



SKILLS FOR A CHANGING MARKET

DO IT JUSTICE

THE CRIMINAL JUSTICE SYSTEM EXPLAINED

Authors

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Feedback or further information

If you have any feedback on the resources, are seeking further information about the programme, or would like to share your own advice/experiences on engaging in commissioning and procurement in the Criminal Justice System, please contact Clinks: info@clinks.org

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CLINKS

This resource is one of a series called Do It Justice, aimed at providing information and advice to the voluntary sector on a range of issues in the Criminal Justice System (CJS) in England and Wales. It aims to support a better understanding of how organisations can prepare themselves for the competitive tendering and procurement of services.

This publication is written by NAVCA, a charity that provides the national voice for local support and development organisations in England, otherwise known as local infrastructure or Councils for Voluntary Service. They champion and strengthen voluntary and community action by supporting local members to deliver their work with over 160,000 local charities and community groups.

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THE CHANGING COMMISSIONING ENVIRONMENT

In recent years, the general trend has seen grant funding to the voluntary sector reduce. Contracts awarded through competitive tendering are replacing grants as the default funding mechanism for the sector. It is not accurate to say that value for money and accountability can only be obtained through contracting. NAVCA and Clinks believe that grant funding should remain a valuable tool in a commissioner's tool-bag. However, it is important to acknowledge that the changing contracting environment is a reality for large parts of the voluntary sector.

Increasingly, we are also seeing a move towards larger, less specialised contracts, whether due to perceived efficiency savings or to better integrate services along pathways. Alongside these larger contracts, an organisation may also be selling services to individuals through personal budgets.

This is leading to an increasingly complex contracting environment which providers of services need to navigate. The time when an individual commissioning department contracted directly to a service provider through a block contract is diminishing. As an organisation you will be examining a variety of opportunities. This could lead you to be simultaneously delivering a mixture of block contracts, payment by results contracts, and delivery in partnership with others or as part of a larger supply chain. You may find that the direct contracting relationship you previously had with public bodies is replaced by contracting relationships with private sector prime (or 'tier 1') providers or through a voluntary sector lead provider.

To compete and collaborate in this environment, providers require an increasingly commercial

skill-set and will need to understand the more complex and varied risks involved.

This resource is meant as an introduction to influencing practices, relationship management, risk assessment, and negotiation. But these are by no means the only factors to be taken into account in the new complex commissioning environment. Other areas for consideration, and further exploration, would include leadership development, evidencing outcomes and impact, contract management and bid writing skills. As you move into a new environment it is essential to conduct a skills audit to examine where you may need to invest.



INFLUENCING AND RELATIONSHIP MANAGEMENT

While most organisations spend significant time on business planning, it should not be forgotten that influencing will be a key task in achieving outcomes. Therefore, an influencing strategy should be developed.

The first part of this strategy is to be clear why you are spending valuable resources engaged in influencing. In a commissioning and contracting environment this will be to:

- **Shape the market** by seeking to influence what public services are purchased, how they are purchased, what is delivered, and how it is delivered.
- **Position yourself within the market** by seeking to be the provider of services, either as a sole provider, or in partnership.

Your influencing strategy should also consider when you need to collaborate with other voluntary sector organisations to influence and when issues around competition may reduce collaboration or limit it to organisations you plan to jointly bid and deliver with. It is likely that you will want to collaborate with many other organisations when you are trying to shape the market to support your beneficiaries or to remove barriers for voluntary sector involvement. However, when you are trying to position yourself within the market, your collaboration with other voluntary sector organisations is likely to reduce.

