



NCVO Response to Consultation on UK transposition of new EU Procurement Directives

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Contents

Executive Summary	3
About NCVO	7
Background - The voluntary sector's role in public service delivery	7
Source of income to voluntary organisations by type of organisation	8
Voluntary sector organisation size.....	8
Income from government	8
1. Consultation questions	10
Division of contracts into lots / SME access	10
Light Touch Regime	11
New measures to increase SME participation in public procurement.....	13
Subcontracting.....	14
2. Missed opportunities in the new EU Directive	16
Restrictions on the use of price and cost only	16
3. General comments on the Draft Regulations	17
Preliminary market consultation and negotiation during tender	17
Procedures	18
Reserving certain contracts for mutuals and social enterprises	20
4. Implementation of the new Public Contracts Regulations.....	20
Improving the confidence and skills of procurement professionals	20
Feedback on existing public sector training materials.....	22

Executive Summary

This paper outlines a voluntary, community and social enterprise sector (VCSE) response to the government's consultation on the UK transposition of new EU procurement directives. It has been written by the National Council for Voluntary Organisations (NCVO) with input from the National Association for Voluntary and Community Action (NAVCA), Social Enterprise UK, Drugscope, Big Society Capital, Locality, Children England, Co-Operatives UK, Compact Voice and Clinks.

VCSEs are important partners for the government in delivering its open public services agenda. We currently provide a wide range of services at both national and local levels, ranging from employment and training to social services, sports and recreation. By being mission driven and close to communities, our sector works with the government to ensure such services impact positively on outcomes for communities.

Emerging evidence on current commissioning and procurement practice indicates that a number of barriers are preventing VCSEs from fulfilling their potential as partners for government in open public services provision. Since 2010/11 government income to the voluntary sector has fallen faster than overall cuts in public expenditure, by approximately £1.3 billion according to the Civil Society Almanac statistics that form part of the ONS blue book. Given that most of this income is derived from public services contracts, there is a real risk of losing the added value brought to public services provision by these providers.

Many of the problems associated with commissioning and procurement relate to poor decision-making, misplaced organisational priorities and risk averse behaviour. Put simply, the procurement process is only as good as the people interpreting information or making decisions, and the organisational structures in place. This applies to decisions taken at every stage of the commissioning cycle. Key challenges include:

Inadequate pre-procurement engagement with service providers and users: As well as conducting consultation exercises, contracting authorities need to nurture long-term relationships with providers who can provide valuable feedback about user experience and need. VCSE organisations are ideally placed to contribute at this stage. Regular engagement with providers also helps a contracting authority better understand what is commercially or technically deliverable and the commercial context and structures of their provider markets.

Inappropriate choice of funding mechanisms: A healthy market of service provision should include a diversity of providers, including VCSEs. Therefore procurement approaches need to be varied to suit the individual characteristics of the service being procured. A grant may be most appropriate way of funding a VCSE to deliver services at a local level – particularly if the service is niche, small scale or innovative.

Disproportionate tender requirements and timescales: Some VCSEs, particularly smaller ones, often struggle to find the time and resources needed to complete unnecessarily burdensome tender documents and meet short timescales.

Contracts awarded on price, not value: Despite Best Value Guidance and the Social Value Act 2012, many VCSEs are reporting procurement decisions which heavily weight price, over quality, as the key factor in decision-making. This often represents a complete diseconomy to the taxpayer, particularly where public services are concerned.

Unnecessary use of large-scale contracts: In recent years we have seen a steady increase in the use of larger contracts. Many VCSEs are unable to access the capital often needed to deliver these larger scale contracts. In some cases this is leading to a loss – sometimes permanently - of local knowledge and specialist expertise.

Lack of political leadership: Challenging procurement professionals to adopt new and more innovative ways of working, such as commissioning for social value, requires senior level leadership. Leaders need to understand how procurement can help a contracting authority realise its aspirations and how the misapplication of regulations can prevent this from happening.

Organisational silos: Often connections are not made between the various staff involved in commissioning, procurement, finance, and legal teams. Commissioners seeking to achieve broader social value or trial new methodologies, such as outcomes-based commissioning, can have their business case blocked by risk averse legal or finance teams.

Lack of a procurement vision which sets out what an authority is trying to achieve with its spending power. This should reflect local priorities such as the need for greater social cohesion, job creation and unemployment, environmental objectives or the health and well-being of residents.

Risk averse approaches: Contracting authorities sometimes fail to understand that an element of financial and other risk is likely to be a necessary component of any commissioning approach that will deliver impact at community level.

We believe the new EU procurement Directive presents an important opportunity to tackle some of these barriers and help realise the potential of VCSEs to shape and provide public services that improve outcomes, especially for hardest to help groups. Realising this potential will depend on ensuring the directives are transposed effectively. This paper makes a number of specific recommendations on how this might be achieved in practice:

Division of contracts into smaller lots

NCVO welcomes the Government's decision to allow contracting authorities discretion over whether to split large contracts into smaller lots and where applicable explain their reasons for not doing so. Whilst recognising the potential advantages of large contracts, evidence from the Work Programme and elsewhere indicates that small providers play a vital role in ensuring services are informed by local and specialist expertise, including the hardest to help groups. Encouraging a diverse range of providers is also essential for the health of future markets in public service provision.

We want to see a properly resourced training and guidance programme for contracting authorities that includes a specific focus on encouraging small organisations to realise their potential as shapers and providers of public services. This should highlight the advantages of dividing contracts into smaller lots, and encourage procurers to provide support for consortia formation. We also want the Government to monitor and evaluate the size of the contracts being awarded with a view to ensuring future markets include a sufficiently diverse range of providers.

Light touch regime

NCVO welcomes the replacement of the existing 'Part B' services category with a new 'light touch' regime for health, social and other services. Evidence indicates that current 'Part B' regulations are failing to reduce the regulatory burden on VCSE service providers or address the distinct characteristics of social services provision in particular. We are particularly pleased that a new financial threshold of €750,000 is being introduced, below which EU regulations will not apply.

We recommend that training and guidance includes a particular focus on ensuring contracting authorities do not mistakenly apply EU regulations where they are not required to do so, as has been common practice in the recent past. Efforts to educate on this issue must extend to procurement and legal staff, as our research indicates that it is they who often mistakenly believe such regulations must be applied for compliance with financial audit and performance measurement requirements.

We are disappointed that the Government has failed to take advantage of the flexibility provided for in the new directive to make Most Economically Advantage Tender (MEAT) the mandatory basis for contracts awarded under the new regime. If outcomes for communities are to be improved, we believe it is vital for contracting authorities to take full account of wider value for money concerns including social value, and not just award contracts on cost or price alone. This is unfinished business and we hope the Social Value Act review currently underway will present another opportunity to address these concerns.

SME Participation in public procurement

NCVO has serious reservations about the Government's decision to abolish Pre-Qualification Questionnaires (PQQs) for contracts below €207,000 because evidence does not indicate that this is likely to encourage more small providers to bid for contracts. VCSE providers, especially the smaller ones, benefit from knowing whether they are both capable or suitable for delivering a contract. Without this, there is a real risk that such questions are simply carried over into the more onerous Invitation to Tender (ITT) stage.

