

**Modernising Commissioning: Increasing the role of charities, social enterprises, mutuals and cooperatives in public service delivery**

**Response to Cabinet Office Consultation**

**from**

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Ref: MC/GEM

## Introduction

Thank you for the opportunity to respond to *Modernising Commissioning: Increasing the role of charities, social enterprises, mutuals and cooperatives in public service delivery* (the "Green Paper"). The proposals set out in the Green Paper are key to a number of our clients, both in the public sector and amongst "Civil Society". In preparing this response we have sought input from a number of our clients and other colleagues in the procurement and civil society sectors, as well as drawing on our own longstanding experiences of working across the public, private and third sectors.

We trust that this response will be useful in helping the Office for Civil Society find a route to modernising commissioning which helps public sector commissioners and third sector organisations to form lasting and mutually beneficial relationships built on trust and understanding. We have not attempted to answer all the questions but have focussed on those where we have real experience to offer meaningful responses.

If there are any questions about our response, please do contact any of the following people:

- Mark Cook on
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## **In which public service areas could Government create new opportunities for civil society organisations to deliver?**

The Green Paper indicates Government's commitment to "increase the diversity of provision in public services by increasing competition and consumer choice", involving consideration of three proposals:

- introducing payment by results across public services;
- setting proportions of specific services that should be delivered by independent providers, including civil society organisations; and
- introducing new rights for communities to run services, own assets and for public service workers to form mutuals.

We have endeavoured to answer Government's "sub-questions" below.

### **1 What are the implications of payment by results for civil society organisations?**

The concept of "payment by results" raises significant concerns for civil society organisations and SMEs alike, and serious thought will need to be given to the circumstances in which payment by results is appropriate, and beneficial rather than detrimental to the service in question and the efficiency of delivery.

Real and genuine problems arising through payment by results include:

- the discouraging effect this can have on SMEs and smaller civil society organisations. Larger organisations may have the cash reserves and infrastructure in place to tackle receiving payment by results, but this is rare within smaller organisations, most of which have limited reserves and therefore investment capacity. The knock-on effect of payment by results may well be the opposite of Government's intended outcome – that smaller organisations, so often those that best know and understand the needs of their communities and are best placed to respond to those needs, will not be able to cope with receiving payment by results, and so will not bid for public services when they are commissioned. The diminished level of competition for any individual contract that this will represent has a two-fold impact on service delivery:
  - a resulting impact on price as the commissioner will have fewer bidders to choose from;
  - a loss of those civil society organisations that can best deliver the service in question – therefore meaning a reduced service quality.
- in some cases, the only financially viable way of delivering services on a payment by results basis may be to provide services only to those individuals or communities that will produce results most quickly or with the least investment of time or money. This means that, even where civil society organisations feel able to tackle the financial implications of delayed payment for their services, there remains a serious risk that those individuals most in need of services will lose out. This effect is multiplied when

the service areas in which civil society organisations are prevalent are considered – health and social services, cultural and sporting services, and educational services. In areas where the service being provided focuses on vulnerable people, such as in the social services arena, it is those most vulnerable in society who most need these services, but where also “results” will be most difficult to achieve, and sometimes impossible. Civil society organisations cannot afford to invest in individuals for considerable periods of time where results are by no means guaranteed – with the effect that these individuals may be bypassed entirely;

- with this in mind and bearing in mind another principle that has been long cherished in sustaining civil society organisations, namely, that of full cost recovery, it may be cheaper and often more appropriate for payment by results to be factored into a hybrid payment mechanism that balances the need to ensure that organisations’ cashflow is maintained and incentivising them to deliver good results. It also assists prime contractors that are being required or encouraged to use smaller sub-contractors as the prime contractors will not be the ones having to cover the smaller organisations’ viability purely from their balance sheet;
- it also may be worth considering a tiered model, where the payment profile reflects the size and/or resources of the organisation;
- a pure payment by results formula may also actually be a soft touch by creating outcomes that are easily achievable rather than seeking to deliver the engagement of the harder to reach parts of society that continue to be the wrong sort of drain of State resources;
- it is also important to understand how differently “results” can be measured in a particular sector and therefore to design appropriate and reflective outcomes;
- it is desirable to develop skills that enable a more targeted approach where the best of resources can be brought to play and where the larger contractors can work together with the smaller players to achieve across the board results that connect communities to the delivery of services that affect them. Payment by results should not be the easy option that replaces intelligent commissioning; that would be a great irony if it did!

