

Introduction

This fact sheet is the first publication from the ACEVO Procurement and Commissioning support service which is funded by the Big Lottery Fund BASIS programme. It serves as a basic introduction to the issues raised by the governmental procurement processes and what this means for the third sector.

1. Why commissioning and tendering?

Whether you are a social enterprise or a charity, if you are in any way interested in the delivery of public services, the increasing likelihood is that you will have to look towards getting your services procured by the public sector, be that a local authority or a national governmental body. This is true across a huge range of services including the provision of supported housing for those in need, training for the unemployed, domestic collection of recyclable materials, running bus routes and providing care for people with mental health problems. You may find you need to deal with a local body like a local authority or a primary care trust or a national body like the Department of Work and Pensions or the NHS.

Commissioning is the process by which government departments and local authorities secure their services. This is usually done through a legal procurement process that will require potential service providers to submit a tender. This as outlined below, is often a multi stage process. In general terms commissioning refers to the process as a whole, and it should be clear that third sector organisations can do a lot to influence this, prior to the legal procurement process commencing.

While the work required to submit a tender and the legal obligations of entering into a contract for service delivery may seem daunting, the advantages are huge. A contract will enable a service provider to move away from grant funding and secure a framework for delivering work, in accordance with the 'charitable' aims of the company that is properly paid for a given timeframe. In simpler terms, you can do the work you want to do at an agreed price, and be sure, that subject to performance, you will do it for the length of the contract.

2. Procurement and commissioning regulations

Procurement and commissioning processes in England, Wales and Northern Ireland are governed by the Procurement Contracts Regulations (2006), while in Scotland they are governed by the Procurement Contracts (Scotland) Regulations 2006. Both these regulations bring into UK law the EU Directive on the Co-ordination of Procurement Procedures 2004.

The basic regulations

Procurement regulations fully apply when the following three conditions are met:

- **The procuring body is a "contracting authority" as defined in the rules.** This includes central government, local authorities, associations formed by contracting authorities, and other 'bodies governed by public law' such as registered social landlords and fire authorities.



- **The contract is a public works, services or supplies contract.** Within this different rules and financial thresholds will apply to different contract types of contract
- **The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold.** The current thresholds are: £3,497,313 for the procurement of works; £90,319 for the procurement of supplies and so called Part A services by Central Government bodies, and £139,893 for the procurement of supplies and Part A services by other public sector bodies.

When these three conditions are met, then the service being tendered for must be advertised in the EU's Official Journal and then follow the official regulation.

What types of service the law applies to

The rules governing tendering split services into Part A and Part B services. Part A services have to be tendered in full accordance with the regulations and include waste management, building contracts and accountancy services.

In many cases, the services of more interest to the third sector are actually Part B services. These include healthcare, education and recreational, cultural and sporting services.

EU law assumes that Part B services are more likely to be of interest to local suppliers, so they are not subject to the full regulations. They are, however still caught by general obligations such as transparency, equal treatment and non-discrimination that derive directly from the EC Treaty. How this is applied is less clear and many Part B services are actually procured in full accordance with the regulations.

As a prospective supplier you should be able to see most of these principles at work in commissioning processes as you engage with them.

Local variations related to low value contracts

Most UK local authorities follow the following rules for tenders of a certain size. For tenders below £5000 the local authority officer should simply be satisfied that it represents value for money. For tenders under £20,000 two written quotes might be all that is expected. This is a clear way in which smaller third sector organisations can build their levels of experience in delivering work for local authorities.

Tendering processes

Tendering processes must adhere to five key EU principles, which are:

1. Equal Treatment
2. Non-discrimination
3. Mutual Recognition
4. Proportionality
5. Transparency

The process itself can be carried out in four ways:

- **Open:** Anybody can submit a tender in response to the notice and only those who meet the criteria will be assessed
- **Restricted:** Anybody can express an interest in delivering the service, generally through a Pre-Qualification Questionnaire. Only those meeting the commissioner's criteria will actually be invited to tender.
- **Competative dialogue:** This works in the same way as the restricted process, but allows for a dialogue phase during which the potential service provider can discuss aspects of the contract with the commissioner
- **Negotiated:** In some limited circumstances, the local authority can negotiate, with or without the issue of an advertisement. In the case of an advertised negotiation the supplier would submit an expression of interest and only those that meet the criteria of the assessment will go through to negotiation.

Exclusion from the process

A commissioner can under certain circumstances exclude people from the tendering process. This might relate to the supplier's personal position, such as whether they have been declared bankrupt, have issues of professional misconduct or have relevant criminal convictions such as fraud and money laundering.

In addition a supplier might be excluded for lack of relevant professional experience or financial capacity. Pre-Qualification Questionnaires will require suppliers to submit examples of delivering three similar services and to submit details related to their turnover and accounts in recent financial years.

