

Warwickshire Compact
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Managing Reality

**A report on the
Voluntary Sector's
experience of
working with**

**Warwickshire County Council's
Commissioning and Procurement
Services**

**This report has been prepared by
Warwickshire Community and Voluntary Action**

May 2008

Warwickshire Compact

Commissioning and Procurement Survey

Background

The need for the Survey was identified as a result of a number of referrals being made to the Compact Officer by a number of voluntary sector organisations expressing their concerns about the new commissioning and procurement processes which public agencies are required to adopt in the light of the current European Procurement Directives.

The referrals seemed to indicate that local voluntary sector organisations were experiencing difficulties in participating effectively in these new processes and that there were problems with the processes themselves.

A number of organisations indicated that they felt were being treated unfairly by the County Council and that the procurement processes did not reflect Compact and other relevant current good practice guidance, which has been issued to public agencies by various Central Government departments.

A questionnaire was devised to tease out the issues and to move away from simply relying on anecdotal information.

The online survey was launched on 3rd March and was finally closed on 31st March 2008.

Participants were told that their responses would remain confidential to encourage and facilitate full responses without fear of reprisals.

60 organisations, mainly from the voluntary sector Compact Signatory Register, but also including other organisations which may have acquired some tendering experience in Warwickshire over the previous three years, were emailed asking them to participate in the survey and the survey was also accessible from the Warwickshire Compact website.

Respondents were asked to say which public agency their comments related to. The choice included all five District and Borough Councils, the County Council, the Coventry and Warwickshire Learning and Skills Council, the Coventry and Warwickshire Partnership Trust and the Warwickshire Primary Care Trust.

A total of 19 responses were received in respect of tendering activity with Warwickshire County Council.

18 of these were from voluntary not for profit organisations, which were all registered charities, and one was also received from a limited liability partnership, which has also been included in the results.

Responses were received in connection with services categorised under the following headings:

- Advice, Advocacy and Information
- Carers Support and Empowerment
- Children and Young People
- Counselling Services
- LINKs Host
- Mental Health/Physical Disabilities
- Money Management
- Older People

This indicates a wide spectrum of experience of procurement activity, not confined to a single service.

The Findings for Warwickshire County Council

1. Of the 19 responses received 15 (68%) said they had provided similar services to the County Council previously.

- 2 (13.3%) had provided services for 1 – 2 years
- 6 (40%) for 3 – 5 years
- 2 (13.3%) for 6 – 10 years
- 5 (33.3%) for more than 10 years.

The above shows that 13 (87%) of the 15 respondents who answered this question had three or more years experience of delivering similar services to the Council, with 46% having had six or more years experience of similar service provision.

Since tendering for services is a relatively new experience for many voluntary sector organisations, which may have previously been grant funded, it is assumed that for most of the responses their comments would have been based on their first experience of competitive tendering. A specific question was not asked on this point.

In addition, one other organisation had had more than 10 years previous experience of delivering different services to the Council, with one other having had 1 to 2 years experience of delivering a different service to the one being tendered for.

So whilst the tendering process might generally be new, experience of providing services to the Council over many years was not.

2. At the time of the survey, of the 19 responses received 7 (37%) had had their tenders accepted and for 4 of these their contracts had commenced.

The 12 respondents (63%), whose bids had been unsuccessful at various stages of the process, said that the County Council had given various reasons for their rejection. Multiple reasons could be given for each bid failure.

Their rejection reasons are summarised below:

- Method statement preparation and planning (2)
- Management and staffing issues (1)
- Service delivery issues (1)
- Quality assurance issues (1)
- Policies and procedures issues (1)
- Poor financial reserves position (2)
- Inadequate level of annual turnover (3)
- Business references (1)
- Tender was not accepted as the best value bid (3)
- Low score for presentation (1)

Other comments included were:

- Council did not have enough money to provide County wide service as specified in the Invitation to Tender
- Panel was convened to decide on the bid and then aborted the whole process because they wanted to rewrite the service specification for the third time
- No reasons were given for the rejection. We were shocked not to have been given an interview, especially as we had had to do the whole tender process again due to them getting it wrong the first time round
- The Council withdrew the tenders after the whole tender process had been completed, due they said to new government directives. This was after an extension of time due to them changing the tender guidelines and answering tender questions.

None of the responding organisations had decided to withdraw from the tendering process at any stage.

3. Respondents were asked, as a potential tenderer for a particular contract, if the Council had consulted them about the service specification prior to it being finalised and tendered.

From the 19 responses to this question 10 respondents (53%) said they had been consulted, however, 9 (47%) said they had not.

This result indicates a lack of corporate consistency on ensuring that consultation with existing and potential service providers is regarded as a vital component of the service specification review and development process and is a breach of Compact good practice guidance. It may also be the reason

why some tendering processes have failed and have needed to be re-run, creating additional and avoidable expense not only to the County Council but also for individual tendering organisations, most of which are not well placed to incur these significant, additional and avoidable costs.

4. Respondents were also asked as a potential tenderer for a contract, if the Council had consulted them about the contract terms and conditions prior to them being issued with the Invitation to Tender.

From the 18 responses to this question 5, (28%), said that they had been consulted, 13 (72%) said they had not been consulted.

Again these results show corporate inconsistency and indicate potential breaches of good practice guidance in that unfair contract terms and conditions may be being imposed on successful tenderers who may be least able to accept the increased levels of risk being placed on them.

Unreasonable levels of risk being placed on the service provider can lead to contract failure, temporary loss of services to vulnerable service users, and affect the future viability of the service provider.

