

**Does Best Value Offer a Better Deal for Local Government Workers than
Compulsory Competitive Tendering?**

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Internationally, public services are under increasing political and ideological pressure to remove barriers to private sector involvement in the delivery of public services. Political pressure comes in the form of the encroachment into this area of domestic activity by proponents of trade liberalisation. In particular such pressure stems from the General Agreement on Trade Services (GATS) being pursued through the World Trade Organisation (WTO). While the WTO has been keen to distance itself from allegations that GATS represents a challenge to domestic policies regarding the provisions of public services (WTO 2001), the scope of GATS, in itself, opens up these areas of activity to greater scrutiny. In addition to these structural pressures, ideological pressure for 'reform' has come from the 'conversion' of the parties of the progressive left – particularly in the Anglo-Saxon world – to the benefits of the market. Nowhere better can this be seen as in the UK.

In the UK, the marketisation of the public sector has been longstanding. This is not because the UK has the most minimal public sector, but because the UK provides the most striking example of transforming a previously large public sector into a comparatively minimal one. While most of this was achieved through privatisation – the direct transfer of state assets into private ownership – in public services, marketisation was achieved through market testing and compulsory competitive tendering (CCT). Like privatisation, CCT had been identified with New Right assertions that public services were inherently inefficient and that only the imposition of 'markets' could cure this. The declared intention was always to cut staff associated

costs and to undermine the trade unions that were able to maintain 'restrictive practices'. When the Conservatives were ousted in 1997, 'New' Labour proposed replacing CCT with the more progressive policy of 'Best Value' (BV). Initial expectations from public service unions, was that BV was to be welcome relief from CCT, as it was going to be based on 'partnership', 'trust', 'valuing staff' and an emphasis on 'high value-added' (as opposed to the emphasis on low cost). However, the initial welcoming of the new BV approach, has led to increased scepticism and ultimately hostility by the public service unions.

The article assesses the reasons that lie behind this mistrust and hostility. It will begin by outlining the policy of CCT, the assumptions behind it and its impact on employment. Following this, the development of the policy of BV will be outlined. It will be shown how BV was developed out of a critique of CCT based around the issue of quality and 'good' employment practices as being mutually supportive. It will then be shown how quality was gradually redefined as being an issue requiring greater private sector involvement in the running of public services, and of an abandoning of the link between quality of service and quality of employment.

The policy of Compulsory Competitive Tendering

The policy of CCT in local government was introduced in 1980 with the aim of reducing "waste, bureaucracy and over government" (Conservative Party, 1979). CCT was derived from the now familiar, but at that time 'radical', collection of – often inconsistent (Gamble 1994) - new right assumptions about the nature of public sector bureaucracies. The assumptions in these theories insisted that the lack of true market incentives encourage 'political issues' to dictate priorities – and that these naturally

encourage expanding budgets to meet the needs of competing political interests. A key 'political interest' in this context is that of the workforce: through the lack of an external competitive threat, workers, through their unions, insulate themselves from the need to adapt their working practices to improve productivity. They are aided in this by - in what could effectively be seen as collusion - public administrators. These administrators do not have the threat or incentive of the competitive market to confront such behaviour. As a result the local taxpayer is not receiving value for money; and the interests of the taxpayer, in new right thinking, *is* the public interest. What is needed, it is argued, is more vigorous management and such management can only come from the introduction of the market; in short, privatisation.

Unlike in many of the nationalised industries targeted for privatisation in the early 1980's however, there were difficulties in public services for a number of reasons. First, the enhanced public sensitivity to such services (for example the National Health Service) in comparison to other utilities deemed as ripe for privatisation (such as British Gas) made this a politically dangerous option. Secondly, the lack of a 'true market' for, and the interdependency in, these types of services, made the cost structures - and hence the potential attractiveness to investors - obscure.

The answer to these problems was CCT. CCT sought to create 'contestable markets' in the various activities of public services by opening up to competition activities previously immune from competition. In this way 'vigorous' commercially-oriented management could be introduced which would be inherently better than the model of 'public administration' that preceded it (Pollitt 1990; 1998). CCT was used in the NHS and in local government and - though in a different format - in the Civil Service. Under CCT, in-house, direct service organisations (DSOs) were required to be

made into distinct organisational entities within the local authority and to bid for contracts on the same basis as private contractors and thereafter to comply with their own detailed contract specification in the event that they were successful.

