

Fighting privatisation in Local Government

A UNISON guide

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Introduction

UNISON members know privatisation within local government services is not new. But the Tory-led coalition government is seeking to open public services to the market at a scale never before seen. Under their agenda, no public service is safe from the open market, as the Tories seek to put profit before service quality and care.

Within the services provided by local authorities, it is not only those functions which have traditionally been outsourced which are seen as open to private competition, but services provided to some of the most vulnerable members of our society which are up for grabs. All the evidence and our experience shows that once services are run for private profit, the quality of care and service is reduced, the workforce are adversely affected and local economies suffer.

Privatisation comes in many forms. Whilst the Coalition is keen to push their vision for the 'big society' which puts its emphasis on the third sector and 'community-led' initiatives, behind this lies the real danger that vital services will fall into the hands of private companies, if not immediately then in the near future.

In many areas, community groups and organisations are being presented with a stark choice – agree to run your service at reduced cost or risk losing it altogether. Yet we know that in a vast number of areas, there is not sufficient infrastructure within the community to support this shift.¹ In many cases, people are perplexed as to why the provision of vital services should fall to the voluntary sector. What is local government there for if not to provide services to its community?

The message is clear – we must mobilise to protect public services now, resisting privatisation in its many guises.

Beginning with the case for public services, moving onto an exploration of various service delivery organisations and then the key workforce issues and procurement policy, this pack contains a number of key documents and advice published by UNISON and has been designed to assist branches and regions in responding to the threat of privatisation within their areas.

Many of these documents are also available online - <http://www.unison.co.uk/localgov/cuts.asp>

For further information and advice, branches should speak to their regional organiser. Regions can contact the Local Government Service Group for further guidance on any of the issues covered in this pack.

localgovernment@unison.co.uk

¹This is shown in the Centre for Local Economic Studies (CLES) analysis of the local economy in Suffolk in relation to their plans for mass outsourcing of services as part of the 'New Strategic Direction' policy: <http://www.unison.org.uk/acrobat/B5365.pdf>

The case for public services

In the current political and economic climate, many people have simply accepted the groundless myth that private services are more efficient than public ones. Yet there are plenty of examples of excellent, efficient public services.

UNISON is at the forefront of arguing for public sector solutions to public sector reform. There is a huge amount of evidence that publicly run public services deliver good value for money and quality services which cannot be matched by the private sector. A mistaken consensus has developed among politicians, commentators and senior public sector officials that privatising services improves service delivery and saves the taxpayer money. This is based on the assumption that the private sector is more flexible and better at managing service delivery.

This document aims to help UNISON branches counter many of the myths about privatisation which have gained acceptance amongst many politicians and public sector managers:

<http://www.unison.org.uk/file/The%20case%20for%20in-house%20services%20-%20a%20branch%20guide.pdf>

Below is a brief summary of those myths and some arguments against them:

Myth 1

Contracting-out to the private sector saves money

Too often public sector managers compare the current cost of providing a service with the price of contracting-out and jump to the conclusion that the only way of saving money is to out-source.

Even the Audit Commission says this is wrong. This approach assumes that no savings can be made if services are kept in-house.

Contracting out is expensive in itself. Fees for lawyers and consultants need to be taken into

account when considering the cost of contracting out.

When things go wrong, huge costs can fall on the public sector for contract cancellation and bringing services back in-house.

There is often little competition for contracts which means contract prices are often very high.

Myth 2

Contracting-out services will improve them

Contrary to free market theory, privatising services does not automatically improve them.

Many of the ingredients for long-term success (such as long-term investment and good staff engagement) are more likely to be found in the public sector.

Contracting-out introduces the risk of lowering standards and even complete service failure which can be avoided by putting in place an in-house service development plan.

The inflexibility of public sector contracts and the loss of direct management control mean that when things start to go wrong on a contract, it can be very difficult to turn things around.

Myth 3

Services can't be restructured or improved when they are kept in-house

Just as private companies are not inevitably irresponsible, profit obsessed employers, neither is the public sector bound to be slow, bureaucratic and resistant to change.

UNISON branches have been involved in a number of staff re-organisations within the public sector which show that services can be improved when the employer and staff representatives work together.

The example of Newcastle City Council shows what can be done when trade unions and public sector management work together.

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Myth 4

Contracting services out is not political – it’s just a management decision

There is a real, practical difference between services managed by the public sector and those run by the private sector. It is a mistake to just pretend these differences don’t exist. Contracting out is political.

The pressure to return a profit on private sector management means they are less likely to value long-term investment.

Studies show that people who work in the public sector have a greater commitment and emotional attachment to their work.

The public are fully aware that introducing the profit motive into public services can have a damaging effect.

Concerns about contracting out and a preference for keeping public services public consistently show up in public opinion surveys. People want their public services to be run by the public sector.

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Myth 5

Contracting-out transfers risk to the private sector

We shouldn’t assume that risks (such as service failure or cost over-runs) are transferred to a contractor when they are contracted out.

The importance of public services often makes it impossible to transfer risk.

If a contractor fails to provide adequate services or goes bust, the NHS trust or Local Authority

cannot simply stop providing the service.

As a result they often step in and clear up the mess that out-sourcing has created.

UNISON has also commissioned a number of reports from the Association for Public Service Excellence (APSE) which are a timely reminder that the public sector has an excellent track record of delivering high quality, cost-efficient services. These are all available via the website.

The value of trade union involvement to service delivery

This interesting and useful research shows why it is critical to fully involve trade unions in major service changes.

<http://www.unison.org.uk/acrobat/19226.pdf>

The Ingredients for Success: How in-house teams are delivering first-class services

This report shows public services performing at the highest level. Our message to local authorities is that if you trust, value and train your workforce they will deliver for you and the communities you represent.

<http://www.unison.org.uk/acrobat/13455.pdf>

Think Twice: The role of elected members in commissioning

Think Twice is an excellent guide produced jointly by UNISON/APSE and the LGIU to encourage councillors to be involved in commissioning. In the current economic situation local economies depend on the flow of money not drying up. Elected members need to assert their rights and duties to ensure commissioning protects the high quality, democratically accountable services members provide.

<http://www.unison.org.uk/acrobat/B5150.pdf>

Insourcing Update: The value of returning local authority services in-house in an era of budget constraints

This recently commissioned report from APSE examines insourcing in the current climate, with evidence suggesting that the phenomenon is continuing and that insourcing is an increasingly positive option in an era of budget constraints.

www.unison.org.uk/localgov/success.asp

Strategies for fighting privatisation

Alongside the ideological agenda of cuts to public services, many politicians have accepted the groundless myth that private services are more efficient than public ones. There are plenty of examples of excellent, efficient public services. UNISON has resources to assist branches in tackling privatisation threats.

When faced with any proposals for outsourcing, it is essential that branches ensure they are prepared to argue the case for public services through:

- **Political lobbying** – outsourcing is a political decision, not merely a ‘management function’ and it is key to capitalise on this and make contact with elected members and MPs
- **Organising** – ensure members within the proposed services are fully briefed about the proposals and what outsourcing could mean for them. It is also vital to ensure new members are recruited as part of the process
- **Preparation for procurement** – if despite our efforts the decision is taken to outsource the service, branches need to be ready to play an active part in the procurement process to ensure the best deal for our members.

Engage

Senior council officers and leading local politicians will consider major service or privatisation behind closed doors. So it is crucial to have a working relationship with them.

Plan ahead around elections (especially local ones) and talk to all significant political parties beforehand about the value of in-house services. See if they will sign up to working with UNISON and keeping services in-house. After the elections, talk to the council leader and chief executive about their plans.

Also try to involve backbench councillors, using the advice that is available: www.unison.org.uk/acrobat/B5150.pdf.

No matter what changes are proposed, the employer should conduct an equality

impact assessment on them and there is local government service group guidance on using these at www.unison.org.uk/localgov/servicechanges.asp. This can slow down the process and help you get a foot in the door to negotiate. It is also a way to link up with potential allies in the community.

Pre-empt

There are many examples of how in-house services can be reformed with the involvement of trade unions. Newcastle is the most often quoted example: www.tni.org/tnibook/public-service-reform-not-we-know-it. But UNISON research has detailed many others: www.unison.org.uk/acrobat/19226.pdf. Don’t wait to be presented with proposals, but try to maintain a dialogue with your employer about their plans for service change, and encourage them to involve you from the start.

Before any proposals come forward, try to get your employer to sign up to a decent agreement on procurement – there is a model procurement agreement at: www.unison.org.uk/acrobat/MPA_FV.doc and one on access to information at: www.unison.org.uk/file/Model%20Information%20.

Discredit

There is a common view amongst senior officers and politicians that privatisation is a cost-efficient option. But the debacle in the flagship Liverpool Direct project shows this is simply not true: www.unison.org.uk/activists/pages_view.asp?did=12082

Privatisation and cuts can have a devastating economic impact on the local economy, with every £1 cut taking an extra 64p out of the local economy: www.cles.org.uk/files/102868/FileName/EXECUTIVESUMMARYFootprints.pdf. Branches can contact their region about getting studies done on the impact of privatisation and

cuts, such as the one undertaken for Suffolk:
www.cles.org.uk/files/106451/FileName/SuffolkFinalReport.pdf.

Campaign

There have been many examples where privatisation proposals have been fought and won. A series of case studies and videos are on www.unison.org.uk/localgov/success.asp

Service contract adverts (known as OJEUs) are monitored by the local government service group and sent to regions as a safety net.

If a procurement process goes ahead, there is advice and training from UNISON: www.unison.org.uk/activists/procurement and consultancy support available from UNISON nationally and from the Association for Public Service Excellence (www.apse.org.uk).

You may want to consider secondments or other arrangements, and there is general advice available at www.unison.org.uk/acrobat/B5075.pdf and more specific advice at www.unison.org.uk/file/UNISON%20LG%20Secondments%20.

There is also the experience of other branches to draw on when faced with shared workforces: www.unison.org.uk/acrobat/B5011.pdf.

Funding is also available to support branch campaigns – from the general political fund and the regional pool. Contact your regional organiser about access to this money.

Follow the members

If members are faced with outsourcing, ensure that TUPE and other protections are enforced www.unison.org.uk/acrobat/PCU_Organising_guide.pdf.

For Scottish branches, further resources are available on UNISON Scotland's Public Works campaign site www.unison-scotland.org.uk/publicworks.

More information is available on www.unison.org.uk/localgov/cuts.asp.

Service delivery organisations

As public sector workers confront the prospect of major cuts in spending, the government and others are encouraging employers to look at outsourcing or redesigning services.

The way public services should be provided is different from commercial activities. They should:

- Be publicly accountable
- Be open and transparent
- Be of high quality
- Use the experience of users and workers
- Deliver value for money
- Give workers a fair deal
- Minimise risk of service failure
- Help deliver public policy objectives, such as equality

UNISON's preferred option is for council services to be directly provided in-house because this can best deliver on all of these objectives. But there are other types of 'service delivery vehicle'.

If a service is outsourced the council has limited control over it. Even if the council owns or part-owns a company and has councillors (or council officers) on the board, they are legally bound to operate in the interests of that company, not the authority.

Most outsourcing involves a costly procurement process and ongoing monitoring costs once a contract is issued, and if an outsourced service fails (the company goes bankrupt) then the public authority has to pick up the pieces and the workers may find themselves redundant – it can be high risk.

Freedom of Information (FOI), the public sector equality duties and other positive requirements of public sector organisations do not directly apply to many outsourced services.

Implications for the workforce

Service delivery models will be set up in different ways and branches will need to be alert to a range of different issues. However in terms of the workforce there are several issues which will be

the same whatever service delivery proposal is on the table:

- Whilst any employees transferred over to a new provider would have their rights protected by TUPE, there is always the possibility that organisations could argue that it does not apply as the transfer constitutes a 'service re-design'
- Even where TUPE does apply there is no guarantee these rights would continue to be respected and any future changes or improvements to public sector pay and terms and conditions would not automatically be granted
- New employees appointed would not be covered by TUPE and could be employed on poorer terms and conditions, creating a two-tier workforce
- There is the risk that job losses and pay cuts could be proposed as a reaction to reduced funding (contracts and providers are highly dependent on funding agreements with the local authority and their budgets are just as vulnerable to cuts in public spending).

Even if an outsourced option looks good to start with (i.e. a mutual) bear in mind that if it loses the contract next time, workers may transfer to a private company.

The table overleaf takes you through the different types of service delivery vehicles.

