

The Compact and Procurement Law



A Guide to Frequently Asked Questions

July 2009



The Compact Series of
implementation guidance

What is the Compact?

The Compact is a voluntary agreement between the government and the third sector in England. It recognises shared values, principles and commitments and sets out guidelines for how both parties should work together to ensure that better outcomes are delivered for local people.

Financial relationship between public sector and third sector organisations are governed by both Procurement Law and the principles of the Compact. This guide helps commissioners to procure in a way that follows both these sets of rules and principles.

For more information, please visit:

www.thecompact.org.uk

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A Guide to Frequently Asked Questions

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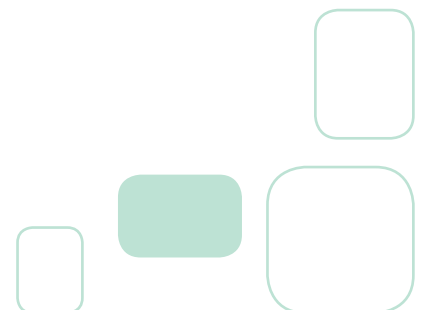
Purpose of this guide

Financial relationship between public sector and third sector organisations are governed by both Procurement Law and the principles of the Compact. This guide helps commissioners to procure in a way that follows both these sets of rules and principles. Working in such a way is in line with the Government's policy of supporting the growing number of third sector organisations who want to play an active role in shaping and delivering public services.

This guide clarifies how the Compact and Procurement Law relate to each other, through answering some questions about common areas of confusion and concern. It demonstrates that Compact principles and Procurement Law are compatible and that procurement processes may readily comply with both. This guide complements the Compact Commissioning Guidance and it is recommended that the two publications be read together.

This guide is primarily aimed at commissioners, and the frequently asked questions are asked from a commissioner's perspective. However, it will equally be useful for third sector organisations who are involved in financial relationships with the public sector.

It is important to note that this document is not a comprehensive guide to the procurement process. Commissioners should refer directly to the legal procurement rules and principles for information on complying with Procurement Law, and the Compact Commissioning Guidance for detailed guidance about how to manage commissioning in a way that reflects Compact principles. There are also other useful documents listed in the 'Further Resources' section of this guide.



Introduction to the Compact

The Compact is a voluntary agreement between the Government and the third sector in England. It recognises shared values, principles and commitments and sets out guidelines for how both parties should work together to ensure that better outcomes are delivered for local people. Central government signed up to the Compact collectively, so it applies to all central government bodies.

From 1998, local authorities were encouraged by the Government to agree Local Compacts for partnership working with third sector organisations in their areas, and now all top-tier areas have a Local Compact in place. These reflect the principles of the National Compact but vary from area to area, to reflect local issues and partnership arrangements.

The Compact Code of Good Practice on Funding and Procurement and the Compact Commissioning Guidance identify principles and undertakings that underpin the financial relationship between public sector and third sector organisations. As a result, financial relationships are constructed in such a way that allows the best outcomes to be achieved.

Introduction to Procurement Law

Public sector procurement is governed by a number of legal principles and regulations which have the aim of ensuring good practice in public sector contracting. These are:

- *Standard procedural obligations for public sector contracting imposed by European Community Treaty obligations through the Public Contract Regulations 2006 (“the 2006 Regulations”).* These are sometimes referred to as European Procurement Law and consist of ‘*procurement principles*’, which apply generally to all public sector contracts, and more specific and procedural ‘*procurement rules*’, which apply, on a mandatory basis, only to certain types of contracts.
- *The statutory duty on local authorities to ensure contracts they enter into fulfil Best Value criteria - “economy efficiency and effectiveness”.*

In the interest of simplicity, these principles and regulations will collectively be referred to in this guide as ‘Procurement Law’. Where appropriate, distinctions will be made between the different rules and their applicability.





General Questions about Procurement Law

1

We have been criticised by third sector providers for following Procurement Law too stringently - they say that not all the rules apply to our contracts with them and that we could follow the Compact better if we were less strict. Are they right?