However, unlike in the NHS, a further issue exists in local government. Resistance to CCT was anticipated from unions and recalcitrant managers in all areas of 'reform'. In local government, however, there exists the additional tricky aspect of local democracy. So opposition to CCT was also to be expected from those Local Authorities that were under the control of the Government's, legitimately elected, political opponents. In this situation, political opponents – primarily the Labour Party, but particularly the local Labour Party in its 'New Urban Left' guise (Lansey et al 1989) - had local electoral mandates explicitly challenging the new right agenda with counterposing promises to 'protect jobs and services'. The Government, then, needed to ensure that CCT could overcome such opposition by framing of the rules of CCT in such a way as to prohibit the restriction, distortion or prevention of competition (HMSO 1988). Local authorities could, therefore, oppose the outsourcing of services and bid to retain services in-house, providing that they complied with the rules and demonstrated that they were more cost effective than external tenders.

Initially, the Government forced local authorities to re-organise the various intermeshed functions into distinct 'purchaser' and 'provider' units in order that the provider functions could be tendered for private bids. This was based on the notion that while 'true markets' may not be possible in many of the public services in question, competition could be introduced by creating 'quasi-markets' for such services (LeGrand 1990).

DSOs were further required to operate as separately constituted accounting units with the requirement to maintain trading accounts and to achieve a six per cent rate of return on capital employed for services with sufficient capital outlay. The interpretation of the CCT rules was policed by District Auditors and by private companies competing for contracts, who were able to complain to the Secretary of State and embark upon independent legal action (Colling 1999).

There was a range of responses to CCT from local authorities (Painter 1991). Some Conservative authorities actively encouraged the process – to the extent that they voluntarily outsourced services, negating the need to be subject to CCT rules at all. Others were ‘agnostic’, conducting the process with the view to giving the contract to the ‘best bid’, regardless of whether it was in-house or external. Others opposed the principle. Such opposition ranged from opposition from ‘traditional’, ‘Fordist’ Labour councils - with support from in-house unions; to opposition from ‘New Urban Left’ Labour councils – with support from a wider coalition of community-based politics. Both these bases of opposition relied on using any slack in the contract tendering process in order to keep the contract in-house. It was therefore possible to resist the outsourcing of services, providing that political and union collusion was possible. In these circumstances the ‘principle’ of in-house was achieved – although at the expense, possibly, of conceding to managerial demands for greater flexibility (Shaw et al 1994). This became increasingly the case, as the rules of CCT – ultimately through the final discretionary powers held by the Secretary of State – were tightened to prevent such behaviour, as the following statement explicitly asserts:

...too many authorities have sought to bend the rules... to cushion their workforces against the full force of competition - and thus to deny their own

charge-payers the financial and performance benefits that competition can deliver. (DoE 1991 p4)

In addition to providing the legal framework for CCT, the 1988 Local Government Act also determined the basis of competition under CCT. Thus, Part II of the 1988 Local Government Act, for example, set out precise details on what factors ought and ought not be considered in the evaluation of contractor's bids. For example, section 17 (5) stipulated a series of 'non commercial matters' that ought not be considered in the evaluation of tenders. Notable within this clause was the following statement:

The terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces. (HMSO 1988)

This clause therefore abolished the practice of 'contract compliance' which had previously required contractors to meet certain employment and/or non-commercial conditions (Ascher 1987). Since labour costs are the main contributor to total service costs and up to 90% in some cases (Paton and Bach 1990), competition for local services became focused upon labour costs (Ganley and Grahl 1987, Cutler and Waine 1998, Escott & Whitfield 1995; Walsh 1995). So CCT explicitly incentivised cutting terms and conditions of workers:

"The general trend is that jobs are being lost, and fewer people are trying to do as much or more work... All this talk of efficiency savings is just getting rid of people, and persuading staff to work harder." Spokeswoman for Unison on local government employment. (Independent on Sunday 21 Sept 1997)

