

Commissioning Task and Finish Group- Report 5 Risk Management Workstream – Final Report

Background

This group is one of six work stream groups, part of the 'task and finish commissioning group' set up to enable the co-production of a joint programme of work between SCC and VCF sector to enhance and improve commissioning capability. The public sector is moving away from a grants based approach to a commissioning and procurement culture and this will have huge implications for both commissioners and the VCF sector. SCC/ NHS (and some other commissioners) have signalled their intention to move towards a co-commissioning process based on quality, outcomes and value for money.

Disproportionate risk has been identified as one of the key reasons why VCF providers feel unable to participate in commissioning processes. This work stream has considered issues of risk and risk management in relation to the commissioning process. This will also at times include risks relating to procurement processes. More importantly the work stream has attempted to develop strategies to mitigate risk both for commissioners and providers, and has considered which risks are more significant or need to be treated differently for VCF providers compared with providers from other sectors.

Introduction

In the recent Modernising Commissioning Green Paper published by the Cabinet Office, the Government noted that “smaller providers [of services], including many civil society organisations, identify disproportionate levels of risk in contracts as a significant barrier to involvement in public service delivery. Anecdotal evidence suggests that this can disadvantage these providers as public sector providers and larger prime contractors seek to transfer risk to smaller providers that lack the capital or financial backing to run such risks. This can mean that civil society organisations lose out to larger, often commercial, enterprises that are able to bear the financial risk. Conversely, anecdotal evidence also suggests that some smaller providers are unwilling to accept such delivery risks in return for funding.”

It is clear, therefore, that this is not an issue just for Sheffield, but is in fact a national issue. However, there are likely to be some key steps that we can take locally to ensure that those smaller VCF providers are not disadvantaged by the prospect of risk transfer. Similarly there are steps that public sector commissioners can take to reduce the (sometimes perceived) level of risk that can be associated with using VCF providers.

Process

As a first stage the most significant risks for both commissioners and providers were identified. This was done both through desktop research and through conversations as part of the work group. For each risk, the Council's current commissioning framework was examined to understand whether or not this was an issue that had been previously identified. If so, the potential mitigations or actions proposed were considered to see if they were actually reducing that risk. If not, then we have considered what sorts of mitigation might be considered on both sides.

The risks we have considered have been broken down into a number of categories:

- Financial risks
- Reputational risks
- Legal risks
- Political risks
- Operational/service user risks

For each risk, a fuller description is given in the table along with an assessment of where in the commissioning cycle the risk is most likely to occur, and on which party the majority of the risk falls. Additionally, a suggested mitigation or proposed action is given for each risk, alongside a suggested responsible owner for the mitigation or action. Commissioners and providers will need to consider, for each risk, both the probability of that risk occurring and the impact of it doing so. These will differ between

commissioning exercises so it is not possible to include generic probability/impact scores. Commissioners and providers will also need to identify what constitutes an acceptable level of risk for their service or organisation.

Risk	Risk Type	Issue	Point in commissioning cycle	Provider/ Commissioner?	Proposed Mitigation	Responsibility
Lack of funding following a procurement process	Financial	One of the key risks for VCF providers (particularly where they have historically been grant funded) is that they will not receive any funding (or very limited funding) following a competitive procurement process. This can lead to organisational failure and a loss of diversity within the sector	Procurement	Provider	<p>It is very difficult to mitigate this risk in its entirety – it is one of the key points of a competitive process that not all bidders will be successful.</p> <p>There is an onus on providers to make sure that they make best use of their ideas, experience and knowledge to put forward compelling propositions to commissioners – incumbent organisations should be in a good position to do this in most cases.</p> <p>However, there does need to be an acknowledgement from commissioners that the fear of not securing any funding can be extremely worrying for VCF organisations particularly where they have been historically reliant on the public sector for the majority of their funding. Some of this can be offset by letting smaller contracts rather than a single large contract to allow a greater opportunity to be successful</p>	<p>Provider</p> <p>SCC</p>

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Uncoordinated funding across public sector commissioners	Financial	Some providers receive funding from a range of funding sources across the local public sector, including multiple sources within the same organisation. This can lead to uncoordinated, disjointed, duplicative and poor value for money commissioning; and confusion and added bureaucracy for the provider organisation	Service planning and design	Both	<p>Proposed new responsibility on commissioners to consider how they can join up funding with other parts of the Council and the wider public sector when commissioning activity.</p> <p>Providers to be alert for potentially duplicative commissioning processes and to highlight these to commissioners</p>	<p>SCC</p> <p>Provider</p>
Proportionality of costs of participating in a commissioning process	Financial	Some organisations have cited the costs of participating in commissioning processes as disproportionate and a disincentive to participating, including both direct costs (time devoted to bid-writing, updating policies etc.) and indirect costs (e.g. loss of focus on core delivery etc.)	<p>Service planning and design</p> <p>Procurement</p>	Provider	<p>Tapered approach to be taken by commissioners, ensuring that the level of information and detail required in documents, time to be devoted is proportionate to the value of the commission. Commissioners to move towards lower cost procedures (e.g. online systems such as SCMS which allow single registration for multiple tenders)</p> <p>SCC consider a higher monetary level for triggering competitive tendering, enabling commissioning of services, but not</p>	SCC

