

NEWSLETTER

CIPFA CHARITIES PANEL

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AT THE HEART OF
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Close to the edge – **By Chris Harris**

The slide into administration by Metronet Rail provided much entertainment for those involved in the vexed question of public/private partnerships. But it raises some interesting issues for charities involved in public service delivery, especially following the recent article by Martin Narey of Barnardo's.

The numbers in the Metronet case are large - £30bn over 30 years – but we should not assume that charities can ignore the lessons. The government believed that by making the contract big enough and long enough, the risks would be spread over a long period, profits made by contractors would be sufficiently attractive to keep them on board and the public sector would have a high degree of certainty over the delivery of the service required. Current government thinking in the charity sector is running along similar lines; bigger contracts for longer periods. In fact it would be better to say government thinking in social care or employment or any other sector is working in this direction and most service delivery charities gratefully support this.

Lesson one is about cost control and partnership. Building firms have used subcontractors for years and are skilled in the art of turning resources on and off when needed. However, it appears that there were just not enough hours per night for tube maintenance to take place and the multiplicity of sub contractors falling over one another did not help. Service delivery charities, especially those delivering a niche service know that it is likely that much future work will be delivered in partnership. We need to learn to do this in a way that really adds value for our clients. For example, Action for Blind People works closely with local societies for the visually impaired in various parts of the country and have many success stories working together. But we all know of situations where various agencies compete over a single family or individual when another potential client has no service at all. Partnership is not just a "nice to have" but a real skill that needs practice and commitment.

Lesson two has to be about the balance of risk. Metronet were in trouble because of massive cost overruns early in the contract. Building projects often cost more than initially planned and sometimes firms knowingly underbid, hoping to get the work and then get more money out of the client later on. When the risks are entirely within the public sector, such as the Millennium Dome, then the price can rocket. When the contract places the risk on the contractor, such as at Wembley, then the business has to take the losses. When charities take on these bigger contracts they will have to be clear about where the risk lies and how much it can afford to take. We have yet to see any high profile charities going bust, as the sector remains solidly risk averse, but the more entrepreneurial we become the more likely it is that some will find they have overreached themselves.

THIRD SECTOR CASE STUDIES: By Carl Allen

PARTNERSHIP WORKING AND CONTRACTS

INTRODUCTION

This background sets the scene for four carefully selected case studies used to highlight the practical differences between a signed contract and the polite discussions of partnership working i.e. the Compact way of working.

In all the case studies Third Sector parties had something to say about the Compact agreement.

The case study analysis is not the norm, deliberately, but all the lessons learnt from these cases are for all sizes and types of Third Sector organisations.

BACKGROUND

Given the current drive for stronger, better and more partnership working between the Third Sector and public bodies, what regulates and governs the contract behaviour of both parties **beyond** the initial partnership working i.e. what governs contract behaviour when things go wrong for one or both contract parties? We are talking here about contracts for a Third Sector organisation to deliver a public service.

We need to be crystal clear at this point: **we are not talking about contracts for partnership working**. And having said that, it is very important to note that few or perhaps no Third Sector contracts/grants have dispute prevention or resolution clauses that entertain the idea of equity between contract parties in keeping with a sense of partnership working, partnership or partners.

This is despite the existence of the *Compact*, *Compact Voice* and the *Compact Commissioner*, the *Partnership in Public Services: An action plan for third sector involvement* and other initiatives: all working towards an improved working relationship between the Third Sector and the Public Sector.

PARTNERSHIP WORKING and CONTRACTS

Compact agreement... guides the relationship up to and through the partnership working stage. Partnership working can happen in several ways e.g. grants, strategic, delegation, operational by way of joint working or pooled resources or in the commissioning stage.

Beyond the partnership working stage i.e. the Compact stage, a contract for service delivery is usually signed. The major problem here is when such a contract fails to deliver or is in danger of becoming an unsustainable financial loss and one or both contract parties' tries to make the Compact agreement over-ride a contract.

However a Compact agreement was never meant to and cannot over-ride a contract.

Most Third Sector contracts do not have partnership support obligations if the contract runs into problems unless such contracts are **a contract for delivering in partnership or a legal partnership agreeing to deliver a service.**

Most contracts with the Third Sector are **not contracts for delivering in partnership or delivering by a partner since there is no legal partnership agreement to deliver a service.**

Misunderstanding the difference between the above two types of contract are often the cause of bitter recrimination between the Third Sector and the Public Sector when contract problems arise and the Third Sector thinks it has a right to depend or call on the Compact agreement or the partnership principle.

The Compact agreement cannot be used as a prop or fallback position for lack of knowledge, skill and due diligence before signing a contract. During the course of negotiation both parties can use the Compact as a reference point.

GENERAL POINTS FROM THE CASE STUDIES

In all the case studies, none of the contracts/grant had any written reference to the national or local Compact but all the areas had Local Compacts.

In case studies 1 & 2, the Third Sector parties had not recognised the crucial difference between partnership working and their contract at the beginning i.e. where the Compact agreement began and ended, and where the contract took over.

In case studies 1, 2 and 3, the Third Sector parties asserted that the Compact process had failed and the Compact agreement had no value, despite the shortcomings on their part.

In case study 3, the Third Sector parties decided to fight.

In case study 4, the Third Sector party indicated that the Compact and Compact process was not the problem, but that Third Sector organisations had to accept that the need to fight against abuse of process by public sector bodies was not removed by the coming of the Compact.

Case studies 1 & 2 showed the value of due care, and the need for proper dispute prevention and dispute resolution clauses. This is a Compact way of working.

Case studies 3 & 4 showed the value of fighting i.e. the Compact never promised a bed of roses.

All cases showed the need to be alert and stay alert.

CASE STUDY 1 A badly financially modelled contract turning into a financially unsustainable contract.

Lesson 1 Due care on both sides would have detected the charity's research on demand and service level for financial break even was not accurately reflected in the financial model used for the contract.

Lesson 2 Generally, a contract party that is a public sector body may be unable and/or unwilling to act as a "partner" within a contract, unless the contract was so designed.

Put another way, a contract is only as flexible as the actual contract provisions, but more importantly, the law and governance document of each individual party outlines the actual behaviour of each party. This is why it is critical to cater for risk or changes to the basic elements underlying the contract work when it is not partnership work.

KNOWN PRE-CONTRACT FACTORS

- At the required base service level, the profit margin was low though steady in the long term thus tending to keep out private sector competition
- The service was a statutory service but service level was discretionary although there is a basic service level
- Pre-contract service demand was predictable
- Pre-contract service level demand was predictable

- The basic or lowest service level would give the charity full cost recovery

COMMISSIONING AND TENDERING

The charity participated in the commissioning process. The tender was won by the charity. Incidentally the Local Authority wanted the charity to win as it had confidence it would get *value for money* and *added value* from the charity.

CONTRACT The charity became a sole service provider at agreed rates for different service levels set by the Authority. Charity spent in excess of £1m on physical facilities and equipment to set up the service based on an agreed service level for clients referred. Charity employed new staff although it followed the normal precaution of having 3 months contract termination clauses. The guidelines for user service level are set by the Local Authority.

CONTRACT FINANCIAL MODEL FLAW Charity's financial sustainability model was not fully reflected in the contractual model for securing minimum number of clients needed to meet full cost recovery at an agreed service level. Service level payment rate was part of contract.

CONTRACT RISK The Council and not the charity sets the client service level i.e. the service level remains variable and discretionary outside of any prior contractual requirement for clients already referred. The service user rights or demand on service level is not the question here.

PLACING THE CONTRACT RISK There are several financial models which could be used in the contract and allow the Council to reduce client and/or service level while compensating the charity on set up cost and ensuring full cost recovery basis. This would bring financial equity to the contract.

POST CONTRACT SIGNING

1. Local Authority ... Budget pressures led to a decision to lower the basic service level to users. The Local Authority would only refer those users it felt had an absolute need for the existing contractual service level while negotiating an additional contract for most users at a lower service level and reduced price.
2. Charity ... Recovery of set up capital costs and meeting already fixed recurrent expenditure depended on both sufficient clients and at the basic contract service level. The Council was willing to alter the contract to guarantee a minimum service demand but not higher service levels for the demand.

FACT The Council made an unavoidable decision. The Charity ended up incurring a substantial loss and concluded the contract early, with the Council's consent, to avoid further losses.

QUESTION Can the Council compensate the charity in the circumstances?

ANSWER The Council had budget pressures and it was reducing grants to other charities it supported. Use of the power of well-being could not be justified here since the charity was not in danger of failing. Once the decision was made to reduce the discretionary service level, regulatory requirements on Best Value and use of resources meant that it could only refer clients who had an absolute need for the existing contractual service level.