From the Council's perspective such highly undesirable outcomes would lead to criticism of their procedures, broken trust with service users and significant additional costs being incurred to recover from such a situation.

5. Of the 19 respondents asked to indicate from a list provided what had gone well with the commissioning and procurement process, 18 commented. Their responses are set out below:

- 5 (31%) said that their organisation was consulted about **and able to influence** the service specification
- 2 (12%) said that they had been consulted about **and able to influence** the contract terms and conditions
- 6 (37%) said the procurement timetable was set at the beginning and did not change
- 8 (50%) said the PQQ documentation was clear
- 4 (25%) said the ITT documentation was clear
- 10 (62%) said the service specification reflected their clients needs
- 3 (19%) said that the service specification did not need amendment during the tender process
- 8 (50%) said that the tender bid evaluation criteria were fully detailed and explained when tenders were invited
- 6 (37%) said the Key Performance Indicators were realistic and achievable
- 5 (31%) said the contract performance management criteria were fair and reasonable
- 3 (19%) said that the contract payment terms were fair and met their organisations viability needs

- 1 (6%) only one respondent thought that the apportionment of risk between their organisation and the County Council was fair and reasonable
- 5 (31%) said that the questions raised through the ITT period were fully and promptly addressed.

It is fair to say that the level of responses indicating what had gone well with the commissioning and procurement process was low. Out of a potential 234 positive responses that the 18 respondents to this section could have made to the 13 aspects of the process set out, only 66 (28%) positive indications were given.

6. Respondents were also asked if they had any comments on what went badly with the commissioning and procurement process and their verbatim responses are shown below:

1. Whilst we were originally consulted and documents were clear and indicators were in place etc. etc. the County Council must have known about the procurement guidelines prior to cancelling the tender. We have wasted time and are considerably out of pocket financially tendering for this now non-existent tender.
2. There was a lack of clarity as to how the tender was going to be marked. There were no clear Key Performance Indicators. We had to resubmit the tender as one of questions was incorrectly worded. We had to agree to take out professional indemnity insurance on top of our normal public liability insurance despite our brokers querying the reasons why.
3. Bids had to be resubmitted due to poor wording of the Specification, which gave rise to some applicants misinterpreting parts of it. This caused a two-month delay and extra time pressure once the contract was awarded.
4. There was a lack of clarity for us as current provider of the service as to when the tender would take place. We were unofficially given three different dates within the period of approximately 12 months. Throughout this period of time it affected staff morale and prevented any development work taking place. There was poor involvement of service users throughout the process. The contract was awarded to begin in February, which was a tight timescale from award to delivery despite the length of time WCC took to implement the process. It would have been more sensible to start the new contract at the start of the new financial year i.e. April. There was a lack of clarity over TUPE and we were told (*by WCC*) that TUPE didn't apply when clearly it would have.
5. Everything – the whole process was a catastrophe! They took 10 months to obtain agreement to this contract to put this contract out to tender which meant that they could not renew our SLA in time and they gave us a roll over contract. They took another year to work out the specification and prepare the tender. This again meant that they could not do it in time and they gave us a second years extension- just as progress was being made they completely changed the specification

and merged several contracts – they eventually drew up a time table and contract. They also drafted a specification, which clearly demonstrated that the writer had no understanding of the services. They invited expressions of interest in one year but did not go out to tender and did not invite further EOIs on the new specification the next year. – they did not go through the PQQ stage – they aborted the process at a late stage in order to rewrite the specifications – they aborted the process a second time once all the bids were in.

6. The PQQ was submitted on 29th Oct 2007 and we do not know what is going to happen next (*MARCH 2008*) we are still waiting, during that time we have had two email one liners saying we will be informed soon.
7. Time scales for submitting full tender document were short and unfair to smaller organisations.
8. As a newly formed organisation, but formed from among the group intended to benefit from the contract (*service users*) we were in formal terms unknown to the service (*the County Council*). Neither partner was invited to visit or expand on the content of the bid (*or*) the context within which it was submitted, (*and this*) did not permit any judgement to be formed as to whether *our bid* might or might not produce better outcomes than alternatives.
9. The Commissioner did not understand the effects of tendering on the voluntary sector. The Commissioner appeared to be practising his own skills on procurement on our organisation.
10. Service specification, KPIs were unrealistic. Payment terms were unfair. Risks were all on the provider.
11. The agreed time frame for the project was put up for question half way through the project and payment of the other half of the project was withdrawn for a certain period while decisions were being made, leaving us uncertain of how or if to proceed. This was dangerous and unethical considering the project and could have potentially put our clients at risk. It caused uncertainty with staff working on the project and gave a negative attitude to promotion of the project.
12. One tender outcome should have been known by late December. The result was finally declared in late March, an exceptionally long time.
13. The amount of paperwork is ridiculous and the time frames to complete the tender are always really short

7. Respondents were asked to think about their relationship with the Commissioners of the service they were tendering for and asked to rate it.

19 responses were received as follows:

- | | |
|----------------|---------|
| • Excellent | 2 (11%) |
| • Good | 6 (31%) |
| • Satisfactory | 0 |
| • Poor | 9 (47%) |
| • Very poor | 2 (11%) |

42% of responses said their relationships with commissioners were satisfactory or better.

58% said their relationships were poor or very poor.

These figures suggest that some Commissioners in the Council are capable of developing good and excellent relationships with service providers and that others need to learn how to emulate this.

