



Leicester
City Council

WARDS AFFECTED: ALL

Cabinet

3 March 2008

Contracting with the voluntary sector – “grant aid contracts”

Report of the Director of Resources and the Director of Partnership Performance and Policy

1. Summary

This report is about the arrangements for extending the “grant aid contracts” due to expire on 31 March, to enable re-provision to take place.

2. Recommendations

1. Note that officers had anticipated renewing contracts expiring on 31st March 2008 following the appropriate monitoring, evaluation and consultation with the exception of those identified in Appendix 2 where service reviews and temporary extensions have been put in place.
2. That Contract Procedure Rules as to competition be waived and that the relevant Corporate Director be authorised to offer extended contracts the providers concerned in the case of the contracts identified in the table in this report.
3. That extensions be for up to 12 months from 1 April 2008.
4. That a consultation exercise be implemented with the Voluntary and Community Sector. This will involve both the process of re-provision and the contract documentation.
5. That a further report about the approach to re-provision will be presented following consultation with the Voluntary and Community Sector.
6. That the further report considers the resources required to deliver the project and the impact on existing resources.

3. Report

3.1 Overview

A large number of “grant aid contracts” are due to expire on 31st March 2008.

For various reasons, principally a recent change in EU procurement rules, the procurement of new contracts will not be practically possible before then.

The change means that, with limited exceptions, ALL contracts must be pre-advertised.

These contracts support essential (statutory) service delivery to our service users and service continuity needs to be secured.

The contracts are with voluntary sector providers. The Council has recently entered into a “compact” which endorses a collaborative approach to working together and to engage with the Voluntary and Community sector where major changes are involved. This approach must be programmed into the decision making process about how reprocurement of these contracts will be conducted. It is recognised that there may be an impact on the Councils relationship with the sector and that effective communication, explanation and communication is vital to the success of any reprocurement process.

It is proposed that there be a block “waiver” of contract procedure rules to extend these contracts for up to 12 months where necessary. The procurement process will run alongside this extension so that reprocurement is in place when the extension expires.

This mitigates the risk of challenge in that potential providers will not suffer a loss of a chance to compete, the extension is short enough to render any legal challenge not only very expensive relative to the value but also of no practical point.

The Contracts concerned are summarised below

Category	Commissioning Department	2007/08 Value
Accommodation & Tenancy Support (Hostels)	A&H	£399,900
Adults – support in the community, services provided in Day Centres and advice	A&H	£5,007,800

Services and support to Children, Young People and their carers	CYPS	
Community Activities (Community Centres)	A&H	£343,200
Community Cohesion services	Corporate	£152,900
Young Peoples Support – Youth Services (Playgrounds)	CYPS	£944,900
Emergency Pressure	A & H	
Support to volunteers	Corporate	£288,300
Arts and Media activities in the Community	R&C	£58,300
Early Prevention	CYPS	£298,700

A detailed breakdown of these contracts is attached as an annex 1 to this report.

An extension to contracts relating to early years and youth work services, appendix 2, to enable service review, following consultation, has already been considered by Joint Commissioning Board on 11.09.07. The commissioning strategy approved under that report will be implemented and will obviously impact upon the contracts concerned.

3.2 Background

Approximately 4 years ago work started on moving all such arrangements to a “steady state” contract for services and an interim “short form” contract was devised to bridge the anticipated 9 month lead in time.

This would represent a clear move to contracting for services, and reviewing some of the requirements we impose concerning the organisational workings of the VO. This would enable a focus on service delivery as opposed to organisational inputs, whilst giving the VO’s more certainty about the basis on which the Council paid money.

Apart from a very limited number of funding arrangements that could legitimately be said to be “grant” all our arrangements that fall under the concept of “grant aid contracts” are contracts for supplies or services and are subject to contract procedure rules.

Grant awards in their true sense are not be subject to contract procedure rules. This should not be used as an escape route – grants (subsidy) are subject to the EU rules on state aid and, legally, our remedy is in trust law (ie clawback) rather than breach of contract (damages/termination).

3.3 Historical Procurement Position

Contract procedure rules themselves have been subject to a number of changes since 1997, but it has always been the case that a Director could exempt a contract from the competition requirements (as long as it was not caught by the EU Procurement rules) by certifying that there was only one provider and that there was no acceptable substitute. Contract procedure rules could also be complied with, notwithstanding a “direct award” to the VO concerned by obtaining a waiver, for example on the grounds that contracts were of relatively small value and the cost of tendering would not represent vfm, or on the grounds that that the VO represented specialist essential service delivery to vulnerable service users.

Most “grant aid contracts” fall under Part B of the regulations on service contracts or are in any event under the financial threshold and therefore did not have to be competitively advertised under EU law.

3.4 New Procurement Position

Recent case law and an interpretative communication issued by the European Commission indicate that all contracts – Part B or otherwise below the threshold have to be subject to some form of competition. The degree of competition will have to be judged against the commerciality of these contracts on inter community trade, and there is a de minimus level below which the new “law” need not apply. The old “exemptions” from contract procedure rules will also not longer apply

Furthermore following a European Court Case last year and a new Directive from the European Commission (which the UK government have until November 2009 to bring into UK law) remedies for “direct awards” in breach of EU law now include declaring a contract “ineffective” ie that contract will not stand.