LEGAL and QUASI-LEGAL The contract is a commercial contract. Neither judicial review nor the Ombudsmen have standing in the matter. There was no complaint in law or public law.

If both parties were negligent and the contract fell under the Compact framework agreement, as it did, the Compact underpins/overarches the broad relationship but cannot over-ride contracts between individual parties.

In the circumstances

- The dispute resolution procedures in the contract did not cover the nature of the financial dilemma
- The Charity was negligent in not having its financial model properly reflected in the contact terms, but should the Council be expected to compensate the charity?
- The Council was negligent in not using its greater (assumed) expertise in contract drafting to correct the charity's mistake, but should the charity expect the Council to use the power of well-being?

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CASE STUDY 2 Unspoken assurances

LESSON May 2005: failed to finish preparations and started in haste
Feb 2007: still repenting at leisure.

LESSON Your "partner" breaking its own guidance does not remove risk or become protection.

PRE-GRANT The need and business case for the project had been evidenced. The Council had confidence in the management committee integrity and performance track record in other organisations, the quality assurance of work were met and there was no project risk per se that was not coverable by insurance.

GRANT The Local Authority agreed to fund advice and advocacy work to be delivered by a Third Sector body. With the Council's knowledge, the project started while awaiting approval of the articles of Memorandum and Association from Company House. The Council agreed to pay at the beginning of each quarter and payment began before the Articles were received back from Company House as being approved.

ASSUMPTION Both the Management Committee and the Council assumed the project could start without company limited liability protection since sundry insurances had been paid and the work itself had a disclaimer and had met quality assurance specifications for staff employed.

FLAW The Management Committee itself had no protection i.e. their governance work was not covered by company limited liability or Trustee insurance.

PROBLEM Industrial problems arose that were not properly handled by the Chief Executive and then the Management Committee. The memorandum was returned by Company House and Charity Commission for a minor correction. This took time and the industrial problem reached the Industrial Tribunal who ruled for the employee and awarded damages. At this point in time the memorandum still had not been returned to the Charity Commission and more importantly, the Company House who would give limited liability protection.

BAD NEWS The organisation was unable to pay the damages and had no limited liability protection i.e. it was bankrupt.

WORSE YET The management committee became personally liable as a judgement was granted.

QUESTION While the Council was at fault to begin grant payment to the organisation before Company House approval was received, was it liable in any way?

ANSWER No, although the Council as a "partner" broke its own guidance.

FINAL It was notable that the grant was a full cost recovery one and included a contribution to the Charity's free reserve. The reserve contribution could not pay the full amount of the judgement but the Trustees could not show how the difference would be met. The Council refused to pay the 1st year 3rd quarter grant amount unless it could be assured that the grant would not be seized for payment of the judgement. It offered to pay the project costs directly i.e. make direct payment to employees and to suppliers for other project costs. The grant provisions gave the Council that right. The project folded and the Trustees ended up with the full judgement amount to pay.

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CASE STUDY 3 This is a case that simply reaffirms that in public law

- Adherence to proper consultation process is required
- Judicial review does not change a decision when proper consultation is carried out.

LESSON With much to gain and nothing to lose, be brave.

LESSON Information dominates. It is a part of strategy to know how your "partner" manages their total flow of information i.e. beginning to final disposal, and the laws/rules that govern this information.

PRE-JUDICIAL REVIEW A Council concluded the annual grant process to the Third Sector without proper consultation. Third Sector parties went for judicial review after failing to obtain a reasonable reply from the Local Authority about lack of proper consultation.

JUDICIAL REVIEW The judge found for the Third Sector and ordered a proper consultation be carried out and interim funding settlement for affected Third Sector organisations.

UNANSWERED QUESTION A Freedom of Information request to the Council would have revealed what its own legal counsel advised the Council about the facts and likely legal outcome of the matter in a judicial review challenge. This valuable information on the integrity of partnership working not sought by the Third Sector organisations.

BAD PARTNERSHIP WORKING The Council knew that it would lose at judicial review but thought that the Third Sector would not go for judicial review.

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CASE STUDY 4 The Third Sector pushing the boundaries on standards for proper consultation

LESSON Continuous improvement requires pushing the boundaries ... individuals and private bodies win compensation, why not Third Sector bodies?

This recent case is important because it is the first time a Third Sector body had been awarded costs and compensation because consultation practices were found to deliberately waste an organisation's resources.

The case established that when the nature of consultation is set, consultation practice must not only be proper, but carried out with a genuine intention to adhere to the nature and terms of the consultation, rather than receive comments only.

The charity discovered that decisions on the consultation matter were being taken before the end of the consultation and while active consultation on the decision made was ongoing. This was in no way about an impact assessment as the public body initially asserted and had to then withdraw the assertion.

When the matter was carried to legal authority for redress, that authority ordered compensation with the comment that a charity's resources put into responding to a consultation could not be wasted in this way.

PARTNERSHIP WORKING This was very bad partnership working as the public body had asked that particular charity to take a lead on the matter.

COMPACTS AND CONTRACTS ... organisational failure to deliver

The Compact also works as an underpinning or overarching agreement but not an overriding agreement. This is why when a contract is signed and the Compact is included (or not) in some form within the contract terms, the Compact cannot be construed and used to override an organisation's governing documents re how it must act within the contract. That was not and is not the intent of the Compact i.e. an organisation cannot be required to break rules of governance.

It would be an incompact way of working, besides being illogical and unreasonable, to generally depend on the Compact as a relief to contractual penalties for organisational failure to deliver i.e. Compact parties are not relieved of penalties for not delivering primary contractual responsibilities when they sign a contract, They must negotiate for relief and can call on the Compact framework of values to be used as the basis for negotiation and relief.

But in the final analysis, relief depends on the legal ability and financial capacity of a compact party to grant relief e.g. while the well-being power of Local Authority may be useful to call on for giving relief to a charity, budgetary constraints and competing requests for discretionary funding is usually intense.

To sum up, relief is not a given or automatic and that is why the Trustees of charities must have the capacity to understand the difference between personal heroic efforts and seemingly endless meeting to save a difficult situation and a situation where it is time to call independent expertise or an end to heroic efforts.

COMPACT AND CONTRACTS ... problems with the contract due to

THESAURUS (not legal one) mistake defect omission miscalculation
misunderstanding misinterpretation uncertainty lack of clarity silence error erratum
lack of information late information bad information false information unforeseen
occurrence act of god

Defect will be used as a catch all term here.

It is yet to be clarified if defects in an existing individual contract that have not yet caused a problem can be corrected as of right by claiming Compact compliance, after the contract is signed. But this is true i.e. no party can simply refuse to correct a defect by simply claiming that the contract has been signed, and indeed such party is obliged to show valid reasons why the defect cannot be corrected; a matter of compact compliance. It appears that the validity of such reason or reasons can be tested before legal authority, for contract and Compact purposes. And of course there exists different forms of correction in practice for different sorts of defects, if a defect is indeed correctable except by terminating the contract.

But before the Third Sector rejoices, the nature of the defect must be such that an actualisation of the defect or further continuance of the contract would cause significant harm to one party or cause the contract objectives to be undeliverable by one or both parties. That a defect in itself causes one party to exclusively benefit or suffer a loss is not the critical understanding of a defect in this section. What drives any negotiation or decision is the degree or level of harm caused to a party by an actualisation of the defect or further continuance of the contract and the legal ability of the other party to correct the defect.

Financial capacity to correct a mistake is more of a practical negotiation matter unless it becomes an extreme amount, but noting that organisational demise for Third Sector organisations is always a practical and recommended way out for managing a significant or fatal contract defect, while remembering that unpaid Trustees tend to give time and effort to help the achievement of the organisation objectives, not to pay debts. It is a fairly simple but nonetheless passing painful decision.

But there is a need to draft guidelines on the consideration for a degree or level of harm and there appears to be no insurmountable barrier to having these guidelines as part of the Compact body of reference work. This would greatly aid dispute prevention and resolution processes and increase incident resolution at an early stage.

It appears that a case by case approach to individual contract issues around defects would be Compact and contract compliance.

Having said that, there are few or no instances of a contract between the Third Sector and public sector where the notion of equity in dispute prevention and resolution clauses is mentioned. Lack of the notion of equity limits what can be done to remedy a defect by way of a correction i.e. competitive advantage for one party replacing the idea of fair. This despite official guidance from bodies such as the Office for Government Commerce for public sector bodies to be fair in procurement.

EXAMPLE Mistake in the charging terms can result in an underpayment or overpayment resulting in an unplanned loss or profit. In an existing contract a charity might have to accept the to date loss, but negotiate for the contract to be terminated without penalty ... the charity might have been the sole bidder because the charging term defect was seen by others as an unacceptable risk.

