

SOLACE RESPONSE TO:
Communities and Local Government Select Committee's
call for submissions on Local Government Procurement
September 2013

SOLACE welcomes the opportunity to contribute to the Communities and Local Government Select Committee's inquiries into procurement. SOLACE is the only representative body for all local authority chief executives and as such we are in a unique position to express the views of local authority professionals. Our collective response, based largely upon research undertaken in the production of the SOLACE guide to commissioning and sourcing, 'When the salami's gone' (available free at http://www.solace.org.uk/knowledge/reports_guides/), is set out below.

Part One: Procurement

One public reform measure that has been ever-present over the last three decades is the 'market mechanism'. We have seen the privatisation of utilities, voluntary and compulsory competitive tendering; and embrace of PFIs and the Right to Request. The current Government has followed suit with its Open Public Services White Paper, the acceleration of central government outsourcing and the Community Right to Challenge.

However, market diversification and experimentation in service models has been far from a top-down central government policy. Local Government had engaged in outsourcing long before voluntary and compulsory competitive tendering were created and shared services have in some cases existed for decades. In addition, local government has long encouraged, and funded, voluntary organisations to deliver a wide range of functions and services on its behalf. In summary, local government leads the public sector, both in the UK and internationally, in the innovative and effective way it engages with the market.

In this world traditional practices and skills are still required – outsourcing still depends on effective procurement, for example – but it increasingly involves decisions of deep strategic and political importance that have lasting consequences for an area or a region. The management of those consequences demands new approaches. Even the basic procurement decisions that face local authorities are ever more complex, given the increasing range and variety of options available and the potential for the growth of community budgeting.

While there is much that is good about local government's approach to procurement challenges do remain. Such complexity means that the process of 'procurement' is increasingly confronted by barriers, both real and perceived, that hinder its efficient and effective operation.

Challenges

Legal constraints are often cited as among the most difficult barriers to implementing new service delivery models. Prominent among the targets for criticism are the European procurement rules. However, although the issues can be complex, there are well-established legal frameworks to support nearly every model that a local authority might wish to put in place.

Authorities will be well-versed in the application of EU procurement rules and the various features are familiar. If these rules did not exist, authorities would need to create transparent procedures that embodied many of the same principles (as do private sector organisations that buy goods and services), i.e. organisations would be invited to bid and an objective decision made on whom to award the contract to.

However, the current EU procurement rules have presented a number of key problems to authorities and businesses bidding for work. It is hoped that the planned new EU directives will address a number of these, including:

- **Limitations on negotiation:** no negotiation is possible under the current procedures except for the negotiated procedure which can now be used only in limited circumstances. Proposals and terms can be 'clarified', but the scope for refining details and terms through negotiation is limited, putting pressure on authorities to get the details of the Invitation to Tender absolutely right, encouraging over-prescriptive specifications and terms and potentially increasing bidders' costs. This is likely to be changed in the revised EC directive through the consolidation of the negotiated and competitive dialogue procedures and allowing more scope for negotiation overall and we would welcome such a change.
- **Encouraging local suppliers:** although there is a provision for taking 'social' factors into consideration, this is limited and does not allow authorities to favour local suppliers. The Public Services Social Value Act 2012 and the revisions to the EU directives allow the evaluation of social considerations in contracts where they are related to the subject matter of the contract. However, the skill set to use procurement power to regenerate local economies is still developing, so that authorities' efforts to encourage local businesses will continue to rely on encouraging local businesses to bid; making the process more transparent and easier to understand; or encouraging larger businesses to work with SMEs and the voluntary sector.
- **Protecting mutual 'spin-offs'** from exposure to competition: currently, authorities encouraging new mutual spin-offs have to comply with EU procurement rules before awarding a contract to a newly formed mutual. As a result, formal procurement may be triggered with some new mutuals being immediately subject to full open competition. To address this, some public bodies have procured private sector partners for new mutual – adding delays and complexity. Despite the UK Government's lobbying for time limited exemptions from the EU procedures for new mutual appears to have been at least partially successful and this progress is welcomed.
- **Making use of Part B flexibilities:** although the principles of transparency and fairness still apply to Part B services, there is currently much more flexibility in

awarding such contracts. Indeed, the scope of Part B services includes major services such as health and social services, education services and recreational, cultural and sporting services. The loss of the distinction between Part A and Part B services threatened to increase the burden for services previously classified as Part B, but the success in creating a new light-touch regime introduced for social, health and other services is to be welcomed.

