

When things go wrong...

Compact

The Compact is an agreement between Government and the voluntary and community sector, which outlines a set of principles intended to help govern the relationship between public sector organisations and the VCS, with the aim of ensuring a fair and transparent deal for each party involved. Many localities have taken the national Compact and rewritten it to reflect the local situation and local priorities.

What does the Compact mean to you? It means that if something goes wrong in your relationship with a public service procurer, you can use this agreement, which was signed by Government, to try to get a fairer deal. See the *Funding and Procurement Compact code of good practice* at www.thecompact.org.uk for more detail on the Compact.

Eight principles of good commissioning

The Office of the Third Sector, based in the Cabinet Office, has developed principles of good commissioning, which may also help in discussions with public service agencies. They are:

1. Develop an understanding of the needs of users and communities, by ensuring that, alongside other consultees, you engage with third sector organisations and advocates, to access their specialist knowledge.
2. Consult potential provider organisations, including those from the third sector and local experts, well in advance of commissioning new services, working with them to set priority outcomes for that service.
3. Put outcomes for users at the heart of the strategic planning process.
4. Map the fullest practicable range of providers with a view to understanding the contribution they could make to delivering those outcomes.

5. Consider investing in the capacity of the provider base, particularly those working with hard-to-reach groups.
6. Ensure contracting processes are transparent and fair; facilitating the involvement of the broadest range of suppliers, including considering subcontracting and consortia building where appropriate.
7. Seek to ensure long-term contracts and risk sharing wherever appropriate as ways of achieving efficiency and effectiveness.
8. Seek feedback from service users, communities and providers in order to review the effectiveness of the commissioning process in meeting local needs.

The Small Business (SME) Friendly Concordat

The Small Business (SME) Friendly Concordat is a voluntary, non-statutory code of practice developed in 2005 by the then Office of the Deputy Prime Minister, the Local Government Association and the Small Business Service (SBS). It seeks to encourage a diverse market of local public service suppliers and set out what small businesses and organisations should be able to expect when tendering for local authority contracts. All local authorities have been encouraged to sign up to the set of principles outlined. You can download the Concordat and Good Practice Guidance from the Communities and Local Government website.

www.communities.gov.uk/documents/localgovernment/pdf/135262.pdf

Resources

There are some very good resources in the VCS to help organisations when things go wrong with the contracting and procurement process.

The **Compact Advocacy Programme** was set up by the National Council for Voluntary Organisations (NCVO) to help the VCS use the Compact to improve their relationships with Government. The programme provides practical support and wider campaigning to the sector in cases where government agencies have not followed the principles agreed in the Compact. Contact the programme if you need help and support on how to use the Compact, what principles have been breached and how to best challenge using the Compact. As well as giving advice and support, they also advocate on behalf of organisations in cases of clear breaches.

www.ncvo-vol.org.uk/compactadvocacy

The **Public Law Project** provides free advice and training on public law principles to all VCS organisations in England that deal with public bodies. As well as offering regular advice sessions, the project tries to help the VCS gain knowledge and skills to help it negotiate effectively with public bodies. www.publiclawproject.org.uk

The Commission for the Compact is an independent organisation for the Compact and oversees the relationship between Government and the VCS. www.thecomcompact.org.uk

Compact Voice represents the views of the VCS on taking the Compact forward and supports Local Compact Voice in helping to make more effective use of local Compacts with public bodies. www.compactvoice.org.uk



Negotiation

Negotiation is a key element to successful tendering arrangements. It can allow organisations and public sector agencies to work out arrangements that are of the greatest benefit to them both. When preparing to negotiate, it is important to think about your particular strengths as an organisation and what influence they allow you to have with the procurer. Equally, it is essential that you decide at what point you will walk away from the deal when the terms or conditions are not acceptable.

There are four stages in a negotiation process:

- Preparation.
- Discussion.
- Proposal.
- Bargain and close.

Preparation

Good preparation is absolutely vital to successful negotiation. Ensure that you know your organisation inside out, especially thinking about what you are uniquely able to bring to a service and why you should be given a contract over other organisations that may put in a bid.

Once you have taken the time to really think about who you are and why the public sector agency should give you the contract, you will need to consider your negotiating position. To do this you should determine:

- What your ideal outcome is.
- What terms you are prepared to accept.
- What point will you stop negotiating and walk away from the contract.

You should decide on these thresholds for each part of the contract that can be negotiated, such as your price, the scope of the service or the length of the contract.

Discussion

Discussion is about opening up the negotiation dialogue. It should start to build a positive and helpful relationship between you and the public sector agency; you should avoid provoking or antagonising language and behaviour as this may hinder the successful completion of your deal.

The discussion phase should be used to:

- Clarify why you and the procurer are meeting.
- Gather information to better understand the position of the procurer and possibly share your position.
- Summarise what you and the procurer both want, what you agree on and where you still need to work out differences.

The proposal

Once you are sure that you understand the procurer's position, you should make your proposal.

A good proposal will try to understand the position of the public sector agency and come up with a solution that meets both of your needs. It should answer the question, 'which of the procurers' needs do we need to meet in order for them to meet our needs?'

