

*Child Welfare Privatization Initiatives—*

Assessing Their Implications for the Child Welfare Field and for Federal  
Child Welfare Programs

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## **Topical Paper #5**

# **Preparing Effective Contracts in Privatized Child Welfare Systems**

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<http://www.uky.edu/SocialWork/qicpcw/> .

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## **INTRODUCTION**

Child welfare privatization is accomplished through contractual agreements between local or state public agencies and private providers. Contracts document an understanding about the service the contractor will offer, the results expected, and the cost. Developing effective contracts is a difficult task and the actual writing of the contract is the last step in a series of steps to procure services. Studies on child welfare privatization initiatives (GAO, 1997; Freundlich & Gerstenzang, 2003) have identified several shortcomings in service contracts reviewed, including a lack of clarity and detail about a range of direct services and activities or, the reverse, excessive detail about requirements that reduce the flexibility and creativity often expected from privatization initiatives.

This paper places current contracting issues in a historical context and describes the many important decisions that must be made carefully, and when possible inclusively, with the provider community during the procurement or contract renewal process. The paper provides examples of some of the decisions that must be made during pre-procurement planning to determine basic program components and describes some of the lessons learned about preparing solicitations, selecting bidders, and executing contracts.

An overarching theme of this and other papers in the series is partnership. When public agencies contract for services, they are seeking one or more partners to share the risks, rewards, and responsibilities of delivering services to children and families in the child welfare system. To the extent allowed by state procurement rules, a collaborative public-private planning process can ensure that consensus is reached on the broad goals and expectations of the procurement, paving the way for explicit, fairly negotiated, enforceable, and outcome-based contracts.

### **Purpose of this Project**

This is the fifth of six papers in a technical assistance series. The project was funded in 2006 by the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services (DHHS, ASPE). The paper series is designed to provide information to state and local child welfare administrators who are considering or implementing privatization reforms. For the purpose of this paper series, “privatization” is defined as the contracting out of the case management function with the result that contractors make the day-to-day decisions regarding the child and family’s case. Typically, such decisions are subject to public agency and court review and approval, either at periodic intervals or at key points during the case.

This paper builds on information already presented in other papers in this series and makes reference to the other papers throughout. These are available online as they are completed at <http://aspe.hhs.gov/hsp/07/CWPI/>.

- **Assessing Site Readiness: Considerations about Transitioning to a Privatized Child Welfare System**
- **Program and Fiscal Design Elements of Child Welfare Privatization Initiatives**
- **Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems**
- **Evaluating Privatized Child Welfare Programs: A Guide for Program Managers**

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- **Ensuring Quality in Contracted Child Welfare Services**

This paper series incorporates research conducted under the Quality Improvement Center on the Privatization of Child Welfare Services (QIC PCW), funded in 2005 by the Children's Bureau, U.S. Department of Health and Human Services. It also draws from the research on privatization in other, closely related social services. Additional information for this paper comes from the field experience and from telephone discussions with state and county child welfare administrators and private providers.

### **History of Child Welfare Contracting**

State and local governments have paid private, voluntary agencies to provide child welfare services since the early 1800s (Rosenthal, 2000). Today, most public child welfare agencies could not offer a full array of services without the private sector. For example, a report by the U.S. Department of Health and Human Services, based upon results of a survey of public child welfare agencies, found that 58 percent of all family preservation services, 42 percent of all residential treatment, and 52 percent of case management services for adoption are contracted out to private agencies (DHHS, 2001).

Until the mid-1990s, public child welfare agencies used noncompetitive, quasi-grant arrangements to purchase services from private, typically nonprofit, agencies. Since that time, practice, policy, and fiscal considerations have set the stage for the emergence of a variety of new types of contractual relationships, many of them competitive and performance-based. In contrast to earlier contracts in which private agencies simply agreed to serve a certain number of children or families in return for payment based upon a pre-determined rate, current contracts often include performance targets and fiscal incentives or disincentives tied to performance standards.

The concept of performance based contracting (PBC) was facilitated by the federal government in 1991 when the Office of Federal Procurement Policy in the Office of Management and Budget (the Office) issued a policy letter on service contracting that emphasized the use of performance requirements and quality standards in defining contract requirements, source selection, and quality assurance. In 1997, the requirement was incorporated into the Federal Acquisition Regulations. In 1998, the Office released a Guide to Best Practices for Performance Based Service Contracting, and in 2004 the Office replaced the 1998 guide with the Seven Steps to Performance Based Service Acquisition, which provides an overview of the contracting process and essential contract elements (FCS Group, 2005).

By the late 1990s, some states had mandated the use of performance based contracts for all purchased services, and many other states had initiated other contract reform efforts (FCS Group, 2005). Today, child welfare service contracts within the same state can differ from one jurisdiction to another in significant ways. In addition to targeting different families, requiring different services, establishing different performance expectations and using different payment methods, they can differ in the degree of competition for contract awards and the level of negotiation of final terms and conditions.

In addition to variability in the types of contracts used, there is also variability in the quality of contracts. Research on child welfare privatization initiatives has found that, in many cases, contracts do not always have clearly defined expectations regarding the services to be provided, the target population to be served, the expected results, and the means by which the services will be funded. For instance, a recent analysis of jurisdictions that had privatized one or more components of the child welfare system found that contracts were often extremely lengthy, unduly complicated, and overly focused on details

that bore little relationship to the critical issues that needed to be addressed. In some cases, contractual expectations were ambiguous. The contracts combined vague service obligations, poorly defined outcomes and performance measures, and poorly specified roles and responsibilities of public and private agency workers. The result in many initiatives was that an inexperienced purchasing agent did not receive the expected services, which in turn, placed the provider agencies at some level of financial risk due to their poor performance (GAO, 1997; Freundlich & Gerstenzang, 2003).

