

SITRA

A PROVIDER'S GUIDE TO PROCUREMENT (PARTS 2.7-2.8)



This guide aims to help managers of organisations that provide welfare services to respond to the procurement practices of the public sector bodies that commission services. It also offers guidance on the preparation of bids. The information and guidance it contains will be of value to all service managers, finance and human resources staff involved in preparing to bid for or negotiate contracts for new or existing services.

The guide focuses on the commissioning of housing-related support by local authorities, although it has wider application. The regulations it describes apply to other public sector bodies such as central government departments, NHS Trusts and others, and while the welfare services which local authorities commission include residential and domiciliary care, day care and advice services as well as housing-related support, it is in the commissioning of housing-related support that there has been most recent change.

TENDER EVALUATION AND SELECTION

Competitive tendering is intended to enable a commissioner to achieve value for money in the procurement of services. Value for money is defined as “the optimum combination of whole-life cost and quality to meet the user’s requirements.” Evaluation of tenders should therefore consider both cost (ie the cost to the commissioner which is the price set by the provider) and quality. This is referred to in some procurement guidance as commercial and technical evaluation.

The criteria for evaluation of the tenders received should be determined by those commissioning the service at an early stage in the process. The balance between cost and quality considerations can be expected to vary from one service to another. The *Guide to Procuring Care and Support Services* produced by Communities and Local Government (CLG) for local authority staff suggests that a higher level

of expertise required of a provider could determine a higher weighting for technical (ie quality) considerations.

In practice, evaluation criteria set for what appear to be similar services can be very different. The cost and quality balance for generic floating support services recently tendered has been set at from 70% cost – 30% quality to 20% cost – 80% quality by different local authorities.

The evaluation criteria should be published within the tender documentation sent out after the initial shortlisting stage (or to all applying if it is an open tender process). If it is not, then an organisation proposing to tender should ask for this information. It is considered good practice to apply the evaluation criteria by scoring the tenders received. The overall cost/quality percentage figure may be broken down further to set out how many points, or percentages of the total figure, can be allocated to different aspects of the tender, and this should also be included in the documentation sent out to tenderers.

Any published evaluation criteria should be taken into account by a potential provider when proposals for the service are being drawn up. If there is any lack of clarity on the criteria or lack of correlation between them and other sections of the specification, this should be checked out with the procurement staff.

Providers should note when asking questions that it is seen as good practice to publish all questions and answers on tender documentation up to the agreed cut-off date, to ensure that all have access to the same information. It is therefore recommended that the questioner words the question in a way that does not identify their organisation.

Public bodies must keep records of the contracts they have awarded and sufficient information on the process to enable them to answer queries on it. They must set up a procedure which meets the general EU principles of fairness and transparency.

Evaluation of tenders will often be carried out by a panel set up for that purpose by the commissioner’s staff. They are likely to aim for a mix of

expertise, including those with knowledge of the service type and client group, finance and procurement procedures. Some commissioners have involved people who are service users or are representatives of service users via community groups or advocacy services. Good practice in running such evaluation panels would, as for recruitment and selection panels, include involving all parties from an early stage and providing training and briefings to ensure that all can contribute effectively.

While tenders may be evaluated and the contract awarded on the basis of only the written submissions, it is also possible to add further stages to the selection process by requiring tenderers to attend an interview, make a presentation or, in some cases, visit a current service. The evaluation panel should identify what it wants to gain from this next stage, but if this is not communicated to the tenderer, they should ask for more information to help them to prepare.

It is important to find out:

- who is on the panel and, if possible, what their area of expertise is or how familiar they are with the sector
- whether there are any specific points or issues the panel wants to explore
- how much time has been allocated for the interview
- if a presentation is required, how much time has been allocated for this and for questions on it, and what equipment will be available if visual aids are appropriate
- where the interview or presentation will take place – if the address given does not make it clear whether it will be a large council chamber, small interview room etc – as this may affect numbers who can come or use of visual aids

The organisation can then prepare its interview or presentation team and materials. When deciding who should attend, the organisation will want to select someone who can answer questions about the nuts and bolts of service delivery and someone who can answer detailed questions about finance, as well as a senior member of staff who will demonstrate the commitment of the organisation to this bid. It is usually thought inadvisable to heavily outnumber the panel, so the numbers on the interview or presentation team may be limited by that.