We understand the Government is considering the introduction of a 'self-certification' process whereby an organisation declares that it meets the minimum criteria needed to deliver a particular contract. This will depend for its success on the Government mandating full and early disclosure from public bodies about their contractual requirements.

Contracts Finder

NCVO supports the Government's decision to mandate that all public procurement opportunities and award notices for public contracts over £25,000 be accessible from Contracts Finder, but believe that much more must be done to make this outlet user-friendly for VCSEs and other SME organisations. Important lessons can be learned from Funding Central on how to achieve this in practice.

Subcontracting

NCVO is disappointed that the Government has not taken advantage of the option to make it compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and any proposed subcontractors. Transparency of this kind is important to prevent a repetition of the recent experience of some subcontractors being used as 'bid candy' to secure a prime contract in the Work Programme, without subsequently receiving either a contract or client referrals.

We want training and guidance to include a requirement for bidders to indicate the composition of their supply chain and which organisations will deliver the various components of the service. We recognise that it is not always feasible to predict precisely the value of work that will go to subcontractors (for instance under spot purchase or specialist intervention arrangements) but a percentage share expressed as a range between two figures is achievable.

Transparency throughout the supply chain is a priority for improving performance and we urge the Government to use this opportunity to fill gaps in data about the performance of prime and subcontractors. Prime contractors should be required to publish timely data on referral volumes and work flows throughout their supply chain and subcontractors should provide comparable performance data. These reforms would be in keeping with both the Compact and the Merlin standard.

Restrictions on the use of price only

NCVO is disappointed that the Government has failed to take advantage of the option to prohibit contracting authorities from using cost or price only as the sole award criterion, or to restrict their use to certain types of contracts. We believe value for money can only be achieved through full consideration

of social value and quality alongside cost, and that this provision should have applied to all 'services to the person' covered by the 'light touch' regime. We recommend that government strengthen the Social Value Act 2012 by closely monitoring its implementation and placing an obligation on contracting authorities to account for how social value is generated in public procurement.

Consultation at the tender stage

NCVO welcomes the increased emphasis on preliminary market consultation and negotiation during the tender process. VCSEs bring a great deal to the conversation about user need and service design, yet often commissioners mistakenly believe that EU regulations prohibit dialogue of this kind. Guidance and training must include a particular focus on clarification of how Regulation 24 should be interpreted alongside Regulation 40.

Time limits for responses

NCVO is concerned that new time limits to respond to tenders and adverts are approximately 30% shorter and allow for further shortening where it is deemed 'urgent' or where the procedure is preceded by a Prior Information Notice (PIN). Short time frames present a real barrier for small VCSE providers seeking to put together bids and build consortia. To compensate for this, clear guidance must be given to authorities that minimum limits must only be applied in very limited circumstances and not become the norm. Practice in this area must be actively monitored by the Mystery Shopper programme and other means.

Negotiated procedure without prior publication

NCVO accepts that contracting authorities may need to negotiate a contract with one or more suppliers without any advertisement where it would not serve any purpose to conduct a fully open and competitive procedure, but it is vital that the use of this provision is actively monitored to ensure it is not abused. Authorities must consult locally and re-examine the market to ensure new providers capable of delivery have not emerged and close monitoring would be needed to ensure that where no responses to an open or restricted procedure are obtained, a poorly-designed contract notice is not to blame.

Timing of tenders

NCVO has serious reservations about the Government's decision to adopt the 10-day minimum time limit to respond to tenders in the restricted procedure in the event that selected candidates cannot agree on a timescale. This could place undue time pressures on smaller providers with limited capacity, resulting in a dilution in bid quality (including capturing of social value and quality) and reduced competition between providers. Practice in this area must be actively monitored by the Mystery Shopper programme and other means.

Innovation Partnerships procedure

NCVO welcomes the introduction of the new 'innovation partnership' procedure which allows contracting authorities to engage with suppliers to procure innovative services that are not already available on the market place. Given its untried and untested status, extra effort will be required to raise awareness of this new flexibility and the parameters of what is, or is not, permissible under the new procedure. Government should also facilitate the sharing of best practice as the procedure is developed and used.

Reserving certain contracts for mutuals and social enterprises

The new Directive allows for certain services in the fields of health, social and cultural services to be reserved for organisations that have as their objective the pursuit of a public service mission; who

reinvest any profits with a view to achieving the organisation's objective; and whose structure is based on employee ownership or participatory principles. One of the chief characteristics of VCSEs is that they are driven by a public benefit ethos and often generate additional societal benefits with the services they deliver. Being embedded in the communities they serve, their activities are also driven by the active involvement of service users. To ensure the spirit of this provision is fulfilled, and the Government's ambitions for more open public services is achieved, it is therefore important that government clearly communicates that VCSEs can be included within the scope of the new provision, as long as they meet the criteria as set out in Article 77.

To address many of these concerns, there must be a cultural change among procurers and within contracting authorities. It is therefore vital that government provides comprehensive guidance endorsed by key stakeholders involved in public procurement, including HM Treasury, Cabinet Office, the Department for Business, Innovation and Skills, the Local Government Association and the Society of Procurement Officers.

A comprehensive training package is also recommended through the existing Commissioning Academy. While we welcome the Government's intention to expand the size of the programme to target 1,500 participants by 2016, this target still represents a modest intake given the size of the procurement community nationally. Furthermore, feedback from participants of the Academy suggests the initiative has not yet done enough to address the disconnect between procurement teams and commissioning teams which often serves as a significant barrier to creative procurement and value for money interventions. We therefore recommend that government extend the academy to a larger number of commissioners than at present, as well as extending the offer to procurement, legal and financial staff.

About NCVO

NCVO champions and strengthens the voluntary sector, with over 11,000 members, from the largest charities to the smallest community organisations and Community Interest Companies. Alongside our sister councils in Wales, Scotland and Northern Ireland, we make sure the voluntary sector can do what it does best www.ncvo-vol.org.uk.