Type of service	What is it?	Democracy	Workforce	Risks	Examples
Direct Provision	Fully part of the public sector				
In-house	Directly provided services by one authority	Direct council influence, FOI, and equality duties apply.	Council employed, LGPS access		
Delegation	One council can, by mutual agreement, have some functions (and funding) delegated to them by another council.	Direct council influence, FOI, and equality duties apply.	Council employed, LGPS access		Frequently happens in highways between counties and districts
Joint Committee	An administrative arrangement to provide service(s) jointly between several authorities. Relatively cheap and easy to set up.	Overseen by a joint committee of councillors.	Council employed, LGPS, staff may transfer between authorities if one 'leads' on a particular service.	Councils may have rivalry or disagreement	'Tayside Contracts'; also Adur and Worthing councils.
Council Trading	One council can provide services to another and charge for it. Service is effectively 'outsourced' to the public sector	Public sector ethos may remain, but no direct control. FOI, and equality duties apply	Existing workforce might transfer, but still council employed, LGPS.		
Public sector influenced	Some public oversight, but workers not local authority employed.	Limited companies must operate in their own best interests, and those of the council who may part own them. They may be 'limited by shares' but where part-council owned are normally 'limited by guarantee'. Secondment may be an option instead of TUPE transfers for staff. As any trading company, they may (and do) go bankrupt.			
ALMOs	Only used for housing, some now being taken back in-house			Have substantial assets	
Wholly owned service company (a 'Teckal' company)	A limited company that may be owned by several councils. Only provides services back to those council(s) - can't trade more widely.	Council will decide how board is formed, and councillors may be on the board.	Staff transferred. Local bargaining. LGPS access likely.	Can go bankrupt. May be used to make cuts at arms length.	Essex Cares

Type of service	What is it?	Democracy	Workforce	Risks	Examples
Wholly owned trading company	Limited company. Can trade widely, including with the private sector, in services that it would already provide as a council.	Council will decide how board is formed, and councillors may be on the board.	As above	Has to bid for all work, including the council that owns it.	Norse / NPS (Norfolk Property Services), Sefton New Directions
Limited Liability Partnership	Similar to a company, a looser joint arrangement between individuals or individual organisations. More commonly used in Scotland.	Potentially more council influence than a company, depending on how constituted.	As above	LLPs pay no tax as a corporate entity – if profit is made.	City Building (Glasgow) LLP, Kier Sheffield LLP (Kier group + council)
Trusts	Normally a wholly-owned company, often with charitable status (see below). Often used for leisure or cultural services.	Council will decide how board is formed.	As above, but may outsource its services (eg BCL outsourced their work to SERCO)	May have access to non-council grants.	Bolton Community Leisure (BCL)
Joint venture	Companies, can trade, owned by private contractor and council	Councils will have a shareholding, and representation on the board. In practice, private partner normally dominates.	Staff transferred. Local bargaining. LGPS access likely.	Risk may lie with council instead of private 'partner'.	SouthWestOne (Somerset Council, Police + IBM), Liverpool Direct
Outsourced					
Social enterprises	The term is used in many different ways, but include small businesses and community interest companies and mutuals.	Outside of public control, may have a positive ethos to service users.	TUPE transfer. Often inexperienced as employers	Often financially less stable, terms and conditions may be worse.	Many and varied!
Charities	Limited company with charitable status - may have access to external funding and gets savings on business rates.	Outside of public control, but positive ethos to service users.	TUPE transfer. Pressure on pay from low paying public contracts.	As above	Barnados

Type of service	What is it?	Democracy	Workforce	Risks	Examples
Community interest company	Assets 'locked' for the good use of community, limitations on dividend payments.	As above	As above	As above	DOTS Disability (Dorset)
Mutuals	Limited companies, registered as industrial and provident societies, user owned or employee owned, possibly hybrids	Operates in interests of owners – staff or users – not wider public	TUPE transfer. May be problems with LGPS access.	If financial problems, workers may have to cut their own pay.	Greenwich Leisure, Sunderland Homecare
Privatisation	Mainly large contractors (smaller companies get bought out over time)	The contract is the only public control	TUPE transfer, larger companies may have own pension scheme.	Will try to maximise profits. Union organising more difficult.	Capita, SERCO, IBM, Sodexo
Others					
Unincorporated association	A group with no formal legal status.	Accountable only to itself.	Should not employ staff	Could simply disappear	Voluntary groups
Self employed / Agency	As indicated – the agency workers regulations are likely to limit long-term agency staff use from late 2011.		Minimal protection		Often used in personalisation of care
Volunteers	Often help with some services, but have no obligation to perform work, or be paid for it.	None	No work rights or obligations	Volunteers may have a duvet day	Walcot Charity Shop and Library

Shared services

This guidance explains how branches can deal with proposals for a shared workforce.

Introduction

More councils are looking at sharing chief executives, management structures, and their whole workforces. There has long been cooperation between councils, but this is now being taken a leap further by merging whole services.

This throws up a range of issues for UNISON branches to face in an already difficult environment. The union can play a constructive role in facilitating change, as long as employers take on board our agenda.

Shared workforces are being introduced across the UK. In England this is alongside 'two-tier pathfinders' (sharing many services between counties and districts) and local government reorganisation (merging political structures as well as services).

But with a shared council workforce there remain two councils and two sets of councillors, and some shared workforces cross into other parts of the public sector. Workforces can be shared across other public sector organisations, but this briefing concentrates on local authorities only.

Why share workforces?

Often shared workforces start with shared chief executives. This began as a way of temporarily filling chief executive vacancies, and then for developing partnership working. Now the main concern is to make efficiency savings, and a shared chief executive is often the first step towards shared services and shared workforces, and as financial cuts start to bite this trend is increasing.

Workforces are usually shared between neighbouring authorities. In England this is usually between district councils, but also between counties and districts. It also happens between unitary authorities across the UK and there are (as

of end 2009) around a dozen examples involving nearly 30 councils.

The (claimed) financial savings vary substantially. Between them, Havant and East Hampshire believe they have saved £59,000 annually from sharing a chief executive, whereas Staffordshire Moorlands and High Peak claim to have cut £560,000 from having a joint management team and cutting middle and senior managers from 37 to 21. Much bigger savings are claimed for shared services, and this means it will be hard for these arrangements to be reversed, even with a change in political control.

What is a 'shared workforce'?

The use of the word 'shared' can disguise the details of what is being proposed. In any arrangement, every worker will still have a specific employer, and there will be specific governance structures in place. It is important to be clear about what is being put in place, and this can take a number of forms:²

- One council can delegate a function (and the budget for it) to another council. For example, in England many county councils delegate highways responsibilities to district councils
- Two or more councils can jointly carry out a function (such as providing a service)³. There will usually be a 'lead' council who actually employs the staff, although the service may be jointly governed by a joint committee.

² The powers described in this section do not apply to councils in Northern Ireland.

³ Local Government Act 1972 (section 101)

So where there is a 'shared workforce' staff will still be employed by one of the local authorities involved, although different services may be provided by different authorities. If there is a shared Chief Executive, they will normally be employed by just one of the authorities and seconded to another authority. Neither of the arrangements above is a 'procurement exercise', so the services do not have to be competitively tendered under the EU procurement regulations.

There are also many other models which can be followed which involve councils charging for services or trading in them. Some of these include:

- **Charging.** One council can charge another council for providing it with a service, for example a payroll service, and make a profit on it.⁴ In Scotland councils can directly provide services to the private sector and charge for them
- **Trading Companies.** Councils can also set up trading companies which can provide council services and related services.⁵ These companies can be owned by the council alone, by several councils or public sector bodies, or partly or mainly by the private sector as 'joint ventures'. In Scotland, councils can also set up Limited Liability Partnerships.

If these companies generally sell their services on the open market, then the council that owns them must treat them as completely independent bodies, or they may be giving them 'state aid'. So if a council moves its refuse section into a wholly-owned trading company, bidding for business on the open market, then the contract for that council's own refuse services must be fully tendered according to EU procurement rules – it can't just give that contract to its own company.

The exception to this is a Teckal⁶ Trading Company. If the company is owned by the council(s) and the services it provides are overwhelmingly provided back to the authority (or authorities) that own the company, then it is treated as almost being part of the local authority and it doesn't need to go through the EU procurement regulations. Trading companies use contractual arrangements, and have to follow the normal EU procurement procedures⁷. These are not usually referred to as 'shared workforces'.

⁴ LA (Goods and Services) Act 1970, LG Act 2003 s93, LG Scotland Act 2003

⁵ LG Act 2003 s95, LG Act 2000 (Power of Well-being), LG Act 1972 s111

⁶ The name 'Teckal' comes from the original piece of case law which came from the European Court of Justice - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0107:EN:HTML>
⁷ The Public Contracts Regulations 2006 and Public Contracts (Scotland) Regulations 2006

Case Studies

Adur and Worthing

Adur and Worthing district councils are in the south-east of England and have probably the most advanced shared workforce project. They are two separate councils, both Tory run, but they have a single chief executive (since 2007) and a single management structure. Whilst each council still provides some services individually and there are some arrangements with other councils, many services are now provided 'jointly' between the two. Each 'joint' service is provided by Adur and Worthing, with joint service staff employed only by Adur. Worthing staff have therefore TUPE transferred to Adur. All services arising out of the shared provision remain in-house.

The process has not been without conflict from time-to-time, including UNISON calling for it to be halted at one point, but the chief executive now speaks highly of UNISON. There is now a single UNISON branch covering both authorities.

South Oxfordshire and Vale of White Horse

UNISON heard about the 'Ridgeway Project' - creating a single workforce covering South Oxfordshire ('South') and Vale of White Horse ('Vale') district councils - from a newspaper leak. South was Conservative, and Vale was Lib-Dem, but this was not a problem to the Leaders and leading officers who drove the process. Indeed the Vale Conservatives opposed the process! Council co-operation started with sharing accountancy services, but accelerated with a plan (July 2008) to move from 2 chief executives, 5 directors and 14 heads of service, to 1 chief executive, 3 directors and 8 heads of service. This was completed by February 2009 and shared middle management is due for April 2010. South led the process, which felt like a 'take over' to many Vale staff, and perhaps because of this the trade unions in South were much more involved than those in Vale. South had outsourced many services and when the new heads of service developed business cases for sharing services, they did it on the basis of outsourcing. The process of harmonising terms and conditions was mainly based on the ones in South, and this is due for completion in April 2010 except for the thorny issues of pay and grades. There is a single meeting with the new joint management, but individual branches also meet their own HR leads. In Vale, the branch still meets with councillors, something which disappeared a long time ago in South.

Branch action

The building blocks

Branches should aim to be engaged in the process before any shared workforce proposals are actually developed. A good relationship with senior officers and senior councillors underpins this, but other early warning signs include proposals around a shared chief executive, and items on cabinet or council agendas.

Information is critical, and using the 'twin track' strategy branches should engage with their employers, even if you disagree with the proposals:

- Knowing the real reasons behind any proposals tells us who the key decision makers are and what their priorities are
- Knowing the timescales involved (and any project plan) means that we can plan our own meetings and responses at the right time
- Having copies of any business case and options appraisal means we can understand and challenge financial and other assumptions.

Co-ordination between branches and the region is equally critical. Branches will need to exchange information, and develop a strategy which protects and benefits all our members. This can only happen with regional coordination, and the region can also access legal advice and national support.

Organising

Our ability to influence the employer is underpinned by the quality of union organisation and the density of membership. The uncertainty that staff will feel is a key organising opportunity we can use to make sure there is a trained union rep in each affected area, and the workforce, members and non-members, are mapped and recruited.

There may be areas of organisational strength

and weakness in each branch, and an organising strategy should bear in mind what the final workforce is likely to look like.

Bargaining

Sharing workforces is a big change, with potential political disputes between parties, councillors and senior officers. If we get involved early it will maximise our bargaining strength when the project is most vulnerable.

Try to get an agreement from all employers that UNISON will be fully involved and informed at all stages. This means being part of joint discussions with all affected employers, not just at the level of individual employers. Major industrial relations problems could stop a proposal, but the union can also play a constructive role as a facilitator of change. These changes may take years to work through, and additional facility time will be essential for proper union involvement.

There is a clear order of preference about the results of sharing workforces. For UNISON, the most important result is keeping any services inside the public sector.

Preferably this should be as a part of a public authority, but a fallback position could be as wholly owned 'Teckal' company providing services back to one or more public authorities. In Scotland, the Scottish Government has developed shared services procurement guidance⁸.

⁸ See www.scotland.gov.uk/Resource/Doc/82980/0055049.pdf

There are likely to be staff transfers between employers, and this may be done in different ways. UNISON has guidance on this process.⁹ TUPE¹⁰ is likely to apply to staff in many services, although for purely administrative functions it may not apply and equivalent protections do.¹¹ It is also possible that staff may be seconded from one organisation to another, and this has to be done with care.¹² Branches may want to seek specific legal advice on how TUPE may apply.

Equal Pay could well be a major issue. UNISON is currently preparing comprehensive guidance on Shared Services and any Equal Pay implications. But in all cases there should be a full equality impact assessment carried out of any proposed changes.

