 4(3)). (P. The Rt. Hon. lord Millet, Ed.) London: Butterworths LexixNexis.

Butterworths LexisNexis. (2001). *The Encyclopaedia of Forms And Precedents* (5th ed.). (P. The RT. Hon. Lord Millett, Ed.) London: Butterworths LexisNexis.

Button, K. (2019, March 30). *Six Statistics Supporting Contract Management System Adoption.* Retrieved February 28, 2024, from ContractSafe: https://www.contractsafe.com/blog/stats-for-cms-adoption

CFI. (2024). *Introduction to Risk Management .* Online: CFI.

CFI. (2024, February 29). *What is Funding Liquidity Risk.* Retrieved February 29, 2024, from CFI: https://corporatefinanceinstitute.com/resources/career-map/sell-side/risk-management/funding-liquidity-risk/#:~:text=Funding%20liquidity%20risk%20refers%20to,settle%20its%20current%20outstanding%20bills.

Chitty. (1980). *Chitty on Contracts* (24th ed., Vol. 1). London: Sweet & Maxwell.

Chitty. (1980). *Chitty on Contracts* (24th ed., Vol. 1). Sweet & Maxwell Limited.

Columbia University Irving Medical Centre. (2024, March 1). *Content Analysis.* Retrieved March 1, 2024, from Columbia University Irving Medical Centre: https://www.publichealth.columbia.edu/research/population-health-methods/content-analysis#:~:text=Content%20analysis%20is%20a%20research,words%2C%20themes%2C%20or%20concepts.

Contractlogix. (2024, February 28). *Contract Risk Asessment Checklist: 10 steps to Follow.* Retrieved from Contratlogix: https://www.contractlogix.com/contract-management/contract-risk-assessment-checklist/

Contractlogix. (2024). *Minimizing Risk with Effective Contract Management.* Online: Contractlogix.

dealhub. (2024, February 28). *What is the Contracting Process*. Retrieved from dealhub: https://dealhub.io/glossary/contracting-process/#:~:text=The%20contracting%20process%20is%20a,stakeholders%20and%20their%20roles%20throughout.

Deloitte. (2021, May 20). *Third party risk management survey 2021: Over half of organisations have faced a risk incident due to third-party failure during COVID-19 pandemic*. Retrieved February 28, 2024, from Deloitte: https://www2.deloitte.com/uk/en/pages/press-releases/articles/third-party-risk-management-survey-2021.html

Denzin, N. (1970). *The research act: A theoretical introduction to sociological method.* New York: Aldine.

Dovi, S. H. (2023). Same Old Story, New Solution: Force Majeure Deficiencies in The Wake of COVID-19 and an Unorthodox Apprach to Drafting it. *Brooklyn Journal of Corproate, Financail & Commerical Law*, 89. Retrieved February 29, 2024, from https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1401&context=bjcfcl

Finance Strategists. (2024, February 2024). *Invesment Risk.* Retrieved February 2024, 2024, from Finance Strategists: https://www.financestrategists.com/wealth-management/investment-risk/

Fisk, E. R. (2003). *Construction Project Administration.* New Jersey: Prentice Hall.

Frost, J. (2024, February 28). *Purposive Sampling: Definition & Examples .* Retrieved from Statistics By Jim : https://statisticsbyjim.com/basics/purposive-sampling/

GRADCOACH. (2023, April). *Qualitative Data Analysis Methods 101:.* Retrieved March 1, 2024, from GRADCOACH: https://gradcoach.com/qualitative-data-analysis-methods/

Grand Canyon University. (2021, November 3). *5 Qualitative Research Designs and Research methods.* Retrieved February 29, 2024, from Grand Canyon University: https://www.gcu.edu/blog/doctoral-journey/5-qualitative-research-designs-and-research-methods

Helpjuice. (2024, February 29). *How to Create an Effecitve Standard Operating Procedure (SOP).* Retrieved February 29, 2024, from Helpjuice: https://helpjuice.com/blog/standard-operating-procedure

Hokkaido Electric Power Co., Inc. (2024, February 29). *Flow Chart of Standard Pricurement Procedures.* Retrieved February 29, 2024 , from Hokkaido Electric Power Co., Inc: https://www.hepco.co.jp/english/procurement/chart.html