The Labour Party's Grounds for Opposing CCT

Labour initially shared the unions' view about CCT. However, nationally, Labour was developing its own reform agenda for local government – and this was part of its larger transforming itself into 'New' Labour. Part of this transformation was in consciously distancing itself from the 'new urban left' image of the Party that existed at the local

level. As part of this, Labour revised its rationale for opposing CCT, to one that was more 'user-led'. In addition to opposition to CCT on the grounds of employment, then, Labour also began to express much concern at the quality implications of CCT (Labour Party 1989, 1991). This, in part, reflected the conventional view that the quality of public services is dependent largely upon the credibility of the public expenditure in place (Bach and Winchester 1999) and the fact that lower costs usually require lower quality of service (Boyne 1998). To reflect this view, Labour's objection to CCT on the grounds of quality was supported with numerous examples of contractor failures (SCAT 1989, PSPRU 1992) and further evidence that suggested that cost concerns eclipsed considerations of quality in bid evaluation (LGMB 1992).

In contrast, the Conservatives maintained that the simultaneous pursuit of reductions in employment and increases in 'quality' were both consistent and virtuous (Adam Smith Institute 1987). That is to say that the justification for the Conservatives' attack on producer group interests was that CCT intended to shift local authorities' emphasis from the good employer role to the good provider role, away from employment and the work force towards customers and services (Martinez Lucio and MacKenzie 1999). The legitimate aim of CCT was therefore of fewer staff doing more work at no loss to quality.

The impact of the pursuit of quality in the public service, through the use of market-based mechanisms, has been a significant reduction in the number of staff employed. Competition is seen as ensuring the delivery of better-quality services at lower cost, which, given the labour-intensive nature of public service, inevitably means lower staffing. (Walsh 1995 p95)

In order to provide legitimacy for this agenda, the Conservatives had to prove that CCT entailed no loss to quality. This led to the active pursuit of 'quality' and the utilisation of concepts imported directly from the private sector (Kirkpatrick and Martinez Lucio

1995) which stressed the standards and specification of services (ISO 9000). It was further suggested that such organisational changes brought about by CCT, notably the client and contractor split, were functional to 'quality' because they enhanced the 'standard' and 'performance' of public services (Treasury 1991):

“Competitive tendering means more than savings. Benefits accrue from setting clear specifications, the acquisition of new and improved management skills, the cultivation of a more business like and innovative approach, the removal of restrictive practices, the setting of targets for standards and productivity and the development of performance indicators. The whole process, whether authorities have won the work themselves or awarded contracts to private firms, has been the catalyst for increased efficiency, better value for money, and the best possible service for the customer.” (Ian Lang, MP, Secretary of State for Scotland, speaking in Scottish Grand Committee on local government structure and finance in Scotland on 18 June 1991: cited in *Competing for Quality*: DoE 1991)

Of significance, the consumerist agenda for CCT became increasingly influential upon the Labour Party (Labour Party 1991) as it sought to dispel both its image of high taxation and its inability to be seen to be able to improve the quality of public services (cf Hills 1998). Consequently, Labour increasingly accepted the consumerist rationale given for CCT and began to endorse the managerialist view that local services would only be effective if they could be made to meet explicit standards. By 1995, for example, Labour's plans to replace CCT became centred upon the production of a local performance programme (Labour Party 1995) which promised 'continuous improvements, target setting, achieving standards and monitoring costs' (Rogers 1999: 36-37). As part of the performance plans, Labour proposed to refocus the Audit Commission into a 'standards inspectorate' and to imbue it with powers to ascertain the extent to that local services were 'failing or costing more than could be justified' (Labour Party 1995 in Rogers 1999: 36-37). As a result, the manner in which Labour defined the 'quality' of local services became ever more compatible with the definitions

provided by the Conservatives and relied increasingly upon instrumental performance measures. This was none more so true than its proposal to introduce a 'Best Value' system into local government.

