

THE CJC's RESPONSE TO THE PASC ISSUES AND QUESTIONS PAPER

Commissioning Public Services from the Third Sector

Who we are and why we are responding

The **Commissioning Joint Committee** comprises nominees of organisations representing all the disciplines involved in the commissioning of local authority work and services. We publish guides to many aspects of commissioning, particularly those posing problems needing input from a range of disciplines.

The CJC is sponsored by CIPFA but is an independent body, does not accept funding from any source, and meets all its expenses from the sale of guides. Our website is at <http://www.cipfa.org.uk/pt/cjc/index.cfm>

The layout of our response

Selected PASC questions are in italics and our response to each such question then follows (indented, upright).

Background: The Third Sector and Commissioning The government's push . . . is part of a wider policy agenda of contestability, or opening up markets for public services to new suppliers from the private and third sector.

Under this model, public, private and third sector suppliers compete for public service contracts on a truly 'level playing-field' without discrimination on the basis of their sector membership . . .

We appreciate that that is part of the background, not a question, but we think it contains a misconception about level playing fields which underlies a number of the questions which we address later.

We entirely agree that playing fields have to be level. By this we mean that there must be no unnecessary impediment to serious tenders of any sort; and that, if clients can do anything to help any sort of competent tenderer to compete which does not hinder other such tenderers, then they should do that too. But this will not be enough to help members of the third sector, except perhaps some of its biggest members, to win more work in competition. What the sector needs is instead for clients to exercise some of their many legitimate client discretions differently from now.

For services, clients first have to decide whether to package big or small, for a single skill or several, and for all types of service users or separately for each type. It is a pipedream to suppose that many of the resulting options will please all types of prospective tenderers equally. There are for example no packages which would attract both the biggest tenderers and the smallest. Clients sometimes try to get the best of both worlds by lotting (packaging big and then allowing tenders for individual lots) but it is in practice unusual for clients to get enough small lots to cover the whole of the work.

Clients can in addition choose from an immense and valuable range of contract conditions, specifications, payment mechanisms, and tenderer selection and tender evaluation criteria. The options then chosen may serve to bring out the special strengths of some types of tenderers, thereby identifying the relative weakness of other types. Similarly, some specifications may make compliance easier for some tenderers, but harder and more expensive for others.

When as usual intelligent clients cannot suit all types of tenderers, they have to make up their minds which type of tenderer is likely to provide the best outcomes overall. All types of tenderers are nevertheless still welcome, and if in the event the best tender comes from an unexpected source, this is of course a bonus. But it would be the exception, not the rule, and would not invalidate the client's original choices. There is nothing new about all this - it is nothing to do with creating a level playing field; it is instead what any intelligent client has to do.

It follows that what the third sector needs, if it is to win significantly more contracts, is not only a level playing field, which we hope most of them enjoy already. More importantly, it needs a re-think of packaging, specifications and all the other client options. It is also what client authorities need to do whenever they believe that the third sector is most likely to contain the best tenderers.

Key questions

1.b *Is loss of accountability a threat of commissioning services? If so, how can this best be managed?*

Nobody can stop the line of communication (between client authorities and service providing staff) being lengthened by contracting out. But accountability is not then lost, it just gets more expensive. Authorities nevertheless continue to contract work out, because its advantages often outweigh such disadvantages. We see no reason why using the third sector should in this respect be any different from using the private sector.

3.a *Will contractual relationships with the state improve stability within the third sector?*

Having contractual relationships with the third sector will give public sector clients a strong interest in its stability, and there is a great deal which clients can do to protect it. This calls for

- ◆ payment mechanisms which protect contractors against steep and arbitrary changes in the volume of orders, which are often unavoidable. Unit rates for example often need to be stratified more sharply, for example, so that they are high enough at the bottom of the range cover contractors' fixed costs when volumes are unexpectedly low; and low enough at the top of the range not to make contracts unaffordable when volumes are unexpectedly high
- ◆ the simplification and abbreviation of contract documents. Small contracts do not need every possible nuance and contingency to be covered in the same way as for large contracts
- ◆ the least possible prescriptiveness as to methods. Third sector bodies often use unconventional (and sometimes startling) methods, and readily change such methods of their own volition whenever different methods look more fruitful, and are best left free to do so
- ◆ abstinence on the part of clients from driving unduly hard bargains. Influential clients can and often do secure heroic tenders, but these are seldom good business for either party. Although expressed to be enforceable, the courts are in any case often unwilling to enforce them

3.b *Will close involvement with service provision prevent third sector organisations retaining the ability to be critical of government?*

Criticism of central government is unlikely to affect, or be affected by, contracts with local government. Whether it will be affected by contracts with central government will depend in the long run on how ministers react to criticism. We hope they will not react at all, or not adversely.

