

# Legal issues

This worksheet provides a brief introduction to the most common structures for collaborative working and to some of the issues that need to be taken into account when developing the legal agreements that capture the relationships between partners. It also provides signposts to other resources. No worksheet, however, can be a substitute for legal advice – the more complex the arrangements, the more essential it is to consult a lawyer with experience of this field.

## AT A GLANCE

- If in doubt, seek specialist legal advice
- Agree a written legal contract before you submit your bid
- Different legal structures have different advantages – and disadvantages
- Consortia should be based on clear legal agreements

## Contracts with commissioners

When an SP commissioning body announces a procurement process for a service it will specify the number of packaged contracts. For each contract, however, the basic rule is there is one party on either side – the commissioner and the contractor. Having invited tenders for a service on the basis of one contract, commissioners are highly unlikely subsequently to agree to enter into separate contracts with more than one contractor for two main reasons:

- one of the main drivers for inviting tenders is to reduce the number of contracts SP teams have to manage, so this would go against the flow;
- changing the rules of the game after the procurement process has begun is likely to be seen as unfair by other organisations who might have structured their bid differently (or decided to bid at all) if they had known that this was a possibility. It might, therefore, result in a legal challenge.

This means the options for collaborative bids are restricted to two categories:

- a group of organisations set up as a separate organisation, known as a special purpose vehicle (SPV), through which to contract with SP, or
- one lead agency contracts with the commissioners on behalf of itself and one or more sub-contractors. Within this category there are two variants:
  - a traditional sub-contracting arrangement, or
  - a consortium agreement.

## Special purpose vehicles

This is not a common model. Although several of the Collaborate partnerships considered it, only one decided to take it any further (see box page 3).

The structure was chosen because it avoids a number of potential pitfalls. In particular it avoids the risk that VAT might be chargeable on contract management and administration services, and it limits the liability of the individual member organisations. Its advantages are that:

- it creates a flexible vehicle which can be used for a range of bids for different services – not limited to Supporting People;
- it embodies a genuinely equal partnership;
- it provides members of the consortium with access to professional tendering capacity to match the large national and regional organisations they will be competing with.

## AN EXAMPLE SPECIAL PURPOSE VEHICLE STRUCTURE

- The SPV is set up as a Community Interest Company (CIC);
- Each member of the consortium is a member of the CIC;
- The CIC hires staff to search for contracts and to put together tenders;
- A separate Limited Liability Partnership is set up for each contract, consisting of the members of the consortium who are interested in delivering the service, plus the CIC;
- The CIC provides each LLP with contract management, monitoring and quality control services.

There are, however, a number of issues that have restricted the number of partnerships who moved to adopt this model, including:

- setting up an SPV is a long and expensive process. The Collaborate partnership spent more than a year, and over £25,000 in consultancy and legal fees, in getting their model to launch point;
- once the model is established, further start-up capital is needed to hire staff to undertake the contract search and bidding. The Collaborate partnership is talking to potential sources of loan finance, but a strong business plan is essential;
- the business plan for this model requires a high volume of contract activity to pay its way. This is likely to involve the members of the consortium in operating well outside their traditional areas in order to achieve this.

Setting up an SPV does not avoid the sort of hard choices that have to be made in setting up other forms of consortium. For example, because you are engaging with other organisations in a long-term partnership, it becomes all the more important that all of the partners can meet a high quality threshold. It is not a lifeline for second-rate organisations.

One key learning from the Collaborate project is that, if you do decide to explore this avenue you need to take specialist legal advice. A generic law practice or neighbourhood law centre is unlikely to have the specific knowledge you need. The extra cost is small, but it will be worth it.

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## Traditional sub-contracting

This form of collaboration normally takes place between:

- a large organisation which takes on the contractual relationship with the commissioner and responsibility for the delivery, monitoring of performance and quality control of the entire service, and
- one or more smaller partners who deliver part of the contract.