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					necessarily competitive tendering for securing VfM and outcome based services	
Contract length and retender costs	Financial	Commissioners sometimes offer contracts of very short length (less than a year). This can mean that the costs of tendering or retendering for that contract are high relative to the length of the contract and therefore off-putting for small organisations. Short term contracts also tend to lead to commissioning for outputs (or inputs on occasion) rather than for outcomes. There may sometimes be valid reasons for short term contracts (e.g. piloting a programme, time restricted funding etc.)	Service Planning and Design Procurement	Commissioner	For commissioners to consider the most appropriate length for contracts, bearing in mind the cost (both to the commissioner and provider) of future retendering. It is possible and may often be helpful to provide indicative funding amounts for future years if this can't be confirmed in advance or to insert annual review or break clauses to allow contract values to be renegotiated without retendering.	SCC
Uncertainty of payment mechanisms/ overall contract costs	Financial	Some organisations have raised the movement towards new payment mechanisms as	Contract implementation	Commissioner	Many of these risks are driven by national policy (e.g. the move to PBR). However, the move to new forms of payment have	

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		<p>being a key risk for the future. These mechanisms include Payment by Results (PBR) and personalised budgets. Their common feature is that there is uncertainty about the value of the contract as it depends on achievement of specific outcomes or decisions made by individuals. There are linked risks including cash flow issues which may arise.</p>			<p>allowed greater provider innovation in key areas such as social care.</p> <p>Providers will need to carefully consider how they can innovate within these payment frameworks to ensure that they are not disadvantaged.</p> <p>Commissioners will also want to think about what the impact of a move towards new payment mechanisms on VCF providers might be, which might include considering a phased approach to implementation (e.g. contracts being partially traditional block contract and partially PBR), and learn from services (e.g. Adult Social Care services) that have already moved in this direction</p>	<p>Provider</p> <p>SCC</p>
<p>Reputational risks to the commissioner of provider failure</p>	<p>Reputational</p>	<p>One of the issues sometimes cited by commissioners is that smaller (and newer) providers tend to run a greater risk of failure than larger private sector organisations. This can lead to a reluctance to</p>	<p>Procurement</p>	<p>Commissioner</p>	<p>Councils and other public sector bodies need to be encouraged to take greater risks in these areas. In reality, the risk of provider failure is relatively small if the contract has been set up correctly and if appropriate due diligence has been undertaken.</p> <p>Commissioners will want to</p>	<p>SCC</p>

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		contract with that provider because of a perceived reputational risk if the provider were to fail (and potential issues regarding service continuity etc).			consider how they might structure contracts in such a way that risk is spread, possibly between a number of VCF providers. This might be done by breaking the contract into a number of smaller geographically based contracts, or by de-risking through the use of innovation funds to test new ideas before large contracts are let.	SCC
TUPE	Legal	The risks of TUPE regulations applying has been cited as a key reason why smaller organisations do not want to get involved in commissioning processes. Indeed it is one of the most significant risks for smaller organisations, including the costs of paying for advice, capacity to manage the implications of TUPE, the frontloading of costs that can occur because of redundancy pay-outs	Service planning and design Procurement	Both	This has been identified as an important issue nationally in the Modernising Commissioning Green Paper and something the Government are considering. It is unlikely that there are significant mitigations we can put in place locally. However, a good understanding of TUPE regulations and whether they apply at an early stage can at least help to clarify these risks.	Government

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		<p>etc.</p> <p>Note that TUPE only applies where an existing service is being recommissioned, not when a new service is being commissioned for the first time</p>				
Pension liabilities	Legal/ Financial	Pension liabilities is the single biggest risk for VCF organisations in contracting with the public sector. It is linked with the TUPE issue above in that TUPE provides the primary reason why pension liabilities would transfer to a provider.	Service planning and design Procurement	Both	Again this issue is primarily a national one. In the past admitting VCF providers to the LGPS has helped to mitigate some of this risk from the provider side, but this has resulted in risk being maintained by the commissioner.	
Tax (including VAT)	Legal/ Financial	One of the key reasons why smaller VCF organisations often do not wish to get involved in commissioning (and more particularly contracting) is that such contracts are often liable to VAT. This is an issue where an organisation is not	Service planning and design	Both	This is a critical issue for many smaller provider organisations, and again is largely a national issue. In some instances it may be possible to use a grant to fund organisations where this is likely to be an issue, but this needs to be determined at the start of the process, and is unlikely to be suitable for the majority of competitively	Both

