

COMMUNITY CARE PROVIDERS SCOTLAND

DRAFT SOCIAL CARE PROCUREMENT GUIDANCE

COMMENTS FROM CCPS

MARCH 2010

Introduction

CCPS is the national association for providers of care and support services in the voluntary sector. Our membership comprises more than 60 of Scotland's most substantial non-profit care providers, operating with a combined annual income in excess of £1bn. Most of these providers have significant and direct experience of social care procurement, and have seen at first hand the impact of procurement exercises, and of service re-tendering exercises in particular, on the market for care; on voluntary organisations; on the social care workforce; on family carers; and most crucially on the people who rely on the support services that are the focus of these exercises.

Since 2006, CCPS has played a significant role in highlighting the growing concern around social care procurement, producing information and evidence in relation to the impact of re-tendering, and pressing for action to address the key issues arising from its increasing use in Scotland. Alongside colleagues in local government, private provider associations, regulatory bodies and indeed the user movement, CCPS has called for guidance in this area: we are delighted that the Scottish Government has now produced a comprehensive document in response.

Overview and key issues

This draft guidance comes at a crucial time. Procurement policy, in particular the public procurement reform programme and the Public Contracts (Scotland) Regulations 2006, has resulted in a rapid increase in competitive tendering in care services and in particular the re-tendering of existing services. Yet there has never been any formal recognition by government that social care is a significantly different service to refuse collection, IT support, or the range of other goods and services that public bodies need to procure; nor that, consequently, a significantly different procurement approach needs to be taken in relation to it.

A number of high-profile social care procurement exercises have attracted a great deal of negative press coverage in recent years, and this has led to intensive and continuing parliamentary scrutiny. Most recently, in February this year, a large city council abandoned a major tender for care and support because of flaws in the process and unprecedented levels of public protest; and in March, the Social Work Inspection Agency (SWIA) in its report [Improving Social Work in Scotland](#) commented specifically on the shortcomings of current approaches to social care procurement within local authorities.

In the light of these developments, the guidance needs to provide clarity on a number of key issues that have bedevilled this whole area of local government activity. We would want to highlight the following positive aspects of the guidance in this regard.

- For the first time, the guidance offers **formal acknowledgement that social care services are not the same as other goods, works and services to be procured by public bodies**, and that a distinct approach must be taken in relation to them. The issuing of the guidance in and of itself helps to establish this, and explicit recognition of it is also provided in the text (at p.7 and p.26). This is very welcome indeed.

- The guidance establishes **a clear set of principles to guide social care procurement activity**, and helpfully states that these principles must be applied to any procurement exercise (our emphasis) (pp.9-10). The inclusion of service user involvement among these principles is particularly welcome, and in our view, would benefit from even greater prominence (see below, Improving the guidance).
- The guidance suggests that **local authorities have a considerable degree of discretion** about whether or not to put services out to tender (pp.19-22): again, this is very welcome but could, in our view, receive more emphasis and be less hedged in by caveats (see also below, Improving the guidance).
- The **amount of investment required by local authorities** – in procurement skills and competencies, in the fair administration of procedures, and in the degree of consultation, preparation, analysis and information required in order to manage both risk and process appropriately – is made very clear (p.48 and throughout). The SWIA report cited above, along with material produced by CCPS itself, has clearly highlighted the gaps that require to be filled in this regard.
- There is a clear recognition in the guidance that the **re-tendering of existing services carries a greater degree of risk than competitive tendering applied to new service development** (p.22 and elsewhere). This has been our consistent view since we published our initial position statement on tendering and it is helpful to have it reinforced here.
- **The role of the Chief Social Work Officer, and the importance of the SSSC Codes of Conduct and Practice, are clearly highlighted** (p.9 and p.26). This is crucial, as it locates social care procurement firmly within the territory of social work and social services values and principles, serving to further reinforce the position that procurement activity must be conducted in accordance with them.
- The guidance is absolutely clear that **the use of e-auctions in social care procurement is not appropriate** (p.59) and that authorities need to be cautious with regard to **the use of standard procurement terminology** (p.30). Again, these are matters about which CCPS has consistently expressed concern and it is very positive to see them addressed so unambiguously.
- There is some very useful material in the guidance regarding the **duration of contracts for social care provision** (p. 63 and pp.69-70). Given the impact of service re-tendering on all parties concerned, and particularly on service users, the prospect of routine systematic re-tendering on a short contract cycle has been one of the key concerns of CCPS and its members, so it is very helpful that the guidance highlights the importance of continuity of care and the options available to authorities in this regard.
- The importance of and indeed the priority to given to **quality in relation to selection and award criteria** is very significant and the attention given to this in the guidance is extremely positive (pp.55-58). In particular, there is a very helpful emphasis on the importance of evaluating the track record of providers and their capacity to deliver, including the use of Care Commission information, site visits and other methods which take the evaluation process beyond a purely paper exercise based on material submitted by bidders themselves.
- The guidance reinforces the position adopted by SWIA and indeed ourselves that **procurement activity must take place within the context of a wider commissioning strategy** (pp.24-25). The need for such strategies to project 10-15 years into the future is particularly welcome, as is the guidance that they should be accompanied by delivery plans that provide indicative purchasing intentions for a 3-5 year period.