They could be right. Many of the contracts between public sector bodies and third sector organisations will not be covered by the most stringent mandatory level of Procurement Law. This is the case if a contract is either:

- Not classified as a “Part A” contract in the 2006 Regulations. Any type of contract not included in the Part A statutory list is classified as “Part B”. Service areas such as education, health, social services, culture, recreation, and sport are explicitly classified as “Part B”.
- A service contract with local government with a contract value below €206,000 (officially converted to £139,893 until January 2010); or with central government/the NHS of €133,000 (£90,319); or a works contracts (as opposed to supply, or service contract) of €5,150,000 (£3,497,313)).

If a contract is classified as “Part B” or valued below the financial thresholds described here, it does not have to comply with the greater part of the mandatory requirements of the ‘procurement rules’ imposed by the 2006 Regulations. This means that:

- There is more scope for tailoring the applicable procedures to those that suit the actual scale, nature, and circumstances of the particular case. As a result, implementing Compact principles is generally more straightforward. For example, it is easier to tailor reasonable response deadlines to suit the type of potential provider, as there are no rules specifying mandatory timescales.
- Contracts must still comply with some aspects of Procurement Law including Best Value procedure and ‘procurement principles’. These require the application of general principles of transparency, proportionality, equal treatment and non-discrimination.

The full set of 'procurement rules' do apply to contracts listed in the Regulations as "Part A" valued above the thresholds presented here. However the great majority of contracts between public sector bodies and third sector organisations do not fall into this category. For "Part A" contracts above the thresholds there are mandatory procedural obligations such as advertising in the Official Journal of the European Union ("OJEU") and directed timescales for each stage of the procurement; however Compact principles can still be implemented within this procedural framework.

The rest of this guide is primarily about the Procurement Law requirements that apply to contracts for "Part B" services or that are below the financial thresholds, as most contracts with third sector organisations are likely to fall into one or both of these categories. However, this guide does note where there are prescriptive requirements for "Part A" contracts above the thresholds.





Questions about grants and contracts

2

How should the decision to use a grant or a contract be made so as to comply with Procurement Law and the Compact?

There is no engagement with Procurement Law when making this decision and the thresholds for contract values do not apply, as Procurement Law relates to the commissioning of a contract once such a decision has already been made to contract. However, public sector bodies will normally have internal procedures, which determine whether to proceed with grants or contracts.

The Compact Commissioning Guidance recommends that commissioners consider in every situation whether a grant or a contract is the most appropriate approach to securing the outcomes required, based on robust analysis and planning. To make this decision properly, it is important to recognise the difference between a grant and a contract. There are many resources available to help with this decision; please see the Further Resources section, and Question 3.

It is worth adding that European State Aid Rules may be considered relevant in relation to grant-funding. These rules are part of European Competition Law and they generally prohibit subsidies being given to organisations operating in an economic market, which may provide an unequal advantage, thereby distorting competition in the relevant market and affecting trade between EU member states. However, there is a tendency towards excessive caution in this area, so that State Aid Rules are seen as a problem, when the rules should not properly have application to the relevant case, or relevant exemptions are applicable. If you think a funding arrangement may involve state aid, you should consult relevant guidance (see the Further Resources section).

3 What is the difference between a grant and a contract?

Firstly, it is important to establish that Procurement Law applies to public sector contracts and not public sector grants.

The technical differences between grants and contracts are as follows:

- A public sector grant involves the provision of subsidy (capital or revenue) funding, by the relevant public sector body, in support of a charitable, or other public benefit, service, which the public body wishes to support, as part of fulfilling its own public benefit remit. A grant is provided on conditions aimed at ensuring the proper application of the grant funds, but not in return for anything.
- A public sector contract involves the provision of goods or services, to the relevant public sector body, directly in return for payment representing the price of the relevant goods or services. Terms and conditions of a contract regulate the exchange of services for payment.

There is often confusion in distinguishing between grants and contracts. For example, a public sector contractual service may be purchased by a public sector body for actual delivery to a beneficiary group, giving the appearance of a grant funding relationship. In addition, there is often misunderstanding around the term “service level agreement”. Such an agreement should clearly function either as a contract, or as a grant, yet is commonly regarded as some third type of relationship. Properly analysed, a “service level agreement” is often a contract specification document.