8. Respondents were then asked to think about the overall procurement process from inviting expressions of interest and the PQQ stage onwards and to rate their experience of it.

19 responses were received as follows:

- | | |
|----------------|----------|
| • Excellent | 1 (5%) |
| • Good | 1 (5%) |
| • Satisfactory | 5 (26%) |
| • Poor | 10 (53%) |
| • Very poor | 2 (11%) |

36% of responses rated their experience of the procurement process as satisfactory or better.

64% rated their experience of the procurement process as poor or very poor.

These figures seem to indicate that in a minority of cases the Council is capable of providing good and excellent procurement processes but that there is again strong evidence of inconsistency, which needs to be addressed.

9. Respondents were then asked if there was just one thing they could change to improve either the commissioning or procurement processes what would it be?

17 responses were received as follows:

1. That those evaluating the bid be given an opportunity to form a judgement about the likely effectiveness of performance against the contract and be informed of the evaluation placed by commissioners on the business case presented by the bidder.
2. For commissioning officers to understand and value the voluntary sector and the role we play in delivering services. Explore how they can support us without giving us more administrative work.
3. Transparency and honesty from beginning to end of the process. Due to an error by WCC in the first tender submission it had to be resubmitted creating more work for staff. This also delayed tender award, giving only two months for an exit strategy for the organisation as we were unsuccessful.
4. Warwickshire County Council should NOT put tenders out to the general public until they understand themselves exactly what it is they want an organisation to provide.
5. Timescales between stages
6. That the County know what they have in their budget for service provision before they put services out to tender.

7. Clarity of what they were expecting from a Key Performance Indicators point of view so we could all compete on a level playing field. Also what weightings were given to which answers. One question was discriminatory as it asked if we had provided such a service before. How does one get into the system if this is asked all the time?
8. Employ staff who understand the services they have to commission and what they exist to do rather than bureaucrats who do not!
9. The persons on the interview panel and who are evaluating the tender application should be impartial, 2 out of 3 persons on the panel had (*previously*) raised a complaint against our organisation – when we questioned this we were told that the panel had been set in November! End of conversation. There was no formal complaints procedure (*about the procurement process*) and a letter of complaint generated a whitewash response, in our opinion.
10. WCC should stick to timetables, we have to. Also very costly to us, just over £5,000 to put it together, hopefully cheaper next time. The tendering master classes were not of any practical use.
11. Clear timescales and transparent communication before the formal tendering process begins. The new contract was clearly lifted from the previous contract and service design indicating that Commissioners purely lifted what was already in place rather than develop an improved service specification.
12. Procurement staff need better local knowledge and a better understanding of charity law. The person that evaluated the finance section of our PQQ told us that one reason we failed was that we did not make a profit. The same person missed that we had reinvested revenue surpluses (10% of turnover) in two capital projects during both years reviewed rather than drawing off capital reserves (sounds like we made a “profit” or surplus to me.)
13. More clarity and feedback
14. Communication, transparency of decision making. A timetable that is attempted to be kept to and if not tell us. Another contract we are currently tendering for has used ESPO who are a professional contracting procurement organisation, we have had the most positive experience, I think because the staff have the skills, know the regulations and behave professionally.
15. Ensuring Contract terms and conditions were all COMPACT compliant
16. The annual turnover or size of the organisation they are seeking for the tender should be stated.
17. Less paperwork having to be photocopied and sent with the tender.

10. Respondents were also invited to add any other comments they might like to make.

The 12 responses received are detailed below:

1. In the context of an alleged wish to welcome bids from small organisations able to offer expert/local knowledge and proven/likely capability to perform, it is incredible that 25% of the potential score

- appears to be disallowed to a tenderer which is newly formed. It would be eminently sensible to permit personal references for the organisation's leaders, who may have strong credentials, where there is no (*current*) capability to present corporate references. Proprietors of all new organisations should be interviewed.
2. Commissioning officers want to protect their statutory roles before they want to commission voluntary sector delivery.
 3. We believe the funder wanted a countywide delivery of service, which became apparent when feedback was given after being unsuccessful. This was denied and it is impossible to evidence although the contract award is county wide. Real transparency as to what they are looking for would have saved a lot of staff time/resources working on a tender, which was probably, doomed from the start. User involvement into the tendering process was tokenistic (*and this was*) backed up by feedback from users after the process (*was*) completed.
 4. Communication between the commissioners and the County Council does not appear to be in place
 5. Despite bad experience on this particular project relationships are reasonably good with the county and I think they realise that it has been a negative experience for us.
 6. The whole of the process was very poor. It took an awful amount of work and rather than simply asking us all to complete a separate page or so to meet the unanswered query they made us do it all again which was a tremendous waste of resources, paper and time.
 7. I think the decision to abort the tender process is legally unjustified (though it has worked to our advantage as we have a contract for another year). The excuse for the delay was the major structural changes within WCC but given that they knew this was happening they could have deferred tending our (*existing*) contract (as they had done for the previous 21 years) until they were in a position to do it properly. I am sure that the National Audit Office would not prefer maladministration to failure to tender at all.
 8. The latest tendering process was poor in the way it was managed by WCC. They have no concept of the strain both financially and emotionally that staff have to endure. The delay cost us 3 valuable support workers and one off with stress, who has since been retired on the grounds of ill health, costing us another packet of money. Also whilst we accept the need to be more cost effective the margins are now so tight we have lost all capacity to be flexible.
 9. We were told by a member of the procurement team that we were too high risk at our current size to take on a contract of the size they were offering and that we should "build our portfolio" by bidding for smaller ones to increase our turnover. This was the smallest one available to us – we are now concerned that organisations of our size will lose their contracts to medium sized organisations who are "building their portfolio" (passion for the client group or commercial drive?)
 10. Awaiting result of tender bid.

