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Alternatives to procurement

Guidance for commissioners

women's aid
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“Importantly, commissioning services does not just mean procurement and commissioners should seek to identify the most appropriate method – for example, grant based funding, co-production and preferred provider partnerships. As part of the commissioning process, it is important to start with the need, then build a process around it that most effectively meets that need”

Home Office, Violence Against Women and Girls Commissioning Toolkit 2022

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Background

Over the past 15 years Women's Aid members have been raising concerns about how procurement and commissioning practices impact on specialist domestic abuse and violence against women and girls (VAWG) services and the survivors who need them.

These problems include: the misapplication of public procurement and subsidy laws; risk-averse and prescriptive procurement processes; and an assumption that charities delivering domestic abuse services do, or should, operate within a 'competitive market'. Such trends severely negatively impact the country's network of specialist, purpose-driven and expert domestic abuse services.

Commissioning is the continual process of planning, agreeing and monitoring services, it is not restricted to putting a service out to tender. The law governing public sector procurement and delivery provides a significant amount of flexibility, which allows commissioners to shape services that achieve the best possible outcomes for survivors. Alternatives to procurement are both legally possible and recommended within statutory guidance when commissioning domestic abuse services.

This guidance aims to provide legal advice on the practical alternatives to procurement and the obligations on public sector bodies to commission domestic abuse services effectively. It has been developed based on legal advice provided to Women's Aid by Julian Blake, Public Benefit Lawyer and Partner at Stone King LLP (JulianBlake@stoneking.co.uk)



For any further questions in relation to commissioning or alternative methods to procurement detailed in this resource, please contact policy@womensaid.org.uk

Practical **alternatives** to **procurement**

The responsibility of public authorities, such as councils, to provide public services is **not limited to** purchasing services through transactional, short-term and competitively procured contracts. Commissioning public services places a deeper responsibility on local authorities, for which they have a wide range of policy implementation powers.

These implementation powers can include the following:

1. Grant and preferential loan subsidy

1.1 A public authority can support the facilities and operations of core public institutions, such as specialist domestic abuse (DA) charities, through a subsidy, including through grants and preferential loans. Subsidy decisions are now regulated by Subsidy Control Act 2022, **[1]** replacing the pre-Brexit EU State Aid regime, both of which are to ensure fair market competition.

1.2 There are specific routes to compliance with the Act which thereby legitimise grant-based funding. The first and most important one is to identify that there is in fact no subsidy (defined in the Regulations) **[2]** involved, on the basis of there being no competition in respect of the service being supported with financial assistance. **[3]**

1.3 Public sector grants to commercial companies, operating in commercial markets, need to be scrutinised in case they are distorting the commercial market. In almost all cases, properly analysed, grants to charities are not entering commercial markets.

1.4 The second basis for a legitimate grant is under provisions allowing for “good” subsidies to services which contribute to an objective of public interest, **[4]** which are beneficial to the public interest, and do not inappropriately distorting market competition. Again, in almost all cases, independent and voluntary specialist domestic abuse services will meet such criteria.

1 UK Subsidy Control Act 2022. [Available online](#)

2 The definition of a subsidy is set out in Chapter 2 of the Guidance. Statutory Guidance on the United Kingdom Subsidy Control Regime, 2022. [Available online.](#)

3 Page 17, Department for Business and Trade, Statutory Guidance on the United Kingdom Subsidy Control Regime, 2022. [Available online.](#)

4 Chapter 5, Department for Business and Trade, Statutory Guidance on the United Kingdom Subsidy Control Regime, 2022. [Available online.](#)

1.5 The UK legislative approach also emphasises that reasonable consideration and discretion is the basic test for a legitimate subsidy or grant. **[5]** The essential and specialist nature of specialist DA charities suggests grant-subsidy as the most appropriate commissioning method for them.

This is made clear in the Home Office’s VAWG Commissioning Toolkit, which states that “grant giving is a legitimate commissioning technique. Grant regimes are typically more responsive and allow greater flexibility in meeting complex outcomes.” [6]

2. Low value and light touch regime flexibility

2.1 Procurement rules have a clear provision, under the Public Contracts Regulations 2015, **[7]** for a simpler process, to be used when commissioning services that are ‘to the person or the community’, such as specialist domestic abuse services. **[8]**

2.2 Under these regulations, there are **no prescriptive procurement procedures for social, health and community service contracts under a certain threshold.** The only requirements are compliance with general principles of: equal treatment of providers; non-discrimination; proportionality; and transparency.

