What is the difference between commissioning and procurement?

What do we mean by “commissioning” and “procurement”?

The theory of commissioning is that a process of intelligence gathering and needs assessment is carried out to identify what services are required. This process should involve identification and benchmarking of current good practice performance with reasonably comparable local authorities. The commissioning process includes defining the outcomes that are being sought, and determining whether there is agreement between buyers and suppliers on an optimum service design.

Local authorities (indeed, all public bodies) are able to achieve their duties and objectives using a number of different routes. These include different ways of either carrying out activities themselves, or asking outside parties to carry out activities on their behalf. This process, described as “commissioning”, covers the cycle of:

- assessing the needs of the people the public body serves or represents (in the case of a local authority, its constituents);
- designing the specification for the necessary works, goods or services;
- securing delivery of those works, goods or services; and
- monitoring and reviewing their delivery.

There are a number of ways in which a local authority may consider commissioning, including:

- delivering the activity itself, by employing people and providing the necessary resources; many local authority services are still delivered “in house” in this way;
- giving a grant to an organisation to carry out the activity; smaller projects aimed at reducing waste, increasing reuse or improving energy efficiency can be commissioned via grant funding.
- giving an organisation the right to provide the service (a “concession” or licence) without paying them to do so;
- providing capital funding (funding which is spent on buildings, equipment or other property) to the organisation, which is then able to carry out the activity on a self-financing basis;
- setting up a joint venture (often a legal entity formed by one or more local authorities and private sector partners to undertake an activity together);
- giving financial support to service users so that individuals are able to meet fees charged by the service provider organisation (or so that they can purchase their own service);
- procuring a contract for the delivery of the goods, services or works that are needed, following a formal tendering exercise; and
- providing in-kind support (such as seconding staff or providing services, equipment or assets) to the organisation delivering the activity.

For example, when the Morecambe-based TSO, Furniture Matters, won Lancaster City Council’s bulky waste collection contract (the partnership and service is known as Bulky Matters), the council seconded a call centre member of staff into Furniture Matters. The contract arrangement means that

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1 Third Sector Investment for Growth, WRAP, 2009
Bulky Waste Guidance: Commissioning and Procurement

Furniture Matters makes all the bulky waste collection bookings in-house. By having a council representative familiar with the council call centre service and booking system on the Bulky Matters team, a consistent and professional level of service is provided to Lancaster residents. Since Furniture Matters won the contract, the service has improved and compliments soared, even at a time when a bulky waste collection charge was introduced. Residents did not appear to mind paying the charge to a local social enterprise and charity; and

Procurement is just one of the routes open to public bodies when they are deciding what and how to commission something.

The “Investment for Growth’ report” (WRAP/Realliance, 2009) found ‘Most waste services are still procured, as opposed to the use of other commissioning options. This process involves the waste service department setting the service specification, and then handing it to the procurement department to develop into a contract. This handover creates problems for TSOs in that standard contract terms and conditions are attached at this point, without recognition that they can create insurmountable barriers for TSOs. Other commissioning routes are widespread in other sectors such as health and social care, including within local authorities, but have been adopted much more slowly in waste services.’

The local authority must decide on a case-by-case basis which is the most appropriate commissioning route to take. There are some circumstances where the local authority will not have absolute freedom of choice over what route it takes. There are circumstances where the law indicates that a local authority must follow a procurement process, e.g. the value of a contract exceeds the minimum financial threshold when EU procurement rules will then apply. For information see the The Legal Framework for Local Authorities section on the main webpage.

Each local authority must also follow its own internal rules and procedures, and these may give guidance or direction as to which commissioning route to take. The term ‘procurement’ is used to refer to the procedures that public bodies must follow when purchasing works, goods or services and refers to the entire purchasing process, from the initial advertising through to the final contract arrangements. When the decision is made to ‘procure’ something (rather than follow a different commissioning route), the formal EU procurement process may or may not apply to the procurement of that contract. This depends on the subject matter and value of the contract, and whether any specific exemptions apply.

When does “commissioning” become “procurement”? The EU procurement rules only apply once a public body has decided to – or has ascertained that in the circumstances it must - procure a contract, rather than opt for one of the alternative commissioning routes available to it. As the “commissioning” process includes the process of establishing a need and deciding how to meet that need, a public body may begin the process of commissioning something without having yet decided to procure it (or without having established that it is obliged to procure it).
Indeed, it is good practice for every commissioning process to start with the local authority deciding what it wants to commission, before considering how it does so.

