



The Re-tendering of Services to Vulnerable Adults

**Notes towards the development of new Guidance
for commissioning Social Care and Supporting People services in Wales**

September 2007

1.0 INTRODUCTION

There has been a quasi-market approach to social care commissioning in the UK at least since the 1990 Community Care Act.

Recently, in England*, there has been increasing emphasis on a market-led approach, with a dominant assumption that competition between providers will deliver better value, innovation and consumer choice.

In Wales, conversely, the explicit national policy approach has been increasingly to emphasise the benefits of collaboration and partnership.

The pressure on some local authorities for quick-fix cost reductions, and perhaps too the influence of English* policy, has led to a number of recent re-tendering exercises in Wales, particularly in the Learning Disability sector.

A case can of course be made for re-tendering services which are failing their service users, failing to meet contract specifications, and whose providers are persistently unchanging in the face of evidence-based challenges either to do better or to address issues of comparative high cost.

But it is far less clear that there is any public benefit in re-tendering services to the most vulnerable when none of the above conditions apply, and where the primary objective appears to be cost-reduction while the means are procedures that are resource-consuming, mechanistic and arbitrary.

These notes are intended to highlight:

- Problems experienced to-date with re-tendering exercises
- Negative consequences for the future if such exercises become a trend
- Merits of commissioning services on the basis of the Welsh collaboration model.

~

*** Note:** The ‘In Control’ initiative and English policy statements promoting personalised social services contain much that is positive. They build on the individualised values-based approach to service delivery which has long been a hallmark of learning disability policy in Wales. They encourage client/commissioner/provider collaboration. They run counter to the mass tendering of block contracts for whole regions, and to the use of procurement departments to oversee processes better suited to the letting of cleaning contracts. It is this latter trend, rooted in the Blairite “modernisation” agenda, which is here meant by English policy.

2.0 IMMEDIATE PROBLEMS WITH RE-TENDERING EXERCISES

Service users' rights and status are seriously undermined. Individual choice and dignity are set aside for an exercise in top-down large-scale insensitive state purchasing.

Advocates and families' legitimate interests are largely ignored.

Existing care staff are distracted from care, and treated like moveable 'chattels'. Valuable knowledge and relationships are jeopardised and often lost.

Joint planning forums, where they exist, are seen to be tokenistic and play no part in such important decisions.

Communication, which should be a major part of a process as significant as re-tendering, for a range of predictable reasons is poor.

Interviews and presentations are required of tenderers on an inconsistent basis and the involvement of users and carers is erratic, and often tokenistic.

Paperwork submissions require enormous amounts of effort and paper, often duplicate existing purchaser requirements, and are open to abuse by 'creative' tenderers.

Selection criteria are generally cost dominated but also inconsistent. Whether to offer long-term savings or short-term mass redundancies is the devil's guesswork.

One-sided contracts: Care agency contracts are typically lop-sided, but when an existing major contract is re-tendered commissioners can make them *entirely* one-sided.

Inter-agency working suffers badly both at local commissioner/provider level, and more widely between providers. Distance, secrecy and paranoia replace collaboration.

Survival responses in provider organisations: Confronted by the prospect of extinction if they lose an existing contract, agencies can feel obliged to compromise quality.

Timescales for changeovers are always longer than originally intended, creating long periods of disruption, low morale, planning blight, and costs without benefit.

TUPE arrangements typically negate much of the anticipated savings which tempt commissioners into re-tendering, and are a high-cost administrative nightmare.

Impact on CSSIW processes: Agencies, managers and staff have to go through a mass of activities in order to replicate the registration position that existed pre-tendering.

3.0. THE NEGATIVE CONSEQUENCES OF RE-TENDERING EXERCISES

Damage to the infrastructure of indigenous Welsh care agencies as Wales is colonized by English providers. This will also result in care provision being run by agencies that are geared towards English needs and policies, and will consign Welsh staff to lower level jobs, whilst the top jobs are located in England.

Loss of trained and motivated staff and managers as they jump ship before or after transferring to a strange new employer, or facing redundancy. Major investments in skilling-up and qualifying staff and managers will be wasted.

The collaborative vision of One Wales is undermined as competitive rifts are encouraged between sectors and agencies.