THE CORE ELEMENTS OF AN INFLUENCING STRATEGY

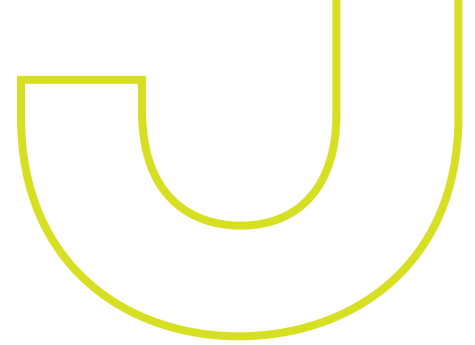
To develop an influencing strategy, three elements need to be considered:

1. The structures in which decision making occurs
2. The people within those structures who make or influence decisions
3. The plans that are developed based on those decisions.

For those providers working in criminal justice or community safety, these three elements will have changed considerably in recent times. New structures have been introduced, for example police and crime commissioners, the changes to the probation service, new offender health commissioners, the introduction of new resettlement prisons, and the new commissioning structures for victims' services. The Criminal Justice System (CJS) is undergoing massive change, and at the same time local authorities are, likewise, trying to do more, or maintain services, with less resource.

Within these structures you may have to deal with new commissioners or try to identify appropriate people with whom to build relationships. These new relationships might not only be with public sector bodies, but could be within private sector companies, or public sector spin-offs such as mutuals. New structures and people have been accompanied by new plans, including Transforming Rehabilitation, which have led to large contracts, supply chain models and the gradual introduction of payment by results into contracts.

We are also seeing renewed efforts to join up local commissioning through co-commissioning or shared budgets, as in Community Budgets and the Troubled Families initiative. This may lead to you having to work with new and different departments, where change has also been rapid in recent years. For example, the health sector has seen Primary Care Trusts replaced by Clinical Commissioning Groups, and the responsibility for public health has transferred to local authorities. Patient representation is now conducted



through Local Healthwatch while Health and Well-being Boards have the important role of joining up NHS and local authority decision making. It is a complex environment to navigate.

It is absolutely critical that voluntary sector organisations have a clear plan, whether you are looking to shape the market to ensure appropriate services are developed for your service users, or

you might be looking to position yourself to deliver services. Ask yourself the following question:

Are you clear which structures or organisations make the decisions that have an impact on you achieving your vision and mission?

The diagram below can be used as a simple tool to start to identify what and who you need to target.

EXAMPLE: TOOL FOR BUILDING AN INFLUENCING STRATEGY

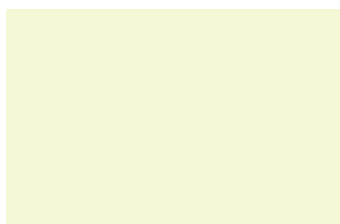
KNOW THE RIGHT STRUCTURES, PEOPLE, AND PLANS



POSSIBLE STRUCTURES

- Ministry of Justice
- NOMS
- Office for the Police and Crime Commissioner
- Local authorities
- Prisons
- Probation providers
- Public Health England
- Health & Wellbeing Boards
- Clinical Commissioning Groups
- Local networks or consortia.

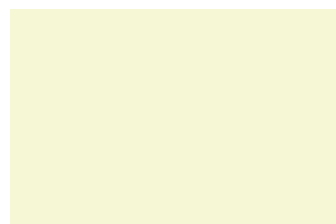
We need to identify these structures that affect us:



POSSIBLE INDIVIDUALS

- Ministers or government officials
- Policy makers
- Service users
- Internal staff and volunteers
- Commissioners
- Procurement officers
- Relationship managers
- Elected officials
- Public representatives
- Voluntary sector representatives
- Private sector representatives
- The wider public.

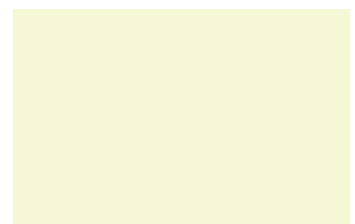
We need to link to the following people:



POSSIBLE PLANS

- Transforming Rehabilitation
- NOMS commissioning intentions
- JSNA
- Joint health and wellbeing strategy
- Commissioning frameworks
- Social Value Strategy
- Contract pipeline
- Specific consultations
- Outcomes frameworks
- Payment models
- Evidence datasets.

