



Contracting and the voluntary sector

A position statement
and model of good practice

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INTRODUCTION

About CCPS

Community Care Providers Scotland (CCPS) is the association of voluntary sector organisations providing community care services in Scotland. It has 28 members (*as at February 1999 - see p.11*).

The aims of CCPS are:

- to represent the views of its members to central and local government and other statutory and professional bodies;
- to promote the common interests of members as service providers within the mixed economy of care; and
- to assist the voluntary sector in this field in developing and improving its services and standards.

CCPS members provide a wide range of community care services for vulnerable adults in Scotland. The total cumulative income of the membership now stands at in excess of £120M; a significant proportion of this income derives from contractual or other formal agreements with statutory agencies relating to the provision of services.

About this document

The principles and processes involved in contracting¹ are at the heart of the relationship between the statutory bodies that fund community care services and the voluntary organisations that provide them. This document has been drawn up to articulate the position of voluntary sector service providers on the contracting process as they experience it, and to stimulate action to secure improvements to the process which will benefit purchasers, providers and service users alike. It is addressed to The Scottish Office, COSLA, ADSW, local authorities, Health Boards and all other statutory bodies (and their representative associations) that enter into contracts with voluntary organisations. It sets out:

- why the present arrangements for contracting can be considered to be unsatisfactory; and
- the improvements to the process that CCPS members seek to secure.

The document also sets out recommendations for future action.

CONTRACTING AND VOLUNTARY SECTOR PROVIDERS

The practice of offering service-specific contracts rather than open-ended grants to voluntary organisations has become widespread in Scotland since the implementation of the NHS and Community Care Act 1990. This is particularly the case where services are delivered by voluntary organisations on behalf of the local authority, rather than as add-ons to statutory provision.

Voluntary organisations have found that contracting has a number of advantages over grant funding:

- Contracts can offer greater clarity about the nature of the service to be provided, and who is accountable for delivering it
- Contracts can help to protect the interests of service users by specifying quality standards and the means by which they will be monitored
- Contracts can offer greater funding stability to providers

- As legally binding agreements between partners, contracts can help to modernise the traditional donor/recipient relationship between statutory funding bodies and voluntary sector providers.

When introducing the community care reforms, the government stipulated that:

'Authorities should seek to move towards contractual funding *in partnership* with the voluntary sector'². (*Italics added*)

The commitment of Scotland's voluntary sector to a partnership approach is reflected in the fact that a comprehensive code of practice on contracting for voluntary organisations was drafted by SCVO as early as 1991³. The code was endorsed by COSLA and signed by many of Scotland's voluntary sector service providers and local authorities. Other initiatives, such as the former Strathclyde Regional Council's working party on contracting⁴, followed. Nevertheless, a number of significant reviews have since revealed the existence of major difficulties in the operation of the community care 'contract culture':

*'Those local authorities that have seized on the real opportunities provided by the new contract culture to improve services, without simultaneously adopting the partnership approach which recognises the unique needs and contributions of the voluntary sector, need to re-think their approach.'*⁵

*'Recent changes, and particularly the shift to the provision of services through contracts, present the [voluntary] sector with a major opportunity to build on its expertise, and to develop services to meet future demand. But organisations are finding that the bargain they are being offered is a deteriorating one.'*⁶

'...we did find evidence of a hardening of attitude on the part of some authorities in a number of areas...a "take-it-or-leave-it" attitude [which] leaves organisations with the moral and financial dilemmas of: operating, effectively on the purchaser's terms; or withdrawing from the publicly funded market;

*or failing to deliver the service in line with their principles.'*⁷

*'In short, there tends to be a clear imbalance of power in negotiating contracts which means that charities and their advisers must be vigilant in protecting their vital interests.'*⁸

There is a considerable amount of academic literature and research which reaches similar conclusions to these extracts. In the light of this level of awareness of the problems of contracting for the voluntary sector, a number of initiatives have been undertaken in Scotland which attempt to remedy the situation. The Commission on the Future of the Voluntary Sector in Scotland and the House of Commons Scottish Affairs Committee have each drawn up detailed recommendations on the relationship between voluntary organisations and local authorities⁹; COSLA and SCVO have collaborated on a series of policy guidance documents for local authorities¹⁰; and the ADSW Contracts Officers Group has embarked on a series of contracting guidance documents for its members relating to specific community care service areas¹¹. Elsewhere in the UK, similar initiatives have been conducted or are under way¹².

