

# Response to Cabinet Office Procurement Policy Note

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## 1. Introduction

1.1 NCVO is the largest general membership body for voluntary and community organisations (VCOs) in England. Established in 1919, NCVO represents over 8000 organisations, from large 'household name' charities to small groups involved in all areas of voluntary and community action at a local level. Our members include national and local infrastructure organisations, thereby extending our reach still further.

1.2 NCVO champions voluntary action. Our vision is of a society in which people are inspired to make a positive difference within their communities. A vibrant civil society deserves a strong voice and the best support, which we work to provide. We therefore welcome the opportunity to respond to the Procurement Policy Note (PPN) issued by the Cabinet Office on 21 December 2011, to represent the sector's views on procurement and public service delivery.

1.3 This response provides:

- A summary of NCVO's activities in the review of the Directives
- A comment on specific proposals highlighted in the Cabinet Office's Procurement Policy Note

## 2. NCVO activities

NCVO has been involved in many opportunities to influence the review of the Procurement Directives. In 2011, we produced a report outlining recommendations for the review of the

Directives<sup>1</sup> ('NCVO recommendations report'), which was submitted to the European Commission.

Through our Chief Executive's role on the European Economic and Social Committee, we contributed to key opinions on the review of State Aid rules, and exploring social entrepreneurship, evaluating the role of procurement in better service delivery outcomes, and facilitating the growth of the social investment and enterprise markets.

NCVO recommends the Cabinet Office to continue engaging with public service delivery agents, and the civil society sector, to better inform the implementation of the Directives into UK legislation and practice.

## 3. Response to specific proposals

### 3.1 Greater flexibility to negotiate

NCVO supports the continued use of negotiated procedure, and is encouraged by the government's positive response to this rule. In current UK practice, the negotiated procedure is under-used, especially in the procurement of health and social services. We hope that increased flexibility in the regulations will encourage improved use of the procedure in the UK.

Negotiated procedure is especially valuable in designing welfare service provision, of which many VCOs are involved. Considering government support for this process, our members have expressed a need for more practical support for the voluntary and

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<sup>1</sup> [http://www.ncvo-vol.org.uk/sites/default/files/files/NCVO\\_Reform\\_of\\_EU\\_Procurement\\_Directives.pdf](http://www.ncvo-vol.org.uk/sites/default/files/files/NCVO_Reform_of_EU_Procurement_Directives.pdf)

community sector in how to use this procedure in effective bidding for negotiated contracts.

### **3.2 Simpler rules on dynamic purchasing systems**

The elimination of indicative tenders is positive for the voluntary and community sector as it reduces the administrative burden on potential providers, when there is uncertainty of eventual call-off periods.

However, although the revised Directives are welcoming, national practice of these frameworks needs to be reviewed and improved to ensure better communication, information and management of the tendering process and call-off periods, in order to reduce the risk on waiting providers.

### **3.3 Evaluating suppliers' past performance rules**

We welcome this inclusion to the evaluation criteria of technical ability. Many VCOs provide services to their communities independently of contractual arrangements with statutory bodies. This clause allows procurers to better apply professional judgment in assessing the quality of suppliers' past relevant work and experience. We hope that the government will value and include such independent activities as evidence of past performance.

### **3.4 Shortened time limits**

The NCVO recommendations paper highlights challenges facing the VCS regarding the length of deadlines. Shorter deadlines are habitually unrealistic when considering often-reduced workforce capacities in civil society organisations, to complete quality submissions within tight timeframes. We urge that smart use of short deadlines is applied, taking into account the capacities of bidders and the contract types, especially when tendering for health and social services.

Accelerated procedures have already proved problematic for the sector, and have not always been appropriately applied. Although the Commission proposes minimum time limits, in practice this is often taken as guidance for standard practice. We are concerned that this will create barriers to market entry for SMEs and the VCS, and therefore hope that the government would promote and monitor the appropriate use of this specification.

### **3.5 Treatment of social services**

These proposals recognise that the current regulations do not account for the distinct characteristics of social services, and have minimal effect on competition and cross-border interest. The sector has long campaigned for changes in the procedures for social services, and so NCVO supports the principle of a more simplified and appropriate process.

The introduction of higher thresholds will alleviate many administrative and reporting obligations, which heavily burden small organisations. Contracting authorities are also able to focus their procurement procedures on more appropriate assessments of social criteria and service design.

Whilst the new treatment of social services is positive in itself if it means a simpler process to comply with, by increasing the thresholds, many small contracts will fall outside the parameters of the directive and therefore lose the benefit of other social measures within the regulations.

We believe that the Directive has made these provisions in order to drive down unnecessary burdens on contracting authorities and providers, and enable better delivery of outcomes for service users. To maintain these virtues, we would urge contracting authorities to:

(a) ensure social clauses are not ignored for contracts under the €500k mark, regardless of the obligation not to do so for contracts falling outside the directive and;

(b) take the most appropriate approach to such contracts within national procurement regulations on contractual procedure, award criteria, and administrative and reporting obligations.