Employers may want to harmonise terms and conditions, and our starting position is to harmonise upwards to the best of existing policies and agreements, which means negotiators need to know what they say! If major savings are being made by employers, then some of that money can go to improving conditions, and harmonising upwards will help the morale of staff who would otherwise be working side by side on different terms and conditions. TUPE gives some protection against detrimental changes.

It is likely that a reduction of staff and relocation of remaining staff will be involved. A proper assessment of workload for staff and compensation for relocation and travelling costs is important. UNISON has examples of agreements on relocation and other issues.¹³ Computer systems are almost always a big issue with integration projects, as are different organisational cultures.

Campaigning

Branches are likely to do best with a strategic approach to campaigning.¹⁴

Branches and the region should jointly what our key objectives are, who we need to influence, and how we can do this as proposals develop.

The local controversy about major council changes, and the inside knowledge that a trade union has, gives UNISON many opportunities for influencing a shared workforce proposal – as long as we get involved at the start. The public story given by councils will contain a lot of spin, and back bench councillors are often on the sidelines. So getting activists to raise key issues in the local press, radio phone-ins, and with councillors can be effective.

Having an accurate view of where negotiations are is vital. Different councils will be telling different stories to their staff, councillors and local media. We need to share this information between branches and the region to help guide our strategy.

Having different political control in different councils does not necessarily cause problems, but there will be local concerns and it is important that we strengthen our contacts with elected politicians. If one employer will not release certain information then another one may do, and if managers do not cooperate, then political contacts may help. The Freedom of Information

9 See the UNISONs Guide to Transfers at www.unison.org.uk/acrobat/PCU_organising_guide.pdf

¹⁰ See TUPE 2006 regulations at <http://www.legislation.gov.uk/uksi/2006/246/contents/made> and Thompsons' briefing on them at www.thompsons.law.co.uk/text/110-time-to-transfer.htm

¹¹ Cabinet Office Protocol - <http://www.gad.gov.uk/Documents/Staff%20Transfers/stafftransfers2.pdf> and Scottish provisions s52.

¹² See UNISON safe secondments guidance at <http://www.unison.org.uk/file/UNISON%20LG%20Secondments%20advice%20-%20final.pdf>

¹³ On the Bargaining Information System (BIS) (contact bsg@unison.co.uk)

¹⁴ UNISON runs a strategic campaigning training course for activists. Contact your Regional Education Officer for more details.

Act¹⁵ is also a powerful weapon if other methods don't work.

Branches may need expert help in understanding business cases and technical information, and many UNISON branches have used APSE¹⁶ to provide analysis of these documents. It is not unusual for councils to spend hundreds of thousands of pounds on consultants' reports which are superficial and unjustifiable. The Regional Pool fund and UNISON's General Political Fund can help with costs,¹⁷ and regions can fast track GPF bids under £5,000.

You may also need help with understanding the council finances. The Local Government Service Group and your region will give you guidance. You can also get help from UNISON's guide to local government finance.

An in-house improvement plan is the preferred option for changing services, but a shared service in the public sector is better than outright privatisation. Bear in mind that some politicians would rather privatise services than share with other authorities, because sharing may take longer.

More information

UNISON has produced guidance on a range of issues:

Efficiency reviews – www.unison.org.uk/localgov/pages_view.asp?did=5075

Procurement - www.unison.org.uk/activists/procurement

Access to Information model agreement -

<http://www.unison.org.uk/file/Model%20Information%20and%20Confidentiality%20Agreement.2.doc>

The IDeA has produced two reports on shared chief executives:

Shared chief executives and joint management: a model for the future? - October

2009: www.idea.gov.uk/idk/aio/14197204

Shared chief executives: the lessons - October 2008:

www.idea.gov.uk/idk/aio/8890180

For more information contact the Local Government Service Group at:

localgovernment@unison.co.uk

¹⁵ UNISON guidance on the FOI Act and FOI (Scotland) Act at www.unison.org.uk/acrobat/B1959.pdf

¹⁶ Association of Public Service Excellence – www.apse.org.uk/consultancy.html

¹⁷ A model GPF bid is available from UNISON

Mutuals – questions to ask

The Government and media keep talking about ‘mutuals’ – co-ops. They want workers to form mutuals to take over the running of public services.

There is little experience of mutuals providing public services. In some services where staff are no longer employed by the council there may be benefits. For example in social care, where personal budgets mean that staff are employed by service users (or agencies), a mutual could bring workers together to support each other. But

in other services which are currently provided by a local authority, UNISON members should ask some serious questions before agreeing to form a mutual.

Whether mutuals are a good idea or not, it is vital that we don’t take our eyes off the main issue – which is public spending cuts. But below are a dozen questions about mutuals to help start you off.

	Claim for mutuals	Questions to ask
1	A mutual will put you in control	‘Mutual’ can mean all things to all people, be very clear on what is actually being proposed. Is it a co-operative? A small company? A management buy-out?
2	It is a whole new way of providing public service	Will the council fund a mutual as much as it funds its current services? If a mutual is responsible for a service, will it be blamed for any cuts rather than elected councillors taking responsibility?
3	They can provide the service cheaper	The biggest cost in most services is staff wages. How exactly will a mutual provide the service more cheaply?
4	They are more accountable and involve users more	The council is elected by, and accountable to, local people through the ballot box. How will people influence a mutual if they don’t like what it is doing? Can involving users only be done in a mutual? If the mutual will be run by the staff, why would this automatically involve users more than the council could (if it chose to)?
5	They involve staff, making use of their talents	Can this only be done in a mutual? If there is the political will, can’t the council give staff more influence over its own services? Would all staff be full members of the mutual, or would admin staff end up as the poor relations?
6	They protect staff terms and conditions	A mutual is an outsourced company. Will the organisation be allowed admitted body status to the LGPS? Will the mutual need to raise a bond to cover potential liabilities for redundancy? What will the mutual do if its funding is cut?

7	A council can simply ask a staff mutual to take over a service	EU procurement law means that services would have to go to free and open competition. So a mutual would potentially have to compete against Capita, IBM and 'social enterprises' to win a contract to provide services to its own council. The mutual would have to submit a detailed tender, pre-qualification questionnaire, and fulfil ongoing contract monitoring requirements.
8	They will remain independent	Experience from housing associations suggests that mutuals might amalgamate after a few years to get economies of scale. Would this reduce the advantages claimed for a mutual?
9	They are secure in the long run	How will a small mutual raise funds for capital investment better than a multi-million pound council? If the mutual didn't win the contract when it is retendered in a few years time, would you be happy TUPE transferring to work for the new contractor, which might be a private company?
10	Staff are safe from unemployment	Public finances are very tight, so would you have to bid low to get the contract? What would that mean for your terms and conditions?
11	You will get the freedom to become your own boss	How would your mutual deal with being legally responsible for health and safety, equalities and disability discrimination, financial reporting, data protection, contract law, etc?

Trusts

The information below gives an outline of a service delivery model that is often cited in relation to the privatisation of leisure and cultural services, but could also be used for other services.

What is a trust?

When a local authority opts to transfer services from their control to that of a trust, this in effect means privatising the service to a separate company. The trust usually leases facilities at a reduced or 'peppercorn rent' from the council, which retains ownership of the freehold.

Proposals for trusts claim they have increased opportunities for innovation through independence from the local authority. However in reality trust proposals are likely to be centred on making savings through the potential for reduced tax liabilities (business rates) and the potential for VAT exemptions.

In the long term, it is likely that moves towards a trust will lead to the overall fragmentation of local government services across the piece, characterised particularly by the erosion of:

- Democratic accountability
- Service user and employee involvement
- Employment policies, pay and conditions
- Social welfare / community objectives.

What are the claimed financial benefits?

Additional funding may be open to a trust as it will be eligible to apply for funding streams which the local authority cannot access. However the main savings for the council derive from business rates reductions, as the trust will take over the liability for the business rates from the local authority. This can represent a significant saving for a local authority. Trusts are then able to apply to the council for rate relief, of which there are two types:

- **Discretionary** – 75% of any relief granted is charged to the national business rates 'pool', with the cost of the remaining 25% being met

by the council (who will usually look to recover this from the trust)

- **Mandatory** – up to 80% is available which is charged to the national business rates 'pool' (discretionary relief is available on the remaining 20%)

Branches should be aware that the Tory-led Coalition government are proposing to make changes to the business rating system.¹⁸ This could have implications for the way mandatory and discretionary relief is funded and might make the trust model less attractive to local authorities in the future as savings will decrease.

As well as the savings related to business rates, VAT reductions are often used as a rationale for the transfer to a trust model. However, the legislation governing VAT exemptions and recovery is complex and will vary between individual local authorities and trusts. Branches are advised to seek local advice on the situation in their areas.

How is the trust board set up?

When a trust is set up the council's direct democratic control of the service is weakened considerably, as in the trust model democratically elected councillors are likely to be in a minority on the board. Board members may be appointed in different ways and are likely to include the local 'great and the good.'

Company law states that all board members must place the interest of the trust before that of the local authority, including councillors and officers. This is likely to impact upon future procurement and contracting for the trust's support services. Trusts can look to the private sector to fulfil these requirements, and if the award of a contract is based solely on price, all board members will be bound to take this into account.

¹⁸ Through the Revenue Resource Review, due to report in July 2011

Key questions for branches to ask

- What are the projected savings and how are these to be reached? It will important to clarify the council's assumptions in terms of business rates relief and VAT exemptions for the trust
- What are the estimated set-up costs for the trust? If these are high it could negate the other projected savings
- Is the trust to permanently take on the service, or will it have a time-limited contract with the council? If the latter, then there is no guarantee that the trust will be awarded the contract when it is re-tendered and is likely to be vulnerable to take-over from a private contractor
- How will members be appointed to the trust board?
- What governance agreements and controls will be put in place to ensure that the trust is transparent and open to public scrutiny? At present trusts are exempt from provisions under the Freedom of Information Act
- What would happen if the trust gets into financial difficulties? What agreements will be put in place with the local authority to safeguard services and jobs in this case?

Community interest companies

This briefing gives information about community interest companies (CIC). As a form of service delivery model CICs can be seen as a key part of the Tory-led Coalition government's drive to take the running of essential public services away from local authorities.

What is a community interest company?

A community interest company (CIC) is a legal term for a form limited liability company which can be created under the Company Act 2006.¹⁹ CICs can either be incorporated as a new company, or converted from an existing company, as either:

- Company limited by guarantee
- Private company limited by shares
- Public company limited by shares (PLC).

CICs can only be established if they pass a 'community interest test' and are subject to an 'asset lock'. This aims to ensure that a company is set up for community purposes and the assets and profits are dedicated to these objectives. The regulations governing CICs stress that they are as flexible as normal companies, but with specific restrictions.

Governance

How a CIC will be governed should be set out in its articles of association. Typically there will be at least one director, who can be paid (although regulations state 'never more than is reasonable'). There will also be board members, secretary and employees. Members of a CIC should have influence and be able to hold the director(s) to account.

As with all companies, board members must act in the best interests of the company. However with a CIC they are also expected to act in the best interests of the community which it was set up to benefit.

¹⁹ Briefing based on information contained within the **Community Interest Companies website** <http://www.cicregulator.gov.uk/guidance.shtml>

Finance

Regulations state that a CIC is not eligible for any specific tax breaks from the Inland Revenue. However under certain circumstances they may be able to claim discretionary rate relief for business rates and VAT exemptions – this will vary between companies so branches should check what claims a local authority is making about the financial benefits of a CIC.

What's different about a CIC?

One the perceived benefits of a CIC is the level of transparency required under their regulations. Annual reports detailing accounts, what the CIC has done and how this has benefited the community, what directors' salaries and dividends have been paid and to what extent it has involved its community in its activities, are one requirement.

Once a CIC is set up, regulations do not allow it to convert into a regular company. The only way in which a CIC can cease to exist is either through conversion to a charity / industrial and provident society or winding up. This means that the option for a local authority to bring a CIC back in house at a later date is not a straightforward process.

What happens if a CIC goes bust?

If a CIC does go into administration or liquidation the remaining assets can only be passed to another 'asset locked' body, such as charity (which should be set out in the company's articles of association).

There is an exception to this which states that transfers can be made 'for the benefit of the community other than by way of a transfer of assets to an asset-locked body'.²⁰ This exception

²⁰ **4.5.9.2. General exceptions (applicable to all CICs)** <http://www.cicregulator.gov.uk/guidance/CIC%20%20ch%204%20Oct%202009%20version%209%20final.pdf>

could refer to local authorities, but this will need to be clarified (possibly via the articles of association).

