SECTION A

Q1 Explain to Balraj the answers he should give to each of Jenny’s FIVE questions. (25 marks)

Analysis of the Question

This question tested candidate understanding of arguments for and against tendering, and contract award procedures.

Analysis of the Answer

Candidates had to address each of the five questions raised in the case study.

First Question: How do you know that you have invited every one of the best possible suppliers in the world to bid? Might there not be lots of other suppliers out there, who do not realise that HH has identified a need and that they could be supplying it?

Candidates should have advised Balraj to say that he recognised that there could indeed be no absolute certainty that HH could ever identify every one of the best possible suppliers in the world! But that it is in the nature of all competitive tendering to take great pains to advertise the existence of available opportunities as widely and as fully as possible using all appropriate media and targeting likely marketplaces. HH operate in a traditional specialist ‘niche’ market and has been in existence for hundreds of years. Therefore it is likely that they have found already the great majority of suitable suppliers, and that they will have a long list of potential suppliers that they use / have used before. Ultimately it is for suppliers to find opportunities to sell not buyers.

Second Question: Who meets the costs of preparing and developing these tender packs, producing them, and sending them out to potential bidders around the world? Is it worth it?

Candidates should have advised Balraj to say that it is HH that meets the costs of the buyer’s role in the tendering process, and that he recognises that it can be a considerable cost. Therefore it is only undertaken for larger scale purchases where the expense can be justified. However tendering produces demonstrable evidence of fair and open competition, which enhances the reputation of HH as a long standing company with a great tradition of trade in sensitive markets such as the military. In addition the costs of tendering can be seen as one of the costs of maintaining that reputation and credibility.

Third Question: Who meets the costs of analysing the documents, completing all of the information, and sending the completed tender forms back? Is it worth it?

Candidates should have advised Balraj to say that it is the potential suppliers, the recipients of the ITTs that meet the costs of the seller’s role in the tendering process. Suppliers will recognise that the cost of bidding can be a considerable; but is a necessary expenditure if they are to win large contracts for work from traditional companies such as HH and all public-sector organisations in the EU and beyond, where tendering is widespread and in many instances legally required. This is especially significant for HH because Governments and public sector organisations such as Universities are important customers for ceremonial and traditional uniforms. HH therefore participate in the bidding process both as a ‘seller’ and as a ‘buyer’.
Fourth Question: How do you make sure that HH’s own terms and conditions apply in the contract that is made with the winning bidder?

Candidates should have advised Balraj to say that this requires careful management of the tendering process. The HH Terms and Conditions are sent out with the ITT, so that any compliant bid returned must fully accept them. HH must avoid any subsequent debate with bidders about the Terms and Conditions to apply to the deal, as this could create a ‘battle of the forms’ situation and no longer ensure that HH Terms and Conditions apply. Candidates might have explained ‘offer’, ‘counter offer’, and ‘unqualified acceptance’ here; and/or supported their answers with relevant caselaw; but this was not a specific requirement to gain high marks.

Fifth Question: I’ve heard about ‘conditions’ and ‘warranties’ in contracts and I understand that if a ‘condition’ is broken then we can end the relationship with the defaulting supplier, but if a ‘warranty’ is broken then we still have an ongoing contractual relationship. So can we just make everything written in our contracts a ‘condition? That way we could always end the relationship with a defaulting supplier if we wanted to.

Candidates should have advised Balraj to explain to Jenny the differences between conditions and warranties under English Contract Law, and confirm that her basic understanding as above is correct. But, crucially for a good answer Balraj must be advised to explain also that English Courts will not uphold a trivial or subsidiary requirement as a ‘condition’, even if it is described in the contract documentation and Ts and Cs as being a ‘condition’. It is the Court that ultimately decides not the writer of the contract. Candidates may also have addressed the topic of innominate terms and/or might have amplified their explanations with relevant case law such as; the ‘opera singer’ cases, but again this was not a specific requirement for good answers.

Exam Question Summary

The majority of candidates answered this question satisfactorily particularly the earlier parts and there were often very good explanations given of how the character ‘Balraj’ in the case study should respond to the five questions asked by his new junior. The few weaker responses were too short or lacked detail and reasons. A few answers mistakenly made the case study organisation subject to the EU Procurement Directives. A very few candidates answered the Third Question as if to say that the buyer should pay for the costs of tendering; and a small number of answers did not understand the use of the term ‘warranty’ in the contract law usage of that word.
Q2 Identify and describe FIVE improvements to the processes used for developing contracts in HH. (25 marks)

Analysis of the Question

This question tested candidate understanding of good processes for developing contracts.