All contracts above the EU threshold (currently c £139,000 for services) will now be subject to the standstill period of ten days before signing. It is also recommended that contracts below the threshold are treated similarly as this potentially reduces the scope of any ineffectiveness proceedings.

Work is ongoing to review the contract procedure rules to take account of these changes.

3.5 A risk based approach to procurement decisions

At this stage the presumption should be that all contracts are exposed to some level of competition. At the very least this will involve advertising for expressions of interest on the Councils web site. The degree of competition should be judged in the light of the potential value and interest in the contract.

Direct awards (ie not following the presumption) will be judged against a risk based approach., an outline of this follows:-

It is clear that there is a “de minimus” value below which there would be no risk – this would appear to be around the £10,000 figure.

For contracts of greater value than that then there would appear to be no risk if a “technical” exemption can be applied (for example the contract can only be performed by one provider because they own the intellectual property rights in an existing product that we use)

A further exemption can be applied if there is no effect on inter community trade. This will involve a judgement of value and market interest. Expert advice from an economist may be necessary to achieve the most robust practical position.

3.6 Review of Contract Documentation

The opportunity will be taken to consult on and review the payment mechanisms under the contracts. There is a variety of ways payment can be made for services and several different models will be developed to meet the particular preferences for the service and/or the business model used by the VO

A more realistic view needs to be taken about risk allocation: risk generally should sit with the party best able to bear it. For some smaller, but well performing VO's, an unrealistic assumption of risk could lead to contract failure.

It may take more than one contracting round to bed down pricing/business models with the VO's so that a sustainable contract can be achieved whilst providing evidence of vfm. If a sufficient data base can be built up this would then not rule out longer term contracts subject to benchmarking.

Grant aid (ie subsidy) itself is subject to the rules on state aid. Again there is a de minimus threshold, and some exceptions provided for by the EU Commission.

3.7 Impact of proposed Compact

The draft compact strengthens the necessity to review “grant aid contracting” (in terms of whether we are in fact purchasing “services” or are supporting, through subsidy, the organisation generally), contracting procedures and contract documentation relating to community based services. This will promote vfm and a greater focus on service delivery.

Some voluntary sector providers may need support to be able to engage in contracting procedures. This approach is welcomed as it strengthens the procurement process itself.

The draft compact provides for consultation with the VCS for a minimum of 12 weeks for significant changes, and for feedback on the outcomes.

3.8 Proposed approach and timetable

Extensions should be on current terms and conditions or in the form to be approved by the Head of Legal Services. It is possible that in a few cases an extension on current terms and conditions will in itself be a risk reduction measure.

A “prior indication notice” will be published as soon as practicable

That will leave a consultation and procurement window of 12 months from that date. It is possible that an “exemption” (see “risk based approach” above) will apply. It is proposed that exemptions be the decision of the appropriate Director (for de minimus contracts) and by the Town Clerk in other cases. There will be a need for economics advice in the case of the “no economic impact” exemption.

It is proposed to utilise “framework” arrangements. This will mean that providers are selected for up to 4 years, with individual work packages being called of as necessary within that timeframe. This will be compliant with EU procurement law and will save the expense and time of annual procurement of providers.

The indicative timetable is as follows:

Community Based Services Re-provision & Latest Dates/Minimum Periods	
Consultation	Until End of June
PIN	20 March 2008
Identification of Exemptions	By end April 2008
Bidder events and other capacity building	By end June 2008
Advert (minimum Councils website and OJEU)	By end June 2008
Return for expressions of interest	7 – 36 days
<u>Invitation to Bid</u>	?
Return period for bids	7 – 36 days
<u>Evaluation</u>	
Award decision	19 February 2009* *but 31 December 2008 is recommended to enable a 3 month challenge period to expire before contract start

Standstill	10 days
Contract Start	1 April 2009

It is recognised that the conjunction of circumstances, in other words many contracts expiring at the same time, the need to advertise and the impact of the Compact will create resource pressure both in terms of officer time and expense.

There may be resource implications in the additional pressure placed on existing resources, and also if additional support is needed eg for expert economics advice.

4. Financial, Legal and other implications

4.1 Financial Implications

There is evidence that framework contracts provide better value for money for the Council. This is achieved from savings in officer time, lower prices (compared to annual procurement), and certainty in price.

The Council can also take comfort from knowing that the engagements are fully compliant and therefore the risk of challenge, and the subsequent potential for financial penalties, is minimised.

(Steve Charlesworth – Head of Strategy and Development)

4.2 Legal Implications

These are contained in the report

5. Other Implications

OTHER IMPLICATIONS	YES/NO	Paragraph References within the Report
Equal Opportunities Policy	Yes	3.7
Sustainable and Environmental	No	
Crime and Disorder	No	
Human Rights Act	No	
Elderly/People on low income	Yes	3.1

6 Risk Assessment Matrix

		Likelihood	Severity/Impact	Control Action
1	Contracts not being in place if extensions not offered	H	H	Action extensions
2	Legal Challenge on procurement grounds	L	M	Follow procurement strategy

7 Background Papers

Draft report to SRG on audit of contracts in Adult Services

Notes of internal meetings

Draft compact

8 Consultations

All departments via SRG

Individual officers responsible for commissioning

9 Report Author

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Key Decision	No
Reason	N/A
Appeared in Forward Plan	N/A
Executive or Council Decision	Executive (Cabinet)