

Supporting members



Defending services

Branch guide to negotiating a procurement agreement



Introduction

The pressure on local authorities to look to the private sector for the delivery of public services has intensified since the Tory-led Coalition began their programme of austerity and spending cuts. Now more than ever branches need to have a good understanding of the procurement process which leads to services being privatised. Early branch involvement is crucial and negotiating a procurement agreement with your local authority is one way of ensuring UNISON is able to influence the process and represent the best interests of our members.

This document is applicable to all UNISON branches, with some variations due to differing legislative powers in the devolved nations. Where applicable, these differences are clearly set out in the text.

This guidance covers:

- Basic information on procurement and links to other guidance
- Why is a procurement agreement important?
- What a good procurement agreement should cover
- A model agreement
- Links to other sources of information and guidance

What is procurement?

'Procurement is the process of acquiring goods, works or services.....The process spans the whole life cycle from the identification of needs, through to the end of a services contract or the end of a useful life of an asset. It involves options appraisal and the critical 'make or buy' decision'¹.

At a basic level, active procurement is the council process which must be gone through before a service is privatised. Given the scale of funding cuts to local authorities and the political and economic climate under the Coalition, engagement in the procurement process is likely to become an even more important and ongoing activity for branches.

The key parts of the process can be broken down as follows:

1. Pre-procurement – includes activities like the council drawing up a procurement strategy and undertaking needs assessments to map out what current and future demand for services will look like, as well as social value criteria².
2. Moves towards procurement – the council begins to undertake service reviews and options appraisals to weigh up how services might be delivered in the future. Sometimes consultants are employed to do this work. UNISON argues that any consideration of future service delivery needs to include an in-house option.
3. Active procurement – this stage happens after the council has made the decision to

go to the market and is governed by European Union procurement law. It includes advertising the contract, selecting bidders, evaluating bids using a scoring matrix and ultimately deciding whether to award the contract.

4. Post procurement – once the council has awarded a contract this stage includes managing the contract and monitoring performance by the contractor on an ongoing basis³.

There is detailed UNISON guidance available on the procurement process⁴ and training for branches and activists run by Learning and Organising Services – speak to your regional education officer for more details.

It is important to remember that the whole process starts well before a service is advertised in the Official Journal of the European Union (known as an OJEU notice). This is why it is important for branches to talk to their employers about procurement even if no services appear to be under threat. Too often employers fail to notify branches that services are earmarked for privatisation until late in the process. This means we are caught 'on the back foot' and often unable to influence or stop the service being outsourced.

1 National Procurement Strategy for Local Government, October 2003

2 More information can be found in the Branch guide to the Social Value Act (UNISON 2013). Please note the Act only applies to England and Cymru/Wales

3 More information can be found in the Branch guide to Key Performance Indicators (UNISON 2013)

4 See the Bargaining Support pages of the website: <http://www.unison.org.uk/bargaining/contact.asp>

Why is a procurement agreement important?

Approaching your employer to negotiate a procurement agreement sends a clear message that the branch is aware of the process and willing to engage in constructive dialogue. It gives us an opportunity to put the case for in-house quality public services and to advocate on behalf of our members.

Having an agreement means asking the council to commit to keeping the branch informed about their future plans for services, before they take the decision to go out to the market. Effective involvement of UNISON branches at the early stages could mean that the council decide not to advertise the service at all, but instead keep it in-house with a service improvement plan in place.

Procurement is seen as a very technical and bureaucratic process, with many people put off by the language used and jargon associated with it. However, branches should not allow this to deter them from

involvement in what is essentially the privatisation process. Many employers would prefer this because it weakens the union's ability to influence the outcome. Even getting to understand the basics will mean that branches can approach their employers with confidence with a view to getting 'a seat at the table' during any discussions.

Many local authorities will present privatisation through procurement as the only option, due to the scale of the financial challenges they face. However, local authorities are not under any obligation to go out to the market. In fact, they have a number of powers at their disposal (including the General Power of Competence in England and the power to enter into partnerships with other councils) that enable them to keep services in-house. What's more, the duty to secure Best Value⁵ (which still exists) means that privatisation can never be a foregone conclusion.