The voluntary sector's ethos is undermined so that it becomes increasingly impossible to tell the difference between for-profit and not-for-profit agencies. Instead of a strong element of genuinely public-spirited agencies within the provider sector, the field will be dominated by survivalists and expansionists

Low cost low quality services become the trademark of Welsh care provision... until the downward trend in prices, wages, quality investment, and quality assurance results in such poor practice that deaths and scandals trigger the need to change course.

Time and resources wasted on perpetual tendering as senior officers in every commissioning authority expend their skills and energy on designing and administering tenders - and picking up the pieces - whilst senior officers in every care agency expend their skills and energy on preparing tender submissions, attending tender interviews, honing skills and techniques to create an advantage in tenders, re-organising their services in order to win re-tenders, and doing it all again and again – and all this activity multiplied by every applicant agency whether successful or not, and all at the expense of providing user-centred services.

4.0. THE ALTERNATIVE

Commissioning on the Welsh Collaboration Model:

The considerable inheritance of quality services in the learning disability field in Wales is based on the best joint planning and collaborative inter-agency working that has ever happened in the health and social care field in Wales, and perhaps beyond.

It offers a positive history of achievement that far outshines the record of England, and fits perfectly with the ideas of 'Making the Connections', 'Beyond Boundaries', the mutually supportive strategies for Health and for Social Care, and the recent 'One Wales' statement.

But instead of valuing and nurturing the structures and positives of the learning disability field, trends such as re-tendering are oriented towards their complete destruction.

What is needed is some strong principled leadership amongst those who set Social Care policy and standards in Wales and who have levers to shape behaviours across all agencies. That leadership needs to stand up for its policies, be proud of them, believe in them, and work to have them translated into practices and beliefs in every area and sector.

We can do more if we work together. Re-tendering social care services without very good cause pulls everyone apart.

**Adrian Roper
Chief Executive**

September 2007

5.0 POST SCRIPT - Some possible grounds for re-tendering services

i. There are problems with the provider

- a. Services are failing to satisfy their customers
- b. Services are failing to meet their contract specifications
- c. Services are costing significantly more than their comparators

and

- d. The provider is persistently unchanging in the face of evidence-based challenges either to do better or to address issues of comparative high cost

ii. Essential reconfiguration of services is needed

- a. There are perceived to be *too many* local service providers with duplicated costs and an unhelpful divergence of effort

and

- b. The providers persistently fail to engage in local partnership working so as to reduce costs and improve their effectiveness through collaboration

or

- c. There are perceived to be *too few* local service providers, reducing choice and giving providers a monopolistic dominance

and

- d. The provider/s persistently fail to address concerns, moderate their dominant behaviour or encourage diversity of provision

WARNING: The costs (direct and in-direct) arising from re-tendering of existing social care services are so considerable that *every effort should be made* to address problems of cost, performance and service configuration *with existing providers*. Re-tendering is best seen as an action of last resort.

The Re-tendering of Services to Vulnerable Adults:

Notes towards the development of new Guidance for commissioning Social Care and Supporting People services in Wales

A.0. DETAILED CONCERNS AND EXPERIENCES

- The following points reflect experiences from five re-tendering exercises in four Welsh local authority areas since 2006. The services re-tendered were all for people with learning disabilities. Most services were domiciliary care / supported living. Two services were respite care homes.

A.1. Service users

- The re-tendering of ‘block contracts’ for the care and support of vulnerable adults is at odds with the principles and requirements of individualised assessment and care management, user involvement, and person-centred planning.
- At the very least, the opinions of service users as to whether they want a change of support provider need to be sought in order to inform decisions to re-tender.
- This is not easy, especially in the case of people with communication and comprehension difficulties.
- Failure to do so undermines the status and rights of the service users, particularly when they are receiving support in their own homes.
- *Experience to date*
 - Service users’ opinions have not been sought.
 - Where individuals have come forward to express a clear wish to keep their existing provider, their choice has not been accommodated.
 - Considerable service user anxiety has been experienced.
 - The involvement of service user representatives in selection procedures has been tokenistic.
 - One service user who sat on an interview panel was not involved in the actual decision-making discussions and, weeks later, was asking his provider what the outcome of the selection process was.

- Several service users were supported over a number of days to engage with the process on a personal and emotional level so as to identify their own selection criteria and to test providers through a series of interviews – without realising that the highest score they could give any provider was less than 5% of their overall score. Cost considerations, in contrast, could contribute 55% to the overall score.

