

## **Supporting People - Procurement Information Sheet**

**This fact sheet has been produced in response to enquiries from Supporting People lead officers and service providers, seeking guidance and information on Procurement and European Union Procurement Directives and how this impacts on services funded through the Supporting People grant.**

### **1. What is procurement ?**

Procurement is the process by which goods and services are acquired, through open competition, by a Local Authority from external providers.

The process includes: identifying services which are to be provided by the Local Authority and those which are required from external providers/third parties, deciding how they want these services to be delivered, tendering for them, evaluating the bids and finally, purchasing and/or contracting directly with suppliers.

Procurement will result in the acquisition of services from suppliers under legally binding contractual terms where there is a necessity to ensure that all the conditions necessary to form a legally binding contract have been met.

Procurement differs from commissioning which is the strategic function of identifying priorities, allocating resources and evaluation. However it is vital that these functions are not considered in isolation.

### **2. What is the legal basis ?**

The new Scottish procurement regulations came into force on 31 January 2006. The Public Contracts (Scotland) Regulations 2006, was introduced to implement the European Unions directive on procurement in the public sectors. The new Directive updated the existing provisions and case law.

In terms of the Public Contracts (Scotland) Regulations 2006, Local Authorities are a 'contracting authority'.

### **3. Are Housing Support Services included in the definition of services ?**

Yes. The Regulations classify Health and Social services, which include Housing Support Services, as Part B services and they are therefore subject to the regulations.

The regulations set out different requirements for the Part A and Part B services. Part A services have to fully comply, where as Part B services which include Health and Social services have to meet less of the prescriptive demands. However the Local Authority must adhere to the general principles and keep up to date with any relevant case law of the European Court of Justice.

Irrespective of a service contract's classification under the Regulations, and irrespective of whether the contract's value is below the threshold at which the full regulations apply, general principles of equal treatment, non-discrimination between providers, transparency and the need for adequate publicity apply.

Guidance on the principle of "adequate publicity" has been published on SPD's website (see link below):

<http://www.scotland.gov.uk/Topics/Government/Procurement/PublicProcurement/policy-notes/2006PolicyNotes>

In effect, the principle (established by the European Court of Justice) contract opportunities need to be publicised, unless there are sound and objective business reasons for not publicising them.

#### **4. What are the principles of procurement ?**

Essentially as stated above, the regulations require Local Authorities to be open, transparent and non-discriminatory in their procurement process.

The aim of the EU procurement rules is to open up the provision of services across the EU and to ensure that the relevant authority obtains the best price that the market is prepared to pay.

The objective of domestic legislation and procurement policy is to:

- Improve services for both service users and providers
- Achieve best value
- Make Local Authorities more efficient
- Encourage innovation and new services
- Ensure fairness and equal treatment between the contracting authority and providers.

#### **5. Is procurement about getting the cheapest service ?**

No. Procurement is about meeting end users' requirements in the most cost effective manner. It also provides a structured framework, based on a legal agreement, for providers to hold to account contracting authorities to fulfil their obligations, such as payment dates, levels of service expected etc.,

It is expected Local Authorities would not award Supporting People contracts based purely on price and that quality and service levels will be taken into account in setting the relevant evaluation criteria.

#### **6. How should Local Authorities undertake the procurement process ?**

Essentially it will be for each Local Authority to determine their own procurement strategy and programme. However as Housing Support Services are a Part B service, Local Authorities do not need to adhere to the detailed regulatory processes applied to Part A services.

Local Authorities have the ability within the regulations to determine their own rules as to how to tender and award contracts - which affords them greater flexibility, in keeping with the overarching principles. However any strategy setting out the rules should be open, transparent, non-discriminatory and accessible to providers and the public.

As there are such a wide range of Housing Support Services, provided by a number of different providers, it is likely that procurement of the overall service required will have to be broken down into manageable chunks and arranged over a period of time.

Local Authorities will need to establish a programme which will take account of the resources available to manage the procurement process. Furthermore, whenever possible, try to avoid an unmanageable number of contracts from expiring and requiring renewing at the same time in the future.

Ideally Local Authorities should specify procurement priorities and manage these in a systematic way and inform current and potential providers of this process. For example, this can be done by publication of the proposed timetable and plans on the Local Authorities website.

#### **7. How will this effect existing services ?**

The original Supporting People guidance stated that full contracts can be entered into on completion of a service review. Whilst the procurement regulations have been introduced since the original SP guidance was produced, it is still possible, depending upon the outcome of the service review to enter into full contracts.

The outcome of the service review or other regulatory and monitoring activity may be that the service is no longer required/strategically relevant, the service is inadequate or due to financial restrictions it is the Local Authorities decision not to purchase the service. Local Authorities may decide to go through a tendering process for these services and in doing so they should have the aims, specifications and decision making processes clearly set out at the outset.

