



**SCOTTISH PARLIAMENT
INFRASTRUCTURE AND CAPITAL
INVESTMENT COMMITTEE**

PROCUREMENT REFORM BILL

WRITTEN EVIDENCE FROM CCPS

SUMMARY OF KEY POINTS

- There is a considerable volume of evidence to suggest that procurement of care and support, in particular competitive tendering, is highly problematic insofar as it (a) is driven primarily by cost rather than quality, and (b) conflicts with policy imperatives associated with public service reform including collaboration, co-production, partnership, involvement, empowerment, self-directed support and personalisation.
- Guidance relating to the procurement of care and support services, published in 2010 and intended to address some of these problems, has not succeeded in significantly influencing practice on the ground.
- The Procurement Reform Bill has the potential to resolve a number of key related issues by:
 - exempting contracts for care and support from any standard requirement to advertise and compete (through Sections 4 and 8);
 - introducing both a sustainable procurement duty and a requirement on contracting authorities to produce a procurement strategy (both provisions to be suitably amended to reflect specific concerns relating to care and support) (Sections 9 and 11); and
 - making provision for guidance to be issued on matters relating to the workforce performing public contracts (Section 24).
- The Bill could go further towards addressing existing problems with procurement of care and support by:
 - placing further duties on contracting authorities to engage with service users, providers and communities in the co-production of service design and specification; and to have specific regard to the quality of services to be procured; and
 - making provision for independent scrutiny of procurement processes, and introducing arrangements for appeal and arbitration.

About CCPS

[CCPS](#) is the Coalition of Care and Support Providers in Scotland. Its membership comprises more than 70 of the most substantial providers of care and support in Scotland's third or voluntary sector, supporting approximately 350,000 people and their families, employing around 43,000 staff and managing a combined total income of over £1.3bn, of which an average 78% per organisation relates to activity funded by the public purse.

CCPS members provide services across the spectrum of care and support, including services for children and families; older people; adults with physical and/or learning disabilities; and people facing a range of challenges in their lives including mental health problems, addictions and involvement in the criminal justice system.

A significant proportion of these services are provided within the terms of public contracts awarded by local authorities following a tendering or re-tendering exercise.

Procurement of care and support: a brief summary

Since the introduction of the NHS and Community Care Act 1990, competitive tendering has been adopted by local authorities as a key technique in the commissioning process for community care. A similar approach has subsequently been taken to services for children and families, homeless people and people involved in the criminal justice system.

The scale and volume of competitive tendering for care and support have increased significantly since 2006; in particular, there has been a marked increase in the *re*-tendering of existing care and support services provided by the third and private sectors. This has been driven by two key factors:

- The introduction of the Public Contracts (Scotland) Regulations 2006, which gave effect in Scots Law to EU Procurement Directive 2004/18/CE and which have generally been interpreted as requiring authorities to advertise and compete contracts for care and support services, including existing contracts on expiry, unless specific circumstances apply (see [Scottish Procurement Policy Note SPPN 10/2008](#))
- The [Public Procurement Reform Programme](#) initiated by the (then) Scottish Executive with the publication of the McLelland report, also in 2006, which identified the need for improvements to the way public bodies purchase goods and services.

CCPS first began to highlight provider concerns about the impact of this acceleration of procurement activity on care and support services with the publication of a [position statement](#) in 2007. This was followed in 2008 by the [findings of a national survey](#) of providers' experiences of tendering, and in 2009 by the publication of research conducted jointly with the University of Strathclyde looking at the specific [impact of re-tendering on the third sector workforce](#).

These initiatives provided evidence that competitive tendering (particularly re-tendering) of contracts for care and support is driven largely by cost, and can thus have a major impact on the quality, continuity and stability of service provision; on workforce planning, development, pay, terms and conditions; on the third sector and the market; and on the wellbeing of service users and their families. This arises principally from the tensions between the respective policy imperatives of procurement reform on the one hand, where care and support contracts are viewed primarily as business opportunities, and social care/public service reform on the other, where the priorities include greater involvement and control for individuals in the design and delivery of support that is personalised to them and, increasingly, strategic partnership with service providers.

Evidence produced by CCPS, combined with other initiatives in this area (including an [inquiry](#) into the procurement of home care services by the Scottish Parliament Local Government and Communities Committee in 2009) led to the development of detailed guidance for public bodies in 2010 (["the 2010 guidance"](#)) as noted above. During the 18 months or so that it took to produce the 2010 guidance, providers observed a slackening-off of tendering activity as authorities either dropped or postponed their plans to tender, pending publication.

Following publication of the guidance, tendering activity picked up pace again, not least because of the financial pressure applied to the public sector as a result of the economic downturn and the subsequent impact on local government budgets. In 2012 Audit Scotland published its report [Commissioning Social Care](#), which pointed to continuing problems relating to the commissioning and procurement of care and support.

In September 2013, the Scottish Government introduced the [Procurement Reform Bill](#) to the Scottish Parliament. CCPS believes that this legislation has the potential to address many of the key outstanding issues for care and support procurement.

Meanwhile the new European Directive on Public Procurement, due to be approved by the European Parliament early in 2014, explicitly recognises and addresses many of the key issues for care and support services and excludes relevant contracts from the full application of the Directive.