A.2 Advocates and families

- The opinions of advocates and families as to whether they would welcome a change of support provider for their client or relative should be sought prior to decisions to re-tender.
- Failure to liaise with families or advocates in respect of such significant matters runs counter to Care Standards expectations, and leaves many service users without the help of someone impartial to voice their concerns and interests.
- Experience to date
- Advocates and families' opinions have not been sought.
- Considerable advocate and family anxiety has been generated.
- The involvement of family carer representatives in the selection procedures has been limited and tokenistic.
 - As with the example given at A.1, above, regarding service users, a panel of parents gave significantly of their time and commitment to score provider agencies without realising that their maximum score would count for less than 5% of the total.
- The involvement of advocates has been limited and not always obviously appropriate:
 - Sitting on a tendering selection panel is not an obvious role for a neutral person-centred practitioner.

A.3 Existing care staff

- The prospect of transferring to a new agency causes considerable concern and distraction for staff in relation to:
 - Security of employment
 - Terms and conditions
 - Organisational values in relation to employees
 - Organisational values in relation to quality of service
 - Loss of relationships and supports from their current agency
 - Feeling like 'chattels' being transferred from one owner to another.
- These worries are compounded by the knowledge that commissioners are typically looking to make savings from the exercise.

- Staff are also required to make a series of major adjustments:
 - New management
 - New offices
 - New care and support policies and procedures
 - New employment policies and procedures
 - New health and safety policies and procedures
- Post-transfer, and despite reassurances about the EU Directive on Transfer of Undertakings Protection of Employment (TUPE), staff may find their new work situation unsatisfactory.
- For these reasons and more, Trade Unions such as Unison have argued strongly against re-tendering exercises.
- Experience to date
- The threat, and the process, of change of agency is a major distraction from service delivery for frontline staff.
- Some good staff, who would have stayed, have left their jobs rather than transfer.
- Some good staff, who would have stayed, have left their jobs following the transfer, either by resigning or redundancy.
- Skilled, trained and committed managers and staff have been lost to their clients, their agency and colleagues, their sector and to the local authority.

A.4 Joint planning

- In the interests of openness and accountability, a decision to re-tender needs to be made openly and following a documented debate by the local joint planning forum comprising of all relevant stakeholders.
- Experience to date
- Where joint planning forums exist, they have never been asked to debate the merits of re-tendering or to comment on the fundamental questions which arise: *why, what, when and how*.
- One authority consulted with stakeholders for the production of a general commissioning strategy, setting out principles, needs and aspirations, whilst saying nothing about the intention to re-tender existing services *en masse*.
- One authority's decision to re-tender on a cyclical basis is said to have been made by councillors as a Standing Order to apply to all council services. This decision is not believed to have been informed by relevant joint planning debates.

A.5 Communication

- Re-tendering creates significant obligations on commissioners to keep everyone informed: that is, service users, advocates and families, frontline staff, agency management, and third parties such as landlords.
- An authority needs to allocate time, effort and resources to communicate with different stakeholders, meaningfully and fairly, in relation to a complex and often evolving procedure.
- Information needs to be provided in advance of decisions, after decisions, and throughout the change process.
- Information needs to be timely, accessible, and show due courtesy to all parties.
- *Experience to date*
- On several occasions, existing providers and other stakeholders have discovered that their services are being re-tendered via a newspaper advert.
- Communication from authorities before, during, and after re-tendering procedures has ranged from mixed to non-existent.

A.6 Interviews and presentations

- Interviews and presentations offer commissioners opportunities to listen to providers explain their tenders and to test them on such matters as price and organisational capacity, but there is no agreed or shared science for making best use of these opportunities.
- Where service users and carers are involved in interviews this needs to be thought through carefully so that both the process and the outcome of their involvement is meaningful.
- *Experience to date*
- Interviews and presentations have been used erratically.
- In one case, providers had been expecting to make a presentation but instead were belatedly invited to interviews.
- The afore-mentioned interviews were with users and carers. These were the only interviews in the whole process and consequently major contracts were awarded

to new providers without commissioners even meeting, let alone challenging, the tenderers.

- The composition of panels has sometimes been contentious, including advocates and relatives with known links to some of the applicant providers.
- Service user involvement in panels has been either poorly prepared but irrelevant or well prepared but irrelevant. That is, their views have carried no weight.

