



Public Service Delivery – The Legal Implications

Part 2: Key Contractual Issues – What to Consider Before It's Too Late!

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A. What is a Contract?

1. A contract is an agreement between two or more parties which is recognised by law and which is enforceable through the courts.
2. In general, there is no set form for contracts: they can be written, oral or implied by conduct. There are some exceptions to this basic rule, for example, mortgages, transfers of patents and contracts of guarantee must be in writing.
3. There are five essential requirements which must be fulfilled in order to create a contract:
 - 3.1 one party must make an offer to another party;
 - 3.2 the party to whom the offer is addressed must unequivocally accept the offer and communicate that acceptance to the party making the offer;
 - 3.3 consideration must flow between the parties;
 - 3.4 the parties must intend to create a legally binding agreement; and
 - 3.5 the terms of the agreement must be clear and certain.
4. Terminology is a red herring. Terms such as "agreement", "service level agreement" and "SLA" have no specific legal meaning: the issue is whether your arrangement satisfies the five essential requirements detailed above. If it does, you will have a legally binding contract.

5. A public body will often go through a competitive tendering process in order to appoint a service provider to provide a public service. Before submitting a tender you should carefully check the conditions of tender: it may be the case that by submitting a tender you are agreeing that if you are successful you will enter into a contract on the terms put forward by the public body. Consider whether the conditions of tender permit you to raise issues on the proposed contract terms: if they do, then raise the issues which cause you concern; if they don't and the contract terms aren't acceptable to you, consider whether it really is in your best interests to submit a tender.

B. Key Issues in Public Service Delivery Contracts

1. Service Specification

1.1 The service specification should:

1.1.1 describe the services to be performed as clearly and precisely as possible in order to avoid future disputes as to what it was intended that you would provide;

1.1.2 be achievable and realistic;

1.1.3 set out details of when the services are to be performed;

1.1.4 set out details of where the services are to be performed;

1.1.5 if relevant, specify the users or beneficiaries who may use the services and minimum / maximum numbers.

1.2 The contract should specify how service performance is to be monitored. Monitoring requirements should be appropriate and proportionate to the service being provided.

2. Service Levels / Performance Standards

2.1 Service levels should be clear, precise, objective (not subjective or opinion based), achievable and capable of being measured.

2.2 Service levels should measure outputs which are within your control.

2.3 Failure to achieve service levels is a breach of contract, giving rise to a right for the public body to claim damages for losses which are, broadly, a reasonably foreseeable consequence of the breach.

- 2.4 If service credits are to be payable remember that these are liquidated damages and, as such, should be a genuine pre-estimate of the loss that will be suffered as a result of the failure to achieve service levels.
- 2.5 Consider whether there should be a right for the public body to terminate the contract once failure to meet the service levels reaches a certain level.

3. Dependencies

- 3.1 The contract should set out all those things that you need the public body / a third party to do or to provide in order to enable you to provide the services.
- 3.2 If a third party is to fulfil any of the dependencies, remember that the third party is not a party to the contract and therefore there needs to be an obligation on the public body to procure that the third party will do or provide the relevant thing.
- 3.3 Consider issues such as rights to access and to use premises, facilities and equipment, provision of information, documents and materials, access to personnel, rights to use software and IT equipment.
- 3.4 The contract should provide that you will not be liable for any delay or failure in performing your obligations that arises from a delay or failure in performance of the dependencies.

4. Price and Payment

- 4.1 The price should enable you to recover all your costs, both direct and indirect, in performing the services: this is "full cost recovery".
- 4.2 Any surplus or profit should be utilised for the charity's objects.
- 4.3 Charity funds may be used to subsidise a public authority's service only if this will be in the best interests of the charity and its beneficiaries, will constitute a proper and effective use of the charity's resources and will be in line with the charity's objects.

- 4.4 Consider a mechanism for price review and increase.
- 4.5 Consider payment terms – when and how will payment be made; is the price inclusive or exclusive of VAT; will service credits be off-set against the price payable?; will late payment give you a right to terminate and / or suspend the services?
- 4.6 Include a right to charge interest on late payments – if the contract is silent, the statutory rate under the Late Payment of Commercial Debts (Interest) Act 1998 will be implied.
- 4.7 Consider what provisions as to financial reporting, record keeping and audit are required.