There is a real need to consider this proposal in detail, and to take a service by service view on what is most appropriate. What may work for one service type may be counter-productive in another. In the words of one of our clients:

*“What is needed is for the Government to ... start, on a service-by-service basis, to consult properly and thoroughly with the existing and potential provider base. Then it needs to look at how services can be procured in ways that are appropriate to the selected kinds of provider and, if necessary, reserve procurements to those sectors. Then it needs to model the costs and incomes to ensure that the providers can provide at the incomes available.”*

**2 Which public service areas could be opened up to more civil society providers? What are the barriers to more civil society organisations being involved?**

There is a natural fit between the public sector and civil society organisations in a number of public service areas. There is no limit on the areas that could be opened up to civil society providers. But this need not necessarily happen through direct commissioning. If public procurement contracts are to address social and economic requirements in a meaningful way, the public sector has a real opportunity to enable delivery by private sector prime contractors through the use of resources and skills in civil society. The pattern of alliances is increasing, but much more can still be achieved in this area, if more for each pound from the public purse is to be achieved. This means that commissioners have to learn how to deliver savings in not just the bit of public expenditure for which they are responsible but the wider State. Just as “carbon credits” are introduced in the environmental sphere, perhaps we should also develop a system of social and economic credits so that public bodies are actually being incentivised to think and behave “community” in their budgeting.

Some of the services that could most valuably be opened up to civil society organisations are those which fall within the “Part B” category under the Public Contracts Regulations 2006 – being those services to which the full extent of the EU procurement rules does not apply. The EU procurement process can seem like a considerable barrier to many civil society organisations and to SMEs, and so concentrating on those services where the full regime of those rules does not apply may be the most successful route in prime contracting. These include service areas in which civil society organisations are strong in any case (health and social services being perhaps the most notable), so this provides an opportunity to benefit both the public sector commissioners and the civil society organisations.

In particular the move from commissioning by Primary Care Trusts to GP consortia marks out health and social care as areas where partnerships with social enterprise or civil society organisations have much potential.

**3 Should Government explore extending the right to challenge to other local state-run services? If so, which areas and what benefits could civil society organisations bring to these public service areas?**

The main incentive to extending a right to “challenge” to cover a broader range of publicly provided services would be to bring some additional benefit to service users through doing so. Clearly, therefore, the only publicly run services that Government should consider allowing civil society organisations and local authority employees to challenge the delivery of should be those where doing so brings such a benefit. These are one and the same question.

The principal benefits of extending the “right to challenge” will be in the increase in plurality of service providers, engagement of users and doing what matters rather than going through procurement as a dispassionate box-ticking exercise.

- 4 Are there types of assets whose viability, when transferred to civil society management or ownership, would be particularly dependent on a continuing income stream from service contracts or public sector tenancies? What are the main barriers that prevent civil society organisations taking over asset-based services?

Community asset transfer – the transfer of public sector assets to community organisations – offers a way of reconciling the consolidation of assets belonging to the public sector, with a genuinely ‘Big Society’ approach that seeks to build the capacity of local groups.

There are some knotty issues which can affect community asset transfer in similar ways to some of the other key ‘Big Society’ proposals, such as the drive to provide public services through co-operatives or mutuals. The complications of delivering the approach in practice have been an issue for some, but we have been working with the Asset Transfer Unit (the body set up by the Department for Communities and Local Government to promote the approach) on tools to make the process speedier and more (cost) effective. The new guidance from the ATU considers the issue of how to avoid unlawful State aid, for example, and also the implications of the EU procurement rules – which can be an issue, potentially, if (for example) the local authority wants to tie the transfer of a community centre to services being provided there. The guidance also acknowledges that there are genuine differences of perspective between public sector bodies and community organisations, which can only be dealt with through negotiation to hammer out the details – and with a different outcome in each case.

Bundling assets with public services does offer some opportunities. The key is to create a public services core package that enables community assets to be managed at a local level, with the added benefits of neighbourhood based organisations then increasing complementary uses of the same facility through wider offerings that are not so reliant on State resources but harness the possibilities that Big Society embraces.

- 5 How can we encourage more existing civil society organisations to team up with new employee-led mutuals?