Key issues for branches

Below are some of the main issues to be aware of, raise with the local authority and bring to the attention of staff and members facing transfer to a CIC:

- What are the arguments for moving from an in house service to a CIC? What does the local authority feel a CIC can deliver that an in house service can't?
- Is the company going to be limited by guarantee or by shares? If by shares this means members can be paid dividends
- What are the proposed governance arrangements? These should be set out in the articles of association, which branches should ensure they scrutinise
- What are the claimed financial benefits of a CIC? Ask the local authority to clearly set out any VAT / business rate relief savings
- What are the proposals to safeguard services if the CIC runs into financial difficulties? Key to this is ensuring that any assets are returned to the local authority in the event of the company being wound up (this should be stated in the articles of association).

Council trading in England and Cymru / Wales

This briefing outlines relevant information in respect of council trading.²¹ Branches should note that councils have powers to charge for some services in order to raise income. Choosing specifically to trade to make profit is a political choice by local authorities.

Devolution issues

The guidance below predominantly focuses on the situation in England and Cymru / Wales where the 2003 Local Government Act applies (with some variations in guidance and Orders under the Welsh Assembly).

The situation as regards Scotland is completely different, with the Local Government in Scotland Act 2003 in place and the Local Authorities (Goods and Services) Act 1970 being the main piece of legislation governing trading by local authorities. Furthermore, in Scotland:

- There is no requirement to establish a separate company for commercial trading
- There is no distinction between charging and trading
- When not trading with another council or public body, there are limits to the amount of income a council can make through trading.

Background and legislation

Local authorities are able to trade in any of their functions under section 95 of the 2003 Local Government Act. Trading enables an authority to make a profit from its activities and to provide goods and services to the private sector, providing these are services it would already provide as a council.

This usually takes place via the setting up of a separate trading company – effectively a form of outsourcing. Whilst many councils have been reticent to undertake trading in the past, this is beginning to change and is likely to accelerate as local authorities seek to generate income from elsewhere as they make cuts.

Setting up a trading company

The following steps have to take place before a trading company can be set up:

- A business case must be drawn up, which requires formal approval. This should be a 'key decision' of the council and made in public
- Once approved a business plan is put together. It is worth noting that local authorities do not have to establish a new company to trade, they can agree with an established commercial company to trade through it on a contractual basis.

Most council trading companies are wholly owned by the local authority but they can be established jointly with other councils.

Governance

Most council trading companies are companies limited by guarantee. The board will be made up of local authority officers and councillors. Board members are required to put the interests of the company, not the local authority, first.

Under the Freedom of Information Act, companies which are wholly owned by one local authority are subject to FOI requirements in the same way as councils are. However, if a company is owned by more than one local authority, the company is exempt from FOI. As a way around this restriction, information could be requested directly from the council(s) who will hold the information and be obliged to disclose it.

²¹ Briefing based on information contained in **Charging and Trading in Local Government (2005)** John Bennett and Stephen Cirell

Workforce implications

Once established a trading company will be legally separate from the local authority. Employees of the company are likely to be sourced via one of the following options:

- Transfer of staff from the local authority
- Another arrangement, for example taking over the employees of an existing business in the case of a takeover or merger
- Secondment of staff from the local authority
- Recruitment from the local / national market place.

In the case of the first two options, TUPE would be likely to apply. Local authority employees could therefore be transferred to the new trading company, on the same terms and conditions as they had previously had. However, inequalities are likely to arise if new staff join a trading company - whilst once these individuals would have been protected by the two tier code, this provision no longer automatically applies.

Pensions

The situation for employees as regards pensions and council trading companies may change in the near future. Currently under the Pensions Directive 2007 staff who transfer from a local authority must be granted access to the Local Government Pension Scheme (LGPS) or a 'broadly comparable' scheme. However the Coalition government is planning to scrap the Fair Deal policy which would mean there is no longer this protection.

Council trading companies are separate from the local authority, and this may limit the ability of the council trading company to retain admitted body status to the LGPS. It is important that new trading companies ensure they gain admitted body status to the LGPS.

Commercial council trading companies may have been set up with the aim of being able to trade

with the private sector. Staff could be deemed as working for the private sector, at which point their membership of the LGPS could be called into question.

One way in which local authorities can avoid this issue and ensure employees retain LGPS membership is to second staff over to the trading company, rather than transfer under TUPE. More information on secondments is available online:

<http://www.unison.org.uk/localgov/workforce.asp>

Bargaining

Collective bargaining on public sector pay and conditions takes place at national NJC level. Trading companies are new employers outside of this agreement, so negotiations will happen at a local level. Branches need to be alert to this and ensure that terms and conditions are harmonised upwards, to guard against the creation of a two-tier workforce.

Procurement

Branches should be aware of the Teckal exemption. If the trading company is wholly owned by the council and the services it provides are overwhelmingly provided back to the authority that owns the company, then it is treated as almost being part of the local authority and it doesn't need to go through the EU procurement regulations. This will be an important consideration and may guard against the service being privatised to another company and staff transferred at the end of the contract.

As with any outsourced service, if a council trading company runs into financial problems there is a risk to services. This situation could occur in the case of insolvency or if the company is unable to deliver on its contracts with the local authority.

Risks for the council

In choosing to establish a council trading company, a local authority is making a decision to undertake activities in order to turn a profit. Commercial activities always carry an element of risk and it would be wrong to assume that council trading companies are immune to this.

Local authorities are advised to put an exit strategy in place when establishing a company in order to protect their investment. Exit strategies should be written into the company's constitution and will most typically be used in the event of the voluntary sale of shares or winding up of the company or insolvency.

A local authority may assume responsibility for any debts or losses of a trading company which it owns. However, depending on the way in which the company was set up and any agreements / guarantees, the local authority may be under no obligation to meet the company's debts.

Risks for the workforce

Clearly the most important consideration for UNISON in the event of failure of a company will be the impact on staff. Branches will need to ensure they ask questions about the governance of the company and its relationship to the local authority.

Even if the company is sold after going into administration allowing it to continue and retain jobs, this will be under a new employer, likely to be a private sector company. It would be wrong to assume council trading companies will always remain linked to the authority – as with all such examples of outsourcing they can be the first step towards outright privatisation.

Key questions to ask

- Will staff be able to access the LGPS?
- Is the trading company set up for a specific contract with the council or as a one-off?
- If the company holds a contract with the

council will this be tendered via procurement in the future or exempt under Teckal rules?

- If the council is not in the majority on the board will they be in a position to halt any sale or winding up of the company? What scope is there to guard against staff redundancy?
- What exit strategy is proposed / in place and what does this commit the council to in the event of failure of the company?

Case study – Essex Cares

Essex Cares was set-up back in 2009 as a company wholly owned by the council to provide social care services to both the local authority and public sector partners including the NHS. This was one of the first council trading companies of its kind. Despite their fundamental opposition to the proposals, UNISON were closely involved throughout the negotiations to establish the company, ensuring TUPE transfer for the 850-strong workforce as well as admitted body status to the LGPS.

The initial contract with the County Council is for three years, with a possible two year extension. After that the company will have to bid against private companies for the contract, and staff may find themselves TUPE to a private contractor.

Equality Impact Assessments

The guidance below gives specific advice on using Equality Impact Assessments (EIA) to oppose privatisation proposals. Fuller guidance on using the equality duties more generally is available online: <http://www.unison.co.uk/acrobat/EIAon%20cutstojobsPAYandconditionsfinalversion.pdf>

Equal opportunities are a good reason for keeping services in-house, because outsourcing a service can have a discriminatory affect of workers and users. The general requirement of the new Equality Duty (in the Equality Act 2010) to eliminate discrimination and advance equality of opportunity applies to councils, but also to contractors carrying out functions on behalf of public bodies.

There are specific duties on public sector organisations which do not apply to contractors, so equality is better served if a service is kept in-house. To protect equal opportunities it is vital that UNISON branches are involved in any procurement process right from the start.

Because TUPE protects the terms and conditions of transferred staff (at the point of transfer), it is unlikely that UNISON will be able to take individual legal equality cases for members which are directly related to the outsourcing. Unfortunately, Government Equalities Office guidance states that the general duty does not impose a legal requirement to conduct equality impact assessments. However, UNISON argues that an assessment is still the most reliable way of assessing the potential impact. An EIA should fully examine proposals, as well as using statistical evidence.

Branch Action

Branches should press councils to conduct Equality Impact Assessments at two stages in the procurement process:

a. At the options appraisal stage

This is the time when a council will consider outsourcing as an option to an in-house service

improvement plan. Our bargaining aim is to show that equality is better served by keeping a service in-house. The EIA should examine each option and include key general questions:

- Will an analytical job evaluation scheme cover all staff?
- Will equal pay audits be periodically carried out and acted upon to reduce pay inequalities?
- Will public reporting of equality statistics and other information be at the same high level as the council?
- How will service users be able to influence equality improvements as good equality practice evolves over time?
- Will future policies on promoting equality opportunities be as good, or better, than existing ones?
- How will the council be able to intervene if equality is not being promoted?

If the council has not implemented equal pay, then an additional question for the branch to consider is:

- Have all equal pay issues been resolved?
- In addition, the staff equality profile (the gender, race, disability, and age of staff) in the service(s) under review should be compared with the staff equality profile in the authority overall, to see if any group is disproportionately affected. The equality profile of the users of the service under consideration should be compared with the equality profile of residents in the local authority area to see if any group is disproportionately affected. If any group is disproportionately affected, then the authority should have a plan as to how they should be protected. If the EIA shows that equality is better served by an in-house service, then ask how the council can justify outsourcing when it has a legal duty to promote equality.

b. At the short-listing or selection stage

If a decision is made to outsource a service, then equality requirements should be specified in the

contract documentation as a legal requirement. Councils are now explicitly allowed to do this. An equalities factor should be explicitly built into the scoring matrix for assessing bids. An EIA should be carried out to compare the equalities practices of companies bidding for the contract, and an in-house bid. Our bargaining aim is to get the highest possible standards, and push for an in-house bid with high equality standards in preference to outsourcing.

The EIA should include key questions, which should be included in the tender documentation:

- Is there an analytical job evaluation scheme for all staff? The jointly-developed NJC and SJC schemes are tailor-made for local government.
- What proposals are there for changes to service delivery, and how will these affect users and staff (especially bearing in mind the staff equality profile)?
- Will trade unions be involved in future job evaluation?
- What is the past equality practice of bidders on different contracts? Can they evidence actions taken to increase equality and ensure equal pay?
- How will equality for new starters (including in pay, terms and conditions, and pensions) be ensured?
- How do their recruitment, selection, training and promotion policies promote equality?
- What specific proposals are there to keep up-to-date with developing good equality practice, and to introduce changes?

The bidder with the best equality proposals should be recognised, and if the EIA shows that equality is better served by an in-house service, and then ask how the council can justify outsourcing when it has a legal duty to promote equality.

Negotiating Points

If any of the strands of equality are disproportionately affected the proposal could be

discriminatory.

Use relevant information from members and the information provided by the employer to negotiate for the retention of the current arrangements or better alternatives than those proposed.

Remedies

If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON equality protocol to challenge them

- Apply the NJC/SJC disputes resolution procedure
- Seek legal advice via your regional organiser on whether discrimination or breach of contract claims can be mounted
- Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

‘Opening the books’ – understanding council finances

Often the rationale for privatisation is that outsourcing presents a cheaper alternative to in-house provision. Guidance is available for branches to help understand council’s finances and why cuts are a bad idea:

- In England: <http://www.unison.org.uk/acrobat/B5124.pdf>
- In Wales: <http://www.unison.org.uk/acrobat/19092.pdf>
- In Scotland: Guidance soon to be released.

who are council finance experts too. The local government service group will give them further advice if they need it.

localgovernment@unison.co.uk

These guides have been written to help branches and activists to understand council finances, so that you can argue with your employers and elected representatives for alternatives to cuts and redundancies from a position of knowledge and strength.

Council finances can appear daunting. Like any new topic, there is new jargon to learn – and not everyone likes numbers. The local government service group has been working with UNISON branches and regions to help them understand council finances and council tax and we are beginning to get results in negotiations and campaigns over cuts and redundancies. The guide:

- Shows branches and paid officials why it is vital to understand your council’s medium term financial strategy and budget preparation
- Identifies the financial information available about your council and where to find it
- Shows you what you can find out from each of your council’s financial documents and highlights the issues that you might need to explore further
- Contains a glossary of terms relating to council finance
- Helps you develop a communication and campaign strategy.

You may need some advice and support during your initial exploration of your council’s finances. If so, please contact your regional head of local government or your regional organiser in the first instance. There may be members of your branch

An introduction to procurement

This information is taken from the UNISON document 'A brief introduction to procurement: a concise version of UNISON's full procurement guide':

<http://www.unison.org.uk/file/Introduction%20to%20Procurement%20Final..2.pdf>

Public sector employers in England are under increasing pressure to contract out services as a part of the government's public spending cuts agenda. Although the devolved administrations in Scotland, Wales and Northern Ireland have pursued a more collaborative approach, preferring co-operation to competition, a growing number of public sector organisations in the devolved nations are also putting some of their services out to tender.

