



Social Care Procurement Guidelines

**UNISON Scotland's Submission to the Scottish Government
on their Consultation on Social Care Procurement
Guidelines**

April 2010

Executive Summary

- UNISON Scotland welcomes the publication of Guidelines on social care procurement and can support some aspects of them.
- However, we have serious concerns at the total omission of the “*Statutory Guidance to Local Authorities on Contracting*”, issued by the Scottish Government on 10 August 2006. (Hereafter referred to as the Section 52 Guidelines).
- UNISON Scotland firmly believes that workers transferred to new employers through the transfer of services should not be subject to inferior terms and conditions.
- Social care services provide essential care in a variety of ways to some of the most vulnerable people in Scotland. They require well-trained, qualified staff and cannot be provided on the cheap.
- Social care procurement policies must not repeat errors from the past in the mistaken expectation that major expenditure savings are compatible with maintaining and improving quality in care services.
- We do not accept the idea that some of the ‘straightforward’ parts of social care can be ‘cherry-picked’ for privatisation, while the public sector deals with services for those people needing more complex care.
- Local authorities have a duty to have regard to the Section 52 guidance, where social care procurement takes place and there is potential for staff transfers.
- Section 52 guidance was aimed at preventing the creation of ‘two-tier’ workforces when staff were transferred to a new contractor. It looked to ensuring that the terms and conditions for new recruits post-transfer were “no less favourable overall to those of transferred employees”.
- When staff transfer they will usually be covered by TUPE. The draft guidance does not make this clear
- Transferred staff should also be able to maintain broadly comparable pensions at the outset of the contract but the draft guidance does not refer to this.
- The Section 52 Guidance emphasises the importance of trade unions being involved and consulted from the earliest stages of any review process and throughout the procurement exercise. The guidelines must be amended to include the full role of the unions, including full disclosure of information on all matters affecting the workforce.
- ‘Commercial confidentiality’ must not be used as an excuse to withhold legitimate information to the trade unions.
- UNISON believes that the final Social Care Procurement guidance should have more references to the option for services continuing to be provided in-house by council staff.
- UNISON wishes to see councils enter into procurement agreements with their own trade unions, and also with unions representing bidders (private and voluntary).

- The guidance includes only a short paragraph on the important legal requirement for Equality Impact Assessments. UNISON believes it should include a brief summary on the Public Sector Equality Duties, specific EHRC guidance, and information on the forthcoming Equality Act and the changes that will introduce.
- The current financial context in April 2010 is of a gravely mistaken broad political consensus that drastic public spending cuts are necessary either imminently or in the near future which is placing pressure on councils to outsource and privatise services.
- UNISON believes the only way in which the proposals will bring significant savings in public expenditure is if they are used to drive down the quality of the service and staff numbers, wages, terms and conditions in a 'race to the bottom'.
- UNISON does, however, welcome the provision that a local authority may decide that, if it is satisfied with the quality of a contract and best value is being achieved, it could renew or roll forward/extend its contract with the existing provider.
- UNISON welcomes the re-tendering advice in the draft guidance where it proposes three year contracts where appropriate as an improvement on some short term funding, but as stated below, five year contracts would be preferable.
- UNISON Scotland has called, in a Fair Funding campaign with other groups, for the Scottish Government to establish a National Framework for Public Sector Contracts in the voluntary sector
- This Campaign includes:
 - public sector purchasers to fund wages and conditions of employment for front line workers in third sector providers at the same level as front line workers in the public sector;
 - five year contracts to replace short term funding arrangements;
 - limits on routine competitive retendering;
 - training of public sector commissioners.

Introduction

UNISON is Scotland's largest trade union representing over 160,000 members working in the public sector, many of whom work in social care, both within local authorities and the voluntary and private sectors.

UNISON Scotland welcomes the opportunity to respond to the Scottish Government on the Social Care Procurement Guidelines.

