

Bargaining on procurement and TUPE



BARGAINING ON PROCUREMENT AND TUPE

Introduction

This guide is intended to assist negotiators in:

- Understanding the procurement process;
- Adopting the key steps in seeking to avoid the full privatisation of services;
- Adopting the key steps in protecting staff terms and conditions where privatisation takes place.

The guide opens with a quick reference checklist of actions that can be considered as the process moves through the principal stages of pre-procurement, active procurement and post procurement shown to the right.

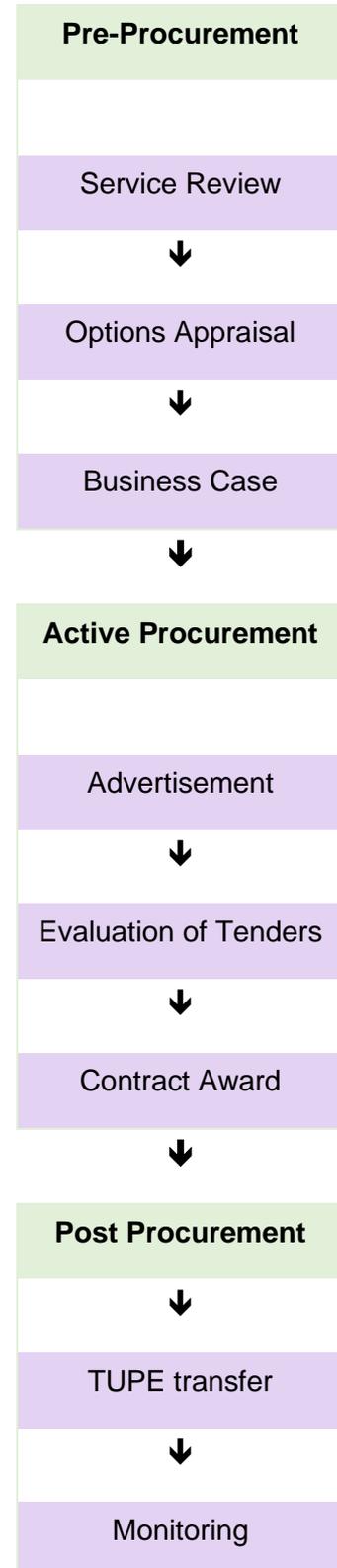
Each stage is then outlined in greater detail in the subsequent sections of the guide for reference where needed and the appendices at the end of the guide offer model materials that can be adapted for use in dealing with each stage.

The guide seeks to display the differences in legislation and practices across the different nations of the UK.

Procurement in Northern Ireland follows a particularly different pattern, where the Procurement Board and Central Procurement Directorate (CPD) oversees the direction of procurement, develops guidance for public sector procurement and undertakes procurement exercises for the NI Executive Departments.

For further information relating to procurement in Northern Ireland, contact John Patrick Clayton - j.clayton@unison.co.uk

Principal Steps in the Procurement Process



Contents

Quick reference checklists	5
Summary of procurement regulations	9
Introduction	9
Regulation coverage	9
The full regulations	11
Steps in the process.....	13
Selection questionnaire	13
Exclusion.....	13
Contract award.....	13
Varying contracts.....	14
Exemptions	14
Awards without notice	14
Awards outside regulations	14
Reserving contracts for specific types of organisation	15
Non-standard forms of contract	15
Framework agreements.....	15
Dynamic Purchasing System.....	15
Light Touch Regime Regulations	16
Below Threshold Regulations.....	16
National and sector adaptations	17
Procurement process through to contract award.....	19
Objectives	19
Procurement agreement.....	20
Gaining involvement and extracting information	20
Commercial confidentiality agreements.....	21
Fair service review	22
Fair options appraisal.....	23
Permitted bids that avoid staff transfer	26
Organising and campaigning plan	27
Influencing criteria	29
Influencing selection.....	35

Procurement process after contract award.....	36
Objectives	36
Introduction	37
Enforcing TUPE application	37
Enforcing TUPE protections	39
General protections	39
Protections for jobs.....	40
Protections for terms and conditions.....	41
Protections for pension rights	43
Protections for collective agreements	45
Protections for recognition	45
Enforcing TUPE information and consultation rights.....	46
Employers’ duty to inform	46
Employers’ duty to consult.....	47
Employee liabilities information	50
Organising for post transfer.....	51
Building membership and activist base.....	51
Maintaining DOCAS	51
Renewing recognition and facilities agreements	52
Monitoring protections and performance	53
Appendix 1 – Model Procurement Agreement.....	55
Appendix 2 – Service improvement plan template.....	61
Appendix 3 - Model letter seeking information and discussions on proposed transfer	62
Appendix 4 - Model first follow-up on proposed transfer.....	63
Appendix 5 - Model response to measures notification	64
Appendix 6 – Model letter on DOCAS arrangements	66
Appendix 7 – Sources for additional UNISON guides, reports and training	68
Appendix 8 – Summary of possible legal claims.....	70
Appendix 9 – Collective bargaining inducements	72

Quick reference checklists

PRE-PROCUREMENT

Service review

Key steps

- Assessment of service standards and costs of specified set of existing services
- Recommendation on whether alternative methods of delivery need to be considered

UNISON branch action

- Seek input to the terms of the review and conclusions drawn from evidence
- Challenge any exaggeration of service flaws and delivery costs
- Challenge any dubious benchmarks against which standards and costs are judged
- Seek input of views among members working in the service under review



Options appraisal and business case

Key steps

- Assessment of feasible options for alternative methods of service delivery
- Analysis of costs and benefits of each option to arrive at recommendation with supporting business case

UNISON branch action

- Seek input to the terms of the appraisal and conclusions drawn from the evidence
- Ensure appraisal carries no assumption of need to put services out to tender and a properly resourced improvement plan for current in-house services is considered as an option
- If appropriate, ensure improvement plan considers provision of services by other parts of the organisation or through co-operation with other public sector bodies, in accordance with public contract regulation definitions for public sector exemption from the regulations
- Ensure costs and benefits of options for putting service out to tender take account of the costs caused by fragmentation of services, such as loss of integration and flexibility of in house provision (appendix 7 shows service group specific research on outsourcing impact)
- Demand a thorough business case to justify any recommendation to put a service out to tender
- Seek an equality impact assessment as part of judging the proposed options



ACTIVE PROCUREMENT

Advertisement

Key steps

- If a decision is made to put a service out to tender, a contract notice (possibly preceded by a prior information notice) is published in Find a Tender for high-value contracts and Contracts Finder for lower valued contracts
- The procurement process is chosen from available options – open, restricted, competition with dialogue and competition with negotiation
- The selection criteria for defining organisations eligible to bid and the criteria for awarding the contract are specified

UNISON branch action

- Seek input to decision on the procurement process selected and the criteria specified for selection and award
- Challenge any specification that discriminates against in-house bids through such factors as short bidding timescales or unreasonably high turnover thresholds
- Seek selection criteria that emphasise consideration of experience in public services and adoption of fair work practices, including Living Wage payment and secure forms of employment (in Scotland, ensure criteria reflect Fair Work First and, in Northern Ireland, ensure criteria reflect Scoring Social Value, both of which are detailed later in this guide)
- Seek award criteria that go beyond solely price to assess quality in terms that play to strength of in-house provision, such as ability to provide services that co-ordinate with the wider organisation and adapt to circumstances without major cost revisions
- Seek in-house bid and / or publication of contract in a way that maximises awareness among other public sector bodies of the opportunity to make a bid
- Recruit and organise staff faced with threat of outsourcing



Evaluation

Key steps

- Submitting organisations are evaluated against the selection criteria to test their capacity to meet the contract
- Bids are tested against the weighted award criteria and the winning bid is selected

UNISON branch action

- Seek input to evaluation of organisations against selection and award criteria, which may include participation in interviews of bidders
- If no adequate bids are received, argue for reversion to in-house provision under procurement regulation exemptions for award without notice
- Demand excessively low-cost bids are investigated in line with procurement regulations
- Seek checks on mandatory and discretionary grounds for excluding an organisation
- Obtain information on bidding organisations through the Bargaining Support Group (bsg@unison.co.uk)
- Seek assurances from bidders on long-term maintenance of recognition agreement if recognition in place (contact Bargaining Support on bsg@unison.co.uk for checking of the UNISON Bargaining Database if unsure of whether recognition is in place) or willingness to sign recognition agreement where not already in place



POST PROCUREMENT

Transfer of service provision

Key steps

- Assessment of whether TUPE applies to transfer of employees to new provider
- If TUPE applies, application of requirements to inform and consult affected employees

UNISON branch action

- Assess whether any grounds to challenge if employer argues that TUPE does not apply
- If TUPE does not apply by law, consider if there is a case for application of TUPE principles to public sector bodies under the Cabinet Office Statement of Principles or similar devolved legislation
- If TUPE applies, argue for commencement of information and consultation rights at earliest opportunity
- Seek clarity on “measures” put forward by new employer to ensure compliance with TUPE rights
- Seek TUPE Plus agreement for maximum enhancement of employment rights
- To fulfil any agreement on continuation of DOCAS “check-off” arrangements for UNISON members, ensure provision of details in format needed by new payroll department
- Begin building relationship with new employer that sets the framework for developing maximum union strength, including:
 - Bargaining arrangements that include a local forum that provides access for full-time officials, branch stewards and officers from across the contracting authority
 - Agreement to allow union access to induction process / new starters list for recruitment purposes, as well as general access for full time officials and branch officers to recruit new members and talk to existing members
 - Where there is an existing national agreement, facility time arrangements that allow for local stewards to attend regional or national forums



Monitoring

Key steps

- Assessment of service delivery standards over duration of contract

UNISON branch action

- Highlight issues in service delivery with a view to raising failures as a factor in contract renewal or an optional extension of the contract
- Ensure union maintains monitoring of continued compliance with TUPE regulations
- Maintain regular union contact with transferred members and seek activists to build union’s strength in the new employer

Summary of procurement regulations

Introduction

The rules on purchasing of goods and services by public sector bodies in the UK are rooted principally in the 2014 European Union Public Procurement Directive. The requirements set out in this directive have been applied to England, Wales and Northern Ireland through the Public Contract Regulations 2015 and to Scotland through the Public Contract (Scotland) Regulations 2015.

Separate rules for the energy, water and transport industries are applied through the Utilities Contract Regulations 2016 and the Utilities Contract (Scotland) Regulations 2016, while the Concessions Contract Regulations 2016 and Concessions Contract (Scotland) Regulations 2016 define rules for contracts which involve selling the right to commercially exploit a service, such as a catering facility in a leisure centre.

Though rooted in EU legislation, these regulations are now UK laws and therefore they are not immediately affected by the UK's withdrawal from the EU, though that withdrawal opens the possibility for future changes.

The regulations also codify the UK's obligations under the World Trade Organisation Agreement on Government Procurement, which sets out similar principles to those derived from the EU.

This section of the guide is intended to provide a quick overview of the core features of these regulations to set the framework for the subsequent material on influencing the procurement process and TUPE to achieve the best possible outcomes for members.

Regulation coverage

The opening provisions of the European Union Public Procurement Directive state:

It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive.

However, where a contracting authority does choose to put a service out to tender, the authority must comply with the UK's regulations in conducting its procurement process.

The full regulations only apply to certain types of contract above a price threshold determined by the EU. The complete set of threshold figures applicable from January 2022 are shown [here](#) for England, Wales and Northern Ireland and [here](#) for Scotland. However, the thresholds of most relevance to UNISON are service contracts for central and "sub-central" government, shown below.

Type of service contract	Threshold
Central government	£138,760
Sub-central government	£213,477

The full listing of authorities that are classified as central government can be found [here](#), however, within the main sectors where UNISON represents members, the principal central government authority is the Department of Health, which encompasses NHS Trusts and the NHS Business Services Authority.

The majority of UNISON sectors are classified as sub-central authorities, including local government, police authorities, higher education and further education. In addition, while the NHS is generally classified as central government, regulatory body Monitor has stated that Foundation Trusts are classified as sub-central authorities.

However, some services which are thought to attract less interest from outside an EU Member State are subject to a “Light Touch Regime.” The full listing of these areas is shown [here](#), but includes healthcare, social services, education, security and catering. These areas have a much higher threshold of £663,540 and those contracts valued above the threshold are subject to a slightly different procedure to those specified in the full rules.

Contracts valued below the thresholds do not have to comply with the full regulations. However, they do have to comply with the principles of procurement set out in the regulations.

The table below sets out the regulations that apply to all forms of contract.

Contract type	Regulations applicable
Central and sub central government contracts above threshold	Procurement must comply with full regulations
Central and sub-central government contracts below threshold	Procurement must abide by principles of regulations
Light Touch Regime contracts above threshold	Procurement must comply with modified regulations
Light Touch Regime contracts below threshold	Procurement must abide by principles of regulations

The Light Touch Regime only applies where the service set out in the contract is of the specified type, not simply because the contracting authority works in the field covered by the regime. For example, an NHS Trust works in healthcare so any tender for healthcare services is subject to the Light Touch Regime threshold of £663,540, but if it seeks tenders for an IT contract the central government threshold of £138,760 applies. Equally, a local government refuse collection contract would be subject to the sub-central threshold of £213.477, but a home care contract would be subject to the Light Touch Regime threshold.