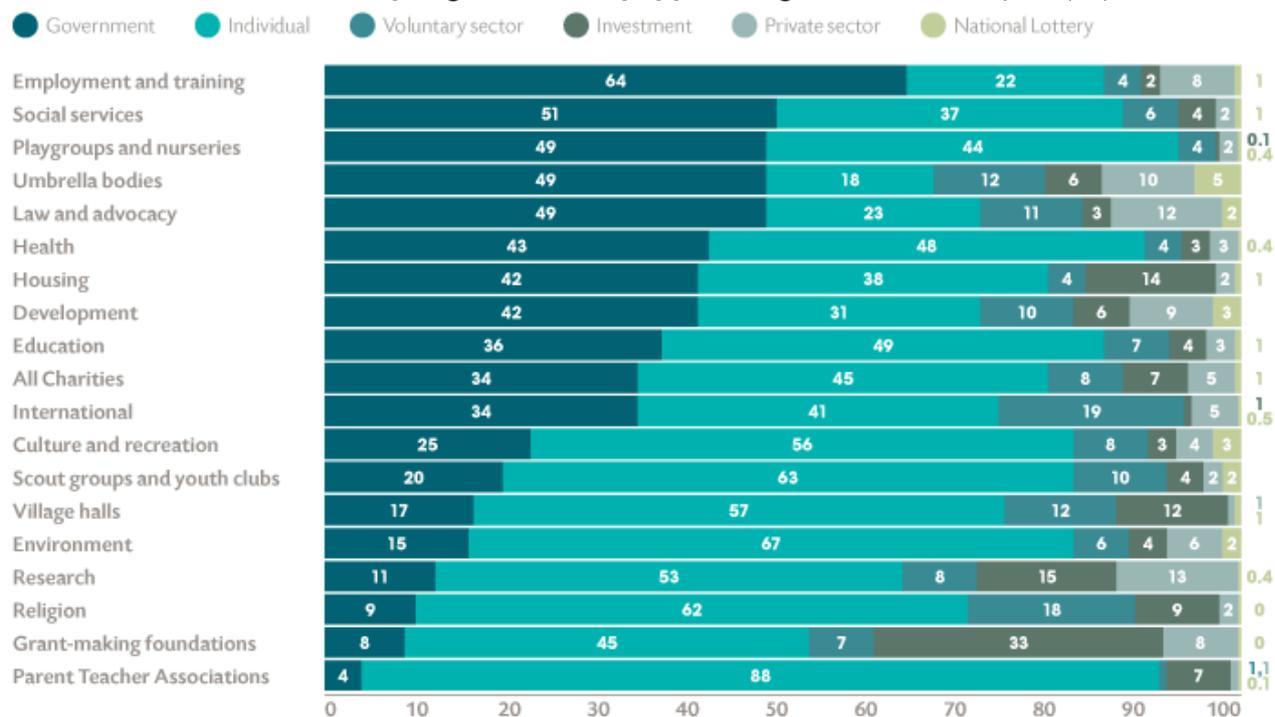
NCVO convenes the Public Service Delivery Network, a group of 2500 organisations that have an interest in public service delivery and a special interest group of sub-contractor organisations involved in the Work Programme.

Background - The voluntary sector's role in public service delivery

The voluntary sector has been involved in public service delivery for decades and has extensive experience of public procurement policies and practice.

In 2011/12 (the latest year for which data is available), the voluntary sector provided services across a broad range of areas:

Source of income to voluntary organisations by type of organisation, 2011/12 (%)



Source: *NCVO/TSRC, Charity Commission*

Further information on the voluntary sector can be found in NCVO's UK Civil Society Almanac: <http://data.ncvo-vol.org.uk>,

Voluntary sector organisation size

The table below shows the size of charities in the UK. The vast majority of charities fall within the EU definition of an SME. Only around 330 out of 161,266 voluntary organisations across the UK are not classed as SMEs under the EU definition.¹

This data relates specifically to charities. However, the term VCSE (encompassing self-defining social enterprises as well as charities, voluntary organisations and community groups) will be used throughout this response to better reflect the range of organisations that NCVO represents.

Number of UK voluntary organisations, 2011/12

How big?	Micro Less than £10,000	Small £10,000 to £100,000	Medium £100,000 to £1 million	Large £1 million to £10 million	Major More than £10 million	Total
How many?	82,391	52,815	21,257	4,270	533	161,266

Source: *NCVO/TSRC, Charity Commission*

Income from government

Charity accounts data, compiled in NCVO's Civil Society Almanac, shows that around a quarter of voluntary sector organisations receive income from government. In 2011/12 the voluntary sector received £13.7 billion in contracts and grants from government bodies; over a third of the sector's

¹ <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition>

income (35 percent). Around 50 percent (£6.8 billion) of this came from local authorities, highlighting the important relationship that exists between the voluntary sector and local government.

Since 2000, the voluntary sector's statutory income has grown faster than total public spending, due to the recognition of the role that voluntary organisations have in improving public services. **However, statutory income has fallen by £1.3 billion in real terms since 2010/11** and has fallen in cash terms from the previous year for the first time since 2000/01.

NCVO recognises that charities should not be immune from spending cuts. However, this fall in income is steeper than the overall reduction in government spending during this period. Our members tell us that the quality and value for money of public services is increasingly being undermined by focus on the cheapest price, and that this, along with the shift to larger contracts, is squeezing many smaller organisations out of their traditional service delivery role. This is resulting in lower quality public services and a loss – sometimes permanently - of local expertise and knowledge. We want to work with the government to address the challenges that are preventing VCSE organisations fulfilling their potential to improve outcomes for communities and individuals.

1. Consultation questions

Division of contracts into lots / SME access

Question 8. *We invite comments as to whether the proposed approach to the two policy choices is appropriate bearing in mind policy goals and stakeholder views to date, or whether there are clear arguments to the contrary.*

NCVO supports the government's decision to give contracting authorities discretion over whether to split 'large' contracts into smaller lots, and where applicable, explain their reasons for not doing so. The primary consideration for contracting authorities should always be securing best value for money (by considering quality, price and social value) and the functionality of the service in question. Mandating the procurement of smaller contracts may not, in itself, necessarily achieve this goal.

However, it is essential that contracting authorities are aware of the advantages of procuring smaller contracts and their obligations to explain their reasoning when they fail to do so. There is a growing trend to package contracts into larger and more generic units. There are potential advantages to this model, such as achieving greater scale and coordination of services – either thematically or geographically – and managing risk. However, many VCSEs do not have the balance sheets to take on these larger contracts or are unable to access suitable finance, particularly hampering the ability of smaller organisations to compete and leading to the loss of local specialist expertise.

A 2013 VCSE survey by Locality found that nearly 42% of respondents believe contracts have become larger in the last five years and a further 52% expect them to become larger still over the next five years. 80% said this would provide them with less opportunities and a lower range and quality of services in their area. These concerns were mirrored by a 2013 NCVO survey where 23 out of 46 respondents said the scale of contracts has prevented their organisation bidding for work.² One respondent noted how Lancashire County Council have moved to seek more county wide contracts rather than more local and how this has opened up the market to larger, sometimes national, providers to the detriment of effective local organisations. Another medium sized provider in the North West reports how they were excluded from bidding for business in their own locality on the basis of their turnover being c.£6.3m. The contract on offer included several services they have run since being established in the early 1980s. Losing the contract has significantly reduced their turnover, damaging their prospects of continuing to work in areas where they are well known, respected and trusted.

The Government's Work Programme typifies the trend to larger scale contracts that exclude SMEs and VCSE. Organisations wishing to deliver one of 40 prime contracts had to display an annual turnover of at least £20 million and the financial capacity to deliver large contracts that require significant cash-flow. Consequently only one charity now acts as a prime contractor in England. NCVO recently published a report which found that the needs of people with complex or multiple needs would be better met by a co-designed, locally-led service delivery approach based on smaller contracts and flexible payment models.³ Procuring smaller contracts delivered by community based organisations would achieve this goal.