Improving the guidance

Overall, there is a great deal of support for the guidance among voluntary sector providers. Nevertheless, we believe that it can be further strengthened in a number of ways, and would raise the following issues in this regard.

- **The degree of discretion available to local authorities with regard to tendering could be set out more clearly, and presented more positively.**

We are very much aware that local authorities, as well as service providers, have been looking to the guidance to set out an unequivocal position on what is frequently perceived to be an obligation under EU rules to re-tender services routinely at contract expiry, or when moving to formal contract for the first time.

Although it contains some positive statements in this regard – including a repetition of the 2008 SPD policy advice that “it is the responsibility of individual local authorities to decide whether the Treaty principles require advertising and competition” – the guidance offers a series of rather mixed messages on this crucial point.

For example, it states on p.19 that “it is not possible to provide definitive guidance on whether a specific service/contract should be tendered, as this will be dependent on the particular circumstances of each case.” Yet on the following page, it says that “there is a presumption that all contract opportunities for goods and services with an anticipated value of £50,000 or more should be advertised on the Public Contracts Scotland website” which strikes us as contradictory and unhelpful.

We strongly support the inclusion of the statement on p.22 that “a local authority may decide that, where it is satisfied with the quality of a service and that best value is being achieved, it should renew (or ‘roll forward’) its contract with the existing service provider, notwithstanding that the contract terms and any advertisement do not provide for an extension option.”

This is extremely important and in our view should be clearly highlighted. We recognise that government guidance will need to set out the potential risks that may follow such a course of action, including the risk of a breach of regulations and of legal challenge: however we feel that the force of the initial statement is diluted considerably by the strength (and length) of the ‘warnings’ that follow. We think that it would be helpful if the guidance could offer authorities at least some sense of the scale of the risks they might be taking in opting for contract renewal, for example by providing information about the number of court or other actions pursued (and won) by those challenging such decisions.

We would propose that the guidance provides greater clarity on this key issue by positively reinforcing those sections that emphasise the choices available to local authorities with a short summary in the introduction, along the following lines:

“There is no universal obligation on local authorities under EU Treaty principles or regulations to tender or re-tender all services or contracts: local authorities are able to exercise a degree of discretion in this regard. Decision-making in this respect should be guided both by a thorough assessment of risk, and by the principles set out at the head of this guidance.”

- **Whilst the guidance rightly highlights the importance both of service user involvement and of risk assessment in the procurement process, it does not place enough emphasis on the role of these principles in initial decision-making about whether or not to advertise a contract.**

It is now recognised, in the SWIA report cited above and elsewhere, that service users and carers have all too often not had any opportunity to express their views during procurement exercises, and that the risks attached to service re-tendering

have not been adequately managed. The guidance addresses these matters in some significant detail and this is very welcome indeed.

There is, however, a tension in the document between the guiding principles and the detailed advice. The first decision that a local authority will have to make in relation to social care contracts is whether to engage in a procurement exercise at all, or whether (as per the guidance on p.22) to renew or roll forward those contracts. It seems to us that an authority must apply the principles of user involvement and of risk assessment when making that first decision, not just when making decisions further down the line about how to progress and manage particular tenders already embarked upon.