We need to input into the following plans:





This tool can be used to consider an overall influencing strategy or to look at specific areas of development. Identify the structures you need to work with, and within these the individuals you need to target. These may be the decision makers or the people who influence the decision makers.

- Do you know their job titles and the names of the people you want to influence? If not, you need to find out.
- Do you have a route to them? If you cannot get a direct route, are there representatives such as local infrastructure organisations or forum representatives who could put your views forward?
- What plans, strategies and frameworks are they developing which you need to influence to meet the needs of your service users and further your organisation’s charitable objectives?

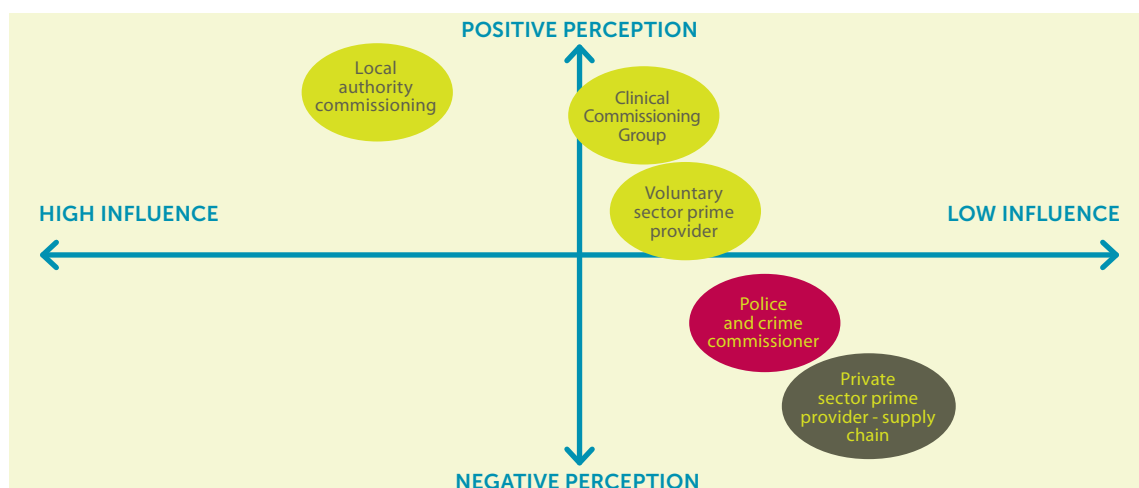
The capacity that you have for influencing will be limited, so prioritise your activities accordingly. Make sure that a named person from within your organisation is allocated to a

key person you want to influence, or a particular plan you want to contribute to. This way it is much less likely that important decisions will be made without your input being considered.

RELATIONSHIP MAP

A tool to help you prioritise your influencing strategy is a relationship or influence map.

This can be used to plot the individuals you need to build relationships with along a scale of the influence they hold and the perception they have of your organisation. It can often be tempting to spend too much time and resources engaging with the people who are already strong supporters of your organisation. Consider whether more of your time needs to be spent influencing those individuals that have a lot of power over the decision-making process but hold negative perceptions of your organisation, or just don’t know enough about your organisation to have formed an opinion. This will further assist you in prioritising your influencing strategy.





UNDERSTAND AND ASSESS THE RISKS

As the sector adapts to a changing contracting environment, it must become adept at considering and dealing with different types of and levels of risk. As you move into different markets or different payment mechanisms, you are likely to face emerging risks that you are unaware of. Try to speak to partners and other organisations that have made this move and do not focus all of your research within the voluntary sector; what can you learn from the private sector in this area?

CONSIDER ALL THE RISKS

As well as financial and operational risks, as partnerships with the private sector increase, charitable autonomy and reputational risk must also be considered. Your reputation can be your biggest asset. If you are working with a prime provider, consider their values and ways of working and to what extent your own organisation's reputation could be at risk.