There is a perception that Government has not fully appreciated the full potential offered by this country’s housing association sector, which is the biggest example of State asset transfer to voluntary sector control ever in the whole of Europe (p.3 of “Housing Associations in England and the Future of Voluntary Organisations” by Andrew Purkiss (2010)).

Housing associations, now called registered providers, are extremely attractive strategic partners to many civil society organisations and particularly employee-led and socially motivated start up enterprises. This is because:

- housing associations have significant asset bases that are - arguably - undervalued, which give them a level of stability and credit rating that is, in many cases, better than the credit ratings given to the banks themselves;

- they have access to large amounts of affordable private finance negotiated in the last few years which is at risk of not being fully drawn down due to the general lack of opportunity in new social housing development;
- they are already embedded in local communities across the country and, having met the Decent Homes programme, are actively engaged in improving the lives of their residents; and
- their ethos is one of a community focus matched with the need to be commercially aware and manage their risks accordingly.

Many housing associations have already diversified into providing all types of care and support, economic & social regeneration and employment & education schemes. With the implementation of the Housing and Regeneration Act 2008 on 1 April 2010, one of the major hurdles in housing associations fully engaging with wider civil society has been removed so that there is no longer a need for a housing association to be the ultimate owner. In short, housing associations can, and want to, be the strategic partners and funders to new community businesses and employee-led mutuals when they do not yet have the critical mass to be stand alone organisations. Government could do more to encourage these partnerships by explicitly recognising the important role of housing associations as community based organisations and signpost new community enterprises or mutuals to locally-based housing associations.

#### **6 What other methods could the Government consider in order to create more opportunities for civil society organisations to deliver public services?**

Perhaps the most important point to bear in mind when considering this question is that public service commissioners must not be in the mindset that they are – to quote a client – *doing the third sector and the 'cottage' private sector a favour by offering the work. On the contrary it is the providers who hold the power in this game. They can and will take their ball and go home.*

Ultimately for the public sector the goal should be the seeking of the best value for money when commissioning services – which requires a balance between service quality and service price. *The resolution of the matter depends upon the commissioners understanding that a cheap 95% service is better than an expensive 100% one – and service users' acceptance of the lower performance standard.* Often to get a 100% quality service demands greater monitoring and intervention that is disproportionately expensive both in time and money. In this sense creating more opportunities for civil society organisations should not be seen as an end in its own right – this is a way to deliver concrete benefits to society:

- enhancements to the local economy, and a reduction in the environmental impact of service delivery, through a more localised focus;
- upskilling of the local workforce, lowering unemployment, and increasingly targeted recruitment and training;



- better value for money for the public sector client, and therefore better use of public money;
- economic regeneration from investment in the local community;
- the potential for more innovative solutions to problems from more flexible and responsible service providers.

Public bodies will often feel that they wish to actively encourage contracting with SMEs and the third sector, but will need to justify why they wish to do so, taking into account the need to achieve value for money, and the impact on the market as a whole. In doing so, it is vitally important to ensure that procurement processes (and, of course, commissioning more broadly) remain fair and transparent, and that the public body does not inadvertently discriminate in favour of some bidders and against others.

There are a number of different sources of research and guidance on how to assist SMEs in seeking and winning opportunities. Much of this research and guidance will be equally relevant to civil society organisations. For example, we have prepared guidance for the construction industry in the West Midlands on how to support SMEs in the construction industry through procurement – *Opportunity in Austerity: A West Midlands Procurement Framework for SMEs in Construction*. This provides guidance not only for the public sector purchasers, but for large organisations that would usually play the role of “main” contractor, and for SMEs and support agencies. We will gladly provide a copy of *Opportunity in Austerity* if this would be helpful.

A final way in which Government could create more opportunities for civil society organisations to deliver services is to look at tax incentives to social enterprises delivering in particular sectors or even for banks lending to social enterprises involved in particular areas.



## How could Government make existing public service markets more accessible to civil society organisations?

### 1 What issues should commissioners take into account in order to increase civil society organisations' involvement in existing public service markets?

The issues that commissioners should take into account in order to increase civil society organisations' involvement in public service delivery markets may be endless, but some of the core concerns include:

- the size of the contracts they advertise: Careful consideration needs to be given to the impact that the size of contracts can have. Amongst the questions public bodies will need to answer are:
  - are SMEs and civil society organisations put off from bidding for large contracts?
  - do the advertising and tendering requirements placed on many larger contracts have an adverse effect on the bids that are received?
  - can public bodies achieve value for money from smaller or larger contracts?