CCPS welcomes and supports all these initiatives. It is disappointing, however, that the resulting good practice statements on contracting have the status of guidance, rather than directions; in this case, it is a matter of concern that very little monitoring has taken place to determine how many authorities have adopted such guidance¹³ and no data collected as to its success or otherwise in resolving problems. Indeed, a survey conducted by CCPS during 1998¹⁴ showed that contracting problems are still widespread, with significant variations between funding authorities in both policy and practice. For example:

- providers are frequently expected to carry all the financial risks of unfilled places, although the power to fill those places often resides uniquely with the purchaser;

- cost of living increases paid to staff employed in a statutory authority's direct service arm are not automatically paid to voluntary organisations contracted to provide services on behalf of that authority;
- there is no transparent process by which the full value of resource transfer monies or DSS inflationary uprates are passed on to providers.

Further, most of the initiatives already referred to above relate to contracting but do not focus

exclusively on it; none are led by voluntary sector service providers with direct experience of working under contract; and very few (if any) have involved such organisations as partners in drafting reports or guidance (although individual organisations have often been consulted prior to publication). This document aims therefore to fill a gap in the debate about contracting by representing the collective experience and position of the majority of Scotland's major voluntary sector care providers.

THE CONTRACTING PROCESS: KEY PRINCIPLES AND GOOD PRACTICE

Key principles

CCPS believes that four key principles should underpin all contracting between statutory authorities and voluntary sector providers:

- **Contracting must be part of a process aimed at meeting the needs of users, not an end in itself**
- **A contract must be an agreement based on mutual respect and fairness; contract conditions must therefore be reciprocal and the balance of risk appropriate**
- **Once agreed, a contract becomes the basis on which a service is delivered to users; all contract conditions must therefore be observed**
- **The contract, and the terms offered, must reflect the nature of the service being provided.**

Further, CCPS believes that for the voluntary sector to thrive, statutory authorities need to recognise that voluntary sector service providers:

- operate on a not-for-profit basis;

- are specifically constituted with the objective of meeting the needs of vulnerable people;
- rarely have significant reserves or access to venture capital; and
- operate in an artificial 'market' where they have no purchasers other than statutory agencies;

and that contracting practice should be based on that recognition.

CCPS therefore offers the following model for good practice based on these principles and beliefs. It consists of a series of statements of principle supplemented by brief commentaries, many of which include illustrations drawn from CCPS members' experience of existing practice. In constructing the model, CCPS is indebted to those earlier initiatives on contracting quoted and referenced in this document; elements of these pieces of work have been incorporated into the model where appropriate. In particular, the model:

- assumes the continuing validity of the SCVO 1991 code of practice; and
- supplements the forthcoming SCVO/COSLA policy guidance on funding of voluntary organisations, by supporting and expanding what it has to say about contracting.

Good practice in contracting

The pre-contract period

- The nature and amount of information required from providers in order to be accepted onto an approved providers list must be (a) reasonable and (b) co-ordinated with the requirements of other processes, such as registration and inspection.

Some providers have found that in order to be accepted onto approved providers lists, they are required to supply a great deal of information (experiences of CCPS members include, for example, being required to supply two personal references for all board members, and the private banking details of senior staff). These requirements differ widely between authorities and can often duplicate the information required by other parts of those authorities (most frequently registration and inspection teams), adding significantly to the costs of contracting for provider and purchaser alike. Most major voluntary sector providers publish annual reports and accounts and follow clear codes of practice regarding governance, accountability and management; these should be accepted wherever possible as evidence of a provider's competence.