But what happens, as is likely, when there are a number of current instances where the same defect is present? That is only an extension of the case by case approach but it is additionally necessary to consider the cumulative effect and how this would affect the market in the current and the future.

But with certainty, if the contract defect is systemic, a Compact party can demand that all such future contracts between the sectors not contain the defect or the outcome of the defect. The demand is effective immediately and includes signed contracts where work has not yet started. Remember that the Compact also works as an agreement between sectors i.e. good for one, good for all with mutual benefit and no seeking of inequitable advantage. In this systemic approach, the potential significance of the defect or advantage is not the question.

Carl Allen writes here in a personal capacity. He is a member of the Charity Panel, Compact Voice and Chair of Local Compact Voice with over 300 members across England. He is also a member of V4CE, a new partnership of national and regional organisations that speaks for the interests of the BME Third Sector.

This note seeks to fill some open space in that part of the consultation environment occupied by the Compact re **how long to allow for consultation?** The Compact is the *policy* agreement to improve the relationship between the Third Sector and Government. The Compact Code on Consultation and Policy Appraisal states

11. How long to allow for consultation

11.1 For written consultations, wherever possible 12 weeks should be allowed for replies in order to accommodate the work cycles of organizations working with voluntary management committees and to reach the local level or member organisations. This is more likely to be achieved where consultation has been built into regular planning cycles. It should, however, be recognised that for a variety of reasons a 12 week period will not always be possible, in which case eight weeks for replies will generally be the minimum (in line with Cabinet Office Service First guidance).

Clear, concise, simple and practical as this part of the Code is, it does not cover all eventualities or situations, thus leaving individual organisations to make their own interpretation. But after recent poor consultation practices followed by successful Third Sector actions for redress, including lobbying advocacy and judicial review, it seems the Compact is becoming both bindingly and blindingly clear in law and details of practice.

Compact consultation customs are now being added to a number of other consultation customs that have been long and well established in non-compact judicial review cases; in a recent instance a charity was awarded compensation (by the Parliamentary Ombudsman) for having its time wasted in a consultation, but these instances and cases are for another time. *So what does this legalese mean for compact compliance?*

NOTE for the reader. This is a note on the Compact consultation period of 12 weeks. It takes no heed, useful and needed as that undoubtedly is, of the overall environment for consultation and participation e.g. no comparison is made between compact proofing and impact assessment or mention made of the community empowerment commitments in the Community and Local Government White paper or guidance from equalities legislation such as the Race Relations Act or law cases on consultation which have brought much clarity and certainty as to what is fair in practice or indeed the Government's own Consultation Code now under review. But one observes that in terms of civil society development, we have come a distance when the apparent situation is that the proposed revised Government Consultation Code must be compact compliant and not the other way around!

Points of note about the 12 week compact consultation period

- Compact consultation period of 12 weeks is not a **dividing line** between good compact practice and bad compact practice in setting the consultation period. *This is plain from the Compact code*
- The 12 weeks compact consultation period can be changed by reason and process. For the party and public being consulted such change must not result in a state where frequent or even occasional changes occur
- The point is made that change from the 12 weeks compact consultation period to a shorter period must be rare. See section headed ***Period less than 12 weeks*** for the reasoning
- Some limitations are in effect to prevent defeat of the purpose in having the 12 weeks compact consultation period as a yardstick, reference or standard etc; purpose being to allow the Government/public sector, Third Sector and the public to set their response systems to work to a known time. This approach contributes to efficiency, economy and effectiveness for all parties
- Worryingly, there is a question mark about the overall awareness, ability and capacity of those being consulted to consistently and effectively use these limitations in a preventive, challenging and contributory manner
- The causes of poor consultation practices indicates that some parts of the public sector do not undertake consultation properly in terms of the value and purpose of consultation, use of consultation resources and legal implications
- The effectiveness of consultation practices are required to generally outweigh considerations of economy and efficiency in consultation practices; a consultation supports decisions about proposed and continuing use of other resources and strategies. Thus consultation is also a management tool.

Anecdotal evidence of how the Compact is used and regarded in a continuum; *from* an agreed contradistinction, tool, enabling mechanism, dispute prevention and resolution

guide, reference or reference point, yardstick, policy agreement, framework agreement, regulatory performance indicator, implied term, sectors guidance, statement/commitment of intent, formal agreement, promise, best practice or standard *to* an overarching or underpinning agreement but not an over-riding agreement.

Context

The Compact is the *policy* agreement to improve the relationship between the Third Sector and Government. There are also Local Compacts between the Third Sector and Local Authorities/public sector bodies in nearly all local authority areas in England. The Compact is supported by Codes of Good Practice nationally and locally.

In the box are 2 extracts from judicial review cases (2007) in which the Compact was introduced as an agreement. Connectivity between the judges' comment give pause for thought as to where the legal status of the compact is heading; implication of/implied terms in Code progressing in a particular manner to be taken as a yardstick for deciding what was or is reasonable. It is analogous to accepted understandings from case law on consultation. But let us not get too far ahead of where we are, although prudence and a sense of improvement requires us to look around and ahead.

EXTRACT from draft reserved judgement IN THE COVENTRY COUNTY COURT, Claim No. 6CV01056 Hearing Date: 17th May 2007 B e f o r e : HIS HONOUR JUDGE OLIVER-JONES QC Between: LEARNING AND SKILLS COUNCIL FOR ENGLAND (claimant) *and* KIDS IN COMMUNICATION LIMITED (defendant)

Extract “ What I do know is that there is a very detailed Code of Practice which is intended to govern, if not control, the relationship between relevant parties. On this basis alone there is, in my judgment, a sufficient basis for allowing the Defendant's application to re-re-amend its Defence. The implication of terms from the Code of Practice can, in my judgment, arguably, and with a real prospect of success, be said to fall within that category of implied terms which are ...”

NOTE While the Code of Practice mentioned in the case above was the Compact Funding and Procurement Code, all the Codes have implied terms.

EXTRACT from a note on the PLP website “The case, brought by the Public Law Project (PLP) on behalf of Mrs Helen Berry, related to a challenge brought by an individual service-user against a decision by Cumbria County Council to introduce day care charging across the county. Mrs Berry brought the judicial review claim on the basis that the Council had failed to consult properly with voluntary sector organisations and their users when it initially made a decision in February this year to bring in charging, and that a subsequent decision in September was also unlawful.

In the High Court yesterday, Judge David Mackie QC held that the February decision had been taken without adequate consultation and was therefore unfair and unlawful. Part of Mrs Berry's claim was that the Cumbria Compact – which required a minimum 12-week written consultation over any major service change – had not been complied with. Whilst the judge made it clear that his final decision did not rely specifically on the Compact terms, he described the Compact as “more than a wish list - a commitment of intent” on the part of the Council, and that the 12-week written consultation promise should be taken as a yardstick for deciding what was reasonable on the Council's part.” The written judgment is not yet available.

of 12 weeks is not a ***dividing line*** between good compact practice and bad compact practice in setting the consultation period. **Our deduction may not be the law**, but we are more concerned with equity in the consultation process and the effectiveness (in particular), efficiency and economy of resources used for consultation. **Let the law follow may well be right or wrong, and readers are advised accordingly!**

So how can we treat with the standard 12 weeks compact consultation period?

We can start with the point that a departure from the standard consultation period may or may not be beneficial to compact parties and those actually affected by the consultation outcome; the subject of compact consultation and the condition of those to be consulted may indicate more or less than 12 weeks is desirable or possible for the consultation exercise to be effective without unduly burdening those being consulted. *But see the sections on **Period less/ more than 12 weeks**.*

In assessing the consultation period needed for a particular consultation, the widely differing abilities and preparedness of people, communities and organisations to respond have to be estimated and accounted for. This estimation, which is *not to be averaged by measurement*, is accounted for in the consultation document, since following the 12 weeks period is a demonstration of *compact compliance by way of tick boxing but is not compact proofing, two somewhat different matters*.

Anecdotal evidence indicates that many public sector bodies are excellent at the art of tick boxing. To be even handed, there is the growing perception that parts of the Third Sector are not far behind.

Whilst compact compliance is not guaranteed by ticking the box, demonstrable and evidential assurance of compliance is gained by compact proofing. Evidential assurance has a high value in assuring the effectiveness, efficiency and economy of the consultation process for regulatory purposes such as Best Value, use of resources, partnership working, duty to consult properly and corporate direction of travel.

