

Care and Support Services: Overview Report

Finance and Resources Committee (Special Meeting)

4 February 2010

1 Purpose of Report

1.1 The purpose of this report is to:

- set out for members the policy and service rationale which underpins the procurement of care and support services and a "chronology" of key events;
- present the findings of the review work carried out over the last two months and, in particular, an assignment undertaken by Deloitte; and
- propose a way forward.

2 Policy/Service Rationale

2.1 Care and Support services have developed over a period of years, most significantly when additional housing support funding became available approximately seven years ago under the Supporting People Programme. Councils were encouraged by the (then) Scottish Executive to grow these services rapidly and the more effectively Councils did this, the greater the resource they were allocated.

2.2 By 2007 it was apparent within the Council that, whilst that growth in resource was much welcomed, the consequence was an ad hoc range of service delivery arrangements, including a wide range of prices from externally commissioned providers. Hourly rates were found to vary by nearly 100% across different providers, with no apparent rationale for this. Currently, some 36 providers are involved in delivering 798 packages of services. It is considered unlikely that this arrangement represents Best Value.

2.3 Whilst some financial savings have been achieved through direct negotiation with providers, it was concluded that the best means of achieving savings across this wide range of services was through an open competitive tendering process. This approach has been successfully adopted by a number of local authorities including Argyll and Bute, Midlothian, East Lothian, South Lanarkshire and Glasgow. A report to the Executive of the City of Glasgow Council in November 2009 identifies a reduction in providers from 73 to 15.

2.4 On 13 March 2007 a report entitled "Review of the Council's Contracting Management Arrangements for the Provision of Social Services – Update" was submitted to the (then) Executive of the Council. The report pointed out that the Council's contracting arrangements (for social services) required to be modernised and procured in line with new regulations. The report concluded that:

"the move to improved procurement practice will result in modernisation, some service redesign and development of services which are fit for the future"

The Executive took three decisions, one of which was "to receive a further report in line with the anticipated timescale on proposals for installation of a new framework for the Council's management of contractual relations for social services".

2.5 The decision of the Council was "called-in" to a Scrutiny Panel and was discussed at a meeting on 26 June 2007. The decision of the Panel was to let the Executive's decision be implemented.

2.6 In February 2008, all political groups represented on the Council included within their budget proposals a saving of £2.4m under the heading of "Tender Housing Support Services". This duly formed part of the approved Council budget with a saving of £1.2m removed from departmental budgets in both 2008/9 and 2009/10 – a total projected saving of £2.4m.

2.7 In order to take this project forward, a Project Board was established, chaired by the Finance Department, and including Heads of Service from Health and Social Care and Services for Communities. Likewise, a Project Team was established drawn from the same three departments. Legal Services were involved when legal advice was requested.

2.8 The key stages in the project were as follows:

• Tender strategy and budget proposals	February 2008
• Project Board/Project Team Formed	September 2008*
• Tender documents prepared	November 2008 – February 2009
• Equalities Impact Assessment	February 2009
• Invitation to tender issued	Advertised on 6 February 2009

• Tenders returned	April 2009
• Officer training for tender evaluation process	April 2009
• Tender evaluation process began	May 2009
• Tender evaluation process ended	October 2009
• Report to Finance and Resources Committee	27 October 2009
• Equalities Impact Assessment	November 2009

* *the Learning and Care Board first met in September 2008. A project team had been established before then by Health and Social Care as the Non Core Care at Home Project which after September 2009 then reported to the Learning and Care Board.*

2.9 Throughout the tendering process due regard was paid to the public equality sector duties, in particular the requirement to involve, gather and utilise information from disabled service users and carers. In February 2009 a full equalities impact assessment was completed as part of the ongoing process to monitor the range of impacts on service users.

3 Recent Committee/Council Reports

3.1 A report seeking approval to award contracts for the provision of care and support services was submitted to the Finance and Resources Committee on 27 October 2009. There was a lengthy discussion and debate on the proposals in the report and the decision of the Committee was to refer the matter to a meeting of the Council.

3.2 The Council met on 19 November 2009. In addition to the report from the Finance and Resources Committee a supplementary report entitled: "Direct Payments: Transitional Arrangements for Care and Support Services" was submitted. This had been prepared in response to concerns expressed by elected members and customers of care and support services.