- Within a statutory authority there must be proper links between those commissioning the service, those drawing up contracts for it, and those controlling the budget, before providers are invited to tender for a service¹⁵. Relevant links and relationships with other agencies involved in delivering or resourcing the service (for example Scottish Homes, Health Boards, LECs, etc) should similarly be established.

Where providers are invited to tender fully priced bids, they require comprehensive information on which they can base their proposals. This should include full details of the nature of the service

required, property arrangements, the needs and number of the service users envisaged and the budget within which the service has to operate; such information can only be supplied to providers if there is effective communication within and across the statutory agencies. Without such detailed information, all that providers can reasonably supply are expressions of interest with indicative prices, which may need to be substantially revised upon receipt of full information.

- Pending full contract negotiations, a purchasing authority should draw up a pre-contract agreement or an agreement in principle with service providers.

A pre-contract agreement should include details of:

- *the broad nature of the service;*
- *the anticipated start date;*
- *roles of the partners;*
- *funding responsibilities and arrangements;*
- *responsibilities in relation to development costs;*
- *arrangements and responsibilities in relation to delays or unanticipated costs;*
- *training arrangements.*

The agreement may also serve as a basis for providing funds on account to the provider. Such a document offers evidence of a commitment to a project which providers can use in continuing negotiations with third parties, such as housing providers or top-up funding bodies; it can also clarify arrangements for the paying of costs incurred prior to the commencement of the service.

It represents both a statement of good faith and recognition of unanticipated development costs, especially if there are delays which are beyond the control of the provider. Purchasers as well as providers have found this extremely valuable in areas where it has already been introduced as a standard procedure¹⁶.

Negotiating the contract

- Contract negotiations should be conducted within an agreed time frame and concluded by the time the provider has employed staff for the service.

The time frame envisaged for contract negotiations must allow for the accountability needs of voluntary organisations, where senior staff conduct the negotiations, but the board of management or the trustees are required to sign the document itself. It must be a primary goal of all parties to conclude service contract negotiations before the provider has employed staff; the employment of staff represents a further tier of contractual relationships which ought not to be entered into without a written guarantee that associated costs will be met by the purchasing authority. If the full contract itself cannot be concluded and signed by this stage, some other form of legally binding agreement (eg. a missive) committing appropriate resources to the service should be issued and signed.

- Contract negotiations should be focused on the service users, and thus conducted with the understanding that risks must be shared between parties.

Many providers find that certain types of agreement, in particular call-off contracts and spot purchase agreements, place all the risks of low occupancy or voids on the provider; furthermore, in many cases no back-up is offered when a lack of resources or delays in assessment result in lower than anticipated use of a service, leaving the consequent financial penalties to be borne solely by providers. A complete reliance on spot purchasing may place the interests of service users at considerable risk, either because providers may be forced to reduce the quality of a service to make up losses, or because the availability of a service may be curtailed by purchasers running out of funds and ceasing to make further placements.

- Purchasing authorities should negotiate with providers on the total price tendered for a service; they should not seek a breakdown of that price with a view to negotiating on specific inputs within it, for example management fees or salary costs.

Providers must reserve the right to determine for themselves, as independent organisations, the cost of their inputs to a service. If a reduction in the total price is required, the provider must be left to decide, within the parameters set out in the service specification, where reductions are to be made.

- 'Added value' should not mean that a voluntary sector provider is expected to use charitable funds to subsidise the revenue costs of a contracted service or to make up a shortfall caused by under-use of an agreed number of places.

Recognising the risks involved in eroding the capacity of the sector to innovate, some purchasers have introduced a clause in contracts explicitly ruling out the use of charitable funds for revenue or deficit funding in relation to services provided by voluntary organisations. Such clauses should become standard across Scotland.

- Once the initial negotiations are concluded, purchaser and provider should commit themselves to an annual review of the way in which the service operates.

Over time, the needs of service users change; new research into service delivery arrangements is conducted and published; and innovative models of care are introduced. The conclusion of contract negotiations should not signal an end to all discussion about the service beyond the financial arrangements required to support it; an annual service review, the nature and scope of which must be jointly agreed, should be conducted to take account of changing needs and patterns of service delivery. Changes to service specifications should not be unilaterally imposed but should be subject to joint agreement at such reviews.

