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the power of community

Better Services, Stronger Economy

A Keep it Local guide for commissioners

Friends Provident Foundation

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Locality believes that we can harness the power of community to create a strong local economy and a fair society through commissioning public services locally.

This is one of three guides for commissioners, councillors and community organisations with practical advice on how to keep services with local providers. It applies the successful approach described in Powerful Communities, Strong Economies', the final report of Locality's 'Keep it Local for Economic Resilience' action research project, supported by Friends Provident Foundation.

Local authorities are under huge pressure from rising demand for services and shrinking budgets. Many councils are seeking savings through outsourcing services at scale: bundling up services into big contracts that go to large providers at the lowest price possible.

Locality's Keep it Local campaign argues that this is the wrong approach. It pushes experienced local providers out of the picture, meaning we end up with the wrong kind of services. It also means public money leaks out the local area and leaves before it can be of broader benefit to the community.

At Locality, we believe there is a better way: to Keep it Local. By commissioning local community organisations to provide local services, councils can simultaneously create better, more responsive services and build a fairer, more resilient local economy.

We have been working in six places – Bradford, Bristol, Calderdale, Dorset, Hackney and Shropshire – to find out how we can make this happen in practice. It is clear from our research that councils have a growing interest in maximising the value of their shrinking resources through local commissioning – but that even an 'in principle' commitment will not automatically translate into Keep it Local practice.

This guide for local authority commissioners is intended to address one of the key barriers our research had identified: that commissioning remains fractured and disconnected, in particular the relationship between commissioners and procurement officers. We need to join up the system to embed a consistent place-based approach.

Despite numerous attempts to 'bust myths' around commissioning and procurement, we still hear about how OJEU thresholds, EU procurement law, state aid rules and anti-competitiveness concerns, present roadblocks to greater use of local commissioning. As one local authority officer put it to us:

> **"There is a degree of disconnect between the procurement function – with a focus on legality, EU law, state aid etc – and the specification process developed from commissioning leads"**

So this guide is intended to support commissioners who want to Keep it Local. It builds on a series of local workshops on alternative commissioning approaches, delivered as part of Locality's Keep it Local for Economic Resilience project, by Neil Coulson, a consultant who specialises in supporting the voluntary sector to grow its role within public service delivery.

Locality's research project has developed a Keep it Local: Economic Resilience Framework.[1] The framework is intended to build a shared commitment between the council and community to place-based commissioning that develops local economic resilience and maximises the local benefit of public sector procurement spend. The framework can be used by local authorities to assess to what extent current practice is promoting economic resilience and support them to commission locally and small-scale.

This guide sets out some alternative commissioning methods and delivery models that can be used to realise this strategy in practice:

Method 1: Alliance Contracting

Method 2: Light Touch Regime

Method 3: Single Tender Action

Method 4: Reserved Contracts

Method 5: Innovation Partnerships

[1] See Locality (2017) 'Powerful Communities, Strong Economies'. Available at: http://locality.org.uk/wp-content/uploads/LOCALITY-KEEP-IT-LOCAL.pdf

Method 1: Alliance Contracting

Why use it in the context of Keep it Local?

Alliance contracting is an innovative way of structuring the contractual relationship between commissioners and providers. It is important because it enables commissioners to take a place-based approach. Too often, our services exist in 'silos', creating a disjointed service landscape that can be hard to navigate. Alliance contracting affords the potential to create a much more joined up approach to service delivery at a local level.

