

THE THIRD SECTOR

What it is

- 01** The third sector is a loose collective term for
- ¥ **voluntary organisations.** These are organisations which carry out their chosen activities because their members want to, and not out of duty or for reward. Many are companies limited by guarantee, but by no means all CLGs would now be accepted as being voluntary organisations
 - ¥ **community organisations.** These are bodies formed to further the interests of all people, or specified types of people, in specified (and usually small) geographical areas
 - ¥ **small businesses.** These are defined (**22; 247**) as enterprises with at least two of the following features
 - annual turnover not more than £2m
 - balance sheet total of assets not more than £0.975m
 - not more than 50 employees.
 - ¥ **social enterprises.** These are enterprises (usually CLGs, I&Ps or trusts) which trade in order to support their social and community objectives; or wholly owned subsidiaries of VCOs (themselves often CLSs) which trade for profits to be used in support of such objectives
and
 - ¥ **ethnic minority service providers.**
- 02** These groups are highly heterogeneous, and overlap with one another widely, but have a great deal in common, particularly what they can do for local authorities. The umbrella term 'the third sector' is therefore convenient when discussing the commissioning of many types of local authority work and services.

Why many of them are worth helping

- 03** The **strengths** of many members of the third sector are their
- ¥ knowledge of end-users, and their credibility with end-users and with local communities generally
 - ¥ convenient location, and willingness to work from local bases
 - ¥ knowledge of vulnerable service users such as disabled people, drug addicts and ex-offenders
 - ¥ amenability to change, and ability to apply new technology and adopt new approaches to the service
 - ¥ acceptance of small packages
 - ¥ readiness to provide add-ons to bigger and more complex contracts and services
 - ¥ ability, in the case of minority service providers, to meet contract conditions and input specifications which might deter non-minority contractors
 - ¥ ability, in the case of many social enterprises, to trade outside the constraints of charity and trust law

Why many of them need help

- 04** The reasons why **many of them may need help** are their
- ¥ limited business experience, financial standing, turnover and skills range
 - ¥ in the case of charities, restriction to tendering for work which constitutes one of their own charitable purposes
 - ¥ low profile, making them hard to find out about
 - ¥ dedication to what, for them, are familiar fields, making them hard to attract into wider fields
- 05** These notes contain details of the following effective ways of helping them
- ¥ good **general publicity about contracts** in progress, in the pipeline and under consideration
 - ¥ **advice and training** about how to do business with the authority
 - ¥ placing **advertisements** wherever the third sector can be reached, and then telling them what they need to know about the work
 - ¥ **welcoming** their own approaches

- ¥ · **packaging** the work so that they can do it
- ¥ · **providing support services** which they lack
- ¥ · identifying **contract conditions and specifications** which bring out their strengths
- ¥ · avoiding off-putting **contract conditions, specifications, and payment mechanisms**
- ¥ · discarding irrelevant **tenderer selection criteria**, and identifying those which bring out their strengths
- ¥ · allowing **variants** which allow scope for their own special methods
- ¥ · not adding unnecessarily to **TUPE** liabilities
- ¥ · giving them **enough time** to respond, tender and gear up
- ¥ · **debriefing** them so that they know how to do better next time
- ¥ · **dispensing with competition** altogether where it is pointless

06 There are some common misgivings (often much exaggerated) about legal constraints (particularly in European law) on helping the third sector in some of these ways. These constraints are described first. The effective ways (just mentioned) of helping the third sector are entirely lawful provided practitioners avoid some obvious pitfalls.

The Treaty of Rome

07 The Treaty applies to all public sector contracts in the EU even if the directives do not apply at all. It precludes authorities from doing anything **which does have** (and not merely anything **which is intended to have**) the effect of discriminating against service providers in other member states (**5**; **6**).

08 This means that

- ¥ policies of **local purchasing**, and fragmentation for the purpose of encouraging it, are unlawful
- ¥ service providers from any EU states have to have **the same chance of selection** as those from the client authority's home state

09 The objections to **local purchasing** apply, for the same reason, to

- ¥ specifying the use of local labour
- ¥ specifying subcontracting for its own sake, and not for example for the purpose of getting specified work done by subcontractors with special expertise
- ¥ making track records in subcontracting factors in tenderer selection.

