

What is contracting and how is it different from grant funding?

Contracting, procurement and commissioning are often used interchangeably, but actually describe different activities.

Commissioning describes the whole process of mapping, planning, delivery and evaluation of services for a local area. The commissioning process for children's services is detailed in the government document, *Joint planning and commissioning framework for children, young people and maternity services*, which can be found at www.everychildmatters.gov.uk

Procurement refers to the purchase of services (or goods) by publicly funded bodies at the best possible price, in the right quantity and quality, at the right time and generally via a contract. Procurement is one part of the commissioning process.

Contracting is about one agency, such as a local authority or PCT, paying another agency to deliver a service to an exact specification as laid out and agreed in a contract. Contractor refers to the organisation providing the service in return for payment by entering into a binding agreement.

For the purpose of this guide, 'contractor' or 'provider' refers to the organisation providing the service and 'procurer' or 'public service agency' refers to the agency buying the service. 'Procurement' refers to the act of buying a service.

Contracts and grants have different implications for organisations.

A **contract** is a legally recognised, legally enforceable promise made between parties, which sets out the arrangements whereby one party provides a service (or goods) to the other in return for payment. A contract is about getting paid for outputs that you achieve. Contracts are subject to EU and UK law and, in some cases, contracting may have **VAT** implications, which means that you may have to charge VAT. Also important is that while grants are usually paid in advance, contracts often are not. This may be an issue with your bank, depending on whether they allow an overdraft and how much they allow. It also means taking on increased risk if something goes wrong and the debts are not honoured.

A **grant** is a sum of money given to an organisation to undertake an activity often initiated by the organisation. Grants can be given to fund a specific project, which the organisation may be required to monitor and report on or show how the money has been spent. Grants are also legally protected to a certain extent – if the organisation does not do what it is asked to do, the local authority does not automatically have the right to take that money away; in effect, a grant is a gift.

Unfortunately, the difference between grants and contracts is often not cut and dried. Many public service agencies will have a **service level agreement** (SLAs) attached to their grants. SLAs may contain binding statements on:

- Services to be delivered.
- Performance, monitoring and reporting.
- Legal compliance and dispute resolution.
- Duties and responsibilities of both parties.
- Termination of the agreement.

SLAs are contracts in all but name, and that means that organisations that default on the terms of the SLA can be made to pay back the money to the public service agency.

Health Warning: You should still get expert legal advice, just to be sure. If it is a contract you may be legally liable for fulfilling the terms of the contract, even if something outside of your control happens. You may also have to register with HM Treasury and charge VAT if it is a contract (see page 48 for more on VAT).

Resources

The *Grantmaking Tango*, produced by the Baring Foundation, describes some of the issues around grants and differentiates between different kinds of grantmaking.

www.baringfoundation.org.uk/GrantmakingTango.pdf

Fruitful Funding, produced by NCVO is another useful source of information about grants.

www.ncvo-vol.org.uk



What is the role of trustees?

Trustees have a remit to act in the best interests of the organisation and its stakeholders, particularly the children, young people and families that it serves. Ultimately the trustees in the governing body have responsibility for the overall direction and policy of the organisation. Trustees form the board of a charitable organisation, whether it is called a board of trustees, board of governors or a management committee. Although not all voluntary organisations are required by law to have a trustee board (registered charities and companies must have a board) most funding bodies and public sector agencies will want you to show that you have good systems of accountability in place.

How an organisation is constituted (for example, whether it is a registered charity or not) will impact on how liable trustees are. In some cases this can mean being legally liable for debt incurred or a breach of charity law by the organisation. Trustees should, therefore, be well enough informed about the circumstances of the tender to take into account both the opportunities and the risks. They need to be able to ensure that any new projects help deliver organisational mission and do not put the organisation's financial standing or reputation at risk.

Often there is limited time available to complete a tender; some thought and groundwork should already be done with trustees if you want to be ready to put in tenders when opportunities come up. One way of being 'tender ready' is to take time with your trustees at the point when you are researching contracts for which to tender. Have a focused discussion about what the organisation hopes to achieve in the future. Revisit your aims. Do they still reflect the work the organisation is doing? Do they need to be updated? Speak with your service users. What do they hope for the organisation?

After your discussions with trustees, you may want to consider writing a policy which outlines the organisation's position on pursuing contracts outside its mission, pricing guidelines and lines of accountability and communication when entering into new contracts.