The benefits of procuring smaller contracts should be communicated as part of a high quality training and guidance programme which should advise procurers on how best to encourage and support smaller organisations to form consortia so they can participate more in the delivery of large scale contracts, and ensure that contracting authorities carefully consider the effects of competitive tendering processes on local relationships, referral pathways and sharing of good practice. It should also explicitly state that the new Directive prevents contracting authorities from demanding an organisation's turnover is more than

² Neither of these surveys is available online, but can be provided on request.

³ http://www.ncvo.org.uk/images/documents/about_us/media-centre/stepping-stones-vol-sec-and-welfare-to-work-work-schemes-jul-2014.pdf

twice a contract's value and highlight the longstanding principle of subsidiarity - fundamental to the functioning of the European Union - which holds that social problems should be dealt with at the most immediate or local level compatible with the intervention, unless there is a strong case to the contrary.

NCVO also supports the Government's decision to allow contracting authorities to award contracts combining several or all lots, (in procurements where a tenderer is permitted to win more than one lot) where this offers better value for money or added social value. However, in doing so procurement professionals should be required to consider the impact on the long-term health and competitiveness of the supplier market. While this could potentially make the evaluation process more complicated, it would also provide greater flexibility for bidders to offer more effective solutions. We recognise that the use of this option could reduce the benefits of lotting to some SMEs and niche providers. As such this option must be available to consortia and partnerships so that these specialist providers are also able to compete with larger organisations or prime contractors. It should also be noted that that combining lots can lead to higher costs and reduced efficiencies if, for example, a contract has to be re-tendered because there are not enough bidders.⁴ Taking the time to engage with the market at an early stage can help avoid this. The measures we have suggested are also opportunities to uphold important elements of Compact principle three, namely "Responsive and high-quality programmes and services".

Light Touch Regime

Question 16. *We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.*

NCVO welcomes the replacement of the existing 'Part B' services category with a new 'light touch' regime for health, social and other services. The current 'Part B' regulations have done little to reduce the regulatory burden on the services they cover, or highlight the distinct characteristics of social services. The new regime therefore offers an opportunity for a 'fresh start' and *if implemented correctly* (see below), could help alleviate unnecessary procedures for all parties and allow more focus on the design and effectiveness of services. The new financial threshold of €750k that accompanies the new regime – below which contracts should not be subject to EU regulation - is strongly welcomed by NCVO.

We recommend that training and guidance includes a particular focus on ensuring contracting authorities do not mistakenly apply EU regulations where they are not required to do so as has been common practice in the recent past. Efforts to educate on this issue must extend to procurement and legal staff, as our research indicates that it is they who often mistakenly believe such regulations must be applied for compliance with financial audit and performance measurement requirements.

NCVO largely supports the Government's minimalist approach regarding which rules to import into the new 'light touch' regime, as the more rules that are introduced, the more similar the regime will become to the 'main rules'. However, we are disappointed they have failed to take advantage of the flexibility provided for in the new EU Procurement Directive to make 'MEAT' (Most Economically Advantageous Tender) the mandatory basis for contracts awarded under the new regime. 'MEAT' requires a contracting authority to take account of criteria that reflect qualitative and social aspects of a tender as well as price and cost when reaching an award decision. We believe these factors should always be considered where public services are concerned. While we recognise that 'MEAT' still allows a contracting authority to procure on cost or price alone, we believe this represents a missed opportunity to send a clear signal to procurers that failing to consider wider public benefit will compromise the

⁴ <http://www.clinks.org/resources-reports/more-provider-role-voluntary-sector-commissioning-offender-services>

quality of services, and consequently represents a diseconomy to the taxpayer. Mandating the use of 'MEAT' would also have helped reinforce existing obligations on procurers to consider wider public benefits as set out in the Public Services (Social Value) Act 2012 and uphold and implement measures in line with Compact principle two.

Question 17. *We envisage that a minimalistic regulatory approach would need to be supported with relevant training aids, policy instructions or guidance, and welcome inputs on the type of supporting materials needed and key issues to be addressed.*

There is a strong culture of risk-aversion and inflexibility in public contracting authorities when applying EU procurement rules even when these allow for flexibility and the use of discretion. For example, the existing 'Part B' services category that the 'light touch' regime will replace also has few rules to follow, yet procurement professionals often follow 'full' procedures when not required to do so.

To combat poor practice, commissioners and procurement officials need to feel secure that they will not be challenged for certain decisions. It is therefore essential that the Government provides clear, practical and comprehensive guidance to accompany the implementation of the new regime. This should make clear that procurers must assume that contracts below the new threshold of €750k are *not* of cross border interest and therefore no OJEU advertising or recourse to formal EU procedures is required. It should also make clear that contracts captured by the 'light touch' regime (those above €750k) are only subject to OJEU advertising and award notice requirements and that there is no obligation to comply with the prescriptive procurement processes applicable to other services under the full regime, such as the need to follow the detailed procurement procedures.

One particular barrier identified through conversations with council commissioners is that procurers often follow full procedures and competition under pressure from their finance or legal teams. Councils must demonstrate they have sought value for money when their accounts are annually audited otherwise they risk losing funding, or worse, get labelled a failing council. Often finance and legal teams believe following full procedures is the most effective way to do this, even when it leads to unnecessary costs, bureaucracy and poorer quality public services. Therefore particular effort should be also made to educate finance and legal teams (and private auditing firms) that better value for money can often be achieved without open competition and the full application of EU procurement law. Expanding the reach and coverage of the Commissioning Academy – as recommended by NCVO's Manifesto⁵ – would be one way of achieving this.

The guidance and training programme that has hitherto accompanied the new EU procurement Directive has failed to emphasise the flexibility provided by the new regime and is at times contradictory. For example the slide pack⁶ disseminated through the public sector training session states:

'Contracts below [the new €750k] threshold are assumed to be of no cross border interest, so no OJEU advertising is necessary' (p.23 of 'slideset') and,

'The threshold for LTR contracts (EUR 750000) is much higher than Part B Services, so this would mean fewer [OJEU] notices would be placed' (p.2 of 'Frequently Asked Questions')

NCVO welcomes the permissive and enabling nature of this messaging. However, the procurement 'handbook' - 'A Brief guide to the new EU public contracts directive'⁷ - that accompanies the slidepack encourages risk averse behaviour by putting culpability back onto individual procurement officers:

⁵ NCVO's Manifesto 'A bigger difference: Realising the potential of voluntary organisations and volunteers' http://www.ncvo.org.uk/images/documents/policy_and_research/ncvo-manifesto-2015.pdf

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361006/Final_Trainer_Slideset_-_EU_Procurement_Directives_Training.ppt

'Even when a tender process is not subject to the Public Contracts Directives, (for example because the estimated value of a contract falls below the relevant threshold), EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply. Where the authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before awarding the contract' (page 6, section 8.1)

NCVO believes this conflicting messaging will create confusion and represents a missed opportunity to highlight how procuring contracts through routes other than the full EU procurement rules can provide greater potential to integrate wider policy objectives into procurements. Indeed, paragraph 5.13 of the handbook notes how Part A and Part B services have been replaced with a 'light touch' regime, but it fails to emphasise the opportunity this provides to use simple and flexible procedures to procure these services. Paragraph 12 also makes below threshold procurement sound more onerous than it needs to be. We believe it would be helpful to describe it more positively and as something that contracting authorities should be actively seeking to take advantage of.