Description

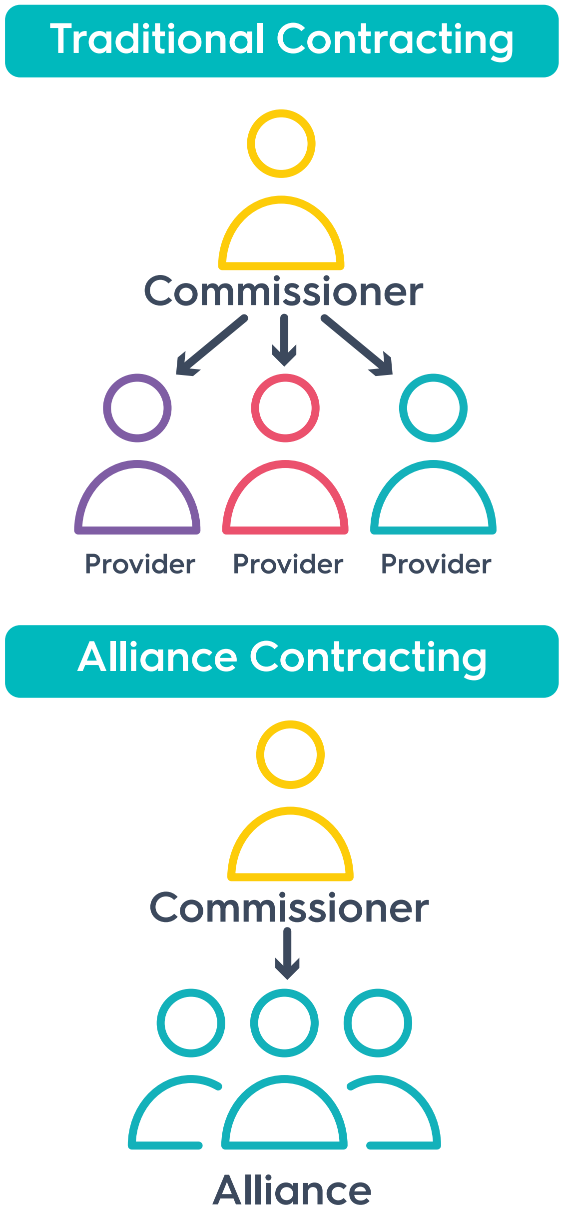
Recently, alliance contracting has emerged as a specific form of Outcomes Based Commissioning (OBC).[2] In a nutshell, alliance contracting is about developing and managing relationships between the different parties to the contract. Of late, it has gained increasing traction, especially as a way of reducing fragmentation of service delivery within health and social care.

Alliance contracting originated within heavy engineering in the 1990s. British Petroleum (BP) introduced it in the North Sea oil platforms in response to a range of problems in working with suppliers: escalating costs, delays in project completion, dispute and litigation. These problems were making it uneconomical to tap into the oil reserves. Therefore, BP decided to trial a new approach to contracting – alliancing – and selected a notoriously problematic oil reserve, the Andrew oilfield, to showcase it.

Alliancing encourages the buyer and suppliers to work as an integrated team because it ties the commercial objectives (eg profit/performance payments) of all the parties to the actual outcome of the project – 'best for project' and 'not best for individual', since the alliance either wins or loses as a group.

[2] The content of this sub-section draws on the report on alliance contracting that ACEVO produced in 2015 (Alliance Contracting: Building New Collaborations to Deliver Better Healthcare, February 2015).

The commissioner has a single contract with a group or providers, unlike in traditional contracting:



All providers are involved with the commissioner in the alliance team and therefore in the joint oversight of project progress and performance.

This approach represents a marked difference from traditional arrangements. In traditional contracting - whether it be through a commissioner holding multiple contracts with different providers, or a single contract with a lead contractor or Special Purpose Vehicle that then holds multiple sub-contracts - the emphasis is not on risk-sharing but risk transfer, with transfer of risk being built into the clauses of the contract.

This approach to risk transfer passes down the supply chain – commissioner to lead contractor, lead contractor to sub-contractors. Therefore, it often ends up with small VCSE sub-contractors carrying a disproportionate amount of risk that is difficult for them to bear.

By contrast, the cornerstone of alliance contracting is a shared risk and reward compensation structure, sometimes referred to as a 'gainshare painshare' compensation model. Here, each party's commercial interest is expressly tied to the actual whole system outcomes. The commissioner, as the 'owner' of the contract, drives this shared risk and reward approach.