Compact Proofing Approach The reasons for any departure from the 12 week period has to be stated in the consultation document and must be as a result of

- The estimation, which may indicate that more or less than 12 weeks are needed or possible
- Some unavoidable condition which the consultation objective must meet, resulting in less than 12 weeks, or infrequently, more than 12 weeks

The estimation or the unavoidable condition can be

1. Used as a call for more consultation resources from the public sector to be devoted to facilitating the public and Third Sector response
2. Challenged with a view to lengthening or sticking to the 12 week period rather than shortening the consultation period
3. A demonstration of the public sector view of the Third Sector, or the restrictions that the public sector faces. This has value in itself.

The 3 actions above are how we may approach ***compact proofing*** the consultation period against the 12 weeks i.e. we do not compact proof by treating the 12 weeks as a dividing line. But diversity in thinking and approaches should not be discounted.

Perhaps the hallmark/proof of an effective and successful consultation process is that there are sufficient intelligent or challenging responses, with the consultation outcome being another matter. But it is sometimes the case that those to be affected by the consultation outcome may not respond in numbers. Thus the hallmark of sufficient intelligent/challenging

responses is not necessarily a reliable indicator that anything is wrong with the actual consultation process, at least in terms of the time period.

It would be both reasonable and useful to regard the compact agreed consultation period of 12 weeks in several ways for the purpose of compact proofing a consultation time period

- As a standard, from which any departure must be justified
- As a legal reference or working yardstick or standard measure for the use of those being consulted, to object if there is any departure or no departure
- As a framework around which the consultation period may be set, and to inform those being consulted to ask for a longer period or agree to a shorter period.

Period less than 12 weeks for a consultation

- Public sector bodies must avoid reducing the 12 weeks period unless there are clear benefits to those being consulted rather than mainly a benefit to the public body, but there may be an unavoidable condition forcing a reduced period
- Even where a shorter consultation period may be effective in the sense of obtaining sufficient intelligent/challenging responses, the Third Sector should not be burdened by having to continually assess this likelihood, perversely so in a short time period. In general, Third Sector organisations and the public will strongly resist having to continually assess the desirability of a shorter consultation period for individual consultations re their very limited organisational resources and voluntary and community action have to be carefully apportioned and timed bearing in mind their operational demands
- The demands of time/timing are very strong constraining factors when asking the public and the Third Sector to respond to a consultation in a shortened time period, whether or not the shortened period is unavoidable. Mitigating or strong facilitative action from the consulting body may be required.

Point of Note *It is a sign of compact compliance or compact way of working that a public sector body notifies potentially affected parties as soon as it becomes likely that the proposed consultation period for the subject matter is likely to be shorter than the standard of 12 weeks, whatever the validity of the reason. That the consultation documents are not ready is not a valid or acceptable reason, in law, for failure to notify where the period is less than 12 weeks, especially where the outcomes of consultation are significant to the parties affected. It may be that affected parties will then have a good reason to initiate proceedings against the consulting party for extra expenses and effort incurred as a result of failure to notify in such circumstances or perhaps claim maladministration i.e. consultation duties begin before the published date. Instruments such as the Freedom of Information Act have made it more difficult to hide poor processes and decisions from the enquiring mind. And even the limited advances in public legal education make the Third Sector and the public more aware.*

Period more than 12 weeks

- The differing ability and readiness of people to respond to a consultation has to be estimated and accounted for by the public sector.
- The Third Sector will tend to be more aware of the readiness and capability of communities to respond effectively to consultations better than the public sector. Thus the burden, but not the duty, of demonstrating the need for a longer than 12 weeks consultation period can fall more heavily to the Third Sector than the public

sector. But the burden of proof for demonstration should not be so rigorous as to become another burden in itself

- A consultation period longer than the Compact standard indicates that the consultation subject outcome may be both fundamental and complex. In this case the public sector should engage with the Third Sector infrastructure and ensure that those likely to be affected are involved as early as possible

END STATEMENT

- For consultation as a process, economy and efficiency do not override effectiveness in a Best Value assessment or use of consultation resources
- The final responsibility for an effective consultation process rests with the consulting body. But a compact way of working is a 2 way process
- Many Third Sector infrastructure bodies have an obligation to help affected communities in the consultation process.
- Public sector consulting bodies should support the participation of Third Sector compact champions in compact compliance and proofing exercises.
- The consultation document should be signed off as being compact compliant
- The 12 weeks compact consultation period is a principle, not a **dividing line** between good compact practice and bad compact practice. *Reasons for departure from the 12 weeks period must be stated in the consultation document.*

Websites

<http://www.compactvoice.org.uk/>

http://www.cabinetoffice.gov.uk/third_sector/compact.aspx

<http://www.thecompact.org.uk/>

<http://www.ncvo-vol.org.uk/>

<http://www.publiclawproject.org.uk/>

<http://www.voice4change-england.co.uk/>

CSR 2007, the Third Sector and Local Authorities

The policy challenges encompassed by CSR 2007 facing the UK are numerous and include: climate change, migration, technological advancement, an ageing population and rising consumer/service user expectations. These developments will have complex and far-reaching implications for government, citizens, businesses and the third sector that demand a shared sense of purpose and coordinated interventions across a number of policy fields. The key word here is coordinated because without such coordination, policy achievements will not be all that they could be in terms of efficient and effective service delivery over the CSR 2007 period. The government has intimated that it wants to have a greater public involvement in the design, delivery and governance of services, giving the public more control and responsibility for, outcomes in health, education and other key service areas. The Third Sector's expertise in reaching out to hard to engage groups of people will be particularly welcome in the government's quest to increase such public involvement.

The government has also recognised the potential of businesses that want to combine profit generation with social and environmental goals. It is investing funds in raising awareness of the social enterprise business model as set out in the review of the Third Sector entitled: "The Future Role of the Third Sector in Social and Economic Regeneration: final report, HM Treasury and Cabinet Office, July 2007." This included coverage of social enterprise in business studies education, improving access to finance and advice for social entrepreneurs and investigating how the social enterprise business model can improve government policy delivery and outcomes. This will also be linked to using the experience of the Third Sector in the welfare reform agenda especially as it links into getting people back to work and also a greater role in improving community cohesion.

The aforementioned July 2007 document underpinned the CSR 2007 proposals and cemented the government's relationship with the Third Sector.

It focused on creating the conditions for a vibrant campaigning sector which would strengthen local communities, assist in transforming public services, and further develop social enterprise approaches to ensure that service delivery to UK citizens improved. Over the CSR 2007 period (2008-09 to 2010-2011) the Office of the Third Sector will invest around £515m in third sector programmes which will include the following:

- £80 million for a small grants programme for community action and voice (previously announced in the March 2007 Budget)
- £50 million for a local endowment match fund, which will enable local independent foundations to develop community endowments to provide sustainability in future grant making
- £117 million of new resources available for youth volunteering, through the organisation v (the Government will also continue to match private sector contributions to v)
- In excess of £85 million for Capacity builders, for third sector infrastructure development

Appendix C of CSR 2007 includes a list and description of some 30 key public service agreement targets. Chief amongst these is a new PSA target aiming to build more cohesive, empowered and active communities. The impact of the Third Sector will be gauged by indicators detailing levels of formal volunteering and the number of people employed by the sector. The Sector will be expected to support the government in many of its service delivery agreements including the following:

- Raising the educational achievements of children from poor and disadvantaged backgrounds
- Increasing the work and accommodation chances of excluded adults
- Halving the number of children in poverty by 2010

- Increasing equality of opportunity for both adults and children in work and education

Although the Office of the Third Sector will offer its unstinting support; the expectations on the Third Sector to contribute to the delivery of a variety of government policies are very ambitious. The sum of £515 million seems to be high but is not significant in terms of public expenditure over the CSR 2007 period.

The Third Sector will also need to work with other public and private agencies to deliver this ambitious policy agenda. There are clear linkages here with local government service delivery. CSR 2007 has imposed a very restrictive resource growth regime on local authorities (Only an average 1% real annual growth rate in resources) over the CSR 2007 period. The Local Authority Sector will still need to deliver services to all its service users without compromising on quality and at the same time achieving savings targets over the period of some £4.9billion (3% per annum cashable savings). The only real growth area for local authority resources is through the mechanism of Local Area Agreement Grants. The latter will change into Area Based Grants from 2008-09.

Local Authorities will have to work with their strategic partners to determine service priorities in their local areas. These determined service priorities will have to be funded under the new grant arrangements. This is where the Third Sector could have a very significant role in working with local authorities at the local area level in helping to determine local priorities, identifying funding needs and assisting in the delivery of local services. It certainly is a real opportunity for the Third Sector to get involved in local service delivery for the benefit of the local populace thereby meeting some of the expectations that central government is placing upon it as part of CSR 2007.