New measures to increase SME participation in public procurement

***Question 19.** Given we have already consulted on the principles of the Lord Young measures, we are only seeking comments specifically on technical points related to the implementation of the measures.*

a) Pre-Qualification questionnaires (PQQs)

As stated in our response to the Government's 2013 consultation 'Making public sector procurement more accessible to SMEs', NCVO has serious reservations about the Government's decision to abolish PQQs for contracts below €207k. A PQQ tests whether an organisation is both capable and suitable to deliver a particular contract. If these questions are not asked at the beginning of the tendering process, there is a risk they will simply be incorporated into the far more time-consuming Invitation to Tender (ITT) stage. This could have the opposite effect of what the Government is seeking to achieve, by increasing the administrative requirements in Invitation to Tenders (ITTs) and discouraging smaller organisations from bidding. Indeed, there is no evidence to suggest that abolishing PQQs will increase the number of contracts awarded to SMEs by local government. A 2013 survey by the Federation of Small Businesses showed local government awards 47 per cent of its spend to SMEs compared with central government which only awards 12 per cent after having abolished PQQs.⁸

We understand government may seek to mitigate the absence of a PQQ with a 'self-certification' process whereby an organisation declares that they meet the minimum criteria needed to deliver a particular contract. However for this to work it is essential that government:

- **Mandate full and early disclosure from public bodies about their requirements** It is essential that all pertinent information about the contract – i.e. legal, economic, financial or technical details (including the main financing and payment arrangements), TUPE requirements, partnership requirements, quality standards, conditions relating to the personal situation of bidders (eg whether they are expected to be enrolled on a professional or trade register), insurance cover needed, and minimum requirements relating to financial and technical capacity - be disclosed upfront when the contract is first advertised. This will give potential bidders a better chance of evaluating whether they are suitable and capable of delivering the contract before they spend time writing a tender.

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338055/Handbook_Final.pdf

⁸ 2013 FSB survey <http://www.fsb.org.uk/policy/assets/local-procurement-2013.pdf>

- **Provide clear advice and training to public bodies about proportionality of ITT requirements** VCSEs often encounter disproportionate requirements (e.g. certain quality standards and high levels of insurance cover) at PQQ stage, which arbitrarily screen them out. There is a high chance that this will continue under current proposals, but at ITT stage. Clear statutory guidance is therefore needed to give procurement teams confidence to set more proportionate requirements and another opportunity to implement undertakings of Compact principle three.

b) Contracts Finder

NCVO supports the Government's decision to mandate that all public procurement opportunities and award notices for public contracts over £25,000 be accessible from Contracts Finder. This proposal was supported by over 80 percent (145) of respondents to a 2013 NCVO survey.⁹ While we acknowledge this could have implications for regional procurement portals that currently operate across the country, the benefits of the proposal - in terms of transparency, creating a level playing field, efficiency and consistency - must take precedence. That said a technological solution which allows Contracts Finder to interface with existing portals could solve this issue.

However, we are also aware that current VCSE usage of Contracts Finder is limited and that there are concerns about its usability. A survey of members of Funding Central¹⁰, an equivalent platform for grant funding, found that only four percent of respondents used Contracts Finder with just over 1.5 percent commenting that it proved useful to their organisation.¹¹ These low satisfaction levels most likely stem from the difference in the 'user-friendliness' of the information provided by the two sites. Part of Funding Central's appeal derives from its ability to translate complex contract opportunities with technical jargon into a plain English, user-friendly format. This is particularly appealing for organisations that lack previous experience of contracting and public service delivery.

This highlights a potential weakness with Contracts Finder inasmuch as it simply reproduces the differing requirements and often recondite language of different contracting authorities. Some VCSEs could find it difficult to navigate. Therefore, while having all public contracts available in one place would mark a significant development for many VCSEs, it is equally important that contract opportunities posted by public bodies are 'user-friendly' in both their taxonomy and presentation. Accordingly, any move towards a single portal for all public contracts and award notices must be accompanied by an effort to ensure that contracting authorities use language that is as clear as possible, and that the Contracts Finder site is itself an appealing and user-friendly option for SMEs.¹²

Subcontracting

Question 13. *We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.*

Question 14. *We welcome comments on the type of supporting materials needed and key issues to be addressed.*

⁹ The survey - which covered other proposals by government in its 'Making public sector procurement more accessible to SMEs' - is not published online, although a summary of its findings can be provided on request.

¹⁰ <http://www.fundingcentral.org.uk/>

¹¹ A selection of the survey results can be found on Funding Central <http://www.fundingcentral.org.uk/Page.aspx?SP=6348>. The question results on Contract Finder are not included but were passed on to OCS in a quarterly monitoring report for Jan-Mar.

¹² NAVCA is concerned that this proposal will not benefit those organisations at the micro and smaller end of the SME scale, as it could potentially benefit organisations that are searching for opportunities at cross regional or national level. It could be particularly detrimental to these smaller organisations if regional and local procurement portals stop being maintained and invested in.

NCVO is disappointed that government has not taken advantage of the option in the new EU Procurement Directive which allows member states to make it compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and any proposed subcontractors.

When submitting a bid for a public service contract it is essential that a prime contractor clearly indicates the composition of their supply chain and which organisations will deliver the various components of the service. A contracting authority must maintain diligent oversight of the supply chain and knowing where work is going is key to this. Transparency of this kind would help avoid accusations of so-called 'bid candy' where organisations are included in a main contractor's bid in order to make it more attractive to the contracting authority awarding the contract. The practice of 'bid candy' has been most visible in the Government's Work Programme where a number of VCSEs listed as 'specialist' or 'tier 2' providers have not yet received any referrals or in some cases, even received contracts from their prime. An NCVO survey of VCSE sub-contractors found that in the first year of the Work Programme 35% of respondents had received no referrals.¹³

To address these issues, NCVO urges government to issue statutory guidance to contracting authorities requiring them to ask bidders to indicate what share of the contract they intend to subcontract. NCVO recognises that it may be difficult for prime contractors to accurately predict the precise value of work that will go to subcontractors – particularly those delivering 'spot purchase' or 'specialist intervention' services – due to the changeable and unpredictable nature of workflows. However, it should be possible to indicate a percentage share – even if this is expressed as a range (for example 10-20%) - on the basis of what a prime contractor itself will receive from a contracting authority. To illustrate with an example of the Work Programme: if a prime contractor proposes to use a subcontractor for between 10-20% of referrals for a particular customer group then it should fulfil its obligations in this regard. If, however, no or substantially fewer than expected referrals materialise from the contracting authority or its referral agent, the prime could be excused for not passing on any customers from this cohort. We recognise that some main contractors may not know who all of their delivery partners are from the outset as can sometimes be the case in the early stages of forming consortia. Therefore main contractors should also indicate confirmed delivery partners and whether additional partners might be brought in at a later stage.