The question of how 'glossy' a bid should be cannot be answered in a general guide. Some feedback from evaluation panels has been that they are not impressed by smart presentations from marketing staff who know little about frontline issues; but in other cases, organisations inexperienced at presentations have felt out-done by those who can give a good performance in this competitive environment.

Whatever the level of 'gloss' aimed at, the organisation will want its team to have:

- A sound, in-depth knowledge of the bid;
- Prepared itself by working through the main points to get across, deciding who will focus on each one;
- Rehearsed to check timings or to practice fielding difficult questions;
- Produced a (probably short) information pack or handout to take with them which backs up the main points of the presentation, or proposal or image of the organisation, but does not attempt to replicate the tender submission.

Some providers have considered the inclusion of current service users in their presentation team. Whether service users play a part in the different stages of preparation for a procurement process will depend on their interest, capacity and experience as outlined earlier, but providers should also be aware of the potential drawbacks of involvement of service users in presenting a bid. It can be seen to involve a significant identification with the organisation, rather than the service, in a way that involvement in service improvement or service re-design does not. After involvement in a losing bid, the future support relationship with the organisation that won the tender could be adversely affected. A presentation or interview is also likely to be experienced as a highly pressurised situation where it could be difficult to avoid creating significant anxiety about the service user's contribution to the success or failure of the bid.

As part of a selection process, a panel may want to visit a service currently run by the tendering provider. Again, it is important for the tenderer to find out what the panel seeks to gain from this and to find out who will be coming, for how long and if they have any specific requests on what they want to see or do, as it is likely that meeting and talking with service users and staff will be the main focus. People affected will need to be briefed on the nature of the visit. In Supporting People funded services there is likely to be some familiarity with this from experience of service review validation visits, although the panel will be considering how this organisation would provide the service being tendered, which may not be the same as the one being visited.

In the course of the evaluation and selection process, there may be discussions between the commissioner's procurement staff and the provider organisations, but this should only be for checking information or clarification. It is good practice to ensure that all prospective tenderers have access to the same information, which is usually done by circulating or publishing questions and answers, as referred to above. There should not be any negotiations with any one potential provider or agreement to change any significant aspects of the tender at this point. If the commissioner does discover, after preparing all documents and advertising a service, that they had failed to take account of some significant issue raised in providers' responses, they should withdraw the tender and start again.

CONTRACT AWARD

There is no set period in procurement Regulations for how long a commissioner may take to make a decision on which bid to accept, and it is unlikely that a local authority's standing orders would specify this. However, expiry of current contracts and a service start date will be known and the commissioner's own tendering timetable will have been set up with an estimate of how long it will take them to make their evaluation, check factual queries, take up any references and make a decision. In some cases decision making may be delegated to the evaluation panel, in others a recommendation will be made to a commissioning body or its equivalent. The local authority's standing orders will set out who is authorised to make decisions at the different levels of contract value.

Most instructions to tenderers will specify that the tender they submit must be unconditional, ie not subject to any changes after acceptance. Some may specify that the tenderer must commit themselves to accepting the contract if it is offered to them on the terms on which it was made. All will make clear that the commissioner may choose not to award the contract at all if not satisfied with any of the bids.

When a decision is made, and the selected provider has agreed to accept the contract, the procedure for announcing the decision will vary according to the local authority's standing orders and practices. If a public body is commissioning a service defined as Part A by the EU Directives,



there is a requirement for a ten-day 'standstill' period to follow notification by the commissioner to all unsuccessful tenderers. This period is to allow them to get feedback or make objections before the award of contract is acted upon. As support and care services are defined as Part B, this will not be a regulatory requirement for them, although the commissioner may choose to do it. The Regulations specify that the unsuccessful tenderers must be advised of the name of the winning tenderer, of the evaluation criteria, and of how they scored and the winning tender scored. If asked, the commissioner must also advise the unsuccessful tenderer what the characteristics and relative advantages of the winning tender were. It is considered to be good practice to provide feedback even where there is no regulatory requirement to do so. The nature of the feedback is unlikely to be specified, but it would be intended to help providers learn from the process and develop the capacity of the provider sector for future tenders.

