

National Market Development Forum

The implications of personalisation for social care tendering

Briefing Paper 4

The National Market Development Forum (NMDF) involves leaders from local authorities, voluntary organisations, private service providers and national umbrella bodies. The NMDF has been funded through the Putting People First (PPF) Consortium as part of the PPF Delivery Programme.

Acknowledgment

The National Market Development Forum (NMDF), established in 2010 and resourced by the Putting People First Consortium, involves around fifty key individuals from a range of independent sector social care and housing providers and national umbrella bodies, as well as representatives from councils, government and CQC. Its purpose is to explore some of the challenges of market development in adult social care in the context of personalisation, and to propose practical ways in which partners can work together to address them in the future. The NMDF is supported by the Department of Health, the Association of Directors of Adult Social Services, the Local Government Association, and LGID (formerly IDeA). The Institute of Public Care (IPC) at Oxford Brookes University has acted as a facilitator of the Forum.

This is one in a series of papers developed by IPC for the Forum.

Disclaimer

The papers, prepared by IPC, do not seek to represent the views of any single organisation on the Forum, nor that of the Putting People First Consortium (The Department of Health, ADASS, LGA, and LGID). Equally, they do not represent the views of individual members of the Forum. Rather, they summarise the discussions and conclusions that arose during the course of the Forum's meetings. Where there was no consensus across the Forum about a particular issue, the papers have attempted to present a diverse range of views as objectively as possible.

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The context of policy and practice

The Coalition Government has made it clear that it will continue to drive forward the personalisation and choice agenda in health and social care. In May 2010 it said:

*'We will extend the greater roll-out of personal budgets to give people and their carers more control and purchasing power. We will use direct payments to carers and better community-based provision to improve access to respite care.'*¹

There are a number of mechanisms for doing this, on a continuum from a direct payment enabling a service user to purchase their own care, to self directed care where the money may still be held by the local authority but its control remains with the service user, through to services that the local authority still directly purchases. Each of the mechanisms has implications for the way in which social care services are specified, tendered and contracted in future. There are also other emerging commitments from the Government which will impact on the range and style of tendering practice in social care:

- Clear signals that public sector resources will be reduced significantly from 2010 onwards, and that the social care sector must search deeply for greater efficiency and effectiveness.
- A commitment to extending the range and number of services delivered through social enterprises - *'We will support the creation and expansion of mutuals, co-operatives, charities and social enterprises, and enable these groups to have much greater involvement in the running of public services.'*²
- A commitment to reducing the number of services provided directly by public sector bodies and finding other options for the employment of staff – *'We will give public sector workers a new right to form employee-owned co-operatives and bid to take over the services they deliver. This will empower millions of public sector workers to become their own boss and help them to deliver better services.'*³

¹ HMG: The Coalition: Our Programme for Government' 20 May 2010

² Ibid

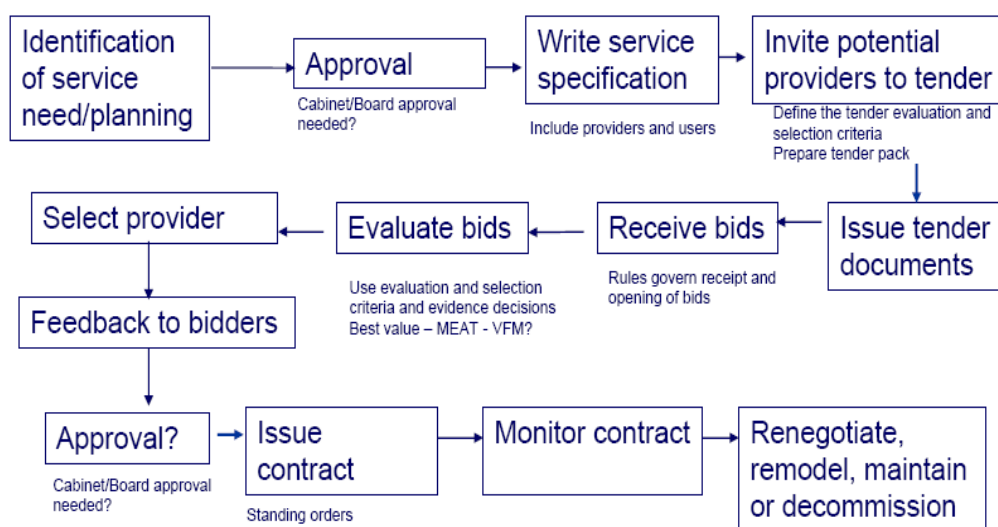
³ Ibid

Current procurement and tendering practice

The purchasing process, value and timescales can vary widely. At one extreme, for example, The Mears Group recently signed a £200m contract with Brighton and Hove Council for upgrading housing services in May 2010⁴. At the other extreme, individual service users might use their local authority funded, personal budget to secure just a few hours of support from an unregulated personal assistant.