11. The Learning Disability Partnership Board ensured everything followed the timetable for completion and contract start date. This was our first attempt at tendering for a Learning Disability advocacy service and everything appeared to be clear and straight forward.
12. Although we won our tender the paperwork required and the timeframe we had to do it was a real strain on our resources.

Interpreting the Findings

The survey findings are very disappointing.

It is clear that a significant majority of those voluntary organisations, which have had recent dealings with the commissioning and procurement services, do not hold them in high esteem.

These negative perceptions not only include organisations which lost tenders, but also those that tendered successfully. Sour grapes are not therefore the explanation.

The dissatisfaction is widespread across a range of services.

The dissatisfaction is not confined to just one or two key issues, but touches most aspects of the commissioning and procurement processes.

These findings are being expressed by organisations which, in the main, have had long standing, and presumably, satisfactory relationships with the Council. In many instances the adverse findings may have been caused by the moving away from grants and the introduction of competitive tendering for services.

Some of the comments made seem to indicate that voluntary organisations generally need to find ways of improving their ability to function effectively in this new competitive environment if they are to have much chance of survival in the years ahead.

A survey seeking the views of commissioners and procurement staff of their perceptions of local voluntary sector organisations performance has not been undertaken, however, this could be done, if the Council so wished, to establish a more rounded picture of the current relationships.

Some of the responses indicate an apparent lack of corporate consistency in the approaches being taken by different departments in respect of consultations with existing and potential service providers and service users.

Such consultation is now recognised as good practice and should be a routine and essential part of the commissioning process.

There is also an apparent lack of corporate consistency in the approach for agreeing contract terms and conditions, some of which appear to be laid down without consultation or negotiation with potential service providers. There seems to be a take it or leave it attitude, which pays no regard to, or understanding of, the potential risks to the provider of unreasonable allocation of risk being placed on the successful tenderer. There also seems to be little understanding or concern that inappropriate payment arrangements can threaten the financial viability of smaller voluntary organisations which could then result in service failure. These comments would apply equally to Small and Medium-sized Enterprises in the Private Sector.

The tender evaluation criteria details are not made fully available at the Invitation To Tender Stage. Broad statements such as 50% for financial aspects and 50% for the quality of the service delivery approach, in my view, are too broad to be useful to potential bidders and are less than being fully open, honest and fair to all potential tenderers.

If more detailed explanations could be given in respect of the weightings being applied to, for example, technical ability, relevant experience, method, management ability, customer care and equalities, with the required standards for each being made explicit in the ITT details, then bids could be more focused.

Full disclosure of the scoring methods to be used for evaluating the most economically advantageous tender need to be given upfront, so that organisations less experienced in the tendering process are given the opportunity to fully understand the rules that will be applied to their bid and which would help to level the playing field.

The availability of this information would enable potential bidders to assess how well they might perform against the criteria and some may decide not to bid and save themselves abortive work and costs as well as saving the Council the expense of evaluating a poor bid.

It would also enable bidders to strive to demonstrate better how they meet the required standards and where the key emphasis needs to be given in their tender documentation to show themselves in the best possible light.

The Council would then be in a better position to compare, score and evaluate all the tender submissions received and be more confident that at the end of the process that the best outcome has been achieved and with a minimised overhead cost to the procurement team.

There are also concerns about the financial appraisal methods being used in the procurement process to assess voluntary sector organisations.

Once again there seems to be an apparent lack of openness in respect of the criteria being applied.

If Council Officers are applying the same assessment criteria to small local charities that they apply to large national charities and large private sector companies, then this may be inherently unfair and unreasonable, leading to discrimination against existing and potential small local niche providers which may have low levels of reserves and a relatively low turnover.

More openness is required here also, so that the appropriateness of the criteria can be challenged if it then appears to be unfair.

The survey findings generally indicate that there is poor level of understanding of Charity law and of the voluntary sector generally in many corners of the County Council, including Commissioners, Procurement Officers, Finance and Legal staff.

As a consequence there seems to be a serious lack of corporate consistency in the way the sector is being treated.

At a strategic level there is a strong commitment to support and value the sector. However, at operational levels this commitment is being dissipated through the lack of sector sensitive, good practice processes being adopted.

Some of the survey responses also indicate a lack of understanding in the sector of the new, tough world of commissioning and procurement.

The implications for the sector are profound.

Out of 19 responses received 12 had tendered unsuccessfully.

Without further research it is not clear whether the unsuccessful bidders have lost out to other local voluntary sector providers, regional or national voluntary sector providers or private sector providers.

However, it would appear that serious changes are now starting to take place in the ability of some local charities to continue to be successful service providers, as a result of competitive tendering.

It may be that some local charities are not sufficiently ready to move away from grants and into to a competitive contracting environment or might not have the necessary skills or capacity to compete effectively, or to successfully manage more demanding contracts, which may be larger than those they have been used to in the past.

The findings of this survey may present a reality check for some existing service providers to consider what steps they need to take to operate successfully in this new climate in future, with serious consideration being given to collaborating with other providers in a variety of ways to develop new business skills and critical mass that may be lacking at present.

Nevertheless, these findings illustrate the potential consequences of the lack of implementation of good practice guidance issued by Government and others and which is inherent in the Warwickshire Compact.

