

Procurement reform and social care

Care and support provided by the third sector have been increasingly subject to procurement processes, in particular competitive tendering, following the introduction of the EU Procurement directives into Scots Law in 2006.

There is a clear tension between public procurement- which views social care services as business opportunities to be awarded through competitive tendering and social care policy which focusses on supporting choice and control; tailoring support to the individual and building and maintaining relationships.

The recent introduction of more collaborative approaches has been welcome, however this drive towards partnership runs counter to much procurement practice adding a significant level of challenge and tension to collaboration.

Recent changes to procurement law, policy and guidance attempt to improve public procurement in general; as well as recognising the unique nature of social care procurement.

Legislation and policy

The 2014 EU Directive on procurement (EU/2014/24) set out a range of provisions about procurement. These are given effect in Scots Law

through the Public Contracts (Scotland) Regulations, 2015. The Procurement (Reform) Scotland, Act (2014) and the Procurement (Scotland) Regulations (2016) deal primarily with contract values below the EU threshold (€750,000) with a view to simplifying and streamlining the procurement process.

The Act and regulations are supported by statutory guidance covering the following aspects of the Act:

- Procurement strategies and annual procurement reports.
- Sustainable procurement duty.
- Community benefit.
- Selection of tenderers and award of contracts.
- Selection of tenderers and award of contracts- fair work.
- Procurement of health and social care service.

It is important to note that, although these changes are significant there are considerable pre-existing flexibilities within procurement practice. Local authorities may take any approach they choose- so long as that approach fulfils the TFEU principles.

At a glance

Revised thresholds and replacement of part B services with the light touch regime.

No requirement to advertise for social care procurements under €750,000.

Light touch regime (and single, universal Pre-Qualification-Questionnaire document) for procurements above €750,000.

No legal requirement to tender for Option 2 of the Social Care (Self-directed Support) Scotland Act, 2013.

Contracting authority to publish annual procurement strategies and reviews.

New procedure focussed on innovation/service redesign.

Fair work criterion which assesses how the bidder approaches reward, recognition, training and supervision.

Public authority 'may consider' issues relating to supported people such as continuity, accessibility and involvement.

Sustainable procurement duty and community benefits focus on how procurement can support the economic and environmental wellbeing of an area.

Thresholds for health and social care

New thresholds (levels of spend to which different requirements apply) have been set by the legislation.

Over €750,000	Advertised in the Official Journal of the European Union (OJEU) and 'light touch' provisions apply (see 2015 regulations)
Between £50,000- €750,000	s.12 exemption from the requirement to advertise
Below £50,000	Non- regulated procurement. Some contracting authorities' standing orders require procurement processes to be followed for contracts in this value range but this is not required by national or EU legislation.

Exemption from the requirement to advertise (competitively tender) for social care contracts

A contracting authority can decide on a case- by – case basis whether to advertise contracts within valued between £50,000 and €750,000. S.12 of the Act affirms that for this type of contract is not required. The contracting authority must publicise the award of the contract and ensure award does not go to an organisation that is excluded from public procurement.

Light touch regime – contracts over €750,000

The contracting authority must:

- Publish a contract notice or prior information notice (PIN) as a call for competition.
- Publish a contract award notice.
- Follow a process that ensures that the EU¹ procurement principles are upheld.

Single European procurement document

For procurements of a value of €750,000 and above contracting authorities must use this single format document for the PQQ stage of their tender. This single document was developed in response to complaints from suppliers about the significant variation in what is required by contracting authorities at the PQQ stage.

New procedure- innovation partnership

Where a contracting authority decides to follow a procurement process they have a number of procedures open to them.

- Open: single stage tender, evaluated by contracting authority then awarded.
- Restricted: two - stage tender. A Pre-Qualification Questionnaire (PQQ) is used to create a shortlist then responses to an Invitation to Tender (ITT) are used to award the contract.
- Negotiated: the contracting authority negotiates directly with a provider or group of providers.
- Competitive Dialogue: a mixed process. Following a selection stage the contracting

¹ The EU procurement principles include transparency, equal treatment, proportionality and equal treatment

authority negotiates with providers and invites bids. The contract is then awarded after the selected providers submit bids.

- Innovation partnership (new)

The majority of procurements follow either an open or restricted process² – both of which are competitive.

One of the objectives of procurement is to 'promote innovation' however there is little or no evidence that competitive procedures lead to innovation within the social care sector.

The new innovation partnership procedure provides a potential alternative. It is aimed at developing and then purchasing 'an innovative produce, service or works'. While not fully collaborative the process blends selection with collaboration –recognising that competition alone won't create innovation.

Selection takes place at the beginning of the process (unlike a traditional PSP collaboration on service design leads to competitive tendering) with a group of organisations selected on skills, abilities and price. The new solutions(s) are developed in collaboration with the contracting authority and partners can exit throughout the process as required.