It should be noted, however, that for a prime contractor to be held to account for any commitment made, there needs to be full transparency throughout the supply chain. As seen with the Work Programme, part of the problem with quantifying the occurrence of 'bid candy' or tracking the level of work to organisations down through the supply chain has been a lack of reliable referral data below the level of the prime contractor. This is symptomatic of the outsourcing of public services more generally in that the contracting authority discharges responsibility for much of the process beyond its direct relationship with the prime contractor. Therefore in addition to making it compulsory for economic operators to indicate in proposals any share of the contract they may intend to subcontract to third parties, NCVO also believes that government should make it compulsory that contracting authorities ensure their prime contractors publish timely data on referral volumes and work flows in £ value throughout their supply chain, in keeping with both the Compact and the Merlin standard. This would also help address concerns surrounding 'creaming and parking' or 'cherry picking' whereby a prime contractor keeps the most economically viable customers for itself while failing to provide for 'harder to reach' or more 'expensive' clients.

¹³http://www.ncvo.org.uk/images/documents/practical_support/public_services/SIG%20survey%202012%20report.pdf

2. Missed opportunities in the new EU Directive

Restrictions on the use of price or cost only

NCVO is disappointed that the Government has failed to take advantage of the policy choice in the new Directive which allows member states to prohibit contracting authorities from using cost only or price only as the sole award criterion, or to restrict their use to certain types of contracts. Only by considering quality, price and social value can procurers get a true picture of the value for money offered by different tenders. We believe this provision should have applied to all the 'services to the person' covered by the 'light touch' regime.

Despite existing government policy, such as DCLG's Best Value Guidance and the Public Services (Social Value) Act 2012, which seek to embed quality, value for money and social value into public procurement, feedback from NCVO members, Compact Voice, the Public Services Delivery Network and voluntary sector partners suggests this is not happening nearly enough. A 2013 survey by Compact Voice found that almost 90 percent of voluntary sector respondents believe that public bodies will still focus on lower cost rather than social value when funding.¹⁴

Procuring primarily by reference to price tends to prefer the lowest quality service and increase indirect costs. High quality, early social service interventions can save the multiple and escalating costs of later interventions – therefore representing better value for money. The Nuffield Trust has estimated that without preventative action, there will be a £44-54 billion gap in funding for the health service by 2021/22 caused by an ageing population.¹⁵

One NCVO member reports how approximately four years ago a public health body let a smoking cessation contract where the contract specification was 80 percent quality and 20 percent price. In 2013 the contract was re-let at 60 percent price, 40 percent quality. Another member which delivers fostering and adoption contracts for numerous local authorities across England reports how some local authorities are moving to a 100% price-based system. They are frequently seeing basic 'ticklists' that show an organisation has the required policies and regulations in place. As long as they pass the minimum requirements they are included in a list of potential providers. The local authority then ranks providers on a price basis and work their way down the list when trying to find out-of-area foster placements. The agency notes how they used to be asked for much more information about how their interventions make a difference and young people's outcomes, which allowed them to demonstrate the quality of the service they deliver, and why this quality is not always cheap. At a time when more children entering care are displaying increasingly complex needs, and given that the agency tends to deal with those hardest to place, quality is of vital importance.

Where quality and social value are fully incorporated into public procurement, higher quality services and significant savings to the taxpayer are achieved. The following are examples of VCSEs delivering public services with added value and social benefit.

- A Social Prescribing Pilot delivered by Voluntary Action Rotherham (VAR) increased the capacity of GP practices to meet the non-clinical needs of their patients with long-term conditions and their carers. By filling gaps in provision and enabling existing services to expand to meet additional demand the programme resulted in a 20 percent reduction in Accident and Emergency attendances; 21 percent reduction in in-patient stays; 21 percent reduction in

¹⁴ <http://www.compactvoice.org.uk/blogs/compact-voice/2013/08/07/local-compact-survey-results-2013-briefing-3-social-value>

¹⁵ www.nuffieldtrust.org.uk/sites/files/nuffield/publication/121203_a_decade_of_austerity_summary_1.pdf

outpatient appointments. The pilot led to potential cost reductions of £1.9 million over 5 years.¹⁶

- Working Chance¹⁷ helps women with criminal convictions find professional high quality jobs, in areas that they wish to work. By building the women's self-confidence and by working with employers to overcome preconceptions, the charity has placed over 300 women in professional jobs ranging from customer service and admin roles to HR and finance, in organisations such as Virgin Management, Pret A Manger and Mitie. There is an increasingly convincing evidence base that women specific services have a positive impact, and securing employment is a key contributing factor in reducing re-offending. Women who have been supported by Working Chance have a reoffending rate of just 3%
- Age UK's Newquay Pathfinder project¹⁸ helps older people with multiple long term conditions remain independent and stay out of hospital. Volunteers listen to the older person's needs and desires so that, together, they can work to achieve their goals in a shared care plan which suits their life and will help them maintain their health and wellbeing. The pilot project has led to a 25% reduction in emergency hospital admissions. By focussing on the needs of the individual, the quality of life, confidence and wellbeing of those people taking part have also improved significantly.
- Blue Sky Development and Regeneration¹⁹ deliver grounds maintenance, waste and catering contracts by only employing ex-offenders. Given the known positive impact of employment on re-offending rates, services of this nature have the potential to reduce costs to the taxpayer, reduce crime, and reduce the number of victims in local communities.²⁰

To help mitigate the decision not to prohibit the use of price and cost alone, NCVO recommends that government strengthen the Social Value Act 2012 by closely monitoring its implementation and placing an obligation on contracting authorities to account for how social value is generated in procurement activities.

3. General comments on the Draft Regulations

Preliminary market consultation and negotiation during tender

NCVO welcomes the increased emphasis on preliminary market consultation and negotiation during the tender process in the new EU Directive. Before commencing any procurement activity contracting authorities should always engage with their supplier market to assess user need; reflect on service design and gain a better understanding of the feasibility of delivery; understand the capacity of the market to deliver (and the possible risks involved); and develop, where necessary the supplier base. Pre-procurement dialogue also allows potential suppliers to ask important questions in the early stages of the tender process.

With expertise across a wide range of sectors, VCSEs are an important stakeholder in this engagement process. With their close connection to communities and service users they play a vital advocacy role for a range of groups, especially the most disadvantaged and hardest to reach communities. Engaging with VCSEs is therefore essential when designing services that tackle intractable social issues such as unemployment, reoffending and substance abuse.