INVOLVE YOUR TRUSTEES

Risk management strategies should be set at trustee level, with a culture of risk awareness running throughout the organisation.

Q. What appetite for risk do your trustees have?

Q. Do trustees need training and development in this area?

It is important for trustees to understand that simply trying to avoid risky activity is unlikely to lead to the long term sustainability of an organisation. In contracts such as payment by results, it is likely that those

organisations who take on more risk will receive higher rewards for success, but have to accept significant risks should they miss agreed targets. What is important is that types and levels of risk are identified and a risk mitigation analysis is conducted. Only then can an informed decision be taken on whether to pursue a particular opportunity.

MITIGATE RISKS

An organisation can respond to and attempt to mitigate risk in a limited number of ways. Zurich's 'Understanding the impact of emerging risks' guide outlines a simple four T's checklist where, once identified, a risk can be:

- **Transferred** – Through partnership arrangement or insurance, for example
- **Treated** – By putting controls in place to reduce the impact in the event of a risk occurring
- **Tolerated** – Because the risk is minor enough to manage
- **Terminated** – Stopping the activity which is generating the risk

In the current contracting environment, some examples of how risk could be mitigated are through:

- **Passing it onto someone else** – For instance, back to the commissioner or prime provider, to a partner organisation, a sub-contractor, or staff. An example of transferring risk to staff would be placing staff on zero hour contracts to mitigate the risk of unknown referral levels. However, this could risk damaging your reputation or go against your values as a charity.



- **Treat it** – For example, having minimum or maximum referral levels written into the contract; or changing your processes. You could agree a pricing structure that charges a higher price for high risk services.
- **Qualify out** – This means walking away from the bidding process. Even if you have invested significant time and resources into the bidding for a piece of work, sometimes walking away from it will be the most appropriate action.

RISK FRAMEWORK

A traffic light system is commonly used to identify risk. While this is a first step, it is then essential to examine the high risk areas and identify how these risks can be reduced to moderate or low. If the risk cannot be reduced, you should consider qualifying out. For example, in the risks identified below, you may judge it unrealistic that you will be able to secure a bank loan or secure a social impact bond to mitigate cash flow issues. If this is the case, it is unlikely you would take on such a risk.

TRAFFIC LIGHT SYSTEM TO IDENTIFY RISK

	Insignificant	Minor	Moderate	Major	Catastrophic
Almost certain	Low	Low	Moderate	High	High
Likely	Low	Low	Moderate	High	High
Possible	Very low	Low	Moderate	High	High
Unlikely	Very low	Very low	Low	Moderate	High
Rare	Very low	Very low	Low	Moderate	High

EXAMPLE OF RISKS AND MITIGATION

Risk	Initial category	Mitigation	Post mitigation category
Referral volume lower than expected	Red	<ul style="list-style-type: none"> • Agree minimum referral levels in contract 	Green
Partner organisation fails to meet targets	Red	<ul style="list-style-type: none"> • Due diligence • Contractual partnership agreement 	Amber
Reserves do not cover cash-flow required under payment mechanism (PbR)	Red	<ul style="list-style-type: none"> • Secure bank loan • Secure social impact bond 	Amber



NEGOTIATION SKILLS

Another skill-set where voluntary sector organisations may need to build their capacity is in the area of negotiation. The Chartered Institute of Purchasing and Supply describes negotiation as: **‘Communicating with the objective of reaching an agreement by means, where appropriate, of compromise’**. It is about finding a settlement that works for both parties, particularly if you are looking at building long-term relationships and further opportunities.