Most proposals should be made in an 'if, then' format. The 'if' says what you want from the procurer, and the 'then' says what you will provide in return. An example of such a proposal is, 'if we are given a three-year contract, then we will deliver two-weekly parenting courses with year-on-year savings of 10 per cent.'

Bargain and close

Bargaining is about each party offering something to the other in order to reach an agreement. It is important to know what the procurer wants from you and what you want from them; be cautious about agreeing too quickly on their wants before securing agreement on your wants.

Closing the deal is about ensuring you and the procurer have made an agreement and are each certain of the terms of that agreement. You can close a deal by offering to write a letter outlining the agreed terms, asking when you should expect to receive the contract or asking whether there is anything else that they would like to discuss.

Even if the procurer is not ready to close the deal at that moment in time, it can still be a good idea to close on some aspect of the negotiation, such as arranging another meeting or giving a tour of your organisation.

It is important to be assertive in the bargain and close phase of negotiations; you may want to think who in your team is particularly good at being assertive without being aggressive and ask this person to bargain and close on behalf of the organisation.

Taken from *Negotiation Briefing: effective negotiating to secure better outcomes*.

Resources

The Finance Hub produced a very good briefing on the principles of negotiating, including helpful tips and case studies, *Negotiation Briefing: effective negotiating to secure better outcomes*, which can be downloaded from www.financehub.org.uk



Full-Cost Recovery (FCR)

Full-cost recovery is about understanding the true costs of a piece of work and then negotiating for the appropriate fee to deliver it. The full cost of a service includes overheads such as rent and utilities, management costs, workforce development and any other costs that must be met in order for the organisation to survive, grow and develop. In order to calculate full-cost recovery you should add up all of your overhead costs, that is everything you pay out that is not associated with a specific project, and distribute them proportionately across all of the projects and services you deliver so that these costs are included in the price of your service in a 'comprehensive, robust, and defensible basis.'

Additionally, the Compact, which is an agreement between central Government and the VCS, states that funding should reflect 'the full cost of the service, including the legitimate portion of overhead costs'. What this means is that public sector agencies, which have signed up to the Compact, should be giving you full-cost recovery; if they are not you can use the Compact to pressure them to do so. See page 41 for more about the Compact.

In some cases, however, you may decide to forgo full-cost recovery if you feel that it benefits your beneficiaries to do so. For example, you could receive a contract to run a service you were planning on running anyway, perhaps because your service users requested it. Or, you may already have partial funding from another source, and the contract would allow you to deliver a more comprehensive service. Do ensure that taking a contract for less than the amount that it will cost to run the service is a well-thought-out choice and not simply a way for the procurer to take advantage of the dedication of the VCS.

It may be difficult to accurately estimate the cost to your organisation of delivering a service, but it is essential that you make your best attempt to do so before deciding to bid for a contract. There have been many reports of organisations being asked to deliver a service for a fee that is far below the actual cost of running the service. Misjudging this not only puts the organisation's sustainability and reputation at risk, it also risks negatively impacting on the wellbeing of service users. See appendix 3 for a tool to help you calculate unit cost and unit price.

Health Warning: Public sector agencies are under increasing pressure to show efficiency gains, which means that they will often be looking for ways of saving money with the contracts they buy. Procurers will look at the cost of a service over the life of the contract, including any costs associated with the finishing of a project or contract. They may not be willing to give a year-on-year increase with inflation and may even ask you to show how you will reduce costs each year.

Resources

Full Cost Recovery - a guide and toolkit on cost allocation, available as a free download from www.fullcostrecovery.org.uk and includes a comprehensive list with explanations of all costs.

TUPE (Transfer of Undertakings, Protection of Employment)

TUPE stands for *Transfer of Undertakings (Protection of Employment) Regulations 2006*. This regulation protects the rights of employees who are transferred from one employer to another, requiring the new employer to maintain certain terms and conditions, such as pay, leave and pension entitlements. If staff transfer from the public sector to a charity, their terms and conditions must be preserved under TUPE regulations. In particular the obligation to take over pension liabilities can create a major barrier to organisations wanting to deliver contracts. If the public sector organisation has a company pension scheme, the new contracting organisation and its trustees may be liable to guarantee the transferred staffs' pension arrangements.

As well as these additional costs, there can also be implications due to the code of practice, '*Workforce Matters in Local Authority Service Contracts*'. These guidelines aim to prevent organisations having a 'two tiered' workforce with some employees (i.e. those who have been newly transferred from the public sector) receiving much better pay and conditions than their colleagues who are doing the same work. It says that if you recruit new staff into a project they must be offered equal terms to those staff transferred over. This may mean additional expense for an organisation and should be carefully considered when deciding to tender for work.

There can also be TUPE costs associated with losing a contract that you previously held. If staff need to be transferred to a new organisation it could mean significant costs in administration and finance management time, including time to meet with staff and the new contracting organisation, gather information about terms of employment and potentially reshuffle other employees

work responsibilities, for example a manager who was managing other staff as well as the transferred staff.