Key clauses in a contract

- The duration of a contract must reflect a commitment to the service, its users and its provider.

Annual contract negotiations are onerous for provider and purchaser alike; the introduction of three-year budgeting under the Best Value regime should help to eliminate the instability caused by yearly spending decisions. Many community care services are clearly envisaged as long-term developments (including, for example, those involving substantial capital outlay, especially housing), and contracts should reflect that long-term commitment by encompassing a period of between 5 and 10 years. Such contracts, combined with the annual review process proposed above, will provide services (and service users) with a stable framework and built-in flexibility.

- Termination clauses should be reciprocal and should set out the responsibilities of purchaser and provider in the event of such termination. All contracts should also contain a clause setting out the arrangements regarding a provider's opportunity to seek renewal of a contract once its duration is ended.

Some providers in Scotland have been offered contracts which allow a purchaser to give 7 days notice of termination whilst providers must give a full year's notice. The period of notice required should be reciprocal, and should take account of the length of time it may take to make arrangements for an alternative service; further, in the case of termination on the part of the purchaser, a contract should specify how service users are to be consulted about the termination of the service (such consultation is required under the Best Value regime¹⁷). A contract should also set out the right of a provider to terminate a service where the degree of underfunding renders it unviable; responsibility for paying redundancy and other costs associated with the termination or end of a contract should also be set out.

- Contracts should be linked to the local authority social work department's care management process by containing a clause guaranteeing

that the authority will respond to a request by the provider to reassess the needs of an individual service user. Further, providers should have a right in the last resort to withdraw a service which is no longer adequate to meet the service user's needs, particularly where other users or staff are adversely affected.

Service users' needs can change over time, and the service delivered to them may also need to change as a consequence. Many providers will be able to meet the additional needs of a service user if the costs involved in doing so are recognised and met; in some circumstances however the provider will be unable to meet additional needs (for example where there are safety issues arising for other service users) and at this point, authorities must accept their statutory responsibilities in relation to providing appropriate care elsewhere.

- A contract should set out arrangements and responsibilities in relation to any requirement for a provider to hold open an unoccupied place. *Providers are occasionally required to hold open a place while, for example, a service user is in hospital, or to provide a bridge between an existing placement and a new one. A contract should make it clear that the purchasing authority requiring the place to be kept open will pay for that place.*
- In addition to an independent arbitration clause, contracts should set out arrangements for pre-arbitration mediation or alternative dispute resolution.

A pre-agreed method of independent alternative dispute resolution, which can be invoked without prejudice to either party, may help to prevent the unnecessary escalation of disputes.

- Contracts should commit authorities to uprate the price agreed for the service in line with the Retail Price Index (RPI) on an annual basis.

A failure to uprate service costs in line with inflation represents a cut in real terms; services for vulnerable people should not be subject to such cuts. Some providers are put in the position of deploying charitable funds in order to make up deficits caused by the failure to uprate for inflation;

others are requested to meet inflation costs by seeking 'efficiency savings'¹⁸. These 'savings' can often be impossible after two, three or more years of price freezing; furthermore, providers' prices are largely composed of staff and/or property rental costs, neither of which can be reduced without damaging the quality of the service. A failure to uprate for inflation serves to erode the continuing capacity of the voluntary sector to deliver services and undermines the statutory responsibility to provide adequate care for vulnerable people.

- The price agreed in a contract must be the price paid: contracts should not contain clawback clauses in the event of a surplus unless the same contract guarantees that shortfalls will be covered.

Most services involve long-term commitments and require prudent financial planning to meet future liabilities. Providers should be able to make appropriate provision for operating surpluses.

- There must be enforceable penalty clauses for late payment of agreed costs.

Providers are in a relatively weak position in circumstances where purchasers fail to abide by contract conditions; withdrawal of the service is rarely an option. Contracts must therefore set out clear arrangements about what happens in the event of late or non-payment (such as a percentage surcharge).