Currently, there is a formidable range of procurement and tendering requirements as set out in EU treaties, national legislation and guidance which regulate the way in which local authorities must engage in tendering for services, including social care⁵. Providers and commissioners are also well aware of a continuing expectation that councils must operate effectively and fairly in their procurement practice and in the management of contracts and their relationships with suppliers⁶. Agencies such as the Care Services Improvement Partnership, Office of Government Commerce and NAVCA have all produced practical guidance designed to ensure that the tendering is fair, proportionate, cost effective and results in mutually beneficial contracts and partnerships⁷⁸⁹.

Major competitive tendering exercises are often time consuming and resource intensive for both the purchaser and provider. This flow diagram describes the elements in a fairly standard process:



⁴ Community Care Market News (May 2010) 'Mears Makes Massive Waves in Procurement'

⁵ The NMDF is planning to produce by October 2010 a briefing paper of legal advice on tendering requirements for social care.

⁶ ODPM (2003). National Procurement Strategy for Local Government.

⁷ CSIP (2005) Guide to Fairer Contracting

⁸ OGC (2004). Think smart ... think voluntary sector!: Good practice guidance on procurement of services from the voluntary and community sector.

⁹ NAVCA/NCVO (2009) Pathways through the Maze, A Guide to Procurement Law

It is not uncommon for these exercises to take up to 18 months to complete. However, in situations requiring major re-provisioning there can be important benefits from these processes. They can:

- Help to ensure that decisions are based on fair and thorough competition.
- Help to push down prices by providers costings being held up to public scrutiny.
- Be used to test the strength of the market and introduce a wider range and greater diversity of suppliers.
- Provide opportunities for providers to develop and deliver new services.

However, for many commissioners and providers there is an increasing gap between aspirations and day to day competitive tendering practice. For example, at the second National Market Development Forum (NMDF) in March 2010, one senior manager of a large provider organisation commented that procurement by local authorities was still too often characterised by poor alignment between strategy and service specifications, and a focus on specifying for 'task and time' rather than outcomes. Equally the investment and commitments to be entered into by a provider in order to fulfil a contract may not be matched by the length of time the contract will last for.

For others, social care tendering practice does not sufficiently recognise the high cost of preparing and presenting bids in tendering and re-tendering exercises. In Scotland in 2008 for example, a survey by Community Care Providers found that *'Providers ...emphasised the very significant level of management and administrative activity involved in participating in tender exercises, regardless of whether business is won, lost or retained; they noted that the time, effort and expense of participating in tenders would better be employed in service development and improvement; and they drew attention to the sometimes very minor differences in tender evaluation 'scores' that result in services and staff being transferred on a massive scale.*¹⁰

In many instances both local authorities and providers recognise that formal and rigid tendering arrangements do not always produce the best result for any of the parties, particularly where this may be about purchasing new forms of provision or where there is uncertainty about what shape services should take. Formal tendering works best where the goods/services being purchased are distinct, simple to describe, what is to be provided is not innovatory or subject to variation and they have been purchased many times before in the same format. Where the converse is true such arrangements work increasingly less well.

Finally, current practice does not sufficiently recognise the changing nature of the relationship between the local authority, the provider and the service user, resulting in tendering exercises remaining too fixed on tying down a guaranteed block contract over a period of time, rather than offering flexibility and responsiveness. For example The Social

¹⁰ Community Care Providers Scotland (2008) Retendering of Social Care Services

Care Institute of Excellence suggested in 2009 that *'The traditional service-led approach has often meant that people have not received the right help at the right time and have been unable to shape the kind of support they need.'*¹¹

What people say

There are very different views about how procurement and tendering behaviours will develop in social care. On the one hand, some suggest the likelihood of an increasingly adversarial culture in the market:

*'The procurement landscape is changing with an ever increasing number of challenges to procurement processes....Bid costs and accountability are more important than ever in the current economic climate....Bidders are now entitled to significantly more information that may alert them to potential breaches of the regulations. More crucially bidders may face damaging exclusion from a market if unsuccessful in a procurement. Failure to be awarded a contract or be included on a framework can be potentially devastating for a business.'*¹²