Don't assume that everybody (including the public sector procurer) understands the implications of TUPE. Usually there will be a period of time during which prospective contractors can ask questions about the contract, and the question and response will have to be provided in writing to all who are interested in tendering for the contract. It may be worthwhile to ask the procurer about TUPE. Do the other bidders know the implications of TUPE, including potentially being responsible for paying transferred staff salary and pension at their current rate? Do they know that they may be liable for buying any buildings or equipment associated with the contract? If you are bidding for a new contract are you aware of any TUPE implications and their impact if you win the contract? Conditions of TUPE may seriously prevent an organisation from successfully delivering a newly won contract and can even threaten the stability of the entire organisation. It is essential that all organisations involved in tendering for a specific contract know the implication of the TUPE arrangements.

TUPE applies regardless of whether an organisation operates to make a profit or has purely charitable objectives, and regardless of the size of the organisation.

Does TUPE apply?

The two broad categories where TUPE applies are 'business transfers' and 'service provision changes'. In the VCS, most TUPE transfers will be service provision changes. Most contracting situations where there is a change in the service provider are covered by TUPE legislation. This is also true if a project transfers from one organisation to another in the VCS and its activities are broadly similar after transfer.

Summary of the effects of TUPE:

- All employees employed in the service that is being transferred automatically become employees of the new employer (the 'transferee'). An employer cannot pick and choose which employees to take on.
- Employees must transfer on the same terms and conditions ('contracts of employment') as those they had with their former employer. Length of service is also maintained from the former employer.
- The new employer takes over all liabilities (e.g. unfair dismissal or discrimination claims) arising from those contracts of employment, except for criminal liabilities.
- Any liabilities relating to employees who were dismissed before the transfer (for a reason connected with it) also transfer to the transferee. So if the transferor were to dismiss an employee immediately before the transfer, to avoid the employee having to transfer, the liability for unfair dismissal would fall to the transferee.
- Any collective agreements made with recognised trade unions and any recognition agreements where the business retains a distinct identity following the transfer will also transfer.
- There is special protection against dismissal. Employees who are transferred cannot, in most circumstances, be dismissed if the dismissal is in connection with the transfer.
- Of course, the above provision does not mean that an employer cannot dismiss in any circumstances. A case of gross misconduct, for example, would warrant dismissal. A dismissal in this case would be for misconduct, not on account of the transfer.
- Employees may object to the transfer or resign and claim unfair dismissal if the transfer involves a substantial change in their working conditions to their material detriment.

Source: Workforce Hub '*TUPE*' fact sheet for voluntary and community organisations – transferring projects to and from your organisation.

Health Warning: TUPE is a complex legal issue. You should get professional legal advice on how TUPE will impact on your organisation in the case of winning or losing any contract.

Health Warning: Ensure that you speak to your staff throughout the process. Transferring employees can be a destabilising time for everybody involved, including for those who remain in your organisation.

Resources

The Workforce hub has TUPE fact sheet that gives further details. <http://www.ukworkforcehub.org.uk>

Or from the Department of Business, Enterprise and Regulatory Reform a guide to employment rights on the transfer of an undertaking: www.berr.gov.uk

Another TUPE fact sheet from the Chartered Institute of Personnel and Development that is comprehensive, if a bit complicated: <http://www.cipd.co.uk/subjects/emplaw/tupe/tupe.htm>

VAT (Value Added Tax)

VAT is charged on the supply of goods and services where consideration is received in return. Supply broadly means provision or sale. Consideration means payment, which can be payment in money or payment in kind, such as supplying goods or services in return for other goods or services.

For example, if one organisation provides office space to another organisation in return for the use of workshop supplies, both organisations must still charge and pay VAT, even though no actual money was exchanged in the process.

VAT does not apply to every service or good. VAT is only chargeable on supplies that are not exempt from VAT, such as children's clothes or disability equipment, or covered by the VAT zero rate (such as food, children's clothing and books) for organisations that supply taxable goods or services of more than £64,000 (the 2008/09 threshold for VAT registration).

Some cases where VAT may be chargeable and due:

- Certain health, welfare and education services.
- Some supplies and goods.
- Providing services or goods in return for payment. This is where, if your organisation has mostly been grant funded, but you are now moving to charging a fee for your work, i.e. contracting, VAT may start to apply.
- Services or goods 'bartered' or traded between partner organisations.
- If you have a taxable income of over £64,000 (the threshold for compulsory VAT registration).

Source: VAT *Briefing: VAT made simple when working in partnership* (Finance Hub).

Health Warning: VAT is a complex legal issue. You **must** seek legal advice before taking on new contracts to see how VAT affects you. If you do not pay and charge VAT when you should do, you leave yourself open to having to pay what can be a significant amount of money all at once, which can seriously destabilise an organisation that had not budgeted for that amount of outgoings. Be sure to get any advice you are given in writing to cover your tracks in the event of something going wrong later on.

Resources

Sandy Adirondack has produced useful guides to legal issues in the VCS, including one on VAT.
www.sandy-a.co.uk/vslh/53vat.htm

