

Replacing CCT with 'best value'

by Christopher Bovis



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Following the demise of the compulsory competitive tendering regime, Professor Bovis assesses the concept of best value in delivering public services. He compares it with its predecessor and elaborates on the interrelation between best value and related regimes of public sector management.

According to its pre-election manifesto, the Labour administration has announced its intention to modernise the function of Local Government in England and Wales (see *Modern Local Government In Touch with the People*, DETR 1998) and in particular to evolutionise the system for dispersing public services by local authorities and other public bodies (see *Modernising Local Government – Improving Local Services Through Best Value*, DETR 1998). The ill-fated compulsory competitive tendering (CCT) regime is now due for replacement with a new system in public sector management: 'the best value' (see the Local Government Bill 1998).

The traditional way in which local authorities and other public bodies have delivered public services was based upon 'benchmarking competition'. By virtue of the *Local Government, Planning and Land Act 1980* (Part III), the *Local Government Act 1988* (Part I), and certain provisions of the *Local Government Act 1992*, a number of public bodies and organisations – including local government, police and fire authorities – have been required to submit specified activities to compulsory competitive tendering. Such an approach was deemed necessary in order to safeguard openness and transparency in the delivery of public services, but primarily to achieve savings for the public purse. It should be mentioned here that along these lines the European institutions have already subjected public purchasing (i.e. the procurement by central and local government, other public bodies and utilities) to a rigorously competitive regime specified in the EU public procurement directives for public supplies, works and services contracts (respectively, Directive 93/36, OJ 1993 L199/1; Directive 93/37, OJ 1993 L199/54; and Directive 92/50, OJ 1992 L209/1).

Unfortunately, CCT fell short of the envisaged expectations and attracted widespread dissatisfaction from both the private and public sectors. The CCT became a self-perpetuating excuse for the poor quality of services delivered by local authorities and was deemed responsible for alienating local government from the public.

But who is to blame for the poor quality results in the delivery of public services? A management system such as CCT itself or the way such a system has been used by local authorities and

other public bodies? Irrespective of who is to bear the responsibility, CCT was bound to have a head-on collision with legal and socio-economic obstacles which entered its course. Although based on a well-worn and tried liberal economic model, the compulsory competitive tendering regime was used in order to maintain practically unsustainable budgetary allocations in local government spending, rather than to serve as a tool of modern, effective and efficient public sector management.

WHERE DID CCT GO WRONG?

Let us first, at least, acknowledge the merits of a system such as the CCT in the delivery of public services. Compulsory competitive tendering, by definition, introduces the element of *price benchmarking* in the process which, in theory, would produce two effects:

- (1) the achievement of savings for the public sector; and
- (2) the introduction of rationalisation dynamics for the industry.

On the other hand, competitive tendering has been seen as a safeguard for public accountability and a guarantee for openness and transparency in public procurement. The European public procurement regime is being based upon such premises with undeniably successful results.

Unfortunately, the above benefits have often been counterbalanced by a number of disadvantages attributed primarily to the practices of conducting competitive tendering and, to a lesser extent, to the system itself. CCT eventually became the vehicle to deliver public services in an era of strict budgetary constraints imposed by central government upon local authorities and the envisaged savings for the public sector have often materialised at the expense of the quality of public services.

Financial constraints

The financial constraints in local authority spending inevitably resulted in a rigid application of the CCT regime and the arrival

of a 'grocer's culture' in the delivery of public services. Local authorities disregarded the considerable flexibility built into the system, which relates predominately to the award criteria available to them, and awarded public services contracts solely by reference to price considerations. The award criteria include either the *lowest offer* or the *most economically advantageous one*, thus providing local authorities with a great deal of discretion in considering price and/or quality factors, when selecting their contractors. However, the delivery of public services under the CCT regime has been underpinned, in the vast majority of cases, by price considerations, thus resulting in the award of public contracts to the lowest price tenderer.

The myopic interpretation of the CCT regime and its intended objectives as well as the 'lowest offer mentality' have often been ascribed to the budgetary framework imposed on local authorities by central government. Nevertheless, this argument does not hold water when one considers that intelligent procurement systems such as partnering and public/private sector partnerships, as well as the availability of the award criteria described above, would normally stretch public funds when applied properly. So any shortfall of centrally originated funds could be tackled by maximising the flexibility of the system. Local authorities often failed to use all the means available to them.