This approach to sharing risk and reward involves:

- Setting an initial target cost, generated by the whole project team (the commissioner working alongside the providers)

- The target cost is then compared to the final cost and the resultant cost under or over-runs are then shared by all participants – therefore the team wins or loses as a group depending on project performance

- The comparison of target to actual cost is done through 'open book accounting' (each supplier that participates in the alliance contract has to agree to 'open book accounting', in other words, they have to be prepared to show actual records of expenditure against the project to the other participants in the contract – commissioner and other suppliers). The only exception to this approach to open book accounting is where competition law applies.

- The split of gains and losses between the commissioner and providers is agreed by the parties to the alliance at the outset of the project

Performance is not totally cost-related; instead quality and other factors such as safety, service user experience and agreed service outcomes are also factored in as non-cost based Key Performance Areas. These KPAs would be weighted at the outset and measured via pre-agreed Key Performance Indicators.

The gainshare/painshare arrangement should both reflect fair reward for effort and drive the behaviours the commissioner wishes to see.

The whole commercial framework (cost reimbursement, overheads and gainshare/painshare) underpins the collaborative working and is openly negotiated and unanimously agreed by all parties.

Summary of the key differences between alliance contracting and traditional contracting

Traditional Contracting	Alliance Contracting
• Commissioner is separate from delivery process	• Commissioner is part of integrated delivery team
• Based on risk transference	• Based on risk sharing
• Exculpatory approach within risk management framework	• 'No blame' culture
• Responsibility for outcome delivery is apportioned across separate providers	• Everyone works towards whole system outcomes
• Encourages decision making founded on 'best for self'	• Encourages decision making founded on 'best for project'
• Closed book accounting	• Open book accounting

Essential ingredients to effective alliance contracting:

- Small number of participants (alliance contracting is based on relationship development and management so the larger the team, the more difficult and problematic this becomes); evidence suggests a maximum of 8 partners

- There is a need for equality between the team members – the presence of a large, dominant provider could skew the consensual decision-making processes that alliance contracting is based on (unanimity is a unique feature of alliance contracting)

- Therefore, alliance team members need to be carefully selected

- The alliance has to be based on clearly documented principles to which all members of the alliance are completely agreed

Key to alliance contracting and its implementation is the role and ambition of commissioners. As commissioners 'own' the project or service that is under contract, they need to drive behaviour change amongst providers by themselves modelling new collaborative behaviours and attitudes.

Why is interest in alliance contracting growing?

As commissioners focus increasingly on commissioning for outcomes, contractual structures are needed that support shared responsibility for delivering outcomes, hence the increasing interest in alliance contracting.

Within the health and social care sector specifically, alliance contracting is increasingly being seen as a way of facilitating integration across the care cycle. It has the potential to align well with the desired shift to a system of whole person care.

Method 2: Light Touch Regime

Why use it in the context of Keep it Local?

The Light Touch Regime offers commissioners who want to maximise the local benefit of procurement spend the scope to tailor how they implement the procurement process for certain services, in order to accommodate the needs of local providers.

Description

The new Light Touch Regime (LTR) is a specific set of rules for certain service contracts that tend to be of lower interest to service providers from other EU Member States and therefore less likely to be subject to cross-border competition. Those service contracts include certain social, health and education services, defined by Common Procurement Vocabulary (CPV) codes.[3] The LTR rules are set out in Regulations 74 to 77 of the Public Contracts Regulations 2015.

The LTR is subject to a threshold, which is set at 750k euros, and so there are different approaches depending on whether the contract is above or below that amount.

The rules for contracts for services falling within the LTR and above the threshold are as follows:

- **OJEU advertising** – a contract notice or a prior information notice must be published, unless there are grounds for using the negotiated procedure without a call for competition[4].
- **Contract award notice** – to be published after each procurement procedure, or a group of notices on a quarterly basis.
- **Transparency and equal treatment** – contracting authorities must comply with the Treaty principles of transparency and equal treatment.
- **Conduct of the procurement** – this must conform with the information provided in the OJEU advert regarding conditions for participation, time limits for contacting/responding to the authority and the award procedure.
- **Reasonable and proportionate time limits** – there are no stipulated minimum time periods in the LTR rules. Contracting authorities should use their discretion and judgment on a case by case basis.