Analysis of the Answer

Candidates had a wide range of improvements that could have been described including:

Move away from paper-based ordering, and addressing the lack of electronic systems in HH, such as EDI, ecommerce, MRP or ERP.

Move away from paper-based tendering, which could be replaced by electronic tendering.

Address the lack of framework agreements.

Consider the use of consortium purchasing or other collaborative arrangements.

Attempt to defray the costs of tendering, for both HH and for the bidders and potential bidders who might be being put off by the costs and complexities of the tendering process.

Consider making more use of model form contracts from appropriate trade bodies.

Consider the use of electronic communication of all advertisements for upcoming tenders.

Consider the use of participation in electronic auctions.

Consider the use of ‘electronic malls’ for both selling and buying.

Exam Question Summary

This question too was answered very satisfactorily by most candidates; and most answers gained more marks for this question than for Question One. Most candidates were able to describe five good improvements to the existing procedures described in the case which were all very traditional and paper-based.

The few weaker responses failed to identify ‘improvements’ and wrote only about contract formation; and a very few responses mistakenly offered more than five ‘improvements’.
SECTION B

Q3(a) Describe The United Nations Convention on Contracts for the International Sale of Goods (sometimes known as ‘CISG’ or ‘The Vienna Convention’). (5 marks)

Analysis of the Question

This question tested candidate knowledge of The United Nations Convention on Contracts for the International Sale of Goods.

Analysis of the Answer

Responses should have given a description of the United Nations Convention on Contracts for the International Sale of Goods (CISG). This is a treaty offering a uniform international sales law, which has been ratified by more than 70 countries around the world. It is one of the most successful international uniform laws, and accounts for a significant proportion of world trade. However, several major trading countries have not signed the Convention, notably the UK, Brazil, India, and South Africa. The absence of the UK is most notable because English Law is a leading choice for many international commercial contracts.

Exam Question Summary

The question as a whole was relatively popular amongst candidates; but it was clearly part (b) of the question that candidates felt most comfortable with, and several answers made no attempt whatsoever at this part (a). Generally, the scores for part (a) were very low; typically just one or two marks because responses did not include basic facts about The United Nations Convention on Contracts for the International Sale of Goods.

Q3(b) (i) Explain the purpose of Incoterms. (10 marks)
(ii) Describe TWO Incoterms from different groups. (10 marks)

Analysis of the Question

This question tested candidate knowledge of the purpose and types of Incoterms.

Analysis of the Answer

For Part (i) of this question, answers should explain that Incoterms (International Commercial terms) are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC), which are widely used in international commercial transactions for goods. Incoterms clearly communicate the tasks, costs and risks associated with the transportation and delivery of goods. They do NOT deal with matters of title and ownership. Incoterms are accepted by governments, legal authorities and practitioners around the whole world for the interpretation of the most commonly used
terms in international trade. Their purposes include the reduction or removal of uncertainties arising from different interpretation of terms in different countries.

For Part (i) of this question, candidates should have described any two Incoterms. One from each of two different Incoterms groups (Groups C, D, E, and F).

**Exam Question Summary**

Understanding of the concept and purpose of Incoterms was generally very good, with many candidates giving good explanations of the purpose of Incoterms, and almost all candidates that chose this question were able to describe accurately two Incoterms from different Groups. More marks were gained than for part (a). Some candidates used the 2010 Incoterms – these were fully accepted as responses, as were the 2-000 Incoterms. A few answers wrongly asserted that Incoterms address transfer of title.

Q4 (a) Explain why an English Court might not enforce an agreement made between two sisters (5 marks)
(b) Explain whether the amount of one pound sterling would be ‘sufficient’ as consideration under English Law. (5 marks)
(c) Explain ‘offer’ and ‘acceptance’ under English Law (15 marks)

**Analysis of the Question**

This question tested candidate’ understanding of ‘domestic agreements’ under English Law and ‘Intent’ in contract law.

**Analysis of the Answer**

Candidates should have explained that the Courts would potentially see this as a domestic agreement, and not one demonstrating ‘intent’ to commit to a legally binding contractual relationship, regardless of the nature of the deal in most cases. Exceptions could include circumstances such as one sister working for a shop and the other going through the till as a customer. Candidates could have expanded their explanations with relevant case law, such as Balfour vs. Balfour, but this was not a specific requirement for a good answer.