It will always be important for the commissioning body to consider the size of the contracts it is procuring, and the appropriateness of either aggregating contracts or separating contracts into lots. The EU procurement rules restrict, to a certain extent, what contracting authorities can do to mould the shape and size of contracts. There are rules that govern:

- what contracts must be aggregated for the purposes of determining whether or not a contract must be advertised in the Official Journal and an EU procurement procedure followed;
- the way in which contracts can be divided into 'lots' while still being compliant with the EU procurement rules more generally;
- the use of 'small lots', which can be used as an exception to the usual rules where certain circumstances apply.

Within this legal framework, commissioning bodies may wish to consider the impact that the size of their contracts has on bidders. It is not possible under the EU procurement rules to artificially adjust the size of a contract (for example to avoid the contract falling above the relevant financial threshold over which the EU procurement rules apply). However, commissioners can use the rules governing the division of contracts into lots, and the small lots rule in particular, to encourage the greatest possible participation by the marketplace in a procurement exercise. In this sense, the use of lots also sits well with the need to achieve value for money;

- geographical extent: civil society organisations, especially social enterprises, can be put off bidding for service contracts when the geographical coverage of the contract is increased beyond their normal "catchment" area. These organisations tend to exist to provide for local communities. Although their catchment areas can be quite extensive, once contract coverage extends to or beyond a city, borough or region, the costs of meeting contract requirements can prove prohibitive;

- access to opportunities: it is always important to ensure that bidders have appropriate access to contract opportunities, and this is no less the case for larger contracts. For example, where contracts are advertised through the OJEU, procurers should nonetheless advertise elsewhere as appropriate;
  - consortium structures for contracts: commissioners should also consider the potential for consortium bids for larger contracts. SMEs and civil society organisations may be able to successfully bid for contracts where consortium bids are accepted, and can offer great value for money and considerable experience and expertise when able to join forces with each other. Consortium structures also potentially overcome the geographical constraints noted above. Creating consortia, and managing through the legal and administrative complexities associated with such collaborations, presents a critical challenge for the Office for Civil Society and key regional infrastructure organisations;
  - the need for real capacity building not just in terms of skills but also change in culture and use of better intelligence and judgement. That means assessing the skills and aptitudes that already exist but are probably untapped. At a democratic level this means educating Government ministers, councillors, employees and users about the **art of the possible** and benefits of collaboration where vested interest can be aired and then re-shaped to meet the real needs of people on the ground.
- 2 In the implementation of the abovementioned measures, what issues should the Government consider in order to ensure that they are fully inclusive of civil society organisations?**

The range of actions for commissioners to consider when deciding what to do and how best to achieve their aims includes:

- informing potential bidders of opportunities, and activity that helps the market to develop. Support activity that could increase awareness of opportunities amongst civil society organisations, and improve civil society organisations' capacity to compete successfully, might include:
  - market dialogue and community engagement;
  - "Meet the Buyer" events;
  - "How to contract with..." guidance;
  - using local and sub-regional portals;
  - using regional, national and European portals;
  - engaging in broad supplier development activity;
  - enabling and encouraging the formation of consortia as a way of developing the marketplace;
- considering the options concerning "what to buy", including:
  - supply chain management contracts;
  - including economic development and supply chain management elements in specifications;

- separating labour and supply elements into different contracts;
- considering the options concerning “how to buy” - how should the commissioning or procurement process be set out to reflect any SME- or civil society-friendly aims for the commissioning. Considerations include:
  - flexible use of the different EU procurement procedures (when the EU procurement rules must be adhered to);
  - the impact of thresholds and aggregation of contracts;
  - the benefits of smaller scale procurement;
  - division of a contract into lots;
  - use of the “small lots” rule;
  - use of frameworks (in particular apportioning work in smaller call-off contracts, or in conjunction with division into lots);
  - how contracts for Part B services (and others outside the EU procurement rules) are procured;
  - how, and where, contracts are advertised, and in particular considering the benefits of local and trade-specific advertising;
  - use of dynamic purchasing systems;
  - the rules concerning reserved contracts;
  - how to get the best out of the prequalification process;
- rather than just setting up public sector portals for public service contracts, working with the OCS's strategic civil society partners to devise ways of bringing opportunities at a national and local level to the attention of the widest level of different service providers and combinations of possible providers. This requires an active process not a passive approach and should yield more positive outcomes across a range of economic and social requirements.

