

DERBYSHIRE CONTRACTS ADVICE NETWORK (DCAN)

Briefing Paper for Sir Clive Booth, UK Chair of the Big Lottery Fund

1. Introduction

Derbyshire Contracts Advice Network (DCAN) is a project run by Links: the CVS for Chesterfield and N.E. Derbyshire in partnership with many infrastructure organisations. The project covers the whole of Derbyshire including Derby City. It is funded by the Big Lottery Fund BASIS programme for 5 years and was recently visited by Sir Clive.

As we are at the end of year two of the project, certain trends in contracting had become apparent and these were discussed with Sir Clive who requested a paper giving more detail. The main issue raised was the increasing difficulty for smaller, local voluntary and community sector (VCS) groups in gaining contracts: this not only affects the outcomes of the BASIS funded project but is symptomatic of trends in the third sector generally. Sir Clive is in discussion with Angela Smith, Minister for the Third Sector, and is interested in overcoming some of these blockages.

I list below the various difficulties DCAN has encountered in the two years: most of them are not new and have been well documented by NAVCA, the Glover report and others, but the severity of the problems seems to us to be increasing lately particularly in view of the recession and actual/forecast public spending cuts. In view of Sir Clive's discussions with the Minister, I am also making suggestions of "unblocking" some of the difficulties.

2. Increasing complexity of finding out about tenders

The proliferation of websites offering tenders was highlighted in the Glover report which recommends one website for all government contracts. Although Supply2gov was set up to co-ordinate tenders below the European Journal threshold, the site is difficult to negotiate with many categories and sub-categories. DCAN provides a "tender alert" service by daily viewing Supply2gov, In-tend, Source Derbyshire, Source Nottinghamshire, Source Leicestershire, Buy4Sheffield, Funding Central, and Funding Information Bureau tender alerts. We summarise relevant alerts to other infrastructure bodies and front line providers. This service is much appreciated but is time consuming and only available through our Big Lottery Funding. For small third sector groups to do this themselves would be very difficult: this has been raised with NAVCA's procurement unit.

Suggestions for 'unblocking'

- permanent funding to CVS to provide this service to front line groups
- simplification of Supply2gov or successor website

3. e-tendering

Increasingly, tenders have to be submitted electronically which disadvantages small third sector groups who lack ICT support.

Suggestions for 'unblocking' – funding for training in e-tendering at local level (for areas without existing procurement projects)

4. Increasing complexity of contracts

The standard NHS contracts run to 100+ pages and are now mandatory for PCTs for health and care services with any provider including the third sector. This is in stark contrast with the previous service level agreements (SLAs) which were a few pages long. Although PCTs are advised they can still use grant funding and a National Audit Office Decision Support Tool is available to help them decide on the appropriate type of funding, the experience in Derbyshire is that PCT commissioners have been slow to make a definitive decision on the way forward. (The Support Tool is apparently difficult to use.) As a result, third sector providers have had SLAs renewed three times on a yearly basis without a clear indication of when specific services will move to tendered services. Derbyshire County Council has issued a clear timetable of tendering intentions for the services it leads but there is less clarity about PCT led services.

Part of the problem seems to DCAN to be that the sums involved e.g. £20k p.a. are so small compared with the other services being commissioned by PCTs that the third sector always comes at the end of the line for decisions to be made.

Certain services have already been put out to tender e.g. Psychological Therapies. After a long and drawn out tender process in Phase One, no local Derbyshire VCS groups gained contracts although several had passed the PQQ stage. Contracts were gained by NHS providers (mental health trusts), national charities e.g. Turning Point, and private sector providers. Although the possibility of sub-contracting was raised and approaches were made, no Derbyshire local VCS group has yet gained a sub-contract.

Extract from DCAN newsletter July 2009: "This was a steep learning curve for the organisations and to some extent for Resource Procurement Hub who managed the whole tendering process. A question that the VCS groups ask themselves is how they managed to get through the PQQ when they have comparatively small turnovers, in some instances no pension and would not have the capacity to TUPE over staff on NHS terms & conditions. Resource accept that they need to gain more information at the PQQ stage, which will identify whether the organisation can deliver before inviting them to tender. There are several meetings with commissioners to discuss issues arising from this tender."

Suggestions for “unblocking”:

- as above, clearer PQQs which weed out providers unlikely to meet full contract specifications thus saving a great deal of time and resource on all sides
- more pro-active encouragement by commissioners re sub-contracting;
- active consideration of grants or modest service level agreements for niche providers particularly those serving specific communities e.g. the Derbyshire Gypsy Liaison Group is funded by the PCT from delivering race equality budget to work on mental health issues and is currently being evaluated
- more support to PCT commissioners on using the tools to decide when grants are appropriate

5. TUPE and pensions

TUPE is a major barrier to third sector groups taking over public services. Not only must they provide the same terms and conditions to transferred staff but they inherit to the continuity of service (affecting redundancy entitlement and other benefits) of local authority and NHS staff who may have built up many years via several authorities. Most third sector organisations struggle to designate a redundancy fund to cover existing staff and absorbing the risk of transferred staff who have union-negotiated beneficial continuity provisions is an added barrier.