The full regulations

Where a contracting authority has to comply with the full regulations, it can choose to run a competitive procedure from among five types – open, restricted, competitive with negotiation, competitive with dialogue or innovation partnership. The principal steps for these procedures are shown below (innovation partnerships follow broadly the same procedure as competition with negotiation).

Steps	Open	Restricted	Competitive with negotiation	Competitive with dialogue
1	Competition is opened by placing a contract notice in the UK Find A Tender site. A Prior Information Notice (PIN) can also be issued to provide a brief outline of the contract before the notice appears.			
2		Bidders submit selection questionnaire designed to enable authority to judge capacity to fulfil tender and whether any grounds for exclusion		
3		Authority invites selected bidders to submit tender (minimum of five bidders must be invited to tender)	Authority invites selected bidders to negotiate over a possible solution to the authority's requirements. Following conclusion of negotiations, authority must invite minimum of three bidders to submit tender.	Authority invites selected bidders to enter into a dialogue over a possible solution to the authority's requirements. Following conclusion of dialogue, authority must invite minimum of three bidders to submit tender.
4	Tenders, accompanied by completed questionnaire that enables authority to judge any grounds for exclusion, are evaluated against award criteria, the winning bid selected and the award notice is published in Find A Tender	Tenders are evaluated against award criteria, the winning bid selected and the award notice is published in Find A Tender		

The timescales for these procedures are shown below.

Open	Restricted	Competitive with negotiation	Competitive with dialogue
<p>The minimum period between issuing a contract notice and a deadline for receipt of tenders is 35 days, though this can be shortened to 15 days if the notice was preceded by a PIN.</p>	<p>A request to participate in the process must be received within 30 days of a contract notice and a minimum of 30 days must be allowed for receipt of tenders following the invitation to submit (this timescale can be shortened to 10 days where a PIN has been issued).</p> <p>The time allowed for tenders to be submitted can be varied by sub-central authorities provided they are consistent in applying the timescale to all bidders.</p>		<p>A request to participate in the process must be received within 30 days of a contract notice</p>

Open procedures are usually used where a standard type of service is required, the restricted procedure where it is considered useful to whittle down bidders from a large number of potential suppliers and the two forms of competitive procedures where a particularly complex service is required that needs adaptation of readily available solutions. The innovations partnership represents a variation on the competitive procedure that has been introduced as a process to develop services not currently available on the market.

Steps in the process

Selection questionnaire

The [standard selection questionnaire](#) is split into three parts (for Scotland, the similarly structured [SPD](#) applies). The first part requires basic information about the bidder, the second requires a declaration about the factors that can form the basis for exclusion and the third seeks to test capacity to fulfil the contract.

The first two parts cannot be amended, but the third allows for adaptation according to the requirements of the particular contract.

Capacity to fulfil the contract is usually tested against economic and financial standing, as well as technical and professional ability. It is not unusual for the economic and financial standing criteria to include a minimum turnover level, but the regulations do not allow the threshold to be set at more than twice the contract value unless it can be justified on the basis of some exceptional circumstance.

Exclusion

The regulations require mandatory exclusion if the bidder has violated bribery, fraud or money laundering legislation (in Scotland, “blacklisting” of trade union officials is also a mandatory ground for exclusion). It is at the authority’s discretion to exclude a bidder if they have violated environmental, social or labour laws, or they have shown persistent deficiencies in prior public contracts which led to early termination of a contract, damages or other comparable sanction within the previous three years

Violations of social or labour laws can include:

- Health and Safety Executive enforcement and remedial orders;
- Complaints upheld by the Equality and Human Rights Commission;
- Findings against the bidder by an employment tribunal or employment appeal tribunal;
- Breaches of National Minimum Wage or Immigration Asylum and Nationality Acts.

Contract award

The regulations require a contract award to be made on the basis of the most economically advantageous tender (MEAT), which means that costs and benefits over the lifetime of the contract can include economic and social factors.

In England, Wales and Northern Ireland, the regulations also permit a contract to be awarded on the basis of the lowest price. However, in Scotland awards on such a basis are banned unless there are exceptional circumstances.

The weightings attached to the criteria have to be clearly set out in the contract notice.

In order to encourage bids from small and medium sized organisations (SMEs), a contract can be divided into lots and a limit can be set on the number of lots awarded to a single bidder. Where an authority decides not to split a contract into lots, it has to set out a justification in the contract notice.

Where a tender is abnormally low, the authority has to seek an explanation of the costs.

On award, the contracting authority has to name the successful bidder, provide a breakdown of the scores achieved by the bidders and set out its reason for the decision.

A “standstill period” of 15 days is required before the contract can commence and a bidder has 30 days from notification to challenge a decision.

Varying contracts

Once established, contracts can only be modified during the term of the contract if they clearly state an allowance for modification. However, whatever is stated in the contract, modification cannot:

- Substantially change the nature of the contract;
- Add further work valued at more than 50% of the contract’s value;
- Impose a change that is impossible or very problematic for the supplier to meet.

Contracts must contain a clause that allows for early termination where contract change is substantial.

Exemptions

Awards without notice

The regulations only allow a contract to be awarded through negotiation without issuing a contract notice in the following specific circumstances:

- No tenders or suitable tenders were received when advertised through open or restricted procedure;
- The service can only be supplied by a specific operator;
- The service has to be fulfilled with extreme urgency.

Awards outside regulations

Contracts between two public bodies can lie outside the regulations where the following specific circumstances apply:

- The contracting authority exercises control over the organisation delivering the goods or services, similar to the control it exercises over its internal departments;
- The provider derives almost all of its revenue from the delivery of services to the controlling body.

This definition can throw into doubt contracts with public bodies that have been given a degree of autonomy in their operations.

Contracts between public bodies that are co-operating with one another to perform a public function can also form grounds for exemption.

Reserving contracts for specific types of organisation

Contracts can be reserved for mutuals and social enterprises within certain sectors (mainly social, health and educational), though such contracts cannot last more than three years. The Light Touch Regime rules apply to the award of reserved contracts.

To qualify for this treatment, organisations must meet all of the following criteria:

- The objective of the organisation has a public service mission linked to the delivery of those services listed in [Schedule 3](#) on the Public Contract Regulations 2015, which are also set out in [Schedule 3](#) of the Public Contracts (Scotland) Regulations 2015;
- Profits are reinvested or distributed on participatory considerations (i.e. to staff/owners of the organisation);
- The structures of the organisation (at least when performing the contract) are based on employee ownership or participatory principles OR require “active participation of employees, users or stakeholders.”
- The organisation has not received a contract for the services concerned within the last three years

The regulations also allow for “sheltered workshops” or suppliers whose main aim is the “social and professional integration of disabled or disadvantaged persons.”

Non-standard forms of contract

Framework agreements

A framework agreement is a particular form of contract where a contracting authority establishes an arrangement under which a number of suppliers are accepted as competent to deliver the service and the framework specifies the terms for awarding specific contracts as required.

Contracts derived from a framework are called call-offs and the framework specifies the terms of call-offs, such as awarding on a rotation basis among the named suppliers or through a mini-competition.

The restrictions on framework agreements are that they cannot exceed four years and the terms of a contract cannot be varied substantially from what is set out in the framework. Only authorities clearly identified as part of the framework can award contracts, though the contracts awarded can last longer than the framework itself.

Once the framework has been established, there is no requirement for call-off awards to be published.

Dynamic Purchasing System

A Dynamic Purchasing System is like a framework agreement, but it allows new suppliers to be added as potential suppliers over the duration of the arrangement and there is no time limit on its application.

The timeframe follows the rules of the restricted procedure, and like a framework there is no requirement for call-off awards to be published.

Light Touch Regime Regulations

Contracts valued above the threshold for services specified as part of the Light Touch Regime have to follow the procedure for publishing a call for competition through a contract notice or prior information notice in Find a Tender, as well as publishing the contract award notice in Find a Tender. However, the contracting authority is not bound to follow any of the procedures specified under the full regulations. Nonetheless, in adopting any variation from these procedures, the authority has to comply with the principles below.

Below Threshold Regulations

Contracts valued at less than the thresholds for central government, sub-central government and Light Tough Regime contracts do not have to comply with the procedures set out under the full regulations, however, they do have to abide by the principles of the regulations highlighted below.

- Equal treatment of all bidders – particularly to ensure that no bidders are treated differently in terms of the requirements placed on them and the access they are given to information;
- Proportionality – particularly in terms of setting reasonable time limits given the scale and complexity of a contract as well as reasonable pre-qualification criteria, such as a sales threshold proportionate to the contract;
- Transparency – particularly in terms of advertising contracts widely, as well as disclosing selection and award criteria;
- Mutual recognition – particularly in terms of accepting qualifications from other member states as evidence of ability to fulfil a contract.

In practice a contracting authority may be tempted to treat below threshold contracts in a similar way to above threshold contracts for simplicity and to avoid the danger of challenge that a contract has been awarded unfairly. However, whatever procedure the authority adopts it cannot impose a two-stage process and so has to drop the pre-qualification stage. An authority will usually set out its protocol for below threshold contracts in its procurement guidance.

Contracts issued by central government authorities and NHS Foundation Trusts worth in excess of £10,000, or sub central authorities and NHS Trusts worth in excess of £25,000, generally have to be advertised in [Contract Finder](#), which therefore provides information on lower value contracts than the [Find a Tender](#) service.

The exceptions to the requirement to publish on Contract Finder are as follows:

- Contracting authorities whose functions are devolved or mainly devolved functions of Scotland, Wales or Northern Ireland¹,
- The procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013;
- Maintained schools, academies or sixth form college corporations.

National and sector adaptations

Public Contracts Scotland Regulations 2015

In Scotland, it has been noted in this guide that the contract regulations differ from those applicable across the rest of the UK in the following principal ways:

- The award criteria cannot be based solely on lowest price
- Grounds for mandatory exclusion of bidders includes “blacklisting” of trade union representatives

However, a further layer of regulations are also applicable in Scotland as a result of the Procurement Reform (Scotland) Act 2014. These regulations mean that:

- A specified [set of procedures](#) apply to “regulated procurements” for services worth less than the Find a Tender publication thresholds but more than £50,000 and such contracts have to be advertised on [Public Contracts Scotland](#);
- Contracting authorities are encouraged to promote payment of the Living Wage as part of a consideration of [fair work practices](#) within the award criteria;
- Contracting authorities have to consider how the procurement can improve economic, social and environmental wellbeing of the area;
- Contracting authorities with a significant procurement expenditure (defined as regulated procurements equal to or greater than £5m) must prepare a procurement strategy and annual report;
- The inclusion of community benefit requirements must be considered for any regulated procurement of £4m or more.

¹ Separate national databases of public sector contracts are kept for Northern Ireland, Scotland and Wales through [eSourcing NI](#), [Public Contracts Scotland](#) and [Sell2Wales](#).

Utilities Contract Regulations

Coverage of the Utilities Contract Regulations include the energy, water and transport industries.

They differ from the standard Public Contract Regulations in the following principal ways:

- The threshold for the full regulations to apply comes into effect for services valued at £426,995;
- Framework agreements cannot exceed eight years;
- Contract authorities do not have to explain any decision not to split contracts into lots.

Concessions Contract Regulations

The Concessions Contract Regulations apply to contracts which involve selling the right to commercially exploit a service, such as a toll bridge or cafeteria. The regulations vary in many ways from the standard Public Contract Regulations, but the most important differences are:

- The regulations apply to contracts worth in excess of £5,336,937;
- Like the Light Tough Regime, the regulations demand advertisement in Find A Tender but otherwise only specify principles to be observed rather than set procedures;
- Award criteria have to be based on “overall economic advantage;”
- Contracts are generally limited to five years.

Further details are available [here](#)

Procurement process through to contract award

Objectives

Over the procurement process that leads up to contract award, the feasibility of what can be achieved will depend on local circumstances. However, the ideal set of goals is as follows:

- 1) A procurement agreement that guarantees involvement of the union throughout the procurement process and establishes criteria for decision making that provide maximum protections for the terms and conditions of staff;
- 2) Where a service review takes place, it delivers a fair judgement of the service against appropriate benchmarks;
- 3) Where a service review identifies shortcomings, they are addressed through an improvement plan;
- 4) Where the process moves to options appraisal, the options consider alternatives to placing the service out to tender;
- 5) The criteria, weighting and scoring of options appraisal gives due weight to the strengths of in-house options and the weaknesses of privatisation;
- 6) Where options appraisal ends in selection of putting the service out to tender, bids based on in-house solutions and / or secondment are permitted;
- 7) A campaign plan rallies staff support and expertise behind in-house alternatives and brings maximum pressure to bear externally from service users, the media, the local community, elected officials and overseeing public authority bodies.
- 8) Tender selection criteria incorporate consideration of "fair work practices."

Procurement agreement

Rather than reacting to each step as it unfolds, the most advantageous outcomes in any procurement process are likely to be achieved if a thorough agreement can be reached with the employer for the procedure to be followed in handling the whole process.