This seems to us to be particularly important in the light of the recent collapse of a major adult care and support re-tender within a large city council area, where very large numbers of service users and carers protested publicly about the authority's failure to seek their views in its decision to re-tender their support.

- **The key strength of the guidance is in its detailed advice about the ways in which procurement activity can be made consistent with social care values and principles. Its weakness is in failing to set out how an authority might apply those values and principles in order to avoid unnecessary procurement activity altogether.**

As part of the consultation process for this package of guidance, we provided the JIT with information about the service review process employed by Manchester City Council when it moved its Supporting People services from interim to full contract. The council conducted a thorough review of all its SP services using many of the same evaluation techniques that might be employed in a formal tender, including taking the views of service users into account. The services that scored highly in this exercise moved to full contract without a formal tender process, whilst those that scored poorly were re-tendered.

The thoroughness of this exercise enabled the council to be highly selective in its approach to procurement. The service review process provided it with a sound and objective business case for renewing significant numbers of contracts without advertising them, and to our knowledge the council has never been challenged on its decisions in this regard. Far too many social care procurement exercises in Scotland have, in our view, moved to re-tender all services in a particular category, or for a particular client group, regardless of the performance record of each service (and indeed without any significant attempt to assess it).

The guidance would be improved considerably by placing a much greater emphasis on the ability of authorities to be selective in this way, and indeed the importance of their doing so. It would be very helpful in this respect if the guidance could draw attention to the relevance of pre-existing Scottish Government guidance in this area, particularly the guidance on Supporting People service review, which describes a process similar to that employed in Manchester.

Meanwhile it strikes us as anomalous that the section entitled "preparation" should come before the section entitled "analyse", in that part of the guidance relating to social care procurement process. Section 8.3 in particular advises authorities to ensure that they have good data about current performance, but the position of this advice in the overall package of guidance suggests that this is only useful after a decision has been taken to go to tender. In the Manchester example cited, performance data informed the initial decision, in many cases, not to tender at all.

- **Similarly, the guidance would be strengthened by placing a greater emphasis not just on the various procurement routes available to authorities, but on the alternatives to procurement activity, in particular self-directed support.**

At section 9.10 the guidance sets out the various methods by which an authority might procure a social care service. It strikes us, first, that this information should feature much earlier in the guidance, since each method will have different implications for an authority in terms of its obligation to apply the guiding principles, and will therefore require to be risk-assessed before any preparations are made to implement any one of them. Second, not all the methods set out relate directly to procurement: a grant, for example, is not a procurement method, and neither is a 'strategic partnership' (although such a partnership might be sought via a procurement route).

Crucially, self-directed support is mentioned in the guidance, but not to any great extent (p.30-31). Yet self-directed support – including Direct Payments, Individual Budgets and other approaches to the personalisation of care and support – has the potential to offer a very important alternative to council procurement activity and the guidance should expand on this in much more detail, again in an early section on alternatives to procurement and tendering. It would be particularly helpful to cross-reference this with the recently-issued Scottish Government draft guidance on self-directed support, and to explore in more detail its relationship with procurement policy.

- **Whilst the guidance is strong on the quality elements of tender evaluation, more emphasis could be placed on the risks associated with the cost component.**

We strongly support the statement that "when procuring care and support services, greater emphasis should be placed on quality rather than cost" (p.57). We would suggest that it is equally important for authorities to have regard to the relationship between the two. In our view authorities have a clear responsibility, when evaluating tenders, to satisfy themselves that the required quality of service and outcomes for individuals can be delivered within the cost envelope proposed by bidders. This entails a relatively sophisticated understanding on the part of those running the procurement exercise of the costs involved in operating different kinds of care and support services, in particular the costs associated with good employment practice and a confident, competent and qualified workforce.

In the current economic climate, low-cost bids will understandably be highly attractive to authorities, however the risks of awarding contracts to low-cost providers without properly assessing their capacity to deliver are significant, and have been borne out on more than one occasion including one very high-profile instance of poor performance that featured in a *Panorama* broadcast during 2009.