In the new Local Government performance framework "*National Indicator 7: Environment for a thriving third sector*", local third sector organisations will be asked "*how do the local statutory bodies in your area influence your organisation's success?*"

This indicator will be scored according to the proportion of the third sector organisations whose perceptions are "positive" or "very positive" to this question on a five point scale.

NI 7 results will be calculated for Warwickshire whether or not the LAA selects this as one of their 35 key performance indicators.

If the results of this, admittedly small, survey are replicated pro-rata across the County, then a poor National Indicator 7 will result.

The first national survey to determine this indicator will take place later this year to establish a baseline and the exercise will be repeated in 2010 to establish the direction of travel.

It seems to me that unless significant changes are made to the commissioning and procurement processes to implement good practice guidance, there is every possibility that the direction of travel in 2010 will be in a reverse direction as many more local third sector organisations could by then have been exposed to unsatisfactory commissioning and procurement processes.

Looking at the content and tone of the 19 responses received there is an overarching perception of many voluntary organisations feeling that they have been unfairly treated by the County Council.

The Council should also be concerned about the potential public law implications of unfair processes leading to unfair treatment and the possibility of an application being made for a judicial review.

In the light of the findings in this report can the Council be sure that:

- There has been a fair evaluation process for all tenders
- All the documents used to base its decisions on have been disclosed
- Tenderers have had the opportunity to comment on documents, for example the Contract Terms and Conditions, and that such comments have been properly considered and decisions recorded
- There was proper consultation at a formative stage, with sufficient time and information given and that the results were taken into account
- There was no bias or appearance of bias against small providers
- It has fully considered the relevant good practice guidance issued by government and has recorded its reasons for deciding not to implement the guidance in full in cases where this applies

- No procurement decision was so unfair as to amount to an abuse of its power.

If there is less than certainty on any of these issues then a judicial review challenge at some time in the future could be a possibility.

Good Practice Guidance

Extracts of various sources of good practice guidance are attached to this report to increase mutual understanding of what good practice is and what action should be taken to secure the improvements that are required.

Recommendations

I recommend that:

1. A joint Commissioning and Procurement Task Group of County Council officers and Third Sector representatives is urgently established to drive forward the implementation of published good practice guidance to ensure that:
 - When reviewing service provision, meaningful consultations with existing and potential service providers and service users take place at the start of the review process with sufficient time being allowed for considered and intelligent responses to be made.
 - There are open and fair Pre Qualification Questionnaire (PQQ) and Tender evaluation processes in place.
 - All documents, including setting out the evaluation criteria to be used as the basis for decisions, including the financial appraisals of tendering organisations, are disclosed with the relevant documentation provided for the PQQ and Invitation to Tender stages.
 - Contract terms and conditions ensure a fair balance of risk between the Council and the service provider and that good practice guidance in respect of payment arrangements and proportionate monitoring requirements are implemented. To enable this, model contract terms and conditions should be developed in consultation with existing and potential service providers, particularly for those services where tenders are likely to be received from voluntary sector organisations. A model contract will ensure that good practice is embedded at the heart of all such contractual relationships.

2. Further research is carried out to establish the nature of successful bidders involved in tenders where local voluntary organisations have been unsuccessful. For example, have the successful bidders been other Warwickshire based voluntary organisations, out of County voluntary organisations, national voluntary organisations, private sector organisations. The results of such research would give an indication of whether or not the third sector in Warwickshire was thriving or perhaps in decline.
3. That training opportunities are provided for third sector organisations on the potential implications of the competitive tendering processes for their own organisations to enable them to consider how they might need to collaborate in future to improve their ability to successfully compete and continue to provide a thriving third sector in Warwickshire. If such training was provided by the County Council then it would be necessary to also include small and medium sized enterprises to avoid risking the accusation of unfair bias. This potential risk could presumably be avoided if the training was provided by the third sector itself.

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Extract of Good Practice Guidance (1)

The Warwickshire Compact 2005

Purpose

The purpose of the Warwickshire Compact is to improve working relations by setting out the principles and standards which public agencies and voluntary and community organisations can expect of each other when working in partnership for the benefit of local people.

Principles

- Contracts and other formal agreements between public bodies and voluntary and community sector organisations will be drafted in accordance with the Compact's principles and good practice standards.
- The voluntary and community sector has both a responsibility and an entitlement to campaign and advocate, within the law.
- All partners are accountable for their own actions and share the need for integrity, objectivity, openness and honesty.
- Effective partnership requires communication and collaboration between all levels in both sectors.

- **Each public agency will:**
 - Actively encourage the participation of the voluntary and community sector in the development of policy and strategy and the planning of service delivery.
 - Develop clear guidelines and appropriate written agreements when funding support is being provided.
 - Respect and value the knowledge and experience of the voluntary and community sector.

- **Voluntary and Community Organisations will:**
 - Maintain high standards of governance and openness.
 - Meet legal reporting and accountability obligations to funders and service users.
 - Promote effective working relationships with the voluntary and community sector and with public agencies
 - Use the good practice principles set out in the Compact and consult their public agency partners when reviewing any of their own plans, policies or procedures, which may significantly affect their relations and dealings with those partners.

- **Both sectors will work together to:**
 - Develop policies and services taking into account the experience, views, obligations and legal requirements of organisations in both sectors.
 - Use their resources, including people, buildings, knowledge, skills and money, to produce the best results for the people of Warwickshire.
 - Reflect the Compact's principles and good practice guidance in their working relationships.
 - Resolve problems in a constructive and open way.