3.3 At the meeting on 19 November 2009 the Council heard, via deputations, representations from 11 individuals and organisations. They all expressed concerns or criticisms over one or more aspects of the tendering process. Following a lengthy debate, the Council took a number of decisions and also instructed that a special meeting of the Finance and Resources Committee should be held on 3 December 2009 to resolve a number of outstanding concerns and issues.

- 3.4 A report was prepared and circulated for the Special Meeting of the Finance and Resources Committee on 3 December 2009. That report, from the Directors of Finance, Health and Social Care and Services for Communities, dealt with the specific issues set out in the Council decision of 19 November and made a number of recommendations, one of which was to approve the award of contracts to preferred bidders in line with previous advice to Committee.
- 3.5 In the period prior to 3 December 2009 I was meeting regularly with colleagues to consider and review the advice being given to Committee. Officers were asked by me to review all aspects of the tendering process and to consider the questions raised by elected members and client representations at the Committee and Council meetings. The purpose behind this request was to check again that the advice being given to elected members was accurate and comprehensive.
- 3.6 On 1 December 2009 a number of issues were brought to my attention by officer colleagues. Correspondence had been received and enquiries had been raised on behalf of some of the unsuccessful bidding organisations. In the process of addressing those and, as a result of the checking process described above, additional factual information was uncovered which raised two immediate concerns. They were:
- the efficacy of the quality assurance process and whether there was full separation of price and quality; and
 - the application of the confidence factor.
- 3.7 Having discussed the position with colleagues I concluded that, given the change in position, it was no longer safe to proceed legally at that point and that further time and investigation was needed to ascertain if the issues raised were of such significance as to require the process to be halted, or whether the concerns identified were in fact insignificant.
- 3.8 I arranged to see the Council Leader and other senior elected members on 2 December 2009, when I advised them of the revised position which had been reached. Following a detailed discussion the Council Leader instructed me to arrange for an independent review of the tendering process to be carried out.
- 3.9 At the Special Meeting of the Finance and Resources Committee on 3 December 2009 the Convener advised the Committee that it was necessary to adjourn the meeting to a future date, to allow time for the independent review to be carried out.
- 3.10 The Council met on 17 December 2009 when 6 Questions were put forward for answer by the Council Leader, the Convener of the Health, Social Care and Housing Committee and the Convener of the Finance and Resources Committee. Since early December I have also received questions and requests for information from a number of elected members. Most of these have been responded to and the remainder will be dealt with as soon as possible.

4 Current Position

Independent Review

- 4.1 On 17 December 2009 Deloitte were commissioned to undertake an independent review of the tendering process for the care and support tenders.
- 4.2 The report from Deloitte, in the form of an extended letter, was received on 13 January 2009. This carried a legal proviso that the document was confidential and should not, inter alia, be disclosed to any other party.
- 4.3 I made it clear to Council officials that I regarded it as essential that elected members were given full access to the Deloitte findings. Following further discussion with Deloitte they have confirmed that their report can be made available to elected members and Directors. However, while they are willing for their report to be included in the committee papers, they point out that this is in breach of their confidentiality clause.
- 4.4 I am still of the view that elected members need to see the Deloitte report in its entirety to enable them to reach a properly considered view of all the issues involved in the procurement process for the care and support tenders. Having taken advice from the Director of Corporate Services and the Head of Legal and Administrative Services I have taken the decision to place the Deloitte report on the "B" agenda for this (Special) meeting of the Finance and Resources Committee. I would ask elected members to observe the confidentiality requirements in the Deloitte report.
- 4.5 Deloitte were commissioned to conduct a brief, high level review of the care and support tenders. What was required from Deloitte was a report within a timescale which allowed advice to be given to the Council as soon as possible on whether it was safe to award the contracts or not. In the time given to them it was not a requirement to review all documentation or do a full review of tenders. Council officers have conveyed to Deloitte some questions over some of the statements in the report. However, given also the position regarding Direct Payments (see below), I can state that Council officers do not wish to challenge the conclusions in the report.
- 4.6 As members will see from the Deloitte report, they came to the following three conclusions:
- while the intended approach and process may be regarded as appropriate, reasonable and in accordance with guidance and regulations, the execution in practice was not as sufficiently meticulous or as thorough as might have been expected;
 - as a result of the quality assurance process, the ranking of bids did change. Other than the impact of changed quality scores, it is not possible to derive any other definite conclusion at the level at which this review has been conducted; and

- during the process, changes in requirements as a result of Direct Payment applications may have affected the original business case and, if it has, may necessitate a reassessment of the way forward.