The remainder of this paper describes how contracts are created and provides insights from public and private agency officials that have engaged in this work.

### **PRE-PROCUREMENT PLANNING**

#### **Program and Payment Models and Contracting Mechanism**

The quality of the contract can depend, in part, upon how the public agency structures the planning process and reaches consensus on programmatic and fiscal issues. Either through a collaborative contract planning process or behind closed doors, public agencies must create a structure and assign responsibility for fleshing out the scope of work and establishing performance and outcome measures and payment arrangements. Solicitation documents and final contracts cannot be written until there is clarity about:

- The services that will be provided
- The children and families that will be served
- The outcomes, performance standards, and performance measures used
- The fiscal model and payment provisions
- The roles of the public and private agency workers and other stakeholders<sup>1</sup>
- How the contract will be monitored once it is executed.

Research suggests that discussions between public and private agencies are important in building consensus about the goals of a new procurement and/or needed changes in existing contracts (Kahn & Kamerman, 1999; McCullough & Schmitt, 2003; Figgs & Ashlock, 2001). Furthermore, if an implicit or explicit goal of introducing a new contract is to foster a stronger public-private partnership, private agencies should help shape the terms and conditions under which they will be expected to operate.

While collaborative planning may be desirable, in reality, a state's procurement rules may restrict this process. The choices for planning and executing contracts may also be affected by the need for competition -- either as directed by a state's procurement policy or because a state or jurisdiction wants to reduce the number of providers delivering a service. If competitive bidding is required (or sought out) to meet design goals or mandates, state procurement rules and policies may make it difficult to ensure broad-based input and buy-in on model design, service delivery, and payment methods. In some states, administrators are allowed to hold meetings to discuss proposed contracts with private agencies only if prior notice was given to all eligible bidders and if the contracting

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<sup>1</sup> For a more detailed discussion about roles and responsibilities, see Issue Paper #3: Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems.

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officer is present to ensure that the dialogue does not violate procurement rules regarding fair competition.

In those instances when the public agency is not required to competitively procure services and the overall design does not require the public agency to limit the number of contracts awarded, private providers can be engaged in early and sustained dialogue — essentially collaborating in the design of all elements that will ultimately be included in a contract. This is the model that Illinois used in developing its Performance Based Contracts (see textbox). Illinois learned from its experience in 1997 procuring foster care services that the best way to ensure a shared vision of success (and a shared approach to achieving it) was to engage the private provider community and other stakeholders, including the courts, prior to contract development and work out program and implementation issues together (McEwen, 2006).

In 2007, Illinois significantly expanded stakeholder involvement in planning for the expansion of performance based contracts for independent living, transitional living, and residential care. Workgroups held more than 75 meetings to work on the design during the first year of contract development. They performed the following tasks:

- Analyzed the service delivery in residential and independent living, and transitional living programs (ILO/TLP)
- Reviewed available data and research pertaining to these programs
- Identified evidence-informed practices
- Determined gaps in existing data, and future needs for data collection
- Engaged national and local experts to provide technical assistance
- Discussed performance indicators and the data used to measure them
- Reached consensus on the proposed performance indicators
- Developed fiscal incentives
- Developed a preliminary risk adjustment model (Kearney & McEwen, 2007).

Rather than issuing a competitive Request for Proposal (RFP) for agencies to participate in the demonstration project, Illinois simply added contract addenda containing the new performance measures to existing residential and ILO/TLP contracts. Providers agreed to cooperate in all data collection, evaluation, and training efforts. The Project Steering Committee, the CWAC Subcommittees, and Workgroups continue to meet monthly to evaluate performance data. Modifications, if any are necessary, will be incorporated into state fiscal year 2008-2009 contracts.

### **Illinois Child Welfare Advisory Committee**

In 1995, following a gubernatorial directive, the Illinois Department of Children and Family Services established the Child Welfare Advisory Committee (CWAC) to advise the Department on programmatic and budgetary matters related to providing or purchasing child welfare services. In 1997, a Foster Care Infrastructure Work Group comprised of nonprofit foster care provider agencies with Purchase of Service (POS) contracts was created to craft, propose and implement strategies for improving system performance (McEwen, 2006).

In 2007 the CWAC helped design and develop proposed performance outcome measures, fiscal incentives, and risk adjustment strategies for the state's new performance based contracts for residential care, independent living, and transitional living programs.

When Philadelphia decided to adapt the Illinois performance based contracting (PBC) model, a similar collaborative planning process was developed. Between early 2002 and early 2003, a PBC Design Group which included the County child welfare agency, the provider agencies, the city law department, and outside experts, developed the basic PBC contract. The contract included the performance targets, requirements for care and services, a redesigned referral process, provisions regarding aftercare and reentry, and other matters. After PBC “went live” for the 27 largest provider agencies in March 2003, the Design Group continued as a Steering Group that meets monthly to discuss systemic barriers to permanency, refine the basic PBC performance measures and contract to accommodate unforeseen circumstances, and consider other issues affecting the foster care system (Hollingsworth and Roth, 2006).

In addition to making critical design decisions, public agencies must also decide on general terms of the solicitation—such as determining eligible bidders, the number and types of contracts that will be awarded, the implementation process, and the duration of the contracts.<sup>2</sup>

### **Eligible Bidders**

Public agencies must decide who they want for potential partners. Will only nonprofit agencies be allowed to compete, or will public and for-profit companies be allowed and encouraged to bid as well? This decision may affect the way the solicitation is written and how the review process is conducted. For instance, if public agencies are allowed to bid on contracts, it will be necessary to have an independent third party, such as a public board or state procurement office, review the bids. In addition, rigorous cost-accounting standards will need to be incorporated to ensure that there are fair comparisons across public and private agencies (DHHS, 1997; Cooper, 2003).