Health Warning: Trustees are legally responsible for all contracts to which any employee commits the organisation, whether or not the trustee has approved the contract or authorised the employee to enter into it. Internal controls need to be in place to prevent the organisation committing to contracts without trustees' knowledge.

Health Warning: Another aspect to be aware of is the new vetting and barring scheme, which will start rolling out in October 2009. Trustees of children's organisations will need to be registered with the scheme. Check the website of the Independent Safeguarding Authority, www.isa-gov.org.uk, for updates, events and resources.



Activity:

Key questions to consider with trustees

Consider the overarching implications of contracting to deliver public services.

- Will you be able to deliver public services and stay true to your mission?
- If you campaign or give your service users a voice, will you be able to keep your voice independent and strong?
- If there are changes in public sector priorities, are you strong and independent enough to survive a particular service being decommissioned?
- Will children, young people and families ultimately benefit if you invest your energy in delivering public services?

Examine the contracts that are being put out to tender in your local area.

- Who makes funding strategy decisions in your area? What is their approach and proposed timescale for putting contracts out to tender?
- Do you understand how local decisions are made and who is involved in making them?
- If you feel the wrong procurement approach is being used, can you take advice and discuss it with the funder?
- What do you need to do to articulate your **USP** (unique selling point) in a way that links your work with potential procurement priorities, objectives and award criteria?
- Are there certain contracts that are a good fit with your organisation?

- Is this a direction in which your organisation should be moving or will it cause you to drift away from your organisational purpose?
- Are there contracts for work that you could deliver with more training, resources, support or experience?
- Are there other organisations around to build partnerships with?
- Can opportunities outside of the current scope of the organisation be pursued?

Think about what resources you will need to invest in your organisation, staff and volunteers in order to be ready to bid for future contracts.

- How can the necessary resources be obtained?
- Do your trustees think that it is an investment that makes sense for your organisation?
- Is it a good investment; will the return justify the cost?

Resources

For more information about the roles and responsibilities of trustees for children's, young people's and families organisations, see *Governing for Children* at www.childrenengland.org.uk

NCVO has additional resources for trustees on governance issues:
www.ncvo-vol.org.uk/askncvo/TrusteeGovernance

Are you allowed to contract?

Before going too far down the contracting route, you should ensure that the Charity Commission permits you to do so.

The National Audit Office offers this guidance:

“There is no general prohibition on trading by charities, and hence a charity is also free to enter into contracts for delivery of services, including contracts with government, provided the trustees are satisfied that it is in the interests of the charity and its beneficiaries to do so. This is called *primary purpose trading* and does not create any liability to corporation tax provided any profits are applied to the support of the services provided (which will virtually always be the case, since a charity cannot distribute profits).

“More complex is the situation where a charity undertakes a trading activity that falls outside its objects. This is generally permissible where the aim is to raise funds to support the charity’s objects, although some charities have limits on this in their governing documents and in any case there are strict tax limits on such *trading for non-charitable purposes* and in some cases corporation tax would be payable. (This tax liability can be averted by arranging for the trade to be undertaken by a non-charitable trading subsidiary company controlled by the charity – but in that case the service is not delivered by the charity itself, but by what becomes a social enterprise.) So, trading for non-charitable purposes by the charity itself is normally limited to small scale fundraising activities: it is not appropriate for a charity to seek to deliver significant public services on this basis.”

What is the procurement process?

There is a lot of information and there are many resources available to help you understand the contracting process. In order to avoid duplication with other resources, this part of the guide offers a general overview about the procurement process. At the end of the section there is a list of some of the resources, which may address more specific questions.

There are four main ways that public sector procurers award contracts:

- In an **open procedure** all organisations wishing to deliver the service can submit a tender.
- In a **restricted procedure** only organisations who have successfully made it through a pre-qualification stage (see below) can submit a tender. Restricted procedures are recommended by the Office of Government Commerce and are very likely to be used to award contracts.
- In a **negotiated procedure** the procurer can negotiate the terms of the contract with one or more supplier of its choice.
- A **competitive dialogue procedure** is used for complex contracts and allows the procurer to consider different possible ways of addressing the identified need. This is still part of a competitive process.

Health Warning: There are risks to engaging in a competitive dialogue procedure. You could find yourself having shared all of your innovative ideas and then the procurer decides to use those ideas and keep the service in house.

Unfortunately, there are many different approaches to procurement and each commissioning agency may do things slightly differently. The following are some of the possible stages procurers may request.