The new regime gives commissioners/contracting authorities much greater flexibility for LTR contracts, in that, following the initial OJEU notice, there is significant flexibility to decide how to run a LTR procurement, as long as it complies with the mandatory requirements above. Commissioners can use the standard EU procurement procedures (open, restricted, and so on), if helpful. Alternatively, they may tailor those procedures to fit their own needs or design their own procedures to get to the contract award stage.

The LTR rules are flexible concerning the types of award criteria that may be used, although certain considerations may be taken into account, including:

- The need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services
- The specific needs of different categories of users, including disadvantaged and vulnerable groups
- The involvement and empowerment of users
- Innovation

Below the LTR threshold contracts do not need to be advertised in the Official Journal (OJEU) unless there are concrete indications of cross border interest, as they would typically be regarded as not being of interest to service providers from other Member States. The Treaty Principles around transparency and equal treatment are still applicable.

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[3] See list of services to which the Light Touch Regime applies set out in Schedule 3 of the Public Contracts Regulations (PCR) 2015 [Annex A].
[4] Regulation 32 of PCR 2015 lays down the specific cases and circumstances in which contracting authorities may award public contracts by a negotiated procedure without prior publication.

Method 3: Single Tender Action

Why use it in the context of Keep it Local?

There may be circumstances where a commissioner, using the Single Tender Action approach, could award a contract directly to a local provider, maximising all the benefits of localised spend in the process.

Description

Single Tender Actions – also known as Direct Award Contracts – are where a commissioner directly awards a contract to a provider by a negotiated procedure without prior publication (see PCR 2015 regulation 32).

In 2014 Leeds City Council used Single Tender Action to award a 3 year advice services contract to Leeds Advice Consortium (consisting of Better Leeds Communities, Chapeltown and Harehills Citizens Advice Bureau, and Leeds Citizens Advice Bureau).

A key part of the rationale for awarding directly to a single provider, without prior publication, is that competition is absent. A major factor in this respect within the Leeds scenario was the coming together of the different advice agencies to form one unified provider – Leeds Advice Consortium (effectively converting from erstwhile competitors to collaborators).

A soft market test needs to be carried out to enable a clear and fully documented rationale to be developed in justification of any decision to instigate a Direct Award/Single Tender Action.

In the case of the Leeds advice service, the council report explains that[5]

- A market-sounding exercise was undertaken by Leeds City Council to determine the extent to which a developed market currently existed for the design and delivery of a new city-wide advice service
- The intention was for the outcomes of the market-sounding to then inform how the service should be commissioned
- This would be via a full, open and competitive tendering process, if several organisations demonstrated their capability to deliver the new service; or, via a direct commission if only one organisation could demonstrate this. This latter option would require a waiver of the council's procurement rules
- The market-sounding exercise was duly completed and following a thorough assessment of the responses, it was concluded by the council that only one option (that submitted by the Leeds Advice Consortium) demonstrated the experience, expertise and capability to deliver the service within the city

[5] Report of Leeds Advice Service Delivery Group, 31/1/2014. Available at: http://democracy.leeds.gov.uk/documents/s109454/Report.pdf

Method 4: Reserved Contracts

Why use it in the context of Keep it Local?

Commissioners have the opportunity to use this procedure to reserve a contract for a local VCSE provider, subject to them being a 'qualifying organisation' and meeting certain conditions.

Description

Regulation 77 of PCR 2015 allows a contracting authority to reserve the right to participate in a procurement process for 'qualifying organisations'.

This only applies to contracts for certain services (social, health and educational services) - the CPV (Common Procurement Vocabulary) Codes for them are set out in 77 (2).