IBM Security. (2023). *Cost of a Data Breach Report.* Newyork: IBM. Retrieved February 28, 2024, from https://www.ibm.com/downloads/cas/E3G5JMBP

Indeed. (2022, October 1). *Managing Reputation and Competitive Risk.* Retrieved February 29, 2024, from Indeed: https://www.indeed.com/career-advice/career-development/how-to-manage-reputation-and-competitive-risk

Investopedia. (2022, December 5). *Reputational Risk: Definition, Dangers, Causes, and Example.* Retrieved February 29, 2024, from Investopedia: https://www.investopedia.com/terms/r/reputational-risk.asp#:~:text=Reputational%20risk%20is%20a%20threat,of%20an%20employee%20or%20employees

KPMG. (2024, February 29). *Conduct Risk & Culture.* Retrieved February 29, 2024, from KPMG: https://kpmg.com/ie/en/home/services/consulting/risk-consulting/conduct-risk-culture.html#:~:text=Conduct%20risk%20is%20broadly%20defined,market%20stability%20or%20even%20competition.

L, F. (2011). *Phenomenology for Psychotherapists: researching.* New York: Wiley-Blackwell, USA.

LSC America's Partner for Equal Justice. (2024, February 29). *Procurment Policy Drafting 101: Guidnance for LSC Grantees.* Retrieved February 2024, 2024, from LSC America's Partner for Equal Justice: https://www.lsc.gov/i-am-grantee/grantee-guidance/procurement-policy-drafting-101-guidance-lsc-grantees#:~:text=Introduction,waste%2C%20and%20abuse%20in%20purchasing.

Macneth, D. K. (2012). *Contract Lifecycle Management* (1st ed.). Online: Bookboon.com.

Martin Loosemore, J. R. (2006). *Risk Management in Projects* (2nd ed.). Abingdon: Taylor & Francis.

Moody's Analytics. (2024). *The rising tide of thrid-party risk management - Surfacing risks to safeguard reputations.* Online: Moody's Analytics. Retrieved February 2024 28, 2024 , from https://www.moodys.com/web/en/us/site-assets/ma-kyc-the-rising-tide-of-third-party-risk-management-report-LOWRES.pdf

Open Risk Manual. (2024, February 29). *ESG Risks.* Retrieved February 29, 2024, from Open Risk Manual: https://www.openriskmanual.org/wiki/ESG_Risks

Osborne, A. (2012). *Risk Management Made Easy.* Online: Bookboon.com.

PDfFiller. (2024, February 29). *Free Contract Flowdhart Word Templates.* Retrieved February 29, 2024, from PDfFiller: https://www.pdffiller.com/en/documents/flowchart/contract-flowchart.htm

Phinity Integrated Risk Management. (2024, February 28). *How to Tie Together and Boost Your Third Party Risk Management Processes.* Retrieved from Phinity Integrated Risk Management: https://www.phinityrisk.com/how-to-tie-together-and-boost-your-third-party-risk-management-tprm-processes/

Proofpoint. (2024, February 29). *What is Compliance Risk.* Retrieved February 29, 2024, from Proofpoint: https://www.proofpoint.com/us/threat-reference/compliance-risk#:~:text=Compliance%20risk%20is%20an%20organization's,protect%20people%20and%20sensitive%20data.

ResearchGate. (2024, February 29). *Practical guidelines to formulate an Operational Risk Appetite Statement for Corporate Organizations" A South African Perspective.* Retrieved

February 29, 2024, from ResearchGate: https://www.researchgate.net/figure/Operational-risk-appetite-matrix_fig2_289844420

SafetyCulture. (2024, February 27). *Why is Risk Mangement Important for Organizations.* Retrieved February 27, 2024, from SafetyCulture: https://safetyculture.com/topics/risk-management/

Sagay, I. (2007). *Nigerian Law of Contract* (2nd ed.). Ibadan: Spectrum Books Limited.

Sagay, I. (2007). *Nigerian Law of Contract* (2nd Edition ed.). Ibadan: Spectrum Books Limited.