Others suggest that this may be less of an issue as tendering and contracting will become more person-centred, and block contracting and associated competitive tendering will reduce:

*'Personalisation means that where commissioners continue to play a direct role in specifying and procuring services, there will be a strategic shift away from task- and time-based (tendering) towards outcomes-focused and person-centred approaches. This may include a reduction in block contracting for many services as these can reduce the choice available to people...New contractual models that support the move to personalisation include framework contracts and approved provider lists – where people opting for the council to manage their personal budget can draw upon a range of 'approved' services.'*¹³

Others suggest that placing an emphasis on tendering activities which improve the balance of risk between commissioners and providers to stimulate greater innovation will be important:

*'Everything carries a risk, and failures already exist within publicly delivered health and social care. There needs to be greater willingness to take calculated risks related to innovation and new forms of delivery while ensuring it is shared between both parties and that excessive risk is not transferred to social enterprises or other providers.'*¹⁴

Others have the view that the local authority in its new role will need to change its focus, perhaps away from competitive tendering altogether, leaving purchasing to individuals. The

¹¹ SCIE (2009): Personalisation: Implications for Commissioners.

¹² Gilliam and Heatley of Eversheds Solicitors in Community Care Market News, Laing and Buisson, May 2010

¹³ SCIE (2009): Personalisation: Implications for Commissioners.

¹⁴ Social Enterprise Coalition (2008) 'Healthy Business'

role of the local authority will be as an influencer through effective signalling of likely need and of purchasing intentions – the NMDF has already considered the role of the market position statement as a key tool for purchasers and providers in Briefing Paper 2. However, this will require significant improvements in the quality of information available to all parties:

'...councils were not good at signalling their purchasing intentions in the short term, nor did they signal the need for new services..they did not signal the services that might be needed in the long term, regardless of the numbers of people the council might support financially. In some instances, where councils did have discussions about future intentions, particularly about the development of new services, the private sector was often excluded (or perceived itself to be)' ¹⁵

Therefore, the procurement landscape is changing rapidly. It presents a whole series of challenges and opportunities to the parties involved in decisions about setting and responding to tenders.

Moving from existing to new tendering and procurement arrangements

New tendering processes need to reflect changes in the relationships between the local authority, the provider and individual service users / carers that are emerging from the personalisation agenda. For example this may mean moving from:

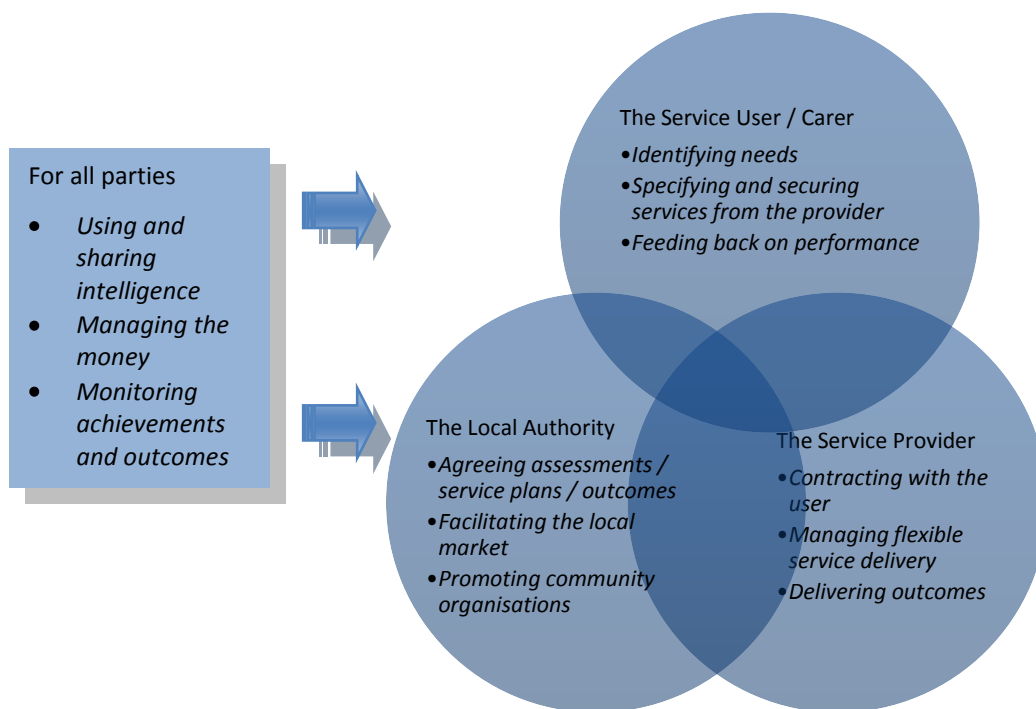
- The local authority as a sole purchaser, to one where providers will need to market to, and contract with, a larger number of individual service purchasers.
- Large block contracts to individual service contracts and arrangements, although perhaps underpinned by a framework agreement between the local authority and one or more providers.
- Formal structured arrangements for the procurement and delivery of social care to a more flexible approach where achieving agreed outcomes for a given price is the contractual focus rather than the volume or nature of service delivered.