**Exam Question Summary**

The question as a whole was very popular amongst candidates. Many scored very highly on this part of this question often with good explanation of the nature of ‘intent’ to be contractually bound.
Q4(b)   Explain whether the amount of one pound sterling would be ‘sufficient’ as consideration under English Law. (5 marks)

Analysis of the Question

This question tested candidate knowledge of ‘consideration’ in contracts.

Analysis of the Answer

Candidates should have explained that for a binding contract to be created under English Law consideration must be legally ‘sufficient’. It must therefore be either legally detrimental to the promisee (the one receiving the promise) or legally beneficial to the promisor (the one making the promise). Therefore if a pound sterling changes hands, or the future promise of payment of a pound is made then a pound is ‘sufficient’. More complete explanations would have added that a person is not promising consideration if they already had a legal duty to do the same thing such as appear as a witness in Court. More complete explanations would also contrast ‘sufficiency’ with ‘adequacy’ of consideration, where the Courts would hold that any value of consideration can be adequate. Real consideration however small will support a promise as long as each party gets what it has bargained for, and that the consideration is of some value. As with part (a) of this question, candidates could broaden their explanations with relevant case law, but this was not a specific requirement for a good answer.

Exam Question Summary

Again candidates generally gave very good answers to this part of this question, with candidates demonstrating a detailed understanding of the subject of ‘consideration’, and stronger candidates giving very detailed explanations. There was only the occasional misunderstanding between ‘sufficiency’ and ‘adequacy’ of consideration.

Q4(c)   Explain ‘offer’ and ‘acceptance’ under English Law. (15 marks)

Analysis of the Question

This question tested candidate understanding of ‘offer’ and ‘acceptance’.

Analysis of the Answer

Candidates should have explained that ‘offer’ and ‘acceptance’ are key parts of the process of contract formation under English Law. Agreement consists of an ‘offer’ by one party (the ‘offeror’) to another party (the ‘offeree’) of the offeror’s willingness to enter into a contract on certain terms without further negotiations. The contract comes into existence when ‘acceptance’ of all of the terms of the ‘offer’ is communicated to the offeror by the offeree. More complete explanations would also have addressed; the nature of an offer and an acceptance, the nature of communication of offers, the differences between ‘acceptance’ and ‘counter-offer’ and the special situations recognised under English Law, such as ‘the Postal Rule’. Stronger responses might amplify these explanations from relevant case law, but case law was not a specific requirement for a good answer.
Exam Question Summary
This question as a whole was very popular, and this part of the question was generally well answered, with candidates clearly understanding the distinction between offer and acceptance. Stronger answers gave more detailed and comprehensive explanations, and many quoted appropriate case law, although some answers merely listed cases, without explaining their significance.

Q5 Discuss FIVE differences between ‘conformance’ and ‘performance’ specifications (25 marks)

Analysis of the Question
This question tested candidate understanding of the differences between ‘conformance’ and ‘performance’ specifications.

Analysis of the Answer
Candidates had a very wide range of ‘differences’ to choose from, and should have discussed any five. As an example candidates could have discussed that:
It can be much quicker to write a performance specification than a conformance specification.
A performance specification is likely to be a very much shorter document than a conformance specification which makes it much easier and cheaper for all interested parties to handle, amend, read and understand.
A performance specification places all of the risks of non-achievement of performance squarely with the supplier, and not with the purchaser. If the required performance is not met then the supplier must remedy the situation wholly at his time and cost.
A performance specification allows for innovation and new approaches to achieving the desired/required performance, and to dealing with any problems that arise. This encourages flexibility and innovation in the market place; it can also be argued that it encourages new start-up companies and diversification of existing companies.
A performance specification requires little or no detailed technical knowledge on the part of the purchaser.
A performance specification will avoid reliance on existing suppliers and their brands/IPR.

Exam Question Summary
This question was the most popular of all the Section B questions, and was generally very well answered. Candidates showed a good understanding of the nature of specifications and their different types. Typical responses dealt with the areas shown above, but all other valid ‘differences’ discussed were accepted, and were awarded marks appropriately. Higher marks were awarded for the more comprehensive and well-reasoned discussions, and those that made good use of examples.
Q6 (a) The head of production buys 200 fastenings described by the seller as being ‘made of phosphor bronze’ and ‘suitable for high-temperature environments’. On delivery, the fastenings are found to actually be made of brass, and therefore unfit for the purpose that the head of production had intended.