2.3 This means domestic abuse service **contracts with a total value equal to, or under £663,540,** inclusive of VAT, **do not need to go through a competitive tendering process and commissioners can be creative in their approaches,** including using grant funding.

2.4 Where the value of specialist domestic abuse service contracts exceeds the financial threshold, a **Light Touch Regime (LTR)** can be applied, under which there are **minimal requirements attached:** the formal advertisement of a contract opportunity. **[9]**

5 Department for Business and Trade, Statutory Guidance on the United Kingdom Subsidy Control Regime, 2022. [Available online.](#)

6 Home Office, VAWG Commissioning Toolkit, 2022. [Available online.](#)

7 This is set out in Schedule 3 of The Public Contracts Regulations 2015. [Available online](#)

8 The Public Contracts Regulations 2015: Guidance on the new light touch regime for health, social, education and certain other service contracts, Crown Commercial Service, 2015. [Available online](#)

9 The Public Contracts Regulations 2015: Guidance on the new light touch regime, Crown Commercial Service, 2015. [Available online.](#)

2.5 The LTR was introduced specifically to give procurement teams flexibility to accommodate for the special characteristics of public value services, such as specialist domestic abuse services. It gives public authorities considerable latitude to determine the most appropriate way to deliver vital services. The same principles for the LTT will carry forward in the procurement bill.

“The Crown Commercial Service recommends that authorities take advantage of the various flexibilities where possible, to maximise the possible benefits from the lighter rules regime, such as reduced process burdens on procurers and suppliers.” [10]

3. Reserved contracts for public benefit providers

3.1 There are some types of public services where alternatives to working with a specific, purpose-driven provider, to deliver a specific service, would be harmful or significantly less beneficial to service providers. For example, an **organisation dedicated to supporting disabled survivors of domestic abuse.**

3.2 The Regulations recognise this, allowing the use of reserved contracts, **[11]** whereby invitations to tender for certain service contracts **[12]** can be limited to organisations which: have a social purpose; are non-profit distributing; and have significant employee participation. **[13]** Commissioners can set a criteria for organisations to qualify to participate in the tendering process, but should still operate under the Light Touch Regime, meaning that non-prescriptive and flexible approaches should still be pursued. **[14]**

3.3 The Home Office VAWG Commissioning Toolkit also recognises this, emphasising expectations for **[15]:**

“...the best areas to commission out their services to specialist third sector providers – including services run by and for marginalised communities – to make use of their expertise and to best support survivors.”

3.4 Under Regulation 20, there is also a specific provision that allows organisations with workforces made-up substantially of disadvantaged individuals to be particularly promoted, on the basis that the social policy of supporting the employment of such individuals is a legitimate priority. **[16]**

10 Guidance on the new light touch regime for health, social, education and certain other service contracts, 2015. [Available online](#)

11 Regulation 77. The Public Contracts Regulations 2015: [Available online](#).

12 The list of relevant Common Procurement Vocabulary (CPV) codes of which services can use Reserved Contracts (77 (2)), will be revised shortly following the Procurement Act.

13 The Regulations have a very specific definition of this 77 (3). It would cover most voluntary organisations with missions relevant to the contract's work (such as specialist refuges).

14 Pg 15, The Public Contracts Regulations 2015: Guidance on the new light touch regime for health, social, education and certain other service contracts, Crown Commercial Service, 2015. [Available online](#).

15 Home Office, Violence against women and girls services: commissioning toolkit, 2022. Available [online](#).

16 Regulation 20. The Public Contracts Regulations 2015: [Available online](#).

4. Service contract with a unique provider and precautionary market-testing

4.1 Under Regulation 40, **[17]** councils are required to 'conduct preliminary market consultations' for public service specifications which should:

1. be based on full community and expert provider consultation;
2. be focused on actual need, understood through consultation;
3. identify resources available to meet the need and develop the service;
4. provide for commissioner and provider collaboration and communication focused on ensuring the need is met in the best way possible.

4.2 It is likely therefore, to be some occasions where a provider has **a unique solution to address particular needs, and where they, and they only**, have the means to deliver the requirements of the commissioner.

