

THE CJC's RESPONSE TO DEFRA THIRD SECTOR STRATEGY CONSULTATION DOCUMENT NOVEMBER 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** 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

- 03** 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>
- 04** There are four points on which we particularly want to respond. For each point we set out first, indented and in italics, extracts from the Paper, followed by our response, in normal format.

THE LEVEL PLAYING FIELD

Part 4 - Strategy Objectives . . . To ensure that . . . we create a level playing field for the third sector in our day to day business . . .

Q - Do you agree with Defra's initial thoughts about the vision and objectives for our third sector strategy ? If not, what alternatives would you propose and why ?

- 05** We agree entirely with the vision and objectives, but not the language. We think that some serious confusion, and unnecessary resentment, is being caused by the frequent allusions to the supposed absence of level playing fields in competitions in which third sector bodies take part.
- 06** What most practitioners mean by tilting the playing field is the malicious, corrupt or thoughtless placing of obstacles in the paths of some only of the tenderers for a given contract. We have seen no evidence suggesting that this happens on any scale.
- 07** We are not of course saying that all playing fields are perfect. Most competitions, in all sectors, prove to have some or other irritating feature. Often these features were introduced after legal advice about how to address some long-passed danger. But they are not the reason why many smaller third sector bodies fail to win more work in competition.
- 08** What small third sector bodies most need if they are to win, and what they mean by a level playing field, are **contract packages** of sizes which suit them. Ironically, large third sector bodies and contractors, for their parts, may then feel that playing fields have tilted sharply uphill. But no client can please everyone. Since competition began, clients have had to make up their minds what sort of tenderer they most need to attract for any given work. This is called being an intelligent client.
- 09** 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.
- 10** Besides choosing their packaging carefully, clients can use tough specifications and evaluation criteria designed to bring out precisely the strengths of the service-providers which they are looking for. Some specifications will make compliance easier for some tenderers, but harder and more expensive for others. And they can use pricing mechanisms which protect small tenderers' overheads against unavoidable reductions in the volume of business.

- 11 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 packaging strategy was unnecessary.
- 12 All this is designed to make competition more searching and more fruitful, and we have done our best, in our own Guide to Using the Third Sector, to describe what form more searching competition might take. If indeed the third sector then wins more work, it will be for the right reason. Better still, it will for the first time identify work which any given type of third sector body truly does best. This will in turn feed back into procurement practice, and inform practitioners about what sorts of service providers they should be looking for.
- 13 So there will always be providers who find packages and contract conditions unattractive. This will usually be because the client decided that some other sort of provider would probably do the work better. This is usually a conscious decision, and the right person to make it is the client who has to pay, and pick up the pieces if it all goes wrong. It is no use expecting any client to go ahead with any such strategy without first being convinced that it is right. Any hesitation by procurement staff is certainly not because they need re-training, or anything so fanciful. It is because not enough has yet been done to convince them. The case for any major change needs support from more specific evidence about who is best at which types of work.
- 14 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 bodies 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 to carry more conviction with practitioners.
- 15 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.

WORKING IN PARTNERSHIP WITH OUR DELIVERY BODIES

Part 5 - We will work with our delivery bodies to publish contact details for officials responsible for the third sector. We also intend to develop a third sector liaison network for Defra, its Executive Agencies and NDPBs, so that we can more easily co-ordinate our approaches and exchange information. We will also explore the need for a mechanism, such as an annual forum, which brings together Defra, its delivery bodies and third sector stakeholders to improve dialogue.

Q - In what ways could both Defra and its delivery bodies work more effectively with third sector stakeholders ?

- 16 Third sector bodies are a largely untapped source of ideas about how their own work is best done, how therefore it should be **packaged and specified**, and what criteria would be the most searching for use in **tenderer selection and tender evaluation**.
- 17 Client bodies are responsible for spending their own money, so have to have the last word about which of these ideas to take up. We do not therefore expect them to make many instant changes without first having had satisfactory opportunities to thrash out such ideas with their proponents, face to face. We hope that Defra will encourage such dialogue, create opportunities for it, and allow time for its fruition.