⁵ For more info see the Branch guide to the duty of best value (UNISON, 2013)

What should a good procurement agreement cover?

Appendix 1 to this guidance outlines a model procurement agreement with a number of points and agreements that UNISON branches should push for. Taking into account local political circumstances and relationships with the branch, it will not always be possible to get agreement on all of these points.

Branches will need to weigh up which points are non-negotiable and which could be omitted. For branches with more hostile employers, even opening up a dialogue about procurement may be seen as positive progress and provide a basis for future, more detailed, negotiations.

The model procurement agreement is divided into several sections which are outlined below, as well as potential points for branches to be aware of when negotiating the agreement with your employer.

General principles

This section sets out the general ground rules for how the council will consult and co-operate with the branch on all stages of the procurement process, from the very early stages of service review through to possible contract award and monitoring.

- Your council may take issue with some of the points outlined in 1.2 and 1.4, specifically around whether they choose to just consult or actively involve the branch in the process
- With this in mind, when negotiating it will be important to stress the positive role the branch can play in the process through meaningful involvement, where our concerns are taken on board and our

knowledge and experience helps to shape the process

- Branches should be aware that the Equality Duty and the need to have 'due regard' to equalities issues is still in force and UNISON believes equality impact assessments are the most effective way of ensuring that equalities issues are thoroughly considered
- Branches who come up against resistance to this idea should highlight to their employer that the potential outcome of failing to have 'due regard' may be legal action – which can be costly and time-consuming – and question how they can evidence they have shown 'due regard'

Statutory / policy background

This gives some detail on the overall statutory and policy framework from the point of view of staff involvement and the equality duty⁶.

Service review and options appraisal

This section gives more detail on how the council will involve the branch in the service review process and any options appraisal that takes place to determine whether a procurement process will happen.

- Branches with good relations with their employers may already play a role in the service review and options appraisal process
- As a minimum, councils should always carry out an options appraisal before going out to procurement
- For some branches, getting the employer

⁶ For more information, see the Branch guide to equalities in procurement (UNISON 2013)

to agree to active branch involvement in the process, as outlined in 3.2, may be more difficult

- Emphasising the positive impact the branch could have in this process will be important during negotiations – try and think of previous examples of where branch involvement has led to positive outcomes
- Points 3.3 and 3.4 deal with the value of in-house public services which are of key importance to UNISON
- Getting your employer to agree to have an in-house bid as part of a procurement process (3.4) is vital if the considerations during options appraisal (3.3) do not persuade them to use their powers to keep the service in-house, using the duty of Best Value

Why in-house? the economic case⁷

- Avoids the high costs associated with inflexible contracts
- Long-term value for money
- Better coordination and integration of services
- Reduces the risk of a ‘loss leader bid’
- Cost transparency
- Supports the local economy and local jobs
- Allows for more efficient and effective citizen involvement⁸

The procurement process

This part of the agreement sets out how the council will keep the branch informed from the earliest stage of the active procurement process, including notification of the advertisement of contracts and facilitation of meetings between the branch and bidders.

- As a minimum branches should be asking for prior notification that contracts are being advertised in the OJEU⁹
- Some employers may not be keen to agree to active branch involvement in the drawing up of notices and consideration of social value, much less with bidder open days – however, again what we need to stress is the value of trade union involvement and our experience of delivering services
- Many councils can be very wary of the procurement process and keen to stay within the letter of the law so as not to risk legal challenge from unsuccessful bidders
- Because of this, some will be reluctant to help facilitate branch access to the short-listed bidders
- When negotiating on this point, branches should highlight the positive benefits of beginning early dialogue with potential suppliers, as well as pressing the local authority to see union recognition by bidders as crucial to good workforce relations in the future, should the service eventually be outsourced.