Both authorities and their service providers find the procurement process tortuous and frustrating. However, some of the problems and their solutions, while on occasion contradictory, are in the hands of public bodies:

- **Over-complexity:** authorities can require bidders to provide too much information either at the PQQ stage or in the ITT, or both; they can also require too many meetings with bidders.
- **Inflexible contracts:** in addition to being over-complex, contracts and specifications can be so prescriptive that they make it more difficult for the provider to achieve the contract's objectives or introduce innovation.
- **Underuse of framework contracts:** often the complaint is that there are too many framework contracts established (at great expense) which are then not used.
- **Lack of standardisation:** the requirements, specifications and contractual terms are often different for very similar contracts and services.
- **Slowness in decision-making:** there can often be significant delays in moving through the stages of the procurement process.
- **Insufficient opportunities for discussion:** bidders would often welcome the opportunity for dialogue before tendering gets underway.
- **Lack of innovation:** there are relatively few opportunities for new ideas and innovation to be explored (except through the competitive dialogue procedure and the new innovation procedure under the revised EU directives).

It is therefore important that solutions are strongly promoted and that investment goes into ensuring that both the political and managerial leaders of local government are well versed in this important area of their work, and that they are supported by a sufficient cohort of well-informed professionals with strong links into other sectors who are able to support the procurement process.

Local government use their procurement specialists as key players in the procurement of major service contracts. Their role is to bring a practical understanding of the procurement process and procurement law; and commercial nous and knowledge of the relevant market. While those specialists with a public sector background will tend to have a strong grasp of local government decision-making and public sector procurement procedures, they may have lacked exposure to commercial disciplines, a development requirement that needs to be further addressed.

However, the leadership of major procurement exercises must rest with the senior managers responsible for commissioning the services or outcomes in scope. Neither the political or managerial sponsors can be divorced from the procurement process.

Competitive Dialogue

One of the elements of the procurement process that causes much discussion is competitive dialogue. While competitive dialogue is appropriate for more complex contracts, it can be a highly complex process. Some service providers welcome it, while others find it too slow and expensive. In fact, the Government has discouraged the use of the competitive dialogue procedure in central government with certain exceptions.

We have found that what service providers do welcome is the chance to engage in dialogue before the formal tendering process is initiated. This can help them to decide whether to qualify the opportunity in or out and can also provide them with opportunities to contribute to the client's thinking and improve the procurement process and eventual contract.

There is a common misconception that talking to contractors before a tendering process is not allowed or is anti-competitive. This is something that has been addressed by the Cabinet Office which has issued a useful myth-busting factsheet.

Focusing on outcomes and achieving flexibility in contracts

Both clients and providers frequently express frustrations that contracts are too focused on the mundane and that their impact on strategic outcomes is unclear. Furthermore, the clients fear that any time a change is mooted, the provider will try to take advantage. The providers feel that they are too hemmed in by over-prescriptive specifications and input and output measures. Both sides are apparently locked into a battle over the detail at the expense of the overall objective.

To address these concerns, more attempts are underway to develop outcome-focused specifications that are less prescriptive about the inputs and outputs and focus instead on the impact of their service. However desirable the theory may be, there are few practical examples. In part, this is due to the difficulties in measuring outcomes sufficiently to be able to assess whether they are being achieved. Often, the measures chosen are 'proxy' measures or output measures which can prove difficult to price. There are several procurement exercises underway at the time of writing that have attempted to embed an outcomes-based specification. Southampton's contract with Balfour Beatty has already applied some of that thinking.

Change in contracts can be facilitated if the expectation of change is built into contract terms and change control mechanisms and review checkpoints are carefully defined. More importantly, change may be easier to achieve if the governance of the contract focuses more on its shared strategic intent (based on an understanding of each partner's objectives) than on the detailed application of variation notices. Gloucester City Council's Chief Executive, Julian Wain reports: "The whole relationship with Civica is truly open book - we know a great deal about their financial returns and what they are getting from the contract. They have also exposed their

approach to us. Bearing in mind that we have an interest in the partnership's success it's important we learn how we can make it a success".

Innovations in incentives

In response to concerns that traditional payment mechanisms do little to focus the provider on making a lasting impact on the outcomes the authority is trying to achieve, there has been a search for ways of aligning them with the provider's financial returns. There are negative incentives, i.e. default payments in the event that performance targets are not met, but few positive incentives.

Gain-share and risk/reward arrangements have been in use for some time, often in respect of individual transformation projects. For example, authorities will commit to sharing in the savings resulting from a transformation exercise that will be led or delivered in partnership with the provider. The challenge comes in managing the risk to the provider of the authority not undertaking the changes needed within the council to release the expected savings. The more the authority seeks to transfer the risk of its own failures, the higher the risk premium that the provider will require.