### **3 What issues should the Civil Society Red Tape Taskforce consider in order to reduce the bureaucratic burden of commissioning?**

Perhaps one of the biggest hurdles for civil society organisations and SMEs is the inappropriate use of the EU procurement rules. Better education is needed amongst public sector commissioners about when the Public Contracts Regulations 2006 must be followed, and when this is unnecessary. Public commissioners must be made aware of the circumstances in which the full EU procurement rules do not apply, and understand the flexibility that is already available to them. Procuring or commissioning contracts through routes other than slavish adherence to the EU procurement rules when this is not necessary may give greater opportunity to integrate wider policy objectives into commissioning, and to encourage civil society organisations into public service delivery. In addition procurement must be undertaken in a way that enables real choices to be made about quality service delivery at the right price. There can be also a culture of box-ticking that results in the reduction in disproportionate questions or requirements about health and safety, equalities, financial strength, etc for the particular contract in question.

**4 How can commissioners achieve a fair balance of risk which would enable civil society organisations to compete for opportunities?**

To a great extent this is about creating a better understanding of the two sectors when they work together – please see our comments elsewhere in this document in this respect. Where the public sector commissioner understands the way the civil society organisation works, it can better appreciate the limits on the risks that that civil society organisation can accept. Similarly, the civil society organisation needs a better understanding of the public commissioner's need to pass on some risks. Most issues can be addressed by adequate time being given to market consultation and by responding to the feedback accumulated.

**5 What are the key issues civil society organisations face when dealing with TUPE regulations and what could Government do, within existing legislation, to resolve these problems?**

Whether civil society, or private sector, it is our experience that TUPE and pensions raise the largest concerns for a bidder for a public contract. An example of this is the need for admission into the Local Government Pension Scheme, and the associated bonds that can be needed. These are the issues that get negotiated time and time again when a public body procures the external provision of a previously in-house service. This amounts to the appropriate distribution of risk, and often the main issue faced is obtaining the appropriate indemnities from the commissioning public body, to ensure that the risk for the civil society organisation is ring fenced.

*"Unless the Fair Deal Policy on Pensions is reviewed, the opportunities for other providers to compete for community health services (previously provided directly by the NHS) will be completely lost – This piece of legislation contradicts all government rhetoric about independent provision and plurality of public service provision.*

*The pensions issue is largely an NHS one as they have enhanced rights under TUPE – but the pensions issue is not the only problem – TUPE liabilities can be risky, particularly when transferring staff with such enhanced sickness and holiday entitlements – and with way above average sickness and absence levels.*

*This is a clear barrier to civil society organisations being involved.*

*The key issues faced when dealing with TUPE are pensions, holiday and sickness entitlement and previous claims made before the TUPE took place – this places too great a burden on community based organisations and the contract values do not allow to mitigate that risk.*

*The Principles and Rules of Commissioning as laid out by the Co-operation and Competition Panel state that sectors must not be discriminated against and that an equal playing field must be provided to allow providers to compete fairly. While the*

*legislation around TUPE and in particular pensions remains the CCP principles are irrelevant."*

Another key issue faced when dealing with TUPE and pensions regulations is the need to have the right information at the right time. Often the biggest issue is between an incumbent service provider and its replacement – here the TUPE transfer of staff has little to do with the commissioning public body, but that body is nonetheless often in the best position to assist with the mechanics of that transfer.

One option that will have to be recognised is the opportunity for some public bodies to cease delivering or commissioning some services altogether and then to create an environment and the infrastructure in which civil society organisations can come forward with new services that meet local needs instead. In doing so the usually lower cost base of civil society organisations can be an additional benefit without the legacy of TUPE and pensions liabilities to bear from continuing service provision. So the packaging of services in circumstances in which TUPE may not apply will become a skill that some commissioners need to develop.

**6 What issues should Government consider in order to ensure that civil society organisations are assessed on their ability to achieve the best outcomes for the most competitive price?**

The tools needed to ensure that any bidder for a public contract – regardless of whether this is a civil society organisation – is assessed on its ability to achieve the best possible outcomes for the most competitive price are in essence already in place. What is perhaps a more current concern is how to convince public commissioners to use them in an environment where the message has become purely about the cost and affordability of service delivery.