A good starting point is to clarify the local authority’s high-level objectives (including relevant policy and strategy such as the Sustainable Community Strategy). This decision should then be translated into the desired service-specific objectives, outputs and/or outcomes. It can be valuable to involve relevant potential providers and key stakeholders in the decision-making process when deciding what to commission (perhaps through soft market testing or stakeholder consultation). The direct link with service users and communities that key stakeholders have will often give a useful insight into users’ needs, and how they can best be met. Encouraging wider involvement in the process will also help to clarify what potential providers have to offer.

In March 2010, Cheshire West and Chester Council adopted this approach, and consulted with the Cheshire Furniture Forum about individual and potential consortia capacity of local TSOs to provide a bulky household waste collection service. It was also council policy to provide benefits to the wider community.

As all public procurements must comply with the EU procurement rules and general principles of EU law, it is important for the public body, and potential bidders, to be clear when a formal procurement process (as distinct from the wider commissioning process) has begun. If a commissioning process is not clear and well defined, it can make it difficult to be fair and transparent. Local authorities must therefore be careful when undertaking any stakeholder consultation, soft market testing or other pre-procurement scoping activity to ensure that the way they act will not prejudice the procurement process – for example by giving one potential bidder an advantage over others.

Local authorities will also need to consider their internal policies and procedures – in particular the contract standing orders, which may proscribe a particular process in some circumstances (for example, requiring some form of competitive tender process be followed even when the contract is under the financial threshold for it to follow an EU-compliant process).

What is the difference between a contract and a grant?

There is a clear distinction, for the purposes of the EU procurement rules, between awarding contracts and providing grant funding: contracts are subject to the rules; the EU procurement rules do not apply to grant funding. However, the distinction between a grant agreement and a contract for services is often blurred, especially as grants are increasingly being given subject to conditions requiring the achievement of specific outcomes, and because phrases like “service level agreement” are often used to describe either a contract or a grant agreement, muddying the waters.

While grant funding is not subject to the EU procurement rules, it is sometimes unclear whether something is in fact a grant or a contract. It is possible for an agreement, regardless of what it is called, to demonstrate a mixture of the characteristics of both. If it is at all unclear, a grant agreement could be challenged on the basis that the arrangement should have been subject to the EU procurement rules. If the arrangements are challenged in court, the court will analyse each relevant factor and decide whether the arrangements form a grant or a contract.
Clear drafting of grant agreements is vital to avoid legal challenge. It is important to draw up documentation in a way that would encourage the court to come to the desired conclusion in the case of any challenge; the way the arrangements are expressed by the parties is very important in a borderline situation. Local authorities should seek appropriate legal advice if concerns arise over the status of an agreement or arrangement.

Public bodies should not be put off from giving grant funding where they consider this to be an appropriate and effective way of satisfying a need.

The Doncaster MBC case study is an example in which the local authority awarded a grant to a TSO for services where no other potential supplier existed, and/or were unable to provide the range of outcomes that the local authority sought. Grant funding can be provided in a transparent way so that it cannot be confused with the awarding of a contract. However, strictly speaking grant funding and contracts are different animals, and commissioning bodies should be clear on the differences between the two, and certain of their reasons for choosing one commissioning route over the other. The table below shows a brief comparison between some of the defining characteristics of grants and contracts.