- **Although the guidance provides a helpful summary of TUPE regulations and procedure, it significantly underplays the impact and the consequences of workforce transfer.**

The workforce implications of post-tender service transfer are considerable, and a wealth of evidence is emerging about the challenges and risks involved for providers, authorities, families and service users.

The guidance helpfully points to some of this evidence (p.83) but again, it does not adequately highlight the importance of taking it fully into consideration when an authority is deciding whether or not to tender an existing contract.

Further, the guidance needs to be absolutely clear that TUPE does not, and has never set out to, guarantee or protect the continuity of the service to the user. We have seen many examples of information materials distributed to users and carers during particular tender exercises that include misleading information in this regard. We appreciate that authorities are frequently motivated to minimise anxiety and uncertainty for users and carers, but we believe that it is unhelpful, unwise and indeed unprofessional to provide information that is based on a profound misunderstanding of the law in this area.

- **Much of the detailed advice in sections 3 and 4 seems only to be relevant to a minority of the 'procurement routes' set out in the guidance.**

Where an authority has decided to proceed with a competitive tendering process similar to the 'restricted procedure' set out in the guidance, the detailed advice in sections 3 and 4 will be extremely valuable. It is likely to be less valuable where an authority has decided to set up a framework agreement or seek a long-term strategic partner.

It is crucial that the guidance sets out the full range of options to authorities, and avoids any suggestion or impression that a PQQ/ITT service contract award procedure is the most appropriate (or indeed the only) method of securing services.

- **The guidance could be much clearer in its expectation that all procurement activity will itself be reviewed and evaluated.**

From the dozens of social care tenders and re-tenders that have taken place in Scotland during the last four years, we have never once seen a public document that provides a transparent and comprehensive review or evaluation of the process or the outcome. All that is generally available is a post-tender report to council providing brief details of the contract awards and the (estimated) savings to be achieved.

The guidance is clear at section 7.2 and 7.3 that all procurement activity requires good governance and project management, but it omits any requirement for project review and evaluation. We believe that public and professional confidence in social care procurement is presently at a very low ebb, and that it can only be restored by the production of clear evidence that benefits accrue both financially and in terms of service quality improvement, including user satisfaction and the achievement of good outcomes. We would therefore strongly suggest that the guidance sets out a clear requirement for councils to review and evaluate procurement activity, no later than a year after the commencement of the contracts awarded, and to provide a publicly available summary of their conclusions. Summaries should include information about the following:

- The total cost of the exercise to the council, including staff costs
- The total savings achieved on contract value
- The difference (if any) on service quality, including gradings, user satisfaction and outcomes
- An assessment of the effectiveness of the risk assessment and risk management strategy
- An assessment of the impact of the exercise on service users and families
- An assessment of the impact on the market
- An assessment of the impact on any transferred workforce
- An assessment of the extent to which the guiding principles of this package have been adhered to throughout, including specific information about the success (or otherwise) of a user involvement strategy
- The learning for any future procurement activity.

Detailed comments

The issues raised above are the main points that we would want to highlight in this consultation. We also have a number of more detailed comments on the wording of various parts of the guidance: these are appended to this paper (p.8 onwards).

The guidance package itself

Our comments above relate to the content of the guidance: we have some brief further remarks about the package overall, as follows.

- There are some significant variations in style and language throughout, which may be inevitable given the many different contributors to what is a very lengthy document. Nevertheless, this range of voices and styles leaves an overall impression of fragmentation and inconsistency, and we would suggest that a professional copy editor be engaged to advise on the final draft.
- We would like to see the final draft issued alongside a clear plan for promoting and monitoring its use, and evaluating its effectiveness in securing improvements to social care procurement in Scotland. The production of the guidance represents the culmination of a huge amount of effort, not only on the part of the authors – which we recognise and appreciate – but involving many other individuals and agencies, including CCPS. It would be hard to overstate the disappointment on the part of all those involved if the guidance were to be issued without any proposals for implementation or follow-up and we very much hope that this will be forthcoming.

In closing we would like to thank the Scottish Government Joint Improvement Team and the Scottish Procurement Directorate for producing this important document and for inviting our comments. We very much look forward to seeing the final document.