¹⁶ <http://www.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/social-economic-impact-rotherham-summary.pdf>

¹⁷ <http://www.workingchance.org/>

¹⁸ <http://www.ageuk.org.uk/brandpartnerglobal/cornwallvpp/docs/newquay%20pathfinder%20evaluation.pdf>

¹⁹ <http://www.blueskydevelopment.co.uk/>

²⁰ 49% of Blue Sky's employees have gone on to further employment. More examples of VCSEs delivering social value: <http://www.ncvo-vol.org.uk/policy-research/public-services/what-we-believe>.

For example, the charity Turning Point²¹ has delivered its Connected Care model of community-led commissioning across 14 areas in England. This model enables communities to be involved in the design and delivery of services and has resulted in services that are more effective and which deliver significant net benefit to the public purse. A cost benefit analysis of one area found that with every £1 invested a return of £4.44 was achieved. When the benefits of improving quality of life are included, a return of £14.07 is gained for every £1 invested. Another example is West Mercia Probation Trust which works with the charity YSS, to identify local needs and explore innovative new service ideas.²²

However, in practice public authorities often fail to engage meaningfully with suppliers before procurement takes place. VCSEs report a widespread but mistaken assumption on the part of commissioners and procurers that EU rules prohibit such dialogue. We therefore urge government to ensure that Regulation 40 which clearly states that before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements is effectively communicated to contracting authorities. Only then can this flexibility and potential for innovation, greater value for money and a more efficient tendering process be fully exploited.

Clear guidance should also include clarification around how Regulation 24 (conflicts of interest) should be interpreted alongside Regulation 40. The Regulation states that 'Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators'. Without adequate clarification on when pre-procurement consultation becomes a competitive advantage there is a risk the confusion and risk averse behaviour that currently characterises public procurement will persist (we have provided more detailed feedback on training and guidance below).

Procedures

a) Time limits

NCVO is concerned that the new time limits to respond to tenders and adverts in the new EU Directive are approximately 30 percent shorter, and that these could potentially be open to abuse. Where it is deemed 'urgent', or where the procedure is preceded by a Prior Information Notice (PIN), these timescales can be significantly reduced further.

Short procurement timescales are already reported as being a significant barrier to VCSEs wanting to compete for contracts. Producing high quality responses to what are sometimes complex and onerous ITTs can take a considerable amount of time and resources, particularly for small VCSEs when multiple lots are tendered at the same time. A another challenge is forming the partnerships or consortia needed to achieve the capacity and scale required to deliver some large contracts. 37 out of 46 respondents to a 2013 NCVO survey said short procurement timescales have prevented their organisation from bidding for work. One respondent noted how their local authority gave only 4 weeks to put a consortium together and complete the PQQ back-to-back with the ITT.²³

In light of the significantly shorter minimum timescales in the new Directive, it is essential that government provides clear guidance to contracting authorities on fixing time limits for the receipt of tenders and requests to participate. This should make clear that minimum limits should only be used in extenuating circumstances. Contracting authorities must ensure a proportionate approach which reflects

²¹ <http://www.turning-point.co.uk/about-us/who-we-are.aspx>

²² NCVO's *Open Public Services: experiences from the voluntary sector* provides more examples of pre-procurement dialogue: http://www.ncvo-vol.org.uk/sites/default/files/open_public_services_experiences_from_the_voluntary_sector.pdf

²³ The survey is not published online, but can be provided on request.

the complexity of the contract and the time required for writing tenders. The use of accelerated time limits where the requirement is deemed 'urgent' must be properly policed through ad hoc spot checks and the Government's Mystery Shopper programme, as should the requirement on contracting authorities to disclose their reasons in contract notices.

b) Negotiated procedure without prior publication

NCVO accepts the Government's decision to adopt the policy option afforded by the European Commission to allow contracting authorities to negotiate a contract with one or more suppliers without any advertisement where it would not serve any purpose to conduct a fully open and competitive procedure. The provision potentially simplifies and speeds up the procurement process, particularly for smaller organisations where no other local competition exists.

However, the use of this option must be properly policed to ensure it is not abused. For example, when new contracts that repeat similar services agreed with past providers are let, authorities must consult locally and re-examine the market to ensure new providers capable of delivery have not emerged. Close monitoring would also be needed to ensure that where no responses to an open or restricted procedure are obtained, a poorly-designed or non-transparent contract notice is not to blame. This oversight is essential and should be subject to regular audits. The Cabinet Office's Mystery Shopper service may need to be strengthened and more proactive in this regard.

c) The timing of tenders in the restricted procedure

NCVO has serious reservations about the Government's decision to adopt the 10 day minimum time limit to respond to tenders in the restricted procedure in the event that selected candidates cannot agree on a timescale. A 10 day limit could place undue time pressures on smaller providers with limited capacity. This could rule out certain organisations from submitting bids or affect the quality of tenders and reduce competition. A 10 day timescale constraint could also prevent organisations from having the opportunity to develop means to generate social value through their tenders. We are also concerned that there may be instances where the 10 day minimum might become the default under pressure from larger providers.

NCVO urges the Government to put adequate safeguards in place to ensure contracting authorities are aware of their obligations under the new EU Directive to set proportionate time limits. It should be clearly communicated that the 10 day minimum limit should only be used in exceptional circumstances to ensure certain providers are not disadvantaged during competitions. Use of the 10 day minimum limit must be properly policed – for example, through the Cabinet Office's Mystery Shopper programme or spot checks by the Crown Commercial Service - to ensure it is not abused.

d) The new 'Innovation Partnerships' procedure

NCVO welcomes the introduction of the new 'innovation partnership' procedure which allows contracting authorities to engage with suppliers to procure innovative services that are not already available on the market place. The new procedure seems to offer significant potential for innovation in the design of public services by allowing contracting authorities to publish an opportunity to partner with one or more organisations to conduct research and development to meet its requirements. However, given its untried and untested status, extra effort will be required to raise awareness of this new flexibility and the parameters of what is, or is not, permissible under the new procedure. Government should also facilitate the sharing of best practice as the procedure is developed and used.

Reserving certain contracts for mutuals and social enterprises

The new Directive allows for certain services in the fields of health, social and cultural services to be reserved for organisations that have as their objective the pursuit of a public service mission; who reinvest any profits with a view to achieving the organisation's objective; and whose structure is based on employee ownership or participatory principles. One of the chief characteristics of VCSEs is that they are driven by a public benefit ethos and often generate additional societal benefits with the services they deliver. Being embedded in the communities they serve, their activities are also driven by the active involvement of service users. To ensure the spirit of this provision is fulfilled, and the Government's ambitions for more open public services is achieved, it is therefore important that government clearly communicates that VCSEs can be included within the scope of the new provision, as long as they meet the criteria as set out in Article 77.

NCVO is concerned that existing health legislation (the NHS Procurement, Patient Choice and Competition Regulations) prevents the mutual reservation from applying to healthcare commissioning in England. The procurement of public services must always be based on value for money and what is best for users. Arbitrarily excluding healthcare commissioning from the flexibility afforded by the mutual provision could therefore represent a diseconomy to the taxpayer and compromise the sustainability of the service in question. We also believe applying the new provision to some public service markets, while neglecting others, represents an inappropriate transposition of EU law, given the new Directive does not provide member states with this flexibility. We therefore urge government to include healthcare commissioning within the scope of the new provision.

