

Charities as sub-contractors

Taking on some delivery for a company running a public contract can be a brilliant way for a charity to secure income and improve their experience and track record of contracted delivery. This process, “sub-contracting,” can be done without taking on the full risk that comes with leading a public contract, and it can also allow for larger, more complex services to still benefit from the expertise, resources and connections that charities hold.

But, it can also leave charities open to exploitation and high risks.

This resource is here to help you weigh up the benefits and risks and give you the right information to set yourself up to succeed.

Definitions

Technical language will get thrown around in your discussion with public contract providers, and there can be legal and financial implications for what you agree to. Make sure that you are familiar with the key terms -

Prime, or prime provider	The organisation that has the contract with the public authority. They accept responsibility for compliance to the contract, for reporting to the commissioner and for ensuring that the service performs to the contracted standard
Sub-contractor	An organisation that performs part or all of the obligations of another organisation's contract. They have a contract with the prime.
Supply chain	All organisations (e.g. external suppliers, sub-contractors, partners) involved in delivering a contract's requirement
Memorandum of understanding	A document that outlines an agreement that two or more organisations have reached. It is <u>not</u> legally binding. Instead, it is there to clarify and record commitments and get organisations “on the same page”
Non-disclosure agreement	A legally binding agreement between two or more organisations that prevents sensitive information from being shared with others. While this may be associated with covering up wrongdoing, they are completely standard where information such as commercial planning or salaries are discussed
Partnership agreement	A legally binding agreement between organisations setting out contractual obligations and providing the framework for their day-to-day work on a contract together
Exclusivity agreement	A legal contract between two organisations that restricts one organisation to selling its products or engaging in bidding activity solely with the second organisation
Payment by results	Where some or all of a contract payment is dependent on verified results against targets

Success stories

Third sector sub-contracting third sector

Toynbee Hall have a long running sub-contract with Macmillan Cancer Support to provide advice, advocacy and information on welfare benefits and entitlements to those affected by cancer. Macmillan is able to provide a specialist offer without needing to invest in the relevant infrastructure themselves; Toynbee Hall can reach more people in Macmillan's expansive service users and have an additional income source for their skilled staff and management; and users of Macmillan's services benefit from access to a expert in a clear area of need.

Private sector sub-contracting third sector

Catch22 was a sub-contracted to a number of prime organisations in the delivery of "through the gate" support for those leaving prison. The Ministry of Justice invested xxxx into the procurement of such services in xxxx, and no third sector providers were offered contracts. Bidding as a sub-contractor gave Catch22 a safety net to still gain income from these services, and having an established prime as a contract manager gave the commissioner the reassurance that they needed.

This ultimately enabled Catch22 to build its expertise and reputation in this area and, when the services came up for tender in 2020, successfully bid to prime the largest number of contracts of any third sector provider.

Many other success stories are there all the time – charities may run a local part of a larger employability programme, support a particular element of a health contract such as peer mentoring, and train companies' to understand the communities that they work with every day.

Is it for you?

Sub-contracting isn't for all third sector organisations.

If you are considering sub-contracting to an organisation running a public contract, you should first reflect as an organisation on:

- **Infrastructure** – While a good prime will remove some pressure by managing the commissioner relationship and taking responsibility for overall contract compliance, you will still be performing to a set of contracted expectations that will need performance management, monitoring and reporting, often to a high level of detailed accountability. This will need consideration of what tools, expertise and infrastructure such as administration or databases are needed, and whether your charity has or can invest in these.
- **Culture** – Working to a restricted scope of a contract will mean having set parameters for delivery. For example, it might dictate which service users you are eligible to work with and set limitations on what you are there to support them with. This may be a departure from how you usually achieving your mission, especially if you are used to working with unrestricted funding. Your staff must be prepared for and bought into this change and its implications.
- **Needs around influence** – sub-contracting can be a challenge when you are used to being in charge. There will be a middleman between your delivery and the commissioner, reducing your ability to influence their understanding of the needs of the service and client group, and your own reputation.
- **Relationships** – If you have experience delivering your own contracts or grants, you must be aware that sub-contracting is not subjected to the same rules of fairness of opportunity than funding directly from a government authority. There is no legal basis to stop a prime dropping a sub-contractor from their bid or contract without process (unless it is prevented in the terms that are set between providers). This can take sub-contractors out of the driving seat for their delivery and mean that the relationships and trust held with primes can have more value than the well-evidenced proposals that they can depend on to win services directly.
- **Appropriate opportunities matching their expertise** – Sub-contracting is generally used for larger contracts that includes larger delivery staffing and has a diversity of output e.g. in geography or specialist area. A bid for a smaller contract may lose more than it gains by splitting delivery between providers. Before resourcing conversations around sub-contracts, is it worth understanding the public

services market for your cause, who is delivering the contracts and whether they routinely bring on supply chains and partners.

