

THE CJC's RESPONSE TO CLG THIRD SECTOR STRATEGY DISCUSSION PAPER JUNE 2007

Who we are

- 01** 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.
- 02** We strongly support any steps to make the best possible use of the third sector. We have in fact published our own practical Guide to this subject. A note about our Guide, including a table of its contents, is at <http://secure.cipfa.org.uk/cgi-bin/CIPFA.storefront/EN/product/BV021>
- 03** 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>

Why we are responding

- 04** This response is our reply to Question 1 in the Paper - **how effectively do we implement Compact principles ?**
- 05** We think the Paper sets out the desired outcomes very clearly. But, like the Compact itself, it contains no analysis of the reasons why these outcomes have not so far been secured. Without such an analysis, we think that **any results will be modest, and short-lived.**
- 06** What seem to us to be fundamental questions are hardly ever addressed, and the Consultation Paper does not do so. It does not for example try
- ◆ to explain, in any of its references to greater use of the third sector, the distinction (which we address in our paras 10 to 14) between
 - awarding **more contracts** to third sector bodies and
 - giving them **more grants**; and if so to explain the constraints on guaranteeing full reimbursement
 - ◆ to make clear, whenever arguing for some or other change of service provider, whether they are talking about **big third sector service providers or small.** This choice usually makes a decisive difference (explained in our paras 15 to 20) to how client authorities set about securing change, and to the benefits
- 07** Self evidently there are material pros and cons to all these options. Authorities will be deceiving themselves if they are encouraged to suppose that all the pros, and none of the cons, will apply in any instance. Authorities and their advisers will need to make informed choices, and identify the (often controversial) factors which will have to be addressed before making them.
- 08** Two other conspicuous omissions are
- ◆ to acknowledge that if substantially more services are to be provided direct by the third sector, other service providers will **provide substantially less.** This calls for some fundamental changes in how competition is conducted, and all parties will need to understand what changes these are, and why they are being made (our paras 21 to 23)
 - ◆ to make clear, when pressing for the transfer of many public sector assets to third sector bodies, whether it is **their management or their title** whose transfer is being urged. We believe that the Quirk Review made a strong case for the former; but not for the latter. We know of few supporters in local government for the transfer of title (our paras 24 to 28)
- 09** We enlarge on our suggestions below.

Is it a contract or a grant ?

- 10 We see the value of both processes. They are however mutually exclusive.
- 11 **Contracts** for their part are normally advertised. For all except small contracts this is almost always required by the EU directives, value for money, or standing orders. And if contracts are advertised, they are thrown open to all sectors, and no tenderer can then be rejected for coming from the wrong sector.
- 12 **Grants** differ fundamentally from contracts. They can properly and lawfully be given to whoever any donor believes to be the worthiest recipient. But if both parties commit themselves (as to what work is to be done, and the payment for doing it, respectively) grants become contracts, and are liable to competition. A contract is a contract, and it makes no difference if the parties agree to call it something else.
- 13 We appreciate that grants have been given since time immemorial on the basis of all sorts of arrangements. Case law on the subject leaves many questions open, but it has been generally accepted that most such arrangements have not created contracts. But if authorities are going to commit themselves to reimbursing the cost of any work, for example by accepting tenders for it, they have to know what type and quantity of work this is. Apart from anything else, they will not otherwise know what work to stop doing themselves. Equally, if third sector bodies are to do work of a type or quantity which they have not done before (unavoidable if greater use is to be made of the third sector) they cannot commit themselves to doing so without knowing that they will be paid for it in full.
- 14 This suggests that funded work becomes a contract as soon as the funded body requires full reimbursement. If so, there is **no such thing as the full reimbursement of grant-aided work**. Any expansion in the volume of third sector work will have to be via contracts.

Which type of third sector body ?