Strictly speaking, it is the lowest offer mentality that should be attributed with the adverse effects of CCT and the deterioration of the quality of the services. The award of public contracts to the lowest offer rather than the most economically advantageous has resulted in disproportionate and inefficient risk allocation arrangements between the public and private sectors, which then in turn revealed poor end results and poor value for money to the public. The lowest offer in a public contract would normally reflect a relatively risk-free arrangement between the parties.

The compulsion element

The *compulsion* element in competitive tendering has also created a hostile environment between the public and private sectors which is often reflected in the delivery of public services and deprives them of significant elements such as quality and innovation. The contractual relations between public authorities and the private sector through the compulsory competitive tendering have often been criticised for not giving the best value for money. The criticism has been mainly directed towards the cyclical demand structures of the procurement process, which often impose unnecessarily repetitive functions (particularly the advertisement, selection and qualification processes) and can be cost ineffective for local authorities.

ACQUIRED RIGHTS DIRECTIVE

Finally, a significant blow in the demise of compulsory competitive tendering was delivered through the application of the acquired rights directive (Directive 77/187 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ 1977 L61/26), as implemented by the TUPE regulations (*Transfer of Undertakings (Protection of Employment) Regulations 1981*

(SI 1981/1794)). Its relevance upon compulsory competitive tendering became clear when local authorities started testing the market in an attempt to define whether the provision of works or services from a commercial operator could be cheaper than that from the in-house team.

The notion of contracting out conceptualised an exercise which aimed at achieving potential savings and efficiency gains for contracting authorities by subjecting the provision of services to a compulsory competitive tendering regime. The application of the transfer of undertakings rules in contracting out cases had two important consequences for CCT: first, that the external bidder had to engage the local authority's former employees on the same conditions as they enjoyed under the authority itself; secondly, that the entire contracting out exercise, when filtered through the transfer of undertakings rules would, by changing the conditions of the workforce, render the achievement of savings for local authorities virtually impossible. The private sector could not realistically outprice the in-house team of a local authority when it was bound to observe constraints imposed by the transfer of undertakings rules. Thus, potential savings could not be materialised if labour as a factor of production (the employees of a contacting authority in a transfer of undertakings scenario) was to remain intact. The application of the transfer of undertakings rules had a catalyst effect upon the realisation that the objectives of the CCT regime were in reality incompatible and mutually exclusive with those stipulated in the acquired rights directive and TUPE regulations.

on the internet

<http://www.local-regions.detr.gov.uk/lgwp/index.htm>

The following documents may be found on the web: *Modern Local Government In Touch with the People*, DETR 1998, and *Modernising Local Government - Improving Local Services Through Best Value*, DETR 1998, at <http://www.local.doe.gov.uk/cct/improvbv.htm>.

THE BEST VALUE REGIME: AN OVERVIEW

The abolition of CCT and its replacement with the 'best value' regime as the management system available to local authorities and other public bodies for the delivery of public services should modernise, according to the government's intentions, the function of local government and improve the quality of its deliverables to the public. Best value is defined as:

'[a system of] ... securing continuous improvement in the exercise of all functions undertaken by a public authority, whether statutory or not, having regard to a combination of economy, efficiency and effectiveness.'

Best value pledges to provide genuine value for money for the public sector. It intends to deliver target-driven results in public services which will be quality-benchmarked rather than price-benchmarked and subject to external controls. Best value will capitalise upon the consensus amongst the stakeholders (local authorities, service users, private sector). Competitiveness, however, would be expected to play a major role in the new regime, as it is the prerequisite for efficiency and effectiveness in the delivery of public services.

The much eulogised best value regime intends to emulate intelligent procurement systems such as partnering,

public/private sector partnerships and framework agreements which are the norm in the private sector and would normally stretch public funds. The main objective of such procurement systems and methods is to create a co-operative rather than an adversarial relationship between the public and private sectors by breaking the sequential nature of tendering and establishing a continuous delivery frame, within which quality, innovation, scale economies, savings and overall value for money can be achieved. Such arrangements would result in contractual relationships between the public and private sectors which are no longer the normal project-by-project arrangement of competitive tendering. It is expected that best value will remove the costly, wasteful, repetitive and antagonistic practices of competitive tendering, by establishing a relationship which introduces numerous beneficial prospects.