General Comments

UNISON Scotland welcomes the publication of Guidelines on social care procurement and can support some aspects of them. However, we do have serious concerns at the total omission of the "*Statutory Guidance to Local Authorities on Contracting*", issued by the Scottish Government on 10 August 2006. This dealt with the treatment of employment issues and was issued under section 52 of the Local Government in Scotland Act, 2003 (hereafter referred to as the Section 52 Guidelines).

We will make reference to the Section 52 Guidelines on several occasions during this response, as it protects workers by:

“. . . actively implementing the protocol which ends the two-tier workforce and protects workers who are transferred to new employers under contracts for the delivery of public services.”

UNISON Scotland firmly believes that workers transferred to new employers through the transferring of services should not have to be subject to inferior terms and conditions, through no fault of their own.

Quality social care services

Social care services provide essential care in a variety of ways to some of the most vulnerable people in Scotland. Very often these are lifeline services. They require well-trained, qualified staff and cannot be provided on the cheap. In the current financial climate, no-one should forget the lessons of Compulsory Competitive Tendering policies and the disastrous effects on standards in hospital cleaning, public sector catering and other services. Many of the problems with this were because staff numbers, pay and conditions were slashed, putting unfair and impossible pressures on workers; creating two tier workforces and leading to high turnover, fragmented services and deteriorating standards. The public sector had to pick up the pieces and most of these services in Scotland were correctly brought back in-house.

Social care procurement policies must not repeat those errors in the mistaken expectation that major expenditure savings are compatible with maintaining and improving quality. UNISON has serious concerns about developments in the sector - many parts of which are hostile to working in partnership with trade unions – about terms and conditions for staff,

casualisation, and about some recent social care procurement exercises by local authorities in Scotland.

There is a real problem with the idea that some of the 'straightforward' parts of social care can be 'cherry-picked' for privatisation, while the public sector deals with services for those people needing more complex care. This fragments provision and means people who might currently receive council care may find that service outsourced, leading to changes in staff, then may in the future need the more comprehensive services that are only provided by the council, again affecting continuity of care. The public sector provision necessarily becomes more expensive in comparison because it is not dealing with the same volumes and economies of scale. This is a sector that is underfunded, not ripe for so-called 'efficiencies'. There are understandable fears about cost-cutting among many service users, as seen during the recent flawed, failed and expensive tendering exercise carried out by the City of Edinburgh Council. This guidance is crucial as part of ensuring quality services with positive outcomes for the people who rely on them.

The guidance should be embedding a number of important principles into how local authorities approach procurement. It ought to be a significant improvement on the brief Scottish Procurement Policy Note 10/2008 and there are parts to be welcomed, such as the banning of e-auctions for social care contracts. This was done, as the draft guidance says, "*because of the risk that an e-auction's focus on reducing costs will impact on the standard of care that can be delivered for the amount bid*". The decision to ban them followed last year's undercover Panorama investigation *Britain's Homecare Scandal*, which featured use of an e-auction by South Lanarkshire Council to drive down costs of the service and which exposed the pressures staff employed by one firm were under to cut short visits to elderly and disabled clients. That principle, that a focus on reducing costs will affect care standards, needs to be better reflected throughout the guidance.

Section 52 Guidance

An important way to protect quality services is to push for, value and retain decent training, pay and conditions in the sector. However, UNISON Scotland is dismayed and concerned at the glaring omission from the draft guidance of any reference to the Section 52 Guidance. This guidance (and the related PPP staffing protocol¹¹) followed concerns about the way CCT, the Private Finance Initiative and other policies had resulted in outsourcing being used to drive down pay and conditions, leading to reduced standards. It aimed to prevent the creation of 'two-tier' workforces when staff were transferred to a new contractor. It looked to ensuring that the terms and conditions for new recruits post-transfer were "no less favourable overall to those of transferred employees". This will be

¹¹ www.scotland.gov.uk/Resource/Doc/1069/0005205.pdf

particularly important as more and more councils look into further outsourcing and the use of arms length companies etc.