Focussing your engagement on what primes are looking for

Funding opportunities come easiest when your engagement is focussed on what funders care about – just ask any fundraiser.

If you are looking to open up opportunities for your charity by working with primes, you will need a firm understanding of what they are looking for as they identify potential delivery partners.

The below reflects a few highlights to help understand your audience, and a (non-exhaustive) list of what that means for you as a charity

What a prime needs	Implications for you as a sub-contractor
Their bid must be competitive and high quality, which means information and content provided promptly and reliably in the right presentation	<ul style="list-style-type: none"> You must have clear evidence of your ability to deliver, demonstrated through data, case studies, and developed examples of good practice Though you may not need to write a bid, you will need an understanding of method statements expectations and what high-scoring bid content looks like Time must be given to edit and refine what you send them while they are bidding – you cannot send your whole annual review and expect them to pick through it for the information that they need
Reassurance that their intellectual property is safe	<ul style="list-style-type: none"> You must have clear and enforced data protection policies All staff engaged with the bid and its materials must have a clear understanding of the NDA
Confidence that budgets presented are realistic and will to be stuck to	<ul style="list-style-type: none"> You must have a level of commercial awareness before, during and after winning a contract to clearly define the cost of your delivery, and less tangible costs such as subject matter expertise During contract management, your income and costs must be tracked through suitable financial management
A shared understanding of the public contract opportunity, and positive dialogue to identify areas of strength and weakness as delivery providers	<ul style="list-style-type: none"> All staff members engaged in bidding must have a thorough understanding of the overall service specification as published by the commissioner, not limited to the areas relevant to their delivery All staff members available to the prime must have sufficient understanding of bidding needs and process, and not be dependent on the prime to explain them
Social value	<ul style="list-style-type: none"> The majority of bids will include some scoring on wider financial and nonfinancial value created by the providers e.g. on the wellbeing of individuals and communities, developing a local workforce and a positive impact on the environment Keep evidence for the scale of your wider value and how it relates to specific regions e.g. numbers of volunteering opportunities, the support and resources you give to local community groups Be prepared to make commitments such as the numbers of hired staff and apprentices that are local or have barriers to employment
Access to resources and facilities	<ul style="list-style-type: none"> Assets that you have that may be valuable may include; knowledge and existing relationships within a geography or a niche provider network; buildings and facilities; staff trained and experienced in a certain area; accreditations

Reassurance that the organisation is stable enough to not pose a reputational risk to them	<ul style="list-style-type: none"> • Healthy finances must be demonstrated to show that you are not at risk of bankruptcy • Maintaining a positive overall reputation and perceptions, which could be impacted by things like industrial action, scandal or fraud allegations • Clear “hygiene factors” must be in place such as clear policies, including data security, health and safety, safeguarding, equality diversity and inclusion
Added value	<ul style="list-style-type: none"> • You must monitor and be able to evidence what you can deliver that will benefit the contract without being directly funded by it. This could include fundraised delivery to the same service user group or expertise drawn in house from other services
Professional, honest relationship with the commissioner in which problems are raised and proactively solved	<ul style="list-style-type: none"> • Make clear who their single point of contact is; they will be expected to be available and at a suitably high level to drive good work • State the experience of your staff and leadership as an asset • Model an honest, open discussion throughout; be willing to point to the limitations of your expertise
Ability to bring in referrals and service users to the service, particularly in the case of payment by results contracts	<ul style="list-style-type: none"> • If you are good at attracting people to your service, make sure you have the evidence to prove it • Other assets include your relationship with other collaborating organisations and your local reputation

Key questions to consider when engaging with primes

Bids can be a mad rush. Often a prime will be trying to understand the opportunity, build their model, work out what partners they need, identify them, negotiate, and integrate them into their model, plus writing the whole proposal in a narrow window of a few weeks.

It can leave very little time for in depth conversation about the partnership and how it looks for this service, hence why primes will often prefer to work with familiar partners.