7 For more detail see The Economic case for in-house options and bids (ESSU, 2010)

<http://www.european-services-strategy.org.uk/news/2010/the-economic-case-for-in-house-options-and-bid/economic-case-in-house-2.pdf>

8 You can find more information in The case for in-house services (UNISON) <http://www.unison.org.uk/file/The%20case%20for%20in-house%20services%20-%20a%20branch%20guide.pdf>

9 Regional Officers receive copies of notices from the Local Government Service Group via email, as they are monitored and downloaded from the Tenders Electronic Daily website. This is a useful safety net. But it is no substitute for prior notification of the process through constructive dialogue between the branch and the employer, which gives branches more time to plan a response.

Access to information

This section sets out agreements about UNISON branches' access to information throughout the procurement process. This includes agreements on confidential information and financial support to enable the branch to have complex information analysed.

- Access to information will be vital to ensure that the branch is meaningfully involved in the process (5.1 - 5.3)
- Employers may be nervous about making an agreement about commercially confidential information
- There is additional guidance and a model agreement available on the UNISON website to help with this
- Point 5.5 will be of particular use to branches dealing with large privatisation programmes, which are time consuming and involve large amounts of information
- Employers may be reluctant to make agreements about this kind of financial support except in exceptional circumstances, but the point is worth making if an agreement can be reached

Workforce issues

This section gives more detail about staff and branch engagement in the procurement process, including agreements on facility time, as well as points on redundancy, redeployment, training and development, equalities issues, TUPE and access to the LGPS. This part of the agreement also includes reference to the Two Tier Code (England), workforce code (Cymru / Wales) and PPP Protocol and s52 (Scotland).

- Points 6.1 and 6.2 cover issues to allow for meaningful involvement of both staff and the branch in the process
- Given the current climate, many councils will be reluctant to agree additional facility time, particularly when many branches are already suffering from cuts to current agreed levels
- However, if a large scale privatisation programme is proposed and the council wants to have the constructive input of the branch, then additional facility time will be essential and should be argued for
- Many of the points contained in this section such as TUPE and the LGPS, are 'bread and butter' issues to branches. However, there is value in ensuring they are included in the written agreement as they will enable you to hold your local authority to account
- Make sure your employer is aware that from April 2014 the LGPS will require all external providers to provide those compulsorily transferred from councils with access to the LGPS (6.7)
- On point 6.8, branches in England will be aware that the Coalition scrapped the Two Tier Code for local government in March 2012 for any new contracts (it still applies to existing contracts)
- However, it can still be voluntarily applied and we would argue that any responsible local authority should do so to guard against the creation of a two tier workforce and a race to the bottom
- If your council will not agree to this, you should ensure any agreement makes reference to the Cabinet Office's principles of good employment practice¹⁰.

10 Principles of good employment practice (Cabinet Office, 2010) ---

Whilst this is no substitute for the Two Tier Code, it at least gives some standards to which the council can be held accountable

- Branches should also note that the Best Value duty to consult still applies in England and Cymru/Wales¹¹
- The workforce code and PPP Protocol and s52 still apply in Cymru / Wales and Scotland respectively and should be included accordingly.

Appendix 1

Model procurement agreement General principles

- 1.1 This agreement sets out how **[name of council]** and all its departments/ sections will involve and consult the trade unions in the key stages of the service review, service transformation and / or procurement process.
- 1.2 **[Name of council]** will involve and consult the recognised trade unions (hereafter called the trade unions) in all parts of the commissioning and procurement cycle before any key decisions are made, including service reviews, options appraisals, and where relevant throughout the active procurement stage from considering social value issues, advertising the contract through to contract award and subsequent contract monitoring.
- 1.3 **[Name of council]** and the trade unions are committed to providing high quality services that meet the needs of local communities. **[Name of council]** recognises that trade union involvement is positive for facilitating change, protecting the workforce, encouraging positive staff engagement and raising service standards.
- 1.4 There will be regular engagement and consultation with the trade unions throughout the commissioning and procurement process and trade unions will have an opportunity to input and comment on all aspects of the procurement process before key decisions are made. The parties will

¹¹ For more information see the Branch guide to the duty of Best Value (UNISON 2013)

agree structures and timetables that enable this to happen.