### **3.7 Innovation partnerships**

Innovation in service delivery has been identified as a key government aim. The innovation partnership procedure offers a structured contractual arrangement for contracting authorities to engage with organisations, to develop new solutions for public good.

Through this contractual relationship, the contracting authority will be able to maintain control of the contract life through the development stages, and monitor the quality and success of the innovation project through its development life-cycle. Although there are concerns for the long-term security for the developer, this staged process reduces risk of involvement for both the statutory body and developer.

In turn, government will be able to invest more capital for larger innovation projects, while reducing the financial risk for unsuccessful outcomes. It will also better ensure that successful development of innovation will be rolled out across public service delivery after the contract life, due to confidence from the monitored process of development and the contracting authority's formal involvement as an innovation partner.

However NCVO believes that there still remains a need for grant-funding of pilot projects, as this contractual arrangement and its tendering process, is not appropriate for all economic operators, or necessary for all innovation development.

### **3.8 Sustainable procurement**

NCVO believes that the UK should support this proposal and has a key role to play in leading on implementation of sustainable procurement. UK government initiatives also advocating greater assessment of social and environmental criteria in commissioning and

procurement include the Public Services (Social Value) Bill and the Best Value Guidance. We encourage the UK government to seek guidance as to how best implement this approach to procurement practice.

Furthermore, NCVO seeks clarification as to how the definition of “most economically advantageous tender” (Article 66) marries with the above-mentioned government policy initiatives.

### **3.9 Explain contracts over €500,000 not divided into lots**

Although this procedure may not be appropriate across all procurement activity, NCVO believes, in principle, this clause will stimulate a different attitude towards contract sizes. This new attitude and an increase in smaller contract lots are especially important at local contracting level.

Contract sizes have been identified as a main barrier to market entry for smaller organisations, and therefore this measure would allow a greater role for some VCOs and SMEs in service delivery. Increased involvement of these organisations is an important aim for key government agendas, such as the ‘Big Society’, and the opening up of public services.

Contracts in “lots” also open up opportunities for innovation in service delivery outcomes and along the supply chain, and so it is in the interest of contracting authorities to tender for smaller contracts, where possible.

### **3.10 Direct payment to subcontractors**

This is an interesting proposal in light of the changing landscape of public service procurement in the UK. Although we appreciate that it may not align with the Coalition Government’s shift to using the David Freud model of payment-by-results (PbR) and greater use of the prime/sub-contractor structures, we believe this mechanism offers a

solution to key problems within this framework.

Whilst respecting the context of contracts, this clause recognises the need for subcontractors, which are more often SMEs, to protect their financial interests in being paid. It allows for flexibility and opens up alternative channels, especially in cases of extenuating circumstances.

In our response<sup>2</sup> to the Open Public Services White Paper, we raised concerns regarding PbR, which “will potentially exclude organisations which cannot bear the financial risk, or have enough working capital to ‘wait’ for payment”. Members of NCVO’s Work Programme special interest group for subcontractors (SIG) have reported of yje risks posed by the late payments from primes in the current programme.

NCVO believes that it is in the interest of contracting authorities to be made aware of problems in their contract supply chains, and maintain the viability of these economic operators, to ensure seamless service delivery. This mechanism will also hold prime-contractors to account and encourage more responsible partnership-working between contractors.

### **3.11 Temporary exclusion for employee-led organisations/mutuals**

NCVO seeks clarification from the Cabinet Office for its rationale in seeking temporary exemption for employee-led organisations/mutual, and further asks why charities have not been included within this exemption. Many civil society organisations face the same barriers to market entry and therefore we would support all CSOs to be subject to the same exemptions.

### **3.12 Governance requirements**

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<sup>2</sup> [http://www.ncvo-vol.org.uk/sites/default/files/NCVO\\_Policy\\_Analysis\\_OPSPW\\_for\\_web\\_final.pdf](http://www.ncvo-vol.org.uk/sites/default/files/NCVO_Policy_Analysis_OPSPW_for_web_final.pdf)

NCVO welcomes the proposal for an independent national oversight body, to fulfil the following functions:

- for oversight and coordination of implementation activities
- produce an annual report to include statistics on SMEs winning contracts
- provide legal advice to contracting authorities and economic operators
- examine complaints from citizens and businesses on application of rules

The NCVO recommendations report highlighted the uncertainty that pervades current procurement practice for both contracting authorities and economic operators, and the need for more information and support for the appropriate interpretation and implementation of the Directives, as intended.

Although the Cabinet Office views the new governance requirements as burdensome, we hope that government appreciates the value in these measures. Better understanding of the Directives and consistency of good practice across contracting authorities are vital for opening up markets and facilitating growth.

It is important to recognise that robust monitoring and evaluation of procurement activity is increasingly necessary, when greater flexibility is being afforded through other measures in the Directives. This would ensure that abuse of fair regulation or bad practice is deterred. NCVO encourages government to consider the benefits of these measures for future initiatives in procurement practice, independently of the Directives.