Procurement strategies and annual reports

A contracting authority which expects to spend

² Source: Cotton, R (2014) Brodies LLP
<http://uk.practicallaw.com/9-566-1806>

£5,000,000 or more in a year is required to produce a procurement strategy. At the end of the financial year the authority must produce an annual procurement report on the effectiveness of its regulated procurement.

Sustainable procurement duty and community benefits

The sustainable procurement duty (s.8 of the Act) requires a contracting authority to:

- Consider how it can improve the social, environmental and economic wellbeing of an area through their procurement process.
- To make it easier for Small to Medium Enterprises (SMEs) third sector organisations and supported businesses to participate in procurement
- To use public procurement to promote innovation.

Arguably the provision of social care is, inherently improving the social wellbeing of an area and it raises the question about what additional sustainability requirements a contracting authority could usefully or reasonably add. Previous criteria have stipulated e.g. the inclusion of modern apprenticeship schemes; the recruitment of staff from SIMD areas to reduce inequality of opportunity and similar measures.

The commitment to making it easier for organisations to participate in procurement is an interesting one. While there are generally accepted concerns about proportionality, complexity of process and contract size work to address these had tended towards upskilling the sector to fit into unwieldy, complex

processes rather than addressing and simplifying the processes themselves.

A similar observation can be made about the innovation duty which includes implementation suggestions based on requiring innovation from suppliers within a competitive framework despite little evidence that competition necessarily drives innovation- particularly in single purchaser/ multiple provider (monopsony) markets like social care.

Selection of tenderers and award of contract

This piece of statutory guidance deals with how contracting authorities deal with:

- **Exclusion grounds-** there are mandatory (required) and discretionary (case- by case) reasons why a contracting authority can exclude a supplier from a procurement exercise; for how long they can be excluded and how they can demonstrate they have changed their practice and can be included again.
- **Selection criteria-** how a contracting authority assesses organisational suitability to deliver a contract. Criteria include issues such as economic and financial standing; technical and professional ability.
- **Award criteria-** how a contracting authority decided which organisation to award a contract to. These criteria may be developed by the authority but have to be proportionate and relevant to the service being purchased.

Selection of tenderers and award of contract- fair work

This criterion allows contracting authorities to use

'as an award criterion The supporting statutory guidance interprets 'fair work' very widely (including living wage, terms and conditions, union engagement, employment stability) and raises several issues of relevance to social care providers.

s.15 of the guidance states that 'fair work for those on public contracts should be broadly comparable with those adopted by public sector organisations' which shows a degree of recognition of the two tier workforce within social care.

s.18 considers the issue of the living wage. Due to European Union (EU) law the living wage cannot be made a mandatory requirement of any procurement process as it is a voluntary wage level- not a minimum wage. S.19 sets out how local authorities can encourage the payment of the living wage through the inclusion of 'fair work' criteria (which can include the payment of the living wage.)

s.11 and 12 deal with stability of employment, picking out the use of *avoidable* zero hours contracts as a marker of poor work practice.

s.25 gives a strong message that the fair work criterion is particularly relevant where service quality is dependent on quality of staffing making it likely that this would be applied in the case of social care.

The guidance is silent on the responsibilities of the contracting authority in creating the financial and practice conditions that lead to poor work

practices. Real levers for fair work include:

- Setting an hourly rate that is sufficient to allow providers to pay the living wage
- Keeping re-tendering to a minimum to allow employment contracts to be more stable
- Refraining from the use of framework agreements (a form of organisation level zero-hours contract) where providers have no guarantee of business and thus cannot guarantee stable hours to their workers.

Summary

Recent procurement reforms have taken encouraging steps towards partnership and the recognition that competitive tendering is not necessarily the only route to innovation. The legislation and guidance specifically recognises that social care is distinctive through the exemption from the requirement to compete below- threshold contracts.

These changes to the legislative and procedural framework are very welcome.

However real change will only occur where contracting authorities are willing to act on these new permissions and work collaboratively with providers to develop new approaches to social care purchasing.

Read more

The Procurement (Reform) Scotland, Act (2014)

<http://www.legislation.gov.uk/asp/2014/12/contents>

Public Contracts (Scotland) Regulations, (2015)

http://www.legislation.gov.uk/ssi/2015/446/pdfs/ssi_20150446_en.pdf

Procurement (Scotland) Regulations (2016)

<http://www.legislation.gov.uk/sdsi/2016/9780111030868>

Statutory guidance under the Procurement Reform (Scotland) Act, 2014

<http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/ProcReformAct/statutoryguidance>

Guidance on the procurement of care and support services (Best Practice)

<http://www.gov.scot/Topics/Government/Procurement/policy/SocialCareProcurement>



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