- 15 We entirely accept 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 so. But this will not help many smaller third sector bodies to win more work in competition. This will happen only if client authorities exercise some of their many legitimate client discretions in ways which will also have the effect of making contracts less attractive to big service providers.
- 16 In the real world clients always have to decide first whether to package big or small, for a single skill or several, and to suit all types of service users or just some. It is a pipedream to suppose that many of the resulting options will please all types of prospective tenderers equally. There are 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 this seldom works because it is in practice rare for clients to get tenders for enough small lots to cover the whole of the work. This in turn is because large service providers generally have no incentive to tender competitively for anything less than the whole contract.
- 17 Clients can in addition choose from an almost unlimited range of valid and constructive 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.
- 18 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. There is nothing new about all this - it is what intelligent clients have to consider every day. All types of tenderers remain welcome, and if in the event the best tender comes from some unexpected source, this is of course a bonus. But it would be the exception, not the rule, and would not on its own demonstrate that the change of packaging strategy was unnecessary.
- 19 The reason why more third sector bodies are not winning more contracts already is not therefore because procurement staff need more of different training. They know what to do already. We suspect that the

reason is, instead, that many client authorities are **not yet convinced** that all the many packaging changes called for are justified. The case usually made for the greater use of the third sector has relied too much on generalisations, and needs support by more specific evidence if it is to carry more conviction with practitioners.

- 20 We believe that training is indeed needed, and that the greatest need is for the training of small third sector bodies (and other small businesses) in tendering and preparing for public sector contracts, and for firm price contracts generally. There are objections to public bodies giving training or any special help to some only of their own potential tenderers, but there are better ways of providing the necessary training. This is for local authorities, using their wellbeing powers, to offer such training to all such service providers in their own areas, regardless of whose contracts they may be tendering for. Some authorities provide such training already, and we urge it in our own Guide.

Whose current share of the work excessive ?

- 21 It is unrealistic to expect any increase in the budgets available. There will therefore be no big winners without big losers. If third sector bodies win significantly more work, this will be at the expense of large contractors and in house workforces.
- 22 This may well result from more, and more searching, competition, and we have done our best in our own Guide to describe what form more searching competition will take. If indeed the third sector then secures more work, it will be for the right reason. Work which given types of third sector bodies do best will have been identified.
- 23 It is however idle to ignore the high risk and cost of both **first time competition** and of changing to some fundamentally **different basis for competition**. Authorities cannot be expected to go ahead with either strategy on the scale apparently sought by ministers without being convinced that these are good strategies, and not enough has yet been done to convince them.

Asset management or asset titles ?

- 24 We believe that many local authorities and third sector bodies are **not convinced that there is any special merit in the permanent transfer of title to assets**. Practical objections to it include
- ◆ its preclusion in many instances for authorities by the terms of bequests and foundations; and, for some of the most suitable third sector bodies, by their present constitutional form
 - ◆ the likelihood that it will be more businesslike and more propitious for authorities to do any refurbishments needed and then lease the assets to suitable organisations, than to give run down or derelict assets to the same organisations. This is because of
 - the lower interest rates paid by local authorities on the cost of the work
 - the burden of the unfamiliar technical and budgeting functions which would be placed on small organisations
 - ◆ the threat to continued community use of transferred assets if organisations which are neither trusts nor charities become insolvent
- 25 We accept that an impressive case is made by the Quirk Review **but this case is for more (and more comprehensive) transfers of management**.
- 26 This emphasis is clear from the detailed analysis in the Review of what can go wrong when management or titles are transferred, and from the remedies proposed. A total of 46 are set out very clearly in Appendix A of that Review. Of this 46, 28 are remedies for **defective management**. All 28 are self evidently easier for authorities to apply if they **retain title** and exercise the rights of lessors. If on the other hand title is transferred, former owners can apply them against current owners only if they have, before disposal, made the necessary collateral agreements or drafted the necessary covenants. Even then, application is a cumbersome and uncertain process.
- 27 The other 18 remedies are for problems which arise **as a result of transferring titles**. Of these 18

- ◆ 11 involve various types of intervention, for which the processes available are, for the reasons just mentioned, less satisfactory
- ◆ 5 are checks which, if made in time, would have deterred authorities from going ahead with transfers of title in the first place
- ◆ the last two would need local authority financial support, thus reducing any net financial contributions made by third sector bodies

28 The review does not therefore seem likely to be seen as making a case for the gift or sub-market sale of assets.

Next steps

29 We would be pleased to meet members of the department to go into our proposals in detail.

30 We have no objection to our response being shown to whoever the department thinks might be interested.

signed

A handwritten signature in black ink, appearing to read 'Will Werry', written in a cursive style.

Will Werry, chair CIPFA-CJC
28 September 2007