The process used to secure these services, either in-house or from an external contractor, is called procurement. In recent years 'procurement' has become an increasingly common feature of public services reform, often leading to outsourcing. To varying degrees this is happening across all parts of the public sector.

It is important that UNISON branches both understand and seek to influence how employers use the procurement process. Branches need to convince employers that outsourcing often leads to a deterioration in service quality. We also need to show that the best way to improve public services is through more investment and the development of in-house services, supported by the workforce and their union. Crucial to this process is the development of an in-house service improvement plan.

Where services are at risk of being privatised the branch should resist and suggest a positive in-house alternative. However where the employer decides to go through a formal procurement process, the branch should engage with the process to ensure the interests of members continue to be represented.

This guide is a shorter version of UNISON's detailed guidance on procurement and commissioning. Procurement can involve complex rules and procedures and our full guidance comprehensively covers all of these issues. The

full guidance is on UNISON's procurement web page: www.unison.org.uk/activists/procurement

The Local Government Team have recently created a database of OJEU notices and are able to monitor adverts and alert branches electronically to advise of contracts in their areas which signal outsourcing and privatisation.

Does this guide apply to all parts of the UK?

Yes. There are important differences in the legislative and political context of procurement between England, Scotland, Cymru/Wales and Northern Ireland. However the advice given in this document is largely generic and applies across the UK. Dedicated factsheets explaining the distinctive elements of procurement in the devolved administrations are available from the procurement webpage:

www.unison.org.uk/activists/procurement/docs_list.asp

Why is commissioning and procurement a key issue for UNISON?

UNISON is a public services union. Our members are employed in the NHS, local government, police and fire services, probation and education and children's and other services. The commissioning and procurement agenda could lead to the fragmentation of public services and result in the transfer of thousands of public sector jobs to private companies and the voluntary and community sectors. This could lead to the break-up of national bargaining and undermine the pay, conditions and pensions of many UNISON members. Despite government promises that staff transferred will have their employment rights and pensions fully protected, these are often undermined. The creation of a 'two-tier' workforce with staff employed to do the same jobs on different terms and conditions is a constant danger.

What forms can procurement take?

The procurement of services can take a variety of different forms. These include:

- Contracting out or outsourcing is the most common form of procurement in which private or voluntary sector organisations take over management and delivery of a specific service for a defined period. Staff are usually transferred to a new employer under the TUPE Regulations or in some cases are seconded by their current employer
- Public Private Partnerships or Private Finance Initiatives (PFI). Often used for infrastructure projects. Contracts usually involve a consortium of private companies financing, building and running key services for a period of 25 to 30 years
- Strategic Service-Delivery Partnerships (SSDP) are long-term (10–15 years) multi-service contracts usually between a local authority and a private contractor. Staff are usually transferred or can be seconded to a private contractor or to a joint venture company (JVC)
- Building Schools for the Future (BSF) programmes are a version of PFI's used for projects to build new schools and refurbish existing schools in England. They can cover services like grounds maintenance, information technology, and building cleaning
- Shared services involves public sector organisation pooling resources either between departments or functions, or between different public authorities. This often, though not always, involves a private sector organisation running services on behalf of several public authorities. In some cases public authorities combine to provide shared services in public-public partnerships
- Procurement under an 'Express LIFT framework' is a modified form of PFI to build new clinics and health centres. Under the framework primary care trusts and local authorities can bypass the European procurement procedures by choosing a LIFT partner from a vetted list of companies.

UNISON's 'twin-track' policy

Influencing procurement decisions through negotiations isn't an alternative to campaigning. They are both vital parts of the twin-track strategy successfully followed by many UNISON branches. UNISON branches can negotiate and campaign to keep services in-house. But in many cases we may not be able to stop outsourcing. It is vital the union stays involved in order to influence the procurement process and, if a contract is outsourced, to represent members under a new employer.

The link below takes you to a booklet of model letters for branches to use before and during the procurement process to ensure UNISON involvement in every stage of the process:

<http://www.unison.org.uk/file/Procurement%20model%20letters.pdf>

Building UNISON organisation

Your branch will be in a far stronger position to represent members in a procurement process if you are well organised and effective at recruiting members. Negotiations with employers on these issues can be used as a focus for recruiting and organising. It is also important in raising the profile of the union and showing members that the union is listening; of encouraging non-members to join; and of getting existing members more involved.

If a contract is outsourced the branch will need to focus its attention on the crucially important task of building union organisation and membership in the new employer. Good communications and the active involvement of members throughout the process will boost confidence in the union, lay the foundations for strong organisation, and make membership recruitment and retention easier even where a contract is outsourced. Further information and advice on this can be found in the Organising Guide to Transfers of Employment 2008 (UNISON),

www.unison.org.uk/acrobat/PCU_Organising_guide.pdf

The different stages of procurement

UNISON branches need to intervene at an early stage in order to influence and shape the procurement process. The key stages are:

Stage 1: pre-procurement

All public authorities will have a procurement strategy or plan. This will set out its approach to procurement and how this relates to the authority's wider objectives. Branches should try to reach an agreement with the authority that ensures that the union is fully consulted at all stages of the procurement process, including the service review stage. The agreement should also commit the authority to protecting existing staff, fully applying the relevant workforce code, and ensuring that compulsory redundancies are avoided through a good workforce training and development agreement. At this early stage the branch should:

- A: Negotiate a service transformation and procurement agreement (For guidance go to page 14 of the Procurement Guide)
- B: Develop a branch strategy (For guidance go to page 17 of the Procurement Guide)
- C: Get on top of the employment issues (For guidance go to page 20 of the Procurement Guide)
- D: Ensure compliance with the public sector equality duties and ensure that an equality impact assessment(s) is carried out. (For guidance go to page 23 of the Procurement Guide)

Stage 2: moves towards procurement

The public authority will normally carry out a service review to ensure it is providing good-quality, value for money services that meet the needs of service users. The branch should seek to influence both the service review and any improvement plan that develops out of this. The branch should also ensure that it is involved in any 'options appraisal' that may involve the use

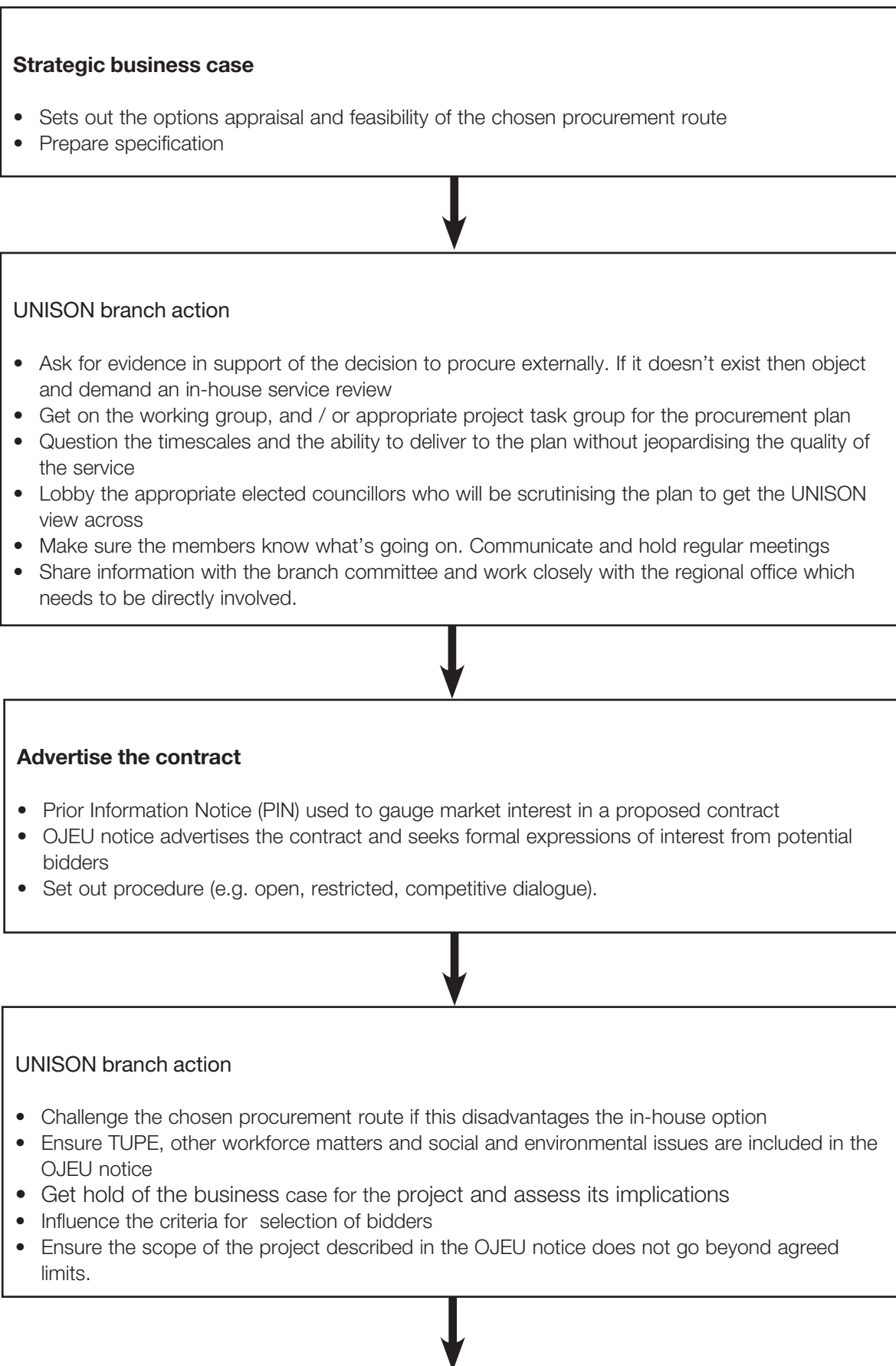
of external consultants. At this stage the branch should:

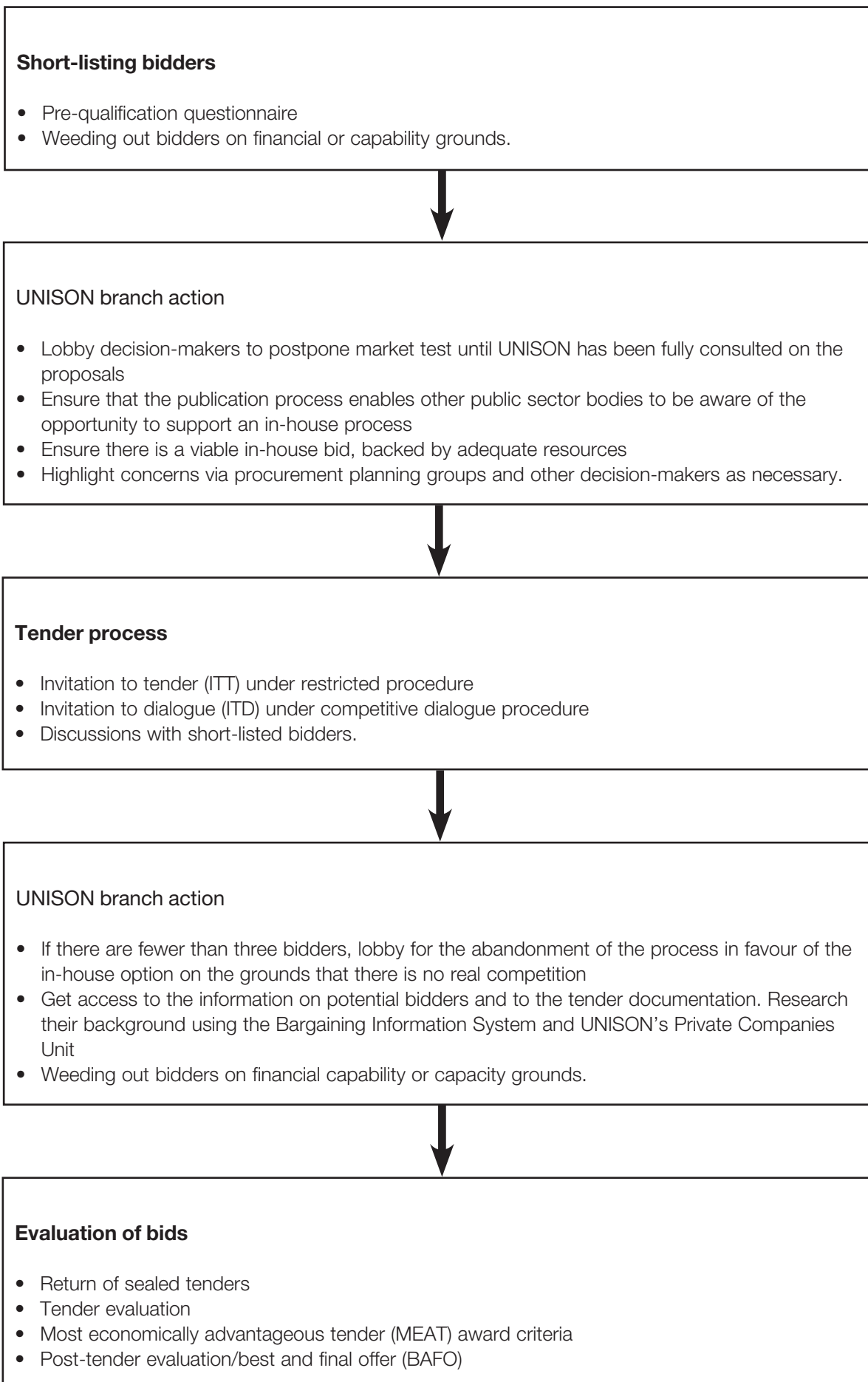
- A: Contribute to any service review(s) and service improvement plan(s). (For guidance go to page 26 of the Procurement Guide)
- B: Seek to influence the options appraisal. (For guidance go to page 37 of the Procurement Guide)

Stage 3: active procurement

Active procurement is the stage where a decision to 'go to the market', outsource or partner has been taken and the legal and technical process of procurement takes place. This usually has defined legal stages and timescales that begin with advertising the service for tender, through to awarding contracts and implementation.