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<th>Contracts</th>
<th>Grants</th>
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<td>■ an obligation to deliver something to the paying local authority, for the benefit of that local authority or to satisfy a duty that local authority has to deliver something</td>
<td>■ delivery of something for the benefit of third party beneficiaries rather than or as well as directly for the local authority – as can often be the case with a bulky waste collection service</td>
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<td>■ the ability of the paying public body to recover from the organisation financial losses it suffers as a result of a failure of the organisation to deliver the services it is contractually required to provide</td>
<td>■ the financial obligation of the grant recipient is limited to paying back all or part of the grant, rather than compensating the paying public body for losses incurred as a result of the non-delivery or failed delivery by the recipient organisation (i.e., if the grant recipient fails to deliver, the local authority can require it to repay the grant, but may not be able to seek any other remedy – such as recovering its own financial losses).</td>
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<td>■ the requirement to charge VAT on the supply</td>
<td>■ the grant recipient is able to hand back the grant without having an obligation to deliver the services funded by the grant</td>
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<td>■ public bodies must follow their internal contract procedure rules and apply the EU procurement rules when necessary</td>
<td>■ VAT is not payable</td>
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<td>■ should not fall within the remit of the EU procurement rules meaning the grant application process can be less complicated.2</td>
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2 This opinion has been reinforced by a recent European case, Commission v Ireland, which concerned the provision of emergency ambulance services by Dublin City Council. The Eastern Regional Health Authority gave the council funding towards
Key to ensuring that the appropriate route is taken, therefore, is to determine which of the elements in the above table are desirable or necessary. If a local authority needs to require the other party to provide a service, and it would suffer a loss if that service were not provided that it would want to recover from the other party, then it would be appropriate to enter into a contract for the provision of those services. If, by contrast, the local authority is content to provide funding for a project or service provision, and to limit its remedies should things go wrong to the recovery of that funding, then it may be more appropriate to provide a grant to an interested organisation, rather than a contract where performance is specifically monitored.

Local authorities may therefore choose to limit grant funding arrangements to the delivery of the services that are discretionary – where there is a duty or obligation on local authorities to perform a certain function, the decision may be made that a contract is more appropriate. For example, a local authority might choose to formally procure a contract for a core waste management function such as general collections of household waste, but might choose to provide grant funding for the provision of an additional service, such as the collection of bulky waste items specifically for reuse, that it is not under a legal duty to provide.

Grants and contracts can also be used in tandem with each other, especially when a local authority may be acting in different roles – as grant funder and ‘client’ under a contract.

**Clarity of terms**

In the local authority context, where both grant funding and contracts are used on a regular basis, the need for clarity is obvious. “Service level agreements” and other terms are often used to describe different arrangements made between parties – to one person an “SLA” may refer to a grant, while to another it may refer to a contract. In legal terms, what you call a document is not as important as what it requires of the parties. But local authorities would be wise to maintain clarity of terms when preparing agreements of any sort – both what those agreements are called and what they contain. The content of a “service level agreement” may be exactly what the local authority needs and wants – but both parties need to know for certain whether what they are signing is a grant agreement or contract. This is something that can only be decided on the facts, and so local authorities should be vigilant when entering into any arrangement with an external party.

**Can the public sector procure outcomes, not outputs?**

Local authorities often need to focus on local, sub-regional and regional priorities, which can vary with the area. Priorities need to be identified locally and tackled locally using the resource and procurement decisions of key public bodies.

The way this can be achieved is by shifting commissioning and procurement focus away from the outputs, and moving towards developing outcomes. Outputs include narrowly defined products or services that fulfil a particular need, while outcomes can relate to the local authority’s policy and the costs of providing the services. The court held that “the mere fact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty”.
strategy goals, and overall solutions to needs. The latter could be achieved through partnership between public bodies, and after consultation with the community and suppliers.

Releasing the experience, expertise and potential for innovation captured by the private and third sectors (as well as the knowledge and insight of service users and beneficiaries), can help the public sector to develop different, more effective approaches to their procurement and commissioning, focusing on the outcomes, rather than base outputs, of the service delivery or supply.

Many commissioners still focus on the outputs of their commissioning (for example, the number of items of bulky waste collected, or the number of doorstep collections made). By contrast, focusing on the desired outcomes (for example, the customer satisfaction levels resulting from efficient collection of bulky waste, and/or the benefits to recipients of reused items) can lead to innovative ways of satisfying the needs of the beneficiaries. Many local authorities are already thinking, or are starting to think, in this way, and considering how best to draft the specifications of contracts to achieve the greatest outcomes.

While there has been a drive to improve efficiency across the public sector for some time, the efficiency agenda alone has not been, and will not be, enough to enable public bodies to meet the expectations of their communities while making very necessary costs savings. What is needed is "transformational change" – a shift to outcome-focused commissioning would allow communities to have an input into service provision, budgeting and governance, and allow local authorities to implement policy through their procurement.

Outcome-focused procurement is not always straightforward. To comply with European law, outcomes will need to be sufficiently clear and specific to ensure that the information sought from tenderers, and the outcomes sought from contractors, are capable of being measured and verified. But focusing on outcomes can allow the public sector to provide local services that are genuinely aimed at meeting the needs of the people who will use them.

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