The smaller partner(s) will have a form of agreement with the head contractor

setting out what they are expected to deliver, the price, and the arrangements governing the relationship. This is in effect a sub-contract, even though it may be called something else (service level agreement, partnership agreement etc).

### **Advantages – and disadvantages**

The issues you need to consider when thinking about traditional sub-contracting are set out in worksheet 2. In summary the main advantages are:

- it places much lower demands on small organisations in terms of setting up the relationship and compiling the bid than a consortium approach;
- if bidding with more than one lead agency, it increases the chances of being part of a winning bid.

The disadvantages are:

- it relies on the goodwill of the lead contractor to maintain the relationship of trust and equal treatment needed for a successful partnership;
- there is relatively little protection if lead contractors subsequently start to behave unfairly or ditch their former partners – unless the commissioner has prevented this (see worksheet 5).

### **Issues**

Trust and personal relationships can play a critical role in the establishment of partnerships between large and small organisations. A written agreement is, however, essential to avoid misunderstandings and ensure the relationship between organisations is maintained if and when key personnel change.

The fact that collaborative bids are generally put together against very tight timescales often means that discussion of the detailed relationship between large and small partners get put on the back burner until the contract has been won. This, however, puts the smaller organisation at a negotiating disadvantage. You should try to get at least the key points set out in a '*heads of agreement*' document at an early stage.

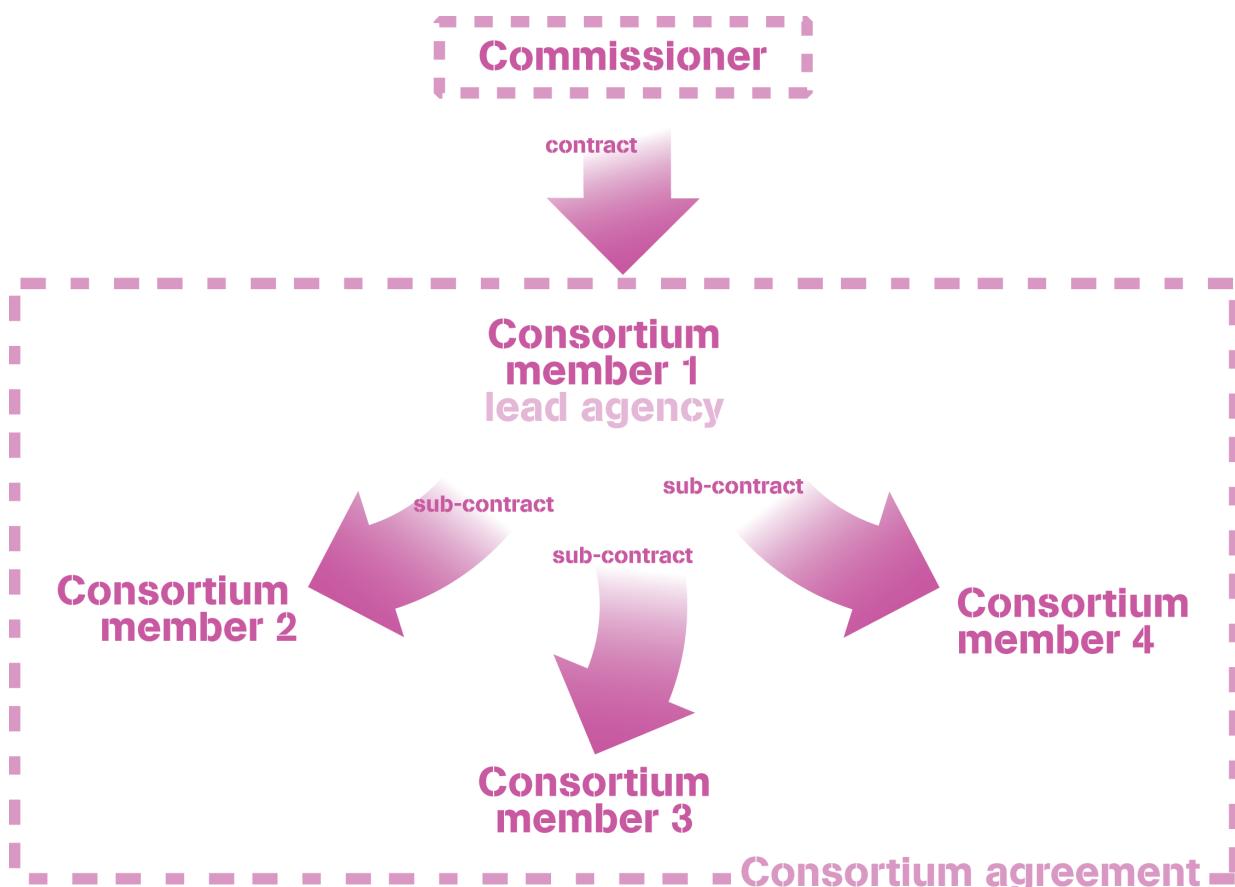
There are two broad areas to focus on: the part of the agreement dealing with the general relationship between the two organisations, and the part dealing with issues which are specific to the delivery of the service. As far as general relationship issues are concerned, the NCVO publication *Joint Working Agreements*, which can be downloaded free from NCVO's website (see the end of this worksheet for a link), provides a comprehensive checklist of areas to think about. Your agreement may not need to cover all of them, but you should take them all into account in deciding which are essential in your case.