GIVE AND TAKE: REACHING YOUR SETTLEMENT AREA

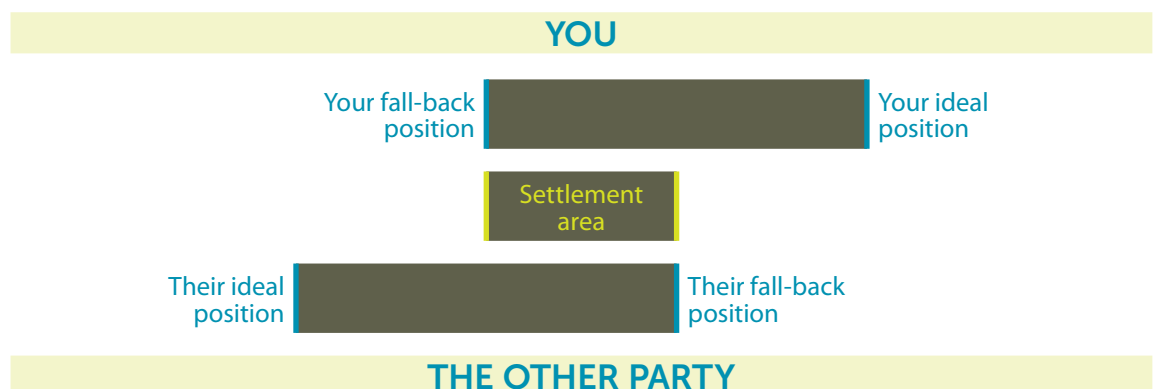
In previous commissioning rounds of large scale contracts, such as the Work Programme, many voluntary sector organisations in the supply chain signed up to unsustainable or unfair contract terms, although this did not occur across the board. If you have reached the stage of contract negotiation with a prime provider, you have already evidenced your value to them and that you can provide them with something they need. If this were not the case then they would deliver the contract themselves. Therefore, do not underestimate your position of power, but

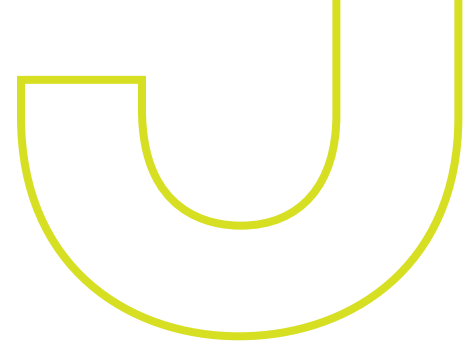
be realistic and make efforts to assess whether competitors could provide the same value.

There are a number of areas you may wish to negotiate on. If you have been awarded a service following a tendering process with a public body, it is important to understand that the Public Contract Rules, which are based on EU procurement regulations, limit the areas that can be negotiated. In this situation, no material changes can be negotiated from what you offered in your bid. This includes things like price and specification. If material contract clauses are changed, it would leave the commissioner open to challenge from a losing bidder. The option to negotiate non-material clauses should be a possibility. Where a commissioner tries to use a standard contract, ensure it is suitable to the specifics of the service and the payment mechanism, and negotiate changes where it is not.

When you are negotiating with private sector companies to be part of a supply chain, the same rules do not apply. However, there may be some areas they are unwilling to negotiate on. Price will often be non-negotiable as they will have already

PLOT AND MEASURE YOUR NEGOTIATION





completed their costings. Payment schedules on the other hand might be negotiable. It is important to try and anticipate what is open to negotiation and decide your priorities. Do not go into the negotiation with a long list of things you want changing and expect to get them all. Understand what is really important to you and what your 'red lines' are (the things that you must have else you will walk away from the contract).

THE MoSCoW TOOL

Preparation is vital. Before you enter negotiations you should have considered the issues you are willing to negotiate on and their level of importance. A tool that can be used to help prioritise issues, in both negotiation planning and other areas, is the MoSCoW tool. The MoSCoW tool is basically a mnemonic that aids prioritisation.

- **MUST** have this
- **SHOULD** have this if at all possible
- **COULD** have this if at all possible but less important
- **WON'T** have this time.