Extract of Good Practice Guidance (2)

Improving financial relationships with the third sector: Guidance to funders and purchasers

HM Treasury, OGC, NAO, Cabinet Office - 2006

**Sir Sandy Bruce-Lockhart
Chair, Local Government Association**

Third sector organisations have a vital role in supporting local authorities and the communities they represent. Together we share ambition and determination to make a difference to the lives of people across the country.

We hope that the advice within this guidance will help funders across the public sector to make more effective and efficient use of public funds. Local government has made significant steps in efficiency, as shown by the achievements made in efficiency savings, and in working with the third sector. This guide helps to bring these two agendas together which will ultimately be of good to local residents.

Local government is already making huge steps to improve the way that services are commissioned and procured locally, they are now far smarter and outcomes focused. To achieve excellence in service provision local authorities should use this guidance to review their own funding regimes to draw on the experience of best practice, with the aim of building strong and productive relationships with the third sector. Nearly all local authorities are covered by a local compact which already sets out codes around procurement. This guide builds on the compact and provides a clear basis which funders can work from.

Cross departmental, organisational change and effective partnership working is required to implement these changes over the longer term. We hope that the guidance will be used widely amongst practitioners, grant makers, procurers of public services, commissioners, policy makers, chief executives, finance officers amongst others.

Local authorities are determined to build a productive relationship with the third sector. This will not be an overnight transformation but with support from national, regional and local government it can be achieved across the public sector.

In the following extracts from the original document the bold italic highlighted text replicates emphasis used by HM Treasury.

1.17 Procurement practices should not involve preferential practices for third sector organisations.

2.2 Some funding practices can unwittingly inhibit third sector organisations ability to successfully bid for public sector funding.

2.23 Funding bodies must be clear with recipients about the nature of the financial relationship they are entering into, both upfront and as the relationship develops.

2.24 Contracts (and grants) should be jointly agreed in writing before the work commences. The timing of decisions can also impact on value for money. Organisations being notified at the end of March, for example, that they have been successful in bidding for funding that commences in April can have a similar impact as late payments in terms of third sector organisations' ability to make progress on the objectives for which the payment is being made and in their duties as employers.

3.4 At all times, ***value for money for the taxpayer must be the overriding principle that dictates whether or not a longer term funding arrangement is appropriate.*** There needs to be an appropriate balance of risk between the funding body and the recipient of funds. This balance of risk should create the appropriate incentives on the recipient of funds to deliver the best possible outcomes for public money used thereby securing value for money.

3.6 Funding arrangements should be agreed between all parties if they are to be effective and offer the right incentives to deliver value for money. This is in line with the Government's commitment to effective co-operation and collaboration in the Compact.

3.9 Longer term funding can reduce dependency, allow the third sector organisation more flexibility to carry out its core function, and produce clear benefits for the – often highly vulnerable – client groups supported by such organisations. Quite simply, ***longer term planning and funding arrangements can often represent better value for money than one year funding agreements by providing greater financial stability.*** Through the Compact, government has undertaken to “implement longer term financial arrangements, when these represent good value for money”

3.12 The length of funding should be tied to the length of the objective, and with regard to the impact on the funded organisation in the interest of securing value for money. Historical tendency to fund for a certain period is not an acceptable reason to maintain short term funding arrangements. Equally, there is a need to guard against advocating long term funding for its own sake.

3.17 There is no fiscal barrier that prevents funding bodies from agreeing longer-term funding arrangements

4.9 It is vital that the timing of payments is considered in collaboration with, and not imposed upon, the organisation responsible for providing the service.

4.10 An inappropriate balance of risk in favour of the funding body e.g. arrears payments, can sometimes create overly harsh incentives on the recipient of funds, compromising outcomes and value for money. For example a small community based group delivering services may not be in a position to borrow sufficient funds to cover activities until an arrears payment is made and could get into financial difficulties, perhaps becoming overdrawn and suffering penalty charges. The cost, including interest on the loan or penalty charges, might then be greater than the interest foregone to the public purse.

4.12 End loading of payments can discourage third sector organisations from working in partnership with Government. Payment arrangements that disadvantage third sector organisations can lead to poor value for money if organisations best placed to deliver a service are discouraged from entering into partnership with Government.

4.13 When making the decision whether to fund in advance, funders need to be aware that third sector organisations that may appear not to need payment in advance, may in fact require it if their other funding streams are restricted for specific purposes and cannot be used elsewhere.

4.14 The Compact Funding and Procurement Code expresses the Government's commitment to payments in advance.

4.15 In particular funding bodies should agree the timing of payments with funding recipients at the beginning of a programme. Under a grant regime, timing of payments, as with other factors in the relationship, should be negotiated early, and should not come as an unwelcome surprise to the recipient. Funding bodies should make it clear to recipients that they are amenable to representations with regard to payment in advance, including under procurement, where potential arrangements for timing of payments should be made clear at the beginning of the tender process. Purchasers should remember, however, that they are bound to offer equal payment terms to all bidders, and cannot give preferential terms solely to third sector organisations to the detriment of other suppliers.

4.16 In general, the agreed date of payments should be set out in any financial memorandum, contracts and grant conditions. If no such memorandum exists, payment should take place within 30 days of receipt of goods or services. **Funding bodies should make a commitment to pay within a specified time or on a specified date or dates, and such commitments should be fully honoured.**

4.18 Government accounting describes payment in advance as one “made to contractors before the customer has received the equivalent value in return. An advance payment provides the contractor with working capital, to enable commitments under the terms of the contract to be fulfilled”.