A checklist of possible items for agreement that cover the specifics of how the service will work is set out in the box (see page 6).

As with any significant contractual issue, you need to ensure that your board is comfortable with the principle of sub-contracting and the broad terms that are being proposed. Try to get their agreement as early as possible since your prospective partners will not appreciate last minute changes or withdrawals.

## Consortia

A consortium is a special form of sub-contracting where – in addition to the main contract with the commissioner and a sub-contract between the lead agency and each of the other partners – the partners have agreed how the relationship between them is to be managed, building in greater equality between the partners and shared management of the consortium. The consortium agreement does not form part of the contract with the commissioner, though – as with any sub-contract – the commissioner will have awarded the contract in the knowledge and expectation that the consortium will operate along the lines it sets out. It does, however, set out a framework of expectations and understandings between the consortium members. A typical arrangement is illustrated (below).



# DRAFT AGENDA FOR DISCUSSION BETWEEN LEAD AGENCY AND SUB-CONTRACTOR

## The contract

- Heads of agreement document;
- Form and terms of sub-contract;
- Arrangements for payment;
- Review meetings and arrangements for evaluation;
- Resolution of disputes;
- Termination.

## The service

- Aims, objectives and values of service;
- Number and characteristics of clients to be supported by sub-contractor; time allowed to get to full caseload; arrangements if full caseload cannot be achieved (e.g. if the sub-contractor is a specialist service and there are not enough referrals requiring their specialism);
- Referral/assessment arrangements; involvement of sub-contractor in assessment process; process to be followed if sub-contractor wishes to reject a referral;

- Standard service delivery processes (e.g. support planning, sign-off) to be adopted by sub-contractor;
- Monitoring and casework management systems to be used; timing and nature of information and reports required;
- Operations and contract liaison meetings.

## Staff provided by sub-contractor

- Number of staff to be employed on the contract and any arrangements for review;
- Salary levels and other terms and conditions (to ensure broad consistency between providers);
- Location of staff and how they liaise with lead agency and subcontractor staff teams;
- Arrangements for supervision and support: caseload supervision; line management;
- Arrangements for cover, duty rotas etc;
- Training and induction.

## Capacity building by partners

- By lead agency;
- By sub-contractor (e.g. training in specialist areas of expertise).