Assessment criteria

There are two main ways that tenders can be awarded. The simplest way is **cost**, where the successful supplier will win the contract by being the cheapest supplier.

Contracts may also be awarded in accordance with the principles of **MEAT**. This stands for Most Economically Advantageous Tender. This allows the commissioner to consider value for money and what they are getting from their service provider. Crucial to the aims of the third sector, it allows the local commissioner to consider social benefits as a measure of suitability.

If MEAT is used, then the criteria on which it is assessed must be available to everyone. In all cases this requires the award criteria need to be available in the tender notice, and in many cases the actual weightings used in the assessment process will also be made available.

3. Engaging with the process

Developing the relationship

The securing of tenders should be viewed as part of a stage in a long-term relationship. Building a relationship takes time and trust. Large organisations with a clear track record of service delivery can bring that trust with them. They will probably have a recognised brand that breeds confidence. Through marketing and a list of happy clients they can show they know how to deliver this type of service and that they are a safe bet for the delivery of this service.

Local third sector bodies need to be able to counter this by establishing a good dialogue with the local authority long before the tender is issued. This requires honest and transparent dialogue, and plenty of it. A group should always be attempting to communicate success with the local authority and should also be attempting to engage with and shape the debate about future service delivery. This last point might include responding to local authority strategy or planning papers, being seen to react to changes in national policy direction, and through offering to help the local authority respond to issues or opportunities that you are aware of.

In the coming years some topical trends to be seen to address might include getting ready for 'Personalisation' and 'Individual Budgets' in the fields of health and social care or preparing for the way many contracts are being rationalised into larger prime contractor models, with the local authority handling fewer individual contractor relationships itself (see separate factsheets on these topics).

Tender advertisements

In accordance with European law all tender opportunities have to be advertised publicly through the Official Journal of the European Communities (OJEC). They run a service called Tenders Direct. Through this you can either search their online database, or you can subscribe, for £730 per annum, to a tailored notification service that will send you information on the kinds of tenders you might be interested in by email. You may miss some Part B tenders if you rely on this though.

Expression of interest

The Expression of Interest (EOI) is a simple process, often just requiring an email, or registering with the tender advertising service. All that is needed at this stage is for you to tell the commissioner that you are interested in delivering the service being procured and you want to be involved in the tender submission process.

Pre-Qualification Questionnaire

Most official tender processes in the UK start with the Pre-Qualification Questionnaire (Pre-Qual). At present there is no standard format for this, but the Office of Government Commerce is in the process of developing one. This will make the procedure simpler assuming that local authorities and other commissioners take it up.

The purpose of the Pre-Qual is to set out the information by which the commissioner might assess the suitability of different suppliers to deliver the service. Typical questions will include ones on the organisational structure and history of the service provider; financial information and similar services being delivered. It will ask for details of the organisations capacity to deliver the service, with questions related to staff, facilities and skills. Where relevant questions may also be asked about issues such as; environmental performance and regulatory compliance, health and safety policy, quality assurance and the professional qualifications of individuals in the team.

All submissions to Pre-Quals must be in accordance with consistent criteria.

Invitation to tender

While the Pre-Qual will be more about suitability or provider, the Invitation to Tender or ITT will focus on the specific proposal. In other words, this will lay out the proposed methodology for service delivery and how much it costs. Given the huge breadth of types of service that might be procured, the ITT process will be much more specific to the individual act of commissioning, but all the procedures will have to be carried out in accordance with the EU's principles.

In most cases you will be able to ask questions of the commissioner and the answers to these questions will be supplied to all the other service providers who have got through the Pre-Qual process.

You will have a clear time-frame and time to complete the ITT.

Interview and presentation

You are likely to have to present your proposal to the commissioner. It should come as no surprise that successful presentation requires thorough preparation. The commissioner will be forming an opinion of your ability to deliver as team, based on how you come across on the day. This requires agreeing roles, and responsibilities for your presentational team and making sure you are ready to answer questions, and are able to present your proposal in a professional manner.

Negotiation

There are a number of points at which negotiation might be permitted in the process. Primarily these might include the restricted tender negotiation processes, once you have been short listed, once you have been selected as a successful bidder or at various points once you have commenced service delivery and are able to renegotiate the terms of your contract.

ACEVO has published the 'Win-Win' guide to negotiation as well as producing a factsheet on the subject. The key points to consider when entering into negotiation are research and preparation. You need to research what you think the other person wants and be clear of your own needs and aims. A key point in the actual meeting is to get the other party talking. The more they talk, the more you learn about what they want. Think about questions in advance that will help this.

Signing the contract

The contract will set out the delivery of the service and how much it costs in a legally binding document. It will set the price, targets for the service, and in most cases will include clauses on poor performance. Given this is a legally binding document, it is essential you get the appropriate level of professional advice before signing.