3.d *Is there a risk that third sector organisations will lose their independence, their identity or their distinctive ethos?*

It is hard to believe that there will be no such effect at all, if indeed increasing use of the third sector is sustained. Clients can however minimise it by

- ◆ matching their specifications, and their selection and evaluation criteria, as closely as they can to the abilities sought from the third sector bodies which they want to attract to the service under consideration. The more sensitively and effectively that clients do this, the more likely that contracts will reinforce the ethos of third sector bodies, rather than erode it
- ◆ avoiding imposing on small third sector tenderers the same insurance requirements and financial standing criteria that they impose on large private sector contractors. There is no point in trying to make third sector bodies act more like private sector bodies, or in forcing them to insure at high cost with reluctant insurers. Client bodies ultimately have to pay anyway, so that requiring small contractors to take out insurance puts clients in the same position as if they were themselves

insuring a multitude of small risks with high chances of occurrence, which for large organisations is not cost effective

3.e *Might the third sector become polarised between large service providing organisations and more radical groups? If so, would this matter?*

Giving any sort of business to any sector must be expected to have the effect of making some of its members bigger. Whether this would tend to make them less radical is a separate question, which we tried to answer at question 3.b, and we hope that third sector bodies will be encouraged to carry on with any campaigning which they think fit.

We do in any case see no correlation between small size and radicalism. Some of the biggest and longest-standing voluntary organisations have always been forceful and intrepid campaigners.

4.a *Does the state risk losing control of service delivery in a way which might be damaging?*

There is certain to be some perceived loss of control. One of the strengths of voluntary organisations which work with vulnerable and disadvantaged people is that such people do not normally perceive third sector staff or volunteers as being 'officials'. Any such 'loss' is likely to be counted as one of the advantages of using the third sector.

It is of course always possible that small voluntary organisations will use methods so unconventional as to embarrass client authorities. To strike the right balance, client officers will need a good grasp of two disparate subjects, namely of contract law and practice, and of the real world in the service areas in question. There will at first almost certainly be a shortage of such practitioners.

4.b *What capacity will the state need to ensure that it can be an intelligent customer of services?*

All stages in commissioning call for the same range of expertise and knowledge as just mentioned. This suggests to us that it would be unconstructive to force (for example by legislation) the pace at which third sector services are taken up.

4.c *How is duplication of effort in order to monitor and manage contracts best avoided?*

Some duplication is unavoidable whenever any work or services are contracted out, for the reasons given in answer to question 1.b. It can however be reduced by

- ◆ rationalising all the different data needed for making contract payments, supervising output, updating personal records, and ordering essential support services. The more often that one piece of data can serve several such purposes, the better
- ◆ eliminating the number of different clients' personnel who have to visit the same end users, or the same sites. This means rationalising their duties in the same way as for data

It has to be accepted that this also reduces useful occasions for cross-check between different types of data, and the work of different officers. Judgements will have to be made as to how far it is safe to go in the pursuit of economies, and experience will from time to time no doubt trigger reappraisals of such judgements.

4.d *How good is the state at managing bidding processes and defining contractual obligations when commissioning services?*

This debate is academic unless it is thought possible that the public sector is so bad at the jobs in question that it would be better not to commission work from the third sector at all. We know of nobody with knowledge of the subject who goes that far.

It seems more constructive to look constantly for ways in which both jobs can be done better. We have done our best to suggest improvements in our own recent Guides to Buying from the Third Sector, and Commissioning Social Care.

5.b *Are there 'hidden costs' such as contract oversight ?*

There are always costs to any type of contracting out. They are not so much hidden as unquantifiable. Many attempts were made to quantify them when competition for most work and services was compulsory in local government, but with no success. There is no reason to expect any similar attempt at quantification to succeed in the case of commissioning services from the third sector. Client authorities therefore have to make their own judgements about whether to go ahead with contracting out.

5.c *Are the benefits of the third sector participation in public service provision so great that it is appropriate to have financial rules which encourage this, or should the aim be to have "competitive neutrality" between public, private and voluntary sectors ?*

Financial and other rules have been tried for different sectors but most have had short shelf lives. They have in some cases been lobbied for by service providers but have failed to command the respect of practitioners. These would almost certainly prefer voluntary guidance, of which there is no shortage. Apart from our own Guides, a steady flow of guidance is likely from OGC and, in local government, from the Society of Chief Procurement Officers, the Improvement & Development Agency and the Regional Centres of Excellence.

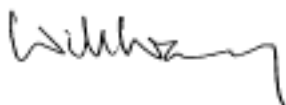
Competitive neutrality is unattainable if it means commissioning in such a way as to make contracts equally attractive to all three sectors. This is for the same reason, which we try to explain in our notes under 'background', that a level playing field is not enough. The decision as to which sector is likely to serve best has to come first, and the competition comes afterwards.

6 *Are the costs and benefits to the state the same when commissioned from the third and private sectors ?*

This is a fair rhetorical question, but we prefer not to answer it. Generalised judgements of this sort can only be highly subjective, and all participants will no doubt form their own.

It seems however inevitable that there will be horses for courses. Different types of service provider will be top of class in different specialisms. The sooner that judgements about their relative merits gain wide acceptance, the sooner that practitioners will be able to adapt their packaging and other procurement strategies to the types of service provider most likely to perform best.

We hope that there will be plenty of other guidance and research focused on bringing out this sort of information.



Will Werry, chair, CJC
02.03.2007