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APPENDIX: DETAILED COMMENTS ON THE TEXT

SECTION 2 – SOCIAL CARE PROCUREMENT SCOTLAND – GUIDING PRINCIPLES

p.9, last paragraph

The current wording is not sufficiently clear and we would suggest re-wording as follows:

“Codes of Practice (SSSC) – social care procurement *policy and practice should be consistent with the SSSC Codes of Practice and in particular must not compromise the ability of social services staff to comply with the Code’s requirements to promote the interests.....*” etc.

SECTION 3.3 – FINANCIAL CONTEXT

p.13, paragraph 3, last sentence

The statement that “there will...be a requirement to find savings through social care procurement in response to reduced budgets” is highly misleading. We appreciate that councils may need to find savings, but there is no requirement for them to do this through procurement.

SECTION 3.4 – LEGISLATIVE CONTEXT

p.14, paragraph 4

“Social care services should also be procured in line with local standing orders/financial regulations”. This needs to be linked to the later statement on p.26 that authorities should have “dedicated policies and procedures for social care procurement”, as it may be the case that existing standing orders and regulations do not enable authorities to apply the guiding principles of social care procurement, and will therefore required to be amended.

SECTION 4 – LEGISLATION

We cannot find any reference here to the Public Sector Equality Duties, which have a bearing on this issue. Further information can be found at http://www.equalityhumanrights.com/uploaded_files/PSD/31_psdandfinancialdecisions.pdf

SECTION 4.6 – OTHER RELEVANT LEGISLATION

p.23, paragraph 4

The current wording of the opening sentence could be misleading, so we would suggest re-wording it to read “The *intention* of the TUPE regulations is to preserve....” rather than “The *effect* of the TUPE regulations is to preserve....”

This section could usefully include a footnote referencing the Voluntary Sector Social Services Unit’s guide to TUPE, which can be found at <http://www.ccpscotland.org/assets/files/vssswu/Guides/TUPE%20for%20managers.pdf>

p.23-24, Freedom of Information (Scotland) Act 2002

It might be useful to supplement the information on the FOI(S)A by citing the Information Commissioner’s decision 104/2008, Streetwork UK and Glasgow City Council, which has a direct bearing on this matter.

SECTION 5 – LOCAL POLICY, STRATEGY AND APPROACH

p.29, paragraph 2

It is important that service users and carers are also enabled to make formal representations and complaints about any procurement process involving their support, as well as about the support they receive.

p.31, paragraph 4, second bullet point

“In addition, service providers...will need to consider...how to view the people they support”

The meaning of this is unclear.

p.32, paragraph 4

We suggest that a footnote is added providing references to support the contention that better value for money can be achieved by service providers “with cost reductions through different arrangements for administrative functions...” We appreciate what the guidance says about needing to allow providers time to form consortia etc, but in our experience, the main driver here relates to authorities wanting to minimise their own transaction costs by reducing the number of contracts, not that providers themselves are able to make efficiencies through ‘shared services’. In this regard, it is very helpful that the guidance says authorities “should seek to ensure that...collaboration reduces the administrative burden on service providers rather than increasing them.”

SECTION 6 – SOCIAL CARE PROCUREMENT – PROCESS

p.34, paragraph 2

We would suggest amending the first line to read “Social care procurement *must* exist within a wider process of strategic commissioning” to avoid any impression that the guidance is describing current practice.

In line with our key points above, we would point out that this paragraph ends by saying “...there may be various means of securing these requirements...one of those means is social care procurement...” Again, we think the guidance should be clear here (and elsewhere) about alternative means of securing services that do not involve procurement.

pp.36-37

Again in line with our earlier comments, we think that the ‘analyse’ section must come before the ‘preparation’ section, since the analysis may result in a decision not to tender. Further, we find it anomalous that the section on ‘procurement routes’ should appear at such a late stage: the choice of procurement route should be part of the preparation. Finally, the ‘secure services’ section refers only to the ‘tender process’: the later text taking readers through that process appears only to describe one of the ‘procurement routes’, that is, a process following or similar to the restricted procedure. If authorities choose a different route, for example a competitive dialogue or a negotiated procedure, they may find it hard to appreciate the relevance of this section.