Therefore, UNISON's [model procurement agreement](#) set out in Appendix 1 seeks to provide a template for agreeing union involvement at the crucial decision points and lay down criteria for those decisions which protect staff terms and conditions.

If this can be agreed with the employer in advance of any procurement initiative emerging, it may offer the best opportunity to resolve any points of contention in good time and achieve the most beneficial clauses.

Gaining involvement and extracting information

Where a recognition agreement is in place, it may explicitly refer to “reorganisation” and / or “contracting out” as a subject to be brought before the joint negotiating committee (as per UNISON's [model recognition agreement](#)). And even where the scope of recognition is defined in broader terms, it may still offer a basis for arguing for discussions early in the procurement process.

Where an agreement of any kind is not in place, there are limited options for forcing the employer to permit union involvement in pre-procurement processes, as there is no statutory requirement on the employer to inform and consult the workforce until a contract is awarded under TUPE.

In Scotland, [section 52 of the Local Government in Scotland Act 2003](#) offers one of the most useful reference points as it states that “there should be consultation with and the involvement of the trades unions at the earliest stages of a review process where staff may transfer to a new service provider.”

Elsewhere, it may be possible to fall back on duties in place in some areas of public services to consult with “stakeholders” or “representatives,” usually in terms of the impact of changes introduced by the employer on the wider community. This can offer a route to argue that the workforce should be classified as a “stakeholder” and so involved in consultation. However, it is more usual for “representatives” to be classified as service user or community groups, so the union’s input to such groups through a campaign plan may prove more fruitful.

Such requirements are broadly applied in Scotland and Northern Ireland through community planning sections of the Community Empowerment (Scotland) Act 2015 and the Local Government Act (Northern Ireland) 2014. In England, such requirements are set out for Clinical Commissioning Groups under the Health and Social Care Act 2012 as well as in the NHS Constitution, while Best Value statutory guidance issued in 2015 for England places similar demands on local authorities.

In Northern Ireland, employers have legal obligations to disclose information for the purposes of collective bargaining and in accordance with the recommendations of the Wood Report have a duty to consult with recognised trade unions to enable them to affect decisions before they are taken. Public authorities are also under a duty to consult under section 75 of the Northern Ireland Act 1998 and their individual Equality Schemes.

The NHS constitution gives the most explicit reference to involving staff specifically by stating that *“the NHS commits... to engage staff in decisions that affect them and the services they provide, individually, through representative organisations and through local partnership working arrangements.”*

As always for bargaining where a union is recognised, the primary reference to justify demands for information is the [ACAS Code of Practice on Disclosure of Bargaining Information](#) or its [LRA equivalent](#) in Northern Ireland. Procurement is not specifically mentioned in the code but it clearly has implications for all the broad areas highlighted by the code – pay and benefits, conditions of service, manpower, performance and financial.

In the case of public sector organisations, the Freedom of Information Act 2000 may offer an alternative means to extract information and UNISON’s full guidance on making such a request is available at <https://www.unison.org.uk/content/uploads/2016/08/Guide-to-using-the-Freedom-of-Information-Act.pdf>

Commercial confidentiality agreements

At some stage in the procurement process it is not unusual for union reps to be asked to sign a confidentiality agreement. In general, the union is seeking the maximum information to put it in the strongest position to challenge proposals and develop alternatives. However, the price of a confidentiality agreement for receiving such information is often a commitment not to share it outside of the parties identified by the agreement. This can clearly hamper the union, particularly where campaigning outside of the union, through the media or public authorities with an overseeing role, is liable to form a major strand of work.

Therefore, the decision on whether to sign such an agreement has to be worked out on the balance of advantages and disadvantages in each particular case. Branches should seek advice from their regional office and any agreement must be signed on behalf of UNISON by the designated regional official.

Fair service review

A service review is the process by which an organisation assesses a part of its operations, typically in terms of cost and performance. These are usually set against its previous record and / or baseline information on typical costs and performance indicators among comparable operations. Such reviews may take place at regular planned intervals or as an ad-hoc response to concerns.

Union involvement at this stage should seek to ensure that the judgement made about costs and performance is reasonable. Drawing on the knowledge and expertise of staff in the unit under review is liable to be invaluable in making such judgements.

Equally, benchmark costs and performance levels are often highly subjective. Care should be taken that comparisons are like for like, since costs and performance can vary markedly for reasons that are not connected to efficiency but to such factors as geography, the size of the organisation or the type of work demanded. Care should also be taken that a narrow set of performance indicators are not being used that paint an unfair picture of the service. For instance, a few mechanical productivity measures such as number of patients seen per day may show a decline, but if the quality of service is measured through patient questionnaires the data shows an improvement as more time is being dedicated to each patient.

Union reps should assess any review to ensure that unfair judgements are not being made that then act as a stimulus for recommending that some form of remedial action needs to be taken.

Where a service review judges that some level of remedial action is needed, it may be possible to head off a move to a full options appraisal through the development of a service improvement plan.

A template for seeking agreement on a service improvement plan is set out in Appendix 2.

Fair options appraisal

When a service review leads to an options appraisal, the organisation must assess the options for addressing the shortcomings identified by the review.

It is vital to remember that there is no legislative requirement on a public sector organisation to seek a solution in putting the service out to tender. As set out in this guide's summary of procurement regulations, the EU directive upon which UK regulations are based states:

It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive.

And no UK wide legislation or guidance has been issued against the backdrop of the withdrawal of the UK from the European Union that challenges this position.

UK central government bodies (including NHS trusts) work under the framework of the Treasury's Managing Public Money guidance², which demands that resources are used "efficiently, economically and effectively." The guidance does not require procurement but simply states that where it does take place that it is carried out "objectively and fairly, using cost benefit analysis and generally seeking good value for the Exchequer as a whole."

Similarly, the Best Value requirements on local government (which are rooted in the Local Government Act 1999 for England and Wales) demand arrangements "to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness." Closely worded provisions are found in the Local Government in Scotland Act 2003 and the Local Government (Northern Ireland) Act 2014 within the context of performance improvement.

Therefore, when entering into options appraisal, there should be no assumption that putting services out to tender will be the outcome.

In order to offer maximum protections to terms and conditions for staff, consider whether it is possible to get the following options on the table:

- An in-house service improvement plan based on changing the way the individual service is delivered to address shortcomings. This may have been raised at service review, but should again be put forward if it represents a viable option. Appendix 2 offers a framework for beginning to set out such a plan. This option should very clearly not be treated as a "maintain the status quo" option (which is easy for the appraisal to dismiss), but as a serious redesign of operations.

² HM Treasury Managing Public Money March 2018

- An in-house service improvement plan based on joining forces with other public authorities to achieve “economies of scale” without sacrificing jobs or staff terms and conditions. The cost advantage that some large private companies enjoy from the sheer scale of their operations can be a key reason for their ability to achieve lower bids and therefore a joint public sector response can head off this danger.

In making an assessment of the options, they should be judged against a specified set of criteria, each criterion should be weighted appropriately and each option should then be scored against the criteria.

These judgements are highly subjective and once again the input of the union is liable to be invaluable to ensure that the criteria, weighting and scoring is not skewed toward putting services out to tender.

The key considerations in making these judgements are as follows:

- Is quality of service given due weight against cost?

Private contractors can be very good at putting in low bids because they anticipate attacking labour costs, but would fair less well if the quality of their service delivery is assessed fairly.

- Do the criteria take sufficient account of impact on staff costs, morale and motivation?

Though TUPE can protect terms and conditions initially, new employees of private contractors are not subject to the same protections and services will almost inevitably increasingly be delivered by staff on inferior terms. The government’s own [Should Cost Modelling](#) guidance recommends that staff costs are explicitly stated in an analysis in the costs of contracts over their full duration. This can force public authorities to expose assumptions about staff pay, terms and conditions over the long-term.

- Do the criteria take sufficient account of the impact on the wider community?

There will be a negative economic impact on the local community of moving to a lower pay model and the consequences for service users of a workforce on reduced terms should also be appreciated.

- Is the flexibility of services to respond to changes given due weight alongside the costs of making those adjustments?

When services are in-house, they are subject to the direct authority of the organisation’s management and therefore changes to service arrangements are generally much easier to achieve than when contracted out. Many outsourced service providers have gained notoriety for imposing major charges for any departure from the strict terms of a contract.

- Has account been taken of the cost of cancelling a contract?

- Has account been taken of the cost of the commissioning process?

It is not unusual for the cost to include substantial fees for consultants and lawyers to steer through the process

- Has account been taken of the cost of contract management?
- Are the options all subject to an equality impact assessment?

The Public Sector Equality Duty forces public authorities in England, Scotland and Wales to consider the impact of changes on those with “protected characteristics.”

Though the legislation does not require this duty to be discharged through an equality impact assessment, the case should be made that this is the most effective way of discharging the duty. This can be a weakness for the option to tender as outsourcing has a marked tendency to hit the low-paid hardest and women, ethnic minorities and disabled staff all tend to figure prominently among the low-paid.

In Northern Ireland, section 75 of the Northern Ireland Act 1998 requires public authorities when carrying out their functions to have due regard to the need to promote equality of opportunity for the nine categories of persons outlined within the legislation. To give effect to these duties, public authorities are required under schedule 9 of the Act to have an equality scheme, setting out how the public authority intends to discharge the section 75 duty in relation to its functions. This Scheme must set out how the public authority will assess and consult on the impact of its ‘policies’ on the promotion of equality of opportunity. The purpose of such assessments is to set out the consideration given by the public authority as to how it will mitigate any adverse impact of the policy on the promotion of equality of opportunity, or what consideration has been given to alternative policies which may better promote equality of opportunity.

Statutory guidance prepared by the Equality Commission for Northern Ireland for public authorities on their duty to promote equality of opportunity highlights that the term ‘policy’ is broad, encompassing all the ways a public authority carries out or proposes to carry out its functions. Procurement is specified by the Commission as being covered by this duty. In assessing the impact of policies on the promotion of equality of opportunity, public authorities must first ‘equality screen’ the policy. If this screening identifies that the policy will have differential impacts on the categories of persons under section 75, the public authority should move to carry out a full Equality Impact Assessment, including full consultation. This should be highlighted to the public authority as the most effective means of discharging the duty and will be required in many circumstances. As a minimum, the equality screening should be provided to branches engaged in the procurement process and can be challenged via a complaints process if it has not sufficiently discharged the duties under s75. Support can be provided from the relevant Regional Officer for branches in Northern Ireland in this process.

Arising out of the options appraisal, the employer will usually then move to producing a full business case for the preferred option. If the selected option is to tender, negotiators should insist on seeing the case as it represents the last chance to challenge the financial and organisation justification put forward, frequently on the basis of the issues set out above.

A final fallback position before embarking on putting a service out to tender is to press the public authority to carry out a pilot where a service is being outsourced for the first time, in line with the government's 2021 Sourcing Playbook, which states:

“Where government is outsourcing a service for the first time, a pilot should be run first as part of a robust programme of testing, in recognition of the inherent uncertainty of first-generation outsourcing, before deciding on a long-term delivery model.”

This may offer a further opportunity to challenge an outsourcing decision before implementation.

Permitted bids that avoid staff transfer

Where it is not possible to avoid services going out to tender, there is still a valuable role for the union in influencing what options will be permitted for the tender. The two main options at this stage will be:

- An in-house bid, once again based on a plan for service improvement along the lines of that set out above. Though it may not have been possible to convince the employer at previous stages, a case can still be made that management should work with the unions in assembling an in-house tender that is given a fair chance in the bidding process.

In Scotland, [section 52 of the Local Government in Scotland Act 2003](#) specifically states that a “local authority should ensure that there is a level playing field, that any in-house team is provided with appropriate support to prepare an in-house bid.”

- Bids that allow for a form of secondment of staff to the contractor rather than transfer to the contractor.

This option has to observe strict rules in order to be legally compliant and avoid inadvertent transfer. The following key features should be noted:

- Assent for secondment is often conducted through a specific secondment agreement that sets out variations in working arrangements, which must be agreed by individual workers;
- A key feature of any such agreement is to maintain the principle that seconded workers retain the same employer and the original employer is effectively “lending” workers to the host organisation;
- Therefore, agreements should specify that the secondee remains employed by the original employer and the terms and conditions set out in the written statement of employment particulars/contract of employment remain in force, except to the extent varied by an agreement;

- Pay, terms and conditions should accordingly suffer no detriment. Any reimbursement of the organisation putting staff out to secondment by the organisation receiving the seconded staff should be an agreement between the organisations that leaves the status of the seconded workers unchanged;
- Secondments can inadvertently result in a secondee becoming the employee of the host unless agreements are constructed in a way that makes explicit that the secondee does not owe any duties to the host directly. Appraisals, disciplinary or grievance measures should be explicitly stated as the continued responsibility of the original employer to ensure staff status is protected;

Please also refer to page 37 in relation to the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (COSOP). It is necessary to act with caution as a secondment could lead to a TUPE transfer as matter of law and early advice must be taken.

The model has been used in cases such as Liverpool Direct, a joint venture company formed between Liverpool City Council and British Telecom, where staff were seconded to the joint venture company but remained employees of Liverpool City Council.