Public purchasers must also recognize that for-profit and nonprofit agencies bring different strengths to the table. For-profit agencies may bring capital and higher levels of expertise or technology than nonprofit agencies. However, nonprofit agencies may have deeper roots in the community, and an appreciation of local needs, and perhaps, be in a better position to garner legislative and local support for a new contract. If both for-profit and nonprofit agencies are allowed to bid, the state must consider how the evaluation criteria will be weighted to reward the potential inherent benefits of each sector and protect the state from potential liabilities (Cooper, 2003). Another decision is whether to invite only in-state providers to bid or to open the solicitation to out-of-state providers as well.

### **Type and Number of Contracts**

Contracts can be classified in a number of ways. For example, public agencies can have:

- Indefinite (open-ended contracts within a specified scope of work) or definite quantity contracts;
- Contracts in which the level of effort is known and others in which the work required is new and unknown;
- Single statewide or regional contracts versus local contracts;

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<sup>2</sup> Many of these issues are covered in more detail in the first paper in this series: *Assessing Site Readiness: Considerations about Transitioning to a Privatized Child Welfare System*.

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- Single service (adoptions) contracts versus “soup-to-nuts” contracts that serve children and families from the time the child enters state custody until the time the child exits care;
- Contracts that share financial risks and potential rewards with private agencies or contracts that hold providers harmless;
- Contracts that define specific performance expectations but do not dictate how work is to be performed versus contracts that prescribe exactly how contractors must operate day to day.<sup>3</sup>

In addition to determining the most appropriate contracting model to address agency needs, the public agency has to decide how many contracts to award, that is, how many eligible bidders will be accepted from the same solicitation. Using multiple contractors to deliver a service in a service region has the following advantages:

- Promotes competition that will theoretically keep service quality high and costs down;
- Avoids a private monopoly, thus promoting innovation and responsiveness to child and family needs;
- Ensures continuity of service -- if one provider should fail, another is available to take over service delivery in the affected area; and,
- Maintains a diverse provider base by allowing smaller and less well-funded contractors to specialize by service, geography, or ethnic group.

On the other hand, using multiple contracts has the following disadvantages:

- Increases costs to public agency for contract administration of multiple contracts;
- Reduces opportunities for economies of scale—the ability to spread the costs of the infrastructure and management across a larger number of clients in a single contract;
- Adds complexity to contract and client monitoring activities due to varying automated systems, procedures, and the service approach from provider to provider; and
- Possibly fragments service delivery -- children and families may be more likely to fall through the cracks if services are divided between providers and families are referred from one provider to another.

### **Contract Implementation Schedule**

Contracts can be pilot tested or administrators can decide to proceed directly to a local, regional, or statewide contract without a pilot. Some suggest that if the service is one that has been previously provided by a private agency, the decision to expand or change the terms of the contract may not be controversial. In that instance, the appropriate strategy may be to go directly to full implementation. On the other hand, when a public agency plans to contract for services never before purchased, opposition from one or more stakeholders is more likely. In which case, public agencies might want to pilot test the initiative in selected locations before attempting broad-scale implementation (DHHS,

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<sup>3</sup> For a more detailed discussion about the range of service contracts and payment models, see Issue Paper #2: Fiscal and Program Design Considerations.

1997). The 2007 aborted Texas privatization initiative illustrates how opposition may derail an agency's procurement plan and force mid-course corrections (see text box).<sup>4</sup>

Pilot testing with a rigorous evaluation component allows all interested parties to determine whether privatization is a viable option for a particular service.<sup>5</sup> It also helps the public agency identify the potential costs, benefits, and barriers of contracting the service on a larger scale. In some states, contracts for small demonstrations or pilots can be executed on a non-competitive basis and knowledge gained from the pilot can then be used to develop a competitive RFP for expanded implementation.

Even if a decision is made to implement an initiative statewide, a state may decide to phase in the contract. For instance, in 1998, Florida passed legislation requiring the Department of Children and Families to contract out all child welfare services, with the exception of the child abuse hotline and investigations, by the end of 2004. The department's strategy for accomplishing this was to initiate a phased in approach that relied upon district (or county-wide) Invitations to Negotiate processes in which lead community-based care agencies were selected. Florida took five years to implement its community based care system, and lessons from the initial sites were used to implement later sites.

For example, Florida began using a two-tiered start-up phase for each of its districts. Contract terms and budgets for a transition (or start-up) phase were negotiated with the winning lead agencies. After successful completion of a series of deliverables and a readiness assessment process, service contracts were executed and cases were gradually transferred from state offices to private providers. Florida found that supporting a start-up phase with new or expanded contracts allowed providers to better prepare for full-scale service delivery (Freundlich & Gerstenzang, 2003).

### Contract Duration

There are advantages and disadvantages for choosing short or longer contracts. Contracts covering longer periods reduce the potential frequency of contractor turnover and the disruption in service provision that may accompany it. Longer contracts also may give contractors more opportunity to establish a program model and improve service provision over time (McConnell et al, 2003).

#### Privatization in Texas

In 2006, in response to a legislative mandate (SB6), the Department of Family and Protective Services (DFPS) began work to privatize foster care, adoption, and case management on a statewide basis. The agency released its request for proposals (RFP) for an Independent Administrator (IA), similar to the lead agency model in Florida. The IA would be responsible for procuring and managing selected child welfare services. The initiative was to have been rolled out, region by region, throughout the state.