For transfers of local authorities and NHS staff, **pensions** is a killer issue. DCAN has found that there is little understanding of this issue even at national conferences where we have raised the problem. At a Procurement Champions event held yesterday by NAVCA and ACEVO in Sheffield, DCAN raised the issue again and it was agreed that NAVCA and ACEVO should seek expert advice from an insurance broker or similar.

For years it was thought that as long as some sort of pension was offered by the third sector, it would meet TUPE requirements but recent regulations re local authorities and NHS providers are much more onerous. From October 2007, by virtue of directions issued under section 101 of the Local Government Act 2003 contracting authorities are required to ensure the pension rights for their transferring staff are the same as, broadly comparable to, or better than, those rights received as an employee of the authority. (*The Best Value Authorities Staff Transfers (Pensions) Direction 2007*).

In the standard NHS contracts, the provisions go even further. Clause 11.1 states “Whenever applicable, the Provider shall comply with the Cabinet Office Code on Workforce Matters. This requires that TUPE shall apply to all staff transfers and transferring staff shall be offered membership of a pension scheme which is broadly comparable to the NHS pension scheme. Other staff who are appointed to work on the Services alongside transferred NHS staff should be offered fair and reasonable terms and conditions that are overall no less

favourable than those of their transferred colleagues.” So not only will there be pension liabilities for the TUPE’d staff but NHS style pensions must be offered to new staff appointed to that service. This is beyond the capability of all but large national third sector providers.

Suggested ways of unblocking:

- there have been admissions to the local government or NHS pension schemes of third sector employees i.e. the transferred staff would stay in the same pension scheme even though their employer changes. The danger with this approach is the deficits on many pension schemes because liabilities for pension’s schemes under FRS17 have to be shown on the balance sheet and this could make smaller third sector organisations technically insolvent. Let alone the possibility that the liabilities become real!!!
- Sometimes payments outside the contract are offered by commissioners to compensate for the added pension burden. However, in cash strapped times commissioners are going to be reluctant to offer this.
- Change the requirements! Whilst not wishing to argue against the basic purpose of TUPE, the additional requirement in the NHS contract to appoint new staff on more advantageous terms than the rest of the third sector staff seems a step too far.

6. PQQs unnecessary restrictions

DCAN has found local third sector organisations ruled out of tendering because of financial turnover being too low. In two examples, organisations were told they were too small to tender although this was relaxed on negotiation with the commissioner. The County Council has shared its financial vetting procedures with us which allows us to educate third sector providers. We recognise that financial vetting is necessary but advisory limits are just that and both commissioners and bidders need to be free to negotiate.

PQQs seem increasingly to be asking for higher levels of insurance cover.

Quality standards – insistence on ISO 9001 when this may not be the most appropriate quality measure. The QAF (Quality Assessment Framework) for Supporting People is based on work with individuals and does not capture development work within the community.

Suggestions for ‘unblocking’ – encouragement to commissioners to be flexible and adopt appropriate standards.

7. Commissioners v. procurement/legal officers

Commissioners and procurement/legal officers do not always sing from the same hymn sheet. Particularly at the County Council, the commissioners are very third

sector friendly with participation in DCAN training and videos, negotiations over formats of contracts and a very helpful approach to solving problems jointly. Procurement/legal officers in the same authority seem more risk averse and inflexible. An example is that the threshold for tendering for Derbyshire County Council is ridiculously low at £10,000 for the value of the contract i.e. £3400 p.a. for 3 years would be caught. It is suggested that the cost of a full scale tendering exercise is over £20,000 for the commissioner (let alone the costs on those tendering) so DCAN has repeatedly lobbied for the threshold to be increased to at least the Derbyshire district council level of £50,000. Commissioners privately concur and have even stated openly at the LAA (Local Area Agreement) that the levels are too low but no change occurs because the blockage is said to be in the legal department. This issue will be raised again during a review of procurement and is also a barrier to SMEs in the private sector.

In another area of the country we have heard through NAVCA that procurement has been outsourced to another organisation further creating a divide between the commissioners of service and the procurement process.

In small district councils commissioning is rather non-existent with procurement often seen as 'ordering stationery' and therefore just part of a finance worker's job. Whilst third sector organisations probably have less to offer to district councils, there is still scope for work. An example of good practice is that the Joint Procurement Unit of Bolsover, Chesterfield and N.E. Derbyshire District Councils has a written strategy including the facility to award one contract a year outside the tendering process to the third sector. This is being done deliberately to try out third sector organisations as suppliers and seems an excellent way forward.

Suggestions for 'unblocking'

- regulations from central government on tendering thresholds. It works the other way with a threshold for what has to be in OJEU
- encouragement to procurement officers to work jointly
- encouragement to procurement officers to try out the third sector outside the tendering process.