Questions about service design

4 I am designing a service and I would like to invite local third sector organisations to contribute their views, as set out in the Compact. But I am worried that this is against Procurement Law because it would be unfair on other potential providers. What should I do?

You are right to invite third sector organisations to give their views at this stage. The Compact Commissioning Guidance says that public sector bodies should engage with third sector organisations and other stakeholders in the design of services because this will help you to design the most appropriate service specification and tender process.

It is not against Procurement Law to involve third sector organisations in service design in this way. However, you need to ensure that the way you approach this complies with Procurement Law, which is based on the principle of equal treatment. This essentially means that you must ensure that all potential providers are treated fairly at all stages of the procurement process.

There are many simple ways to involve third sector organisations in service design and ensure all providers are treated fairly, for example:

- When inviting third sector providers to contribute to the commissioning process during the 'Analysis' and 'Planning' stages, the invitation can also be extended to other potential providers, including those from the private sector.
- Measures can be put in place to ensure that a provider assisting at these stages does not gain a competitive advantage. For example, if a third sector organisation had particular expertise in relation to a relevant beneficiary group, it might be very desirable for it to fulfil a consultancy role in setting the service specification for the procurement of a service to that group. This would be acceptable in procurement terms as long as steps were taken to ensure that the consultant organisation did not, through the knowledge gained as a consultant, obtain an unfair advantage as a potential provider of the service. Such steps might involve different individuals within the organisation being separately involved in the consultancy and the application as a service provider. Also it is possible to carefully draft the consultancy remit so that the expertise is provided, but that the setting of the service specification is a separate step not involving the consultant organisation. Of course ensuring that this is all done in a transparent way is very important.



Questions about putting contracts out to tender

5 We don't have a wide range of potential providers in our area and many third sector organisations are not 'ready' to deliver services. Can we provide support to organisations, in order to encourage a diversity of providers able to tender for our contracts?

The Compact Commissioning Guidance advises that reducing administrative barriers when designing tender processes can encourage a wider range of providers to apply to deliver contracts. The Compact also encourages commissioners to consider whether it is appropriate to use grants to fund organisations to deliver the required outcomes. A grant funded approach, rather than a competitive procurement approach, may be the most appropriate option when looking to build provider capacity or create a diverse market.

You might decide to provide more general capacity building support to organisations before the commissioning process begins. However, if you decide to do this, beware undue presumption about the range of suppliers, or the capacity of known suppliers.

That is just the type of unfairness the Procurement rules are intended to prevent. You should note also that capacity building support does raise the possibility of State Aid Rules having relevance (see question two).

Finally, in procurement terms, as with third sector consultancy in service design (see question four), capacity building support must, in principle, be distinct from the commissioning exercise. The organisation you assist with capacity will not necessarily be the best supplier of the service. In some circumstances, part of the capacity building could be the provision of an initial contract, but this is contrary to procurement principles and such preferment should be objectively justifiable, limited and lead towards a subsequent procurement.

6

Does having a pre-qualification stage comply with the Compact?

Yes, pre-qualification stages do comply with the Compact.

Procurement Law provides for a pre-qualification stage to the tender as one of the available procedures for 'Part A' contracts above the financial thresholds. It can also be used for Part B contracts. Using a pre-qualification stage to identify providers that meet the required minimum standards to deliver the contract is in line with Compact principles, as long as:

- The information requested in any such stage is relevant to the particular contract and the decision making process
- Any pre-qualification questionnaire is proportionate to the value of the contract and fairly sets out the two-stage assessment procedure and the applicable criteria and weighting.



Questions about putting contracts out to tender *(continued)*

7

How can I advertise a tender opportunity in a way that complies with Compact principles and Procurement Law?

Compact principles and Procurement Law are consistent with each other on this topic, as both demand that tender opportunities should be advertised in such manner as will make the advertisement reasonably available to all prospective providers.

The Compact is concerned with ensuring that advertising is wide enough and early enough to ensure third sector organisations are likely to be made aware of the contract. The use of third sector infrastructure bodies and networks are a good way to achieve this. Procurement Law meanwhile is concerned with ensuring procurement opportunities are advertised in a manner that promotes equal treatment between prospective providers.