Local authorities have a duty to have regard to the Section 52 guidance, where social care procurement takes place and there is potential for staff transfers. It provides for *“a framework for a fair, consistent and transparent approach across local authorities in Scotland in relation to consultation and employment practices in contracting situations where staff may transfer or where workforce and employment issues are relevant to performance of the contract.”* This definition would certainly cover all social care contracts. Key parts of the Section 52 Guidance must be included in the final Social Care Procurement Guidance. These include references to TUPE (the Transfer of Undertakings (Protection of Employment) Regulations 2006), to the involvement of and consultation with recognised trade unions, to in-house bids, and to monitoring and enforcement.

When staff transfer they will usually be covered by TUPE. The Section 52 guidance states:

“The terms and conditions of transferred employees should be safeguarded by application of the principles of TUPE, even where TUPE does not apply in strict legal terms. Changes to the terms and conditions of transferred employees should only be achieved by agreement between employer and trades unions.”

The draft guidance, in 9.12 Transitional Arrangements, and at other relevant points including 10.6, does not make this clear about TUPE. Transferred staff should also be able to maintain broadly comparable pensions at the outset of the contract but the draft guidance does not refer to this.

The Section 52 Guidance emphasises the importance of trade unions being involved and consulted from the earliest stages of any review process and throughout the procurement exercise. Yet the draft guidance has just one mention of trade unions, on page 28, under Involvement of Service Users and Carers, in a list of possible stakeholders, where it says councils *“can include engagement with service users and carers through different types of groups”*. The guidelines must be amended to include the full role of the unions as detailed in the Section 52 Guidance. This includes full disclosure to the unions of information on all matters affecting the workforce. In addition, ‘Commercial confidentiality’ must not be used as an excuse to withhold legitimate information. The Section 52 guidance also stresses the need to value the workforce and warns that organisations not effectively managing workforce issues may be unable to comply with their obligations under the contract or may prevent or hinder the authority from securing Best Value in the provision of services. It specifically states that when considering reorganisations that may involve a contracting exercise, *“councils should review the options for an existing in-house workforce in relation to future service requirements and procurement options.”*

In-House Services

UNISON believes that the final Social Care Procurement guidance should have more references to the option for services continuing to be provided in-house by council staff. We would like to see an explicit reference to the fact that if there are any problems with in-house services these can, in the first instance, be addressed by a Service Improvement Plan before other options are considered. In 9.10 Procurement Route, the introductory paragraph briefly mentions in-house provision as one method, but then does not refer to it again in a list of all the other options, although the new concept of Public Social Partnerships, which has still to progress beyond the pilot stage, is mentioned.

We think it is important that in making decisions on whether to outsource, councils prioritise the quality of service for users, and consider the potential disruption and stress for service users and carers, the staff time and other costs involved in the procurement process and the relative amount of any potential savings (we would predict these would be minimal if quality is to be maintained). If deciding to proceed, they should be expected to provide evidence of expected benefits during consultation on the proposals. Some of these issues are listed in 9.10 Procurement on page 59. This page also lists the views of service users and carers as a factor, which is clearly very important. We note positive comments on feedback on in-house services from representatives from Edinburgh, and South Lanarkshire councils, giving oral evidence to the Local Government and Communities Committee on home care services for the elderly on 3 June 2009. (This was in the wake of the Panorama programme mentioned above.) Asked if service users noticed any difference in quality and standards between in-house and contracted services, they said:

Edinburgh representative: "The City of Edinburgh Council does not see purchased care services as being distinct and separate from the in-house service. The council is developing a model of care that is called home care reablement, under which everybody will have the in-house service for up to six weeks to allow them to become more independent and achieve their goals. Only after those six weeks will we do an assessment. We will still aim to deliver the most complex care in-house; the private and voluntary sectors will deliver less complex care. We are still developing that process. I suppose that is a bit tangential to the question." "As I said, if we ask customers whether they prefer the in-house service or the external service, they say that they prefer the in-house service. That also applies to care home services. That is people's general view."