New evidence from CCPS in 2013

CCPS conducted a survey of its members in the summer of 2013, designed to explore providers' further experiences and perceptions of procurement in care and support and in particular, to assess the extent to which the 2010 guidance has succeeded in influencing practice on the ground. The survey findings, which will be published in full later in November 2013, indicate a number of positive developments, from a provider perspective, in relation to tendering for care and support:

- There is some movement, albeit limited, towards an outcome focus in procurement processes

- There appear to be fewer large-scale service and TUPE transfers taking place between providers as a result of service contract awards, with positive implications for the stability and continuity of services
- Providers are increasingly asserting themselves in relation to low hourly rates and other imposed conditions by declining to submit tenders, with at least some evidence that in certain circumstances, this can lead to a re-think on the part of the contracting authority
- Some authorities, in partnership with providers, have been able to identify and implement more creative alternatives to competitive tendering, including Public Social Partnerships and collaborative service redesign, that are more in keeping with the principles and ambitions of public service reform.

Nevertheless, the overall perception coming through from the experiences of providers is that procurement practice remains poor. Particular concerns highlighted by the survey include:

- A definite trend towards single-price generic service contracts and away from specialist and tailored support
- A definite trend towards price-capped framework agreements, which are frequently experienced by providers primarily as a means of reducing service costs without negotiation, and which have major implications for the workforce
- Very limited involvement of providers, service users or carers in the development of commissioning strategies, service specifications or procurement processes
- Very limited adaptation (to date) of procurement approaches and policies to reflect legislative change around self-directed support
- Continuing difficulties associated with tender evaluation processes, particularly in relation to the assessment of service quality and/or a provider's capacity to deliver it, and with procurement capability more generally
- A continuing perception of procurement as an inhibitor of, rather than a driver for, partnership, innovation and service redesign
- An apparent failure on the part of authorities to assess risk or impact before embarking on procurement exercises
- A tendency for some authorities to attempt to negotiate or impose price reductions after contract award.

Aspirations for the Procurement Reform Bill

Based on its record of evidence in this area, CCPS seeks two outcomes from the Bill:

1. Much **more** discretion for contracting authorities as to **whether** they advertise and compete social care contracts, including framework contracts (or re-tender them on expiry);

2. Much **less** discretion for contracting authorities as to **how** they conduct tender exercises, having made a decision to do so, with particular respect to the guidance on procurement of care and support.

These outcomes could be achieved as follows:

- **Exempting contracts for care and support from any standard requirement for advertisement and competition.**

This might be taken forward through the use of **Section 4(2) of the Bill**, which enables Scottish Ministers to modify the kinds of contracts which are excluded contracts. Specifically, care and support contracts should be excluded from the provisions of **Section 8(1)(a)**. As outlined in the policy memorandum, this section reflects the EU Treaty principles of equal treatment and non-discrimination, and applies them to any contract in excess of £50k. It is these principles that are generally perceived to be the drivers for routine re-tendering of care and support services: it is therefore very important that contracts for these services are *not* uniformly subject to this provision, otherwise authorities are likely to increase, rather than decrease, their activity in this area. Where an authority decides of its own accord to advertise and compete a care and support contract, then of course these principles should apply: we would therefore suggest that a specific and 'lighter touch' procurement regime be introduced for care and support services. This would align with the approach now being taken by the European Commission.

- **Giving much greater legislative force to the 2010 guidance on procurement of care and support – suitably updated and revised.**

This might be taken forward through strengthening the sustainable procurement duty set out in **Section 9** of the Procurement Reform Bill, to the effect that a contracting authority must consider how, in conducting relevant procurement processes, it can improve the wellbeing of the individual receiving the service to be procured; improve the quality of the service provided to that individual; assess the risks and benefits of procurement activity; and/or otherwise give effect to the 2010 guidance on procurement of care and support. The guidance might also be brought within the scope of **Section (11)(5)(d)** of the Bill, which relates to the matters to be addressed in a procurement strategy. Alternatively (or indeed additionally) the 2010 guidance might be included in guidance issued to public authorities under the provisions of **Section 15 of the Children and Young People (Scotland) Bill**, which relates to the planning of children's services, and **Section 41 of the Public Bodies (Joint Working) (Scotland) Bill**, which relates to the preparation of strategic plans for health and social care.

- **Affording much greater protection to the third sector workforce performing public care and support contracts from cost pressures applied through competitive tendering.**

This might be taken forward through **Section 24(2)(b)** of the Procurement Reform Bill, which makes provision for Scottish Ministers to issue guidance on matters relating to the recruitment and terms of engagement of the workforce, and could thus potentially address such matters as (for example) payment of the Living Wage; inappropriate use of zero-hours contracts; costly and disruptive TUPE transfers; and the importance to public services of an appropriately skilled and qualified workforce. This should help to halt the 'race to the bottom' in workforce pay, terms and conditions which has been driven by competitive tendering in care and support.

How the Bill could go further in addressing concerns relating to procurement care and support:

- By including a requirement for contracting authorities to engage service users, the third sector or communities in co-producing service solutions to be procured (although if the 2010 guidance were given legislative force, this would be addressed for care and support services at least).
- By including a requirement for contracting authorities to ensure that the price tendered is adequate in relation to the quality of service to be delivered (although again, if the 2010 guidance were given legislative force, this would be addressed for care and support services at least).
- By adding provisions to apply independent scrutiny to public procurement processes, and to introduce an appeal and/or arbitration mechanism for suppliers at a level less onerous than court action.

CCPS is grateful to the committee for the opportunity to give evidence, and would be pleased to provide any further information that the committee would find helpful.

CCPS November 2013



CCPS - Coalition of Care and Support Providers in Scotland
Norton Park
57 Albion Road
EDINBURGH EH7 5QY

T: + 44 (0)131 475 2676
E: annie.gunner_logan@ccpscotland.org
W: www.ccpscotland.org

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