Before you tender

When procurers need to buy a service they will advertise it in various ways, either through local routes, such as on their website, in trade journals, like *Children and Young People Now* or *Community Care*, or in national papers and journals, like the *Society Guardian* or the *Official Journal of the European Union (OJEU)*. Additionally, **www.supply2.gov.uk** is a government-backed website that contains lower-value (under £100,000) tender opportunities from the public sector; you can register for some services free of charge while others have a cost attached.

Although contracts will often be publicised, public sector organisations are not required to advertise all contracts. If you are a smaller organisation looking to deliver less costly services, your best bet may be to make contact directly with the person in charge of procuring the kind of contracts you hope to deliver; in a local authority or primary care trust (PCT) this will probably be a dedicated children's commissioning manager.

If you feel that you are able to deliver the required service you can then submit an **expression of interest (EOI)**, which is a letter demonstrating that you are able to deliver the service and asking to be included on the short-list of organisations submitting a more detailed proposal. An EOI may be a pro-forma to complete provided by the funder, but if you are asked to write a letter, you should include:

- Contact information.
- Evidence of previous relevant experience.
- Brief outline of how you propose to deliver the service.
- How you plan to work collaboratively with relevant partners.
- How you plan to engage with relevant policy initiatives.

If possible, it may be helpful to ask for a face-to-face meeting at this stage, which can give you a better idea of the service being put out to tender and can give the public service agency an understanding of your organisation.

Pre-qualifying questionnaire (PQQ)

Procurers will often have a process for short-listing prospective contractors. This is often called a **pre-qualifying questionnaire (PQQ)**, but may be some other pre-tender qualification stage and aims to determine:

- Technical knowledge and experience.
- Capability (skills and knowledge)/capacity (resources).
- Organisational and financial standing.

The PQQ will typically cover the following areas:

- Background corporate information.
- Financial history and current position.
- Contractual performance and renewal history.
- Statements of compliance.
- Customer details.
- Particular questions relating to the specific product/service required.

In addition there may be a list of documents and supporting material that should be submitted with the PQQ response, for example a child protection policy, proof of insurance, quality mark, annual accounts etc.

The PQQ will also contain an outline timetable for the process which you will need to comply with. (From the Office of Government Commerce.)

Invitation to tender (ITT)

Once you have passed the short-listing stages you will be asked to submit a formal tender document; this stage is known as an **invitation to tender (ITT)**. An ITT will state:

- What service the procurer wants delivered.
- The terms of contract, including how much money it is worth and what the timescales are.
- What documentation needs to be submitted.
- The deadline for consideration.

Ensure that you have the capacity to submit a successful tender. Putting together a good tender takes time and money. Consider how much it will cost to go through the whole process, including staff time or any legal advice you may need. Also think about who will be responsible for which aspects of putting the tender together and how daily work will be covered while you are working on it. There is no point in doing it if you do not have the time to do it well or if the amount of the contract will not justify the resources you have to put in to it.

You can write to the procurer if there is anything you do not understand about the ITT. All questions and responses will usually have to be shared with every potential contractor. Procurers have a general knowledge about children's services and may not know much about the specific service they are buying. If there are aspects of the service specification that do not make sense or if there are reasons why you think it will not work as they imagine, you may want to ask them about it.

Even when your price takes into account **full-cost recovery** (being paid the total amount that it costs to deliver a service, including management, overhead and staff development costs see page 45 for more information) there is no guarantee that the public service agency will pay it. You will need to decide what your organisation's position is, whether you are going to 'chase the money' or walk away from contracts that do not pay enough to run your service well. Are you prepared to compromise on your service if you cannot negotiate the right price? If you feel that you cannot deliver a quality service for the money offered, write to the procuring agency and tell them so. You can then ask them to keep you in mind if they are not satisfied with the quality of services being offered in other tenders and want to reconsider what they are paying.

You may want to get a lawyer to look at the ITT to ensure that there are no specifics of contract that may create difficulties for you later. They will be able to say where

there may be issues and will help you to understand and mitigate risks in the contract. It is expensive to get expert advice, but may be worth the cost for more valuable contracts.

If you feel able to deliver the service how the procurer wants, you will then need to write a formal tender document and submit it to the agency by the stated deadline. See section 3 for more on preparing your tender. The ITT may state the price the agency is willing to pay for the service or you may be required to come up with the price you can deliver it for. See pages 25 and 55 on determining unit cost.

Health Warning: Any tender you submit will be used as a legal contract if you win the tender. Be sure that you can deliver what you say you can, in the time and for the resources specified.