Best value places emphasis on qualitative rather than quantitative considerations and it vouches to deliver public services in an effective and economic way, by setting performance and efficiency targets in advance. Best value is determined to maximise the flexibility available to local authorities by introducing elements of advanced supply-chain management systems and procurement practices which are common in the private sector. For example, under best value the compulsion element of tendering for public services will be abolished and replaced with a selection process that can provide for a balance between quality and price. Such a system could result in savings which amount to up to 2% for local authorities and at the same time improve the quality of the deliverables.

BEST VALUE IN DETAIL

The best value regime imposes a statutory duty upon local authorities and other public bodies to deliver public services in an effective, efficient and economic way. Such a duty would probably have a complementary effect to the fiduciary duty applicable to local authorities' resources management. In fact it could be argued that it takes public sector management one step further as it introduces a detailed process in the dispersement of expenditure with regard to public services. Thus, accountability gains and, inevitably, accessibility to justice would result from the following key features:

- (1) consultation between local authorities and all the relevant stakeholders regarding a wider range of public services than those covered by the best value predecessor (the CCT regime). The time-frame, thrust and effect of the above consultation would build up a *corporate view* of the deliverable services, in the sense that local authorities would need to demonstrate their performance on a cost-benefit basis;
- (2) establishment of performance and efficiency targets for public services. The corporate view of local authorities in relation to the delivery of public services should be both quality and price-benchmarked by reference to centrally or locally prescribed performance and efficiency targets;
- (3) quality control of public services delivered by local authorities through external government organisations (e.g. the Audit Commission) and certification of such monitoring processes;
- (4) reservation of powers for the Secretary of State to rectify failure in the delivery of public services by local authorities.

Such powers represent the exception rather than the norm and provide for the Secretary of State the authority to intervene directly in a local authority and substitute its decision making, or even take control over the running and management of an authority which has failed to deliver best value. It should be mentioned here that such 'absolute' powers would follow a layer of preliminary intervention by the Audit Commission and the Local Government Association, where rectification measures should first be exhausted.

The procedural delivery of best value is not yet clearly defined, although it is expected that it will unfold in four stages. Local authorities would need to:

- (1) determine whether a particular service is required and the relevant form for its provision;
- (2) compare performances of that service amongst other authorities or centrally prescribed targets, taking into account all relevant indicators and the views of end users and suppliers;
- (3) consult with all the relevant stakeholders (local taxpayers, service users and the wider business community) in setting specific performance and efficiency targets;
- (4) demonstrate the optimal procedure for delivering the service to the public through a competitive process that guarantees openness, transparency and public accountability.

The procedural delivery of the best value regime reveals, to a large extent, striking similarities with the procedural delivery of the privately-financed projects through the Private Finance Initiative, where public authorities need to demonstrate, by using the so-called 'public sector comparators', the optimal way to deliver a project and finance its operation. Public sector comparators are indices which demonstrate value for money in public procurement by benchmarking variable parameters relating to qualitative considerations of a public contract (e.g. technical merit, quality of deliverables, aesthetic reasons, maintenance facilities and warranties) against its pricing.

FURTHER READING

See Issue 13 (January 1999), p. 7, for an article by Professor Bovis on the PFI.

THE WAY AHEAD

It is expected that best value would certainly make an impact upon the system local authorities use for delivering public services. However, there are many uncertainties in relation to the thrust of best value, which have not yet been addressed by the government. The proposal was rushed through at the last minute in the Queen's Speech in December 1998 and both the public and private sectors need to see a detailed and concrete framework of rights and obligations arising out of the new regime. In particular, the forthcoming legislation, currently before Parliament for consideration, would benefit from addressing the following issues.