While many details will need to be pinned down in the long run by necessity, don't confirm that you are happy to be put onto a bid with a prime unless you have at least discussed the below key areas

Risk – what are the key risks of the contract and how will they be shared between the prime and the partners? For example, if the contract has payments that are dependent on certain results, will the prime take on this risk or could it impact sub-contractors? Or if it is dependent on a challenging demand such as sourcing an appropriate building, where does responsibility for that sit?

Standards and resources: Will sub-contractors be working to their own resources, such as their policies or use of their databases or administrative staff, or will they be responsible to the prime's way of doing things? If it is the second, are you happy that they are aligned to your needs?

Parameters of responsibility: Of the service specification and contract, specifically what areas are you as a sub-contractor responsible for?

Finances – What will you be paid, how much of this will be contributing to your overheads or surplus in addition to delivery? Will the prime take a management fee on your delivery, and what responsibilities will that pay for?

Legal set up – How will you be contracted and what will the terms be? For example, is there a notice period in which the prime can remove a sub-contractor from the contract?

When discussing the above, get their conclusions down in writing so that they are accountable if the bid is successful. They should have a draft Heads of Terms or Memorandum of Understanding format that you can review and sign, but if this is not appropriate not then this will be something that you need to supply.

And finally, the types of partnerships and what to look out for

There are many different ways of partnering with another organisation. The below maps out what the options available to charities can be and what to consider.

	Definition and role	What to consider
Strategic sub-contractors	An organisation with a sub-contract to a prime acts as a significant partner, involved in shaping service design and driving high performance	This is generally used when a prime cannot deliver a service without the expertise and resources of a sub-contractor, or they cannot make a clearly evidenced case to a commissioner that they can deliver. This puts the sub-contractor in a stronger place to shape the service, and makes them less dispensable to the prime
Delivery sub-contractors	An organisation with a sub-contract to a prime takes responsibility for a specific area of delivery	This is the straightforward option, where an area of the contracted delivery can be ringfenced e.g. a specialism, a stage in a customer journey, or a specific geographic area. Generally the sub-contractor will have agreed responsibility for risk and performance in their area – defined through a sub-contract for which the prime will have performance management responsibility
Subject matter experts	An organisation with a sub-contract to a prime takes no responsibility for delivery; their role is to lend expertise to overall design and delivery to ensure it based on expertise e.g. through providing training, supporting development of policies, service design etc	This role is often used as quality assurance in a specific delivery area that the prime lacks or would benefit from additional expertise in, such as working with service users who have additional needs. This can be appealing to commissioners. It can risk being vague “bid candy” and so it is important that you value your expertise and ensure that your role in delivery is defined upfront and suitably budgeted for before you agree
Products	Purchase of specific product e.g. resources such as training programmes and guidance, subscription to a service such as a content management system, or creation of a bespoke tool such as a website	This is a transactional partnership for the provision or development of products only, usually based on purchasing or developing existing products. At bid stage, primes can identifying these products to bring quality where they do not have the product in-house.
Special Purpose Vehicle or Special Purpose Entity or Joint Venture	A separate legal entity that all partners have a stake in is created for a specific purpose and contracted in its own right by the authority. This allows multiple organisations to pool resources and have joint ownership of contracts into a single company	This is a costly and highly administrative process that includes setting up an entirely new legal organisation. This should be used only for long term strategic partnership working and should not be mistaken for a straightforward means to dodge the question of which organization in a partnership will prime
Partners, or a consortium	Agreement that organisations act as peers with joint and equal responsibility for compliance and performance of the contract	This works best where partners are of comparable size and expertise and are used to acting as peers. Ultimately, one organisation must have responsibility for the contract and therefore even the most equal consortium will need to enter into a prime/sub-contractor relationship. It is therefore vital that the genuine terms of the partnership are set out in a thorough and binding agreement between the organisations, as they will not be reflected in the legal contract with the commissioner

Alliance	Usually applies to project or service delivery where there is individuals contract between the commissioner and each organisation in a consortium, with the organisations and the commissioner themselves taking joint responsibility for the overall contract	An alliance contract is intended to create a collaborative environment without the need for new organisational forms. By having one alliance contract, all parties are working to the same outcomes and are signed up to the same success measures This is a new buzzword for commissioners and has huge potential for agile and strategic delivery. As this is a new term, clarity of expectations for the legal set up and the commissioners' role are vital.
-----------------	--	---

I hope that this information gives an overview and a helpful set of references as you navigate this tricky but highly rewarding area.