STRATEGIC PARTNERING

Part 5 - Defra and strategic partnering . . . *The strategic partner model may not fit all of Defra's policy areas or objectives, but where it could add value, we feel that strategic partnering has the potential to*

- *Set overall outcomes but leave the detail of how these are delivered to the third sector organisations. This separates policy from delivery and is in line with the spirit of the Compact*
- *Strengthen links between national policy work undertaken by third sector strategic partners with the local delivery work undertaken by smaller third sector organisations at the local or regional levels*

Q - what roles do you feel strategic partners should perform ?

Q - what should Defra offer in return to support strategic partners ?

- 18 Strategic partnering is a grossly overused word. It covers some excellent concepts but these have little in common with one another. We note that the consultation paper did not attempt to define them, and fully understand this reticence.
- 19 It does however open the door to some serious misunderstandings, and to the risk that precautions widely accepted as being necessary for one type of strategic partnership are neglected, on the assumption that some other type is being used.
- 20 The main types are
- ◆ contracts, in which the contractor has a firm contract for specified types of work, and also some arrangement (many are available) whereby they may by agreement get more work later. These are sometimes distinguished by the term **incremental strategic partnership**
 - ◆ the use of specialist organisations to commission work on behalf of clients from small service providers in the special fields in question, or to advise about it. These organisations may be referred to as commission agents, brokers, or just **clients' agents**
 - ◆ **framework agreements**, which identify the terms on which clients are free to order specified work later
 - ◆ **framework contracts**, which are agreements (sometimes referred to as call-off contracts) in which clients accept some commitment without immediately placing orders, for example by undertaking to order, later, all work of some specified type which is needed during a specified period
- 21 We therefore hope that the department can give further thought to which if any of these types of strategic partnership should be supported.

FULL COST RECOVERY

PART 7 - Creating a supportive environment for a healthy and environmentally sustainable Third Sector - Objectives . . . *There was, and is, a mutual desire and determination to rectify the way Full Cost Recovery (FCR) is implemented by both Defra and the VCS . . .*

What are the key roles which should be performed by a Defra third sector stakeholder group and how should it operate ?

- 22 We fully understand that few if any third sector bodies can nowadays commit themselves to doing additional work without knowing that its cost will be reimbursed.
- 23 What anybody can do about it does however depend heavily on whether third sector bodies have contracts, or are being grant-aided.
- 24 If **contracts**, then it is primarily up to third sector bodies to secure their own full funding by tendering at full cost. Clients can still help them, by checking their tenders for realism, but only if all tenderers get the same service. Local authorities can in addition run courses in tendering, for all third sector bodies and small businesses in their own areas, provided the training is not restricted to tendering for authorities' own contracts.

- 25 But if third sector bodies mean **grants**, none of this applies. If anybody wants to be sure of being paid in full, whoever does the paying will want to know what sort of work they will get in return. This creates a contract, in both UK contract law and EU procurement law. A contract is a contract, and it makes no difference if the parties agree to call it (or really believe it is) something else.
- 26 We appreciate that grants have been given since time immemorial on the basis of all sorts of arrangements. There is undoubtedly a fuzzy uncharted area between grants and contracts, but it takes legislation to create anything half way between them. This has for example been done by NHS legislation, which provides for 'NHS' contracts. These are defined as creating no contractual obligations, which enables all the different NHS to place such contracts with one another without having to advertise them in the Official journal of the EU.
- 27 We believe that anybody aiming to operate only in this fuzzy area, without some such exemption, would be asking for trouble.
- 28 In other words, there is no such thing as the full reimbursement of grant-aided work. Any growth in third sector work will have to be via contracts.

Next steps

- 29 We would be pleased to meet members of the department to go into our response in detail.
- 30 We have no objection to our response being shown to whoever the department thinks might be interested.



Will Werry, chair CIPFA-CJC

15 February 2008