While the state had a long history of contracting for foster care services, and some (though less extensive) experience with adoption, the state had never contracted for case management services nor had it ever contracted with an entity like the proposed IA. Opposition was fierce before the RFP was released and after bids were received and evaluated, an out-of state contractor was selected for contract negotiation. However, a series of events led the state to abandon the initiative before a contract was signed. Some suggest that the effort may have succeeded had the state not introduced the controversial case management component.

<sup>4</sup> Information for the textbox came from personal communication with Nancy Holman, Texas Alliance of Child and Family Services.

<sup>5</sup> Readers interested in learning more about evaluating privatization initiatives are encouraged to read Issue Paper #4 in this series: Evaluating Privatized Child Welfare Programs: A Guide for Program Managers.

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On the other hand, contracts of shorter duration increase incentives for contractors to launch programs quickly so that they can meet performance expectations in order to compete for future contracts. Shorter contracts may also contribute to increased competition by reducing the advantages of long-term incumbency. They also reduce risk by providing agencies more frequent opportunity to change performance targets or payments. Unsatisfactory providers can also be released more readily. Many contracts include provisions allowing the agency to terminate contracts before they expire, but doing so can be difficult (McConnell et al, 2003).

Public purchasers must balance the benefits of keeping competition alive through a frequent re-bid process with the transition challenges that inevitably emerge. Careful attention is needed to ensure that services are not disrupted when new contractors take over existing contracts.

Most child welfare service contracts are multi-year (typically three to five years) but with an annual negotiation in which terms may change based upon the contractor's performance and the public agency's annual budget. In practice, states and jurisdictions have adopted a wide range of contract practices. For instance, New York City which has one of the longest histories of contracting for child welfare services in the country, issues an RFP every nine years. Contracts are issued for three years with two, three year extensions.<sup>6</sup>

## **TRANSLATING AGREEMENTS INTO A WRITTEN SOLICITATION**

### **Components of the Solicitation**

A well-written solicitation is the foundation of a solid service contract. It is critically important that a solicitation describes in detail and with clarity all the decisions that were made during planning, including the following:

- The purpose of the contract
- The contractor's duties
- The expected outcomes and deliverables
- Performance standards
- Methods for payment including incentives and penalties, and
- The responsibilities of the contractor and the public agency in service delivery, decision making, and quality assurance/monitoring.

Solicitation documents must also specify the format and content of a bidder's proposals and clearly define how proposals will be evaluated (if it is a competitive procurement).

In competitive contracting, public agencies have several methods of soliciting bids and selecting a contractor. Some are more competitive than others. In child welfare, most competitive contracts begin with a RFP or, in the case of Florida, an Invitation to Negotiate (ITN). When competition is not desired or required, public agencies might be allowed to develop a Request for Qualifications (RFQ) or Invitation to Bid (ITB), in which the public agency describes service specifications and the bidder provides qualifications and quotes a price for the scope of work described. RFQs and ITBs might be appropriate to use when the public agency simply wants to negotiate service contracts or amend contracts with any

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<sup>6</sup> Personal communication with William McLaughlin, Office of Children and Families, New York State.

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or all qualified bidders, rather than selecting only a limited number of vendors through a competitive screening of proposals. While it is beyond the scope of this paper to detail similarities and differences in various solicitation methods, it is important to identify the basic elements that should be incorporated into any procurement document.

The procurement office in each state or local jurisdiction typically has its own requirements for what information must be included in any solicitation document and how it should be formatted. In most states, the solicitation contains not only the scope of work but also “boilerplate” language that is the same for all goods and services purchased by the state. Regardless of where the information must go in a procurement document, published guides on developing procurement documents cite twelve basic elements that should be included, summarized below:

- 1. Statement of Purpose:** the nature and extent of the services to be privatized and the overall objectives of the contract.
- 2. Background Information:** overview of the program; legislative mandates; caseload characteristics and relevant statistics; and an honest accounting of problems and strengths in the current system.
- 3. Scope of Work:** specific duties to be performed by the contractor and the expected outcomes; a detailed description of who will be targeted for services; when and how clients would be referred and when and under what conditions they would exit services; a detailed listing of contractor and public agency responsibilities for service delivery, decision making, and quality assurance/improvement. As appropriate, a detailed description of other duties including: referrals to and usage of community services; responsibilities for Federal funding eligibility and reporting, case tracking and reporting, and use of management information systems.
- 4. Duration of Contract:** length of contract and options for renewal.
- 5. Deliverables:** list and schedule of all products, reports, and plans to be delivered to the contracting agency.
- 6. Outcome and Performance Standards:** including client-level outcomes and program or service expectations of the contractor, standards for data collection and reporting, frequency and types of reporting and external reviews, and use of information by the public agency; agency appeal and grievance process, and process for implementing performance improvement plans and corrective actions.
- 7. Payments, Incentives, and Penalties:** terms of payment for adequate performance. Basis for incentives for superior performance and/or penalties for inadequate performance or lack of compliance, the timing of payments to contractors and billing procedures.
- 8. General Contractual Conditions:** standard government contracting forms, certifications, and assurances.
- 9. Special Contractual Conditions:** requirements unique to the contract (for example, size of performance bond or requirement to hire public agency staff), if public agency is going to establish standards for agency credentials (e.g. accreditation or staff degrees and certifications); and staff training requirements.
- 10. Requirements for Proposal Preparation:** required organization and content of technical proposal and bid; information to be submitted on bidder's technical and corporate qualifications and personnel.

