

balance best value criteria (cost, quality, efficiency, effectiveness, etc.) when making decisions about service delivery methods; and to integrate the recommendations of *Changing Lives* in this respect, making the link between tender evaluation criteria and bidders' ability to deliver personalisation, achievement of outcomes for individuals and other relevant elements of service quality

- that clear standards are agreed in relation to the engagement and involvement of people who use services, their families, carers and supporters, in all aspects of decision-making about competitive tendering and the potential it brings for a change of service provider,⁶ and that the potential impact of a change of provider is properly assessed and taken into account
- that *either* clear standards are developed relating to the conditions of service of social care and support staff and applied to all service providers bidding for contracts in tendering and re-tendering exercises or Section 52 guidance to the Local Government in Scotland Act 2003⁷ is applied explicitly and consistently to all instances of tendering and re-tendering by commissioning authorities
- that tendering and re-tendering are considered within a much wider discussion about improvements in social care commissioning, and in particular, how people who use services can be supported to design and develop their own service responses.

The way forward

CCPS invites colleagues with an interest in this area to debate and discuss the issues and recommendations set out in this document, with a view to agreeing a series of principles and a way forward.

We have identified the following colleagues as important in this debate:

- public sector commissioning bodies, especially local authorities
- relevant professional and representative associations
- relevant central government departments including those setting policy and allocating expenditure for social care and support services; local government; voluntary issues; public service reform; and procurement
- regulatory and other scrutiny bodies relevant to social care and support
- development and improvement agencies relevant to social care and support.

Notes and references

- 1 For example, a recent tendering exercise conducted by the City of Edinburgh Council advised bidders that price will account for 30% of tender evaluations, and quality 70%; in an ongoing exercise in Glasgow, these proportions are reversed
- 2 Excluding childminders, Care Commission 2007
- 3 Scottish Executive response to the GEN Consulting report on Full Cost Recovery, March 2007
- 4 Note that this circumstance in particular may equally apply to services currently delivered in-house by local authorities
- 5 The Scottish Executive Development Department Supporting People Division issued a Procurement Information Sheet in April 2007 offering similar guidance and stating that it is for a local authority to decide whether to tender/re-tender. Where an authority decides not to tender/re-tender, "the local authority should clearly evidence the thinking and decision-making processes".
- 6 The Learning Disability Alliance has drafted standards in this area and is seeking agreement on them with all local authorities; this work might usefully be expanded and adapted to other areas of social care and support
- 7 Statutory guidance to local authorities on contracting: the treatment of employment issues when exercising a power to enter into a contract, August 2006



ABOUT CCPS

Community Care Providers Scotland (CCPS) is the national voice for social care and support service providers in Scotland's voluntary sector. It exists to identify, represent, promote and safeguard the interests of voluntary sector and not-for-profit providers, so that they can maximise the support they offer to the people who use their services.

CCPS aims

- to be a recognised and respected source of expertise on issues affecting service providers
- to be an influential body able to use the collective experience of members to effect change
- to act as a key source of information and advice
- to champion service quality and promote the central role of providers in quality improvement
- to support providers in improving the experience of people who use their services, and their quality of life
- to promote and champion the role of voluntary organisations as service providers, ensuring diversity and choice.

CCPS has sixty members, comprising Scotland's most substantial providers of social care and support services to children and families, adults and older people.

CCPS
9 Ellersly Road
EDINBURGH
EH12 6HY
T 0131 337 3295
www.ccpscotland.org

© CCPS June 2007



COMPETITIVE TENDERING IN SOCIAL CARE AND SUPPORT SERVICES: A POSITION STATEMENT

Competitive tendering and re-tendering: background and current developments

Social care and support service providers in the voluntary sector have a great deal of experience of working within a competitive market environment. Since the implementation of the NHS and Community Care Act 1990, competitive tendering has been used by public bodies, especially local authorities, as a key part of their community care commissioning processes, and services for children and families are increasingly commissioned using a similar approach.

Voluntary organisations recognise that competitive tendering is a "fact of life" in social care and support provision; indeed many voluntary organisations have grown their organisations and expanded their portfolio of activities chiefly through this route.

The use of competitive tendering has, by and large, been restricted either to new services, or to services previously provided directly by the public sector where a decision has been taken to 'contract out'. In recent months however, local authorities have begun to extend tendering processes to existing contracted services in a variety of ways, for example:

- where a service provider is unable to operate services within the cost limits set by the commissioning authority and serves notice on the contract, which is then advertised
- where a provider's contract term expires, and the commissioning authority advertises it afresh rather than renewing the existing provider's contract
- where a provider has been operating a service without a contract and the commissioning authority wishes to formalise arrangements
- where an authority serves notice on an existing contract in order to conduct a tendering exercise in pursuit of a strategic objective, for example cost

savings, geographical reconfiguration of services, or diversification/rationalisation of the current market.