New Labour and the development of Best Value

New Labour replaced the Conservatives in government in 1997. Its proposal to introduce a BV system was met with an enthusiastic response from a wide range of interest groups. Part of the enthusiasm could be explained by the fact that the introduction of BV signalled an end to the widely discredited and inflexible policy of CCT. Indeed, a diverse mix of lobbying groups including representatives from the CBI, the Business Services Association and the public sector trade unions had all pressured the government to remove CCT and by implication to get BV on the statute book. As the BV Select Committee report maintained

Because BV replaces the previous regime of CCT it is bound to be viewed favourably; the proposed policy may have attracted such strong initial support partly because, at this stage, it appears to be 'all things to all people' (DETR 1998).

Thriving on the level of dissatisfaction that had accompanied CCT, BV was promoted under the banner of freedom and flexibility; the new regime would not compel local authorities in the manner that its predecessor had. The range of initiatives conducted by forty local authorities during a BV pilot scheme supported this view by reflecting the degree of variety and creativity that would not have been allowed for under the straitjacket of CCT (Filkin and Corrigan 1997). The Government further argued that BV would be about 'effectiveness and quality, not just economy and efficiency' and this new emphasis was warmly received by both councils and contractors alike. Consequently, the resulting ease with which the policy of BV was able to progress

through the legislative process allowed central government to proclaim that 'partnership working' was ubiquitous and that local authorities had themselves carried the BV agenda forward (Prescott 1998). In July 1999 the Local Government Bill containing provisions for BV reached Royal Assent.

The Policy of Best Value

The early impression given by the Labour Government was that it did not matter how local authorities pursued BV provided that they delivered BV (DETR 1997). As the Government maintained "councils would not be forced to competitively tender services but they would be expected to deliver BV" (DETR 1997). The proposals for BV had therefore made a clear means and ends distinction summarised under the BV slogan of "what matters is what works" (ibid.). Unlike the restrictive and highly regulated policy of CCT that forced local authorities down a narrowly prescribed competitive tendering route, the policy of BV promised to open up the range of management tools that local authorities could flexibly pursue to deliver BV. The various management tools were conceptualised as the "four C's of BV" and comprised challenge, consultation, comparison and competition.

The replacement of competitive tendering with the 'four C's' was reflective, however, not of the freedom of BV but of the scale and scope of BV and the fact that it dwarfed its predecessor in almost every respect. The provisions for BV encapsulate *all* local government activity and not therefore only the range of services previously subjected to CCT. In addition, whilst local authorities are not in the first instance required to conduct a competitive tendering exercise, they are required to subject all of their services to a fundamental BV review process over five years and in so doing must

address each of the 'four C's'. Not only has the 'competition' requirement been supplemented with three additional principles previously absent from CCT but, in addition, the actual definition of competition itself has been opened up to traverse beyond that of the rather linear definition contained within competitive tendering.

In particular, post-legislative statutory guidance (Circular 10/99 pp15-16) outlined seven options that authorities should consider when conducting the competition element of the BV review process. The first of these requires local authorities to consider whether certain activities ought to be provided by the council and ultimately the taxpayer at all. In arriving at this decision, local authorities have been instructed to consult with a range of interests to identify the relative need for and extent of service provision. Local authorities must then use the competition element to decide exactly who shall provide services.

The BV review process thus represents a continuation of the 'enabling' role previously endorsed by such Conservative politicians as Ridley (1988) and the notion that whilst services should be secured by local authorities, it does not necessarily follow that they should be provided by local authorities. In particular, Circular 10/99 encourages local authorities to involve external contractors in the delivery of publicly funded services in a variety of ways, many of which signal the further entrenchment of the private sector. These include not only competitive tendering but also a variety of partnership arrangements and the direct transfer of services to external contractors. It is precisely the fact that BV does *not* specify the particular means by which local authorities must engage with private contractors that competition has not been deemed to be obligatory under Best Value.

Thus even though the means by which local authorities engage with external contractors in the delivery of Best Value has been less prescriptive than was the case for CCT, simultaneously, Best Value has enough flexibility within it to allow local authorities to traverse a radical outsourcing route if so desired. What then of authorities that wish to retain services in-house? It is true that there remains scope within BV for local authorities to continue to provide services by direct labour, provided that they first 'restructure their in-house service' (Circular 10/99).