It is very rarely the case that awarding a contract to the bidder who tenders the lowest price will automatically enable the commissioning body to achieve the best value for money. For this reason, the majority of contracts within the UK public sector that are let under the EU procurement rules will be – and should continue to be – awarded on the basis of MEAT (the “most economically advantageous tender”). Commissioners need to avoid the trap of thinking that budget cuts mean the only issue to consider should be price – instead, the way to achieve the most for the money that is available, is to consider what you are getting for that price. Within the context of the EU procurement rules, this can take into account a number of factors, including:

- quality;
- technical merit;
- aesthetic and functional characteristics;
- environmental characteristics;
- running costs;
- cost effectiveness;

- after sales service;
- technical assistance;
- delivery date and delivery period; and
- period of completion.<sup>1</sup>

**7 What issues should Government consider in the development of the Big Society Bank, in order to enable civil society organisations to take advantage of public service market opportunities?**

Government will need to consider the appropriateness of alternative funding mechanisms, in circumstances where civil society organisations do not have the security or financial stability to benefit from more traditional funding streams. Robust business planning is a must for civil society organisations, especially when looking to borrow money; this should become habitual. Increasing borrowing power is all about credibility, and civil society organisations must recognise that business development forms a key part of strategy. Government will need to think about:

- **income generation:** think more about charitable business models (including learning from the approach of social enterprises) and borrowing against income streams;
- **security:** consider what forms of security the civil society organisations can give, and whether there are alternatives to the more traditional forms;
- **collaborative purchasing and borrowing:** an asset bank pooling resources could help fund civil society activities. This may require a change in the way we think about ownership – what is “mine” should be less important than how assets and funds are used to further charitable / civil objectives;
- **new forms of investment:** consider innovative funding forms, including social impact bonds, community share issues and Sharia finance. Real opportunities are developing as investors reconsider their priorities for responsible investment;
- **surety for pension bonds:** if civil society organisations are to take on pensions responsibilities, how can the Big Society Bank stand behind retail banks to enable them to provide the level of security required to participate in the Local Government Superannuation Scheme, for example, in the case of staff transferring under TUPE from a local authority.

**8 What issues affecting civil society organisations should be considered in relation to the extension of the Merlin Standard across central government?**

The Merlin Standard requires active management and is not a charter that gets signed and then stuck in a drawer. It will be judged by changes in behaviour and attitude not just contract compliance.

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<sup>1</sup> Regulation 30(2) of the Public Contracts Regulations 2006



**9 What barriers prevent civil society organisations from forming and operating in consortia? How could they be removed?**

Commissioners should always be seeking to ensure and demonstrate that they are achieving value for money in their contracting. There may be circumstances where there are insufficient businesses of an appropriate size (measured in terms of financial assets, the value of contract they typically undertake, their management capacity, and / or insurance cover) capable of delivering a piece of work to demonstrate the necessary element of competition and, therefore, delivery of the best value for money. Similarly, one organisation may find it needs the expertise of another to be able to bid for all of a large contract. A consortium of small businesses together, or in partnership with a larger contractor, may have the capacity to bid for larger pieces of work. Especially where it is not possible to break a contract up into smaller lots or contracts, this may be the best way of encouraging SMEs and enabling them to fairly compete in the market.

The largest barrier, from the point of view of the potential bidder at least, is that consortia can be more likely to arise after several years of collaboration, for example through a contractors' group established in the delivery of partnering contracts, than from work done in preparation for a tendering process – and they are almost certainly more likely to be successful when they have had time for relationships to develop. There is often insufficient time within a tendering process to form a consortium with any strength or confidence, and the commissioner will rarely be satisfied with the bid of a consortium that has given insufficient thought or attention to its own merits and potential success. Forming a consortium can also take a disproportionate amount of time, effort and cost at a stage in the procurement process where success is not guaranteed. This is therefore an element of the procurement cycle to be continuously considered, rather than the procurer merely specifying for particular contracts that it is happy to accept bids from consortia. Procurers may consider including statements that they encourage consortium bidding in their "How to" guides, or welcoming discussions about consortium bidding at "Meet the Buyer" events or in the course of other market engagement.