In these and similar examples, the process might best be described as competitive re-tendering. In a number of "live" cases of re-tendering, commissioning authorities are citing the provisions of the Public Contracts (Scotland) Regulations 2006 as the key driver, maintaining that in effect, these provisions leave them with no other choice than to re-tender services.

Duties of public bodies

Service providers recognise that local authorities have clear duties and responsibilities relevant to their decisions about the use of re-tendering. These are:

- the duty to achieve best value for the public pound;
- the duty to abide by current legislation in force regarding procurement and competition;
- the responsibility to manage the local market for social care and support, ensuring that there is adequate provision to match need and choice for people who use services
- the duty of care to individuals using services.

Authorities have a difficult path to tread in ensuring that their approach to re-tendering does not result in their fulfilling any one of these duties at the expense of another: for example, in complying with procurement regulations, authorities need to be mindful of their duty of care to individuals using existing services provided under contract; and in seeking to achieve cost savings in pursuit of best value, they need to remain aware of the potential effect of re-tendering exercises both on service quality and on the effective operation of the local market.

In drafting this position statement and inviting discussion, providers in the voluntary sector are seeking a way forward on re-tendering that will enable authorities to meet their diverse duties and responsibilities whilst dealing fairly with their partner providers.

Benefits and risks of tendering and re-tendering

The benefits of competitive tendering can be summed up as follows:

- for people who use services, it can stimulate choice and diversity of provision
- for providers, it can present opportunities to bring their particular approach to service provision to more people
- for social care and support staff, it can stimulate a lively labour market in which they can seek the best reward for their skills and experience
- for purchasers, it can be a key tool in diversifying the local market and promoting improvements in both cost and quality.

There are, however, a number of risks to competitive tendering, particularly when it is applied to existing contracted services. These risks are heightened when tendering is driven chiefly by cost considerations, and/or when the process does not fully involve the people using the service; however in some cases the risks will remain unavoidable under any circumstances:

- for people who use services, re-tendering can introduce significant uncertainty about the future of their service, causing anxiety and stress to them and to their families; it can cause disruption in the continuity of service, particularly in relation to familiarity with support staff (there is ample evidence to demonstrate that stability of staffing is a key feature of service quality, from the perspective of people who use services); and it can curtail, rather than promote, user choice
- for providers, it can supply a major disincentive to invest in and develop either the workforce or the service itself (or both) if contracts are to be systematically re-tendered upon contract expiry, and there is a significant likelihood that business will be lost or retained chiefly on the grounds of cost
- for social care staff, it can lead to a ‘casualisation’ of labour as staff are transferred from one employer to another under TUPE arrangements; it can also result in major downward pressure on staff pay and conditions, as providers cut costs in order to remain competitive in the market
- for purchasers, it can trigger a ‘price war’ among providers which, although delivering short-term cost savings, may have a significant impact on providers’ ability to recruit appropriately skilled and experienced staff, both at support and supervisory level, potentially affecting the quality of service; it may also result in those providers who are unwilling to accept these risks withdrawing from the market, thus reducing choice and diversity; and it can lead to considerable transaction costs for both parties.

In addition to these specific risks, there are more general concerns among providers - and, we believe, many commissioners - that:

- re-tendering presents a threat to the concept of partnership and to the ability of authorities to engage in ‘intelligent management of the market’ as recommended by the *Changing Lives* report
- there is a clear mismatch between routine competitive tendering and some Scottish Executive guidance relevant to social care and support services, for example guidance on Supporting People and Best Value.

As noted, many of the risks of re-tendering are heightened if the process is driven principally by cost. In the “live” cases we have seen to date, authorities are publishing in advance their schemes for balancing cost and quality¹ in tender evaluations. “Quality” in these cases tends to refer mainly to policies and procedures and some proxy measures of service quality, such as staff qualification rates. There is little or no connection with personalisation, the achievement of individual outcomes, social capital or other elements that we increasingly understand as crucial to quality service provision.