It is a requirement for both Part A and Part B services that the commissioner completes a contract award notice within a set period after the decision. This includes specified information including name of winning contractor, type of tendering process, evaluation criteria, value of contract and description of service. This information has to be submitted to the OJEU for publication unless there is a case that it is not in the public interest to do so or would prejudice fair competition, legitimate commercial interests or law enforcement. Any organisation can subscribe to the OJEU website and search for contract award notices (as well as for tenders). A local authority will have its own policy on whether or how it publishes contract award information locally. Some list all contracts awarded on their websites; others may publish selectively or make selected information available on request.

Complaints

Where a tenderer believes that a procurement process has been unfair or that mistakes have been made which have hindered their participation, there are actions which they can take.

The first level of response is to always contact the named responsible officer as soon as a problem is identified. As with any complaint, it is

advisable to follow up a phone call with written confirmation of the problem and the solution requested, and to approach the next level of seniority if staff fail to respond. If the problem is likely to affect any potential tenderer, such as a seriously shortened timetable, then a collective response from providers through a local Provider Forum or network can be made and can carry much more weight than an individual one.

Local authorities all have complaints procedures with stages of appeals to be followed. Complaints of maladministration can be made to the Local Government Ombudsman where it has caused injustice to the complainant. The difficulty for providers in this situation is that a tender timescale will be often very tight and the process through the stages of a complaints procedure relatively slow. Unless they can get the authority to respond urgently, they may have to continue trying to work within the process which is the subject of their complaint. However, given the serious impact on services and organisations which can result, it is always worth registering an objection.

Providers may worry that their making a complaint will prejudice the commissioner against them and sometimes decide that it is tactically unwise to do so. While this is understandable, it should be possible to maintain good professional relations as long as all involved remain constructive, focused on maintaining good services and do not allow concerns about the complaint to spill over into other areas of their relationship or partnership.

Where a tenderer believes that the commissioner is in breach of the UK procurement Regulations they can take action in the High Court. The High Court has the power to suspend or set aside a contract award decision where the contract has not yet been signed, or to award damages where the contract has been entered into. This course of action is only open to an unsuccessful tenderer.

Anyone, this is, not just an unsuccessful tenderer but any aggrieved person, can ask the European Commission to take action against the national government concerned in the European Court of Justice. This, however, is obviously not a quick or easy remedy.

Action

Action the tenderer should take is to:

- check their local authority's procurement or contracting standing orders
- find out how to make a complaint, should they need to do so, against their commissioning department
- when dealing with an actual tender, check every aspect of the instructions to tenderers and raise questions (worded with care for anonymity) on any matter that is unclear or which appears to hinder fair competition

Find out more

For CLG's *Guide to Procuring Care and Support Services* for staff of local authorities and other public bodies, please visit: www.spkweb.org.uk/Subjects/Capacity_building/Procurement+guide+templates.htm

For the Office of Government Commerce's guidance on the procurement Regulations, please visit: www.ogc.gov.uk/procurement.asp

POST-TENDER ACTION

Learning from experience

Whether a tender is successful or unsuccessful, an organisation will have invested considerable time and effort in it and will want to maximise the benefit of that investment.

A debriefing or review meeting by the team which prepared and presented the tender can consider:

- feedback from the commissioner – what they thought was good and what was not so good about the tender
- what the team thought was good and not so good about the tender
- what worked and what did not work about the process of putting the tender together
- what the organisation should do similarly and what differently next time it has to tender
- what actions need to be followed up to ensure benefit from this learning experience (eg reports to board, briefings to other staff, rewrite of a tendering procedure or project plan, updating of standard information held)



Loss of tender

If the organisation failed to win a tender for a new service, then learning how to do it better next time may be all that it needs to do. If, however, that proposed expansion was crucial to its financial viability, loss of the tender will mean revisiting its financial projections and business plan to identify alternative courses of action.

If the organisation failed to win a tender for an existing service, there may be a number of consequences, depending on the type of service and the scale of the organisation and its other activities. At one end of the scale, the loss of a small organisation's sole service can result in the organisation going out of business and having to be wound up. At the other extreme, a very large organisation losing a small service may be able to redeploy or reallocate a relatively small number of management hours and overheads to other services or functions. If, as will nearly always be the case, the service was delivered by 'a defined staff grouping' then Transfer of Undertakings

Protection from Employment (TUPE) Regulations will apply to those staff. In addition to the good communication with staff vital for managing TUPE, the organisation must ensure good communication with service users and other stakeholders affected, such as relatives or carers, referral agencies and partner landlords.