¹⁵ CSCI (2007) Safe as Houses? What Drives Investment in Social Care?

Figure 1: Traditional relationships



Figure 2: Future relationships?



In exploring new or changed relationships to the procurement process there are challenges at both an individual as well as at a wider market level. For example, taking the diagram above, and exploring what services are provided there may be different priorities for all three parties in terms of:

- Price.
- Quality.
- Risk and safety.
- Control.
- Flexibility and reliability.

At the wider market level whilst many authorities are responding by moving to the new concept of framework agreements, there are still a number of issues to be tackled.

- Moving from a single to a large number of purchasers potentially drives up transaction costs for providers. At times of falling budgets for local authorities paying a higher price for the same provision may not be a viable option.
- In many instances the local authority may still remain a significant purchaser, buying on behalf of service users who do not wish or are not able to act as purchasers in their own right. In these circumstances what makes for the best purchasing arrangements?
- Some providers are concerned about market destabilisation if the certainty of block contracts is removed. Particularly for smaller providers, managing a diverse set of arrangements combined with uncertainty about take up may drive them out of business.
- Some providers see framework agreements as providing all the difficulties and costs associated with traditional tendering but with the added disadvantage that there is no guarantee of customers at the end of the process.
- Similarly, added pressure may come on providers if they are bidding to deliver a regulated care service with a trained workforce but having to compete against unregulated care in the form of personal assistants.
- If there is a greater emphasis on marketing care services to both self funders and those with personal budgets then again smaller providers may lose out as their capacity to market their provision may not be as great as that of larger providers.

The response to the above by many local authorities is to consider a range of new approaches to procurement:

- **Guarantee contracts.** The Local Authority agrees with a provider to underwrite a given volume of service purchase at an agreed price.
- **Fixed price procurement.** The value of the contract is given together with an assessment of how that market price has been determined. Providers bid against what they can offer for the price.
- **Framework contracts and approved provider lists.** Here in effect the local authority is giving a 'seal of approval' to one or more providers, but leaves the service user free to select who they might use.
- **Aggregated contracts.** A group of personal budget holders get together, with or without the help of the local authority, in order to purchase a set of common services.
- **Individual Service Funds.** The provider (or sub contractor) holds the service users personal budget but the user specifies the tasks to be completed and when they are to be undertaken.
- **Outcome based contracts.** The service user and the local authority agree the outcomes to be achieved and a given price. The service user and provider negotiate over when services are required and how they are to be delivered in order to achieve the specified outcomes. A broker or the local authority is available in the case of disputes.

The implications of new approaches to tendering

As described above; given demographic change, the desire for increased user choice and control over service provision an increase in self funders and a diminution in the public purse, then the social care market is inevitable going to change. The following represents some of the range of issues and challenges to tendering and procurement discussed by members of the NMDF:

Do current tendering arrangements recognise the reality of future purchasing transactions?

The simple and almost universal response from commissioners and providers is 'No' for which a variety of reasons can be given:

- Complex tendering exercises to get on a list of preferred providers, may not be acceptable to providers or effective for commissioners, as providers increasingly move towards marketing their services directly to individual purchasers.
- Similarly such arrangements through their cost and complexity may exclude precisely the type of service providers that government is keen to encourage, eg, small local voluntary organisations or fledgling social enterprises.
- If tendering exercises are made particularly onerous or seek to enforce unfair contractual obligations then successful providers may choose not to participate. Given that some elements of social care have high entry barriers, high labour costs and comparatively low returns then the degree of business risk and the costs of participation in any tendering exercise is something all providers will consider.
- Commissioners need to be clear about the balance of providers they are looking for, and that they understand the potential long-term market and wider social benefits in having a diverse set of providers in an area. A tendering process which results in one or only a few providers may have serious negative consequences on the costs and quality of services. Where a monopoly provider fails, there is, by definition, no alternative provider readily available to respond to service user needs.
- At a time of change, specifying services in detail and for the long term, as a tendering exercise may demand, can lessen flexibility, result in poorer market relationships and less cost-effective services.