Local Authorities are striving to improve their partnership working approaches by heeding advice from the Audit Commission and others on the need for proper partnership governance arrangements and adequate risk assessments of partnership working. This is only part of the story; there needs to be much closer working between local authorities and the Third Sector to ensure that both these parties have a proper input into the delivery of effective local services. This is being driven by a changing grant regime for local government. Will both these sectors be able to rise to the joint working challenge? Effective and well resourced local services may depend on the success of such joint working arrangements.

Roman Haluszczak November 1, 2007

The Excellence Model

Andrew Turnbull is a Panel member and shares his experiences of the Excellence Model.

Finance managers and finance directors can feel that they spend most of their time either battling with the implementation of the latest tranche of red tape...or being audited to see how they comply. It can be a refreshing change therefore to turn from mere compliance to continuous improvement – a more positive way of looking at changing processes...and this is the basis of the Excellence Model.

Produced by the European Foundation for Quality Management (EFQM), the Excellence Model was introduced to the UK in the early 1990s as the basis for the UK Excellence Award – designed to recognise organisations that have excelled when measured against a framework of excellence.

However there is no need to participate in an external competition. It is designed to be used as a model for self-assessment within an organisation. Designed for all organisations, the Model is easily applicable to charities with minimal adaptation – probably some terminology will need adapting to suit the organisation. For example stakeholders or donors may be a more appropriate description than customers.

The Model works by covering a number of areas, split into “Enablers” and “Results”. There are five “Enablers” covering Leadership, People, Policy & Strategy, Partnerships & Resources and Processes. These in turn create 4 “Results”: People Results, Customer Results, Society Results and Key Performance Results.

Under those 9 headings fall a number of questions to be asked of the organisation. My experience has been to involve teams in that process with some very helpful discussions as a result. The next step is to gather evidence to substantiate the answers to those questions. This is perhaps where the challenge rests – for example we think we know that we have satisfied donors or staff, but can we demonstrate it? Putting it another way we think we know, but we really need to know we know.

When we then have the facts about each issue (or the closest we can get to them), we can identify our strengths and our areas for improvement. From that we formulate an improvement plan...and act on it.

It sounds straightforward and it can be, or like any management tool or theory, it can be overcomplicated. At its heart it is a structured way of thinking about the organisation and business planning. It could simply be adopted as the organisation’s annual planning methodology.

However, I hear you cry, we already have various accrediting bodies wanting similar things – Investors in People (IIP) being a good example. The good news here is that things such as IIP can be (and IIP has been) mapped across to the Excellence Model and so can minimise duplication of effort.

In my view a particular benefit for hard-pressed finance teams is a chance to identify – and celebrate – the strengths of the team and the organisation. So often an audit report’s highest praise can only be that no material weaknesses were found – not very encouraging. However the Excellence Model specifically highlights strengths and this can be a refreshing change. When used with a team the process can therefore be a positive experience.

There are many quality systems around, so why this one? I particularly like the Excellence Model as it presents a flexible framework, is based on self-assessment, acknowledges strengths and can be made accessible for many staff to get involved.

You may be looking for some kind of quality system to satisfy donor or purchaser requirements for grant applications or tenders, if so this could be an option for you. To find out more visit the British Quality Foundation's website at www.quality-foundation.co.uk.

Gift Aid Audits

Andrew Turnbull is a panel member and shares his experiences of gift aid audits.

It is quite reasonable that HM Revenue and Customs (HMRC) come out to check that charities are complying with the gift aid rules. I won't go into whether the rules themselves are reasonable or not – you no doubt have your view!

Whatever your view, the rules are the rules and that is what they are coming out to audit. So my first piece of advice is re-read them. In detail. Then read through their very useful information about what to expect from a gift aid audit – just search for gift aid audit on their website or visit the guidance notes page directly

<http://www.hmrc.gov.uk/charities/guidance-notes/intro.htm> and choose chapter 7. Best to read it now if you haven't done so already, rather than waiting until the letter arrives notifying you of a gift aid audit.

The audit process itself will, of course, vary depending upon the individual auditor that you get. My experience is that they are very helpful and keen to educate as well as ensure compliance. In addition they may also point out where there are particularly good processes – always a helpful boost to staff morale. Ultimately they are trying to do something quite simple – check that the donor actually gave the money, that it went into the charity's bank account, that the donor signed a gift aid declaration and that it was valid. So they will ask for the complete list of donations that make up some specified gift aid claims and then ask to see a sample from that list.

Sounds straightforward – until you try and pull out the records! Many charities have multiple streams of fundraising income, all of which may operate in slightly different ways with different audit trails and gift aid declarations in different formats. Contrast the system of sponsorship forms (for example those completed by children in schools) to the system for one-off donations or membership subscriptions.

The key is to treat each one as a separate system and present them to HMRC as such. My experience was that they then addressed each as a separate audit and any results on one income stream were not carried over to another. For example stronger compliance in one area was not affected by weaker compliance in another area, which could otherwise have resulted in a larger repayment of tax. The obvious conclusion from this is to check that your main income streams have the most robust systems and audit trails in place.

Also consider whether the charity's systems may have changed in recent years. Did the audit trail always work as well as it does today? It is possible that you have recently received gift aid declarations from donors covering gifts in previous years and then put in tax claims very recently for gifts received a few years ago. Can you be confident about pulling out the audit trail for a donation 5 years ago?

The best way to find out how good your systems are is of course to test them yourself. A straightforward piece of internal audit on some recent claims is a useful way to identify any weaknesses. This can give time to sorting out the problem – it could be as simple as improving filing systems to enable retrieval and identify any gaps, or the realisation that some older gift aid declarations are not actually compliant. You may then want to get some donors to sign new declarations that do comply and cover the donations for which you have already put in claims.

Pay some attention to your different gift aid declarations, as always the devil is in the detail. For example have you got couples on the declarations – if so which is the taxpayer? If you can't identify which one is the taxpayer, then it isn't a valid declaration. Another issue is whether the dates are right – i.e. is the wording sufficiently clear about the period that the declaration covers? Declarations cannot now cover all donations from 6th April 2000 as it's more than 6 years ago. Do your current declarations make clear what period they refer to? If they say reclaim tax on all donations from today, are they dated?

Some of the points HMRC pick up can be particularly detailed. For example you may have some excellent, fully compliant, double-sided documents, eg sponsorship forms or letters, but with the donor details on one side and the declaration wording on the other. So where someone photocopies this double-sided form on to two single-sided sheets, how can you still demonstrate the audit trail? How can the auditor know that the declaration relates to the details on the other sheet? This can be particularly an issue if you are scanning documents and relying on images.

Also beware helpful donors or supporters creating their own declarations or children designing their own sponsorship forms – no matter how well-intentioned, if they don't comply fully you will be required to repay the tax.

Overall my experience of HMRC audits has been good, even though some more detailed things were uncovered that passed internal audit checks. Consider taking advantage of the fact that the auditor is on site and looking at your procedures. Ask their opinion - even better have an exchange of letters on any tricky points...and keep it on file for the next audit!

THE COMMISSIONING JOINT COMMITTEE (CJC) GUIDE TO BUYING FROM THE THIRD SECTOR (2006) RESPONDS TO THE INTENSE PRESSURE ON LOCAL AUTHORITIES TO MAKE MUCH GREATER USE OF THE THIRD SECTOR, BOTH BY GIVING FINANCIAL SUPPORT TO THIRD SECTOR BODIES TO CARRY OUT WORK WHICH AUTHORITIES WOULD OTHERWISE HAVE TO DO THEMSELVES, AND BY BUYING SERVICES FROM THEM.

THE FOLLOWING EXTRACT FROM THIS GUIDE WILL WE HOPE BE OF USE FOR NEWSLETTER READERS FROM THE THIRD SECTOR AND THE PUBLIC SECTOR. DETAILS OF HOW TO ORDER THE FULL GUIDE ARE AVAILABLE ONLINE AT:

<http://secure.cipfa.org.uk/cgi-bin/CIPFA.storefront/EN/product/BV021>

PART 3 – THE LEGAL POWERS AND CONSTRAINTS

- 3.01 Neither EU nor UK law stops authorities making fruitful use of the third sector. The constraints of EU law are however sometimes seriously exaggerated.
- 3.02 For present purposes EU law is contained in
- the Treaty of Rome 1957
 - the Consolidating Directive, as transposed into UK domestic law by the draft Public Contracts Regulations
 - EJC judgments interpreting the Treaty and earlier competition and procurement directives.
- 3.03 Part 3 addresses the following aspects of EU law, and its inter-action with UK law
- the European Common Market
 - economic, social and environmental objectives
 - distinguishing buying from supporting
 - responsibility for complying with the Directive
 - state aid
 - contract size
 - letting tenderers influence the specifications.
- 3.04 TUPE will be a major liability for some third sector bodies. It is addressed separately in Part 7.