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		<p>VAT registered and the VAT is therefore not able to be reclaimed by the Council. This in effect leads to an increase in contract costs of 20%. Registering for VAT often has a knock-on impact in that chargeable services offered by the organisation then become VAT-able, increasing these costs.</p>			<p>procured services.</p> <p>Good communication between commissioners and providers during the commissioning process should enable this risk to be flushed out as early as possible, and the pros and cons of registering for VAT can be considered</p>	
Political re-prioritisation	Political	<p>Priorities of organisations sometimes change and this is particularly the case for politically led organisations like local authorities. This can lead to uncertainty amongst both commissioners and providers and can make long term thinking about commissioning more difficult</p>	Needs analysis and service planning	Both	<p>It is very difficult to mitigate this risk. Commissioning for outcomes is likely to help, as politicians are more likely to agree on outcome areas to be addressed. Engineering flexibility within contracts to reprioritise certain elements and to give a greater focus on some things can also be useful, as well as keeping contracts under review on a regular basis.</p>	SCC
Continuity of service during transition to a new provider	Operational	<p>If recommissioning results in a new provider taking over a service, it is vital to</p>	Service design and planning	Both	<p>This needs to be taken on board as a key risk by the commissioner at an early stage in the design and</p>	SCC

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		maintain continuity of service. Non-continuity is a key risk for both commissioners and providers			<p>planning process. Mitigation might include dual running for a short period or ensuring that there are clear and well-understood handover arrangements.</p> <p>Commissioners should also ensure that sufficient time is left between award of contract and the point that contract begins to ensure that the new provider has time to prepare for running the new service.</p>	<p>SCC</p> <p>Provider</p>
Reduction in quality of service	Operational	Some organisations have raised concerns that commissioning can sometimes lead to lower quality services	<p>Service design and planning</p> <p>Service review</p>	Commissioner	This should not be a risk if both commissioner and provider have a shared understanding of what the process is trying to achieve and what outcomes are being commissioned.	Both
Reduction/ changes to accessibility of service	Operational	The risk identified here is that the move towards a commissioned service (moving away from grant aid) may lead to a reduction or changes in accessibility of the service, particularly where that service had previously been delivered on a devolved	Service planning and design	Both	This risk should be mitigated through the service design and planning stages of the commissioning cycle. Commissioners and providers will need to work together to ensure that any new service continues to be accessible. Sometimes reductions in accessibility may be inevitable because of cost reductions etc, but in most cases it should be	Both

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		geographical model			possible to offset at least some of this through new methods of service delivery etc.	
Disproportionate risk transfer	All categories	The final risk identified is that even if all the other risks are considered and proportionate mitigating action is taken, the cumulative effect of this may result in disproportionate risk transfer to the provider which may make the proposition unattractive as a whole	Service planning and design Procurement	Both	<p>This risk can only be mitigated through good dialogue and communication between commissioners and potential providers.</p> <p>There is a responsibility on providers to flag at the earliest opportunity that risk transfer may be disproportionate, and for early dialogue about appropriate risk sharing.</p> <p>Commissioners should be aware of the potential for disproportionate risk transfer and should be empowered by the Council's commissioning framework to alter the balance of risk in a measured and evidenced way in order to ensure that the treatment of risk does not put off smaller (but otherwise well qualified) providers</p>	Both Provider Commissioner

Conclusions and Next steps:

On the basis of agreeing the table set out above and, in particular, agreeing that the mitigations presented are the right ones, a set of two handbooks/guides will be produced for commissioners and providers to help to answer common questions about risk management, and to provide suggested mitigations for the key risks identified. It is suggested that these should be incorporated into the City Council's commissioning framework, and into training and communications material for commissioners.

It has become clear that the over-rigid application of rules in relation to risk can sometimes result in smaller VCF providers being put off from applying – this needs to change, and, in particular, commissioners need to be given the freedom to consider appropriate and proportionate risk treatments, within a clear framework.

Providers will also need to take responsibility for de-risking as well – for example, considering tax and TUPE implications at an early stage in the commissioning process, and for bringing potential 'deal-breakers' to the attention of commissioners.

However, it is also clear that some of the most significant risks – particularly around TUPE, tax and pensions – that habitually deter smaller providers from participating in a commissioning process, will require government action for fundamental change to take place. There will be steps that we can take locally around the edges of these issues, but these are likely to remain as (not always insoluble) issues for the foreseeable future.

Further Reading

Modernising Commissioning Green Paper (Cabinet Office, 2010, <http://download.cabinetoffice.gov.uk/green-paper/commissioning-green-paper.pdf>)

Open Public Services White Paper (Cabinet Office, 2011, <http://www.cabinetoffice.gov.uk/sites/default/files/resources/open-public-services-white-paper.pdf>)

Unshackling Good Neighbours report of the independent task force on cutting red tape for small charities (Cabinet Office, 2011, <http://www.cabinetoffice.gov.uk/sites/default/files/resources/unshackling-good-neighbours.pdf>)

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