So, the answer is simply to judge reasonably the appropriate way of advertising the opportunity fairly to all potential providers. For example, if it is reasonably judged that the only potential providers are likely to be organisations operating in the locality, it is not a requirement to advertise the contract nationally.

For a “Part A” service above the contract value thresholds, Procurement Law, in theory at least, considers the potential providers might include providers from the European Union. Therefore, for these types of contract there is a requirement to publish an OJEU (Official Journal of the European Union) Notice.



8 I have just put a contract out to tender and a third sector organisation has contacted me to ask questions about the specification. Should I talk to them?

In accordance with Compact principles, which encourage discussion and dialogue at all stages of a financial relationship, yes, you should talk to them. Meanwhile, Procurement Law requires that any such communication must not provide an unfair advantage in the procurement process to the organisation asking the question.

So, the principle must be that any opportunity for communication is known to all potential providers. Also, any information provided in the course of such communication, which is material to the outcome of the procurement, must be systematically made available to all providers.

This means that from the beginning a clear process should be established to ensure that all the prospective providers receive precisely the same answers and information. For example, it is good practice to designate an explicit stage in the procurement process where any additional information requested by prospective providers is gathered together, and then disclosed to all prospective providers equally.

The process described above may equally form part of a procurement process for “Part A” contracts over the financial thresholds, provided prescribed requirements around the timescales are followed.

Questions about assessing bids

9

How can I develop assessment criteria that comply with Procurement Law and Compact principles?

The Compact Commissioning Guidance calls for commissioners to be clear and transparent when assessing bids and communicate effectively how they will be scored. This is consistent with Procurement Law, which is concerned with ensuring that all bids are assessed objectively, fairly, equally, without discrimination and that the process is transparent.

To comply with Procurement Law, it is important for the assessment criteria and weighting to be scrutinised for any suggestion that they are not scrupulously objective and non-discriminatory. A real trap is in a criterion that looks objective, but could have a discriminatory effect. An example is a criterion of ‘the level of local knowledge the provider has’, which could be appropriate where this is genuinely a pre-requisite for delivering service, but which, in other cases, could be contrary to the principle of equality of treatment. A similar example is the risk of a commissioner prescribing criteria which demand a certain level of resource that is not actually required to be the best provider.

A final Compact principle specified in the Commissioning Guidance is that commissioners should be careful to ensure that they only request information from providers that is relevant for deciding who will be awarded the contract.

It is important to note that for contracts that are for “Part A” services above the financial thresholds, there are specific requirements about the disclosure of criteria and weighting.

10

I think it's likely that a third sector organisation may submit a bid to us that is not the lowest cost, but provides additional social benefits. Can such factors be taken into account when bids are assessed?

Yes both the Compact and Procurement Law allow for such factors to be taken into account. The Compact Commissioning Guidance states that contracts should be awarded based on value for money, which should include a consideration of quality and outcomes.

The relevant Procurement Law requirements are as follows:

- The 2006 Regulations require assessment based on the “lowest price” or the “most economically advantageous”. The latter would in most cases be more appropriate for service contracts, and is akin to “value for money” which the government requires all public procurement to be based on.
- The “best value” principles require a basis of assessment which is in practice similar enough to the “most economically advantageous” test to be considered synonymous with it.
- Both the 2006 Regulations and the “best value” principles expressly allow social and environmental factors to be part of the assessment criteria. In these ways commissioners may give due (disclosed) weight, in the course of objective procurement procedures, to well formulated added value arguments. This includes the consideration of social policy considerations and social objectives.

Examples of factors that can be incorporated, as appropriate, into responses to assessment criteria are:

- a. The fact that a non-profit distributing organisation applies surpluses towards public benefit purposes complimentary to the commissioned service - it is not a negligible point that this allows the same money to be recycled for the same public benefit purposes, rather than draining away as shareholder profit.
- b. A commitment to the application of resources beyond those required under the commissioned service specification, to purposes complimentary to the commissioned service.
- c. The integration of broader public benefit, social and environmental benefits in the institutional manner and method of service delivery.
- d. Capacity, flexibility and incentive to deliver additional elements to the service which neither the public sector (with budgetary constraints), nor the private sector (with its primary focus on shareholder return) are in the same position to deliver.
- e. The particular commitment, dedication, skill, expertise and organisation required to operate a business focused primarily on public benefit delivery, in distinction to the character of such factors required to operate a business focused primarily on shareholder return.