The diagram below shows the different stages of the process and suggests the main areas for UNISON branch intervention.







UNISON branch action

- Get access to bids and assess the potential impact
- Draw together the steward from the affected services and get frontline views on the contractors' proposals.



Contract start-up

- Employment transfer (e.g. TUPE, TUPE Plus, secondment)
- Contract monitoring.



UNISON branch action

- Ensure the employment terms and conditions secured under the tender (secondment, TUPE Plus) are fully implemented before the start of the contract
- Ensure compliance with the workforce code for new starters (i.e. overall no less favourable than TUPE)
- Ensure the branch is in a position to retain and organise membership with the new employer.

Stage 4: post –procurement

After a decision to award a contract externally has been made, staff can be transferred to another service provider. The branch still has a crucial role to play at this point, such as agreeing the detailed bargaining and negotiating arrangements with the new employer and effectively monitoring whether the relevant “two-tier” workforce code is being applied properly. For more guidance on recommended activity during the post-procurement stage go to page 58 of the Procurement Guide.

What support is available to UNISON branches?

Training – A procurement training programme for organising staff and activists is available. The courses are not intended to create procurement experts, but to provide practical advice to UNISON representatives who come into contact with the procurement process. If you or your branch colleagues think you would benefit from this two-day training course please get in touch with Jim Lewis in Learning and Organising Services by emailing J.Lewis@unison.co.uk. Additionally shorter courses can be arranged to help meet a specific and immediate threat.

Advice from your region – Your regional organiser (RO) should be contacted whenever there is a proposal to carry out a major service review or carry out a major procurement exercise. This will enable the branch and the region to discuss the support needed and help with the development and implementation of an effective strategy. If your branch wants help in dealing with other local procurement issues, your regional office should be your first port of call. Regional staff will be able to offer advice and support on all aspects of the procurement process. Any major procurement project will probably also affect other UNISON branches, making close contact with the region vital. The region can also discuss financial support, such as bids to the General Political Fund and the regional pool.

Framework Agreements in procurement

This guidance explains how framework agreements are used in procurement and how to combat potential dangers. The full document can be found online: <http://www.unison.org.uk/acrobat/B5188.pdf>

There has been a steady increase in outsourcing of public services, and with it an evolution of how procurement takes place. One aspect of this is the use of 'framework agreements' for contracts and this briefing explains what these are, and issues branches should be aware of. It is essential that branches get involved in any framework agreements as they potentially have far reaching consequences.

Types of contract

The Public Contract Regulations 2006²² (and the Public Contracts (Scotland) Regulations 2006²³) set out how public procurement must take place. They generally require that it is open to fair competition by any companies across the European Union, and usually that a contract advertisement is placed in the supplement to the Official Journal of the European Union – an 'OJEU' notice. This includes outline details of the service which is being contracted-out, and will specify what type of procedure is being used to bid for it. There are three main types of procedure:

- **The Open Procedure** – where contractors simply submit bids for a tender
- **The Restricted Procedure** – where contractors go through a short listing process
- **The Competitive Dialogue** – where contractors develop proposals in dialogue with the contracting authority (the council)

The Local Government Team have recently created a database of OJEU notices and are able to monitor adverts and alert branches electronically to advise of contracts in their areas which signal outsourcing and privatisation.

Framework agreements

However instead of just awarding a contract, a framework agreement can be set instead (this must be stated in the OJEU notice). It allows authorities to 'opt in' to some or all of the services covered without going through the full EU procurement process. The services themselves can be extended beyond the initially stated.

This can take one of three forms. It can be an agreement:

- Between one contracting authority and several contractors. E.g. Partnership for Schools uses framework agreements for the academies building programme. The agreement has a list of advisers and construction from which a council can choose a contractor, without going through the full EU procurement process
- Between several contracting authorities and one contractor. E.g. the 'South West One' joint venture company was set up to run a wide range of services, using a framework agreement so that any local authority in South West England could choose to opt in at any time. Typically one or more councils would use the service straight away, but the others would be able to contract out their service at any point
- Between several contracting authorities and several contractors. E.g. all public bodies in London and the South East are party to a framework agreement for the supply of catering services, with three catering contractors. If several contractors are included in the framework, then there must be at least three of them.

²² www.opsi.gov.uk/si/si2006/20060005.htm

²³ www.opsi.gov.uk/legislation/scotland/ssi2006/20060001.htm

The framework broadly sets out the terms of a contract. Any of the contracting authorities can then invoke the framework agreement and establish a contract with any of the successful contractors. A safeguard is that a framework agreement can only last 4 years (except in 'exceptional circumstances'). If one authority wants to vary the contract, they must open it up to competition to all the contractors included in the framework. However, it cannot be 'substantially amended from the terms laid down in that framework agreement'.

General bargaining and organising around contracts

The key organising factor in any contracting situation is being aware of it to start with! Try to negotiate an agreement with your employer that the branch will be involved in any service review and informed of the intention to publish any OJEU notice. A model procurement agreement is at www.unison.org.uk/acrobat/MPA_FV.doc

Any contract is a political choice by an employer to 'buy' a service rather than 'make' it themselves. Workers are better protected and UNISON is stronger if all services are directly provided by the public sector. So try to argue for the service to be provided in-house or at least for there to be an in-house bid. A contract tender, or a re-tender of an existing contract, is also a time of uncertainty for workers, and an opportunity to recruit and organise so we have a stronger hand when bargaining on behalf of the workers involved.

Specific issues with framework agreements

Because framework agreements are so far reaching – they can last for four years and authorities can 'opt in' at any time - they pose an ongoing threat of outsourcing.

It is essential for branches to get involved at the outset. The government's procurement arm – the OGC - says that:

3.2. In using framework agreements, contracting authorities will need to ensure that their obligations on issues such as sustainability, TUPE and the Code of Practice on Workforce Matters are being met. The use of framework agreements does not remove the need to the address these issues, where relevant, in awarding a contract at the call-off [contract] stage.

Try to challenge employers on why they want to be party to a framework agreement, if they are not intending to use it. As frameworks often cover multiple councils, employers other than your own may be affected by such an agreement. If you become aware of a framework agreement, make sure you contact your region to ensure all affected branches are aware of it.

Withdrawal of the two-tier codes

Prior to December 2010 there were two main codes of practice in place designed to prevent the development of a two-tier workforce in the public sector: The Code of Practice on Workforce Matters (for central government and NHS contracts) and The Code of Practice on Workforce Matters in Local Authority Service Contracts (for local government).

The codes required suppliers to ensure newly employed staff were offered fair and reasonable terms and conditions which were, overall, no less favourable than those of TUPE transferred employees.

In December 2010 the Government announced that the central government two tier code was to be withdrawn. This was followed by the withdrawal of the local government code in March 2011. With the withdrawal of the codes the Government has published a set of 'Principles of Good Employment Practice'. These are voluntary principles and are far less rigorous than the two tier codes and should not be considered as a substitute for them.

The withdrawal of the two tier codes has important implications for public sector workers. Although not without their problems, the two tier codes were acknowledged to have made a significant contribution to limiting the development of a two tier workforce and promoting fairness in the workplace. The government argues that withdrawing the codes will enable small and medium sized companies to bid for public sector contracts. UNISON believes that it will lead to a 'race to the bottom' with contractors worsening terms and conditions for their staff.

This factsheet provides the essential facts on the withdrawal of the codes, signposts you to other relevant guidance and gives negotiating and organising advice on two tier workforce issues.

This factsheet relates to England only. Scotland and Wales have their own regulations on the two-tier workforce – the workforce code in Wales and the PPP protocol and s52 in Scotland – which still remain. Northern Ireland did not have similar regulations in place.

Details of withdrawing the codes

The terms and conditions that apply on a new contract depend on the contract requirements. Authorities can still apply the terms of the code and UNISON would strongly argue that this is what should still happen (See negotiating points below).

However, the withdrawal of the codes will enable public sector organisations

- For existing contracts, negotiated whilst the codes were in place, the code will continue to apply
- Where an existing contract is extended without a re-tender, the code will continue to apply, unless it is agreed between the commissioning body and the contractor that the Code will no longer apply
- Where a contractor continues to provide a service following a re-tender, suppliers will be free to offer different terms and conditions of employment to new starters working on public sector contracts
- If a contract is renegotiated, it is possible for the two parties to agree that the code will cease to apply. Terms and conditions for existing staff will be unaffected unless suppliers negotiate with the staff
- For new contracts, contractors will be free to offer different terms and conditions of employment to new starters working on public sector contracts.

The Cabinet Office supplier information note on the withdrawal of the two-tier code is available online:

<http://interim.cabinetoffice.gov.uk/media/431441/co-supplier-information-note.pdf>

The written statement on the withdrawal of the local authority two tier code can be found online: <http://www.communities.gov.uk/statements/newsroom/openpublicservices>

Existing staff and TUPE

The withdrawal of the two-tier codes does not change existing TUPE regulations. Employees will continue to have their existing terms and conditions protected as and when their contracts of employment are transferred to a new employer.

The Department for Communities and Local Government has issued the following advice regarding TUPE:

'There may be instances where contracts will be due for renewal or are currently out to tender and it will be a matter for local authorities to take legal advice on the particular contract specifications and circumstances. The abolition will not be applied retrospectively. Therefore existing contracts and the employment terms that flow from them will not be affected by withdrawal of the code'.

The 'Principles of Good Employment Practice'

When it abolished the central government code in December 2010 the Cabinet Office published the Principles of Good Employment Practice. These principles are voluntary and cover a variety of matters including employee benefits. The principles are far less rigorous than the old codes and should not be considered an adequate replacement for them. You can view the principles online:

<http://www.cabinetoffice.gov.uk/resource-library/principles-good-employment-practice>

The Department for Communities and Local Government have not yet made clear whether or not they intend to promote their own version of the Principles of Good Employment Practice. This factsheet will be updated when the position is made clear.

Although there is no formal mechanism for enforcing the principles, it does at least provide some basis for branches to argue against procurement processes that become a "race to the bottom" with regard to terms and conditions of employment for contracted out workers.

Branches should seek to ensure that the principles are formally included in procurement and contract documentation if they are unable to secure a continuing commitment to enforcing the provisions of a two-tier code (see negotiating points).

Principles which will be of particular interest to UNISON branches are:

'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'.

The impact of these 'principles on employment practice' are due to be reviewed by the Public Services Forum in January 2012. The PSF is a forum which enables trade unions and government to discuss public service issues on a regular and informal basis. The PSF will assess how the principles contribute to good employment practices in the delivery of contracted out services.

Fair deal on pensions

In June 1999 the government introduced the 'Fair Deal for Staff Pensions', a code which called on contractors running public sector services to offer 'broadly comparable' occupational pensions to transferred staff.

The withdrawal of the two tier codes does not mean that 'Fair Deal' has come to an end. However, in March 2011 the Government announced a consultation on scrapping it. The Treasury consultation ends on 15th June 2011. Documents relating to it can be found online:

http://www.hm-treasury.gov.uk/consult_fair_deal_policy_pensions_publicsector.htm

UNISON's pensions unit will issue further guidance as soon as the outcome of the consultation is known. You can view the Pensions Unit website:

<http://www.unison.org.uk/pensions/>

Negotiating points

UNISON believes that the removal of the two tiers codes is a significant backward step for fairness in the provision of public services. There is a risk that it will mean a return to high levels of staff turnover and deteriorating standards in public services. You can read UNISON's reaction to the withdrawal of the two codes on the website:

http://www.unison.org.uk/asppresspack/pressrelease_view.asp?id=2085

http://www.unison.org.uk/asppresspack/pressrelease_view.asp?id=2230

UNISON believes that quality public services are best delivered in-house, by staff directly employed in the public sector. For more information on the case for in-house services, see the website: <http://www.unison.org.uk/file/The%20case%20for%20in-house%20services%20-%20a%20branch%20guide.pdf>. However, continued spending cuts and government policy is forcing more and more public sector services into the hands of the private sector.