A qualifying organisation must meet all the following conditions:

- Its objective is the pursuit of a public service mission linked to the delivery of qualifying services
- Profits are reinvested with a view to achieving the organisation's objective, and any distribution of profits is based on participatory considerations
- The structures of management or ownership of the organisation are (or will be, if and when it performs the contract): —
- Based on employee ownership or participatory principles
- Require the active participation of employees, users or stakeholders
- The organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years

What this means for VCSE providers:

- The organisation would have to demonstrate some participatory principles around employee management and ownership
- There is nothing in the regulations that defines what this is
- It can be considerably less than full ownership and control by the entire staff of the organisation, but will need to be more than simply being a social enterprise or not for profit

Method 5: Innovation Partnerships

Why use it in the context of Keep it Local?

This new procedure gives a commissioner the scope to select a local VCSE provider as its innovation partner to develop and deliver new services.

The definition of 'innovation' includes new methods for 'helping to solve societal challenges' (see below), so this naturally lends itself to a commissioner drawing on the unique knowledge and expertise of local VCSE providers to develop innovative approaches to tackling key social problems in the area.

Description

The Innovation Partnership Procedure, as articulated in Regulation 31 of PCR 2015, allows contracting authorities/commissioners to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works without the need for a separate procurement procedure for the purchase.[5] This is provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs.

Interestingly, innovation is defined in PCR 2015 as '...the implementation of a new or significantly improved product, service or process' (though it doesn't define what would constitute 'significant improvement'). It also refers to how it can be about social innovation: a new approach that is about helping to solve societal challenges.[6] Technically, this could include identifying and delivering new services that improve the quality of life of individuals and communities.

The procedure is appropriate for use where commissioners have a need for an innovative product, service or works that cannot be met by purchasing those already available on the market. The aim is the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, and the commissioner can decide to set up the Innovation Partnership with one partner or with several partners who conduct separate research and development activities.

Innovation Partnerships can be structured in successive phases and set intermediate targets to be attained by the partners and provide for payment in appropriate instalments. Commissioners can terminate the Innovation Partnership or reduce the number of partners after each phase, provided that the procurement documents give the option to do this.

Like the Competitive Procedure with Negotiation, commissioners can negotiate the initial and subsequent tenders submitted, except the final tender, with the tenderers to improve their content. Similarly, commissioners cannot negotiate their published minimum requirements, which must be contained in the procurement documents.

This is the first time, through this procedure, that commissioners are able to procure the development and purchase of innovative products, services or works in a single combined procurement.

[5] 2014 EU procurement directives, recital 49.
[6] The Public Contracts Regulations 2015, part 1/definitions.

Conclusion

Locality believes that locally-commissioned and delivered services can save money, achieve better outcomes, and build a strong local economy. We also believe there is a range of options available for local authorities to change their commissioning approach and Keep it Local. Indeed, the approaches outlined in this guide show that, far from preventing innovation or providing obstacles to working with local VCSE providers, 'the rules' actively encourage it, providing specific means and a range of options.

If you are interested in finding out more about how to Keep it Local, and to share and learn with like-minded councillors and commissioners, sign-up to our Keep it Local Network at **locality.org.uk**

You can also read the full final report - **'Powerful Communities, Strong Economies'** from our Keep it Local for Economic Resilience action research project with six local authorities. It sets out the key lessons learned and introduces the Keep it Local: Economic Resilience framework.

We have also previously produced a practical **five step guide for councillors and commissioners,** which outlines the key principles of our Keep it Local approach and how to put them into action.

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About Locality

Locality supports local community organisations to unlock the power in their community to build a fairer society. Our member network of over 550 community organisations creates the services their community needs most in spaces where everyone belongs. Every week over 400,000 people walk through our doors, and ultimately lives are transformed. Locality provides specialist advice, peer-learning, resources, and campaigns to create better operating conditions for our members.

Unlock the power of community

Find out more about the Keep it Local for Economic Resilience project and join the Keep it Local Network at locality.org.uk

Locality is grateful to the Friends Provident Foundation for supporting this work. Friends Provident Foundation is an independent grant-making charity working to support greater economic resilience through building knowledge and taking action at the strategic and local levels

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