- The practice of including standard purchaser indemnity clauses in contracts should cease.

Some contracts include a standard clause in which the provider is expected to indemnify the purchaser against any liability however it arises; this practice is not in line with the principles of mutuality and shared risk, and the provider should not be expected to meet the costs of liabilities arising from circumstances beyond its control.

- Clauses relating to confidentiality must not be widened out into 'gagging' clauses.

Providers must retain the right to challenge the purchasing authority on areas of concern relating to a service or the users of that service.¹⁹

Contract compliance

- Purchasing authorities should not seek to control the internal structure or operations of a provider organisation in contract compliance arrangements.

Contract compliance should concentrate on the quality of service received by service users and the measurement of performance against specification. Authorities should recognise that providers are independent organisations and resist widening compliance arrangements out into internal structures or processes.

A purchaser's right of access to premises in relation to contract compliance monitoring must not infringe the right of service users to privacy and, in the case of registered services, must avoid duplication with other inspection systems.

Although unannounced visits may be perceived by inspectors as advantageous, service users are likely to be disturbed by them, particularly if contract compliance inspections are one intrusion among several conducted by different departments of the same authority.

- There must be a link between (a) what a provider is required to do in order to comply with a contract, (b) statutory requirements such as registration, health and safety, and so forth, (c) other review and inspection processes such as Best Value, and (d) who pays for these various requirements.

If, for example, a contract specifies that alterations must be made to premises, the price included in the contract must reflect the costs involved in making such alterations. Further, the various requirements made must be co-ordinated.

THE WAY FORWARD

At the beginning of this document, a number of initiatives addressing contracting were listed; the point was made that although these initiatives are individually helpful in the contribution they make to the debate about contracting, local authorities are not always in a position to take account of them.

CCPS recognises that this is the result of resource constraints and does not represent any desire on the part of local authorities deliberately to undermine voluntary sector providers: and yet this is precisely the effect of existing contracting practice, as evidenced by the many reports and reviews cited earlier in this document.

CCPS believes that in eroding the voluntary sector, the contracting process has significantly added to the complexity and cost of providing community care services, without necessarily delivering the improvements in quality and choice envisaged at the time of the reforms. We therefore believe that the time has come for a fresh approach to the contracting process; an approach which is in keeping with the spirit of partnership and collaborative working explicitly promoted by a number of recent initiatives, including the Scottish Compact, the COSLA-SCVO policy guidance, the Scottish Office Action Plan (*Modernising Community Care*) and the introduction of the Best Value regime. This must be accompanied by a parallel debate about the adequacy of the overall level of resources committed to community care in Scotland.

Specifically, CCPS seeks discussion with its partners in the statutory sector about the development and introduction of a set of standard or model contracts for services provided by the voluntary sector, based on the principles outlined in this document. We agree with ADSW that:

'...there is a need for some standardisation in the approach to contracting, otherwise some providers may suffer from having to respond to different

*requirements imposed by different purchasers. For some specialist voluntary sector providers... variation in contract conditions can be very onerous.'*²⁰

To this, we would add that such standardisation is also essential to ensure that:

- voluntary sector providers (and consequently their service users) are dealt with fairly by all purchasing authorities; and that
- those providers without the means to procure legal advice can be sure that their vital interests - and those of their service users - are not undermined.

We therefore recommend:

- that all relevant statutory authorities, through their representative bodies or professional associations, enter into a formal dialogue with CCPS, with a view to reaching agreement on the principles outlined in this document;
- that such a dialogue is facilitated by central government; and
- that a set of model or standard contracts is developed and introduced in line with the outcome of that dialogue.

This document is issued with specific invitations to the relevant authorities to begin this process. In the meantime, comments and responses to the issues raised are invited and will be welcomed from all those with an interest in this area.