Despite UNISON's opposition to privatisation, branches must continue to engage in procurement processes and seek to prevent and limit the development of two tier workforces. It is significant that even contractors are privately worried about competing for public services purely on the basis of price and the consequent driving down of terms and conditions for workers. It is not in the interests of commissioning public authorities, contractors, staff or service users to have public services being delivered by workers on poverty wages, working alongside staff who, doing the same job, are on different terms and conditions. The implications for quality of service, staff morale and turnover are far-reaching.

In negotiations with employers UNISON advises branches and regional staff to emphasise and argue for the following:

- Emphasise the potentially damaging impact that the development of a two-tier workforce could have on service quality. There are already numerous examples of service quality suffering as a result of the development of a two-tier workforce
- Recognising this, branches should seek to negotiate (or renegotiate) a procurement agreement with the public sector organisation which replaces the commitment to the old two-tier codes with a new commitment to prevent, voluntarily, the development of a two-tier workforce in the provision of services

- Even if a procurement agreement of this type is not in place, UNISON argues public authorities can (and should) apply the terms of the old two tier codes in the terms of the contract. Ultimately, the terms and conditions that apply on a new contract depend on the contract requirements

Where point 2 and 3 are not possible, branches should seek to negotiate for a procurement agreement which includes the principles of good employment practice in all procurement and commissioning activity. In bargaining groups where they have been adopted, UNISON should ask the public sector employer to insist that all future contractors sign up to the principles of good employment practice before they will be considered as a service provider.

Local government branches should note that the Department for Communities and Local Government have not yet made clear whether or not they intend to promote their own version of the Principles of Good Employment Practice. This factsheet will be updated when the position is made clear.

A shared understanding of the practical implications of implementing the principles of good employment practice should be established, perhaps as an appendix to the procurement agreement. As they are currently written, the principles are vague, which may lead to their implementation slipping. For example, what mechanisms will be put in place to ensure that staff have access to 'appropriate training, qualifications and access to continuing professional development'? What parameters govern the 'fair and reasonable terms and conditions' for new starters? Is it fair and reasonable to pay workers less than colleagues doing the same job?

The principles of good employment practice make several references to 'a recognised trade union'. Where the principles have been adopted by the public sector employer, they should encourage any contractors who do not already recognise UNISON to do so in the interests of positive engagement with the workforce.

Organising

UNISON is best able to defend members' terms and conditions when we have an organised workforce with a high level of membership density.

One of the keys to successful organising is identifying an issue of genuine concern in the workplace and convincing workers that they can do something about it through their trade union. We know from talking to public sector workers that the development of a two-tier workforce prompts a strong sense of injustice among members and non-members alike. Even with the two-tier codes in place there have been examples of workplaces where conditions such as sick pay, annual leave and allowances have varied between transferred staff and those recruited after the contract was awarded. Experience shows us that, with the right organisation, workers are prepared to get active and challenge the development of the two tier workforce.

Branches faced with this situation have recruited and organised, successfully representing the views of the workforce to the employers. Some tips on organising around the two tier workforces are:

- Identify the issues: Talk to workers about what concerns them about differing terms and conditions.
- Raise awareness: It may be that some workers do not even know that they are part of a two-tier workforce. Workplace meetings, newsletters and one to one discussions can highlight the situation in your workplace.
- Engage with non-members: It's important that UNISON listens to the concerns of non-members as well as members. Some workers may need to be convinced about the union's ability to co-ordinate a campaign against the two-tier workforce. Engaging with non-members in a positive way early on can help with recruitment further down the line.
- Engage with management: It's important to be able to represent the views of workers

concerned about a two-tier workforce to local and regional managers. Meeting with management to explain how it is affecting workplace morale and service delivery is a crucial step in achieving change. Reporting back to workers on the progress of these talks is also important.

- Work with your region: Running a campaign against a two tier workforce can be challenging. Talk to your regional officer about what help they can provide for you campaign.

For more information about organising and recruitment view UNISON's Learning and Organising Webpage here: <http://www.unison.org.uk/laos/recruit.asp>

Further information

UNISON guidance on two-tier workforce specific to individual sectors will be issued as appropriate on the following web pages:

Local Government: <http://www.unison.org.uk/localgov/workforce.asp>

Health: <http://www.unison.org.uk/healthcare/>

Education: <http://www.unison.org.uk/education/>

Police and Justice: <http://www.unison.org.uk/policeandjustice/>

Cross sector guidance will be issued on UNISON's Procurement Guidance Website here: http://www.unison.org.uk/activists/procurement/docs_list.asp

The Cabinet Office Page on the Principles of Good Employment Practice is here: <http://www.cabinetoffice.gov.uk/resource-library/principles-good-employment-practice>

The Department for Communities and Local Government announcement of the withdrawal of the two-tier code is here: <http://www.communities.gov.uk/statements/newsroom/openpublicservices>

Mass secondments in local government

Strategic commissioning and shared services mean that outsourcing is a continuing threat to UNISON members. If privatisation cannot be stopped, then mass secondments are a potential alternative to a TUPE transfer of staff to the contractor.

Branches have found there are pros and cons to mass secondments and it is important that the process is carried out effectively and safely to protect members' conditions and jobs.

UNISON has produced an Organising Guide to Transfers on www.unison.org.uk/acrobat/PCU_Organising_guide.pdf.

What is a secondment?

Mass secondments are typically used as an alternative to TUPE transfers in outsourcing situations, especially in shared services, or where a 'partnership' or Joint Venture is established. Where a service is contracted out and staff are seconded, they remain the employees of their original employer, but will be supervised by the new contractor. The specific arrangements between the local authority and contractor for line management and human resources issues vary considerably.

Staff will be TUPE transferred by default unless specific secondment arrangements are put in place. This means that staff are still protected by TUPE consultation rights, even if they are ultimately seconded instead of TUPE transferred²⁴.

Even where collective arrangements are in place to permit workers to choose to be seconded, individuals always retain a one-off individual right to TUPE transfer (at the 'point of transfer' of the service).

The Local Government Service Group has

²⁴ See TUPE 2006 regulations at <http://opsi.gov.uk/si/si2006/20060246.htm> and Thompsons' briefing on them at www.thompsons.law.co.uk/ltxt/110-time-to-transfer.htm

bargaining advice on how to safely do secondments on

www.unison.org.uk/file/UNISON%20

Why secondments?

Staff may also be seconded between local authorities, Primary Care Trusts, and other public bodies as part of a 'public-public' collaboration. Although UNISON members often initially prefer secondments to TUPE transfers for security reasons – because they retain their existing employer and their pension rights – the long term implications of a secondment option need to be looked at carefully.

Case Studies

There are many examples of both successful and poor outcomes in respect of secondments. Success depends on branches being totally involved from the outset; transparency from the local authority and the contractor; and careful negotiation about the secondment arrangements.

1. Liverpool Direct Limited

Liverpool Direct Limited (LDL) is a prime example of a positive secondment, which occurred when 700 staff were transferred to a new contact centre. UNISON was heavily involved in the procurement process, and got in expert advice from ESSU.²⁵ UNISON reps accompanied

²⁵ As part of a wider strategy, branches may want to seek technical advice on procurement from the Local

Government Service Group (localgovernment@unison.co.uk) and subsequently from APSE (Association of Public Service Excellence – www.apse.org.uk/consultancy.html) or the European Services Strategy Unit – www.european-services-strategy.org.uk .

managers at site visits to the 'preferred bidder' (BT) and importantly spoke to other union reps, which enabled local stewards to see other contracts for themselves. The affected members voted to be seconded rather than be transferred. Liverpool Direct staff remain in the employment of Liverpool City Council whilst being seconded, and new starters are employed by the council. All disciplinary issues are dealt with by the authority and union organisation remains strong. However, despite negotiations common standards in respect of overtime have not been agreed, with seconded staff receiving a flat-rate. There have also been issues with BT attempting to subsequently TUPE transfer existing seconded staff to other companies.

2. Service Birmingham

Members in Service Birmingham have had a different experience, despite the efforts of union stewards. Capita runs the IT services for Birmingham City Council. Staff had the option to either TUPE transfer to Capita or to be seconded. Except for managers, staff chose to be seconded. Managers generally opted to TUPE across and follow an enhanced career path resulting in higher salaries. Capita deal with HR issues and, when confronted with difficult issues of seconded staff, prefer to offer redundancy rather than negotiate a way forward, replacing seconded staff with their own employees on inferior terms and conditions.

The workplace has now been moved to the other side of Birmingham making it harder to keep good contact with members. Although there is a Joint Consultative Committee with Capita, the union only has recognition (and membership) among the dwindling number of seconded staff. Birmingham stewards cannot represent members employed by Capita.

3. Customer Service Direct

Customer Service Direct (CSD) is a 10 year strategic partnership between Suffolk County Council, Mid-Suffolk District Council and BT

covering Finance, IT and HR. Instead of being transferred, staff were still employed by the partner authorities but seconded to CSD which employs no staff of its own. There were originally concerns about job losses and reviews of all three functions have occurred. HR has lost some jobs, but staff were transferred back to Suffolk County on the recruitment priority register and slotted in to other posts. More recent budget cuts mean this redeployment option is under threat. Existing terms and conditions have been retained, but with a new performance system for some IT staff. UNISON ensured the transparency of this scheme, and a steward is monitoring its use to ensure fairness.

Suffolk County and Mid-Suffolk branches represent their own members. CSD invite both to appropriate meetings (e.g. service reviews) and there is a joint UNISON staff forum where reps from both branches exchange information.

Are there Pros and Cons to Secondments?

The decision on whether to push for a secondment option depends on collective considerations by the branch, and individual considerations by members. Give members the information and the choice about whether to push for a mass secondment option or not. Individuals' right to choose to TUPE transfer instead means that negotiators need to remain in close contact with members.

Pros – for the seconded individual

- Have the choice whether to TUPE transfer or second
- Retain the same terms and conditions
- Retain secure pension arrangements
- Potentially more job security in redundancy situations

Cons – for the individual

- Lack of career opportunities in contractor
- May feel 'orphaned' if council management/HR has no regular involvement

- If ‘safe secondment’ procedure is not followed they may be TUPE transferred
- New starters with inferior terms and conditions give the contractor a financial incentive to ‘encourage’ secondees to leave

Pros – for the branch

- Existing members are protected
- Recognition continues for seconded staff
- Reps can use facility time to represent seconded staff
- Recruitment opportunities if recognition covers new starters

Cons – for the branch

- Potential two-tier workforce if new starters are not employed as secondees
- Recognition may not cover new starters, leading to a dwindling membership
- Reps cannot use facility time to represent new starters
- Some staff may choose to TUPE transfer rather than second, creating a more complex situation

Branch action

Where a secondment option is under consideration, the experience of branches which have gone through the process leads to the following advice:

The building blocks

- Elect a dedicated lead branch officer to lead on the outsourcing/secondment
- Negotiate facility time to allow for extra work load
- Get involved from the start of a service review, and especially at the ‘preferred bidder’ stage
- Don’t recommend the bid from any contractor, but work to secure the best arrangements for members.

Organising

The quality of union organisation and the density of membership underpins the union’s negotiating strength with the employer. All staff affected will feel concerned.

- Be clear which staff might be affected by the transfer – TUPE rights still protect everyone who is affected by a potential transfer
- Ensure there is a trained union rep in all affected sections
- Recruit new members amongst affected staff

Bargaining

It is vital to secure agreement with employers that UNISON will be fully involved and informed at all stages of the procurement and secondment.

- Have a procurement agreement²⁶ in place before any service review starts
- Have the option of a secondment arrangement agreed at the earliest stage in the procurement process
- Get the backing of members before negotiating a secondment arrangement in detail
- If seconded staff are to avoid being treated as privatised workers, it is vital that a very close link is retained with an in-house HR department, and that disciplinaries and grievances are referred to the council HR department.
- ‘Future-proofing’ the secondment is vital. All new starters on the contract should be directly employed (on secondment) by the council to avoid ‘two-tier’ terms and conditions, and to keep them covered by existing recognition and facilities agreements
- Ensure existing pension arrangements are protected
- Explore how a contractor may be intending to change working practices (e.g. hours and place of work) and ensure adequate protections are in place
- Be aware that multinational contractors

²⁶ UNISON’s model procurement agreement is on www.unison.org.uk/acrobat/MPA_FV.doc

have lawyers that may run rings round local authority procurement departments. Ensure you have access to independent legal advice through your Regional Organiser

- An Equality Impact Assessment should always be carried out. Make sure to include any potential equal pay implications
- Agree issues around implementation of the outcome of any pay and grading review/equal pay settlement/back pay due to staff if their posts had not transferred
- Some staff may still decide to TUPE transfer rather than second. Think about issues which may affect them – equal pay claims, harmonisation of terms and conditions, union recognition – and a TUPE plus agreement.²⁷

Campaigning

Branches are likely to do best with a strategic approach to campaigning. Branches and the region should work jointly on their key objectives, know who we need to influence, and how we can do this as proposals develop. Having an accurate view of where negotiations are is vital. Branches should share all information with the region.