There will always be risks to a procurer in considering bids made by consortia, especially newly formed ones where the relationships are young and weak as a result. Procurers should always ensure that they seek the detailed information they need on the members of the consortium and the way in which the consortium is formed at prequalification and tender stages. Civil society organisations, therefore, need to tackle the collation of the information that commissioners will need from them when seeking to bid as part of a consortium. This includes, for example, the fact that the procurer may wish to consider obtaining guarantees of performance from the individual members of a consortium, and will want to consider the need for such guarantees in the context of the legal structure formed by the consortium and the impact this has on the liabilities of each member.



## General Comments

Both civil society organisations and the public sector require a better understanding of how the other sector operates.

For public commissioners, this is about a need to recognise that commissioning to a civil society organisation is not about getting something cheap or free – but about quality service delivery at a fair price. The voluntary sector, for example, cannot provide services for free, even where they rely on volunteers, as there are still costs involved in a service provided by volunteers.

*“The problem was that the commissioning Council could not understand that we had no contractual lien on volunteers. If they don’t turn up you cannot sack them! We needed so many employed staff to cover the potential non-availability of volunteers that the cost base just got out of control. They, of course, had the problem of accountability for the performance of the service. It was a stand-off position with no real possibility of resolution.”*

For civil society organisations, this is about:

- getting used to moving from a grant-focused system to a contract-focused one. Those civil society organisations who have been heavily dependent on grant funding for many years will find, and are finding it difficult to adjust to having to compete for a contract opportunity, and then to be contractually obligated to perform services;
- understanding that there are legal and policy constraints on the action that public bodies can take – not only the EU procurement rules but their own internal standing orders, policies and strategy. It is important to remember that public commissioners have these constraints imposed upon them, as it often explains their behaviour.

## How could commissioners use assessments of full social, environmental and economic value to inform their commissioning decisions?

### 1 What approaches would best support commissioning decisions that consider full social, environmental and economic value?

There are a range of options available to commissioners, and a great deal of work has been done across the UK and Europe in considering how best to achieve social, environmental and economic value through contracts. See, for example:

- the West Midlands Procurement Framework for Jobs and Skills – currently available online at <http://www.advantagewm.co.uk/what-we-do/supporting-people/economic-inclusion/procurement-framework.aspx>;
- the North East Improvement and Efficiency Partnership's Targeted Recruitment and Training Toolkit – available online at <http://rmacfarlane.co.uk/toolkit.html>;
- the "Can Do" Toolkits on targeted recruitment and training, and SME-friendly procurement, funded by the Welsh Assembly Government and available from Inform 2 Involve at [http://www.whq.org.uk/i2i/about\\_resources.php](http://www.whq.org.uk/i2i/about_resources.php);
- the "Buying Green" and "Buying Social" guidance published by the European Commission.

A wholesale review of these pieces of guidance, and others, would be beneficial. These highlight the approaches that can enable the most informed and intelligent commissioning and procurement decisions and the greatest social, economic and environmental outcomes from commissioning activity. These approaches include the four approaches advocated by the West Midlands Procurement Framework for Jobs and Skills, namely:

- **Approach 1: Charters:** Public sector organisations share their strategic priorities and goals to address Worklessness with current and prospective contractors, encourage the adoption of good practice and seek to develop new customer-supplier relationships;
- **Approach 2: Voluntary Agreements:** Public sector organisations work with their existing contractors to secure commitments to specific jobs and skills outcomes, coupled with a range of support for contractors to achieve the specified outcomes. This approach can be used retrospectively with longstanding contractors and in long term contracts;
- **Approach 3: Use of Contract Clauses:** Public sector organisations include jobs and skills clauses within specific procurement exercises leading to a contractually agreed set of outputs and outcomes;
- **Approach 4: The Strategic Application of Contract Clauses:** Public sector organisations deliberately adopt a 'default' position, which requires clauses specifying jobs and skills requirements to be routinely considered for their relevance to all stages of the commissioning and procurement process followed by monitoring of performance against outputs and outcomes.

While these Approaches are discussed specifically in the context of achieving targeted recruitment and training benefits through contracts, there is nothing to suggest that the same approaches cannot be suitable for the achievement of any economic, social or environmental goal through procurement and commissioning.

We are working with local authorities to see how they work with civil society organisations to establish they can help on three fronts:

- shaping how the local authority commissions social and economic outcomes intelligently;
- bidding for contracts themselves;
- providing a resource to enable successful contractors winning local authority contracts to meet their social and economic obligations.