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NOTES AND REFERENCES

- 1 By 'contracting' this document refers to any process between a purchaser and a provider involving a formal, legally binding agreement relating to service provision; this may include, for example, service level agreements and certain types of grant aid where funds are tied to specified services for an agreed amount
- 2 *Caring for People: Community Care in the Next Decade and Beyond* (p. 24), Cm 849, London: HMSO 1989
- 3 *Community Care Contracting: A Voluntary Sector Code of Practice*, SCVO 1991
- 4 The resulting guidelines on contracting were unable to be implemented due to local government reorganisation; attempts by Strathclyde to have the guidelines adopted by its successor councils were unsuccessful
- 5 *The Implementation of Community Care in Scotland, Second Report* (p. xiii), Scottish Affairs Committee, House of Commons Paper HC 35-1, 1997
- 6 *Head and Heart: The Report of the Commission on the Future of the Voluntary Sector in Scotland* (p.53), SCVO 1997
- 7 *Business As Usual? Commissioning for Community Care in Scotland* (p. 17), SHS Ltd, 1996
- 8 *Charities and the Contract Culture*, Chapter 10 (by Colin McKay) in *Charity Law in Scotland* (p. 215), Greens, 1996
- 9 See footnotes (5) and (6) above
- 10 *Positive Partnerships 1995; Guidance on councils' voluntary sector policy statements* (forthcoming); *Policy guidance on funding of voluntary organisations* (forthcoming)
- 11 *Scottish Guidance on Contracting for Residential and Nursing Home Care for Adults*, ADSW Contracts Officers Group, COSLA 1996; further guidance relating to day and domiciliary care is forthcoming
- 12 See for example *Mutual Obligations: NCVO's guide to contracts with public bodies*, NCVO 1998; *Charities and Contracts*, Charity Commission, 1998; and the Campaign for Fair Contracts initiated by the Disabilities Trust, 1998. The government's Better Regulation Task Force has also touched on many relevant issues in its report on access to government funding for the voluntary sector (1997).
- 13 With the exception of SCVO, which has monitored the action taken by councils in relation to the drafting and adoption of policy statements on the voluntary sector and intends to monitor the forthcoming policy guidance on funding
- 14 *Local authority funding issues: report of a survey of member organisations*, unpublished internal document, CCPS1998
- 15 This document does not address the tendering process itself; the remaining model starts from the point where a provider has already been selected. CCPS addresses the processes and principles involved in competitive tendering elsewhere, in particular in its document *Best Value And Voluntary Sector Community Care Services*, 1998.
- 16 The Scottish Forum on Supported Accommodation (SFOSA) is drawing up guidelines on such pre-contract agreements (or 'development agreements') for use in planned supported housing projects. The guidelines are due to be published later in 1999.
- 17 See *Best Value And Voluntary Sector Community Care Services*, CCPS 1998.
- 18 "efficiency savings are not at all efficient if they simply pass on the cost of care to another agency." *Modernising Community Care: An Action Plan*, The Scottish Office 1998
- 19 Such a right is guaranteed in relation to central government by *The Scottish Compact: the principles underpinning the relationship between government and the voluntary sector in Scotland*, The Scottish Office 1998
- 20 *Scottish Guidance on Contracting for Residential and Nursing Home Care for Adults* (p. 5), ADSW Contracts Officers Group, COSLA 1996

CCPS MEMBERS (as at February 1999)

The Action Group, Age Concern Scotland, Alzheimer Scotland - Action on Dementia, Archdiocese of Glasgow, Ark Housing Association, Barony Housing Association, Brothers of Charity, Camphill Scotland, Capability Scotland, Community Integrated Care (CIC) Ltd, Cornerstone Community Care, Edinburgh Association for Mental Health, Edinvar Community Care Ltd, ELCAP Ltd, ENABLE, Epilepsy Association of Scotland, Key Housing Association, Margaret Blackwood Housing Association, National Schizophrenia Fellowship (NSF) Scotland, Penumbra, Quarriers, The Richmond Fellowship Scotland, Scottish Association for Mental Health (SAMH), Sense Scotland, SHARE Housing Association, Thistle Foundation, Turning Point, Unity Enterprise.