Direct Payments

- 4.7 Members will recall that considerable attention was given in previous reports to the key issue of Direct Payments.
- 4.8 The original intention had been to award twelve contracts. However, the number of people who have applied for Direct Payments is now 483, which represents 80% of the original estimated contract volume. It should be noted that the risk of changing levels of Direct Payment applications was identified at the outset and provision was made within the proposed contracts for volume variations of $\pm 20\%$. However, the level of applications now received is far greater than expected and seriously undermines the viability of awarding contracts. Whilst some of the applications may, for various reasons, prove to be unsuccessful, it is likely that only one, or at most two, contracts could be awarded. Complex TUPE arrangements, which are explained in Appendix 1, would also arise.

Overall Assessment

- 4.9 Taking into account:
- the adverse effect on the viability of the contracts arising from the number of individuals who have applied for a Direct Payment;
 - the conclusions reached by Deloitte about the tendering exercise; and
 - the representations made at the November Council and the decisions taken by the Council at that meeting.

my advice to the Council is that it should not now proceed to award the care and support contracts as originally proposed.

5 Way Forward

- 5.1 For the reasons outlined earlier, a strategic approach to the commissioning of care and support services, in order to ensure that Best Value is achieved, remains valid. Members are aware of the serious financial situation faced by the Council and also of the fact that there is a waiting list for these services. Financial efficiencies are necessary to achieve the £2.4m saving which has already been removed from departmental budgets, as well as to create headroom to provide services to some of those who currently receive none.
- 5.2 As Deloitte observed, the guidance relating to commissioning of these services is a developing field. However, the Scottish Government is currently consulting upon draft guidance and this will be available for use by local authorities later this year (possibly from April onwards).
- 5.3 It is, therefore, proposed that a two-phased approach is adopted.

- 5.4 In the short term (approximately twelve months) a strategy designed to achieve the following objectives will be pursued:
- service continuity;
 - a workable arrangement for Direct Payments; and.
 - securing budgeted financial savings already agreed by the Council.
- 5.5 In the second phase a commissioning strategy for these services will be developed, in light of new Scottish Government Guidance. This is likely to involve moving to a "Framework Agreement" approach which will offer a choice of providers to clients, even when a Direct Payment is not appropriate. Work on this will commence immediately with a view to reporting the Commissioning Strategy to Committee in the summer, by which time the position in relation to Direct Payments is expected to have become clearer. The Commissioning Strategy will need to include an overall strategy for Direct Payments.

Details of Phase 1

- 5.6 In order to achieve the three objectives listed above it is necessary to ensure that Direct Payment rates are reasonably aligned with those available under existing SLA's (Service Level Agreements with existing providers for those not on Direct Payments). It is, therefore, proposed that the Direct Payment rate for these services be set at up to £15.04 per hour and that discussions take place with those existing providers who currently charge more than this to achieve a similar SLA rate. In exceptional cases, including those of very high complexity, more will be paid.
- 5.7 The rationale for a direct payment rate up to £15.04 is drawn from the recent procurement project and represents the average price from the potentially successful bidders across all client groups. This option was considered and rejected as part of the tender project because it is higher than the lowest successful bidder's rate and would have offered a perverse incentive for clients to leave contracts and take up direct payments. Given that the contracts are no longer to be awarded this is not now considered to be a problem.
- 5.8 If those current providers who currently charge more than £15.04 are able to reduce their prices to that level then it is estimated that the budgeted savings will be achieved. If this is not possible immediately then consideration will be given to some form of transition period by the end of which they will need to have achieved that level of charge. Such a transition period, should it become necessary, will need to be discussed in the light of its potential financial impact on the Council.
- 5.9 It is possible that the above discussions may be unsuccessful. In these circumstances clients will be offered an alternative existing provider who meets the Council's financial thresholds. In the unlikely event that no existing provider is able to provide the required capacity then an approved provider list, following public advert and a procurement exercise, will be developed using existing and new providers who meet the Council's quality and price thresholds. This would

be an interim arrangement to ensure service continuity, pending the Council's consideration of the Commissioning Strategy. In addition, as these interim arrangements unfold, the Council will ensure that it continues to monitor the impact on vulnerable service users.