As stated throughout this response, achieving the best value for money for the taxpayer must be the primary objective of any contracting authority. The misapplication of the new provision has the potential to adversely affect the operation of public service markets, government must therefore issue clear guidance to contracting authorities that contracts should only be reserved when a clear rationale for service improvement and value for money can be made, with this reasoning made publicly available.

4. Implementation of the new Public Contracts Regulations

Improving the confidence and skills of procurement professionals

NCVO welcomes government efforts to make procurement quicker, more efficient and more accessible. The proposed changes are, however, only one small part of the commissioning picture. Improving the skills and confidence of procurement professionals is vital to ensure the Government delivers against its objectives for Open Public Services and promoting economic growth. We are clear that simply creating new rules and leaving procurers to get on with the job will not have the desired effect.

Many of the problems associated with commissioning and procurement relate to poor decision-making, improper organisational priorities and risk averse behaviour. Put simply, the procurement process is only as good as the people interpreting information or making decisions, and the organisational structures in place. This applies to decisions about: funding mechanisms; tendering timescales; proportionate tender requirements; the scope and design of a service; and assessing the quality and value for money of different bids. Through discussions with providers, commissioners, procurement staff and independent solicitors, we have identified the following barriers that can prevent effective procurement:

- **Inadequate pre-procurement engagement with service providers and users when need is first reviewed and commissioning solutions discussed** - This should be less about using **generic consultation exercises and more about nurturing long-term relationships with providers** who can provide valuable feedback about user experience and requirements. Being embedded in the communities they serve, VCSEs are ideally placed to contribute at this stage. Regular engagement with providers also helps a contracting authority better understand what is

commercially or technically deliverable and the commercial context and structures of their provider markets. A lack of understanding of EU procurement rules is often cited as one reason why meaningful pre-procurement dialogue is not the norm.

- **A lack of strong political leadership** - Challenging procurement professionals to adopt new and more innovative ways of working often demands firm leadership from one or more senior officials. This should be someone who understands how procurement can help a contracting authority realise its aspirations and how the misapplication of regulations can prevent this from happening.
- **There is often a disconnect between the key parties involved in leading the procurement of services: commissioning, procurement, finance, and legal teams** - Commissioners seeking to achieve broader social value or trial new methodologies, such as outcomes-based commissioning or social value, can have their business case blocked by risk averse legal or finance teams. Early engagement and constructive dialogue between these teams can help ascertain what is possible in each procurement exercise and avoid compliance problems further down the line.
- **A lack of a bold procurement policy which sets out what an authority is trying to achieve with its spending power** - This should reflect local priorities such as the need for greater social cohesion, job creation and unemployment, environmental objectives or the health and well-being of residents.
- **Failure to acknowledge across contracting authorities that risk is a necessary part of change and improvement in commissioning.**

To address many of these issues, there must be a cultural change among procurers and within contracting authorities. It is therefore vital that government provides guidance (endorsed by key stakeholders involved public procurement, including HM Treasury, Cabinet Office, the Department for Business, Innovation and Skills, the Local Government Association and the Society of Procurement Officers) - and a comprehensive training programme alongside the new Regulations. In particular, this should cover the issues mentioned throughout this response, namely:

- **Splitting contracts into smaller lots** - contracting authorities should be made aware of the advantages of procuring smaller contracts and their obligations to explain their reasoning when they fail to do so
- **The 'light touch' regime** – it must be made clear to procurers that contracts below the new threshold of €750k are *not* of cross border interest and therefore no OJEU advertising or recourse to formal EU procedures is required. It should also highlight the advantages of using other funding mechanisms such as grants, particularly where specialist, niche services or innovative services are required.
- **Educate finance and legal teams (and private auditing firms)** that procuring contracts through routes other than the full EU procurement rules can provide greater potential to integrate wider policy objectives into procurements.
- **Abolishing pre-qualification questionnaires** – government should provide statutory guidance to contracting authorities to ensure all pertinent information about a contract is disclosed upfront when the contract is first advertised to mitigate against the absence of PQQs for below threshold contracts.

- **All public services procurement activity should seek to achieve wider social value and public benefit** - this will help to deliver better value for the public pound – by taking into account economic, social and environmental benefits.
- **Pre-procurement consultation** – the freedom for contracting authorities to conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements must be effectively communicated to contracting authorities.
- **Tender requirements and timescales** - contracting authorities must ensure a proportionate approach which reflects the complexity of the contract, the time required for writing tenders and fixing time limits for the receipt of tenders and requests to participate.

The Commissioning Academy presents the obvious option for the dissemination of good practice and guidance to help mitigate risk aversion and the unnecessary application of EU regulation. While we welcome the Government’s intention to expand the size of the programme to target 1,500 participants by 2016, this target still represents a modest intake given the size of the procurement community nationally. Furthermore, feedback from participants of the Academy suggests the initiative has not yet done enough to address the disconnect between procurement teams and commissioning teams which often serves as a significant barrier to creative procurement and value for money interventions. NCVO therefore recommends that government extend the academy to a far wider audience than is currently planned, and encourage procurement, commissioning and legal teams from a contracting authority to attend the Academy together.

Feedback on existing public sector training materials

The guidance which has hitherto accompanied the new EU Directive has failed to emphasise the flexibility the new rules provide or address the risk averse decision making that often characterises public procurement. Indeed, the public sector training session that NCVO attended in July 2014 merely involved two volunteers reading a slide pack to six delegates.²⁴

In addition to the feedback provided above on the ‘light touch’ regime, NCVO has identified other areas of the procurement ‘handbook’ - ‘A Brief guide to the new EU public contracts directive’ - which accompanied the public sector training sessions where the tone and wording could have been more constructive:

- In setting the context in which the new EU rules have been introduced, Paragraph 3 fails to mention the express intent of the EU to acknowledge the role that public procurement can play in addressing social and environmental concerns. This would help emphasise the importance of social value and value for money to procurers.
- Paragraph 4.3 notes how the new rules support the Government’s priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike. However, they make no reference to the UK government’s aspirations around delivering social value through public procurement.
- Paragraph 5.22 notes that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g. for consultants, architects, etc).

²⁴ This casts doubt over the Crown Commercial Service’s assertion that its training is ‘being delivered ...to a very large number of procurers (both face to face to around 6000 ...to ensure maximum awareness of what can be achieved using the new EU directives.’

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338056/QandA_Final.pdf

But it fails to highlight the opportunity to take into account a commitment to their organisation and clients.

It is our understanding that this guidance is merely intended as an interim guide aimed at raising awareness of the new EU procurement rules. We understand that government plans to develop a more comprehensive guidance and training programme following this consultation and implementation in late 2014. We welcome the Government's offer to NCVO to feed into this process and look forward to working with Cabinet Office in due course.

For more information, or to discuss the issues covered in this response in more detail, please contact Paul Winyard, Policy Officer at NCVO via paul.winyard@ncvo.org.uk | 0207 520 2463.