Scribbr. (2023, June 22). *What is Qualitative Rsearch?| Methods & Examples.* Retrieved Ferbruary 29, 2024, from Scribbr: https://www.scribbr.com/methodology/qualitative-research/

SecurityScorecard. (2024, Janaury 5). *What is cybersecurity risk.* Retrieved February 29, 2024, from SecurityScorecard: https://securityscorecard.com/blog/what-is-cybersecurity-risk-factors-to-consider/#:~:text=Cybersecurity%20risk%20is%20the%20potential,organization's%20digital%20systems%20and%20networks.

Simpl:learn. (2024, January 29). *What is Financial Risk and Its types? Everything You Need to Know.* Retrieved February 29, 2024, from Simpl:learn: https://www.simplilearn.com/financial-risk-and-types-rar131-article

Stanford Health Care. (2024, February 28). *Contract Flow Chart.* Retrieved from Stanford Health Care : https://stanfordhealthcare.org/content/dam/SHC/about-us/contracts/docs/TRAINING%20GUIDE%20-%20Contract%20Administration%20Flow%20Chart%20and%20Definitions.pdf

Summize. (2024, February 29). *A Comprehensive Overview of Contract Checklists.* Retrieved February 29, 2024 , from Summize: https://www.summize.com/contract-hub/contract-checklist

Tamara Bekefi, M. J. (2008). *Managing Opportunities and Risks.* Canada: The Society of Management Accountants of Candan the American Instituite of Certified Public Accountants and The Chartered Institute of Management Accountants.

TechTarget. (2024, February 29). *Operational Risk.* Retrieved Ferbuary 29, 2024, from TechTarget: https://www.techtarget.com/searchsecurity/definition/operational-risk#:~:text=Operational%20risk%20is%20the%20risk,that%20can%20trigger%20operational%20risk.

The University of Arizona. (2024, February 28). *The Contracting Process*. Retrieved February 28, 2024, from The University of Arizona: https://research.arizona.edu/administration/negotiation-and-acceptance/contracting-process

University of Houston. (2024, February 28). *Procurement and Contracting Process Flowchart.* Retrieved from Univeristy of Houston: https://uh.edu/office-of-finance/training/procurement-and-contracting-process-flowchart.pdf

West/Thomson Reuters. (2004). *Black's Law Dictionary* (9th ed.). (B. A. Garner, Ed.) London: West.

World Commerce & Contracting. (2012, October 29). *Poor Contract Management Costs Companies 9% - Bottom Line.* Retrieved February 28, 2024, from World Commerce & Contracting: https://www.worldcc.com/Resources/Content-Hub/details/Poor-Contract-Management-Costs-Companies-9-Bottom-Line

World Commerce & Contracting. (2016). *Excellence in Contract Management -Common Pitfalls from a practitioner's perspective.* Online: World Commerce & Contracting. Retrieved from https://s3.eu-central-1.amazonaws.com/iaccmportal/resources/files/9102_iaccmcpaglobal-contractmanagementwebinar-19jan2016.pdf

APPENDICES

Appendix 1: Questionnaire

A) Online Survey

A. General

1. Please indicate which category you represent (please tick the appropriate category):

    a. In-house Legal Practitioner
    b. External Legal Practitioner
    c. In-house Risk Officer
    d. External Risk Consultant
    e. In-house Procurement Officer
    f. Contract Owner

2. Do you consider the Legal team a control function?

    a. Yes
    b. No

3. Which Policy or Process Documents do you use to mitigate against/manage your contracting risk? Grade them in order of priority with the highest priority being 10:

    a. Procurement Policy
    b. Organization's Risk Appetite/Risk Management Framework
    c. Partnership Framework
    d. Contracting Guidelines
    e. Contract Templates
    f. Vendor Onboarding Process
    g. Contract Risk Assessment Checklist
    h. Scope of Obligations and deliverables of each party
    i. Third Party Risk Management Program
    j. Other (give room for them to include others).

4. Give at least three key provisions you require in the following Policy or Process Documents:

a) Procurement Policy
b) Organization's Risk Appetite
c) Partnership Framework
d) Contracting Guidelines
e) Vendor Onboarding Process
f) Contract Risk Assessment Checklist
g) Scope of Obligations and deliverables of each party

h) Third Party Risk Management Program
i) The Other documents you mentioned in 3(j) above

B. Assessment of Counter Parties

5. Do you carry out due diligence or pre-registration onboarding for counter parties to a contract before entering a contract with them? (Please tick the appropriate box)

   a. Yes
   b. No.