Therefore, local authorities need to think carefully about when to use a competition-based approach to tendering, and when to consider alternative approaches.

When should formal tendering arrangements or block contracts be used?

There are a number of circumstances where competitive tendering and block contracts remain appropriate. For example, in the case of the former then tendering may be appropriate where:

- Entirely new services are needed.
- A high cost / volume of services are being purchased on behalf of users by the local authority.

- There has been a challenge to the fairness of existing procurement practices.
- Current services have consistently failed to respond to need.
- Costs of services are considered unacceptably high or unjustified.

On the other hand, there may be circumstances where negotiations with current providers can achieve the same outcome, or where direct feedback from service users and carers can help to secure the improvements needed. In areas where services are hard to procure or develop then pump priming funding or premium payments may be needed in order to ensure availability.

In terms of block contracts then it is important to recognise that delivering the choice element of choice and control is not necessarily just about a choice of provider. Choice can equally entail a choice of services being available from one provider, or about the timing of service delivery or who is your care worker. There may be circumstances where block or guaranteed contracts may be the best way of achieving these elements of choice. However where this approach is to be used then service users need to play a part in all aspects of the process. For the local authority, building up the capacity of service users to contribute, steer or even control the tendering process is going to be crucial. For providers, services which are genuinely user-led are likely to be able to show that their approach and design will best meet the needs of the purchasers in the future. This may also mean the local authority going beyond the 'usual suspects' or organisations in getting genuine service user representation.

Will co-operation between providers be encouraged?

An unintended consequence of competitive tendering is that it can lead to competitive practice between services. In the complex world of community social and health care it is very rare that an individual with a high level of need will only receive services from one agency. Providers have to work together, and by doing so well can improve the effectiveness and efficiency of the service to the user.

Tenders need to be designed to ensure that service synergies are encouraged through, for example: sufficient time and opportunity for providers to develop joint proposals which draw on the strengths of respective partners; specifications which cover different services across a care pathway; incentives in the contract for delivering improved outcomes and greater cost efficiency between services.

Sometimes a partnership approach, particularly with small providers, might lead to more successful services and better long-term outcomes for users. However, authorities will need to ensure they do not breach fair competition requirements and providers may need help in establishing the contractual relationships between partners as well as between any consortium and the local authority.

In addition the conditions within which providers can build trust need to be encouraged. The local authority and provider umbrella bodies have important roles to play in encouraging good ongoing communications and constructive relations between providers from which delivery partnerships can be developed.

Will the tender actually help deliver outcomes?

Outcome-based tendering and contracting are commonplace terms, yet there are still relatively few successful practice examples. Contracts which reward providers for improving

the outcomes for a user are difficult to achieve, yet cost and volume contracts, for example such as those in home care, may only offer perverse incentives to providers, ie, the incentives encourage increased rather than diminished dependency. Equally, there are areas where volumes of service are provided often without major consideration of what are the outcomes to be achieved, eg, residential care for older people with dementia. Practice needs to move away from easily quantifiable delivery measures (such as hours or bed-days provided) to more subjective measures (such as improvements in users confidence, mobility or independence).

An outcome based approach can help deliver the objectives of personalisation. The local authority and the service user might agree the outcomes to be achieved but it's down to the service user and the provider to determine, within a given price, how this will be delivered. Critics might argue that by detaching the price paid from the services offered could mean paying for something that is not delivered. However, that fails to recognise the current situation where over rigid care plans may equally mean services are offered when not needed.

Is there a strategic approach to procurement and tendering?

Finally, the NMDF members suggested that local authorities and their partners need to have a strategic approach to tendering and procurement practices, as part of their overall commissioning agenda. This means:

- Being clear about the circumstances within which different approaches to service development, including tendering, are likely to be appropriate.
- Publishing information about when and how services will be subject to re-specification and competitive tendering well in advance
- Working closely with colleagues across the local authority and in partner agencies such as the NHS, to take a whole systems perspective about the procurement of services so that they are based on the holistic needs of the service user.
- Challenging those who see competitive tendering as always the preferred option for securing better services in social care.

We hope this document is useful and thought provoking and that it can be used as the basis for discussion between partners involved in securing better social care in your local area.