Organising and campaigning plan

Running in tandem with any work to influence the employer's decisions over the pre-procurement phase, it will usually be valuable to consider an appropriate organising and campaigning plan to maximise pressure on the employer.

UNISON's broad [organising](#) and [campaigning](#) guidance provides advice on rallying support among staff and outside the workplace.

However, the specific considerations in the context of procurement are as follows:

- As a starting point, establish a clear picture of the staff affected by early proposals put forward at the pre-procurement stage, the members in those areas (broken down by such factors as location and roles) and the activists who may be able to act as the spearhead of organising work;
- Drawing on the experience of staff in the affected areas will be crucial to challenging service reviews and putting forward proposals for remodelling in-house delivery;
- The employer's proposals may well cause a great deal of unease and uncertainty among staff, offering fertile ground for recruitment. As always, recruitment will be crucial to building the density of membership that increases the negotiating strength of the union to challenge proposals;
- Branches should notify the appropriate regional officers at an early point, which in turn will enable escalation as required to national officers, drawing in the assistance of such sections of the union as the relevant service group, Private Contractors Unit and Bargaining Support Group;

- Make contact with other unions representing staff affected to begin assembly of a joint strategy around the proposals;
- Draw up a list of external organisations that have an interest in the proposals and may form suitable allies. These will normally be drawn from the following groups:
 - Service users
 - Community groups
 - Media
 - Public authority bodies with responsibility for overview and scrutiny
 - Elected officials such as councillors, and MPs

UNISON's [campaigning](#) guidance offers advice on how to engage most effectively with these groups, as well as drawing in the support of UNISON's Labour Link where appropriate.

For Local Government branches, the "[Think Twice](#)" guide also provides a useful tool for reminding councillors of the dangers of outsourcing, while "[Working with local communities to fight cuts and privatisation](#)" offers advice on campaigning.

It is often crucial to launch this work on establishing allies against outsourcing at an early stage, before the authority has made any decisions on service reviews or options appraisals.

Example 1

All the strands of the issues to be tackled in the pre-procurement phase can be seen in the example of Newcastle City Council.

The case began when back office services came under threat of privatisation, prompting Newcastle UNISON branch to carry out extensive research into the performance of private sector bidders in other outsourced contracts, convincing some middle managers that the promised savings may not be delivered by private sector involvement. This prepared the ground for the development of a business case for an in-house option. UNISON secured union involvement in the procurement process, enabling them to influence the council's evaluation of the various proposals.

Alongside making the case to the employer, industrial action was taken over the proposals, ensuring that key decision makers were left in no doubt about the strength of feeling among workers and community representatives.

The council's Labour group then agreed a resolution committing to an in-house bid, sending a strong message to senior management about the need to work more constructively with the unions to develop a non-privatised solution.

In developing the in-house option, a key factor in winning support was showing management that the union was not opposed to change or efficiency improvements.

Eventually, a new model for delivering the services within the public sector was approved, leading to a £250 million, 10-year contract. This was not painless, not least because of a 25% reduction in staff working on the services. However, all redundancies were voluntary and minimised by the council's commitment to staff retraining and redeployment.

Influencing criteria

If the decision has been made to go to tender, attention should shift to influencing the criteria by which the contract will be awarded and the evaluation of bidders against those criteria.

Procurement regulations continue to allow commissioning bodies in England, Wales to make their decisions on contract awards solely on the basis of cost, but public authorities also have the option to include social, environmental, quality and technical factors among the selection criteria.

In the case of local authorities in England and Wales, the Public Services (Social Value) Act 2012 can offer a useful reference point for making such a case as it requires councils to consider how to improve procurement can assist in improving local social, economic and environmental.

In England, the introduction of the Provider Selection Regime for the NHS is also set to open up the specification of criteria covering "service sustainability and social value."

The proposals that set to take effect following the passing of the Health and care Act are carried on this [link](#) and carry this outline of criteria:

"We intend that the Provider Selection Regime will include a set of key criteria that may be considered when making decisions about provider selection under the regime. These criteria are summarised as follows...

- Integration, collaboration, and service sustainability
- Ensures that decision-making bodies seek to maximise the integration of services for patients to improve outcomes, that decision-making bodies give due consideration to how their decisions may affect the stability and sustainability of services over time across providers, and that their decisions are consistent with local and national plans around integrating care and joining up services for patients and service users...
- Social value
- Ensures decision-making bodies seek to maximise the social value created by the arrangements, recognising the role the health service plays in local communities including its leadership role in achieving a net zero carbon footprint. The criteria and metrics for social value will align with guidance on social value published by Cabinet Office and by NHS England."

In Scotland, commissioning bodies cannot make their decisions on contract awards solely on the basis of cost unless there are exceptional circumstances..

Scotland's guidelines on [section 52 of the Local Government in Scotland Act 2003](#) which apply to Scottish local authorities state that "contracts should not be awarded only on the basis of 'lowest price' other than in exceptional circumstances and unless detailed quality requirements have already been included in the tender specification. Basing contract award decisions on lowest price is not generally compatible with best value and is likely to encourage potential contractors to focus on price at the expense of quality of service."

The [Procurement Reform \(Scotland\) Act 2014](#) requires authorities to look at how they can improve the social, economic and environmental well-being of their community before it buys services.

They also make reference to fair work practices which are set out more fully in [Scottish government guidance](#) and propose that criteria for assessing tenders should include consideration of:

- Appropriate channels for effective voice, such as trade union recognition
- Investment in workforce development
- No inappropriate use of zero hours contracts
- Action to tackle the gender pay gap and create a more diverse and inclusive workplace
- Providing fair pay for workers (for example, [payment of the real Living Wage](#))
- Offer flexible and family friendly working practices for all workers from day one of employment
- Oppose the use of fire and rehire practices.

The spirit of the fair work approach is also reflected in [section 52 of the Local Government in Scotland Act 2003](#), which carries guidelines that:

- Procurement decisions should not be dependent upon dilution of employees' pay and conditions of employment.
- Where relevant to performance of the contract, potential service providers should be asked to demonstrate a commitment to fair employment practices and constructive employee relations. This includes, but is not limited to, the demonstration of positive attitudes to trade union recognition, good practice in health and safety, arrangements for ensuring that the equal opportunity requirements are met, and reasonable pension arrangements for staff

Specific duties apply when a public authority awards a contract or framework agreement which is covered by the Public Contracts (Scotland) Regulations 2015.

These are:

- When a public authority awards a contract or framework agreement on the basis of the most economically advantageous offer, it must have due regard to whether the award criteria should include considerations to enable it to better perform the equality duty;
- When a public authority proposes to stipulate performance conditions in a contract or framework agreement, it must have due regard to whether the conditions should include considerations to enable it to better perform the equality duty.

The Fairer Scotland Duty, Part 1 of the Equality Act 2010, came into force in Scotland in April 2018. This requires public authorities, in the exercise of their functions, to have due regard to how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions.

In November 2021 the Northern Ireland Executive published Procurement Policy Note 01/21 on 'Scoring Social Value'. This policy is mandatory for central government Departments, Non-Departmental Public Bodies and Public Corporations. The policy provides for tenders for public contracts to be assessed on the basis of social value, as well as cost and quality, with all three considerations to be factored into contracts above the thresholds outlined within the regulations above.

From 1st June 2022 tenders must include a minimum of 10% of the total award criteria to score social value. Departments are encouraged to score for social value in advance of 1st June 2022 if possible. This 10% minimum will apply to contracts for services and works above the threshold where the Procurement Regulations outlined above apply. Where appropriate, Departments can also score for social value on contracts outside of these thresholds. Departments can also give greater weight to social value than the 10% minimum.

A review of the Policy will take place in advance of June 2023 with the intention of increasing the minimum weighting to 20% subject to the approval of the NI Executive. Some social value measures are mandatory. From the 1st September 2021 the following requirements should be incorporated into all government contracts;

- i) compliance with relevant employment, equality and health and safety law and human rights standards;
- ii) adherence to relevant collective agreements;
- iii) and adoption of fair work practices for all workers engaged in the delivery of the contract. Fair work is as per the Carnegie Trust definition and contains 7 measurements. They are (i) terms of employment, (ii) pay and benefits, (iii) job design and nature of work, (iv) social support and cohesion, (v) health, safety and psychosocial wellbeing, (vi) work/life balance and (vii) voice/representation.

The payment of the real Living Wage, as calculated by the Living Wage Foundation, must also be included as a condition of contract for all tenders from June 2022.³

Though legislative guidelines are only prescriptive in relation to Scotland and Northern Ireland, similar criteria that take account of a bidder's employment practices can form a target for all negotiators, as per the model agreement set out in Appendix 1.

Establishing employment practice criteria and giving those criteria a strong weight in the selection process can then form the basis for achieving what is often referred to as a TUPE plus agreement, which goes beyond the minimum legal requirements of TUPE transfer outlined in the next section of this guide and delivers enhanced terms and conditions for transferring staff.

Public sector employers have taken a variety of approaches to inserting Living Wage considerations into contract notices when services are put out for tender. The tables below set out actual examples of contract notices that may provide useful models when negotiating with employers over the terms of contracts issued.

The recent examples below show how some employers have taken a very direct approach to specification of Living Wage payments and others set out a looser encouragement of Living Wage payment.

³ <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PPN%200121%20Scoring%20Social%20Value%20%28pdf%20version%2015%20November%202021%29.PDF>

Contract: Cardiff Metropolitan University – Cleaning services

Section of notice: II.2.4) Description of the procurement

Date: June 2021

Statement: The University is an accredited Living Wage provider and wants to achieve fair and nonexploitative practices within this contract. Staff currently employed on this key out-sourced contract are paid the Living Wage (as defined by the Living Wage Foundation) by the incumbent contractor. The University will therefore require any new successful Contractor to continue to pay those staff who work on this contract the Living Wage.

Contract: NHS Kernow Clinical Commissioning Group – Care Home Contract

Section of notice: II.2.4) Description of the procurement

Date: March 2021

Statement: invite Care Home Providers to join a new joint contract for Care Home Services that will... Pay all staff employed in the provision of regulated activities no less than the Living Wage Foundation Rate

Contract: Parliament Hill School & William Ellis School – Cleaning contract

Section of contract notice: **II.2.4) Description of the procurement**

Date: June 2021

Statement: Whilst the School prioritises value for money as a key objective of the Competitive Tender Process, the Governing body is not obliged to accept the lowest price. Both schools are committed to paying the London Living Wage. Borough Council requires all its contractors to pay a 'Living Wage' as defined by the Living Wage Foundation to all those employed on the contract.

Contract: Greenwich Council – Social care

Section of contract notice: II.2.4) Description of the procurement

Date: May 2021

Statement: The Royal Borough of Greenwich is committed to the payment of the London Living Wage and adherence to aspects of the Ethical Care Charter; providers will need to share this commitment and deliver on improved pay and conditions for front line care staff.

Example 2

In developing a consistent approach to renewing contracts or outsourcing services to the private or voluntary sector that takes account of bidders' approaches to employment practices, Southwark Council has committed to considering the position of bidders on the following points in their selection process:

- Access to the Local Government Pension Scheme (LGPS);
- Trade union recognition agreements;
- Payment of the London Living Wage;
- Payment of sick pay;
- Staff training policies;
- Providing defined hour contracts without unreasonable "availability clauses" (i.e. no zero hours contracts);
- Giving staff free access to personal protective equipment;
- Guarantees that TUPE terms and conditions will last for the term of the contract.

Influencing selection

When shortlisted bidders are known, consider the following steps:

- Ensure the employer has carried out checks on the mandatory basis for exclusion of a bidder – violation of bribery, fraud or money laundering legislation (in Scotland, “blacklisting” of trade union officials is also a mandatory ground for exclusion).
- Press for the employer to use their permitted discretion in excluding a bidder for violating environmental, social or labour laws, or they have shown persistent deficiencies in prior public contracts which led to early termination of a contract, damages or other comparable sanction within the previous three years

Violations of social or labour laws can include:

- Health and Safety Executive enforcement and remedial orders;
 - Complaints upheld by the Equality and Human Rights Commission (in Northern Ireland consider any complaints upheld by the Equality Commission, or any relevant investigation by the Human Rights Commission or Commissioner for Older People);
 - Findings against the bidder by an employment tribunal or employment appeal tribunal (in Northern Ireland consider findings made by the Industrial Tribunal or Fair Employment Tribunal);
 - Breaches of National Minimum Wage or Immigration Asylum and Nationality Acts.
- Ensure that, where a tender is abnormally low, the employer complies with the requirement to seek an explanation of the costs, with particular attention paid to its assessment of employment costs.
 - Contact UNISON’s Bargaining Support Group (via bsg@unison.co.uk) for background information on bidders. Bargaining Support will be able to provide any information held on UNISON’s national Bargaining Database relating to agreements or experience of the organisation, as well as profiles covering their organisational structure, finances, position on the Living Wage and any press material on their record.
 - Seek the right for union reps to form part of any interview panel for bidders, using the themes of fair employment practices set out in the Appendix 1 model agreement as a cue for questioning bidders about their intentions if they were to win the contract.