Health Warning: Ultimately, trustees are responsible for the decisions organisations take. You will need to ensure that trustees are aware of the kinds of contracts you would like to tender to deliver and that they agree that they are within the organisation's aims and objectives. There is a real danger of organisations experiencing what is known as 'mission drift' if they lose the focus of what they were set up to do and move towards 'chasing contracts' whether or not they are suited to delivering them. See page 7 for more on the role of trustees.

References

You may be asked to give the names of other services or agencies that you have delivered services to or for. They will then be asked to give a reference about the quality, reliability and effectiveness of your work. The references should relate to the service you are tendering for or the most recent contracts you have held. When providing the name of a referee you should give the contact name, position within organisation, address, telephone number, email address, value of contract,

start and finish dates, and a brief description of the works, services or supplies which were undertaken.

If you've never delivered a contract before, your reference can be from any other funding organisation you've worked with. If that's not possible, you can ask for a reference from a professional, such as a social worker, who often refers clients to your service or a fellow VCS organisation with which you have worked in partnership.

Health Warning: Often, you cannot use the agency which is organising the tender as a referee – even if it is a different department or different personnel. This can disqualify your organisation from consideration, so it is important to check with the procurer if you want to use the same agency.

Interview

At some point you may be asked to present your tender in an interview setting. Sometimes you may be asked to attend follow-up interviews, and interviews can be either formal or informal. Whatever the situation, it is important to prepare well for this interview, including thinking carefully about who will attend. The Chief Executive or Chair should represent the organisation and show that the work is taken seriously. It is important to have someone there who knows the work well and can give a personal touch, maybe by sharing some previous experience of working with the children, young people or families the new project aims to reach, and can answer questions about how the service will run. Somebody at the interview should definitely be able to speak confidently about the financial aspects of the work. Finally, you may want to consider inviting a service user along to the meeting, for example if there is a parent who is particularly involved or passionate about your organisation's work.

The size of your organisation and the amount of the contract will help you to determine who should go; as a rule of thumb, this should be two or three people.

It is absolutely vital that you familiarise yourself with the specification, identify the risks and how you propose to manage them, and have prepared key messages which focus on the award criteria to be used.

Standing time

EU regulation states that for certain services there must be a 'standstill period' of 10 days before the successful contractor and the procurer are considered to have entered into a legally binding agreement. This allows unsuccessful bidders to have feedback and, if necessary, challenge the awarding decision.

Although many of the services delivered by organisations for smaller children, young people and families will not be covered under the full legislation, most procurers will implement this 10 day standstill period between selection of provider and contract award as a matter of good practice.

It is probably a good idea to confirm with your procurer that they are using a standstill period.

Approved/preferred providers list

An **approved provider** is one which has shown that it can deliver good quality services at a best value price. Having an approved providers list allows the procuring agency to contract out more quickly when need arises as they already have a number of contractors who they know are potentially able to deliver services. Being on the list, however, does not guarantee that an organisation will win contracts, only that they will have the opportunity to bid for them.

The problem with an approved provider list is that once the list has been made, it may be difficult to be added to it, depending on how often it is reviewed and how open the procurer is to allowing new providers to join. Each procurement agency will have a different way of

letting groups know about opportunities to become an approved provider; it is best to enquire early about where, and how, such information is publicised. It is also worthwhile ensuring that you are linked into your local VCS networks and fora, particularly those related to your children's trust, as these are often the channels statutory agencies use to get information to the VCS. Your local **CVS/CVYS** should know about these networks and who represents the VCS on them.