4.19 As a general rule payments by funding bodies have been made in arrears of actual expenditure. This is to avoid a financial cost to the Exchequer (and hence the taxpayer) through borrowing. Government is not a source of loan finance, and should aim not to compete with markets or be in contravention of EU procurement rules which are present to protect the right of all potential suppliers to compete on equal terms.

4.20 *It is however possible to make a payment in advance under Government Accounting.* This will either be because the payment falls into one of the exempt categories, or because doing so represents better value for money. For example, many third sector organisations do not have resources to both undertake work and receive payments afterwards, and can usually demonstrate a clear need for the funding before the work can begin. If the recipient falls into one of the exempt categories payment in advance will be appropriate when these five criteria are met.

- Payment arrangements must be agreed between the provider and contractor, or grant maker and recipient;
- Payment arrangements must be recorded in financial memorandum, a contract or grant conditions;
- Payment in advance must meet an identifiable need to spend;
- Payment in advance must not be novel or contentious;
- Payment in advance is wholly necessary (e.g. large third sector organisations with substantial liquid reserves may not need an advance payment).

4.21 For payments to be made in advance of expenditure to be justified, need must be determined and identified. The identification of need should not be a burdensome task, nor should it necessarily take place immediately prior to the spending. Generally need has been determined on the basis of incurred expenditure, but can also be determined on the basis of forecast needs to incur expenditure over a foreseeable period.

4.22 Both funding and funded bodies should therefore consider timing of payments carefully when drawing up contracts or grant conditions. ***Payments to third sector organisations should be made on the basis of need and therefore can and should, where appropriate and necessary, be made in advance of expenditure, in order to achieve better value for money.*** A blanket exemption for all third sector organisations is obviously inappropriate. Where funding in advance is not appropriate - as in the case for when value for money is not clear – then funding bodies should enter into dialogue with recipients to explain this.

4.25 An interim payment is a payment, which is made at a prescribed stage or at intervals during the progress of a project. Such payments are normally

linked to work done and/or physical progress satisfactorily achieved, as defined in the contract. This definition covers such payment methods as “profile funding” where funding is provided in schedule payments of a proportion of a total sum paid at prescribed stages or intervals (for example 10% payment every month for 10 months). Interim payments can be made in advance or arrears as agreed between the parties involved.

5.10 *There is no reason why service procurers should disallow the inclusion of relevant overhead costs in bids.*

5.28 *Under a competitive procurement regime, purchasers should be clear that they expect third sector providers to be aware of the risks of not bidding on a full cost recovery basis.*

6.3 The Gershon review concluded that the front line delivery bodies often had to deal with a plethora of bodies as funders and regulators leading to significant additional delivery costs and recommended that the Government improves its funding relationship with the VCS by streamlining and rationalising monitoring, regulatory and reporting requirements.

6.4 Rationalising funding streams, or encouraging third sector organisations to pool their resources in some bidding, would reduce the transaction costs of securing income and allowing third sector organisations to spend more on frontline services.

6.6 *Funding bodies should ensure that their application procedures are as clear and, wherever possible, as simple as they can be.* This is to minimise the unnecessary costs of submitting an application, and to avoid undue complexity which can cause small or first time applicant groups to be put off applying for funding at all.

Comments:

It seems to be quite clear from the survey results that the County Council has not implemented this good practice guidance that has been issued by the Treasury and endorsed by other government departments and other agencies, including the Local Government Association.

There is no evidence, as far as I am aware, that the Council has formally decided that it has good reasons which would justify the non-implementation of this guidance.

If this is correct it is possible that the Council could be leaving itself open to a judicial review under Public Law for its failure to implement the guidance set out above.

Extract of Good Practice Guidance (3)

Report of the Third Sector Commissioning Task Force

Published by Department of Health July 2006

Recommendations

1. Commissioners should aim to put the user at the centre of service delivery patterns, mapping user pathways to inform service design.
2. Commissioners should consult provider organisations regularly on how to increase efficiency and effectiveness.
3. Commissioners should assess the provider environment and infrastructure required to sustain and maintain providers who adopt an inclusive approach and who involve users in the design and delivery of services.
4. Third sector providers must offer their expertise to commissioners in the business of needs and service mapping. This should not necessarily conflict with the same provider subsequently bidding on a contract, particularly if the commissioners are inclusive rather than exclusive on who they involve in the process.
5. There is a fear that public bodies will commission from the “safe” option. In many cases this will mean large private sector companies, break out groups from the NHS of former colleagues and national charities. The third sector must see a fair playing field. The onus is on commissioners to be fair, open and transparent in procurement and not show preferential treatment.
6. Service mapping and design should be flagged for consultation prior to the commencement of the commissioning process.
7. Commissioners should involve third sector expertise in service modelling and needs analysis prior to commissioning.
8. The third sector should be encouraged to offer its services in the commissioning process. If this is to be successful, training and facilitation will be necessary. In addition public bodies will have to be overtly transparent as they begin service modelling and commissioning.
9. The third sector will have to recognise that they cannot expect to be financially remunerated for participating in the design phase unless specifically commissioned. Third sector providers may choose to enter specifically as specialist advisors on commissioning only. They should be encouraged to do so.

10. Provide clear guidance on the commissioning process which is easy to follow for the smallest third sector organisation and which will ensure a fair playing field.
11. Support development of capacity and expertise for third sector organisations in the marketing of their services and in enabling better commissioning.