In the absence of any common definition of service quality and how it relates to these factors, providers fear that contract awards are likely to continue to be based primarily on cost; providers are also aware that historically, compulsory competitive tendering (CCT) led to a deterioration in service quality, chiefly as a result of the severe downward pressure on pay and conditions of staff. This, indeed, is largely why CCT was abandoned in favour of Best Value: yet many of the same processes are now re-emerging in tendering and re-tendering exercises.

The role of care providers

Care and support providers in the voluntary sector now operate 38% of all care services registered with the Care Commission². According to the Scottish Social Services Council, voluntary organisations employ approximately one third of all social services workers. Care and support services are demonstrably a significant part of the social economy and as noted above, many individual organisations have developed their position in this respect through responding to competitive tendering exercises and winning contracts.

Voluntary organisations have, then, clearly risen to the challenges and the opportunities of competing in the market for social care, and have been able to deliver major benefits, in partnership with commissioners, for people who use services.

Faced with recent developments in re-tendering, providers essentially have two options: they can either cut costs to remain competitive, or they can decide not to tender, effectively withdrawing from service provision.

Commissioners need to be aware of the ramifications for people who use services, and for their own ability to maintain appropriate service capacity and quality, of providers responding to tenders in either of these ways: approximately 80% of most providers’ costs relate to direct staff costs, and cutting these may result in recruitment difficulties, higher turnover and detrimental consequences for service quality (providers are keenly aware that at present there is no lower limit for social services workers pay, terms and conditions other than minimum legal requirements applicable across the board; in this, they may be alone among all the ‘caring’ professions). Withdrawal from provision, meanwhile, may result in a loss of diversity and choice within the local market.

The Scottish Executive has recently suggested that providers can influence the behaviour of commissioning authorities by refusing to engage in the market on unreasonable terms³. Providers have their doubts about this: first, providers believe that it is unreasonable in itself to place organisations in a competitive environment, and then expect them not to compete; second, they believe that the responsibility to restrain the negative effects of the market should not be placed uniquely on their shoulders.

Providers believe that commissioning authorities in particular must play a greater role, as envisaged in a number of key policy documents from *Caring for People* to *Changing Lives*, in managing the market and ensuring that competition does not encourage a “race to the bottom”. Authorities need to be supported in this endeavour by the Scottish Executive and the range of regulatory and scrutiny bodies with an interest in this area.

Appropriate and inappropriate use of competitive tendering

Providers would like to seek agreement with commissioning authorities and others on the circumstances under which competitive tendering is and is not appropriate. As a starter for discussion, we would propose the following as a set of circumstances in which tendering may be appropriate:

- where an entirely new service is being developed
- where individuals would benefit from an alternative or reconfigured service that the current provider is not able to offer
- where a service consistently fails to meet clear and agreed quality standards and the current provider is unable to make the necessary improvements
- where the cost of a service is demonstrably higher than similar provision with no corresponding benefit in terms of service quality⁴, and a more appropriate cost/quality balance cannot be achieved through negotiation

- where people who use a service express a clear wish that the service be provided by a different organisation
- where there is an unacceptable risk to the safety of people using the service, as demonstrated (for example) by Care Commission activity.

Correspondingly, we would propose the following as a set of circumstances in which the use of competitive tendering may be inappropriate:

- as a routine response to the expiry of an existing contract where no other method has been employed to evidence best value
- as a response to poor service quality where service quality criteria have not been made explicit, and/or are not linked to personalisation and the achievement of outcomes for individuals, and/or the existing provider has not been given the opportunity to make improvements
- as a means to reduce costs without setting clear and explicit service quality criteria, linked to personalisation and the achievement of outcomes for individuals
- where people who use services, their carers, families and supporters have not been consulted about a potential change of provider; and/or where Direct Payments, or other means of increasing choice and control for people who use services, have not been considered as an alternative to a change of provider through re-tendering
- in relation to services that have been developed by a provider as a response to an identified gap in provision, and that provider has fully or partially funded its development and continued delivery from its own resources.

We would also wish to seek progress on a number of related matters that we believe will assist commissioners in managing the local market for social care and support services, ensuring that good quality service provision is promoted and maintained alongside developments in tendering practice. Briefly, our recommendations are:

- that the Scottish Executive issues guidance relating to the Public Contracts (Scotland) Regulations 2006 to the effect that those regulations *do not* compel local authorities automatically to re-tender social care and support services currently provided by voluntary organisations upon expiry of the contract term⁵; this guidance might also set out the range of other methods that commissioning authorities can employ to demonstrate that these services achieve best value
- that best value guidance itself is strengthened considerably in relation to social care and support services, in particular by providing clear advice to commissioning authorities as to how they might