THE EUROPEAN COMMON MARKET

- 3.05 The Treaty of Rome prohibits authorities from discriminating against service providers on the grounds of nationality (5; 6). Discrimination means giving service providers from other member states less chance of winning contracts than those from the authority's home state. The Treaty applies to all public sector contracts in the EU, even if the Directive does not apply at all (5; 7).
- 3.06 Policies of **local purchasing** were for many years widely seen as being enlightened self-interest. Local purchasing is however precluded by the Treaty of Rome. The ECJ has for this reason ruled that 'buy British' policies are unlawful (1255).

- 3.07 Specifications and tenderer selection and tender evaluation criteria therefore need to be chosen with care. It is for example lawful to specify that food is fresh, but not that it should be locally produced. This would constitute discrimination on the grounds of nationality. There could therefore be objections to using the distance traveled in the production and transport of supplies as a lawful criterion, but not to using the energy consumed in their production and transport.
- 3.08 Requiring the use of **local labour** is likewise unlawful, but requiring priority to be given to the recruitment of **long-term unemployed people** is lawful (**1166**) provided contracts either
- specify the organisation or register from which such people may be identified (**1163**) or
 - allow the employment of unemployed people from **any** member state (**1090**; note 61).
- 3.09 **Subcontracting** often has the effect of transferring work to smaller, and therefore more local, contractors. The Treaty does not however preclude requirements for subcontracting, if these are to encourage S&MEs. This objective is recognised by the Directive (**61**; recital 31, & 25).

This also provides for authorities to require tenderers to provide information as to the share of the contract to be subcontracted, and the names of any proposed subcontractors (**168**; 45).

- 3.10 Practitioners get innumerable opportunities to prompt potential applicants, and to help actual applicants and tenderers, and this guide does its best to identify these opportunities. Practitioners cannot be expected to seek out all overseas service providers who might possibly welcome such help, but it is possible and constructive to do the next best thing, which is to give similar help to any overseas service providers **who there is any reason to believe** might be interested. This is not so much to comply with the Treaty as to minimise the number of possible complainants.

THE PURSUIT OF ECONOMIC, SOCIAL AND ENVIRONMENTAL OBJECTIVES

- 3.11 Authorities are free, in all circumstances, to adopt contract conditions, and also selection and award criteria, which in practice third sector service providers are best able to meet. These conditions and criteria include the pursuit of challenging social and environmental objectives, so long as
- any such objectives are adopted for genuine **service reasons**, and not just to suit third sector service providers
 - they are **linked to the subject matter of the contract** (**168**; 30.2), and
 - this subject matter falls within the **core objectives** of the authority. Contract objectives may not therefore extend to all and every **benefit to society or the environment generally** (**1166**). Non-core objectives may be used only as tiebreakers in the event of what authorities consider to be dead heats (**1089**; II.3.4) (**1090**; I.1.4.2).
- 3.12 Wellbeing powers are however wide, and therefore give 'core objective' status to many of the objectives of most local authorities. This enables them (**46**; 2) (**55**; 21) to do anything

- which **they consider is likely to** (not which **will**) promote or improve the economic, social and environmental welfare of their areas
 - and which, in England and Wales, is provided for by their community strategies (**46**; 4.1).
- 3.13 These powers may thus be exercised in such a way as to ensure that procurement promotes a wide variety of economic, social and environmental objectives. They do nevertheless have limits. Sustainable development for example is a legitimate wellbeing objective, because it contributes towards the environment in the authority's area, whereas more abstract ethical considerations would not. They could be considered only as tiebreakers.
- 3.14 There is no constraint on the **extent** to which selection and evaluation criteria may reflect wellbeing objectives. Indeed, for some contracts (for example for regeneration projects) wellbeing objectives are the **sole** objectives.
- 3.15 Local authorities with wellbeing powers are
- in **England and Wales**, all councils except parish and community councils (**46**; 1)
 - in **Scotland**, all councils, joint fire boards and joint police boards (**55**; 61(c)(iii)).
- 3.16 The Directive and the draft Regulations provide as follows for authorities to take social and environmental factors into account within the limits of contract subject matters and core objectives
- **contract conditions** – “a contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law...The conditions may include social and environmental considerations” (**168**; 39)
 - **selecting tenderers** – “a contracting authority may have regard to...environmental management measures...but only where it is necessary for the performance of that contract” (**168**; 25.2.h)
 - **tender evaluation** – “a contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including...environmental characteristics” (**168**; 25.2.h); and authorities “may use award criteria aiming to meet social requirements” (**61**; recital 46).
- 3.17 Both the Directive and the draft Regulations are necessarily drafted with all public bodies in mind, not just the local authorities which have wellbeing powers. Their terms therefore reflect the limited social and environmental objectives of most such bodies. There is however nothing in these provisions to **restrict** the pursuit, in procurement or any other field, of local authorities' wider objectives. The contribution which different tenders would make to economic regeneration would for example be a legitimate criterion in tender evaluation.

DISTINGUISHING BUYING FROM SUPPORTING

- 3.18 The difference may not always be obvious to all the parties. Negotiations may in any case turn one into the other.
- 3.19 But in local government there is a **statutory** difference. Local authorities may

- buy, broadly, anything which they consider necessary to the exercise of their statutory functions (11; 111) (12). **Who** they buy from is then normally dictated by value for money and propriety
- **give financial assistance** to any person in order to achieve any of their wellbeing purposes (46; 2.4.b) (55; 20.2.b). A 'person' for this purpose includes a 'body' of any type (15a; 1). Authorities often select bodies to support because these bodies are who they are, and because authorities approve of what they do.

3.20 Financial **support** does not therefore necessarily create or imply any contract. If it does not, there can be no question of the Directive applying.

3.21 On the other hand, when support is agreed it is often **in consideration** for VCOs carrying out specified activities, or achieving specified outcomes. Where so, VCOs have what are, in UK law, enforceable contracts. They are entitled to payment in the event of due delivery, just like any other contractor.

3.22 Support is often a contribution **towards** costs, not intended to cover **all** costs. The contract is unlikely then to be subject to the Directive.

3.23 If on the other hand **full reimbursement** is agreed, the contract appears almost certain to be subject to the Directive, although the point has not been tested. The Directive is expressed to apply

"whenever a contracting authority seeks offers in relation to a proposed public Part A services contract" (168; 5.1)

and it defines a public services contract as

"a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services" (168; 2.1).

If indeed a contract is subject to the Directive, and is for a Part A service above the thresholds, it has to be advertised.

3.24 The full reimbursement of costs has been widely urged, most recently by the NAO in **Working with the Third Sector**, extracts of which are attached as Appendix J. This consequence of full reimbursement does however need to be kept in mind.

3.25 Many if not most such contracts are however likely to be for Part B services. The Directive does not then require advertisement, so that it makes little difference whether or not support constitutes procurement. Value for money applies in exactly the same way to both. Will support to any given VCO for example secure the same contribution to wellbeing as a contract of equal value awarded to a selected third sector or private sector body? Will a new decision to give support have the effect of reducing the take-up of a contract currently in progress?

RESPONSIBILITY FOR COMPLYING WITH THE DIRECTIVE

3.26 The normal rule is that local authorities are directly responsible, and third sector bodies are not responsible at all. There are however the following exceptions to this rule

- local authorities may buy from some types of third sector bodies without the Directive applying to either
- some third sector bodies are subject to the directive when buying from third parties.

- 3.27 A contract of any sort let by a contracting authority is **not** subject to the directives (1092) if it is awarded to another body **over which the contracting authority exercises similar control** to what it exercises over its own departments, for example a wholly owned company for which the authority appoints all the directors. In other words, the Directive treats all such contracts as being internal transactions.
- 3.28 The Directive **applies directly** (168; 3) to any bodies, including any third sector bodies, which, although not public bodies, meet **all** the following criteria. They have to be,
- corporate bodies
 - governed by public law
 - established to meet needs in the public interest
 - not commercial or industrial in character and
- bodies for which other contracting authorities
- provide more than half the finance needed for their functions, **not** including (1161) payments for services provided by the body under consideration
 - supervise the management
Or – appoint more than half the directors.
- 3.29 They therefore include local authority companies which are companies limited by guarantee, universities and most other academic bodies, housing associations and ALMOs.
- 3.30 These bodies are therefore directly responsible for complying with the Directive **when placing their own contracts**.