A.7 Paperwork submissions

- Paperwork submission requirements vary considerably but can be substantial in size and often duplicate information which has been submitted for Care Standards registration and local authority Provider Accreditation purposes.
- The time and effort required for collating submissions can be a major drain on provider agencies, and is especially questionable when enforced upon them for re-tendering purposes, rather than being their own business development decision to pursue new work.
- The time and effort required for evaluating submissions is a major drain on commissioning agencies.
- Care is also needed to avoid unscrupulous or desperate agencies using paper submissions to create a seriously false impression of their capacity and intentions.
- *Experience to date*
- Scores of agencies have each submitted a large ring binder of print just to get through Stage One of a tender exercise, and each of these folders (presumably) has then been scrupulously assessed by commissioning officers using tools of unknown validity.
- A dozen or more agencies have then submitted five large ring binders of print in order to meet pages and pages of Tender Specification requirements, and each of these folders (presumably) has then been scrupulously assessed by more officers, also using tools of unknown validity.
- In this same case, a panel of up to fifteen officers scrutinised the paperwork. Most of them had no expertise in social care. No one with social care expertise examined the costings submitted and consequently these were simply accepted without challenge and scored for their cheapness.
- Stories circulate of varying degrees of falsehood being employed in submitting policies and other 'evidence', and of this all being accepted without challenge.

A.8 Selection criteria (inconsistent and cost dominated)

- There are no consistent selection criteria for the awarding of social care and housing related support tenders.
- This is problematic even when the outcome is only success or failure in winning new business, but it is highly unsatisfactory when the outcome may determine the survival of an otherwise robust and well-regarded agency, and undermine the quality and stability of vulnerable people's support.
- Despite a variety of methods and scores being applied to identify the potential quality of the tenderers' work, and to involve users and carers in the process, there is a great risk that cost will be the dominant factor. This inevitably has the effect of driving down costs, potentially to an extreme degree.
- At a recent seminar in England on social care tendering it was suggested that any percentage for cost of 35% or more should be challenged. However, it is clearly no easy matter for providers to challenge criteria during a tendering process, or for commissioners to resist an opportunity to maximise savings.
- *Experience to date*
- Cost has been given a majority percentage (55%) in at least one major retendering exercise in Wales.
- Inconsistency means that an agency can lose work in one area whilst picking up similar work in another area when, from a rational point of view, they are either good value or not.
- Commissioners do not appear to be talking to each other about how they evaluate quality or the prices they are paying for similar services or how they manage value-for-money exercises such as tendering or market research.
- This not only results in inconsistency of knowledge and approach but also results in costly reinvention of wheels.
- It also contributes to assumptions that re-tendering is the only way to assure value for money when it would be much easier to spend some time every year together with other commissioners sharing data and insights into provider costs and performance outcomes and using this knowledge to inform contract reviews.

A.9 One-sided contracts

- Contracts should be mutually beneficial to both the commissioner and provider and reflect a sharing of responsibilities and obligations. For example, just as

providers should provide services in full, so commissioners should pay for them in full.

- The Charity Commission has reported recently on the widespread under-payment of charities by local authorities and, sadly, care agency contracts are typically lopsided.
- However, when an existing major contract is re-tendered commissioners can make them *entirely* one-sided.
- Large for-profit agencies, and some third sector giants, have the capacity to come and go as they please in pursuit of their organizational interests, and consequently can enjoy the luxury of refusing unfair contract terms offered by a local authority.
- This is not the case for smaller agencies, and especially those third sector agencies which were founded with an often explicit mission to serve Wales or a part of Wales. They either sign what is offered or abandon their history and purpose.
- Where the provider is dependent for its survival on retaining a contract, it will be under extreme pressure to sign anything.
- *Experience to date*
- Contract terms are presented to tenderers as a given.
- In one case existing providers spent months of effort, and thousands of pounds on legal fees, in order to persuade the authority to change its proposed contract which was described by contract law specialists as a ‘business suicide note’.
- Despite some major changes, the contract remained extraordinarily one-sided and onerous for the successful provider.

A.10 Inter-agency working

- Social care and housing related support agencies, especially in the not-for-profit sector, have a values-base and mission that can easily orient them towards collaboration and partnership.
- There are considerable gains to be made from sharing resources, skills, contacts, innovations, training, passion and strategy.
- Such collaboration is actively encouraged in Wales as a means of delivering better value public services and encouraging active citizenship.