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**11. Public Agency Contacts and Procurement Schedule:** persons to contact for information on the solicitation and any restrictions on contacts; dates for submitting questions, pre-proposal conference, submission of proposal, etc.

**12. Evaluation and Award Process:** procedures and criteria for evaluating technical and cost proposals and for making the contract award (DHHS, 1997; FCS Group, 2005).

The art of writing an effective solicitation document lies in carefully considering what the potential contractor needs to know about each of these elements and then presenting the information as clearly, accurately, and completely as possible. There are no unimportant elements. For instance, clear and explicit language about contract monitoring and follow-up activities is critical because in those instances when a private provider is not providing the agreed upon services, both parties must rely on the contract provisions that describe how the public and private agency will proceed if performance is not satisfactory (Freundlich, 2007).

Programmatic staff members usually assume lead responsibility for writing the scope of work for a solicitation, but procurement staff may draft major portions of the document and review and/or modify the scope of work as it gets incorporated into the required procurement format.

### **Challenges in Preparing Solicitations**

There are many challenges to overcome in writing a solid solicitation, including the following:

- Accessing adequate historical data to establish expectations, caseload projections, and costs: Having accurate data has been a challenge in many sites, but it is also essential to effective contracting.
- Clearly defining design components (program and fiscal): General verbal agreements that were reached in planning must be translated into clearly defined and enforceable language.
- Defining the information the bidder should include in proposals: The solicitation must walk a fine line between defining clear expectations but not stifling provider flexibility and creativity to deliver services. Public agencies may want to carefully consider whether standard “boilerplate” provisions contained in solicitations or specification for how a contractor is to conduct its business might need to be reduced or eliminated in order to increase innovation.
- Delineating provisions to protect children and families and the interests of the public agency: The solicitation should clearly describe what will happen if the contractor fails to perform. This should include any obligations the public agency has to assist when performance expectations are not met for reasons beyond the contractor’s control. For example, some contracts include language that defines the circumstances under which the scope of work or the payment mechanisms might be modified if the providers failed to meet expectations through no fault of their own—such as policy changes that increased the level of effort required or acts of nature that increased the number of clients requiring services or the scope of services beyond what was anticipated. If one goal of contracting is to create a public-private partnership to better serve children and families, then a contract that places all or excessive risk on the contractor may jeopardize the relationship the public agency is attempting to foster. Decisions about how risk will be borne must take into account the goals of the contract and the capacities and interests of all partners.

### **Recommendations for Preparing Solicitations**

Hansen and Weisman (1998) make the following four recommendations for the preparation of a solicitation:

“Rule #1: Determine the results you want first.

Rule #2: Decide the criteria you will use to select bidder(s) that can best deliver the results you want.

Rule #3: The evaluation procedures, which incorporate those criteria, should be well thought out before you issue the RFP.

Rule #4: Keep it short! Keep it open! Keep it simple and get only the information you will actually use to make an evaluation.” (Hansen & Weisman, 1998, p. 27-30)

Various other published reports offer additional guidance to public administrators to make the RFP development go more smoothly (DHHS, 1997; FCS Group, 2005; McCullough & Freundlich, 2006):

- Dedicate sufficient staff resources to prepare the written document. Writing a solid solicitation document is time-consuming, exacting work. All too often, however, this task is assigned to one or two people in the agency who already have full-time responsibilities. The result is that either their regular work suffers or the document does not receive the attention it deserves. Staff must also be available to produce detailed information on caseloads, current performance, costs, utilization patterns, policies and procedures, etc., for inclusion in the document. Staff responsible for preparing the document must have the authority to get other departments to produce statistics and program information for the solicitation as needed.
- Allow enough time for document preparation and internal review. The initial preparation and review process, according to some directors, always seems to take twice as long as anticipated (DHHS, 1997). Depending on a number of factors—including how well thought through the design decisions were, the type of services privatized, the degree of cooperation and understanding between the provider agency and the purchasing authority, and the availability of data—the process can take months if not years to complete. The internal review and approval process is often the area in which most of the delays seem to occur. If other agencies or units must approve a solicitation document before it can be released, reviewing of problematic or controversial sections of the document early may save time and wasted energy, rather than waiting to submit the entire document for approval.
- Borrow from other states. States and local jurisdictions have gained experience in privatizing nearly every aspect of the child welfare system in recent years. It is worth the effort to collect and review documents from states that have already developed contracts for similar services and talk to staff in other public agencies to find out what they would do differently. However, the ability to pull language and ideas from other jurisdictions is no substitute for tailoring the solicitation to meet the unique demands of each particular jurisdiction.
- Take advantage of available contracting expertise both in drafting the solicitation document and finalizing the contract. Child welfare agencies, particularly if they have limited contracting experience, can draw on available resources in other government agencies and offices within their states to ensure compliance with contracting regulations and avoid potential problems with the successful bidder over contract

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terms. Departmental lawyers and contracting specialists, staff at the state procurement office, and experienced executive branch personnel can offer advice and counsel based on their experience with other contracts.

- Consider using a consultant. Using a consultant offers several advantages: public agency staff are not diverted from their regular duties; the solicitation can usually be written more quickly; and the consultant can bring a neutral point of view to the process. Even if a consultant is not used to write the solicitation, it is often useful to have an experienced outsider review and critique the document prior to release.
- Supply complete and accurate information about the services to be contracted, population to be served, current and expected performance, and costs. Procurement is not the time for a public agency to gloss over challenges or present a rosy picture. In order to achieve the desired outcomes for children and families, bidders need to know as much as possible about the current system's performance, the children and families to be served, the costs, and any barriers that may impact implementation or success. If accurate or complete statistics are not available, extra time and resources will be required. If this information is not included in the document when it is issued, bidders will surely request it at the pre-proposal conference or through written queries.
- Issue a draft document and solicit comments from stakeholders. Another method for improving the solicitation is to release a solicitation in modified draft form (Request for Information) and solicit comments or suggestions from potential contractors and others who have a vested interest in the services being contracted. This step is particularly crucial if public agencies did not have the ability to fully engage private agencies and other stakeholders, such as the courts, during the design phase when key decisions were made. Comments may be solicited in writing or through public forums. If, however, information about the solicitation is shared with one potential contractor, it must be made available to all others as well.