10 Requiring the employment 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.

11 Local purchasing was for many years nevertheless widely seen as being enlightened self-interest. Even now, it is not contrary to UK law. This is because of the **wide reach of wellbeing powers**, which for many authorities cover the greater part of their functions, and include anything which authorities **think will** (not which **will**) promote or improve the economic, social or environmental wellbeing of the whole or any part of their areas (**46**; **2**) (**55**; **20(1)**) provided it is

- ¥ not specifically precluded by other legislation (**46**; **3**) (**55**; **21(1)**)
- ¥ (EW) in accordance with authorities' own community strategies (**46**; **2(3)**)

12 Some welcome side-effects from employing the third sector are often obtained. But, even though welcome, they have to be left out of account for the time being at all stages of commissioning the work. These side-effects include

- ¥ for wellbeing authorities, the encouragement of the local economy and deprived minorities
- ¥ for central government, the expectation that, because most large enterprises begin life as small enterprises, creating more of them will help to create more large enterprises and thereby strengthen the national economy.

13 A further requirement 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.

The precautions needed

- 14 There are 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.
- 15 If so, 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 from the UK. The same criteria will identify these other contractors too, and they must of course be treated equally.
- 16 Giving overseas providers **an equal chance of selection** occasionally calls for special care. Authorities have to exercise it if they have any reason to believe that there are any overseas providers who might be interested in the work. There will normally be no such providers, in which case nothing need or can be done for them. But if any are known, they must be given the same chance to tender as UK providers. This can be done by including them on all mailing lists of potential providers, and by copying UK advertisements to them.
- 17 Nobody can of course ever guarantee that there are absolutely no overseas firms which would be discriminated against by a decision to advertise only in the UK; but it would be impracticable (both for authorities and for OJEU) if authorities had to explore such a remote possibility for each and every contract. It is therefore enough to give opportunities only to any known overseas providers.
- 18 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 service providers are well placed to address.
- 19 **Packaging options** need for the same reasons to be for the benefit of the authority, not to give the third sector any advantage.

General publicity about contracts

- 20 Many authorities now maintain **websites** which give visitors as much information as possible about
 ¥ forthcoming procurement
 ¥ contracts recently awarded or in progress; this may be particularly helpful to local businesses which are willing and able to work on subcontract for authorities' main contractors
- 21 There is no obstacle to authorities also
 ¥ giving, to any current service provider or any other provider thought likely to be interested, information about authorities'
 - current overriding political imperatives
 - standard selection and evaluation criteria and contract conditions
 - contract opportunities coming up soon
 - periodic updates on medium-term commissioning plans
 ¥ giving them advice and instruction about how to do business with the authority, and tender for its contracts
 ¥ advertising all contract opportunities in regular newsletters supplied to all local businesses provided always that authorities take care to give identical information, and offer identical advice and instruction, if necessary ad hoc, to any service provider from any other member state who is known to be interested.
- 22 Third sector providers would probably value such information about plans and proposals for future programmes even more than most other types of service providers, because they generally have fewer alternative outlets. Such information must not of course commit authorities in any way, but VCOs in particular are well accustomed to operating in a world in which nobody ever makes any long term commitments, so are grateful just for honest statements of intent.

Advice and training about how to do business with the authority

- 23** There is no obstacle to authorities conducting seminars about
 ¥ how to do business with the authority, and
 ¥ tender for its contracts
 provided as before that authorities take care to give identical opportunities, if necessary ad hoc, to any service provider from any other member state who is known to be interested.

Advertising

- 24** Authorities are free, if the directives do not apply
 ¥ to decide for themselves if and how to advertise their work, and in what publications, whether for example in local papers or trade journals
 ¥ to express all advertisements in plain English, and not in the terse and stilted language and prescriptive format required for OJEU notices.
- 25** And they are free, even if the directives do apply, to
 ¥ place advertisements locally, as well as in OJEU, **provided** local advertisements include no more information, and come out no earlier, than in the corresponding OJEU notices (**107; 30(4)**) (**110 & 125; 29(4)**) (**116; 27(4)**)
 ¥ **prompt** likely service providers to apply to tender. This is not the same as **inviting** them to tender, because applicants who have been prompted can thereafter be treated like any other applicant, so that discrimination is avoided
 ¥ press professionals in the services in question, and elected members with special knowledge of it, to suggest likely service providers. These too may then be prompted to apply.

Information sent to respondents to advertisements

- 26** Authorities are free, in all circumstances, to
 ¥ quote the names and telephone numbers of officers who respondents and applicants can contact for more information
 ¥ draw attention to any of the arrangements described later which might be especially helpful to the third sector.