Discuss the legal position under English Law. (15 marks)

Analysis of the Question

This question tested candidates’ understanding of implied terms in The Sale of Goods 1979, especially as they apply to ‘fitness for purpose’.

Analysis of the Answer

Both parts of Question 6 were about consumer protection gained from implied terms in The Sale of Goods Act 1979. Candidates should have discussed the protection offered under this Act; and could have made the point that there may be other, specific terms and conditions covering the purchase in either the buyer’s or the seller’s documentation covering the deal if any exists. Furthermore if there are no such specific documented terms and conditions, then statutory protection applies; and candidates could have discussed the extent of that statutory protection.

In this part (a) of the question, the issue is one of ‘goods as described’ and ‘goods fit for purpose’. The fastenings were described by the seller as being “made of phosphor bronze” and “suitable for high-temperature environments”. The goods did not meet that description, being made of brass, not phosphor bronze, which could be a breach of Section 13 of the Act. The goods could be unfit for the purpose that the head of production had intended because they are not suitable for high-temperature environments. If the head of production made that purpose clear to the supplier; or if that is the usual purpose for such goods, then this could be a breach of Section 14(3) of the Act. In either event, the buyer potentially has the right to reject the goods, and to claim a refund of the purchase price. Candidates did not need to cite the precise ‘Section’ number of the legislation in their discussions nor was case law a specific requirement for a strong answer; although inclusion of appropriate case law was awarded appropriate marks.

Exam Question Summary

This was not a particularly popular question, and answers tended to achieve satisfactory rather than outstanding marks. Most candidates were able to give some valid analysis of the legal position; but most responses did not fully explore the various possibilities and the different legal consequences if different circumstances applied. Responses tended to give a more linear approach, and to arrive at just one simple conclusion.
Q6 (b) As part of an office refurbishment, a managing director chooses new all-wool carpeting, having seen a sample in a carpet salesman's sample book. The carpet when fitted is the same colour and pattern as the sample, but is made from 50% wool and 50% artificial man-made fibres.

Discuss the legal position under English Law.

(10 marks)

Analysis of the Question

This part of this question tested candidate understanding of implied terms in The Sale of Goods 1979, especially as they apply to 'sale by sample'.

Analysis of the Answer

Both parts of Question 6 were about consumer protection gained from implied terms in The Sale of Goods Act 1979. In this part (b) of the question the issue is goods sold under 'sale by sample'. The carpet salesman showed the MD a sample of carpet which formed the basis of their deal. The bulk of the carpet when delivered did not match the sample, which is potentially a breach of Section 15 of the Act. The buyer would have to be able to demonstrate the differences, and the seller might maintain that the differences were nonexistent, or immaterial; but in the circumstances described in the question, the differences between 'sample' and 'bulk' seemed to be fairly clear, and evident. That being so the buyer would have the right to reject the carpet, and to claim a full refund of the purchase price; or to insist that the deal be carried out as originally agreed, with the correct type of carpet as per the sample. Candidates did not need to cite the precise 'Section' number of the legislation in their discussions nor was case law a specific requirement for a good answer; although inclusion of appropriate case law was awarded appropriate marks.

Exam Question Summary

For this part of the question most candidates were able to give some valid analysis of the legal position. However answers did not fully explore the various possibilities and the different legal consequences if different circumstances applied. Some answers gave too much coverage to aspects such as fraud, and misrepresentation; and not enough coverage to the subject of the question - the legal statutory protection aspects.

OVERALL SUMMARY

The range and quality of papers for this particular examination varied from some that gained few marks to others that gained very high marks. Across the papers generally, candidates demonstrated a good knowledge of contract law; terms and conditions; and procurement processes.

The main areas where opportunities were missed to gain higher marks were:

- Answers having a poor structure, with no clear basis of argument
- Where a number of points are asked for in the question - typically five - no clear separation shown in the answer between the number of points being made
- Overlong and irrelevant introductions

- Repeating case study content in answers

- Failure to take account of the maximum amount of marks available to a part question in the length of the response (e.g. a ‘5 mark’ part question response being twice as long as a ‘10 mark’ part question);

- Candidates spending too long on three questions, leaving too little time for the final one

- Candidates explaining more points than the question actually required (e.g. six points given where the question only required five)

- Answers often too short, with not enough detail or examples where appropriate

- Misreading or misunderstanding the question

- Failing to take account of the command word

- Giving generic answers to Section A questions, when there should be clear references to the case.
APPENDIX:
Syllabus matrix indicating the learning objectives of the syllabus unit content that each question is testing

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