Once again, Scotland’s guidelines on [section 52 of the Local Government in Scotland Act 2003](#) offer some of the most helpful prescriptions for handling selection, stating:

“Staff and unions should be invited to participate in the selection process and in the subsequent detailed work around the transfer. Local authorities should consult their employees and trades unions throughout the process, with full disclosure of information on all matters affecting the workforce.”

Procurement process after contract award

Objectives

The principal objectives for negotiators over this phase of the procurement process are as follows:

- Application of TUPE to transfers;
- Enforcement of TUPE consultation rights and protections;
- Early engagement with any new employer to go beyond minimum protections and establish that:
 - Recognition continues with new employer and extends across all staff working on the contract;
 - Facilities and time off enable reps to deliver sufficient support for transferred staff;
 - DOCAS is set up with the new employer to assist in retaining existing members and access is permitted to new starters on the contract;
 - Where the old employer was part of a national bargaining structure, the new employer commits to honour future pay increases awarded by that national bargaining structure;
 - Staff have the option of remaining within or joining the appropriate public sector pension scheme on the basis of admitted body status;
 - Effective bargaining structures are established with the new employer.
- An organising plan to build the strength of the membership within the contractor to defend staff terms and conditions in the long term.

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006, also known as TUPE, governs the transfer of directly employed staff from one employer to another in the UK. The 2006 legislation replaced the original 1981 regulations and was amended in 2014 with changes that affected any transfer in England, Scotland or Wales. In Northern Ireland there is also the Service Provision Change (Protection of Employment) Regulations (NI) 2006.

The essence of TUPE is that any contract of employment of any person employed by the old employer (the transferor) transfers to the new employer (the transferee) as though the contract was made between the employee and the new employer.

This section of the guide covers the applicability of TUPE and ensuring that staff receive at least the protections it affords, before setting out other dimensions of legislation that may offer a useful supplement.

Enforcing TUPE application

TUPE can be applied for staff when a “relevant transfer” takes place in one of the two forms below:

- An undertaking, i.e. an organisation or part of an organisation, is transferred from one employer to another and retains its economic identity;
- A “service provision change” occurs. For example, an organisation engages a contractor to conduct work on its behalf, a contractor is carrying out a service which is then re-assigned to another contractor or work is brought back in house.

In order to decide whether there has been a transfer of an undertaking, the critical question is whether the undertaking retains its identity and is carried on by the transferee.

The acquisition of a company through the purchase of shares in the company is not a TUPE transfer. This is because the identity of the employer remains the same, it is only the ownership of the share capital of the company that changes.

The 2014 TUPE amendments narrowed the definition of service provision change for any transfer taking place in England, Scotland or Wales. The regulations required that activities carried out after the change in service provider had to be “fundamentally the same” as those that were carried out by the transferor who ceased to carry them out. These changes were not made to the TUPE regulations in Northern Ireland however.

TUPE applies to both the public and private sectors. It also applies regardless of the size of the organisation.

Agency workers, genuine freelancers and the genuinely self-employed are usually outside the scope of TUPE.

In the case of central government bodies, including the NHS, the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (COSOP) can provide a further support in ensuring the principles of TUPE are applied to any transfer.

COSOP states:

“Contracting-out exercises with the private sector and voluntary organisations and transfers between different parts of the public sector, will be conducted on the basis that staff will transfer and TUPE should apply, unless there are genuinely exceptional reasons not to do so.”

“In circumstances where TUPE does not apply in strict legal terms to certain types of transfer between different parts of the public sector, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the regulations applied.”

Where TUPE does not apply according to the usual regulations, a COSOP agreement leads to specification of the staff affected in a Transfer Order or Transfer Scheme, which is made by way of a Statutory Instrument.

The full statement on COSOP can be found at

<https://www.gov.uk/government/publications/staff-transfers-in-the-public-sector>

Similar provisions are carried in regulations specific to Wales and Scotland.

In Wales, the Code of Practice on Workforce Matters applies to councils, NHS trusts / boards and maintained schools (the full list of authorities covered by the code is set out in Appendix A of the code) and states that “whenever public services are to be outsourced to a third party. TUPE will apply, and if TUPE does not strictly apply, the principles of TUPE will be followed unless there are exceptional reasons for not doing so.”

In Scotland, guidance on Section 52 of the Local Government in Scotland Act 2003 states that “where there is a decision to outsource which may involve a transfer, and even where TUPE does not apply as a matter of law, the local authority should undertake to behave in a manner consistent with the good practice identified in this guidance.”

Enforcing TUPE protections

The broad categories of protection under TUPE are as follows:

- Jobs;
- Terms and conditions;
- Collective agreements;
- Union recognition;
- Accrued pension rights.

However, the details of these protections, including the exemptions that apply and relevant regulations that supplement TUPE, are as follows:

General protections

- Individuals who are employed by the transferor immediately before the transfer automatically become the employees of the transferee from the time of the transfer on the terms and conditions they previously held with the transferor.
- The transferee inherits the transferor's rights and liabilities in relation to those individuals.
- If the transferor is criminally liable in any way, this does not transfer to the transferee.

Protections for jobs

- Dismissal of any employee (whether before or after the transfer) for any reason connected with the transfer is **automatically unfair unless the employer can put forward a valid economic, technical or organisational (ETO) reason entailing changes in the workforce**, in which case the dismissal is fair if it is reasonable in the circumstances.
- Potentially permitted economic reasons may relate to factors such as the organisation's profitability or changes in demand for their services.

Potentially permitted technical reasons may relate to factors such as new technology changing the organisation's operations.

Potentially permitted organisational reasons may relate to factors such as the impact of a merger or an organisation wide restructuring.

The phrase "entailing changes to the workforce" refers to changes to the numbers and functions of the workforce. Changes to TUPE legislation introduced for Britain in 2014 added changes of the place of work to that definition.

- Where there is a valid reason, a new employer proposing to make 20 or more staff redundant in a redundancy that will affect some or all of the transferring employees, may elect to consult in relation to those redundancies before the transfer.

However, before pre-transfer consultation can take place, the new employer has to seek agreement with the old employer. The effect of this is that the new employer can consult on post transfer redundancies with the trade union recognised by the new employer.

The new employer may choose to cancel a decision to carry out pre-transfer consultation. If it is cancelled, it cannot later be revived.

The pre-transfer consultation should continue after the transfer if it has not been concluded and it may continue with the same appropriate representatives.

However, any notice of redundancy can only take place after the transfer and not before it. This is because the new employer will not be the employee's employer until after the transfer.

UNISON's full guidance on bargaining over collective redundancy is set out at <https://www.unison.org.uk/bargaining-guides/>

Protections for terms and conditions

- Terms and conditions are protected unless a change can be justified on the basis of the economic, technical or organisational (ETO) reasons highlighted above. Contracts of employment setting out terms and conditions can be in written form, verbal form or arise out of “custom and practice,” but the more that is written down the easier it is to argue for their inclusion in a transfer. Protected terms and conditions typically cover such dimensions as continuity of service, current pay levels, number of hours worked, sick pay, number of days leave and notice periods.
- Where a member of staff gains promotion subsequent to transfer, their terms would not normally be protected, since it is just the terms of the transferred job that is covered by TUPE.
- Attempts to change terms and conditions simply out of a desire to harmonise policies across employees will not be accepted as a valid reason to vary TUPE agreed terms, unless there is an economic, technical or organisational reason entailing changes in the workforce, or if it is unconnected with the transfer.

By way of illustration, in the case of *Berrimen v Delebole Slate Limited [1986]*, the new employer required the transferred employee to lose 25% of his pay. Mr Berrimen resigned and claimed constructive dismissal. The new employer gave no other reason for harmonisation, so it simply wanted harmonisation for harmonisation’s sake. The court found that Mr Berriman had been unfairly dismissed as his dismissal was connected with the transfer.

- However, changing economic circumstances can be accepted by the courts as valid reasons to vary TUPE agreed terms in certain conditions. For example, an employer claimed that austerity inspired cuts imposed by public sector bodies on numerous contracts had hit its revenues to the point that it now faced insolvency. The employer was able to demonstrate that other dimensions of its costs had been minimised following review and the court accepted that its actions to reduce terms and conditions was not done simply to harmonise rates but to ensure economic viability.

Where an organisation wishes to harmonise terms and conditions because of a cut in funding it is likely to be permissible. In these circumstances, the employer would be expected to ask all staff to vary their terms and conditions, including those that had not been TUPE transferred. These changes cannot be restricted to the TUPE transferred staff.

- It is also permissible to vary terms and conditions post transfer for equal pay reasons i.e. to equalise pay. For example, if a male employee’s pay is brought down to the same level as a lower paid female employee who does work of equal value.

- The passage of time has traditionally not been accepted as a valid argument for changing terms and conditions. However, as already set out below, the 2014 TUPE amendments have introduced the opportunity for employers in England, Scotland and Wales to seek agreement to vary terms and conditions incorporated from a collective agreement a year after the transfer if the new terms are no less favourable than existing terms.
- Terms of conditions of staff who have not been transferred but are brought in by the new employer to work on the transferred service are not determined by TUPE. However, regulations specific to Wales and Scotland do place obligations on the new employer.

Guidance on [section 52 of the Local Government in Scotland Act 2003](#) states that Scottish local authorities “are expected to ensure no two-tier workforce situations arise as a result of contracted-out services where staff transfer. The terms and conditions for any new appointee to the workforce should therefore be no less favourable overall than for transferred employees.”

In Wales, the [Code of Practice on Workforce Matters](#) states that “staff of the service provider (whether newly recruited or existing staff) undertaking work on that contract will be employed on terms and conditions which are no less favourable than those of transferred staff, with the exception of pension arrangements where reasonable pension provision must be made as indicated in the code.”

- Since the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 were introduced, an employer in Britain has been permitted to seek agreement to vary terms and conditions incorporated from a collective agreement a year after the transfer.

This variation may only take place with the agreement of the individual employee (i.e. not the trade union), and if the terms overall are no less favourable than their current terms. This means that some terms can be less favourable as long as some are more favourable and, considered altogether, the previous terms and conditions and the current terms and conditions balance out.

Terms and conditions not derived from a collective agreement are not affected by these changes and therefore remain subject to the rule that they can only be changed if the reason has nothing to do with the transfer or if there is an ETO reason entailing changes in the workforce.

- The 2014 regulations also explicitly stated that in Britain transferred contracts do not bind the new employer to any term of a collective agreement agreed after the date of the transfer if the new employer is not a participant in the collective bargaining machinery.

For example, if a new employer takes over a service that was provided by an English local authority, any increase to pay rates negotiated by the local government NJC after the date of the transfer will not apply to the transferred employees.

Protections for pension rights

- Accrued pension rights in a pension scheme operated by the former employer are protected. All occupational pension schemes are excluded from any transfer, though exceptions to this rule are any scheme provisions which do not relate to old age, invalidity or survivors' benefits. These provisions can include rights payable before normal retirement age, such as an advantageous early retirement scheme.
- However, dimensions of legislation other than the TUPE regulations do impose requirements on the new employer. Under the Pension Act 2004, where employees were entitled to participate in an occupational pension scheme prior to the transfer, the new employer must establish a minimum level of pension provision for the transferred employees.

This means that the new employer must at least offer a defined contribution scheme that matches employee contributions of up to 6% of an employee's salary or a defined contribution scheme that matches the level of contributions of the transferor's scheme, if that was also of the defined contribution type.

- Since 2013, transfers from central government bodies (including the NHS and certain maintained schools (including academies)) to contractors have been covered by new Fair Deal provisions defining the treatment of occupational pensions.

The new Fair Deal specifies that transferred staff must be given continued access to a public service pension scheme.

They can only be offered the former provision of a broadly comparable private pension scheme in exceptional circumstances. (This does not apply in Northern Ireland).

The details of the new Fair Deal are set on this [link](#)

- Outside of central government, Best Value authorities (defined in [part 1 of the Local Government Act](#)) are still subject to the former Fair Deal rules, which require the new employer to provide either access to the public sector scheme or an occupational scheme that is broadly comparable to the public sector scheme

The original pension directive on which these requirements are based is set out on this [link](#)

For a pension arrangement to be assessed as being "broadly comparable" to a public sector pension scheme, it does not need to offer identical benefits. However, it must offer the same range of benefits, with the same (or greater) overall value. A broad comparability assessment includes both quantitative and qualitative tests.

Greater detail on assessing comparability is set out in the [GAD Statement of Practice](#).

- In Scotland, guidelines on [section 52 of the Local Government in Scotland Act 2003](#) similarly specify that “transferred employees to a contractor’s workforce should have access to the same or broadly comparable pension arrangement to those available to them at transfer.”

It also goes further in stating:

“The service provider should be required to offer new recruits to a contract workforce access to the following levels of pension provision which, where applicable, can be equated as broadly comparable to that enjoyed by originally transferred local authority employees ...

- Where prevailing criteria apply, access to the local authority’s scheme through Admitted Body Status, with the new employer making the requisite contributions.
 - Membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished, or
 - A stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.”
- In Wales, the [Code of Practice on Workforce Matters](#) also places requirements on new employers about pensions for new starters as follows:
 - “The service provider will be required to offer new joiners one of the following pension provision arrangements:
 - Membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions;
 - Membership of the relevant public services pension scheme where, under the 2013 Fair Deal, the employer has entered into a participation agreement as mentioned in the Fair Deal and makes the requisite contributions;
 - Membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the new joiner).”