- *Experience to date*
- The impact of large-scale re-tendering has been to drive agencies into defensive / aggressive positions where they are scared to share anything and in many cases feel an extreme necessity to put their own organisational interests above everything else.
- In the learning disability voluntary sector this has led to a drastic falling off in communication, benchmarking, and co-development of policy, quality assurance and innovation. Furtive ‘non-aggression pacts’ between isolated agencies are replacing a sector-wide camaraderie and trust.

A.11 Survival responses in provider organisations

- Confronted by the prospect of extinction if they lose an existing contract, agencies can feel obliged to compromise quality, and in worse cases may abandon their integrity and loyalty towards clients and employees.
- This means that costings and structures may be enthusiastically submitted by an agency that in fact has little or no confidence as to their adequacy for supporting vulnerable people.
- It can also mean agencies making decisions to abandon such assets as long-standing staff, local knowledge, focused expertise, valued relations and reputations, where these are incompatible with maximizing the likelihood of winning a tender and thereby surviving as an agency.
- Time will tell whether any services arising from such desperate tender submissions prove to be sustainable or fit for purpose, but in the meanwhile they can create a false impression of service costs and requirements.
- If this encourages other commissioners to seek the same, a pattern of social care provision will be created which has its roots in a game of “*how low will you go*”, featuring death threats on the one side and heart-numbing fear on the other.
- NB. A similar game can also be played by agencies who submit ‘loss-leader’ tenders. In addition to creating a false impression of cost requirements, this approach also disadvantages any existing agencies who tender on the basis of the actual known costs of providing the service specified.
- *Experience to date*
- A number of agencies have felt compelled to make exactly the sort of choices outlined above.

A.12 Timescales for changeovers

- The process of re-tendering services in bulk quantities is complicated and fraught with potential pitfalls for the commissioning authority. Consequently it is likely to be long drawn out.
- The changeover of agencies, once the tenders have been awarded, is also complicated and fraught for all the stakeholders involved.
- In consequence, the combined two processes create a high probability of long drawn out disruption, low morale, planning blight, and costs without immediate or potentially any benefit.
- *Experiences to date*
- The timescales have always taken longer than was originally intended
- In nearly all cases the processes have taken more than two years, and in two counties they are still continuing.

A.13 TUPE arrangements

- Under TUPE regulations there are now significant obligations on the winner of a tendered service to protect the employment terms of the staff who transfer with the service.
- Formal procedures have to be followed carefully as failure to do so can lead to financial penalties.
- This is still new legislation and consequently there are different opinions everywhere as to how employers should interpret their obligations and how commissioners should create a fair and rational process for dealing with TUPE in re-tendering procedures.
- It would clearly be helpful and appropriate if there was some consistency amongst commissioners in Wales in this regard.
- It would also be interesting to know the extent to which TUPE is negating the anticipated savings which tempt commissioners into re-tendering in the first place.
- There is no evidence of it, but there is considerable scope for an existing agency to skew the information it provides to commissioners so as to disadvantage others in their costings or in the event of needing to make redundancies.

- *Experience to date*
- Some commissioners have not provided any information about existing terms and conditions of employment and awarded tenders subject to agreement as to what the TUPE additional costs are. In one case this led to the commissioner having to withdraw the contract offer: a distressing outcome to all concerned.
- Some commissioners have sought to acquire and pass to tenderers the relevant information for use in costing tenders but the scope for errors on all sides is massive and inevitably information is flawed.
- The whole TUPE process is typically a high-cost administrative nightmare.

A.14 Impact on CSSIW processes

- Managers who are registered under the Care Standards Act and who transfer under TUPE regulations are required to re-register with the CSSIW.
- Newly appointed agencies have to undergo all the procedures required for the registration of care homes or domiciliary care agencies including voluminous submissions of documents and interviews of Responsible Persons.
- All staff transferring to the new provider have to obtain a new CRB clearance even though they will already have this with their existing employer.
- In Wales, the Domiciliary Care regulations forbid staff from providing care without a valid CRB clearance, and consequently, agencies have been required to break the regulations because of problems obtaining disclosures within the timescales required.
- *Experience to date*
- All of the above - in order to replicate the registration position that existed pre-tendering.