4.3 In this scenario, the regulations acknowledge there is no point in attempting to create an 'artificial' competition, where there is a clear provider who is best-equipped to deliver the service, and where there is transparency around costs. Under Regulation 32, public authorities may enter into a direct service contract with a specialist domestic abuse service, on the principle, and as long as it can be made clear, that there are, in reality, no market competitors for the defined specification. **[18]**

4.4 Public authorities may, understandably, be concerned in such cases about being exposed to challenge and decide that streamlined market-testing procurement procedures may provide appropriate security. In these circumstances, the commissioner can put out a Voluntary Ex-Ante Transparency Notice (VEAT). This notifies the market of the intention to award a contract to a certain provider, without competition. If there is no response from any organisation claiming to be a potential competitor, for the specification, within 15 days, the proposed contract may proceed.

4.5 The same effect may be achieved by what is known as a 'Restricted Procedure', dividing a conventional tender procedure into a first stage, inviting expressions of interest, in relation to the specification and a second competitive tender stage. If only one satisfactory expression of interest is received, at the first stage, for example from a local specialist domestic abuse charity, then there is no need to proceed to the second stage. **[19]**

17 Regulation 40. The Public Contracts Regulations 2015: [Available online.](#)

18 This is what is called a 'Negotiated Procedure', under Regulation 32. The Public Contracts Regulations 2015: [Available online.](#)

19 Regulation 28. The Public Contracts Regulations 2015: [Available online.](#)

5. Innovation Partnership, Community Partnership, and Alliance Contracts

5.1 The 2015 Procurement Regulations introduced the ‘Innovation Partnership’ [20] procedure, providing a legitimate mechanism for partnership-style collaboration between public authorities and specialist providers to co-design innovative services or partnership work. With this process, what a commissioner is procuring is essentially the design and development process that leads to the final specification – and at the same time, the delivery of that specification – all under one collective provider. The process consists of the following steps:

5.1.1 The competitive phase occurs at the very beginning of the procedure, when the most suitable partner(s) are selected.

5.1.2 The partner(s) will develop the new solution, tailored to the requirements of an identified need, in collaboration with the contracting authority. This research and development phase can be divided into several stages.

5.1.3 The partner(s) will then provide the final solution (commercial phase).

5.2 This is a procedure especially suitable for collaborative, long-term relationships between core specialist domestic abuse charities and local authorities, or where stronger multi-agency partnership between different public authorities is needed.

5.3 Statutory guidance for Part 4 of the Domestic Abuse Act 2021 recognises the specific importance of collaborative approaches in domestic abuse commissioning, requiring local authorities to set up a Local Domestic Abuse Partnership Board, with representation from domestic abuse and charities and ‘by and for’ services required to facilitate collaborative commissioning. The guidance states that tier one local authorities “should work closely with local domestic abuse services, in particular drawing on their expertise and experience of supporting victims, including children, to further understand the varying needs and how best to address them” and that “it is particularly important to include specialist ‘by and for’ domestic abuse organisations working with or providing dedicated support to victims with relevant protected characteristics.” [21]

20 Regulation 31. The Public Contracts Regulations 2015: [Available online.](#)

21 B2.9 and B2.10, Department for Levelling Up, Housing and Communities, Statutory Guidance: Delivery of Support to Victims of Domestic Abuse in Domestic Abuse Safe Accommodation, 2021. [Available Online.](#)

6. Public Value Imperatives, Open Book and mainstream procurement

6.1 For services like domestic abuse or VAWG support, which demand dedicated, expert and purpose-driven delivery, it is also possible, and perfectly legitimate, to employ Social Value Imperatives as prerequisites for commissioning of certain services.

6.2 A well-conceived and seriously applied set of Social Value Imperatives will pre-qualify suppliers for public sector service provision by requiring through specific demands and analytical assessment of suppliers' suitability to respond to those demands. These can include: being evidently purpose-driven; having necessary local community knowledge, engagement and trust; and having personnel recruited on the basis of personal dedication to purpose.

6.3 Government guidance states that commissioners of VAWG services should **'make use of local, services already in place...[that] will likely have developed a response to the particular needs of the area and have specialist knowledge and expertise.'** [22] Commissioners may therefore, legitimately, specify essential requirements to qualify for domestic abuse contracts – such as, being a specialist and/or 'by and for' domestic abuse service. In some areas, this may narrow the field of potential providers, even to a single qualified provider - where there is one specialist domestic abuse service operating in that local area.

6.4 This concept can be further developed through a collaborative approach to 'Value for Money' provision. A purpose-driven provider may be recognised as one that is prepared to operate on the "Open Book" principle, so that all resources and costs relating to service provision are transparent within the public service contractual relationship, allowing public benefit collaboration in relation to resource allocation and service pricing. Any mainstream procurement procedure could, in principle, apply the principles of a such a strategic specification, pre-requisite Public Value Imperatives and Open Book arrangements.