6. If Yes indicate five major checks you carry out during the due diligence/pre-registration onboarding?

   ……………………………………………………………………………

7. If no indicate why you don't feel due diligence/pre-registration onboarding is needed?

   ……………………………………….

8. Is it mandatory to conduct a Request for Proposal amongst a minimum number of vendors before selecting a vendor to provide services?

   a) Yes
   b) No
   c) Most times except for a few exceptions

9. If you answered 'c' what mechanism are put in place to manage risk when applying the exceptions?

C. ASSESSMENT OF TERMS

10. Indicate in order of priority (with the highest priority being 11) which risks you consider during your negotiation and contracting process. This risk could be your organization's risk or the counter party risk or the risk considered by both of you?

    a. Market Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
    b. Credit Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
    c. Counterparty Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
    d. Liquidity Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.

e. Operational Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
f. Competition Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
g. Compliance Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
h. Conduct Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
i. Information/Cyber Security Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
j. Reputational Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
k. Investment Risk (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
l. ESG Risks (indicate whether the risk is yours or the counter party's or both). Can you give two examples.
m. Legal Risks (indicate whether the risk is yours or the counter party's or both). Can you give two examples.

11. Indicate in order of priority (with the highest priority being 6) how you evaluate the obligations provisions in a contract:

a. What are your obligations under the contract?
b. How much resources would be expended to meet these obligations?
c. The gray areas where your obligations are not clearly defined and could lead to dispute?
d. The schedule of deliverables, and whether you can meet the delivery dates?
e. Penalties involved for failure to meet the delivery timelines?
f. What risks are involved if the counterparty does not adhere to its own obligations?

12. Aside from confidentiality provisions in a contract can you indicate four other ways in which you protect the confidentiality of information shared in the course of the contractual relationship?
……………………………….

13. Aside from intellectual property provisions in a contract can you indicate four other ways in which you protect the trade secrets and intellectual property rights created, accrued or exposed during the course of the contractual relationship?
……………………………….

14. Do you consider the use of milestone payment terms in a contract, a risk management tool and if so why? (Please tick the applicable response and give a brief reason for your response

a. Yes ………..
b. No ………………

15. Do you have a minimum payment timeline for your payment obligations and if Yes, what risk does this address?

    a. Yes ………..
    b. No ………………

16. Do you have a maximum percentage advance payment that can be made to vendors, and if Yes what risk does this mitigate? Are there exceptions to this percentage?

    a. Yes ………..
    b. No ………………

17. Are there circumstances when you require an Advance Payment Guarantee to effect payment, If your answer is Yes what is the threshold and what risk is this trying to mitigate? (Please tick the applicable response)

    a. Yes ………..
    b. No ………………

18. Do you have requirements around the type of institution that can issue an acceptable Advance Payment Guarantee? (Please tick the applicable response)

    a. Yes ………..
    b. No ………………

19. Apart from the pricing and payment terms, what other financial aspects of the agreement do you track as contract line items?

20. Do you use the term of a contract as a risk mitigation method and which method have you found to be an effective risk mitigation method:

    a) Short terms between1 to 3 years – if so why
    b) Long term of over 5 years – if so why
    c) Automatic renewal contracts – if so why

21. How do you manage the risk of limitation of liability and indemnity provisions?

22. Do you have standing signatories for different types of contracts and if so is it based on:

a. Type of contract?
b. Amount of the contract? Or

c. Both a & b

23. If you have standing signatories for different types of contracts whether based on type of contract, amount of contract or both what risk does each help to mitigate?

    a. Type of contract ………………….
    b. Amount of the contract ………………….

D. <u>LOCATION SPECIFC OBLGATIONS AND RISKS EVALUATION</u>

24. Do you consider governing law a risk mitigation tool and if so where you agree to use foreign law how do you mitigate the risk of using foreign law?

25. Do you consider the mediation and arbitration clause a risk mitigation tool and if so where you agree to arbitration outside your country how do you mitigate the risk of arbitrating outside your country?