### **MANAGING THE PROCUREMENT PROCESS AND NEGOTIATING CONTRACTS**

Given the critical role that private agencies play in child welfare service delivery, selecting contractors is one of the most important tasks for public agencies. There are three main objectives for procurement: (1) attract qualified bidders, (2) award contracts to the most capable providers, and (3) protect the integrity of the selection process (McConnell et al, 2003). All three may be affected by the quality of the solicitation document and how the procurement process is managed.

#### **Setting a Realistic Procurement Schedule**

While it is important to set aside enough time to prepare the solicitation document, it is equally important to give providers enough time to respond to them. Given the complexity of child welfare service contracts, potential contractors usually have a surprisingly short time in which to prepare and submit their proposals. For full-service contracts, the typical period from the date of RFP issuance to proposal submission is six to eight weeks. Unrealistic timeframes may reduce the number of bids and the quality of proposals (DHHS,1997).

During the proposal preparation period, bidders do much more than write a proposal. They must learn as much as they can about the services and the caseload

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composition, assess infrastructure needs, analyze risks, recruit or assign key staff, develop partnership agreements with subcontractors or others, produce and package a coherent plan for meeting the contract objectives, and develop a competitive multi-year budget. In some instances, the bidder also must locate and secure acceptable facilities and equipment and produce a plan for interviewing, hiring, and training current public employees (DHHS, 1997).

Bidders are not the only ones who are rushed by short timeframes. From the time the RFP is released until contract signing, the public agency must complete most, if not all, of the following tasks:

- Distribute the document to all interested parties
- Receive and respond to written questions about the solicitation
- Conduct a pre-proposal conference for interested bidders
- Produce and distribute a transcript of the conference
- Distribute any amendments to the document resulting from bidders' inquiries
- Assemble and prepare evaluation teams
- Receive, review, and rank proposals
- Check bidders' references
- Request written clarification of proposal information from some bidders
- Hear oral presentations and perhaps inspect programs and facilities
- Request and review best-and-final offers from the top bidders
- Recommend a winner to the appropriate decision-making authority
- Negotiate amendments to the proposed contract with the designated winner
- Notify other bidders of the impending decision
- Respond to inquiries or protests from losing bidders
- Finalize the contract.

The proposal solicitation, preparation, and review process gets compressed for a number of reasons. Often there is a firm deadline by which the service must be privatized. This might be due to a legislative mandate, a federal requirement to have a new service in place by a particular date, the need to award a contract by the end of the fiscal year or before the lease on the current facility expires, and so on. Working back from this deadline, the public agency sets a target date for issuing the solicitation. If the agency underestimates the amount of time needed, it may miss the issuance target date. Agencies that miss the intended date may try to get back on schedule by reducing the amount of time bidders have to prepare the proposal. It is little wonder that the usual first question at a pre-proposal conference is, "can you extend the deadline for submitting proposals?" (DHHS, 1997).

### **Improving Bidders' Access to Information**

To the extent allowable by procurement rules, public agencies can release information in advance of a procurement to alert potential bidders to a soon-to-be

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announced contracting opportunity. In addition, holding public meetings enables potential bidders to begin working months in advance of the release.

The most important information potential contractors will need should be included in the solicitation document. But, particularly for large and complex contracts and in instances where the contractor is required to hire current staff or use state equipment and facilities, the bidder will need much more information than can be put into a document of reasonable length. Materials bidders may need to review include but are not limited to:

- State and federal regulations, policies, and procedures;
- Detailed descriptions of automated equipment, especially if the contractor is required to use the system;
- Copies of all forms to be used for reporting purposes; and
- Detailed cost and service utilization data spanning several years.

Some types of information can be easily reproduced and sent to bidders upon request. It is also becoming more common for public agencies to create electronic “Procurement Libraries” accessible through the agency’s website.

If bidders are to submit informed proposals, they must be familiar with how the operation currently works. To impart this knowledge, many agencies have required potential contractors to attend pre-proposal conferences in which the solicitation is thoroughly explained. In addition, bidders have been given hands-on demonstrations of the public agency’s automated case management systems.

### **Reviewing Proposals**

As noted previously, not all public agencies require competitive child welfare procurement processes. However, when the number of potential bidders is greater than the number of contracts to be awarded, the public agency must ensure that the procurement process creates a level playing field for all eligible bidders to compete fairly.

To achieve this, the agency should make the contract process formal—stick to published deadlines; provide the same information to all prospective bidders; and include in the RFP the bid evaluation procedure by which the winners will be selected, including the set of evaluation criteria and the weights for each. The agency should provide each member of the evaluation committee with detailed definitions of each of the rating criteria, emphasizing that these are the only criteria, and evaluators should be required to document their ratings (Hatry and Durman, 1985). Since agencies often place a higher priority on subjective selection criteria such as organizational capacity and program design than on concrete factors like cost and budget allocation, selection criteria should be clear and transparent including how elements of proposals will be rated (McConnell et al, 2003).