STATE AID

- 3.31 The Treaty of Rome 1957 precludes state aid (covering broadly the use of any type of public funds) to distort competition, so far as it affects trade between member states (5; 87.1) whether or not the Directive applies. In other words, state aid may not be given to service providers of any sort if it has the effect of subsidising their tenders for contracts which overseas service providers may tender for.
- 3.32 There are a number of exemptions, including aid given to any bodies for the purpose of
- regional economic development (5; 87.3(a))
 - culture and heritage conservation (5; 87.3(d))
- but before authorities may make payment, they have to **check with the Commission** whether it considers that the proposed aid is compatible with the common market (5; 88).
- 3.33 There are also exemptions which do not require reference to the Commission, but do have to be **recorded** by member states. The DTI does this in the UK. The exemptions are

- a de minimis limit of €0.1m (applying to the aid paid to any one service provider during any three-year period) but it is not available for aid for any transport-related or agriculture-related activity (**1228**)
- for vocational training, up to specified levels which depend on
 - the types of training and trainee
 - whether the enterprise is medium-sized or small
 - whether it is in an area which qualifies for regional aid

and up to a project maximum of €1m (**1227**)

- for S&MEs at specified levels, depending on
 - the type of aid
 - whether the enterprise is medium-sized or small
 - whether it is in an area which qualifies for regional aid

and up to a project maximum of €25m (**1229**)
- subsidies for providing public services (**1230**), for example public transport services, provided
 - the basis for calculating subsidy is established in advance **and**
 - **either** the service provider is selected in accordance with the Public Contracts or Utilities Directives
 - **or** the estimated costs do not exceed what a typical well-run service provider would be expected to incur.

3.34 The constraints on state aid would not therefore apply to

- grants of any amount to bodies of any sort for activities which do not involve trading
- grants (even if for more than €0.1m) to social enterprises whose trading would not involve competition with bodies in other member states (though the absence of such competition would need to be agreed in advance with DTI).

3.35 State aid is a complex subject about which guidance from the Commission is as yet patchy. Practitioners can follow the latest moves on www.dti.gov.uk/ccp/stateaid

ADVERTISING

3.36 The Treaty of Rome does not require equal advertising coverage at home and abroad, for contracts below the thresholds for the application of the Directive, or for Part B services. This is because the express requirements of the Directive for equal coverage do not then apply. The Treaty nevertheless still requires 'reasonable publicity' where the Directive does not apply (**1263**).

3.37 The ECJ did not in this case suggest any de minimis level, below which no publicity at all is required, but there has to be such a limit, otherwise every petty cash purchase would have to be advertised. Reasonableness is therefore the test both as to **whether**, as well as to **how much**, publicity is required. There is no reason to believe that the limits widely adopted by UK authorities in their standing orders are 'unreasonable'.

MAKING CONTRACTS SMALL ENOUGH FOR SMALL TENDERERS

3.38 The Directive includes no requirements as to contract size. There is no presumption that contracts must whenever possible be aggregated. For the purposes of the

Directive, aggregation means only that the values of all contracts within a given 'requirement' have to be aggregated in order to decide whether they have to be advertised in OJEU (**168**; 8.11). It does not stop any desired procurement being packaged as a separate contract.

LETTING TENDERERS INFLUENCE PACKAGING, CONTRACT PERIODS AND SPECIFICATIONS

- 3.39 In the absence of clear judgments from the ECJ, exaggerated assertions are often made about the effect of the Treaty of Rome – for example that it is discriminatory to put any potential tenderer at a disadvantage. This is of course fallacious because there are few client decisions which are not advantageous to some tenderers and disadvantageous to others. Such decisions are lawful even if this effect is intentional, where for example changes of any sort are made in the hope of attracting better tenders from different tenderers.
- 3.40 Authorities do however have to be careful **when the Directive applies** not to accept advice about specifications from any tenderer, pre-contract, which then has the effect of hindering all other tenderers from tendering (**42**; recital 10) (**50b**; intro 3.4) (**1249**; 1.3.1). The only exception is when tendering is in accordance with the competitive dialogue procedure (**168**; 18) which provides specifically for tenderers to put forward their own specifications.

ANNEX TO PART 3 – EXTRACTS FROM THE CJC STANDING GUIDE TO THE COMMISSIONING OF LOCAL AUTHORITY WORK AND SERVICES

PART 1 – Do the directives apply?

WHY THIS MATTERS

1.01 If either directive requires a **contract notice** to be placed in the Official Journal of the EU, this usually makes major differences to methods of advertisement, selecting tenderers, evaluating tenders, and negotiating with tenderers and contractors.

BODIES SUBJECT TO THE PUBLIC CONTRACTS DIRECTIVE

1.11 The Directive applies to 'contracting authorities' which it defines (**168**; 3) as including any of the following local and regional authorities, statutory joint authorities, government departments, and the many other bodies (all listed in the directives) which are generally recognised as being public bodies

- corporate bodies which are
 - governed by public law
 - established to meet needs in the public interest
 - not commercial or industrial in character

and

for which contracting authorities

- provide more than half the finance needed for their functions, not including (**1161**) payments for services provided by the company or trust
- supervise the management

or

- appoint more than half the directors

for example local authority companies which are companies limited by guarantee

- associations (which do not have to be corporate bodies) formed by contracting authorities. This would include any non-corporate partnership which is set up by any contracting authority, and which (unusually) award contracts in its own name
- works concessionaires, when placing subcontracts. Works concessionaires are contractors to which other contracting authorities have awarded works concession contracts and
- discrete operational units (**168**; 8.15) (**169**; 11.11), for example school governing bodies, when acting as clients in the exercise of delegated budgets. They count as **separate authorities** for the purposes of the Directive.

- 1.12 A contract let by a contracting authority is not however subject to the directives (1092) if it is awarded to another body of which the contracting authority exercises similar control to what it exercises over its own departments, for example an 'arm's-length' management organisation.
- 1.12 The Utilities Directive is framed differently from the Public Contracts Directive, and applies to all bodies which carry out activities whose object is one of the specified utilities (169; 3.1). The word 'utilities' is used (even in the directive) both for these activities, and for the bodies which carry them out.

SERVICES, WORKS AND SUPPLIES

- 1.14 There are no generic definitions of services, supplies or works, but
- there are innumerable examples of each in the EU's CPV (Common Procurement Vocabulary). These example do however vary widely in the degree of detail provided, with thousands of sub-headings for some main headings, and none for others
 - **works** appear from the many entries in the CPV, and from the lengthy definition of **works contracts** (168 & 169; Sch 2) to comprise all blue-collar building and civil engineering construction and maintenance work
 - **supplies** include leasing under both financing and operating leases (168; 2.1) as well as purchase
 - the acquisition of off-the-peg software and of computer hardware are supplies, not services
 - the directives specifically exclude the acquisition of land and buildings, telephony, arbitration, dealings in financial instruments, banking, and research & development (168 & 169; 6).
- 1.15 The services listed in the CPV are grouped under 27 main categories of services.
- 1.16 The Directive applies in full (168; 2.2 & Schedule 2) (169; 2.2 & Schedule 3) to any contracts for the 16 categories of Part A services which are above the various thresholds described later. The Part A services are as follows

Category	CPC Rating
1 Maintenance and repair of vehicles and equipment	6112, 6122, 633, 886
2 Transport by land, including armoured car services and courier services but not including transport of mail and transport by rail	712 [except 71235], 7512, 87304
3 Transport by air but not transport of mail	73 [except 7321]
4 Transport of mail by land, other than by rail, and by air	71235, 7321
5 Telecommunications services other than voice telephony, telex, radiotelephony paging and satellite services	752
6 Financial services	81 [Part] 812, 814
a Insurance services	
b Banking and investment services other than	
– financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments	
– central bank services	
7 Computer and related services	84
8 R&D services where the benefits accrue exclusively to the authority for its use in the conduct of its own affairs and the services are to be wholly paid for by the authority	85
9 Accounting, auditing and book-keeping services	862

Category	CPC Rating
10 Market research and public opinion polling services	864
11 Management consultancy services and related services, but not arbitration and conciliation services	865, 866
12 Architectural services:	867
engineering services and integrated engineering services:	
– urban planning and landscape	
related scientific and technical consulting services:	
– technical testing and analysis services	
13 Advertising services	871
14 Building-cleaning services and property management services	874 82201 to 82206
15 Publishing and printing services on a fee or contract basis	88442
16 Sewerage and refuse disposal service: sanitation and similar services	94

THRESHOLDS

- 1.17 The thresholds are (168; 8) (169; 11)
- €0.236m for services and supplies
 - €5.923m for works.
- 1.18 The value of any contract for the purposes of the thresholds is total estimated payments under the contract (net of VAT) (168; 8.7) (169; 11.4) plus
- the estimated value of any fees, options, commission and interest (168; 8.8) (169; 11.5)
 - the estimated value of any contract renewal available (168; 8.8) (169; 11.5)
 - for works, the estimated cost of any materials provided by the authority (168; 8.16) (169; 11.16).
- 1.19 Contracts for a 'single requirement' have to be aggregated, except any contracts which are (168; 8.11 & 8.12) (169; 11.8 & 11.9)
- less than €0.08m for services and supplies, or €1m for works
- and**
- not more than 20% of the total value of all lots in the requirement.
- 1.20 Requirements also have to be aggregated (168; 8.13 & 8.14) (169; 11.11) if they are to be met by a renewable contract or a succession of contracts which
- have similar characteristics
- and**
- are for the same type of service or supplies.
- 1.20 The annual value of renewable and successive contracts has to be estimated for this purpose (168; 8.14) (169; 11.11) from
- their total value in the previous 12 months or financial year, adjusted for known changes
- or
- estimated value in the first 12 months.
- 1.22 Supplies contracts without fixed periods are taken to be for four years (168; 8.9) (169; 11.6).
- 1.23 For works, a work is defined as being "the outcome of any works which is sufficient of itself to fulfil an economic or technical function" (168 &

169; 2.1).