- 1.5 Any proposed reorganisation of services will pay 'due regard' to the need to avoid discrimination and promote equality of opportunity, as set out in the Equality Act 2010 and **[Name of council]**'s published equalities scheme(s).
- 1.6 Equality impact assessments, which include consideration of the impact on staff and on equal pay, will be undertaken to ensure 'due regard' to equalities considerations is taken.
- 1.7 A consistent and common approach, based on the principles of this agreement, will be applied by the Central Procurement Unit (or other relevant body) to all activities relating to procurement.

Statutory/policy background

- 2.1 Statutory and policy guidance requires that procurement decisions by authorities should take proper account of the workforce issues.

[England]

'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'.

- Principles of good employment practice, paragraph 6.6, Cabinet Office

[Scotland]

'There should be consultation with and the involvement of the trades unions at the earliest stages of a review process where staff may transfer to a new service provider. It is especially important when a local authority is making decisions about which procurement path to follow. Where there is a decision to outsource which may involve a transfer, and even where TUPE does not apply in strict legal terms, the local authority should undertake to behave in a manner consistent with the good practice identified in this guidance'

- Guidance on s52 of the Local Government in Scotland Act 2003 - The treatment of employment issues when exercising a power to enter into a contract (paragraph 7, Principles of Staff and Trades Union Involvement and Consultation)

[Cymru / Wales]

'The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the public sector organisation is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract'.

- Code of practice on workforce matters in public sector contracts (paragraph 2), Welsh Assembly Government

- 2.2 Furthermore, statutory and policy guidance requires that procurement decisions by authorities should take proper account of equalities issues

[Scotland]

1. *Where a listed authority is a contracting authority and proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous, it must have due regard to whether the award criteria should include considerations to enable it to better perform the equality duty*
 2. *Where a listed authority is a contracting authority and proposes to stipulate conditions relating to the performance of a relevant agreement, it must have due regard to whether the conditions should include considerations to enable it to better perform the equality duty*
- Equality Act (Specific Duties) (Scotland) Regulations 2012 (regulation 9)

[Cymru/Wales]

1. *Where an authority that is a contracting authority proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty*
 2. *Where an authority that is a contracting authority proposes to stipulate conditions relating to the performance of a relevant agreement it must have due regard to whether the conditions should include considerations relevant to its performance of the general duty*
- Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (regulation 18)

Service review and options appraisal

- 3.1 **[Name of council]** will inform the trade unions of any proposed service reviews and fully consult and engage with them throughout the review process.
- 3.2 **[Name of council]** will carry out a full options appraisal before any formal procurement process is commenced. Trade unions will be consulted over the appraisal method, assessment criteria, and be involved in the options appraisal itself.
- 3.3 **[Name of council]** will assess social, economic, equality and environmental impact, utilising the General Power of Competence and the provisions of the Public Services (Social Value) Act 2012 **[England]** /Local Government (Wales) Measure 2009 **[Cymru / Wales]** / Best Value 2 **[Scotland]**. The assessment and evaluation of all proposals will take into account the costs, loss of direct management control and any risks to service provision from outsourcing services.
- 3.4 **[Name of council]** will ensure that a properly resourced in-house service improvement plan will precede and inform any procurement process, and be included in the options appraisal exercise. Where it is decided to carry out a formal procurement exercise, including one triggered by the Community Right to Challenge provisions of the Localism Act 2011 (**England only**), it will include a fully supported and resourced in-house bid. (Where a local authority is commissioning only – see 3.5 below)

3.5 Where services are subject to long-standing contracts, **[Name of council]** will ensure that a full review of the existing service takes place with the opportunity for the provider to have a service improvement plan considered prior to a decision on procurement.

4.5 Where the negotiated procedure is used the **[Name of council]** will facilitate full discussions between trade unions and the **[Name of council]**'s preferred bidder prior to contract award.

The procurement process

4.1 **[Name of council]** will consult the trade unions on the drafting of any prior information notice (PIN) / Official Journal of the European Union (OJEU) notice it proposes to issue. The trade unions will also be invited to participate in and have input into the contents of these notices, and any 'soft market testing' exercises, bidder conferences and open days.