In particular we are working with them to devise the methods by which they select social, economic and environmental outcomes for each contract. It is a question of how we make the right links so that the local authority knows exactly how it is developing the subject matter of the contract. Factors that we might take into account include: impact, deliverability and affordability. This is work in progress and we'd be delighted to engage with you on how this kind of best practice can be rolled out across the public services arena.

## **2 What issues should Government consider in taking forward the Public Services (Social Enterprise and Social Value) Bill?**

There are a large number of public bodies within the UK that are already taking social value into account in lawful ways through their commissioning and procurement activity. What the Bill will do, of course, is require all public bodies to consider how they do this. The biggest challenge that Government will face is emphasising the change from the lawful **power** to consider social, economic and environmental issues in commissioning, to the legal **duty** to consider these issues. Dissemination of good practice and guidance will be vital to the success of the Bill's goals.

The Bill is a charter for "can do's" and if passed will provide a valuable framework for doing things differently and meaningfully. It will enable civil society to demonstrate its contribution to wellbeing and provide a much greater opportunity for achieving – and recording – that contribution when working with public bodies.

Clause 3 of the Bill (at second reading stage) is confined to "procurement" activity, rather than the broader "commissioning" cycle. *Modernising Commissioning* has provided an explanation of "commissioning" that Government could consider adapting for use in the Bill. It would further encourage the achievement of Big Society if the need to consider social,

economic and environmental factors applied as much to decisions to de-commission as to procurement, for example.

We are happy to contribute our extensive experience in this arena as we seek to make the implementation of the outcomes of the Bill a reality on the ground.

## How could civil society organisations support greater citizen and community involvement in all stages of commissioning?

- 1 What role and contributions could civil society organisations place, through Local HealthWatch, in informing the local consumer voice about commissioning?
- 2 What issues relating to civil society organisations should the Government consider when refreshing the Joint Strategic Needs Assessment Guidance?
- 3 How could civil society organisations facilitate, encourage and support community and citizen involvement in decision making about local priorities and services commissioned?

As well as testing the marketplace for its capacity to provide a service, commissioners can also choose to test the community that it intends will benefit from the contract it has in mind. Making sure it knows what the intended individual beneficiaries or beneficiary community of the contract (be that a locality or a community of interest) actually need will help the commissioner to focus its requirements and, ultimately, will help to ensure the contract is successful and provides value for money. Civil society organisations can be key to this community engagement, as they will best understand the individuals or communities that should benefit from the contract.

Civil society organisations could usefully either:

- facilitate community consultation by a public sector commissioner; or
  - participate in consultation as an “expert voice”.
- 4 What forms of support will best enable statutory partners and civil society organisations to improve their working relationships?
  - 5 What issues should the Government consider in the development of the future programme of training public service commissioners?

The best forum for such training is to have it provided to mixed audiences of the public, private and civil society sectors. They will gain much if they can listen to each other and not just perpetuate their silos by having their training in different boxes!

- 6 What can civil society organisations contribute to the roll out of community budgets? What barriers exist to realising this contribution? How can these barriers be removed?

- 7 What can civil society organisations contribute to the roll out of Local Integrated Services? What barriers exist to realising this contribution? How can these barriers be removed?
- 8 What can civil society organisations contribute to the development of Free Schools? What should Government consider in order to realise this contribution?
- 9 What contributions could civil society organisations make to the extension of personal budgets across a range of service areas? What changes do both commissioners and civil society organisations need to make to adapt to an environment where citizens are commissioning their own services?

The Personalisation Agenda potentially offers enormous opportunities to civil society organisations. The increased choice of service provision by the individual recipient allows more bespoke, varied and individualised services to be offered and this is precisely the sort of area where smaller social enterprises and SMEs have the chance to flourish.

Extending this regime across a wider service area requires reflection on the experience to date, particularly in the health and social care arena. Here an overriding observation is the variance in take up across the country which quite starkly appears to reflect the enthusiasm of particular authorities. Getting commissioners "on board" is therefore key.

Another lesson that can be gleaned from personalisation of health and social care services is that management of funds, albeit directly received by a service user, can be a daunting task. Models including resources allocated to assisting individuals managing their own budgets should be therefore addressed sooner rather than later.

The accessibility of relevant information is also an essential element to effective citizen participation in commissioning their own services. This is particularly so where smaller organisations are involved and transparent pooling of relevant information about services and service providers is extremely important.

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04 January 2011

Ref: MC / GEM