A project plan

Post-tender action for managing the transfer of service will need to be drawn up and agreed by the outgoing service provider, new service provider and commissioner. The timing will be based on the dates for termination of the current contract, the start of the new service and any lead-in time or temporary extensions agreed by the commissioner.

The plan would be likely to include:

- **publicity and communication** – who will be notified of what by which party
- **staffing** – TUPE requirements, redeployment or redundancy, induction to new service
- **service users** – any handover to new keyworker, transfer of case records, induction if new working methods
- **partner agencies** – notice of withdrawal from agreements, alternative referral arrangements
- **premises** – termination or assignment of leases, contracts for utilities or equipment, disposal of any other premise-related assets
- **service termination** – final payments and accounts, any transfer or disposal of records

No party involved should underestimate the emotional impact of a service handover and the need for timely, clear, objective information to be available throughout the process. Even those assured of continuation of service provision or employment may be anxious about their future, and anxiety, or any other strong emotion generated by the change, makes it more difficult to take in information given. In such circumstances the people in daily contact with service users and frontline staff may themselves have limited knowledge of exactly how the new specification and new provider will make a difference to service delivery, so the publicity or communication plan is likely to have to include regular issue of written, plain language briefings that can be referred to by all staff.

Winning a tender

When an organisation wins a tender for an existing service which it currently provides, if it is to be delivered on exactly the same basis as it is currently, then reviewing the success of its tender in order to continue to be successful in future may be all that it needs to do. However, it is more likely that service delivery practices may have to change, either because the new specification requires reconfiguration of some kind or because the price offered requires the same service to be delivered at lower cost or increases capacity for the same cost.

In such circumstances, the plan for the lead-in to the new contract start date for instance, will, as above, be focused on communication. Staff teams will need to work through with their managers how the new specification is to be put into practice, for instance, there may be new referral routes or changed monitoring requirements. If availability or any aspect of the nature of the service is changing, different rota systems or additional training may need to be planned. Where any changes impact on service users or other stakeholders such as referral agencies, the communication plan will need to include briefings and discussions with them.

Winning a tender for a service currently provided by another organisation will require joint planning for handover with the outgoing provider and the commissioner, as outlined in the section above on loss of tender. A major focus for the new provider will be induction for the transferring staff and service users and integration of the new service into its existing organisational systems. This integration may require additional briefings for central or head office staff who were not involved in the tender process but need to know the background to the change to play their part in running it smoothly.

The volume of work involved in the transfer will be significantly affected by factors such as whether the new service can be accommodated in current offices or whether the increase in size of the organisation means that current management systems need to be upgraded. If the organisation's tender took full account of these issues there is a greater chance of a painless transfer. 'Expect the unexpected' is advice not easily acted on. Apparently minor but unpredicted practical problems can consume large amounts of staff time. One organisation's unexpected headache was that their head office could not meet their deadline for supplying the swipe cards that all staff needed to access the offices and sign in, resulting in complicated arrangements for other staff having to be there to let them in and use of temporary paper records.

Additionally, an organisation in this position may have proposed in its tender a service specific steering group or multi-agency group which it will now need to set up and integrate into its current management and governance structures.

Taking on a service where there is a significant interdependence with another service delivered by a separate organisation will require some level of participation by that other organisation in the handover plan. For example, where a support service is accommodation-based and the organisation providing the housing management service was previously, but is no longer, the support provider, the two organisations will need to develop joint working protocols and information sharing agreements to ensure that all staff and service users understand the different roles and responsibilities and how any unforeseen overlaps or gaps should be managed. There may again be practical problems to resolve on use of office space and utilities, where separate provision was not foreseen in the building design or there was insufficient consultation in the drafting of the service specification.

Winning a tender for a completely new service will involve the same issues of expanding or upgrading office space and management systems and induction of new staff. These staff will, however, be recruited to new



posts instead of TUPE transfers. If the tender proposed staff terms and conditions different from those of other staff, without prior consultation with HR staff or trade unions, negotiations may now be needed. New referral or access arrangements for service users will have to be adopted or set up. As above, if a new steering group was proposed, it will have to be recruited, serviced and integrated with current structures.

Contract management

It is usual practice to include a copy of the standard contract to be used by the authority with the tender documentation. This may include information on how the performance of the contract is to be monitored. The service specification may also include any monitoring required for this particular service. Every authority's contract may be different but there will be some common features.