Local Authorities will need to make these decisions locally, however where there are good quality services being provided the Local Authority should consider in accordance with the procurement strategy and procurement risk assessment whether it should move to contract, rather than tendering for all existing services at once.

The procurement risk assessment is essentially a process of looking at the needs of the client group, the need for sustaining the existing service delivery arrangements, the supply of services locally, funding and the risk of legal challenge. The Local Authority should clearly evidence the thinking and decision making processes where the decision is to issue a full contract to the existing supplier without tendering this contract.

#### **8. What is the maximum length of a contract ?**

There is no time limit on contracts. Decisions on contract duration should be based on value for money, bearing in mind the needs of the end user and the impact of duration on price. Generally contracts of 3-5 year duration are most common, in line with the requirements of the European Commission to avoid creating uncompetitive markets.

However, contracts can be shorter or longer where this is justified because of the nature of the contract. For example, Public-Private Partnership (PPP) contracts tend to be of a long duration because this is needed to allow the contractor to recoup its initial investment without charging uneconomic annual fees.

It would be possible to offer a single year contract with options to extend where this was deemed appropriate (although annual extensions can present some difficulties for the purchaser and contractor in terms of a lack of clarity regarding actual contract duration).

It is also possible to frame contracts in a way that would allow the continuation of existing services for individual service users' 'lifetime' (as long as the support was required), where there would be benefits in having such arrangements (for example, where consistency of staffing is crucial to the welfare of service users). In these circumstances it would still be possible for contracts to be worded to allow Local Authorities to cancel contracts where there are poor/inadequate services provided, where services were not deemed to be strategically relevant, where funding does not allow for continuation or where best value was not being delivered. Providers too would be able to end their contract, subject to the terms of the contract, but the possible value of this approach would be to offer greater security for service users than 3-5 year contracts.

The duration of contracts and the reasons for these contracts being of a particular duration should be specified in the procurement strategy and meet the particular requirements of the Local Authority.

#### **9. How will services be procured ?**

Where new Part B service are required or a decision is taken to tender for existing services, the Local Authority will follow their own Procurement policies and rules.

The purpose of the EC Directives is to ensure open, transparent process of contract tendering through, producing a clear procurement strategy setting out what the Local Authorities intentions are, how procurement will be managed, advertising, competitiveness and open communication and ensure a process of feedback to unsuccessful tenderers.

#### **10. What is a procurement framework ?**

Local Authorities are able to regulate to a certain extent their own procurement rules concerning Part B services, however one option would be to operate a framework. In order to do this the terms of the framework will need to be clearly set out, but this system enables Local Authorities to advertise and maintain a list of providers who they wish to contract with. Whilst the framework can continue for a maximum of 4 years, contracts awarded under the framework can be for a longer period, if deemed necessary and advertised as such.

#### **11. Are Local Authorities required to procure their own in-house services ?**

No, procurement does not apply to Local Authorities where they provide services in-house.

Local Authorities are not *required* to obtain the assistance of external providers but decisions on whether to buy services is a decision which they are required to make in accordance with their own internal procedures.

Local Authorities are however required to carry out internal best value reviews, service reviews and these services are subject to external regulation. Local Authorities may decide as a result of these reviews to put these services out to tender.

## **12. How does procurement fit with social work values of service user choice and empowerment ?**

It is vital that throughout the system of procurement service users have the opportunity to contribute to the quality assurance and monitoring processes. Creative Local Authorities may include service users in the procurement process, develop forums to look at gaps in service provision, include service users in the development of tenders, and monitoring contracts.

Where a provider is failing to deliver a quality service, awarding a contract to an alternative provider may have clear benefits to service users. However where existing services are meeting people's needs and the feedback from service users is positive these issues should be taken into account when carrying out the procurement risk assessment and entering into contracts.

Consistency, trust and positive relationships are important to many people who Housing Support Services.

## **13. How would this affect staff providing services ?**

Staff working in these service areas will generally have their employment protected. The Transfer of Undertakings (Protection of Employment) Regulations 2006 are likely to apply where the same service is to be provided by another organisation. The purpose of TUPE is to protect the continuity of employment, terms and conditions. The new provider cannot pick and chose employees to take on, nor can they terminate contracts and dismiss employees just because the transfer has occurred. The employee's period of continuous employment is not broken by a transfer.

## **14. Other legal considerations**

### **Care Commission**

When deciding upon the procurement approach the Local Authority wishes to adopt, it is important that consideration be given to other legal requirements, such as the Care Commission's cancellation and registration processes. The time required for existing providers to cancel their registration and for new providers to register new services requires to be considered when developing the terms of the procurement strategy and any associated timetable.