7. Community asset transfer

7.1 Public authorities have specific powers to transfer buildings and property representing “community assets”, or with potential to be used as community assets to core, local anchor institutions, such as community charities.

7.2 A public authority and public benefit organisations may collaborate to bring such assets into productive community use.

7.3 This may be particularly suitable for meeting accommodation-based support needs, including under Part 4 of the Domestic Abuse Act.



Commissioning obligations, beyond procurement

We know that some local authorities will be less willing than others to listen, engage and accept alternative approaches to competitive, mainstream procurement. Despite statutory guidance explicitly directing public authorities away from competitive and mainstream procurement, [23] some commissioners may be concerned about exposure to challenges where discretion and flexibility is used. However, commissioners should also be aware of their legal obligations beyond the Procurement Act, such as under the Equality Act, and challenges they may be faced with through not fulfilling such legal duties.

This section also articulates the legal rationale for challenging common harmful practices in domestic abuse commissioning.

8. The Equality Act and Public Sector Equality Duty

8.1 It is well-documented that specialist 'by and for' services are disproportionately underfunded, and **5 times less likely** to receive statutory funding than other types of services. [24] This is expressly acknowledged in the Home Office's VAWG Commissioning Toolkit, which states "specialist providers for black minority ethnic women and children tend to be smaller and unable to compete." [25]

8.2 Under the Public Sector Equality Duty (PSED) in the Equality Act, local authorities must have due regard to the need to eliminate discrimination and promote equality when exercising their functions – including the provision of services. [26] The PSED is therefore central to commissioning decisions affecting specialist women's domestic abuse services and those led 'by and for' Black and minoritised women.

8.3 The Equality Act therefore raises a clear potential basis of assertive challenge to competitive tendering processes which automatically disadvantage specialist women's and 'by and for' services, and result in a failure to provide services which meet the needs of groups that share a protected characteristic.

23 A4.11, Department for Levelling Up, Housing and Communities, Statutory Guidance: Delivery of Support to Victims of Domestic Abuse in Domestic Abuse Safe Accommodation, 2021. [Available Online.](#)

24 Domestic Abuse Commissioner's Office, Mapping of Domestic Abuse Services across England & Wales. 2022. [Available online.](#)

25 Page 41. Home Office VAWG Commissioning Toolkit. [Available online.](#)

26 Public Sector Equality Duty: Guidance for Public Authorities. 2023. [Available online.](#)

9. Social Value Act

9.1 It has become common practice, in having regard for the Public Services (Social Value) Act 2013, for local authorities to allocate around 5-10% of a tender marking assessment to social value. However, the term is often conflated with the commercially-based idea of incidental “added value” commitments or benefits which are provided alongside a principal service.

9.2 Whilst it makes sense for commissioners to think about the added social value secured through the services they buy, a voluntary organisation, such a specialist domestic abuse charity, is dedicated 100% to social value. The concept of “added value” therefore bears little relevance to specialist domestic abuse services, for whom social value is at their core. Yet perversely, specialist services often find themselves marked down on “added value/social value” because they may not be delivering activities which align to the local authorities social value priorities.

9.3 Given the inherent social value provided through their life-saving services, the Social Value Act should ‘provide a source of competitive advantage’ for smaller specialist domestic abuse services. **[27]**

10. Capacity building

10.1 The purpose of public service commissioning is to respond to a specific need and, through maximising and utilising available resources, ensure the need can be optimally met, for all those with the need, to the highest possible quality, with consistency, sustainability, improvement, and prevention, reduction and ultimate elimination of that need.

10.2 Therefore, in circumstances where specialist services are unable to meet demand because of funding and resource constraints, these limitations should not work against them in competitive tendering processes. Rather, a public authority can reasonably conclude that existing services, do not meet strategic and/or Domestic Abuse Act requirements, and choose to actively promote and support the enhancement of local service infrastructure and capacity. The Home Office VAWG Commissioning Toolkit advises commissioners that they “nurture existing services on an ongoing basis not simply at the point of commissioning” and ensure that “the nature, length and size of the agreement should preserve the specialism within the sector and their presence within the community”. **[28]**

27 Cabinet Office, Social Value Act Review, 2015. [Available online.](#)

28 Home Office, Violence against women and girls services: commissioning toolkit, 2022. [Available online.](#)

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