Protections for collective agreements

- Collective agreements between the old employer and the union are automatically inherited by the new employer. Therefore, any collective agreements in force at the time of the transfer are transferred to the new employer and any terms of a collective agreement that are incorporated into the contracts of individual workers are protected in the same way as other individual contractual rights.

As has been noted under the section on terms and conditions, the 2014 TUPE amendments allow for employers in England, Scotland and Wales to seek agreement to vary terms and conditions incorporated from a collective agreement a year after the transfer. Such variations can only take place with the agreement of the individual employee and if the overall terms are no less favourable than their current terms.

This means that some terms can be less favourable as long as some are more favourable, resulting in a balancing out between new and former terms and conditions.

Protections for recognition

- A recognition agreement between the old employer and the union automatically transfers over to the new employer under TUPE. However, this can be a weak entitlement, since as in the case of any employer, there is no legal impediment to the new employer deciding to vary or rescind the agreement after the transfer.

Enforcing TUPE information and consultation rights

Once a contract is awarded under TUPE, both the old employer and the new employer must provide trade union reps (or employee representatives where a union is not recognised) with specified information and an outline of any “measures” that are to be taken which could affect the employees. In addition to providing information, the legislation places a statutory obligation on the employer to consult with trade union or elected reps over the consequences of the transfer.

Employers’ duty to inform

TUPE states that all employees who could be affected by a change of employer have the right to be informed in advance of what is happening. This includes both employees working for the old employer and those working for the new employer.

Before a transfer takes place, the old employer must inform the trade union or employee rep of the following:

- The fact that a transfer is to take place;
- The reasons for the transfer;
- The date or proposed date that the transfer is to take place;
- The legal, economic and social implications of the transfer for the affected employees;
- Any measure which the old or new employer will take as a result of the transfer, or if no such measures will be taken, this should be stated;
- Details of agency staff working for the transferor

The old employer must provide this information long enough before a relevant transfer to allow time to consult with trade unions and the appropriate representatives of any affected employees. It must be delivered to each representative or sent by post to them and has to be sufficient to enable the representatives to perform their duties.

This information must be provided whether or not the old employer anticipates that there will be any change to the work.

Legal implications of the transfer for the affected employees may include the impact on contractual/statutory rights, such as terms and conditions or continuity of employment.

Economic implications may cover factors such as the effect on pay and career development.

Social implications may cover such issues as pension provision and National Insurance contributions.

Employers' duty to consult

The old employer has a duty to consult union (or employee) reps when it expects to make changes in relation to affected employees in connection with the transfer i.e. where "measures" are proposed.

Such changes are likely to include any proposed change to work practices and change of work location.

Affected employees can include:

- Those who transfer;
- Those who do not transfer but whose jobs might be affected;
- Those already working for the new employer whose jobs might be affected.

A "measure" means an action which the old or new employer intends to implement, it does mean putting forward a vague idea of future arrangements.

Consultation has to be meaningful and therefore the old or new employer responsible for the proposed measure must make every effort to secure the trade union's agreement and accommodate their objections. The old or new employer must consider any representations, reply to them and if they are to be rejected, state the reasons for doing so.

Negotiators needs to assess proposed measures very carefully as any ambiguity or doubt is more easily resolved at this stage and failure to clarify can blow up into problems after the transfer is complete.

For example, the measures letter for one TUPE transfer specified that the existing pay and grading structure would be among the terms and conditions transferring without change. The letter also referred to performance appraisal, which it said would in future operate as part of the new employer's performance management framework. The branch had assumed that this related to capability procedure, but after the transfer it became clear that it was about pay and incremental progression through performance related pay. Prior to transfer, staff had received an annual pay award, with separate annual incremental progression.

It is in the detailed discussions over the exact terms to be applied in moving over to the new employer that there may be the greatest opportunity to press for what are often referred to as TUPE Plus terms. Such opportunities are likely to be particularly strong where the contract has been awarded on the basis of some form of "fair work practices referred to in the previous section of the guide on selection criteria.

The model procurement agreement in Appendix 1 to this guide offers a possible set of TUPE Plus terms and conditions, which build on the legal requirements of TUPE as follows:

- A reassurance that TUPE transferred terms and conditions will remain in place for the full duration of the contract;
- A reassurance that any variation to conditions of service will only be introduced following a collective agreement with the appropriate trade unions;
- A commitment that new starters engaged in delivery of the contract will have the same terms and conditions as transferred staff, therefore ensuring that a two-tier workforce does not emerge;
- A commitment that new Fair Deal terms will apply for pensions and staff will have the option of remaining within or joining the appropriate public sector pension scheme on the basis of admitted body status;
- A commitment that annual pay settlements will continue to align with those agreed at the national negotiating body to which transferred staff were formerly tied unless otherwise agreed with the trade unions;
- A commitment that the new employer will provide a workforce development, education and training plan in partnership with the trade unions;
- A reassurance that the job evaluation scheme in use at the point of transfer will be applied for the duration of the contract;
- A reassurance that the current trade union recognition will be maintained, unless changed by joint agreement, for the duration of the contract;
- A reassurance that the new employer will provide a check-off facility for the deduction of trade union subscriptions;
- A reassurance that transferred employees will continue to be able to receive support from the appropriate trade union branch and the new employer will make a contribution to the facility time budget;
- A commitment that no staff on the contract will earn less than the Living Wage as specified by the Living Wage Foundation;
- A commitment that no staff on the contract will be employed on a zero hours basis;
- A commitment that there will be no offshoring of employment in delivery of the contract;
- A commitment that any sub-contractor commissioned to run any of the services included in the contract will be required to adopt the same employment standards as the new employer.

If the measures put forward by the employer include adoption of significant new automated operations, it will be valuable to press for a [Data Protection Impact Assessment](#) under the General Data Protection Regulations.

The TUPE regulations specify that the facilities for reps in dealing with consultation must include access to the affected workforce, alongside appropriate accommodation and equipment.

If the employer fails to meet their obligations under information and consultation rights, the union (not the individual employee) can bring a complaint to a tribunal, within three months, less one day of the transfer, which can then result in a protective award for each affected employee of up to 13 weeks' pay.

Micro businesses (those which employ less than 10 staff) may inform and consult employees directly when there are no existing appropriate representatives.

Employee liabilities information

In defining the information that must be exchanged between new and old employer, the TUPE regulations place an obligation on the old employer to disclose “employee liabilities” such as:

- The age and identity of staff;
- Information contained in their statement of employment particulars (i.e. the information required to be given to employees in writing by the Employment Rights Act 1996);
- Information relating to any collective agreements which apply to an employee post transfer;
- Information on any disciplinary procedure taken against an employee in the two years prior to the transfer;
- Information on any grievances raised in the two years prior to the transfer;
- Instances of any actual or potential legal claims against the transferor in the previous two years.

A failure to provide this information will result in a financial penalty for the transferor of up to £500 per employer.

The deadline for the old employer to supply employee liability information to the new employer stands at 28 days before the transfer.

Organising for post transfer

The organising and campaigning issues in seeking to avoid transfer of staff have been set out in the pre-procurement section of this guide and much of that work may continue against the backdrop of TUPE transfer.

However, consideration should also be given to shifting toward an organising strategy that is focused more fully on establishing the density of members and activists among the transferred staff to enable those staff to exert real influence and strength after transfer.

Engagement with the new employer to put in place the mechanisms that will allow the union to forcefully represent staff has to form part of that strategy

A model letter to assist in opening discussions with the new employer is set out in Appendix 8.

Key considerations in the post procurement strategy are as follows.

Building membership and activist base

- Continuing to build the membership and activist base within the set of transferred staff is a crucial component of post-transfer strategy. If transferred members are allowed to feel cut off from the union or develop the belief that being a member of the union is no longer worthwhile, that can only lead to an ebbing away of membership and effectiveness in representing the interests of members.

In addition to the recruitment drive, activist identification and development set out in the pre-procurement section of this guide, consideration should be given to establishing regular two-way communication with the affected workforce to inform the union's response to transfer "measures" and begin to understand the key issues of importance to staff that the union can take up and establish an early reputation for defending their interests among the workforce.

Developing union strength in the new employer is not just about holding on to existing members but also recruiting among new starters working on the contract. Therefore, establishing the right to access new starters and obtaining [new starter lists](#) is an important component.

Maintaining DOCAS

- Keeping hold of existing members will be greatly eased by obtaining absolute clarity about the operation of the system for Deduction of Contributions at Source (DOCAS). Even if a general assurance is obtained from the new employer that they can continue to operate a DOCAS system for automatic deduction of union subscriptions, bitter experience in numerous cases shows that checking with the new employer's payroll department is the only way of making sure that the new employer will be able to handle DOCAS files in practice.

To assist in reaching agreement with the new employer, a model letter to initiate checks over DOCAS arrangements is attached as Appendix 6.

In order to provide the new employer with the necessary information on membership, it will also be necessary to update RMS records. The RMS department has a procedure for updating records called the Bulk Transfer Update and this procedure is set out on the RMS website at <http://rms.uninet/userdocumentation/>, which is accessible to UNISON staff.

For any large scale transfer, please contact r.operations@unison.co.uk, who will seek to assist in ensuring the process runs smoothly

Renewing recognition and facilities agreements

- Recognition transfers under TUPE but the nature of the recognition agreement has to be established. It may be that it is possible to carry over the terms of the existing recognition agreement, but where that is not feasible the [UNISON model recognition agreement](#) can form a reference point for discussions. Negotiators should push for that recognition to cover all staff engaged in the contract, so that it includes new starters and not just transferred staff. The recognition agreement should set out the terms for a joint negotiating committee as the principal forum for future bargaining

UNISON may already have national recognition with the new employer, so it is worth checking with UNISON's Bargaining Support Group (via bsg@unison.co.uk) before seeking to hammer out an agreement with the employer.

Negotiators should forward a copy of any recognition agreement that is established to the Bargaining Support Group via bsg@unison.co.uk so that it can be referenced by others across the union through the Bargaining Database. Bargaining Support can also liaise with UNISON's Private Contractors Unit or Community & Voluntary Group to provide information on any existing relations with the organisation or representative structures for members within the organisation.

- Facilities and time off arrangements for union reps will normally form a component of the recognition agreement. Adequate facility time to enable the representation of members and engage in organising can often form one of the most problematic dimensions of transfer where the activist base is insufficient. Some old employers may be cooperative about time off for reps to continue to support members over the transition, but there is no guarantee of employers showing that flexibility. UNISON's [facility time guide](#) offers advice on assistance that can be sought where facility time problems are acute.

- Where, despite all efforts, an employer seeks to go down the route of derecognition, UNISON's recognition guidance at <https://www.unison.org.uk/recognition-agreements-guide-03-2019/> offers advice on possible options for blocking the proposals and organising against a derecognition drive.

Monitoring protections and performance

- Ensuring staff receive TUPE protections is not just a matter for the point of transfer, but for monitoring by the union over the long term. A systematic process for checking against any erosion of rights will be greatly assisted by regular communication with the workforce to identify any challenges.
- In some authorities, enforcing rights to continued access to a public sector pension scheme has been hugely problematic, with contractors dragging their heels on an admission agreement to the scheme for months or years.
- Alongside monitoring of terms, negotiators should consider how they may monitor performance of the contract to develop the ammunition to rekindle any drive to return services in house, by pressing for a service review or as part of the contract coming up for tender once more.

The union can also play its part in putting monitoring on the agenda of any public authorities with overview and scrutiny responsibilities, which can offer a valuable forum for exposing the failure of contractors to live up to their claims in winning the contract.

- Where any employer in Britain takes up the opportunity offered by the 2014 TUPE amendments to seek changes to a collective agreement a year after the transfer, this may represent the first crucial test of the ability of the transferred workforce to defend terms and conditions on behalf of staff.
- In addition, the explicit statement by the 2014 regulations that new employers in Britain are not bound by pay awards agreed by the new employer unless they were party to the agreement may mean that annual pay claims become a requirement for representing the interests of transferred staff.

Material to assist branches in the development of pay claims can be accessed by [clicking here](#).

- The [Principles of Good Employment Practice](#) are a very weak set of vague, voluntary statements on how a new employer should treat staff post transfer in England, but they may have some limited value to put before the employer where they are falling below even these minimal standards.

The key features of the principles are as follows:

- Central government should encourage contracting authorities and suppliers to promote good workforce practices in the delivery of public services.
- Suppliers will be able to demonstrate that staff have appropriate training, qualifications and access to continuing professional development as befits their role; and that staff are supported to develop their skills and grow their experience in line with any future roles that maybe expected of them.
- Where there is a recognised trade union, suppliers will consult on workforce training and development issues.
- Where a supplier employs new entrants that sit alongside former public sector workers, new entrants should have fair and reasonable pay, terms and conditions. Suppliers should consult with their recognised trade unions on the terms and conditions to be offered to new entrants.
- All suppliers delivering public services should have regard to good industrial relations practice on dispute resolution. This includes treating employees fairly and ensuring compliance with the law on trade union membership.
- Where an employee has a right to be represented by a trade union, the employer will work with the employee and recognised trade union representative in resolving any dispute.
- Government recognises the premise that engagement between employee, employer and a recognised trade union where appropriate can be a key to unlocking productivity and creating a motivated workforce that feels respected, involved, heard, is well led and valued by those they work for and with.