26. Where the contract is denominated in foreign currency, list three measures you use to protect against currency risk?

27. Some locations, especially foreign jurisdictions, may pose their own risks which may involve rules and regulations, such as privacy regulations, which are different from what you are accustomed to. How can these location-specific risks impact the contractual relationship?

E. <u>EVALUATION OF OTHER/OPTIONAL PROVISIONS</u>

28. Are there circumstances when you require Audit rights over the counterparty, what is the threshold and what risk is this trying to mitigate?

29. What role do claw back provisions play in helping to manage/mitigate risks?

30. Do you use exclusivity clauses/restraint of trade/non-compete clauses as a risk mitigation tool and in what types of contracts?

    If yes then please respond to question 30

31. How effective have these clauses been and if they have not been effective what other methods have you adopted to achieve the same purpose?

    If your answer is no then they should have this as their question 30

    Since you do not use the clauses mentioned in question … above, what other methods have you adopted to achieve the same purpose?

32. Are Political Factors a consideration when entering into or negotiating a contract? if so can you indicate two or three of such factors?

33. Beyond the typical social factors such as child labour, anti-money laundering, slavery, human rights, and sexual abuse, which some parties require warranties and guaranties given regarding compliance, are there any other social factors you also consider when entering into or negotiating a contract, if so can you indicate two or three such factors?

34. Beyond the commercials, are there any other economic factors you also consider when entering into or negotiating a contract? If so can you indicate two or three of such factors?

35. Are there any environmental factors you also consider when entering into or negotiating a contract? If so can you indicate two or three of such factors?

36. Beyond cybersecurity and information security concerns, are there any other Technological factors you also consider when entering into or negotiating a contract? If so can you indicate two or three such factors?

F. <u>RISK ASSESSMENT</u>

37. In what percentage of your contracts are you the stronger contracting party?

38. In what percentage of your contracts are you the weaker contracting party?

39. In what percentage of your contracts are you both equal in strength?

40. Where, you are the weaker contracting party what type of provisions are your deal breakers notwithstanding this weak position?

41. From an annual perspective, in what percentage of contracts have you walked away because of non-negotiable terms, even though the business team wanted to proceed with the contract?

42. From an annual perspective, in what percentage of contracts have you walked away because of non-negotiable terms, and the business team agreed to walk away?

43. From an annual perspective, what percentage of contracts have you, because of direct or indirect pressure from the business teams conceded to uncomfortable provisions?

44. From a volume perspective, how many contracts does the risk from uncomfortable provisions crystallize?

45. What Risk culture would you say your organization has vis a vis your contracting?

    a) High Risk;

b) Low Risk; or
c) Medium Risk

Then if High Risk

46. What factors do you feel influence your high-risk culture in contracting?

    If Medium Risk
    What factors do you feel influence your medium risk culture in contracting?
    If low risk
    What factors do you feel influence your low risk culture in contracting?

47. Name two or three pros and cons of a High Risk, Low Risk or Medium Risk culture in contracting?

48. In the order of priority (with the highest priority being 5), which of these do you consider more while contracting:

    a. That all your contracts must comply with all applicable government and industry regulations?
    b. That there is a risk of noncompliance with applicable regulations when you actually deliver on a contract obligation?
    c. That you have a complete history of all activities associated with the contract to serve as an audit trail when the need to provide evidence of compliance comes up>
    d. That a contract may start out relatively low risk but after negotiations, additions, redlining, etc. it may end up with higher degree of risk?
    e. That you need to track all changes and amendments made to the contract and assess and minimize any new risks introduced during the contracting process?

B) Interview Questions

Question 1 – Do you consider elements of events within the contracting process risk mitigation tools and if so why?

Question 2 – What types of risks do you feel each of these events within the contracting process cover? Some people feel they are only restricted to Legal/Compliance and Reputational risks.

Question 3 – Which 3 or 4 elements/events within the contracting process do you consider important and why?

Question 4 – Which 3 or 4 contracting process documents do you consider important and why?

Question 5 – What is the risk culture and appetite of your organization and what role do you think it plays in the contracting process?