In practice 'restructuring' requires the authority to prove via the regulatory domains of performance management and BV inspection that continued direct services provision is fully justified, ensures value for money and will deliver continuous improvements. It is noticeable that the Labour Party's emphasis has shifted between 1997 and 2001 in this respect. In place of 'what matters is what works' (op cit) from 1997, the 2001 general election manifesto pledged that

...where the quality is not improving quickly enough [in public services], alternative providers should be brought in. Where private sector providers can support public endeavour, we should use them. (Labour Party 2001)

It is in this regard that the Labour Government has taken forward its performance programme. The performance programme includes not only a suite of performance indicators but also an audit regime and a far-reaching BV inspection process. Section 10 of the 1999 Local Government Act provides for the Audit Commission to undertake BV inspections. The purpose of the BV inspection service is to check the validity of each local authority's BV review process and to make two judgements concerning the 'current' and 'likely future' performance of the activities contained within. The latter of the two judgements tends to carry more weight for it is the ability of the authority to 'continuously improve' that is the substance of BV.

Potentially, the ramifications of 'failing' an inspection are very severe for the authorities concerned, incurring the wrath, ultimately, of the Secretary of State in the form of a number of remedial options (Part 1 section 15(6) 1999 Local Government Act). Such sanctions include the acceptance of external management help, the requirement to put services out to competition, the seizure of the authority's ability to provide services directly and the transference of service responsibility to a third party. The regulatory performance regime thus represents a last resort route to the externalisation of local services.

Initially, the BV inspection service was confined to an evaluation of the activities contained within each authority's BV review programme. Consequently it was feasible for an authority to receive a positive inspection report for one BV review and a negative inspection report for another BV review. More recent developments (DTLR 2001) indicate that the BV inspection service shall conduct 'corporate assessments' of local authorities' performance. The ramifications of performance failure under the new 'corporate assessment' process are potentially even more draconian and entail not only the prohibition of local authorities providing services directly, but also the right to retain strategic and by implication democratic control (DTLR 2001). This therefore potentially challenges the 'enabling' role of the local authority. Moreover sanctions under the new regime shall not be confined to those authorities judged to be failing but also those deemed to be complacent and coasting (ibid).

Quite clearly, the introduction of a BV system has increased the number of avenues in which the private sector can be involved in the delivery of public services and has provided a foundation from which a more entrenched process by which to

transfer staff from the public to the private sector can ensue. In this way BV poses a greater threat to workers and unions who wish to remain council employees than was the case under CCT. While CCT created a process that was explicitly geared towards transferring work to the private sector, it was at least, a transparent process. Councils could attempt to – and succeed in – keeping a service in-house. In contrast, the provisions for BV are far more wide-ranging and ambiguous. In particular, the notion of retaining services in-house is less clear cut under BV and its provisions extend far beyond a one-off tendering exercise. Thus even if, as part of the BV review process, local authorities decide to restructure services in-house, post inspection findings could signal failure and enact one of a number of the laid down remedial options. Against this background, the early enthusiasm for BV among staff and unions has waned. Faced with the threat of further transfers of staff to the private sector amongst all occupations and grades, union responses to BV has tended to follow that of CCT and remained focused on protecting the terms and conditions of employees transferred or recruited to the private sector.

BV and Employment

In many respects the Government has acknowledged that its BV policy does not signal a halt to the transfer of staff from the public to the private sector but, instead, has actually created further opportunities for such transfers. The avid endorsement of private contractors in the delivery of public services does not however signal that Labour has entirely jettisoned its commitment to reducing the detrimental employment aspects associated with employment transfers. Labour has instead stressed the need for ‘quality employment’ practices and sought to ensure better employment regulation. As the then DETR (1998 section 7.24) maintained:

“the task of local government will be to combine reassurance to employees with the necessary flexibility to allow transfer on a fair basis to other employers where this is in the public interest” (DETR 1998 Para 7.24).