Appendix 1 – Model Procurement Agreement

Procurement agreement between [name of organisation] and recognised trade unions

1. General principles

- 1.1 This agreement sets out how [name of organisation] and all its departments/ sections will involve and consult the recognised trade unions (hereafter called the trade unions) in all parts of the procurement process.
- 1.2 Involvement and consultation will apply to the pre-procurement steps of service review and options appraisals. If the process proceeds further, it will also apply to advertising of contracts and contract award, followed by any transfer arrangements necessary and subsequent contract monitoring.
- 1.3 [Name of organisation] and the trade unions are committed to providing high quality services that meet the needs of local communities. The trade unions recognise the need to deliver value for money in the use of public money. [Name of organisation] recognises that trade union involvement is positive for facilitating change, protecting the workforce, encouraging positive staff engagement and raising service standards.
- 1.4 The parties will agree appropriate structures and timetables that enable input and comment on all aspects of the procurement process before key decisions are made.
- 1.5 Any proposed reorganisation of services will comply with the agreement between [name of organisation] and the trade unions on handling of organisational change.
- 1.6 Any proposed reorganisation of services will pay 'due regard' to the need to avoid discrimination and promote equality of opportunity, as set out in the Equality Act 2010 and [Name of organisation]'s published equalities scheme(s)
- 1.7 Equality impact assessments, which include consideration of the impact on staff and on equal pay, will be undertaken to ensure 'due regard' to equalities considerations is taken as part of evaluating all proposals and equality schemes will detail application to the procurement processes

For Northern Ireland, replace 1.6 and 1.7 with versions below:

1.6 Any proposed reorganisation of services will pay 'due regard' to the need to promote equality of opportunity, as set out in section 75 of the Northern Ireland Act 1998 and [Name of organisation]'s approved equality scheme.

1.7 [Name of organisation] accepts that in the context of section 75, policy decisions on procurement and employment are functions to which the above statutory equality duty applies. Assessment of a proposed policy on these matters through screening and equality impact assessment will occur at the time a business case or similar document is prepared. Such assessment will include consideration of the impact on staff and on equal pay. [Name of organisation]'s approved equality scheme will be amended to recognise these requirements as necessary.

1.8 [Name of organisation] recognises that the procurement process can be complex and time consuming and that meaningful involvement in the process by trade union representatives brings a significant additional workload. Therefore, the trade unions will be granted appropriate additional facility time to fulfil these duties.

2. Service review and options appraisal

2.1 [Name of organisation] will inform the trade unions of any proposed service reviews and fully consult with them throughout the process over the terms of the review and the conclusions drawn from the review.

2.2 If the service review leads to the conclusion that an options appraisal is required, the trade unions will be consulted over the terms of the appraisal and the conclusions drawn from the appraisal.

2.3 Recognising that the founding directive of the UK's procurement regulations specifically states that there is no obligation on public authorities to contract out services, the options appraisal will include due consideration of addressing any concerns with existing service delivery through:

- A properly resourced in-house service improvement plan;
- Provision of services through appropriate other parts of [Name of organisation]'s operations or co-operation with other public sector bodies, in accordance with procurement regulation definitions for public sector exemption from the regulations.

2.4 In assessing the various options, a comprehensive assessment of costs and benefits will be made that takes account of the impact on the organisation as a whole of fragmenting services to an external provider, rather than providing a narrow focus on the cost of one part of the service.

3. Advertising and award of contracts

- 3.1 [Name of organisation] will consult the trade unions on the drafting of any prior information notice, contract notice or selection questionnaire before publication.
- 3.2 Selection shall include a consideration of the bidders' performance in terms of fair work practices, defined as:
- Appropriate channels for effective voice, such as trade union recognition
 - Investment in workforce development
 - No inappropriate use of zero hours contracts
 - Action to tackle the gender pay gap and create a more diverse and inclusive workplace
 - Providing fair pay for workers (for example, [payment of the real Living Wage](#))
 - Offer flexible and family friendly working practices for all workers from day one of employment
 - Oppose the use of fire and rehire practices.
- 3.3 Trade unions shall be consulted on evidence for mandatory grounds to exclude a bid i.e. violation of bribery, fraud or money laundering legislation [in Scotland, add "blacklisting" to this list.]
- 3.4 Trade unions shall be consulted on evidence for discretionary grounds to exclude a bid, including
- Health and Safety Executive (or equivalent body) enforcement and remedial orders;
 - Complaints upheld by the Equality and Human Rights Commission or other violations documented by human rights bodies (in Northern Ireland replace with 'Complaints upheld by the Equality Commission, or any relevant investigation by the Human Rights Commission or Commissioner for Older People);
 - Findings against the bidder by an employment tribunal or employment appeal tribunal [for Northern Ireland, add the Industrial Tribunal and Fair Employment Tribunal];
 - Breaches of National Minimum Wage or Immigration Asylum and Nationality Acts.
 - Persistent deficiencies in prior public contracts which led to early termination of a contract, damages or other comparable sanction within the previous three years.
- 3.5 Consultation shall include the award criteria and the weightings given to the criteria.
- 3.6 Contract award will not be based solely on price, but will take account of both price and appropriate quality criteria in deciding the most economically advantageous tender.

- 3.7 Contract award criteria will take account of the requirement to consider the economic, social and environmental well-being of the local area, in accordance with the Public Services (Social Value) Act (2012) [applicable in England and Wales] / Procurement Reform (Scotland) Act (2014) / NI Executive 'Scoring Social Value' policy in Northern Ireland.
- 3.8 The trade unions will be given the opportunity to participate in the interviewing of short-listed bidders. Where requested, the authority will also facilitate visits by union representatives to sites where the bidders have contracts.
- 3.9 Where the competitive dialogue or competitive negotiation procedure is used, arrangements will be made for trade union involvement and consultation at the stage prior to a final tender being invited.
- 3.10 An adequately resourced in-house bid will be permitted to tender for the contract.

4. Contract transfer

- 4.1 Where a contract award is made that requires a transfer of staff under TUPE, the information and consultation requirements specified under TUPE will commence at the earliest possible opportunity.
- 4.2 Where a contract award is made that requires a transfer of staff under TUPE arrangements, in addition to the legislative requirements, [name of organisation] will seek agreement on the following terms for transfer:
 - TUPE transferred terms and conditions will remain in place for the full duration of the contract;
 - Any variation to conditions of service will only be introduced following a collective agreement with the appropriate trade unions;
 - New starters engaged in delivery of the contract will have the same terms and conditions as transferred staff, therefore ensuring that a two-tier workforce does not emerge;
 - Staff will have the option of remaining within or joining the [insert scheme title as appropriate] pension scheme on the basis of admitted body status;
 - Annual pay settlements will continue to align with those agreed at [insert appropriate national negotiating body] unless otherwise agreed with the trade unions;
 - The new employer will provide a workforce development, education and training plan in partnership with [Name of organisation] and the trade unions;
 - The job evaluation scheme in use at the point of transfer will be applied for the duration of the contract;
 - The current trade union recognition will be maintained, unless changed by joint agreement, for the duration of the contract;

- The new employer will provide a check-off facility for the deduction of trade union subscriptions;
 - Transferred employees will continue to be able to receive support from the trade union branch and the new employer will be required to make a contribution to the [name of organisation] facility time budget;
 - No staff on the contract will earn less than the Living Wage as specified by the Living Wage Foundation;
 - No staff on the contract will be employed on a zero hours basis;
 - There will be no offshoring of employment in delivery of the contract;
 - Any sub-contractor commissioned to run any of the services included in the contract will be required to adopt the same commitments set out above.
- 4.3 Where TUPE does not apply by law, transfer will nonetheless take place as if it did, in accordance with the best practice set out under the Cabinet Office Statement of Practice (COSOP)

5. Post transfer

- 5.1 Monitoring processes shall be put in place to assess both the standard of service delivered post transfer and compliance with the agreement on terms and conditions.
- 5.2 The trade unions shall be involved and consulted over the terms of these monitoring processes

6 Access to information

- 6.1 [Name of organisation] will provide the trade unions with timely access to all relevant information at each stage of the process and seek agreement with bidders for similarly timely access.
- 6.2 Information will be provided on the basis that the trade unions may use it for reasonable communication of relevant issues with their members and advisers.
- 6.3 Where [name of organisation] considers that any information is commercially confidential, the union will be informed that the information is being withheld and the reasons.
- 6.4 Where information is classified as commercially confidential, the trade unions will be provided with the opportunity to reach a confidentiality agreement under which the trade unions will agree that the information is kept securely [note that any such agreement must be authorised by a UNISON regional officer].
- 6.5 Information made accessible shall include employee liability information at the earliest possible opportunity if a decision is made to put a service out to tender
- 6.6 [Name of organisation] will provide assistance to the trade unions in the interpretation of information and proposals, including where appropriate financial support to enable the trade union to have complex information analysed.

Note for Northern Ireland Branches

In Northern Ireland, UNISON utilises a centralised, regional approach to procurement in order to ensure that universal expertise is available to members and branches from the earliest possible stage. Members and branches in Northern Ireland should contact the Area Organiser and/or Regional Organiser in the first instance before seeking to engage employers in reviewing their existing procurement policies. For further information relating to procurement in Northern Ireland contact John Patrick Clayton - j.clayton@unison.co.uk

Appendix 2 – Service improvement plan template

Scope	
Priorities for improvement	
Objectives	
Results expected	
Period covered	Typically, a plan is set out over a two or three-year period
Management of change	
Action to be taken	
Resources and investment required	
Training, staff recruitment/redeployment	
Corporate action	
Staff/trade union involvement and consultation procedures	
Responsibility and management accountability	
Timetable	
Monitoring and reporting progress	
Scrutiny review	Typically reviews take place on an annual or six-monthly basis.

Source: European Services Strategy Unit, 2008. Commissioning and Procurement Toolkit

Appendix 3 - Model letter seeking information and discussions on proposed transfer

[Name of appropriate manager/name of organisation/ address]

[Date]

Dear *[insert name]*

Re: Proposed transfer

We refer to the proposed transfer of *[insert details of the contract to be transferred]* to *[insert details of where contract is to be transferred]* with effect from *[insert date if known]*.

UNISON believe that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to the proposed transfer. As you may know, under Regulation 13 of TUPE, you are obliged to inform and consult with appropriate representatives of any employees affected by the proposed transfer. As the recognised trade union, UNISON therefore requests that you provide the following relevant information:

- The fact that the transfer is to take place
- The date of the proposed transfer
- The reasons for the transfer
- The number and description of affected employees including those of the transferee
- The legal implications of the transfer for the affected employees
- The economic implications of the transfer for the affected employees.
- The social implications of the transfer for the affected employees
- The proposed measures you and or the transferee propose to take in relation to the affected employees in connection with the transfer
- The number of agency workers working temporarily for and under the supervision and direction of you and the transferee
- The parts of the undertaking in which those agency workers are working
- The types of work the agency workers are carrying out

We should be grateful for receipt of the information above within *[insert number]* days from the date of this letter and request a meeting on *[insert date]* to discuss the proposed transfer.

Yours sincerely,

Appendix 4 - Model first follow-up on proposed transfer

[Name of appropriate manager/name of organisation/ address]

[Date]

Dear *[insert name]*

Re: Proposed transfer

Further to my letter dated *[insert date of letter]*, as the recognised trade union, UNISON is yet to receive the information required to be provided under Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

As per TUPE Regulation 13(2), this information must be provided, *“long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees”*.

Further, if any measures are envisaged, the duty to enter into meaningful consultation with UNISON arises under TUPE Regulation 13(6). This must be in enough time before the transfer and with a view to seeking UNISON’s agreement to the intended measures.

UNISON is concerned that there has been no meaningful consultation to date and no invitation by *[insert name of employer]*, to enter into consultation with UNISON.

In order to meet your legal obligations under TUPE, please provide the information required by Regulation 13(2), along with your proposed timescales for a meaningful process of consultation prior to transfer, within *[insert number]* days from the date of this letter.

Should you fail to comply with the statutory duty to inform and consult as above, UNISON will consider the pursuit of Employment Tribunal proceedings in order to secure compensation for those employees affected.

I trust that you will show proper regard for *[insert name of employer]*’s legal obligation to inform and consult and I look forward to hearing from you as a matter of urgency with the required information and with a view to commencing constructive consultation prior to transfer.

Yours sincerely,

Appendix 5 - Model response to measures notification

[Name of appropriate manager/name of organisation/ address]

[Date]

Dear *[insert name]*

Re: Proposed transfer

I acknowledge receipt of your letter dated *[insert date of letter]* which contained notification of measures that *[insert name of employer]* intend to take following the transfer of *[insert name of service/department/team]* from *[insert name of transferring employer]* with effect from *[insert date of transfer]*.