To further enhance the fairness and transparency of procurements, public agencies can engage evaluators who do not have close links with potential bidders, making certain that evaluators share a similar understanding of the selection criteria, undertake a complete review of proposals, and document the selection process thoroughly.

With respect to scoring, Hatry and Durman (1985) suggest requiring actual evaluator scores on individual criteria because rankings alone mask the magnitude of difference between competing proposals. For example, the first and second-ranked

proposals could be very close or very far apart on a particular criterion, and this information would not be available if a system relied on rankings only.

Private agencies point out that even when a point system is used, bidders may not be able to distinguish themselves sufficiently from one another if the solicitation is not written to allow this. Many RFPs specify what the contractor is supposed to do and what performance standards (usually process related) they are expected to meet. As one contractor in a focus group put it, "All we can say in the technical proposal is 'Yes, I will.' and 'I can do that.' So all bidders get essentially the same technical scores and it ultimately comes down to price." (DHHS, 1997)

One of the consequences of poorly constructed RFPs, criteria, or evaluation procedures is that they can lead to protests being lodged by losing bidders who felt that they were more highly qualified than the winner, but were under-bid for a contract or not given any opportunity to demonstrate their capabilities. Protests can quickly derail a contracting effort (DHHS, 1997).

What is the solution to this situation? There is no definitive answer that would work in every state given the variability in procurement rules across jurisdictions. A number of suggestions have been made, however, that individually or in combination may help shift the evaluation emphasis from cost to service quality (DHHS, 1997; FCS Group, 2005; Freundlich & Gerstenzang, 2003):

- The RFP should focus on what the contractor is to accomplish, rather than on how it is to be accomplished. Specifically, solicitations should clearly define the outcomes to be achieved under the contract and evaluate the technical proposals on the basis of how likely each bidder is to achieve these outcomes using the resources and methods it proposes.
- Past performance matters and solicitations for proposals and rating systems should appropriately weight each bidder's demonstrated success in meeting contract requirements and achieving results.
- Cost considerations, while important, should be secondary to technical scores when evaluating proposals. Some jurisdictions evaluate cost proposals on the potential return on investment, rather than on cost-efficiency. Others specify minimum acceptable staffing levels or maximum caseload sizes to reduce the likelihood that contractors will under bid the true costs in order to gain points as the lowest price bidder.

### **Negotiating Fair and Enforceable Contracts**

After the awards are announced, the public agency faces one remaining procurement challenge: the negotiation of the terms and conditions that will be in the final contract(s). The contract is the legally binding exchange of promises or agreement between parties that the law will enforce. Contract law is based on the Latin phrase *pacta sunt servanda*, pacts must be kept. The contract relationship is the legal relationship (Cooper, 2003).

Surprisingly, the whole procurement may derail at this late stage in the process if the parties discover they are not in agreement about the interpretation of the terms that were described in either the solicitation or in the bidder's proposal. The public agency typically has three sets of concerns at the time of negotiation: (1) reaching agreement on how the agency ensures that services are delivered and outcomes are met; (2) ensuring accountability in all areas; and (3) creating a foundation that ensures an

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effective working relationship that is strong and yet sufficiently flexible to meet changing circumstances and unforeseen problems.

Until the 1990s, state and local public child welfare agencies generally dictated terms of agreements and private agencies either agreed or did not agree to the terms. These “top-down” contracts, sometimes called ‘contracts of adhesion,’ offered no opportunity for innovation or negotiation. At all levels of government today, there is a movement to place less emphasis on sticking strictly to the provisions of the RFP and to allow a greater degree of post-award negotiation to occur between the contracting agency and the provider - (Cooper, 2003) In child welfare at the state and local level, the degree of true negotiation varies widely.

At one end of the spectrum are those public agencies that meet with providers and essentially present a contract for signature with limited or no discussion. The contract may be a short (three to five pages) form that simply references all the sections of the RFP, and indicates by signature that the contractor agrees with all terms and conditions.

At the other end of the spectrum are public agencies that use contract negotiation as an opportunity to demonstrate their willingness to collaborate in contract-related issues. There may be multiple meetings held prior to finalization of a new contract and/or at the time the contract is being renewed. For example at the initial meeting, all terms of the solicitation and all aspects of the proposal might be reviewed and both sides might raise issues for discussion, clarification, or amendment. Depending upon the number and nature of issues raised, public-private workgroups might be created to resolve issues and propose alternative approaches and language changes for inclusion in the final contract. While a collaborative approach might extend the time required for a finalized contract, it also might result in fewer implementation challenges that are typical in the first year of a new contract.

At a minimum, during contract talks, there should be an opportunity to ensure that both parties fully understand what is being agreed to related to the service delivery model, and to clarify decisions about which client outcomes and/or system/process outcomes will be tracked, how they will be measured, how frequently the results will be reviewed, and how the public and private agencies will use the data to continually improve performance.

After contracts are signed, the likelihood of success improves with a smooth transitioning of the services to the providers. This requires careful planning, open and regular communication, sufficient staff training, and adequate time to phase in the transfer of responsibility. While not all public agencies are willing to negotiate contract terms, most are taking the time to work with contractors on transition issues prior to referring cases. Public and private agencies often work together to plan a kick-off meeting and communicate with key stakeholders, finalize caseload projections and referral processes, clarify reporting and payment/invoicing procedures, plan for cross-training staff, develop problem-solving mechanisms, and plan for QA/contracting monitoring, including the approach to corrective actions. Challenges and strategies related to ongoing contract monitoring and management is addressed in the sixth and final paper in this series: *Contract Monitoring and Accountability in Child Welfare Privatization Initiatives*.