Resources

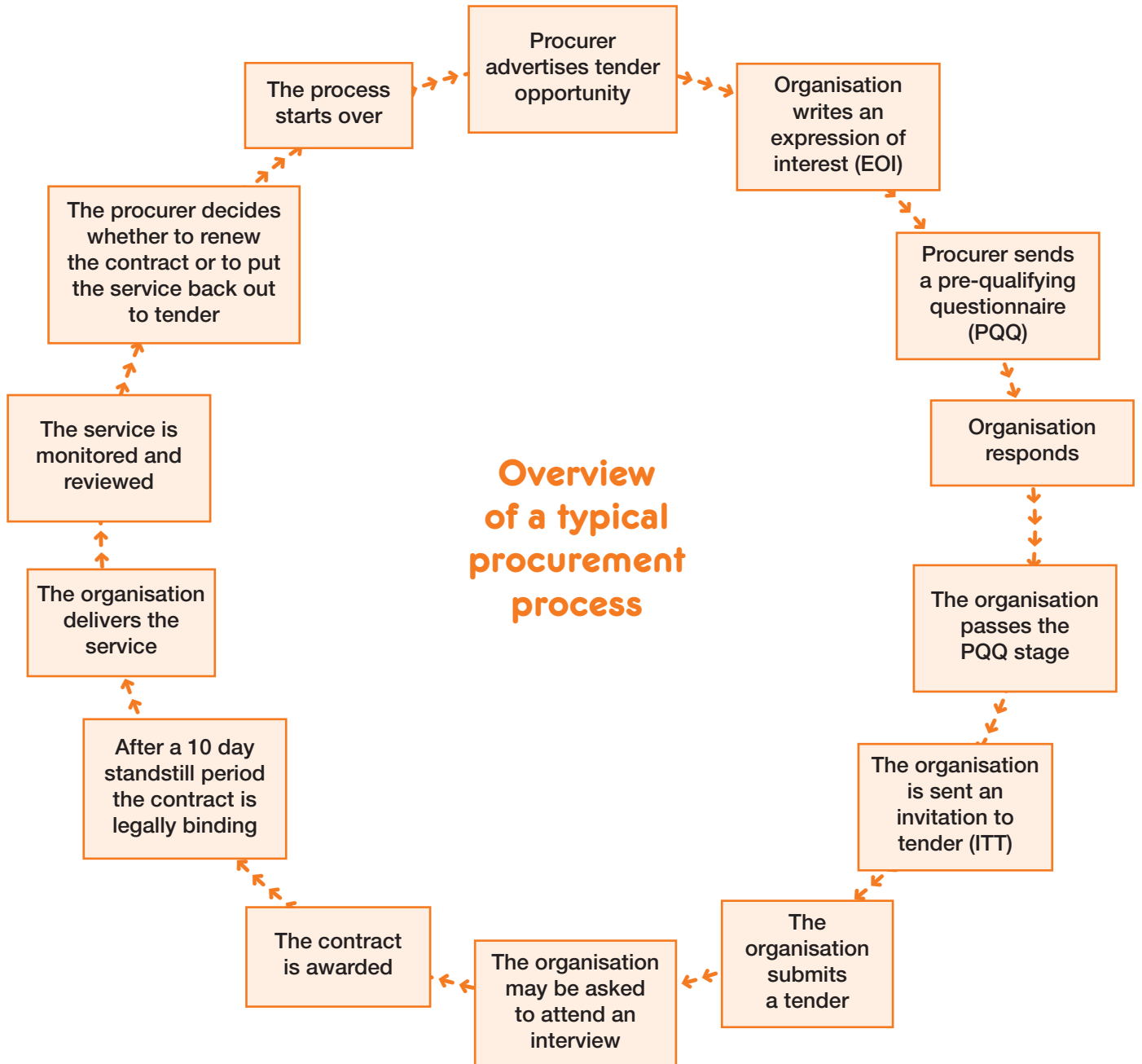
The Charity Commission has guidance around the legal side of charities contracting to deliver public services, which can be downloaded from their website www.charity-commission.gov.uk/supporting-charities/psdindex.asp

NCVO have a number of resources that can be downloaded from their website www.ncvo-vol.org.uk including:

- Before signing on the dotted line: All you need to know about procuring public sector contracts (NCVO, 2006).
- Introductory Pack on Funding and Finance: Guide to Procurement and Contracting (NCVO, 2006).
- Tools for Procurement and Contracting: Funding and Finance Toolkit 3 (NCVO, 2007).

Office of Government Commerce has useful information and templates available on their website, including guidance on the different kinds of procurement procedures. www.ogc.gov.uk

Haringey Council has a good example of a Pre-Qualifying Questionnaire (PQQ) and a workbook to help prepare applicants to fill it out. It is generic to all public services, something that is common to many public sector procurers and specific to Haringey, but it is useful for giving an overview of the PQQ process and has helpful tips for preparing a PQQ; check with your local agencies as they may have similar documents. www.haringey.gov.uk/completing_a_pqq_workbook.pdf



eProcurement

eProcurement is the term used to describe the use of electronic methods in every stage of the purchasing process from identification of requirement through to payment, and potentially to contract management.

Many public sector agencies will use Zanzibar, which is a government backed 'electronic marketplace' that allows procurers to search for providers, and providers to advertise their services, as well as complete all aspects of the procurement process, such as uploading documents and administering payments. There is no fee for suppliers to join.

www.procsolve.com/solutions/zanzibar/

You should check with the procuring agency to find out whether they intend to use eProcurement.