[Select text as appropriate from the three suggested sections below as appropriate]

1. UNISON would like to request a meeting at the earliest opportunity to discuss the following concerns:

[List and detail any issues or clarity required on proposed measures]

2. The letter contained proposed contractual changes which UNISON does not agree with. Changes to individual contract terms are void if the sole or main reason is the transfer unless there is a valid economic, technical or organisational reason for the change entailing changes to the workforce as per the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) Regulation 4(4). UNISON believes there is no such reason and therefore these proposed changes are in breach of TUPE.

[List and detail proposed contractual changes that UNISON disagrees with and the reasons why]

3. UNISON would like to request a meeting at the earliest opportunity to discuss the following:

- Confirmation that *[insert name of employer]* will continue to recognise UNISON post transfer. I have included a draft recognition agreement which may be useful in formulating an updated recognition agreement between UNISON and *[insert name of employer]*. This has formed the basis of agreements with employers across the UK and has led to constructive mutual recognition. *[Include model recognition agreement from UNISON bargaining guides page - <https://www.unison.org.uk/bargaining-guides/>]*

- Facility time and arrangements to be incorporated into an agreement between *[insert name of employer]* and UNISON. I have included a draft facilities agreement which has also formed the basis of agreements with employers across the UK and may be useful in formulating an updated facilities agreement between UNISON and *[insert name of employer]*. *[Include model facilities agreement from UNISON bargaining guides page - <https://www.unison.org.uk/bargaining-guides/>]*
- Future collective bargaining arrangements between *[insert name of employer]* and UNISON. We have enjoyed a good working relationship with *[insert name of transferor employer]* and would like to foster a positive working relationship through effective negotiating arrangements with *[insert name of employer]* going forward.
- Confirmation and/or set up of DOCAS facilities with *[insert name of employer]*'s payroll provider to enable UNISON members to continue to pay their UNISON subscriptions as a deduction from their wages post transfer. *[Include template Service Level Agreement from ?]*
- The proposed pension provisions for eligible transferring employees and confirmation that these are broadly comparable to employees' current scheme and meet the minimum standards set out in The Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005.

[In the case of a member of a public sector pension scheme covered by the new Fair Deal, this bullet point should be replaced with the text below]

- The application of Fair Deal 2013 and in particular the right of employees to be permitted to remain in *[the appropriate public sector pension scheme]*
- *[Insert name of employer]* honouring future annual pay awards agreed *at [insert appropriate national or sector-level collective pay bargaining body]* for transferred employees post transfer.

I look forward to hearing from you with arrangements to convene a formal consultation meeting to discuss these matters further.

Yours sincerely,

Appendix 6 – Model letter on DOCAS arrangements

[Name of appropriate manager/name of organisation/ address]

[Date]

Dear *[insert name]*

Re: Deduction of Union Contributions At Source (DOCAS)

I am writing in relation to the transfer of UNISON members to *[insert name of employer]* on *[date]* under the Transfer of Undertakings (Protection of Employment) Regulations 2006. In order to ensure that union contributions continue to be deducted through the payroll system and therefore members' arrangements transfer as smoothly as possible, could you please confirm whether *[insert name of employer]* will be able to provide the following:

1. Payment of DOCAS subscriptions by BACS directly to UNISON's bank
2. Monthly electronic DOCAS reports to UNISON's Head Office. This should also incorporate any DOCAS information that you may currently send to UNISON Regional Offices. We would prefer the file to be in ASCII format and to be sent as a CSV (Comma separated variable) file.
3. As a minimum we would like to receive the following information:

Employer code	Payment frequency
Employer PAYE number	Pay period
Employer name	Contribution for the period
Employee national insurance number	Date of first subscription payment
Employee payroll number	Date of last subscription deducted
Employee surname	Date of employee transfer
Employee forename	Date employee cancelled
Employee gender	UNISON subscription
Date of birth	Date of leaving employer
Date payment deducted	

I would also ask for any codes, with translations that identify an employee's work location.

I should be grateful if you would let me know whether you are able to meet this request. It may be advisable for UNISON officers to meet your payroll managers to discuss the request in more detail. I look forward to your reply.

Yours sincerely,

Appendix 7 – Sources for additional UNISON guides, reports and training

UNISON's procurement web page is at

<https://www.unison.org.uk/get-help/knowledge/contracts/procurement/>

UNISON's general guides on the procurement process and reports on damage to services caused by outsourcing

[Cross service group report showing how low-cost bids can be based on lowering staff terms and conditions](#)

[The Case for In-House Services](#)

UNISON's service group guides on the procurement process and reports on damage to services caused by outsourcing

Local government

[Branch Guide Best Value Update \(England and Wales\)](#)

[Branch Guide to Council Finances and Privatisation](#)

[Branch Guide to Ethical Procurement](#)

[Branch Guide to Equalities in Procurement](#)

[Branch Guide to Negotiating a Procurement Agreement](#)

[Branch Guide to Options Appraisal](#)

[Branch Guide to Securing in House Services](#)

[Branch Guide to Shared Services](#)

[Branch Guide to Use of Key Performance Indicators](#)

[Insourcing Update - The Value of Returning Services In House](#)

[Think Twice - The Role of Elected Members in Commissioning](#)

Health

[Resisting Privatisation in the NHS](#)

[Damage to cleaning services caused by outsourcing](#)

[Responding to Sustainability and Transformation Plans](#)

Higher education

Privatisation and Shared Services in Higher Education

Police

Stop Police Privatisation

Community

Ethical Procurement and the Living Wage

Procurement Training

UNISON's Learning and Organising Services (LAOS) runs course on influencing the procurement process and handling TUPE. For more information, please contact LAOS on learningandorganising@unison.co.uk

Appendix 8 – Summary of possible legal claims

Following a TUPE transfer, a variety of different types of legal claim may be open to employees. The various possible claims are summarised below.

Discrimination claims

If an employer has discriminated against an employee before the transfer (even where the discrimination took place when she or he was employed under a previous contract of employment), liability for that discrimination will transfer from the transferor to the transferee.

Unfair dismissal

Where an employee has worked for two years for either the transferor or, following transfer, the transferee, Regulation 7(1) of TUPE legislation designates dismissal as automatically unfair where the transfer was the reason for the dismissal. The employer can only stage a defence of the dismissal where there is a valid economic, technical or organisational reason entailing changes in the workforce.

Of course, a dismissal can also occur where it is entirely unconnected to the transfer and relates to valid reasons for dismissal that apply in any employment situation, such as gross misconduct.

Any claim for unfair dismissal must be lodged within three months (less one day) of the dismissal (this could be the day of transfer, but depends on when the dismissal actually takes place).

Unlawful deduction of wages claims

Two examples of where a claim for unlawful deduction of wages can be made are as follows:

- a) Following a transfer, the transferee employer does not honour previously negotiated collectively agreed terms of the contract;
- b) Following a transfer, the new employer decides to move the transferred employees on to their terms and conditions and does not honour the terms the employees transferred over with (this is known as post transfer variation of terms and conditions or harmonisation).

Examples of the first scenario have been restricted in England, Scotland and Wales by the 2014 TUPE amendments. Previously, the possibility existed of claims for unlawful deductions in cases such as where an employee on local government terms and conditions had transferred over to a transferee and, following the transfer, the transferee failed to honour a term of their contract such as a pay increase awarded under the local government terms and conditions.

This case was typified by *Alemo-Heron & Ors v Parkwood*, where the employer argued that a “static” approach should apply (resulting in the freezing of terms and conditions at the point of transfer) whereas UNISON argued that a “dynamic” approach should apply, which would mean that terms and conditions could change in line with collective agreements by the NJC.

This case went through an extensive legal process, but the most recent ruling has seen the Court of Justice of the European Union declare in favour of the “static” approach. This position has been consolidated in relation to TUPE by the 2014 TUPE amendments, which expressly state that transferred contracts do not bind the transferee to any term of a collective agreement agreed after the date of the transfer if the transferee is not a participant in the collective bargaining machinery.

This means that, for example, if an employee’s pay is set at £9.50 an hour on the date of transfer from local government to a private company, any increase negotiated by say the NJC, after the date of the transfer, to say £9.75, will not apply to the transferred employees. Such pay increases would apply if the private company participated in the pay negotiations. Any claim for unlawful deduction of wages must be lodged within three months (less one day) of the date of transfer.

Any claims for unlawful deduction of wages following harmonisation or a variation of terms and conditions must be lodged within three months (less one day) of the date of transfer.

Breach of contract

This sort of claim can be brought post transfer where the transferee is not honouring the transferred terms and conditions.

A claim would need to be brought in the County Court whilst the employee is still in employment, and the time limit for doing so is six years in England & Wales and five years in Scotland from the last on-going breach. If the employee’s contract is terminated, then a claim should be brought in the employment tribunal within three months less one day of the termination.

Claims that can be brought by a union

If the employer fails to inform the representatives of the material facts or if the representatives are not consulted about any measures which may be taken, then the trade union (not the individual employee) may bring a complaint to a tribunal, within three months, less one day, of the transfer, for a declaration and compensation for a failure to consult.

This is not a full array of all the possible claims available following a TUPE transfer, but provides details of the most common forms. Branches should seek legal advice via their regional officer if they are concerned that there are any potential claims

Appendix 9 – Collective bargaining inducements

The 2014 TUPE amendments increased the scope for employers to change terms and conditions derived from a collective agreement. The main body of this guide has outlined the possibilities for challenge on the basis of failing to comply with the terms of those amended regulations. However, Section 145B of the Trade Union and Labour Relations (Consolidation) Act can also be of relevance.

Section 145B prohibits an employer from making offers to workers for the purpose of ensuring that terms of employment are no longer determined by collective agreement negotiated by or on behalf of the union.

The key test for whether a challenge can be made under Section 145B is as follows:

- Is the employer making an offer (this could be an offer of a sum of money, or just an offer) in an attempt to dismantle collective bargaining arrangements for one or all terms and conditions?

The key points to note are:

- In order to be successful, a tribunal will have to be convinced that the employer's sole or main purpose in making the offer is to get out of collective bargaining in relation to a term or condition of an employee's contract. If so, there is a good chance that the proposal can be challenged under Section 145B. An example of a successful case based on this legislation is set out below.
- It is for the employer to prove to the employment tribunal that the offer was not being made for the sole or main purpose of getting out of collective bargaining. A tribunal will consider if the employer changed or did not want to use the normal arrangements or any proposed arrangements for collective bargaining. Employees who are rewarded for high levels of performance or were given retention awards will not fall within this section.

Example of successful defence

UNISON brought a case against the London Borough of Bromley in July 2014. The case centred on offers to UNISON members that gave effect to a 2012 council decision to withdraw from national (NJC) and regional (GLPC) pay bargaining. Bromley wanted to control the pay setting process completely and was expressly unhappy with the delays encountered in the NJC collective bargaining process.

The series of offers made by Bromley asked employees to vary their employment contracts and agree to a localised pay setting process which replaced national and regional collective agreements with future pay awards determined solely by the Full Council. Most of the employees agreed. However, this case was brought by a number who did not and who were ultimately dismissed and re-engaged on new terms of employment that included the localised pay setting process.

The council conceded everything in this case except the issue of whether or not the offers were made for the prohibited purpose of getting out of collective bargaining.

The employment tribunal found in the claimants' favour. They held that the council had made a series of similar offers, the effect of which was for the prohibited purpose that the claimants' terms and conditions of employment (in particular pay) were no longer determined by collective agreement. It awarded each of the claimants' compensation of £3,600 for breaches of section 145B (this is a fixed penalty per claimant).

When might a legal challenge be possible?

In summary, a challenge to proposed changes in terms and conditions following TUPE transfer may be possible in the following cases:

- 1) For individual contracts, where the changes can be shown to be because of the transfer and there is no valid economic technical or organisational reason for the changes entailing changes in the workforce or the terms of the contract do not permit such a variation.
- 2) For contracts deriving from a collective agreement, where the employer has failed to allow a year to pass since the transfer took place (and the defences set out in point one above do not exist);
- 3) For contracts deriving from a collective agreement, where the new terms and conditions are less favourable as a complete package than the previous terms and conditions;
- 4) Where the employer can be shown to be making offers in an attempt to dismantle collective bargaining arrangements for one or all of an employee's terms and conditions.

Key timescales for challenges

The time available for a challenge under s.145B Trade Union and Labour Relations (Consolidation) Act 1992 to proposed changes to terms and conditions runs from the date the offer is made. For example, if a TUPE transfer takes place on 1 February 2021, and the new employer seeks to vary collectively agreed terms and conditions on 1 February 2022 by making an offer on 1 February 2022, the limitation deadline for claims is 30 April 2022.

Where unlawful changes have been made to a person's contract following a TUPE transfer, an individual can also bring a claim for an unlawful deduction of wages. The deadline will be ongoing if the deductions are ongoing, but backpay will be limited to two years.

Any attempt to enforce new terms and conditions (by dismissing and re-engaging) is also likely to trigger the information and consultation requirements of section 188 in the Trade Union and Labour Relations (Consolidation) Act 1992. This is a claim that would be brought by UNISON within 3 months of the first dismissals (albeit, the employees are then re-engaged).