- 1.24 For framework agreements and dynamic purchasing systems, estimated values are to be for their whole periods (168; 8.17) (169; 11.16).
- 1.25 No procurement may be subdivided for the purpose of getting it below the thresholds (168; 8.18) (169; 11.17).

PART 42 – The third sector

THE TREATY OF ROME

- 42.07 The Treaty applies to all public sector contracts in the EU even if the directives do not apply at all (5; 6).
- 42.08 This means that policies of **local purchasing**, and fragmentation for the purpose of encouraging it, are unlawful (1255).
- 42.09 Local purchasing was for many years nevertheless widely seen as being enlightened self-interest. It is however not within even the wide reach of wellbeing powers, because these do not apply to anything which is specifically precluded by other legislation (46; 3) (55; 21(1)). This includes the Treaty of Rome.
- 42.10 The objections to local purchasing apply, for the same reason, to specifying the **use of local labour**.
- 42.11 Requiring priority to be given to the **recruitment of long-term unemployed** is different. This is lawful (1166) provided (1163) contracts either
- specify the organisation or register from which such unemployed people may be identified
- or
- allow the employment of unemployed people **from any state** (1090; note 61).
- 42.12 It is in addition lawful to ask tenderers how much work they propose to sub-contract, if for the purpose of encouraging SMEs (61; recital 31, & 25).
- 42.13 Welcome side effects from employing the third sector are often obtained. But, however welcome, some of them have to be left out of account at all stages of commissioning the work. These side effects include the encouragement of the local economy.
- 42.14 A further constraint for some authorities is that **tenderer selection and tender evaluation criteria** have to represent benefits **to the authority** awarding the contract, not **to society or the environment generally** (1166). Wellbeing powers can however be used lawfully and properly to give many objectives the status of benefits to the authority, so long as not specifically precluded by other legislation.
- 42.15 The use of wellbeing powers to give contract objectives the status of benefits to the authority removes any obstacle to adopting

evaluation criteria which many third sector providers are well placed to address.

42.16 **Packaging options** need for the same reasons to be for the benefit of the authority, and not solely to give the third sector any advantage.

42.17 There are therefore few if any occasions for **using third sector providers merely because that is what they are**. They are however likely often to be the best, and possibly the only, service providers willing and able to do the work.

42.18 If they are, the right selection and tender evaluation criteria will identify them. But there may be other equally willing and able service providers who are not in the third sector, or not from the UK. The same criteria will identify these other contractors too, and if so they must of course be treated equally.

PART 37 – Packaging

PRE-CONTRACT ADVICE

37.44 The competitive dialogue procedure provides for tenderers to advertise contracting authorities pre-contract about any feature of any type of contract, including its packaging, period, and estimated value. There is no doubt that the right economic operators can give excellent advice about all such features. This is not however lawful for any other procedure (**50b**; intro 3.4) (**1249**; 1.3.1).

PART 67 – The Treaty of Rome

STATE AID

67.01 The Treaty of Rome 1957 precludes state aid (covering broadly the use of any type of public funds) to distort competition as far as it affects trade between member states (**5**; 87.1).

67.02 The Commission treats

- loans, guarantees, consultancy advice and advertisements, if free of charge or at favourable rates
 - tax relief or deferment
 - sales of assets at favourable rates
- as all constituting forms of state aid.

67.03 NNDR relief appears to count as tax relief.

67.04 There are exemptions including aid for

- social purposes (payable to users not producers) (**5**; 87.2)
- regional economic development (**5**; 87.3(a))
- culture and heritage conservation (**5**; 87.3(d))

but before payment may be made, the Commission has to be asked whether it considers that the proposed aid is compatible with the common market (5; 88).

67.05 There are also exemptions which do not require reference to the Commission, but do have to be recorded by member states. The DTI does this in the UK. The exemptions are

- a de minimis limit of €0.1m (applying to the aid paid to any one enterprise during any three-year period) but it is not available for aid for any transport-, agriculture- or export-related activity (1228)
- for vocational training at specified levels, depending on
 - the types of training and trainee
 - whether the enterprise is medium-sized or small
 - whether it is in an area which qualifies for regional aidand up to a project maximum of €1m (1227)
- for S&MEs at specified levels, depending on
 - the type of aid
 - whether the enterprise is medium-sized or small
 - whether it is in an area which qualifies for regional aidand up to a project maximum of €25m (1229)
- subsidies for providing public services (1230) provided
 - the service obligations are clearly defined
 - the basis for calculating subsidy was established in advance
 - subsidy does not exceed the estimated cost of the service, less estimated revenues, plus a 'reasonable' profit
 - either the service provider was selected in accordance with the procurement directives or the estimated costs do not exceed those which a typical well-run service provider would be expected to incur.

67.06 The constraints on state aid would **not therefore** apply to

- grants of any amount to bodies of any sort for activities which do not involve trading
- grants (even if for more than €0.1m) to social enterprises whose trading would not involve competition with bodies in other member states (though the absence of such competition would need to be agreed in advance with DTI).

67.07 The constraints **would** probably apply to

- the write-off by authorities of losses by
 - ExTOs
 - ExTraCos
 - InTOs operating following VCT

equity investments in LACos or joint ventures, at favourable terms as to likely returns but the point has not yet been tested.

67.08 If some of the tenderers receive state aid of any sort, the distortion of competition can be avoided, in tender evaluation, by adding back the state aid to the tenders of its recipients.

67.09 The normal accounting treatment of VAT in local government removes the need for any such adjustments for VAT in tender evaluation, even where the tenderers have different VAT status.

SOURCES

- 5** Treaty of Rome 1957
- 11** Local Government Act 1972
- 12** Local Government (Scotland) Act 1973
- 42** EU (Amending) Directive 97/52
- 46** Local Government Act 2000
- 50b** EC Proposed (Consolidating) Procurement Directive 2000/0115 (COD)
- 55** Local Government in Scotland Act 2003
- 61** Coordinating EU Directive for services, supplies and works 2004
- 168** the draft Public Contracts Regulations 2006
- 169** the Draft Utilities Contracts Regulations 2006
- 1089** Commission Interpretative Communication on the Community law applicable to integrating environmental considerations into public procurement – COM(2001) 274 final
- 1090** Commission Interpretative Communication on the Community law applicable to integrating social considerations into public procurement – COM(2001) 566 final
- 1092** ECJ ruling C107/98 (Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia)
- 1161** Case C-380/98 R v HMT ex parte University of Cambridge ECJ – Judgment of 3 October 2000
- 1163** Commission vs the French Republic (Nord Pas de Calais) (C225/98) 1166 Gebroeders Beentjes BV v the State (Netherlands) (C-31/87)

- 1166** Gebroeders Beentjes BV v the State (Netherlands) (C-31/87)
- 1227** Commission Regulation (EC) 68/2001 (exemption for training)
- 1228** Commission Regulation (EC) 69/2001 (de minimis limit for state aid)
- 1229** Commission Regulation (EC) 70/2001 (exemption for S&MEs)
- 1230** ECJ Case C-280/00 Altmark 24 July 2003
- 1249** European Agency for Reconstruction Survey on Public Procurement – review procedures and bidders’ rights December 2003
- 1255** Harmon CFEM Façades (UK) Limited v the Corporate Officer of the House
- 1256** of Commons 1999
- 1263** Case C-195/04 – EC v the Republic of Finland (the Senaatti-kiinteistot case)

Below is the link to the consultation document : **Financial Thresholds in the Charities Acts - Proposals for Change**

http://www.cabinetoffice.gov.uk/third_sector/Consultations/current_consultations/financial_thresholds_charities_act.aspx