Two models are attracting increasing interest: payment by results and social impact bonds. Both concepts are underpinned by a desire that the provider's reward should be related more directly to longer-term performance and, where possible, outcomes.

Payment by results

Bracknell Forest worked with the Department of Health to establish a jointly commissioned Drug and Alcohol Recovery Services (DARS). The interim and final payments to the voluntary sector provider are based on the client's assessment of each individual's quarterly progress towards individually developed outcomes which monitor changes in substance misuse, offending behaviour, etc. The provider was free to deliver a range of interventions whether directly or through subcontracts.

Social Impact Bonds

One of the problems with a shift from universal service model to one that focuses on prevention is that the cost of transition can be unmanageable for the public sector. For smaller service providers, a payment by results framework which requires the deferral of payments can present cashflow problems. The answer to this problem may be Social Impact Bonds. The first use of social impact bonds was at Peterborough Prison where investors have invested funding in preventative measures with short-term offenders and will only receive payment from the client if targets for reduced re-offending are achieved. This approach has now spread to a number of local authorities including Essex County Council.

Making results-based payments work is not straightforward. The more complex are the issues for intervention, the less likely it is that short-term interventions can be identified and then isolated (and controlled for) as the key variables that are

determining an improved outcome. Then, deciding a fair reward for the results presents a further challenge. We believe that further research is required in this area to determine the lessons of the early work and ensure that the approach can be successful in more complex arenas.

Understanding how to commission and procure from the community

The approaches set out above are not remotely realistic as the starting point for attempts to engage the community in the delivery of services, the stated aim of the current Government as well as local authorities. Indeed, the Localism Act 2011 introduced the Community Right to Challenge designed to enable local groups or individuals to request an authority to open up a tendering exercise for a service which they want to bid to take over.

An extended process of dialogue and consultation is often required before the third sector, whether voluntary sector bodies or social enterprises, will be in a position to be commissioned formally or compete for a contracting opportunity. This includes:

- **Understanding the local 'asset base':** including both physical assets and the people and groups who may be ready to make a contribution to transforming the prospects of their local area. As one chief executive says, "we had to work hard for some time to convince people we were serious about this, before they were ready to make their own commitment"
- **Capacity-building in the third sector:** supporting and encouraging the third sector to co-ordinate, form consortia, share resources and develop their organisational and entrepreneurial skills. The Knowsley Partnership created a Unit for Social Enterprise which helped commissioners and local organisations to help build a social enterprise supply base.
- **Removing barriers to being commissioned:** this can include building a better understanding of commissioning and procurement processes and reviewing the procurement rules to make sure they are proportionate (eg turnover requirements and performance bonds). As Martin Jacques of Cobbetts argues, "A lot of the procurement that local authorities carry out are not exercises that are legally required", particularly for Part B services.

Therefore any work to improve procurement within local government or the public sector as a whole needs to take account of its impact on the voluntary and community, as well as private sectors.

International sourcing practices in local government

In comparison with local government in other countries, the UK appears to have made more extensive use of outsourcing and shared services. Local councils in Australia have engaged in relatively little outsourcing. Outsourcing appears to remain rare in local government in the rest of Europe outside of services such as waste collection. A report by Pique for the European Commission suggested that the UK's approach to "liberalisation" and privatisation was unusual: "In fact, the UK was the only country in our sample that partly followed this rather extreme path." (2009,

p10). There is rather more outsourcing in the US than in Europe with some rare examples in the US of a much more radical approach.

Shared services are significantly less prevalent outside the UK, but the financial difficulties experienced across the globe are encouraging local government bodies to explore the potential benefits. New Zealand has a number of shared services, often driven by issues of scale and resilience. Examples include the Bay of Plenty Local Authority Shared Services (BoPLASS) which is a company model with nine councils in the wider region being the shareholders.

Regional government in both Australia (Western Australia) and the US (New York State) have provided incentives to municipalities to engage in more sharing; in Australia, this is against a background of forced amalgamations in some States.

Charities (often faith-based) are common delivery partners for local authorities across the globe. Other models such as mutualisation are less common despite the long tradition of employee-owned co-operatives in countries such as Spain, where the co-operatively-owned Mondragon Corporation is Spain's 7th largest company (and larger even (by turnover) than the UK's John Lewis Partnership).

While offshoring is common in the private sector, few public bodies are making use of offshored services in the UK. In the last decade, there were a number of examples of 'northshoring' of local authority services, partly in response to skill shortages in the south and the lower cost of labour in the North of England and Scotland. With the economic problems and increased levels of unemployment across the country, authorities are less willing to 'export' jobs for fear of an adverse impact on the local economy.