4. Issues to consider

Cost

Setting the budget for the delivery of a particular service and ensuring you charge the commissioning body the right amount will be one of the most difficult issues faced in submitting an invitation. It is essential that you get paid enough money to meet your management overheads in accordance with the principles of Full Cost Recovery and that you can meet the costs of practical service delivery, whilst earning a profit that can be reinvested in the organisation and build reserves to cover unforeseen contingencies.

You will need to balance this with maintaining a competitive price. Clearly, this is a difficult balancing act. Every service provider will have to make their own decisions on how to go about this. The key point is to ensure that the decision is an informed one, and that the implications of the choice have been well thought through.

If you agree a price with the local authority, and it is not enough to meet any aspect of service delivery, the commissioner will be under no obligation to meet the deficit. You may be able to renegotiate the terms of the contract but, you are unlikely to be able to recover large deficits.

Service delivery and penalty clauses

If you sign a contract with a commissioning body, you are agreeing to do something, within a specific framework. That might be caring for a given number of clients a week or agreeing to pick up recyclable materials from so many properties a day. There may also be annual targets such as participation rates in a service. The contract you have signed is a legally binding document, and will probably include penalties for poor performance.

This means it is essential you have contingency plans that will enable you to deliver the service despite problems such as a key vehicle breaking down. You must also set targets carefully so that they are challenging but achievable. Failure to deliver could result in financial penalties being issued by the commissioner against the service provider or in the worst case scenario, you being deemed in breach of contract, and being dismissed.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 is essentially a piece of legislation protecting the right of employees, currently delivering the service for the commissioning body. It allows for the transfer of staff from the current service provider (local authority or third party) into that of the successful bidder. If TUPE is being applied to a specific contract then it should be implicit in the tendering process, that a number of staff

will be transferred. You should be able to get a clear picture of who might be transferred and what the terms and conditions of their employment are.

Thanks to poor procurement practice, this is not always possible, and you will have to consider your response and seek appropriate advice. If you can not access all the information you need to consider the TUPE implications, then you will need to submit costs which are subject to disclosure of TUPE information by the commissioning body.

This will clearly have an impact on how you cost service delivery. The amount you charge will have to account for this. Less obvious will be your need to consider the pension arrangements of the transferred employee, and particularly if they are on a final salary pension scheme. There may also be issues related to integrating staff into your working methodologies and also in terms of the quality of the staff being transferred.

It is possible to protect yourself against pension implications through insurance schemes. This cover does come at a cost, and will need to be considered in your budget.

Individual budgets and personalisation

In the fields of health and social care, the idea that service users should in some way been given control of the services that affect them and be able to choose how the budgets that pay for them, is becoming increasingly common. Third sector organisations need to develop a strategy for responding to this agenda, as following initial pilots, local authorities and health authorities are being directed to roll it out.

Carbon footprint

As national targets to reduce CO₂ emissions by 26% by 2020 and total greenhouse gas emissions by 80% by 2050 are passed on to local authorities and government departments in the coming years, then this will undoubtedly be passed onto anyone supplying services to them. Third sector organisations wishing to deliver services should begin to consider their carbon footprint, in order to be able to respond to this. The carbon footprint is a carbon term used to ascertain the impact of an organisation on climate change, and would include a thorough analysis of the supply chains that feed an organisation as well as the obvious factors such as transportation and energy use.

5. Alternative options

If you do not have relevant experience of service delivery, then you will be, in most cases, excluded from full procurement processes. The options listed below, enable you to expand your business and deliver work in support of your key aims, whilst developing your relationships with relevant government commissioners and private commissioners. Alternatively, you may find the idea of delivering a service to your entire borough more than you want to do. These options may give you a way of finding a niche for your services within the context of fully procured governmental services.

Service level agreements

If you are a relatively new or small organisation, the idea of expanding to take on a full long term local authority contract might seem a little scary at first. One way to trial your capacity to deliver the service might be to operate under a Service Level Agreement (SLA) with the local authority.

The SLA is a negotiated agreement between the service provider and the customer. The SLA records a common understanding about services, priorities, responsibilities, guarantees and warranties. Each area of service scope should have the 'level of service' defined. The SLA may specify the levels of availability, serviceability, performance, operation, or other attributes of the service such as billing.

This is particularly relevant if the type of service you are proposing is a new one for your area. A service level agreement will enable you to trial the potential service and see how it works in your borough. A project of this type might be termed 'Action Research'.

Some services end up being run for years under service level agreements, but if you are hoping to expand your service, in the long term the local authority will probably have to run the service through a full competitive tendering process.