Procuring Services in Future (Phase 2)

- 5.10 As stated above, a Commissioning Strategy will be brought forward in the summer which will be informed by Scottish Government Guidance for these services (as well as other statutory and regulatory requirements and best practice). This will include a strategy for all Direct Payments. The vision for Edinburgh's approach to Direct Payments is to offer all individuals eligible for adult social care a clear and transparent allocation of funding to enable them to make informed choices and exercise control over how to best meet their needs and identified outcomes.
- 5.11 The policy rationale for achieving Best Value in this area has not changed since the February 2008 Council decision and it is, therefore, likely that some form of procurement for at least some of these services will continue to be appropriate.
- 5.12 As Deloitte observe, the strategic approach adopted for procurement of these services was appropriate and reasonable, albeit the execution of the approach was not as meticulous as might have been expected. In light of Deloitte comments I intend to conduct a full "lessons learned" exercise to ensure that the Council is well-placed to undertake future procurement projects, since this approach will continue to play a major role in securing the financial efficiencies required in the coming months and years. I would expect to present that report in the summer, before the Commissioning Strategy is brought forward. The "lessons learned" report will include, for example:
- service users' involvement and engagement;
 - communication and consultation;
 - reviewing the composition of project boards and project teams;
 - reviewing and taking into account the specific shortcomings highlighted in the Deloitte report;
 - additional training for Council officers involved in tender evaluation (for example, in the recording and documenting of information);
 - frequency of reporting to elected members;
 - further embedding equalities impact activity throughout the tendering process; and
 - clarifying recent changes in TUPE requirements.

6 Communications

- 6.1 A detailed description of the communications plan for the tendering of Care and Support Services was contained in the report to the Special Meeting of the Finance and Resources Committee on 3 December.
- 6.2 In terms of communications relating to the content of this report, members are asked to note the following:
- this report (but not the confidential report from Deloitte) has been sent directly to those groups representing existing service users and to all providers who submitted tenders;
 - the decision of the Committee will be communicated in writing to both of the above stakeholder groups, together with an invitation to meet to discuss next steps where appropriate; and
 - the decision of Committee will be communicated directly to service users, with the usual advice about how to seek help/further advice.
- 6.3 If Committee approves the recommendations regarding a new Commissioning Strategy (including Direct Payments) this will be subject to wide consultation with relevant stakeholders.

7 Financial Implications

- 7.1 Good progress has been made towards securing the budgeted saving of £2.4m in 2009/10. This has been achieved through a combination of tendering and negotiation. However, there is a shortfall against that saving of approximately £400,000 in 2009/10 and a further required saving of £200,000 is included in management team budget proposals for 2010/11.
- 7.2 Securing better value in the procurement of supplies and services from third parties is a key requirement to meet the forecast funding reductions set out in the Council's long term financial plan. In this context, maintaining Direct Payment and SLA rates based on the current level of variation across different suppliers is not sustainable.
- 7.3 The financial implications for 2010/11 of the proposals contained within this report are dependent upon the outcome of negotiations with existing providers and also the determination of outstanding applications for Direct Payments. It is considered likely that the proposals will succeed in delivering the required savings, although both of these matters will require close monitoring as they progress.
- 7.4 The cost of the exercise undertaken by Deloitte is approximately £80,000. These costs will be met on a shared basis by the Departments of Finance, Health and Social Care and Services for Communities.

8 Risk Analysis

- 8.1 In preparing the recommendations contained within this report, I have taken advice from relevant colleagues regarding the nature of any risk which may exist as a result of decisions the Committee may take. The key risks to be considered are summarised below.

Service Continuity

- 8.2 The recommendations contained in the report are designed to ensure service continuity for clients during Phase 1. There is a low risk that negotiations with providers may prove unsuccessful and this could result in alternative providers being required. However, not only is this unlikely, but if it were to materialise it will be mitigated by careful management of any transition (including potential continuity of carer through staff transfer).
- 8.3 Any risks regarding service continuity arising from Phase 2 will be addressed in the Commissioning Strategy itself.

Financial Risks

- 8.4 Good progress has already been made towards achieving the budgeted savings for Supporting People. Whilst the recommended approach is likely to deliver less savings than the original plans to award contracts, I am reasonably confident that the budgeted savings will still be achieved if these recommendations are approved.