## **RECOMMENDATIONS FROM THE FIELD**

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Discussions were held with public and private agency administrators from five states with privatized case management contracts to identify what experienced states had learned about preparing contracts for case management services. The discussions were unstructured, exploring what the field had learned about preparing effective service contracts. The following five themes were each repeated across several states and often by both public and private agency representatives.

- **Ongoing collaboration is key.** All sites described the critical nature of ongoing communication and problem solving. For instance, in El Paso County, Colorado, Gwendolyn White, Foster Care Program Director at Lutheran Family Services of Colorado, described how her agency's experience in El Paso County compares to their experience working with child welfare agencies in other parts of the state. "[In El Paso County] we're all at the table when it's time to revise the contracts. We go back and forth and come up with something everyone can live with. Other counties just send us contracts and if we need to make changes, it is very difficult to revise them. In El Paso, we discuss new ideas -- what's working well, what's not working and then work together to solve problems in the next contract... because you were there when decisions were made, you understand them and you take ownership for them because everyone understands the expectations...."
- **Develop system requirements, not contract requirements.** Tanya Keys, the Director of Child and Family Services in Kansas, who has been involved with the state's privatization efforts since the start, noted the shift in the way they are working with providers. She explained that at first, the state child welfare agency focused more on narrow, contract oversight issues and now they focus on broader, child welfare requirements – practice issues, determining their core values and system goals. They develop contracts to try to meet these goals and values. They have "taken a big step back" from being process oriented, telling providers what they must do. Instead, they now focus more on what they want the system to achieve.
- **Focus contracts on what you want to achieve rather than on how to get there.** Similarly, several people described how their contracts have evolved over time from focusing on process issues - specifying how they wanted work done, to outcomes – specifying what they wanted achieved. While it is likely necessary to begin with more process-oriented contracts to establish expectations and build confidence in performance, agency administrators explained that contracts have grown to be less detailed as the purchaser had greater confidence in the skills and experience of the providers (see text box). One way to build this trust is to institute strong quality assurance systems, which is the focus of the next paper in this series.

### **Contracts in Sarasota, Florida**

Lead agencies (also known as Community Based Care providers) in Florida have a unique perspective on service contracts as they serve as both providers for the state and purchasers of services from local community based case management agencies. Christy Kane, Senior Vice President of Community Based Care Operations for the Sarasota Family YMCA, Inc, explained: "We want the providers to tell us how to make the system better within the parameters of state statute and non-negotiable contractual requirements. We do not want to micromanage their workforce decisions. In our contracts, we say 'here is the required array of services that should be made available to families' and we want providers to determine the best way to deliver the services. It is not one-size-fits-all kind of work, and systems of care should have the ability to be flexible and creative in order to meet the needs of the children and families being served. It is a continual challenge, but a goal we work toward."

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- **Ensure contracts are sufficiently funded.** Even the best written service contracts will not produce the expected results unless they are sufficiently funded. As a former state agency director and now Executive Vice President of Child and Family Services of Casey Family Programs, David Berns summarized what several people discussed: understand what it will take for contracts to be a success – don't nickel and dime them — focus on outcomes and what it will take to reach them. For instance, make sure that workers have reasonable caseloads so that they can perform home visits. You have to pay for what you want to buy.
- **Contracts are living documents.** As discussed by several individuals, no one can think of all of the issues and needs of a contract during contract design — even when there is broad-based participation and collaboration in its preparation. For this reason, there should be ongoing opportunities to revisit contract terms and decisions and make contracts living documents. Again, quoting David Berns: “Do not make families suffer when you realize you have not thought of everything beforehand.”

### **CONCLUSION**

Developing an enforceable contract may be relatively simple and largely technical with routine purchases of goods. It is a different matter when public agencies contract for child welfare and other direct services for vulnerable children and families.

In general, there are several characteristics of a strong procurement process that results in an effective service contract. These include:

- **A sound approach to planning.** Creating an infrastructure and conducting sufficient planning before procurement that produces a well-defined request for services;
- **Internal management systems and qualified staff.** Public agencies should not under-estimate the time and effort it takes to manage a procurement that ends in an effective contract. Too often solicitation tasks are assigned to staff with other duties and no particular skill in translating their knowledge of child welfare into effective solicitation documents. Given the dollars spent in contracted services, it is essential that states devote adequate resources into procurement and monitoring staff with the skill-sets needed to ensure quality and accountability in all contractual relationships.
- **Procurement procedures and resulting contracts that focus on what you want the system to achieve.** For well over a decade, the federal government and states have moved in the direction of specifying contract goals, which often involves the use of performance standards. Increasingly, contracts link some level of provider payment with their performance and at the same time give the provider community more flexibility in how they meet the system goals.
- **The freedom to renegotiate contract terms as necessary.** An additional prerequisite for effective contracting is the capacity within government agencies and private contractors to develop productive and fair agreements. Substantial attention to detail, understanding of program components, and knowledge of applicable laws and regulations are necessary for the process to move forward smoothly. This paper highlights the key steps and contract features to incorporate in an effective contracting process.
- **Partnership and teamwork.** A number of different individuals and organizations may need to be engaged at various stages in the procurement process—including contractors, the agency program staff, the procurement and contracts staff, agency

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management and community stakeholders. Trust, and open communication are often mentioned as essential in getting from an idea to a finalized contract.

The contract is not an end in itself and it is not self-implementing. Its conceptualization, development and award must be imbedded in a larger process. Contracts must be negotiated with the implementation and management of the agreement as a primary focus. Again, regardless of how inclusive the planning process was, no one can think of all of the issues during the contract design phase. Ongoing opportunities to communicate and revisit contract terms will help ensure that private providers are able to meet the goals and expectations of government agencies.

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