COMPETITIVENESS AND BEST VALUE

The detailed procedural delivery and the process of competitiveness of best value should be carefully set out. In legal

terms, what the government has so far produced, in relation to best value, amounts to a broad agenda of aims and objectives, targets and the involvement of the relevant stakeholders. The CCT regime which best value now replaces had laid down thorough processes and procedures concerning selection and award of public services contracts. It had also stipulated the necessary requirements local authorities and other public bodies needed to take to ensure high levels of competitiveness and transparency in contracting out exercises. Competitiveness as a component of best value should be better addressed in great detail. The reason is that local authorities have regarded it in the past as a threat to their vested interests. Competitiveness in best value would simply mean the degree and level to which local authorities and other public bodies are prepared to expose in-house teams to offers from external providers. Bearing in mind that there will be no element of compulsion, one could foresee some dangers in the implementation of best value by local authorities, although the Secretary of State has reserved absolute powers over the running and management of a local authority that might persistently fail to meet best value targets by avoiding competition.

on the internet

<http://www.parliament.uk/pa/pabills.htm>

The full text of the Local Government Bill, as amended in Committee in the House of Commons in February 1998, is available at the above website.

THE EU PROCUREMENT RULES AND BEST VALUE

The relation and compatibility of best value with the EU procurement directives needs to be determined. Best value will certainly run parallel with the public service directive (Directive 92/50). However, it is not clear yet whether the two regimes are compatible or mutually exclusive, as the procedural delivery of best value would primarily determine the thrust and impact of the European regime upon it. The European public services regime subjects the award of public services contracts above a certain value (€200k) to a rigorous regime of publicity, selection and qualification procedures and award criteria, primarily with a view to enhancing competition of services providers within the European common market and to eliminating discrimination on grounds of nationality. It could well be argued that the best value regime and the EU public services directive represent two different tiers in the delivery of public services by public authorities, tiers which focus at distinctive geographical markets (domestic and transnational respectively). However, the need for compatibility between them is eminent, given the fact that domestic regimes which appear inconsistent with European standards represent actual non-tariff barriers for the European integration process. Thus, the application of the best value should not constitute an evasive practice of the European public procurement regime.

TRANSFER OF UNDERTAKINGS AND BEST VALUE

The impact and effect of the acquired rights directive (Directive 77/187) and the TUPE regulations upon best value are currently under investigation and should be clearly defined.

The application of the transfer of undertakings rules in contracting-out cases resulted in a considerable rethinking of compulsory competitive tendering, particularly in the delivery of public services, to the extent that the contradiction and mutual exclusivity of the two regimes has led to the demise of the CCT regime by rendering its purpose and results inoperable. The best value regime seems to epitomise the concerns about employee protection in the event of a transfer of an undertaking relating to the provision of public services. However, the forthcoming legislation on best value (*Local Government Act 1998*) should not present local authorities with painful policy choices (the protection of employees or the achievement of savings) like its predecessor did. The choice of policies like those resulted, inevitably, in a heavy abuse of the CCT regime.

THE PRIVATE FINANCE INITIATIVE AND BEST VALUE

A commitment, in principle, to the benefits of the Private Finance Initiative (PFI) was demonstrated by the government by the adoption of specific legislation (the *National Health Service (Private Finance) Act 1997* and the *Local Government Act (Contracts) 1997*) which enables local authorities and other public bodies to introduce the private sector as a partner, rather than as a contractor, in the process of delivering public services. Best value is, in theory, concerned with qualitative rather than quantitative elements in public services and as such it has many attributes in common with the PFI, which envisages the transplant of benefits of private entrepreneurship into the process of delivering public services.

CONCLUSIONS

The best value initiative can be seen as a genuine attempt to improve the delivery and increase the quality of public services local authorities and other public bodies deliver. It is a moderate and non-confrontational system which is based upon a balance between quality and price of public services. Best value would result in best procurement practice for public services by elevating public consultation and quality benchmarking as requisite criteria for genuine value for money in the delivery of public services.

However, there are certain dangers ahead, predominately due to the option available to local authorities to deliver public services without necessarily having recourse to a competition process. Case law and litigation have proved that the best value predecessor (the CCT) was heavily abused, notwithstanding the fact that the principles of transparency and competition were among its strongest points. Best value, as a replacement system needs to be free from any ideological, protectionist and preferential practices that haunted its predecessor. Local authorities and other public bodies need to avoid as much as possible the 'lowest offer' way of thinking when they implement best value. To use one of my favourite analogies, one cannot become a better driver by simply changing one's car! 🚗

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