8. Costs of partnership working, consortia formation and sub-contracting – tendency for contracts to be aggregated

When Kevin Brennan was Minister for the Third Sector, I asked him at a conference how smaller third sector groups could get contracts and he promoted the idea of consortia formation. This has been enshrined in Futurebuilders funding with streams supporting these activities. Our own project has supported consortia formation of advice agencies, community transport schemes, and residential services for children with disabilities. Yet during this period there has been a waxing and waning of support for consortia via the Legal Services Commission who first were, then weren't and may now be in favour of consortia

and local councils first supporting then being unclear about whether consortia were the way forward.

Our project has paid for legal advice on different structures e.g. company formation, limited liability partnerships, partnership agreements, lead agency arrangements. What we have learned through this work is that working together costs a lot in terms of time let alone legal advice and this has to be funded in one way or another. The advice agencies have attracted funding from Lloyds TSB and indeed the Big Lottery Fund for the process of consortia formation. There are issues of trust, ownership and due diligence processes before partners take the risk of working together on real money. One solicitor said to us, "The private sector would only sit down together if there was money on the table." One of the problems for the third sector is that commissioners and funders are not always clear whether they really want consortia or not.

Sub-contracting is a clearer relationship which may enable third sector to have a valuable role as a niche supplier. However this calls for a culture shift. A third sector organisation locally who provided signing services for people with hearing impairment under an SLA with the PCT was outraged to find that the service was being tendered along with interpreting and translating across the whole region via a Procurement Hub who was looking for a 'master vendor'. We advised on a Non Disclosure Agreement to encourage the organisation to try to get a sub-contract with possible prime contractors. Actually, we could understand the commissioners' desire to have a coherent language support service across the piece but also understood how difficult it is for smaller third sector groups to see their niche invaded, so to speak.

The tendency to aggregate contracts on a regional or even national scale is understandable from the commissioners' point of view but further disadvantages smaller local third sector organisations: nowhere is this clearer than in the Flexible New Deal developments where larger and larger contracts have been issued to larger and larger providers. At least the third sector has gained some sub-contracts in this instance although DCAN has had to provide support to some where the final contract terms were less advantageous than the initial prime contractors outlines.

Suggestions for unblocking

- sub-contracting opportunities to be advertised on the central tendering website
- training and support for third sector on sub-contracting.

9. Recession & public sector spending cuts

Sir Clive thought this might provide an opportunity for the third sector but DCAN actually thinks the opposite is the case. We have heard of a local authority commissioner who said he was not going to make his colleagues redundant while giving contracts to the third sector. At national level we have a statement

on 30 September 2009 from Andy Burnham, Health Secretary, that NHS organisations are the “preferred provider” of state-funded healthcare and should be given the chance to offer redesigned services before they are put out to tender (TPP Law bulletin email mark@tpplaw.co.uk). The Dept of Health will be issuing guidance advising that NHS organisations must be given “at least two formal chances” to improve where they are under-performing – draft guidance has been agreed with unions.

In a climate of public sector cuts, unions will understandably be trying to protect their members and the third sector is notoriously non-unionised. Locally Unison has been expressing concern about third sector “take over” of public services.

The Audit Commission has already found that 17% of district councils and 8% of other types have already embarked on cuts to programmes delivered by third sector partners, with services either scrapped or brought back in house. (*When it Comes to the Crunch* available at www.regen.net/doc). This is *before* the massive public sector spending cuts that all political parties are saying will happen in the next three years – councils are preparing for cuts of up to 20% in real terms over the next three years. Several councils in Derbyshire have failed to agree three year contracts and awarded one year ones, saying that “it would send out the wrong message” when they do not know what their own settlement will be.

Much of the political rhetoric of all the party conferences this year has focused on public sector pay freezes, cuts in public sector pensions, and savings in backroom services. In this climate, pressure from unions and colleagues is likely to create a tension surrounding the “level playing field” which is supposed to exist around procurement, already spiked by the barbed wire fence of TUPE and pensions.

Yes, there may be opportunities for innovative and effective third sector organisations but belt-tightening all round may equally create a “keep it in house” mentality.

Suggestions for unblocking – none. All political parties have the same rhetoric of loving the third sector and social enterprise but public sector cuts have a knock-on effect. If CVS are cut, there will be less support for front line groups; if front-line groups are cut, there will be less resource to put in tenders.

Conclusion

Valiant attempts are being made throughout layers of government to open up opportunities for contracts for the third sector. The Big Lottery Fund, Futurebuilders, Capacitybuilders and others are supporting the DCAN project, the NAVCA Procurement & Commissioning Unit, and other procurement advice services. Consortia formation and partnership working are good processes.

Becoming more business like in order to win tenders can have undoubted advantages in improving efficiency generally within an organisation.

BUT and it is a very big but, the prevailing threats of public sector spending cuts - whatever happens at the General Election – and the likely retrenchment of public sector to an “in-house” mentality may militate against the third sector being able to take on as many public sector contracts as we had all imagined. What is important is that third sector organisations view the risks, joys and challenges of contracts firmly in the context of their overall aims and the ethos of the organisation. It is as important for third sector organisations to walk away from a risky, burdensome contract and concentrate on some lower level activity that helps them fulfil their real purpose as it is for them to be innovative, clear and good at selling themselves as niche providers to whoever does get the contract. DCAN hopes to keep advising the third sector on the real choices.

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