5. Liability

- 5.1 A warranty is a promise made in a contract, breach of which gives the other party the right to claim damages for losses which it suffers as, broadly, a reasonably foreseeable consequence of the breach. There is a duty to mitigate such losses.
- 5.2 An indemnity is a promise made in a contract to pay the other party for all its losses that flow from a specified event or circumstance, regardless of whether they are a reasonably foreseeable consequence of such event or circumstance. There is no duty to mitigate such losses.
- 5.3 Giving indemnities should be resisted wherever possible as they expose you to greater liability than would be the case at common law and may prejudice your insurance position.
- 5.4 Consider whether to include a total financial limit or cap on your liability under the contract, however arising (but note that it is not possible to exclude or limit liability for certain types of loss, such as death or personal injury arising from negligence). If you are an unincorporated association, consider capping liability at a level which is equal to or less than the net value of your assets.
- 5.5 Consider what types of loss you may wish to exclude liability for – for example, loss of profits, loss of business, loss of contracts, loss of goodwill.

5.6 Provisions which exclude or limit liability will often be mutual (i.e. they will apply to the liabilities of each party to the contract). If they are not mutual, it is likely that the public body will seek to limit its liability to a greater extent than that to which your liability is limited.

6. Term and Termination

6.1 Is the contract to last for a fixed period or until terminated by one party giving a specified period of notice to the other?

6.2 What rights are there for either party to terminate the contract early, for example as a result of the other party's material breach or insolvency, or for reasons specific to the particular contract such as that the services are to be transferred back to the public body.

6.3 What are the consequences of termination - for example, are you to assist in handing over the services to a replacement provider or back in house? If so, will you be paid for providing this assistance? Will any of your employees TUPE transfer to the public body or to the replacement provider? Are there documents, materials or confidential information to be handed back? Premises to vacate? Will compensation be payable by one party to the other on early termination?

7 Contract Variation

7.1 Both parties should have to agree to any variations to the contract terms.

7.2 If the public body requires a unilateral right to change the scope of the services, consider the parameters within which changes can be made and the impact on price.

8 Other Issues

8.1 Can you comply with all of the obligations imposed on you?

8.2 If the contract requires you to comply with legislation or with the terms of other documents, have you seen these and can you comply with them?

- 8.3 Will personal data which is protected by the Data Protection Act 1998 be passing between the parties? If so, consider compliance with this Act.
- 8.4 Will confidential information be passing between the parties? If so, consider whether your confidential information could end up in the public domain in response to a request under the Freedom of Information Act 2000.
- 8.5 Will staff be TUPE transferring to you at the beginning of the contract? If so, are you aware of their current terms and conditions of employment, as you will become bound by them, and does the contract contain indemnities from the public body in respect of costs and claims which relate to the period of employment prior to the transfer date.
- 8.6 Does the contract contain a procedure for dealing with complaints relating to the services?
- 8.7 Does the contract contain a procedure for resolving disputes between you and the public body?

9 Co-operative Working

- 9.1 Co-operative working means that two or more organisations work together to provide a public service.
- 9.2 All of the issues at sections 1 to 8 above are relevant when co-operative working. In addition to these issues, consider how the risks and responsibilities of delivering the service are going to be allocated between you and your "partner" organisation(s). Is it clear which of you will do what and who will get paid what? Is the contract drafted on the basis that if one "partner" causes the public body loss or

damage, the public body can make a claim against either of you? If so, you should have a separate contract in place between you and your "partner" which enables each of you to recover from the other anything that you have to pay out to the public body as a result of the other's act or omission. Also be aware that a breach by your "partner" could result in the whole public service delivery contract being terminated by the public body.

C. Conclusion

1. You are under no legal obligation to enter into a public service delivery contract, whether on the public body's terms of contract or at all.
2. Before entering into a public service delivery contract you should carry out a risk assessment to ensure that entry into the contract is in your best interests.

This briefing note is intended solely as a general overview of the relevant legal issues. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should always be taken in relation to any specific contract or issue.

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