Extract of Good Practice Guidance (4)

National Procurement Concordat for Small and Medium-sized Enterprises (full text)

**Endorsed by:
Local Government Association
Department of Trade and Industry
Office of the Deputy Prime Minister**

What is the Concordat?

“ Both the Concordat and the Good Practice Guide represent a commitment from Local Government to encourage and develop appropriate levels of competition in local government markets in order to increase value for money and foster innovation, particularly from those businesses/suppliers who may find it difficult to break into this market. These may include small and medium sized enterprises (SMEs), which themselves could include local businesses, ethnic and minority owned businesses (EMBs), women owned businesses, social enterprises and voluntary and community organisations (VCOs). These are all sectors of the business community that can find themselves under-represented in local government procurement”.

Introduction

We are committed to delivering locally the National Procurement Strategy for Local Government. The strategy asks local authorities to adopt a small and medium sized enterprise (SME) friendly procurement concordat and to encourage a mixed range of suppliers in order to help develop and stimulate a varied and competitive marketplace.

The concordat sets out the actions that local authorities will take to make their contracts more accessible to SMEs.

Although the principles should relate to all SMEs, the concordat is particularly focused on small businesses of less than 50 employees.

We recognise the important contribution that small businesses can make to the delivery of public services and the vital role these businesses play in the national and local economy. We are committed to making the most of the benefits offered by them.

Underlying Principles

Contracts are awarded in order to support the Best Value delivery of local government services. We will deliver value for money and take into account the whole life costs in contract decisions; this means considering quality, longer term cost and benefits as well as initial price.

We will make appropriate use of our legal powers including the power to promote the economic, social and environmental well being of our community.

All tender processes and contract awards will comply with EU Public Procurement Directives and the principles of non-discrimination, equal treatment and transparency and our duties under UK law.

Local Authority Commitments

Procurement strategy

We will publish a corporate procurement strategy. The strategy will include a commitment to:

- The role procurement plays in delivering the Council's objectives and its contribution to the community strategy, workforce issues, diversity and equality and sustainability.
- How we will encourage a diverse and competitive supply market, including small firms, social enterprises, ethnic minority businesses and voluntary and community sector suppliers.
- A commitment to ensure that our approach to individual contracts, including large contracts and framework agreements etc, is supported by a sound business case and options appraisal.
- A commitment that where we decide that the best value option is to aggregate supply or let a longer term contract or framework agreement we will invite bidders to demonstrate their track record in achieving value for money through effective use of their supply chain.
- A commitment to consider the role of SME specialist suppliers in delivering elements of larger contracts and framework agreements.

Access to contract opportunities

- ***We will publish on our website;***

- Guidance for suppliers on how to do business with the council;
- Details of forthcoming bidding opportunities, and;
- Contact details for each contract, with appropriate links to any regional site and the national public sector opportunities portal (to be launched summer 2005).

Details of our key suppliers.

- We will advertise contracts. We will use a range of publications and other means in order to encourage greater diversity and competition.
- We will give potential suppliers an opportunity to discuss the procurement in order to understand our requirements and assess their own suitability. Nothing will be done, however, which would give a particular business or provider an unfair advantage in competing for a specific contract
- We will work with prime contractors – both at tender stage and during the life of a contract – to establish the contribution that small firms, ethnic minority businesses, social enterprises and voluntary and community sector suppliers can play in the supply chain. We will provide details of our prime contractors on our website.

Fair tender processes

We will apply our own rules and policies fairly.

- At pre-tender stage and during the tender process we will ensure that all tenderers have equal access to relevant information.
- We will keep the tender process as simple as possible in order to help minimise the costs to suppliers.
- If a pre-qualification stage is used we will use a Council-wide pre-qualification questionnaire containing common core questions with limited bespoke additions for each contract. We will work with regional and national partners to ensure a consistent approach to pre-qualification.
- We will assess potential suppliers against published pre-qualification and tender evaluation criteria. These criteria will be proportionate to the risks of the individual contract process. In particular the criteria relating to financial standing will not to be set to unreasonably exclude newer businesses.

Feedback

We will offer meaningful feedback to suppliers following the procurement process in order that suppliers can improve for future tenders.

- We will seek feedback from suppliers, and their respective trade associations, on our tender processes and address where we can any problems that are brought to our attention.
- We will publish a complaints procedure.

Contract management

We will treat suppliers openly and fairly. Suppliers will:

- Be paid on time. No more than 30 days from receipt of an undisputed invoice.
 - Receive honest and constructive feedback on the supplier's performance of the contract.
 - Be given notice of any performance problems and an opportunity if appropriate, to put matters right.
- All contracts will require our suppliers to pay their sub-contractors, throughout the supply chain, within 30 days from receipt of an undisputed invoice.

As customers we will make clear to our suppliers, and those wishing to do business with us, what is expected of them.

DECLARATION OF SUPPORT FOR THE SMALL BUSINESS FRIENDLY CONCORDAT

The ODPM, the LGA and Small Business Service want to see all local authorities sign up to the Small Business Friendly Concordat. The Concordat is a voluntary, non-statutory document, and your signature will not only demonstrate a pledge to actively engage with small businesses, but it will also show your authority's commitment to good procurement practices in general. This in turn should help foster a professional approach to managing procurement in your authority and, in doing so help you implement key strategic objectives and milestones in the National Procurement Strategy for Local Government.

Comments

Warwickshire County Council has adopted this Concordat.

Of particular interest is the section on Fair Tender Processes.

Here there seems to be some mismatches between the principles set out in Concordat and their application by the County Council.

Addressing these mismatches will help to improve the procurement processes in the County.