- Go on site visits with management (but speak to union reps!)
- Use the resources of the region and the wider union – legal advice, a wider perspective, a different relationship with the employer, and access to other information and contacts
- If necessary, consider the use of legal industrial action at critical stages in the procurement process to strengthen our hand in negotiations.

After the secondment

- Keep close links to the branch for stewards and members
- Monitor how HR issues are being dealt with
- Ensure new starters are employed on secondment
- Include as an issue in standard negotiations with the council.

More Information

Branches involved in secondments should seek help and advice from their regions and Head Office when necessary. The Local Government Service Group web pages has guidance and information <http://www.unison.co.uk/localgov/workforce.asp>

The Private Companies team has a helpful resource on companies and contracts on www.unison.org.uk/privatecontractors/index.asp.

UNISON's Bargaining Information Unit holds information on shared services and recognition agreements - and branches may contact them at bsg@unison.co.uk or on Bargaining Zone on the UNISON website at www.unison.org.uk/bargaining

²⁷ The Local Government Service Group (localgovernment@unison.co.uk) has examples of TUPE plus agreements.

Guidance on how to do a safe secondment in contracting out situations

Secondments have been widely used instead of TUPE transfers in contracting-out situations. However, the 'Celtec' ruling has caused employers all round the country to question the legality of agreeing secondments in place of TUPE transfers. In addition, existing secondment arrangements are starting to be called into question.

UNISON believes secondments are still a viable option, but have to be done with care.

Secondment, TUPE or no change?

Where services are contracted out or changed so that they are delivered in partnership between organisations, the employment position of staff may change. A key factor is whether the service (the 'undertaking') has been transferred to another provider.

Where a service has been contracted-out and another organisation is providing it, this is more straightforward. Staff will normally be TUPE transferred to the new provider, unless arrangements are made for them to be seconded. If a secondment is used instead of TUPE transfer, then a precise model must be followed.

But if there is very close partnership working the position of staff may not be clear-cut – for example in the provision of health and social care between Local Authorities and Primary Care Trusts. Here, staff may remain as employees of their original employer, but there may be a risk that they will be deemed to have unwittingly TUPE transferred.

a) Secondments or TUPE?

Where a service is transferred, staff will normally be TUPE transferred as well unless special secondment arrangements are put in place. The decision on which arrangement to use depends on collective considerations (by the branch) and individual considerations (by the member).

There are a wide variety of circumstances when staff may be seconded:

- Local authority care staff seconded to a housing association after a stock transfer
- Staff from a local authority and/or a health trust seconded to a newly established Health and Social Care Partnership or a Children's Trust
- A shared services arrangement established with staff seconded to another employer.

i) For the individual

Secondment may seem attractive because it maintains the existing employment relationship, which may give more security as they don't have to rely on TUPE for protection for their terms and conditions. Pensions may also be more secure, although the Local Government Pensions Direction 2007 gives strong protection to pensions for TUPE transferred staff.

This is especially true when the service is being transferred for a shorter period of time (under 5 years, say) or the long-term basis of the partnership is uncertain. The original employer may be more financially stable.

Some staff may also wish to retain access to continual professional development and supervision arrangements in their original employer, although as time progresses there may be new career opportunities with the new employer.

ii) For the branch

The branch has got to look at the long term interests of all members and potential members, as well as existing protection. A transfer means that the Best Value Code of Practice will apply to protect against a two-tier workforce. This is a valuable aid to recruiting new starters into UNISON. A two-tier workforce is also likely to undermine collective bargaining strength, and mean the union is seen as protecting the better off workers.

In the long-term, secondment arrangements can

be difficult to sustain because of complexities around areas like grievance and disciplinary procedures. Equal pay issues may also arise over longer periods of time.

b) Problems with secondments – the Celtec ruling

A legal judgement means great care has to be used when negotiating secondments.

The House of Lords *Celtec –v- Astley*²⁸ judgement looked at staff who were seconded to a new employer, instead of being TUPE transferred. It said that legally the staff were TUPE transferred, irrespective of what they, their old employer, or their new employer intended and agreed. This is because of a fundamental principle of TUPE which does not allow waiver clauses. This has two important implications:

- Secondments are still a viable option, but have to carefully follow a set procedure
- It is vital that there is clarity on all sides about whether there is a transfer of undertaking, especially where this may not be obvious (for example where there is joint-working, integrated-services, or pooled budgets between different organisations).

How to do a safe secondment

If a secondment is going to be used as an alternative to a TUPE transfer (other secondments are not affected), then the following procedure must be followed:

- (i) Employees must be given the option to transfer to the new employer
- (ii) Employees must choose of their own free will not to take up the option of transferring to the transferee’s employment, but instead to remain in the employment of the transferor; and

(iii) Employees should enter into a new contract of employment with the transferor through termination of the existing contract of employment by agreement, and substitution of a new contract which permits secondment.

The decision must be taken on an individual basis. Typically each affected member of staff will be sent a bundle of forms, one of which will be a letter refusing to transfer, and one of which will be a new contract (on secondment), both of which they sign and return. By refusing to transfer they will technically be resigning, but they will then be immediately re-employed by virtue of the new ‘secondment’ contract. Continuity of employment should be preserved. Each individual will have the option of transferring or being seconded.

Secondment checklist

Whether you are dealing with a new contracting out situation or an existing ‘secondment’, there are a number of key issues to address:

- The new employer guarantees to implement the outcome of any pay and grading review or equal pay settlement which would have applied if the posts had not transferred
- The old employer guarantees to pay any back pay negotiated as part of a pay and grading review or arising from an equal pay claim
- The new employer has admitted body status into the LGPS or other relevant pension scheme, or that the local authority seeks a Directions Order allowing it to offer continuing membership of the NHS pension scheme where health staff are transferring
- Agreement to give the individual right to transfer back to their original employer at end of contract with continuity of service preserved
- Agreement that where individuals wish to return to their original employer on a voluntary basis e.g. to take up a promotion opportunity or a new job, then the original employer will agree to treat them as if they had continuous service.

²⁸ www.thompsons.law.co.uk/ltxt/114-time-transfer.htm

If a secondment is legally a TUPE transfer there may be implications for equal pay. This is because the time limits for lodging claims start from the moment the transfer happens. It is important that branches map where they have secondments and look at each in turn. To protect UNISON's legal position on Equal Pay branches should consult with their Regional Officer wherever a mass secondment is in place or proposed.

Integrated working

The Celtec judgement, and the care needed over secondments, also has repercussions for joint working between organisations, including Section 75 (previously section 31) partnerships in social care between Local Authorities and NHS Trusts, Children's Trusts arrangements, Joint Futures in Scotland etc.

These partnerships cover a variety of situations, including integrated working, pooled budgets, joint commissioning, and establishing new care trusts.

The problems arise if integrated working results in a transfer of undertakings (TUPE) situation, where it is deemed that the provider of a service has changed. This could mean that the staff could be legally deemed to have transferred from one employer to another, irrespective of what any of the parties wishes or believes. In these situations, a risk assessment should be performed. However, it also needs to be determined if a potential 'new employer' is legally capable of employing staff.

a) Legal status of the 'employer'

Especially where a 'partnership' is involved, it is important to establish the legal status of the new 'employer'. This is because the 'partnership' could be a new organisation, or merely a description of working arrangements between two or more existing organisations. If it is merely a working arrangement, then it does not give rise to a transfer.

For example, a 'Health and Social Care Partnership' might be a real employer, or it may just be the name given to a joint working arrangement between a local authority and health trust. It depends on how it is set up, managed and governed. Whilst most will have some kind of agreement between the partners, and some will have a Partnership Board, the local authority and the NHS body often each retain their respective statutory responsibilities and Partnership Boards do not have any executive decision-making powers.

UNISON's legal guidance suggests that the following should be used to indicate who the employer is:

- Whose disciplinary and grievance procedures are used?
- Whose HR policies are applied?
- Who manages the budget from which wages are paid?
- Who manages the employees?
- If there is a clear agreement setting out who the employer is?

If a 'partnership' is set up with these clearly defined, then staff should be 'safe' from being deemed to have transferred to the new body.

b) Checklist for partnerships

Ensure that there is a written agreement setting out the ongoing responsibilities of the partner employers for all aspects of the management, and payment of their own staff.

Try to keep the elements of day-to-day management which are devolved to the 'other' employer to a minimum – for example ensure that responsibility for payroll, disciplinary and grievance, employee records, appraisal and training remains with the originating employer, with agreed protocols between the partners for sharing of information in relation to these.

Success stories

Case study: Ealing Homes

Ealing Council took the decision to return their housing services in-house in April 2011 following a turbulent relationship with their Arms-Length Management Organisation. Originally established in 2004, the ALMO was criticised for poor governance, weaknesses in handling complaints and inadequate management of the repairs and maintenance budget. The final straw came in 2008 when the Audit Commission downgraded their assessment of the ALMO's performance from two stars to one. However, when the-then Tory administration sought to close down the ALMO, they proposed complete privatisation of the contract to the private sector.

Following the local elections of 2010, the Council switched to a Labour administration, which had run their campaign with an anti-privatisation message. After consultation with tenants, the decision to bring the service back in-house was agreed by councillors. The Leader of the Council commented 'we were concerned the privatisation proposals would mean poor service at higher costs. Immediate effects of bringing the management in-house are increased savings and better performance in terms of service to tenants'.

The Council estimate that the in-sourcing will generate around £5m worth of savings, with all staff transferring back to the local authority under TUPE.

assessed a range of options, it made the decision to insource as bringing recycling in-house meant the service could be integrated with refuse collection, which was delivered by the council's own Clean Neighbourhoods team.

The insourcing of North Tyneside's kerbside collection of recyclable material was rolled out between January and June 2009 and was completed on budget and ahead of schedule. The authority now provides directly delivered integrated weekly refuse collection and fortnightly recycling. Carrying out recycling alongside the collection of residual waste in wheeled bins as part of the same operation has increased efficiency and there have been significant improvements in the service. There has been an 18% increase in resident satisfaction, which is now up to 92% and public participation in recycling has increased from 50% to 94%.

A total of 22 employees who worked for the external contractor were transferred to North Tyneside's Clean Neighbourhoods team under TUPE regulations and are now part of the integrated service, which has 100 staff overall. Staff all opted to change to the council's terms and conditions, which includes sick pay.

This case study is featured in *Insourcing Update: The value of returning local authority services in-house in an era of budget constraints*.

This recently commissioned report from APSE examines insourcing in the current climate, with evidence suggesting that the phenomenon is continuing and that insourcing is an increasingly positive option in an era of budget constraints.

A full copy of the report and further case studies is available online:
www.unison.org.uk/localgov/success.asp

Case study: North Tyneside

Collection of materials for recycling at North Tyneside Council was delivered by an external contractor, which also provided the service to neighbouring authorities. Issues around quality of service arose and problems with reliability and littering led elected members to introduce new arrangements that reflected a more positive image of the council. When the initial contract expired in 2008, the authority decided to seek a replacement service while extending the existing contract for two years to allow time to redesign, procure and implement the new service. Having

Further information

You can find more information and guidance on procurement here:

http://www.unison.org.uk/activists/procurement/docs_list.asp

UNISON Local Government web pages:

Dealing with service changes:

<http://www.unison.co.uk/localgov/servicechanges.asp>

Protecting the workforce:

<http://www.unison.co.uk/localgov/workforce.asp>

Community Interest Companies website:

<http://www.cicregulator.gov.uk/>

Government Equalities Office – Equality Act 2010 guidance:

http://www.equalities.gov.uk/equality_bill.aspx

Freedom of Information Act

<http://www.legislation.gov.uk/ukpga/2000/36/contents>

FOI (Scotland) Act 2002

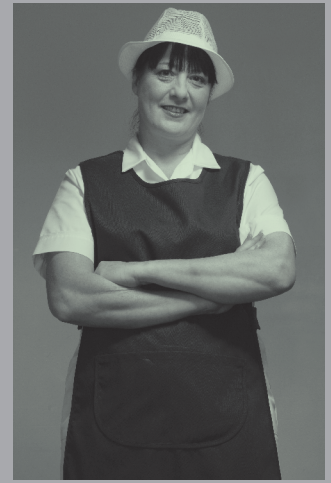
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