Welcoming any approaches

- 27** There is no reason at all why members of the third sector should not make the first move to draw the attention of authorities, and of whichever elected members and officers seem to be the most receptive, to explain their own ideas and strengths. Many contractors of other types already do this to great effect. Third sector members may however feel that this is unlawful, improper, unprofessional, bad form in the public sector, or otherwise unwelcome.
- 28** It is of course none of these things, even for contracts to which the directives apply. These currently preclude firms which have helped authorities to define the specifications of contracts from then competing for them (**50b; intro 3.4**) where this might prevent fair competition, but information volunteered ad hoc cannot have this effect.
- 29** It is therefore proper as well as constructive for third sector providers to draw authorities' attention to
 ¥ their own special expertise and standing
 ¥ the packaging and selection and evaluation criteria which would best bring out qualities like their own
 ¥ services which the authorities in question do not provide at all, but which they are themselves well placed to provide for them
 ¥ the additional social and environmental factors which it would be advantageous to take into account in tender evaluation, or adopt as contract outcomes.
- 30** The best way for authorities to stimulate such approaches is always to give them a warm and positive welcome whenever providers show any signs of being tempted to make them.

Providing support services

- 26A** There are often elements of the work which at least some members of the third sector would be unable or reluctant to take on, or even to subcontract. These may include various types of specialist work, and support services such as transport or IT links with client authority staff. There are several ways in which authorities may do this work for them.
- 31** If the need is anticipated in time, packages can be lotted, so that tenderers are free to choose which lots to tender for. Any lots for which no acceptable tenders are received do not then have to be contracted out at all. Lotting may thus help some or all third sector providers, but it is lawful because it does not hinder others.
- 32** If tenderers decide after the work is advertised that they cannot after all do some of it, authorities can do it by
- ¥ seconding their own staff, under wellbeing powers (**46; 2**) (**55; 21**) and recharging the cost
 - ¥ tendering for it, using their new trading powers (**55; 8**) (**59; 95**)
 - ¥ (EW) in the case of community organisations, tendering for it using their long standing trading powers (**10; 1**) (**101**)
 - ¥ (EW) in the case of IT, tendering to use capacity which would be spare if the work were to be contracted out (**14; 38**)
- 33** Authorities are in addition free, in all circumstances, to share training programmes and workshops with current service providers.

Contract conditions and specifications

- 34** Nearly all third sector providers need a different type of commissioning to attract them and get the best out of them. Traditional standing orders may serve to exclude or discourage precisely the service providers which authorities are looking for.
- 35** It is fatally easy to reproduce, in small contracts, documentation drafted for larger contracts. Practitioners can however drastically reduce the bulk of their contracts by deleting points which arise only on large or specialist contracts, and by thinning out what is said about the rest.
- 36** There is for example no real advantage in insisting on third sector providers incorporating themselves, getting bond cover, or providing other client protection which many such providers would find almost impossible to give anyway.
- 37** Authorities are free, in all circumstances, to adopt contract conditions and specifications which in practice third sector providers are best able to satisfy, including the pursuit of challenging social and environmental objectives, so long as nobody can show that they are adopted just to suit third sector providers, and not for service reasons.
- 38** Constructive and lawful contract conditions and specifications may for example
- ¥ specify the precise locations in which given services have to be carried out
 - ¥ require the maintenance of local offices in which service-users may make contact with service-providers, instead of using call centres
 - ¥ require service providers (**1110; 3.9**) to use personnel familiar with the special difficulties of service-users
 - ¥ require service providers (**1110; 3.9**) to reserve sensitive jobs for personnel who have had extensive direct contact with vulnerable service users of the types under consideration, for example members of minorities, disabled people, drug addicts or ex-offenders
 - ¥ specify that work is done during severely restricted times of day, for example to meet the needs of disabled people
 - ¥ require service providers to train unskilled workers for specified types or numbers of jobs
 - ¥ dispense with any requirement for successful tenderers to incorporate themselves (although if they need their own finance, most finance houses normally insist on it).
- 39** Third sector providers are entitled to have their own innovative methods treated as if they were protected by patent.

Payment mechanisms

- 40 Fears of late payment may discourage third sector providers (**1110**; 3.9) and also raise price levels and prompt front-end loading. Authorities are free, in all circumstances, to undertake to make periodic payments half in advance and half in arrears, while still allowing headroom for incentive payments and liquidated damages.

Tenderer selection

- 41 Authorities are likewise free always to
- ¥ treat ability and technical capacity as meaning ability and technical capacity **to do the work specified**, even if only third sector applicants are likely to possess them
 - ¥ adjust required levels of financial standing to the small size of the contracts in question.

Variants

- 42 Authorities may usefully seek variants quoting additional prices for delivering specified community benefits (**1158**).