Questions about assessing bids *(continued)*

10 Continued

It is important to note that it is the responsibility of the third sector provider not to assume or expect special treatment, as only if there is an objective and demonstrable added value is it a relevant consideration under Procurement Law. The principle of equal treatment precludes any special treatment for third sector organisations, which is not objective by reference to the relevant services.



11

A third sector organisation has asked us whether it can include 'full cost recovery' in its bid. Is this permissible?

Yes, both Compact principles and Procurement Law permit and indeed encourage full cost recovery (which includes reasonable surplus as a legitimate business development cost).

The Compact Commissioning Guidance calls for commissioners to recognise that it is legitimate for third sector providers to include the relevant element of overhead costs in their estimates for providing services, and not to seek details of these costs as their decision must be based on overall 'price'.

According to Procurement Law, a service should be delivered for the fair contract price whatever the legal status of the provider. The fair contract price means at least a price which allows the recovery of all costs reasonably and properly incurred in delivering the service, including a reasonable surplus.

Questions about negotiating terms of delivery

12

I would like to ensure that third sector providers have the opportunity to negotiate the terms of delivery we are offering for our contracts. Can I do this and comply with Procurement Law?

It is good practice to give providers the opportunity to discuss terms of delivery, as this is likely to assist in the creation of fair, reasonable, and improved contracts of mutual benefit to the parties. The Compact also calls for dialogue in every stage of the commissioning process, and for reasonable and proportionate monitoring arrangements to be agreed.

Contract formation can be a difficult subject in relation to procurement, but it is certainly possible for a reasonable degree of contract negotiation to be part of the procurement process. The mechanism for this should be described in the procurement documentation and the golden rule is that any negotiation should not lead to a materially different contract than was available to other prospective providers. Otherwise, unsuccessful providers could argue that they were not given a fair opportunity to contract on the final contract terms.

The main issue to be aware of is that if contract negotiation takes place following the selection of a provider, it can potentially violate the principle of fair treatment between providers. This is because it could lead to the agreement of material contract terms and conditions that, by definition, were not available to other providers in the course of the procurement.

Therefore, to comply with Procurement Law, the process of negotiating terms of delivery should be planned as part of the procurement process, rather than take place once a provider has been selected. This might typically involve inviting and allowing potential providers to propose contract amendments to contract terms and conditions included in invitation to tender documents in their bids. Balance is required, in which one factor will inevitably be implicit pressure on the tenderer to limit its proposals to those that are likely to enhance its attractiveness to the commissioner.

It should be noted that for “Part A” services above the financial thresholds, there are four types of procedure. One of these procedures “competitive dialogue” contemplates engagement between the commissioner and all the potential providers on the contract detail prior to submission of final bids. A “Part B” procurement could, by choice, follow this approach. The appropriate procedure for any procurement incorporating negotiation should be established and followed from the outset of the procurement process.

Further Resources

Useful websites include:

The Compact website, which contains a number of publications and resources on Compact implementation including the 'Compact Commissioning Guidance'
www.thecompact.org.uk

The website of the Office of Government Commerce, which contains a large amount of guidance on procurement practice in its Policy and Standards Framework
www.ogc.gov.uk

The website of the Department for Business Innovation and Skills, which contains advice on state aid
www.bis.gov.uk

The website of the Improvement and Development Agency, which includes a section on the National Programme for Third Sector Commissioning
www.idea.gov.uk

Links to the 'Public Service Delivery Network' web pages from
www.ncvo-vol.org.uk

Useful publications include:

'Improving financial relationships with the third sector: Guidance to funders'
available from www.hm-treasury.gov.uk

'Decision support tool on financial relationships with third sector organisations'
available from www.nao.org.uk

'Guide to Buying from the Third Sector'
available from www.cipfa.org.uk

'Guide to the EU Procurement rules'
due to be published shortly at www.ncvo-vol.org.uk and www.navca.org.uk

'Public Contracts Regulations 2006'
available from www.opsi.gov.uk



Further information

This publication is available on the Compact website at:
www.thecompact.org.uk

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