Subcontracting

If the service you want to deliver is already part of a much larger contract, or if departments and contracts within your local authority are being rationalised into a smaller number of larger contracts, then the principle option open to you might actually be to search for subcontracting opportunities. In this case you will be seeking to work with, what is generally referred to in commissioning processes as a prime contractor. Prime contractors could be drawn

from the private or third sectors, and will in most cases be well established names in service delivery, although their may be big players at the local level in a given locality.

If you can provide technical expertise and capability, deliver work in a professional manner as well as offer local community buy in, then the chances are that both private and third sector prime contractors would be interested in working in partnership with you. Another bargaining point might be that, thanks to your ability to deliver this part of a wider contract, the prime contractor will not have to expend resources on tooling up to deliver this part of the contract.

Partnership working

As an individual organisation, you may not be able to access the procurement process, but the development of partnership working might allow you to form a consortium that really can work at scale. Relevant partners might include other local third sector organisations, experienced third sector organisations who deliver this kind of service in other parts of the country and private sector companies who deliver that type of service at the local, national or multi-national level.

Developing a truly viable and rewarding partnership takes time. You should be working to develop relationships with potential partners long before the tender is issued. A key part of the process will be to have a governing document for the partnership that sets out your terms of reference, and also includes how you will handle issues of poor performance amongst the partnership.

Social clauses

While not exactly an alternative procurement option, social clauses can play a valuable role in ensuring third sector service delivery. The use of social clauses enables a local authority to secure genuine community benefit from the delivery of its services. Commissioners can not specify the origin of potential suppliers, but they can use social clauses to include targets for local employment and training. They can also require that a contractor work with specific third sector organisations as sub-contractors.

The use of social clauses is patchy at best. They undoubtedly offer an extremely valuable opportunity to secure tangible outcomes for the local community, but national support for their widespread adoption is not forthcoming at the government level.

6. ACEVO procurement and commissioning support service

This factsheet has been produced as part of the ACEVO Commissioning Support Service. This service, with support from both the Big Lottery Fund BASIS programme and the Capacity Builders Improving Support Income Generation work stream, is rolling out a range of products to support you as third sector organisations engage with the procurement process.

This includes:

- A helpline service to provide you with support on the various stages of procurement process
- The development of a library of factsheets and sample documents of use to groups engaging with the commissioning process
- A range of bespoke and skills based training programmes
- Focus groups and roundtable events to increase opportunities for and overcome obstacles related to third sector service delivery
- A professional development network for the staff of second tier infrastructure networks and umbrella bodies who provide support to frontline groups on procurement issues

The helpline service can be contacted on:

Telephone: 020 7280 4937

Email: commissioning.support@acevo.org.uk

7. Glossary of terms

ACEVO: The Association of Chief Executives of Voluntary Organisations

CO₂: Carbon Dioxide

EOI: Expression of Interest

Full Cost Recovery: Financial management idea and tool developed by ACEVO enabling third sector organisations to properly account for and re-coup their management costs

ITT: Invitation to Tender

MEAT: Most Economically Advantageous Tender

OJEC: Official Journal of the European Community

Pre-Qual: Pre-Qualification Questionnaire

Prime Contractor: Contractor who holds a major service delivery contract and in most cases manages a network of sub-contractors

SLA: Service Level Agreement

TUPE: Transfer of Undertakings (Protection of Employment) Regulations

8. References

EU law

ec.europa.eu/internal_market/publicprocurement/index_en.htm

UK law

Statutory Instrument

www.opsi.gov.uk/si/si2006/20060005

Office of Government Commerce Procurement Pages:

www.ogc.gov.uk/procurement.asp

Excellent Set of On-Line Factsheets:

www.out-law.com/page-5964

TUPE Regulations

www.berr.gov.uk/files/file20761.pdf

Online TUPE Factsheet:

www.netlawman.co.uk/info/transfer-ndertakings-guidance-employers.php

Other resources

ACEVO Negotiation Factsheet:

www.acevo.org.uk/captest/download_file.cfm?filename=Negotiation_Briefing_appendix_3d.pdf

BASSAC Collaboration Support:

www.bassac.org.uk/our-programmes/collaboration

Full Cost Recovery:

www.fullcostrecovery.org.uk

IDEA – National Programme for Third Sector Commissioning:

www.idea.gov.uk/idk/core/page.do?pagelD=6583598

NCVO Glossary of Procurement Terms:

www.ncvo-vol.org.uk/index.asp?id=10694&terms=procurement

NHS Commissioning Pages:

The NHS is working to standardise health related commissioning procedures

www.dh.gov.uk/en/managingyourorganisation/commissioning/worldclasscommissioning/index.htm

Social Clauses:

www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx

Tender tracking services:

Official Journal of the European Community:
www.ojec.com

Tenders Direct:
www.tendersdirect.co.uk

Tender Match:
www.tendermatch.com

Government On-Line:
www.government-online.net

5. Support helpline

T: 0207 280 4937

E: commissioning.support@acevo.org.uk