The basic terms of a contract as defined by UK law are:

- parties to it
- period of time it covers
- price to be paid and how payment will be made
- product or service to be delivered for that price – usually described in more detail in an attached specification

Most contracts will also have terms which set out:

- any requirements for insurance or security bonds, compliance with relevant legislation or key commissioner policies
- if any terms can be varied and how this is to be done and recorded
- communication channels, eg identified persons or posts on each side with responsibilities for aspects of the contract
- how performance and delivery of the service will be monitored, including by reports, meetings, user feedback
- a price review mechanism
- what to do if things go wrong, ie grounds for termination, penalties for underperformance, complaints, disputes and appeals procedures
- exit arrangements, eg break clauses, notice periods, information to be supplied prior to re-commissioning, ownership of records

Local authorities are further advised by central government that their contracting practices should:

- promote continuous improvement in service delivery
- help the authority to achieve year on year efficiency gains or savings
- encourage providers to see them as partners rather than adversaries
- identify and manage risks to service delivery

As soon as possible after the contract has been awarded, the commissioner and provider should meet to go through and set up the contract management arrangements. A joint meeting of staff with both strategic and operational responsibilities may help to initiate mutual understanding and good working relationships.

At this point commissioner and provider will want to agree the specific arrangements for this service contract, including:

- contact or communication responsibilities and protocols
- a schedule of regular operational review meetings and more infrequent, eg annual, strategic review meetings
- performance reporting and benchmarking
- quality self-assessment reporting and validating
- payments and any price reviews if provided for in the specification
- procedures for agreeing variations
- disputes and complaints responsibilities

Both parties may wish to meet more frequently in the first six months or so of the contract, particularly if it is a new service or there are going to be significant changes, such as a new access or referral route, to be implemented. Thereafter the frequency of meetings and level of performance reporting required by the commissioner should be based on their assessment of the risk of service failure.

The OGC guidance to local authorities on contract management suggests that its activities can be grouped into three areas. First, service delivery management ensures that the service is being delivered as agreed, to the required level of performance and quality. The provider must ensure that all staff involved in service delivery and administration understand the requirements of the new service specification and contract. As outlined above, this may be a particular challenge where staff valued the previous service and are reluctant to accept the necessity for change. It can also be problematic where there is significant staff turnover and those who were very involved in the tender or the set up of the

service move on without an understanding of the new requirements having been sufficiently embedded or documented for their successors.

Second, relationship management keeps the relationship between the two parties open and constructive, aiming to resolve or ease tensions and identify problems early. Regular face-to-face meetings will help build good working relationships. Openness and understanding of each other's priorities and constraints is important. Getting the frequency, method and tone of communications right is vital. Many organisations have learned of the perils of 'email rage'. It is advisable that those involved communicate horizontally with the other organisation, that is, with those at their equivalent level of management. Both parties should be aware that they should not try to direct the work of the other organisation's staff. Regularly acknowledging that both parties are working for the benefit of service users may help deflect focus from clashes of personality or culture.

Third, contract administration handles the formal governance of the contract and changes to the contract documentation. Clear procedures set up at the start and signed up to by all involved are essential. A common tendency is to slip into informality because recording all decisions seems burdensome and unnecessary when things are going well, but when things go wrong or there is a dispute, one party will reach for their formally documented agreements and may find that these do not reflect current practice, that there is no audit trail for an allegedly agreed variation or that they cannot identify which is the latest version of an agreement.

Even if operating with one relatively straightforward contract, an organisation should have a simple document control system with a summary sheet logging all changes and all emails, letters or variation notices filed in the same place, with a copy of the original specification and contract. Which person in the organisation is authorised to agree changes must also be clearly understood.

Contract review

All contracts must be for an identifiable period of time so will have an end date. Contracts for Supporting People funded services have often been for a fixed period such as three years, with an option to extend for either two years, or for one year twice, subject to satisfactory performance. In such cases the commissioner will need to send the end of three-year review with sufficient time left of the contract to allow for possible re-tendering. Commissioner and provider will need to have a clear, shared understanding of what constitutes satisfactory performance and, if the contract has been managed well, will not be springing any surprises on each other at this point.

Actions

The actions to be taken are to:

- use debriefing or review meetings to learn from tendering experiences
- ensure sound knowledge in the organisation of the service specification and contract

To find out more

For Office of Government Commerce Contract Management Guidelines, please visit: www.ogc.gov.uk/documents/Contract_Management.pdf

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