Part Two: Commissioning

While the concept of commissioning is often associated with procurement and the embrace of the market, models of commissioning in local government do more than just address service delivery models. They require detailed policy formulation before consideration is given to which model may be best able to deliver the objectives identified.

This is driven, in part, by a belief that 'efficiency' measures will not be sufficient to meet citizens' needs against the background of punitive reductions in local authority funding from central government and severe restrictions on the ability of local authorities to control their own income. Authorities that are furthest advanced in adopting the principles of commissioning go further and claim to be using the process to rethink the fundamental purpose of public services and the role of the citizen and the state in meeting individual and collective needs. This now extends into market-making as in addition to engagement, whereby in areas such as health and social care authorities play an active role in the development and 'health' of the market.

Commissioning becoming mainstream in local authorities

The language of commissioning is now well established in local authorities. As a result, the range and scope of services being commissioned strategically is broadening. Examples of authorities adopting a whole-organisation approach to commissioning include the London Borough of Barnet.

While many district councils engage in strategic commissioning programmes, they are often doing so as part of other partners' commissioning exercises. One exception is Cheltenham Borough Council which restructured itself in 2010 to become a commissioning authority with a clear separation between commissioning and provider functions and which has introduced a range of new partnership-based service delivery models.

A starting point for effective commissioning is the development of a shared understanding of what it means and what's involved. There are numerous commissioning frameworks, methodologies and toolkits. This diversity, while reflecting different strands of public service delivery, can make it harder for public service professionals to collaborate on commissioning. Whereas there are generic standards for programme and project management through the Office of Government Commerce's 'PRINCE2' and 'Managing Successful Programmes' (MSP), there are not yet equivalent standards for commissioning.

Community involvement and co-production

While commissioning methodologies used by local authorities stress the importance of consultation, there are no engagement or consultation techniques that are specific to commissioning. Instead, the depth of engagement with the public and other stakeholders will be determined through change management planning.

As part of the development of its co-operative council model, Lambeth Council has committed itself to co-production approaches, working with community groups and allowing time for capacity-building.

One example of the techniques used is Lambeth's Made in Lambeth collaborative event organised by Good for Nothing, a community of skilled volunteers. Over a weekend, volunteers tackled three challenges. One challenge was how to engage more people in the running of the borough's parks. The group explored this issue, but after visiting parks and talking to users wondered whether there was a real problem to address. Instead, they identified a problem with neglected green spaces in the borough that were not parks but appeared unused and uncared-for. As a result, the group, over the course of the weekend, developed a 'Love your Space' campaign and a website to bring unloved spaces together with people who wanted to do something about them.

Political leadership

Political judgement is inherent in the process of commissioning and political engagement at all stages of the commissioning process is both legitimate and necessary. Councils are civic institutions with a responsibility to make decisions on the distribution and rationing of public resources to meet local community needs. This requires political engagement throughout the cycle, not just at the contract award stage.

Active political leadership of the commissioning process is essential to its success. There are pragmatic benefits. First, it will provide assurance to stakeholders and prospective partners and suppliers that commissioning exercises are being taken seriously. Second, too many commissioning exercises have progressed close to the point of implementation only for a lack of political support to emerge and derail the process. Third, a successful commissioning process provides important learning opportunities for participants and will enable members to exercise their responsibilities with greater knowledge and confidence.

More importantly, the 'strategy' element of commissioning is essentially a process of policy development, in which issues are identified, defined, examined, options explored and policies refined. At each stage, there will be political questions that will need to be considered and the brokering of accommodations with partners which are consistent with an administration's political policies.

Authorities have addressed the role of elected members in the commissioning process in a variety of ways, including:

- Forming a working group to provide a political steer throughout the life of the commissioning project (either all-party or just from parties in the administration)
- Subjecting the commissioning project to review by a scrutiny committee at key stages.
- Involving portfolio holders and other members in stakeholder events, soft market soundings, supplier presentations.

- Participation in the governance of partnerships (eg through shared service joint committees) and in the strategic levels of contract management.

There are also implications for the role of elected members in a commissioning organisation committed to co-production. Lambeth's Cllr Jack Hopkins suggests: "councillors are acting as facilitators for change. The case work role continues but there's a community leadership role where we are supporting groups and a commissioning role where we say this what the area needs."

Whatever the nature of commissioning adopted by authority, members benefit from specific support and development opportunities to help them with their new roles.



NOTES:

The Society of Local Authority Chief Executives and Senior Managers (SOLACE) is the professional body representing Chief Executives and Senior Managers in UK local authorities and other public sector organisations. SOLACE is committed to promoting public sector excellence and seeks to influence debate around the future of public services to ensure that policy and legislation are informed by the experience and expertise of our members.

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