In negotiating a contract, you are likely to focus on the first three categories to define your 'wants'. 'Musts' are your red lines, if you do not achieve them, you will walk away. 'Shoulds' are important to you, but not deal breakers. 'Could's' are less important, the things that you can live without.

Must	Should	Could

Be careful that you do not place too many issues in the 'must' column and limit your ability to negotiate a settlement. If both sides have opposing 'musts' and will not negotiate on these areas, the negotiation is likely to break down. Also remember that it may be worth conceding a number of the less important areas in order to gain something that is really important to you.

After you have prioritised your own 'must-haves' and 'should-haves' then you should make an attempt to assess what the other party really wants from the negotiation. The more prepared you are, the more likely it is that you will get a positive outcome. Sometimes you can help the other party to achieve what they want without compromising your own negotiating position. This has to be a two-way process, and you should be thinking flexibly to ensure the best outcome for both parties.

PLANNING: PREPARING A NEGOTIATION STRATEGY

In order to remain effective, you will need to keep your negotiation strategy flexible. However, this does not mean you should not have one at all. The outline on page 11 will help you to plan your negotiation, plotting what you need, how far you're willing to negotiate, and what opposition you might encounter. This tool should be completed well before your negotiation, and agreed upon with relevant staff.

What is my objective?		Why is this my objective?	
Why is it me that's doing the negotiating?	Do I have the necessary authority?	Who else is on 'my side' and why?	
Who am I negotiating with?	Do they have the necessary authority?	Who else is on 'their side' and why?	
What do I know about them that might be useful?			
What's my best position?		What's my fall-back position?	
What concessions am I prepared to make? And in what order? (MoSCoW)			
What do I think is their ideal position?		What do I think is their fall-back position?	
What concessions do I think they will make?			
What's my realistic ideal position?			
What questions do I expect to encounter?		What could my answers be?	
What objections do I expect to encounter?		How could I handle/deal with these?	
Initial ideas for possible 'solutions' (win-win outcomes)			
Possible negotiating strategies: (include personal style, preferred structure for discussions, opening position, possible order of concessions)			



OTHER RESOURCES

KnowHow NonProfit, 'Negotiating with prime contractors'

www.knowhownonprofit.org/funding/service/commercial-masterclasses/negotiating-with-prime-contractors

Clinks' commissioning resources

www.clinks.org/support/commissioning

Clinks, Transforming Rehabilitation resources

www.clinks.org/criminal-justice/transforming-rehabilitation

Clinks, Take your temperature: a brief organisational health check

www.clinks.org/resources-guides-toolkits/take-your-temperature

NCVO Inspiring Impact, 'The code of good impact practice'

www.inspiringimpact.org/wp-content/uploads/2013/04/Code-of-Good-Impact-Practice.pdf

Good Governance, 'Code of good governance'

www.governancecode.org

Charity Commission, 'Charities and risk management (CC26)'

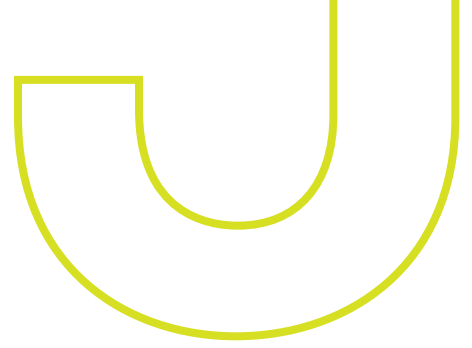
www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/charities-and-risk-management-cc26/

NCVO, 'Payment by Results contracts: a legal analysis of terms and process

www.ncvo.org.uk/images/documents/practical_support/public_services/payment_by_results_contracts_a_legal_analysis_of_terms_and_process_ncvo_and_bwb_30_oct_2013.pdf

NAVCA, Inspiring Local Leadership

www.navca.org.uk/inspiring-local-leadership-1





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