Whilst it is true that *transferred* staff now receive much better employment protection by virtue of the Transfer of Undertakings: Protection of Employment (TUPE) regulations, the situation for new recruits is less clear and the emergence of a ‘two-tier workforce’ is now envisaged. The absence of any real safeguards for new employees taken on after the service has been contracted out has been at the forefront of union efforts. Research by Unison (2002) amongst 116 branches in England enquiring about 190 local government service contracts awarded to private companies or voluntary organisations during 2000/2001, a period capturing the operation of BV, investigated the differences in pay and conditions between transferred staff and new starters. From this it was found that pay levels for new employees were worse than those for transferred staff; that most companies offered inferior occupational sick pay, maternity leave, special leave and holiday entitlements to new staff; that one in five organisations specified a longer working week for new staff; that there was not a single example of a defined benefit pension scheme being open to new employees; and that generally there were more than two sets of terms and conditions in existence.

At the time of writing, the Government was indicating that it was making moves to address the issue of this ‘two-tier workforce’ as part of the DTLR review of BV. This process culminated in the proposal for a new code of practice that, according to Secretary of State, Stephen Byres, should “*oblige contractors to offer employment to new staff on fair and reasonable terms and conditions which are broadly comparable to those of transferred employees*’ (Stephen Byres). However, at present the proposed code will not be mandatory. Likewise, the notion of ‘broadly comparable’ pension

arrangements does not provide guarantees of equality – and even this has been subject to erosion, if ‘leaked’ reports about removing pension pledges from TUPE are to be believed (Daily .Telegraph 07/03/2002).

Meanwhile, even if the exact terms and conditions for both transferred and new staff are maintained, the demands of BV are such that reductions in the numbers of staff employed and the intensification of workplace practices of those retained is likely to continue. The relative success of Labour’s pursuit of better employment regulation therefore must be questioned in the context of a policy that signals continued de-unionisation and by implication an increased absence of collective bargaining (Cutler and Waine 1998). Despite movements towards new codes of employment practice therefore, the very substantive issues of job security, sick pay, workplace practices and training remain far from resolved and over time shall increasingly become the responsibility of arms-length contractors operating in an environment of ‘continuous performance improvements’.

Concluding Comments

The incoming Labour Government of 1997 had an excellent opportunity to offer a new settlement in the complex inter-relationships of interests that exist in local government: conflict’s between local-central relationships, user-provider relationships, political-managerial remits and management-union relationships all had the potential to be harmonised. The replacement of Compulsory Competitive Tendering with Best Value received considerable good will from all parties. While some ambiguity existed at early stages of BV’s development there seemed to be good reason to believe that it would be able to offer a model of reform that would allow the development of public services

that would be based on more than mere cost. However, as the policy has developed, the reform agenda has been increasingly based on a prescribed model that requires the direct involvement of the private sector in the delivery of services. This model is based on the assumption that the private sector is inherently better than the public sector which, in turn, is itself based on the New Right assumption that without the threat of a contestable market, management cannot be adequately incentivised to make changes to the organisation of work. Within this context the Government is in danger of fracturing the potential for a new consensus among key interested parties in local government. New Labour is keen on the notion of 'partnership'. Partnership is the espoused model for the relationship that local authorities should have with private, or voluntary sector contractors. Partnership – as espoused in the Government's Fairness at Work white paper (DTI 1998) - is also the model espoused for win-win union-management relationships. In the case of BV, however, these two versions of partnership do not seem to be reconcilable.

Currently, BV does not, unlike CCT, directly incentivise the cutting of the wage bill and the undermining of collective bargaining in order to compete on the lowest price. BV, in contrast, requires the demonstration that in-house provision will be 'better' than externalisation. Conducting a BV review and not recommending private sector involvement is not viewed favourably. CCT, though crude, did at least provide a process that enabled a local authority to compete for a service with the legitimate intention to retain direct in-house provision.

As for the consequences for workers, the transfer of staff into external organisations does not seem to be backed-up with long terms guarantees – either current or future. Others outside the UK would be wise to monitor the outcome of BV. It is

quite possible that this model will be recommended, as a 'third way' alternative to privatisation of public services, elsewhere.

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