4.2 **[Name of council]** will facilitate meetings between the trade unions and potential service providers and short listed bidders at key stages of the process.

4.3 Trade unions will be invited to participate in the selection process of contractors. The trade unions will be given the opportunity to meet with and be included in the interviewing of short-listed bidders. Where requested the authority will also facilitate visits by union representatives to sites where the bidders have contracts.

4.4 Where the competitive dialogue procedure is used, arrangements will be made for trade union involvement and consultation at the solutions stages prior to a final tender being invited.

Access to information

5.1 The trade unions will be given timely access to all of the relevant information at each stage of the service review, options appraisal, and procurement process.

5.2 **[Name of council]** will seek agreement with bidders that will ensure appropriate and timely access by the trade unions to all relevant information.

5.3 Information will be provided on the basis that the trade unions may use it for reasonable communication of relevant issues with their members and advisers.

5.4 Where the authority considers that any information is commercially confidential the union will be informed that the information is being withheld and the reasons. The commercially confidential information will be made available to the nominated representative(s) and adviser(s) of the trade union(s) subject to a requirement to sign a confidentiality agreement. The trade union(s) will be required to agree to ensure this information is kept securely.

5.5 The Authority will provide assistance to the trade unions in the interpretation of information and proposals, including where appropriate financial support to

enable the trade union to have complex information analysed.

Workforce issues

- 6.1 **[Name of council]** recognises that major procurement exercises are complex and time-consuming for the authority, and that meaningful involvement in this process by trade union representatives brings a significant additional workload. Therefore, the union branch will be granted additional facility time to fulfil these duties and have access to meeting with members in the lead up to and during a significant procurement process.
- 6.2 Staff will be given paid time off to attend trade union meetings at key points in the process.
- 6.3 In any service changes, **[Name of council]** will take steps to avoid compulsory redundancies and maximise redeployment opportunities.
- 6.4 **[Name of council]** is committed to workforce development which maximises opportunities for training and development and recognises the positive role of trade unions and union learning reps in workforce development. A similar approach will be required from bidders for the local authority's contracts.
- 6.5 **[Name of council]** will support its own compliance with the statutory public sector equality duty and its own equalities scheme(s) by including specific requirements for contractors to comply with equality legislation and
- improve equality for the workforce providing public services. Compliance with this requirement will be monitored as part of the overall contract monitoring arrangements.
- 6.6 **[Name of council]** is committed to fully protecting the pay systems, conditions and pensions of the workforce where possible through a 'TUPE plus' type agreement or where appropriate a secondment arrangement. The authority will ensure protection either through secondment arrangements or by ensuring that workforce commitments and protections are embedded within tender documentation, contracts and re-tenders.
- 6.7 **[Name of council]** will require any successful contractor to secure admitted body status to the Local Government Pension scheme (LGPS). This requirement will be compulsory from April 2014.
- 6.8 **(England only) [Name of council]** will continue to apply the provisions of the 'Two-Tier Code' within all contracts and re-tenders to all procurement processes and re-tenders and monitor its application / apply the principles of good employment practice.
- 6.9 **(Cymru / Wales and Scotland only) [Name of council]** will apply the provisions of the workforce code **[Cymru / Wales]** / PPP protocol and s52 **[Scotland]** within all contracts and re-tenders to all procurement processes and re-tenders and monitor its application.

6.9.1 The Authority will encourage contractors to recognise trade unions for new starters as well as transferred employees.

6.9.2 [Optional: The principles of this agreement are fully compliant with the 'Two Tier Workforce Agreement' also in place between **[name of council]** and trade unions.]

Useful sources of information

UNISON guide to campaigning and negotiating around procurement – see UNISON website unison.org.uk

Statutory guidance to local authorities on contracting – Section 52 of the Local Government in Scotland Act 2003 – www.scotland.gov.uk/Resource/Doc/115506/0028632.pdf

Code of Practice on workforce matters in public sector service contracts – Welsh Assembly Government – www.wlga.gov.uk

UNISON guide to Best Value Code of Practice on Workforce Matters England (for reference as now withdrawn) – unison.org.uk/acrobat/B840.pdf

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