Question 6 – What functions are involved in the contracting process and how important is the interplay between each of these functions and is it okay, what are the areas of improvement and what is its role in effectiveness of the contracting process?

C) Extract of Survey Responses

ID	Please indicate which category you represent (please select the appropriate category):	Do you consider the Legal team a control function	Do you carry out due diligence or pre-registration onboarding for counter parties to a contract before entering a contract with them?	Is it mandatory to conduct a Request for Proposal amongst a minimum number of vendors before selecting a vendor to provide services?	Do you use exclusivity clauses/restraint of trade/non-compete clauses as a risk mitigation tool and in what types of contracts
2	Self Employed ;	Yes	Yes	Yes	Yes
3	External Legal Practitioner;	Yes	No	No	Yes
4	In-house Legal Practitioner ;	Yes	Yes	Yes	Yes
5	In-house Legal Practitioner ;	Yes	Yes	Most times except for a few exceptions	Yes
6	In-house Legal Practitioner ;	Yes	Yes	Most times except for a few exceptions	Yes
7	External Risk Consultant ;	Yes	Yes	Yes	Yes
8	Programme Director;	Yes	Yes	Yes	Yes
9	Business Development Consul	Yes	Yes	Yes	
10		Yes	Yes	No	Yes
11	In-house Procurement Officer	Yes	Yes	Most times except for a few exceptions	Yes
12	External Legal Practitioner;	Yes	No		
13	In-house Legal Practitioner ;	Yes	Yes	Yes	Yes
14	Contract Owner;	Yes	Yes	Yes	No
15	Engineer at a National Regulat	Yes	No	Yes	Yes
16	Contract Owner;	Yes	Yes	Yes	Yes
17	In-house Legal Practitioner ;	Yes	Yes	Yes	No
18	In-house Risk Officer;	Yes	Yes	Most times except for a few exceptions	Yes
19	External Risk Consultant ;	Yes	Yes	Yes	Yes
20	In-house Risk Officer;	Yes	Yes	Yes	Yes
21	Contract Owner;	Yes	Yes	Yes	Yes
22	External Legal Practitioner;	Yes	Yes	Yes	
23		Yes	Yes	Yes	Yes
24		Yes	Yes	Yes	
25	External Legal Practitioner;	Yes	Yes	Yes	Yes
26		Yes	Yes	Yes	
27	In-house Legal Practitioner ;	Yes	Yes		
28	In-house Legal Practitioner ;	Yes	Yes	Most times except for a few exceptions	Yes
29	External Legal Practitioner;	Yes	Yes	Most times except for a few exceptions	Yes
30	In-house Legal Practitioner ;	Yes	Yes	Most times except for a few exceptions	No
31	Compliance officer;	Yes	Yes	Yes	Yes
32	External Risk Consultant ;	Yes	Yes	No	
33	In-house Legal Practitioner ;	Yes	Yes	No	Yes
34		Yes	Yes	No	No
35	In-house Legal Practitioner ;	No	Yes	No	Yes
36	In-house Risk Officer;	Yes	Yes	No	Yes
37	Compliance Officer;	Yes	Yes	Yes	Yes
38		Yes	Yes	Yes	Yes

D) Sectors covered in the Interview.

The participants were assured that the information they provided was on an anonymous basis, so this information only provides some of the sectors in which the participants operate**:**

1) **Capital Market**
2) **Telecommunications**
3) **Banking**
4) **Professional Services**
5) **Public Service**
6) **Energy**
7) **FMGG**

STATUTORY DECLARATION

I **Irene Robinson-Ayanwale declare that:**

(i) The research reported in this Thesis, except where otherwise indicated is my original research.

(ii) This Thesis has not been submitted for any degree or examination at any other university.

(iii) This Thesis does not contain other people's data, pictures, graphs or other information unless specifically acknowledged as being sourced from other people.

(iv) This Thesis does not contain other peoples' writing unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted then:

(a) their words have been re-written but the general information attributed to them has been referenced;

(b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

(v) Where I have reproduced a publication of which I am the author, co-author or editor, I have indicated in detail which part of the publication was actually written by me alone and I have fully referenced such publications.

(vi) This Thesis does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the Thesis and in the References sections.

Signed:  Dr. Irene Robinson-Ayanwale