

Commissioning and Procurement

An overview from **Pauline Kimantas**, NAVCA's Local Commissioning and Procurement Manager, and **John Dawson**, Local Commissioning and Procurement Advisor.

The potential of third sector organisations to supply goods and services to the public sector has attracted much coverage and political support over recent years.

There is confusion between the use of the terms commissioning and procurement and the legal position, policy positions and circumstances in which grants and contracts fit within a commissioning approach. The range of technical terms, legislation, regulations and documents can add to the confusion. The terms 'commissioning' and 'procurement' are often used interchangeably, when in fact they refer to different activities. This article aims to provide a basic overview of commissioning and procurement and what they mean.

Commissioning

"Commissioning - the cycle of assessing the needs of people in an area, designing and then securing an appropriate service".

Partnership in Public Services: An action plan for third sector involvement

All national and local public bodies are moving towards commissioning approaches to the design and delivery of public services. They are moving from a more narrow service delivery role to a commissioning role in order to support a more strategic approach to public service delivery. These changes are far reaching and are taking place at different levels – locally,

regionally and nationally. In other words, public sector bodies are in the midst of, and at differing stages of, very large scale change.

A general definition of commissioning is that it is the whole process of deciding what public services are needed, what priorities they are accorded, and choosing what, why, how and where to allocate resources to provide services. It is usually described as a cycle of how best to meet strategic objectives and service level objectives by identifying need, scoping the market of providers, drawing in expertise, designing a service, deciding how to resource the service, choosing a supplier and monitoring the ultimate service's delivery.

"Commissioning is seen as a broader and deeper process of meeting needs for whole groups of service users and/or populations. It provides for a 'whole systems' approach to developing improved outcomes, which links strategic objectives, the intermediate outcomes required from individual services and specific outputs required from delivery arrangements ... This requires a broader understanding and proper consideration of the full range of possible delivery options, providers and partners through contracting, grants, shaping markets ..." (*The National Procurement Strategy for Local Government – Final Report*, p.23-24, April 2008, Communities and Local Government)

As well as making decisions about what services are needed and their design, it is also necessary to consider possible methods of delivering and funding public services. An 'intelligent' commissioning process will consider a range of options, and may choose to provide the service in-house, provide direct payments to individual service users to buy the services they require, use grant funding, or procure using a contract with external providers. Procurement is thus one part of the commissioning process and refers to a specific method of purchasing services which results in a contract.

Local authorities and other public bodies have the powers to both offer grants to third sector organisations and enter into contracts for the provision of goods and services. The National Audit Office decision support tool distinguishes three "funding channels" – procurement (i.e. contracts), grant, and grant-in-aid – and sets out a four stage process for making decisions about which funding channel to use. Decisions on appropriate funding methods need to take account of a number of factors, including legislative frameworks, policies and policy objectives, and principles such as value for money. There are no hard and fast rules about which funding method is appropriate in every situation, but the Treasury guidance on funding relationships with the third sector states that the main factor that should decide which funding method to use is the "nature of the intended outcomes".

The guidance states that where outcomes are relatively specific and it is important to minimise the risk associated with delivering a public service, a contract is more appropriate. In general, grants using public funds are more appropriate to fund organisations whose

activities are aligned with the wider objectives of the public body.

The Institute of Public Finance have provided the following information about grants and contracts. "Local authorities may offer grants to third sector organisations or enter into contracts for the provision of goods and services.

Grants are a means of providing financial assistance to third sector organisations for a special purpose, for example to support the wider objectives of the local authority in promoting the social, economic or environmental well being of their area. Grant funding is usually preceded by a call for proposals. One example would be a grant to support a local community centre hold activities for children during the summer holidays. The grant offer letter will normally set out general instructions as to how the special purpose is to be achieved, i.e. through conditions that limit or guide the behavior of the third sector organisations.

A "contract" on the other hand is an agreement between two or more parties which is intended to give rise to legal relations. The European public procurement regulations (in England, Wales and Northern Ireland this is implemented under the Public Contracts Regulations 2006, in Scotland Public Contracts (Scotland) Regulations 2006), apply to the purchasing of supplies (goods) and services by local authorities from an economic operator (means a contractor or a third sector organisation) above certain specified thresholds under a contract. Note the EU Treaty principles apply also to contracts which are below these specified thresholds. Entering into a contract is usually precipitated by request for tender which are normally published in various public journals

to ensure transparency and openness of the contract. One example would be a contract to deliver supported housing services for ex-offenders.

It is important to understand the differences between entering into a grant funded agreement and a contract for a variety of reasons. If for some reason, a third sector organization does not deliver under a contract it will be in default or breach and it can reasonably assume some legal action may be taken against it for not complying (i.e, the local authority may take the matter to Court and sue for damages or in some cases seek specific performance of the contract). In the case of grants, if you do not deliver under the grant agreement, the local authority may bring no immediate sanction against you, provided of course there was no deliberate misuse of the grant money or it was used for a totally different purpose than it was given. It may however be taken into account when the local authority decides to offer grants in the future.

There are likely to be occasions when it is not clear that funding is by means of a grant or a contract. In such cases, legal advice should be sought."

Further Information

The National Audit Office decision support tool *Financial relationships with third sector organisations: A decision support tool for public bodies in England* can be found at www.nao.org.uk/guidance/better_funding.

The Treasury guidance *Improving financial relationships with the third sector: Guidance to*

fundors and purchasers (May 2006) can be found at www.hm-treasury.gov.uk/media/9/4/guidncefundors1505061v1.pdf .

The NAVCA publication *Why grants are important for a healthy local VCS: A study of four local authorities' policies* (June 2007) can be found at www.navca.org.uk/publications/whygrants.

The pamphlet *Sustaining Grants: Why local grant aid is vital for a healthy voluntary and community sector and thriving local communities* can be found at www.navca.org.uk/publications/sustaininggrants.

NAVCA's Local Commissioning and Procurement Unit

Pauline Kimantas
Local Commissioning and Procurement Manager
Pauline.kimantas@navca.org.uk
0114 289 3982

John Dawson
Local Commissioning and Procurement Adviser
John.dawson@navca.org.uk
0114 289 3983

Rachel Rhodes
Local Commissioning and Procurement Adviser
Rachel.rhodes@navca.org.uk
0114 289 3975

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