TUPE

- 43 For many third sector service providers, the **long term liabilities of TUPE** may be unaffordable. They may therefore be unwilling to tender for a contract unless they are sure (and the staff affected agree) that TUPE does not apply to it.
- 44 The basic position is that TUPE applies to all transfers of all undertakings between authorities and service providers when work is contracted out or brought back in house; and between one service provider and another.
- 45 In practice nearly all contracts count as transfers of undertakings except
- ¥ task-and-finish contracts (**1018a**; 14.2)
 - ¥ contracts for work significantly different (in the skills and assets needed) from the work displaced (**1018a**; 14.4).
- 46 It makes no difference how small undertakings may be, or how few hours' work they require (**51b**; 2.2.b). Part-time staff may therefore qualify for TUPE transfers, and also temporary staff (**51b**; 2.2.c) but not unpaid volunteers.
- 47 Volunteers still count as unpaid if their expenses are reimbursed. If however expenses are regarded (whatever their amount) as being covered by fixed allowances, volunteers count as employees (**1126**).
- 48 All TUPE transferees take their pre-transfer conditions of service with them, including their pensions rights (**59/ 102**).
- 49 Statutory guidance (**1159 & 1164**) goes further and requires English & Welsh authorities to incorporate the UK government's Code of Practice on Workforce Matters into conditions of contract (**1124**; 1) if the contract, or any predecessor contract, involved a TUPE transfer from a public body. The Code then requires service providers to **give new joiners** terms and conditions which are no less favourable than those of TUPE transferees (**1124**; 7) including membership of the LGPS or of another good quality pension scheme with an employers' contribution of at least 6% (**1124**; 10).
- 50 Authorities are however free to package contracts in such a way that, for either of the reasons described in paragraph 45, TUPE does not apply.

Time limits

- 51 There is no obstacle, in any circumstances, to authorities allowing enough time for service providers who have only limited experience of working in the public sector to
- ¥ respond to advertisements

- ¥ apply to tender
- ¥ return tenders
- ¥ gear up for the work after tender award.

Debriefing

- 52** There is no obstacle, in debriefing, to telling even successful applicants
- ¥ which costly preparations they might dispense with next time
 - ¥ what else they might then do better

Dispensing with competition altogether

- 53** Authorities may in some special cases need to foster the formation and growth of new niche service providers in areas in which there are no other suitable providers, for example domestic services in high cost areas, and building maintenance in remote areas; or not enough providers to provide the diversity needed.
- 54** This can be done by drip-feeding work to selected service providers (usually partnerships or sole traders)
- ¥ which is outside the scope of their current business
 - ¥ and for which they would not therefore tender,
 - ¥ but for which information about their current work suggests that they may be able to do efficiently.
- 55** Service providers then usually need extensive technical and moral support.
- 56** There are in addition a growing number of VCOs which contribute indirectly to authorities' objectives when they operate independently, but with funding from authorities. The amount of funding is often related to the achievement of specified outcomes, and where so VCOs have what are, in UK law, contracts.
- 57** They are not however contracts for the purposes of commissioning or procurement, and there is no point in requiring competition for them just because they are contracts. Competition is, for service providers of these types, not usually part of the deal made when getting their input into services.

SOURCES

- 5** Treaty of Rome 1957
- 10** Local Authorities (Goods & Services) Act 1970
- 14** Local Government (Miscellaneous Provisions) Act 1976
- 22** Companies Act 1985
- 45** Local Government Act 1999
- 50b** EC Proposed (Consolidating) Procurement Directive 2000/0115 (COD)
- 51b** EC Directive 2001/23 (Transfer of Undertakings)
- 55** Local Government in Scotland Act 2003
- 59** Local Government Act 2003
- 101** SI 1972/853 - Local Authorities (Goods & Services) (Public Bodies) Order
- 107** SI 1991/2680 - Public Works Contracts Regulations
- 110** SI 1993/3228 - Public Services Contracts Regulations
- 116** SI 1995/201 - Public Supply Contracts Regulations
- 125** SI 1996/2911 - Utilities Contracts Regulations
- 1002** EC Statement on Post-tender Negotiations OJL 111/114 1994
- 1018a** Cabinet Office Statement of Practice on Staffing Transfers
- 1110** HMT on the Role of the VCS
- 1124** UK government's Code of Practice on Workforce Matters
- 1158** ODPM-LGA National Procurement Strategy for England
- 1159** ODPM Circular 3 of 2003 - statutory guidance on Competition, Procurement & TUPE
- 1163** Commission vs the French Republic (Nord Pas de Calais) (C225/98)
- 1164** NAFW statutory guidance on employment matters
- 1166** Gebroeders Beentjes BV v the State (Netherlands) (C-31/87)