Risk of Legal Challenge

- 8.5 Any procurement process carries a degree of risk of legal challenge and this is particularly so in this complex field where, as Deloitte comment, national guidance is still under development. Additionally, case law continues to add to the interpretation of various regulations and guidance. In effect, therefore, the Council faces a degree of risk whether it proceeds to award contracts or not.
- 8.6 It is quite clear from the report that the level of Direct Payment applications significantly affects the business case for the tendering process. This in itself would suggest that an alternative approach is required in light of these changed circumstances. Additionally, the contract documentation made it clear that contracts may not be awarded and, given the position regarding Direct Payments, the risk of a successful legal challenge of a decision not to award contracts is, therefore, considered to be significantly less than if the Council were to proceed to award contracts.
- 8.7 If, on the other hand, the Council was minded to award contracts, despite the changes in relation to Direct Payments, then the report by Deloitte becomes relevant. As noted above (paragraph 4.6) Deloitte conclude that:

“During the process, changes in requirements as a result of Direct Payment applications may have affected the original business case and, if it has, may necessitate a reassessment of the way forward”.

- 8.8 Deloitte also comment that *“the execution [of the intended approach] was not as sufficiently meticulous or thorough as might have been expected”*.
- 8.9 It has become clear over recent weeks that, if contracts were to be awarded, the likelihood of legal challenge from one or more unsuccessful bidders is high. Should such a challenge proceed it would consume significant staff time, incur significant legal costs and create considerable uncertainty for service users. If such a challenge was successful then the financial consequences are likely to be significant, given the overall value of the contracts. Without considerably more analysis it is not possible to determine the prospects of any legal challenge if contracts were to be awarded. Deloitte’s comments tend to suggest that there is some risk but this cannot be determined precisely at this time. There is no justification for incurring the further costs which would be needed to determine definitively the level of risk here, given the changes to the business case in terms of Direct Payments.
- 8.10 In summary, the business case has changed and taking into account the balance of risk associated with awarding or not awarding contracts, I believe the recommendations of this report present the least risk of all the options available to the Council.
- 8.11 In respect of any potential legal challenge based on the grounds of not meeting the public sector equality duties, I will ensure that due regard continues to be paid to these duties throughout Phases 1 and 2.

9 Environmental Impact

- 9.1 There are no environmental implications arising from this report.

10 Equalities

- 10.1 The importance of complying with the equality duties placed on public sector bodies is recognised. Equalities impact assessments were carried out in February 2009 and November 2009. This will be built upon and strengthened in future activity in relation to care and support services.

11 Recommendations

- 11.1 It is recommended that Committee:
- notes the analysis undertaken by Deloitte and the changed position in relation to the number of people who have now applied for Direct Payments and, accordingly;
 - resolves not to proceed to award the care and support contracts as originally proposed;
 - agrees the two-phased approach set out in the report;
 - adopts a Direct Payment rate of up to £15.04;
 - notes that a Commissioning Strategy will be brought forward for consideration by Committee/Council in the summer; and

- notes that I will also report, prior to the Commissioning Strategy being brought forward, on the "lessons learned" from the recent procurement exercise.



Tom Aitchison
Chief Executive

29/01/10.

Appendices	Appendix 1 – TUPE Considerations
Contact/tel/Email	Tom Aitchison, Chief Executive – 0131 469 3002 tom.aitchison@edinburgh.gov.uk
Wards affected	All
Single Outcome Agreement	
Background Papers	

TUPE CONSIDERATIONS

Contracts were to be awarded consisting of a certain volume of hours of support, ranging from 240 to 1,000 hours per contract. When 12 contracts were anticipated, each new provider would have taken on the business of, at most, 6 current providers and so would have had to negotiate staff and service user transition with up to 6 current providers. Despite the level of Direct Payment applications, the hours of care and support now available for contract would still be spread over those 36 existing providers. To achieve the same contract volume (of between 240 -1,000 hours) those contract hours would now need to be drawn from a much greater number of existing providers, because each provider would then have a relatively small number of hours not subject to a Direct Payment application. Thus, a new provider awarded a contract would have to negotiate transition arrangements with a much larger number of former providers. Transition between providers has always been viewed as a significant risk in terms of service continuity and this scale of transition would increase those risks to a much higher level than had originally been planned for.