## LEAD AGENCY ROLES

- Legal and contractual responsibility for delivery of the contract;
- Ensuring effective referral, allocation and needs assessment arrangements are in place;
- Monitor the main contract and sub-contracts with partners, undertake quality checks, and ensure the partnership is meeting its contractual obligations to SP;
- Ensure that all partners produce performance,

- quality and outcome information, collate and report it to SP;
- Collate consultation information and share it with others as necessary;
- Communicate regularly with SP and the partnership to ensure good liaison and quick resolution of issues; take part in formal contract reviews;
- Receive payments from SP, make payments to partners and account for them.

The consortium agreement will cover all of the areas set out in the agenda for discussion between lead agency and sub-contractor box. It will also set out the consortium's governance arrangements, typically consisting of:

- the role and composition of the consortium management group;
- how each partner will be represented on it;
- how decisions will be taken;
- whether voting on the consortium management group will be on a one member one vote basis or weighted according to their involvement in delivery of the contract, and whether the lead agency gets an additional and/or casting vote.

The consortium agreement will also set out the role of the lead agency and how the costs of carrying out this role are going to be recognised. A typical set of lead agency responsibilities is set out in the box on page 6.

If you decide to go develop a consortium, remember that:

- you need to ensure at an early stage your board is happy with both the principle and the main compromises which will have to be made so that you don't find yourself in a position of letting your partners down later in the process;
- if you are likely to be in the running for the lead agency role, you need to think particularly carefully about whether you have got the capacity to handle the amount of work concerned, both through the bidding and implementation process and in the management phase;
- you need to take specialist legal advice to ensure that risks and liabilities are distributed fairly, and to avoid problems with VAT and TUPE.

For further information on adopting a consortium model, see worksheet 3.

## Other resources

The NCVO publication *Joint Working Agreements* is an excellent, free resource. See [www.nvco-vol.org.uk](http://www.nvco-vol.org.uk) for more details.

The Sitra publication *A Provider's Guide To Procurement* has a section on working in partnership. See [www.sitra.org.uk](http://www.sitra.org.uk) for more details.

## About Collaborate

Collaborate was a year-long project run by hact, funded by Communities and Local Government and delivered in partnership with Sitra and NHF, featuring six partnerships in Suffolk, Liverpool, Durham, Rotherham, Redbridge and Southend. The project aimed to demonstrate how diversity can be maintained and particularly how smaller SP providers could thrive within the emerging SP environment, by developing collaborative approaches to tendering and delivering services, between themselves and with larger organisations. Hact helped project partners in two ways:

- Through practical help and facilitation, working through some of the issues involved in developing collaborative models;
- Through financial support of the costs of building capacity of some of the smaller partnership members, as well as some of the legal and expert support costs.

In exchange, all the participating organisations contributed to an evaluation and facilitated learning process between the partnerships, so their insights could be shared with the wider sector.

## About hact

Hact pioneers housing solutions to enable people on the margins to live independently in thriving communities. We use our expertise and resources

to identify emerging issues, test ideas, support multi-agency solutions and share learning that changes policy and practice.

## About this resource kit

This resource kit has been produced as one of the ways of sharing the learning from the Collaborate project. It consists of eight worksheets, which provide information about strategic development, different collaborative approaches, how to influence procurement processes, developing collaborative bids and implementation issues (see list below).

Though focused on small providers, the learning has relevance for all in the SP sector. Hact doesn't intend to suggest that collaboration is the only option for small SP providers. Some may choose to leave the market. Others might persuade local commissioners to exempt them from the normal commissioning process.

For many providers, however, SP is a vital part of their income and leaving the market is not an option. Sooner or later, their service will be subject to reconfiguration and tendering, probably as part of a much larger contract. Some form of collaboration may represent their best chance of staying in the market – and possibly in existence. It may also, if the experience of some successful Collaborate partnerships is a guide, be a stimulus to developing better services and ensuring a diversity of provision for service users.

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## Collaborate resource kit

Worksheets:

- 1 A strategy for change
- 2 Large/small partnerships
- 3 Consortia
- 4 Developing positive relationships
- 5 Influencing the process
- 6 Legal issues**
- 7 Writing the bid
- 8 Implementation