SECTION 7.3 – PROJECT MANAGEMENT

p.39, first paragraph

There is another misleading statement here, to wit “...there will also continue to be specific major procurement exercises.” As discussed above, the guidance is clear that this is a matter for local authorities to decide.

p.39, first bullet point list

As noted in our main comments, review and evaluation of procurement activity should feature in this list.

SECTION 7.4 – KNOWLEDGE AND SKILLS TRAINING

p.39, paragraph 5

The text says that ...“the scope of knowledge....should also include an awareness of national social care policy and legislation; national procurement policy;...” etc. We think that “awareness” of these areas will be insufficient so this should be re-worded to read “a detailed understanding of”.

p.40, paragraph 6

“Local authorities should *consider how they will* provide training...*thought should also be given* to using advocacy...” This strikes us as very weak, and we would suggest re-wording it to read “Local authorities should provide training....and use advocacy...”

SECTION 8.2 – ESTABLISHING NEEDS AND OUTCOMES

p.43, bullet point 9 (Benefit and risk)

The potential impact on the market, on provider organisations and on the existing workforce should also be analysed at this stage.

SECTION 9.5 – USER AND CARER INVOLVEMENT

p.50, paragraph 5

This section is generally very good but there is a significant issue with it, insofar as it states that “when a decision has been made to re-procure social care services which individual service users are already benefiting from, those individuals affected should be informed of this decision...”

We would argue very strongly indeed that individual service users should not just be *informed* of a decision to re-procure their support: rather, that decision should itself be informed by their views. This further illustrates the central weakness of the guidance in that it appears to assume that user involvement and consultation only becomes a requirement once the decision to go to tender has already been taken, and not as part of an initial analysis as to whether one is necessary or appropriate.

SECTION 9.6 – SERVICE PROVIDER INVOLVEMENT

p.52, paragraph 3

We feel strongly that the phrase ‘as far as possible’ should be removed from this sentence, so that it reads “...early information is consistent with the information provided in subsequent tender documentation.”

We would make similar point in respect of p.77, paragraph 5: “Local authorities...should also ensure that they observe timescales for taking decisions”, removing the phrase “wherever possible.”

SECTION 9.7 – SERVICE SPECIFICATION

p.52, paragraph 7, second bullet point

We think that this should read “focusing local authorities on exactly what *the users* want the provider to achieve, and why...”

Similarly, on the following page, second bullet point, this should read: "services that are offered will not meet *the user's* requirements..."?

SECTION 9.8 – SELECTION AND AWARD CRITERIA

p.56, last paragraph

It is not clear to us why authorities should need to seek a summary statement of Care Commission gradings "from potential service providers" when they can get this directly, on-line, from the Care Commission website.

SECTION 9.10 – PROCUREMENT ROUTE

As noted above, we think this section is in the wrong place in the package of guidance, and should appear much earlier, alongside the alternative ways of securing services that do not involve procurement (eg. self-directed support, grant funding, renewal of existing contract, etc).

SECTION 9.12 – TRANSITION ARRANGEMENTS

pp.72-73

As noted earlier, this section on TUPE should be expanded to include specific guidance on (for example) the responsibility to provide accurate information to prospective bidders, where that responsibility lies, and what the consequences are of failing to provide it. At present it is not sufficiently unambiguous, eg. "regulations may apply...." with the implication that, equally, they may not. This is not helpful.

SECTION 10.2 – COMMUNICATION WITH USERS AND CARERS

p.75, bullet point 3

There is a further weakness here, in that the guidance says authorities should tell users "how much say there is for service users in the process". The implication is that if authorities tell users that there is little or no say, then they will have complied with the guidance. The guidance should set out stronger expectations for authorities in this area.

10.7 – TRANSITIONAL ARRANGEMENTS

p.83, paragraph 2

We would suggest a further sentence at the end of this paragraph as follows:

"...anxiety and loss over changes. The considerable challenges of service transfer and the potential effects on users are matters that should be considered very carefully by authorities when making initial decisions about whether to re-tender a service or to renew a contract."

Again, the issue here is the disproportionate emphasis that the guidance places on managing the risks associated with procurement: it needs to be much stronger on helping authorities decide whether those risks are worth taking, or whether an alternative way of securing services should be sought.