South Lanarkshire representative: "We have asked all our council service users for feedback on that service, which has been positive. It would be wrong to suggest that the council service is always better than the service from other providers, because that depends on the service user's experience of the carer who goes into their home. None

of us has a monopoly on good carers. A service user will talk about their carer in first-name terms—that is important for the service user.”

“We have received positive feedback about our in-house service and we have had no significant complaints about any private provider in South Lanarkshire. Some people prefer a council service—that applies not just to home care, but to care homes. Sometimes, people prefer to be with the council. I do not necessarily think that we are given the credit to which we are not entitled, but sometimes people prefer to be cared for by an organisation that does not make a profit.”

“We have had a number of cases—not a huge number—in which the council could not pick up the whole care package at one time, so it was split between the council and another provider. In those cases, people have by and large asked the council to pick up the whole package as soon as it can.”

UNISON’s City of Edinburgh branch is currently campaigning against a range of outsourcing and privatisation proposals across services. It says the council has refused to look seriously at in-house options, yet there is no hard evidence base for any benefits from contracting out. The guidance must ensure that councils do so in social care, as they should in all areas of their work.

UNISON wishes to see councils enter into procurement agreements with their own trade unions, and also with unions representing bidders (private and voluntary).

On monitoring and enforcement, which are critical to maintaining quality standards, the Section 52 Guidance points out that the provisions of the guidance should be included in any contract within the scope of the guidance. Failure to do this could be regarded as a breach of the statutory Best Value duty under Section 2 of the Local Government in Scotland Act 2003 and therefore covered by the enforcement regime under that Act.

Guiding Principles - Workforce

UNISON disagrees with the wording of Principle No 11 - Workforce, of the 12 ‘Guiding Principles’ in Section 2 on pages 9-10. This says merely that the need for a ‘skilled and competent workforce’ must be ‘taken into account’ within social care procurement. We believe this reference should be strengthened considerably to reflect the importance of the workforce in such contracts. It could be amended to read, for example:

“The need for a skilled and competent workforce is crucial to delivering positive outcomes for service users. Social care procurement must ensure that quality assessments look at the overall package of training, terms and conditions for staff, time allowed for visits, measures to ensure continuity of care etc.”

There should also be references to adequate training, proper qualifications and registration with the SSSC where appropriate. The provisions of the Protection of Vulnerable Groups (Scotland) Act, 2007 must also be taken into account and assurances given by new employers that all staff will have been disclosure checked under the auspices of the Act.

An example of our concerns about reductions in terms and conditions would be the zero hours contracts which are being introduced into the private home care sector. This is claimed to be necessary by some service providers where councils only pay for client contact time, but it results in a casualised workforce and should be looked at as part of the overall package and the impact on quality. We know of one contractor which won on the lowest bid, but then said that they could not break even let alone make a profit from the contract whilst maintaining staff on guaranteed hours. Therefore staff contracts have been changed to zero hours.

Problems that can result from such a scenario, include that, with no guarantees in earnings, workers have no commitment to staying in the job. Therefore the service user experiences a succession of different carers who often are inexperienced, due to their short time in the job. For the company, it means they are always recruiting and training new staff with the costs that this brings, cutting into profits and therefore putting greater pressure on staff terms and conditions. It also leads to constantly needing to cover vacancies, with service users losing out on time allocated to them and carers expected not only to be flexible in terms of which clients they cover and time of day they work but also expected to work overtime. We know of carers in one company working over 50 hours a week. Therefore, the quality of the care is compromised.

Other guiding principles

Personalisation and service users and carers' involvement are important and rightly feature in the principles. However, on Principle 9 'Procurement Rules', we suggest that there should be a reference to the Section 52 guidance. It could have been covered by the reference to Scottish public procurement policy, but in fact we have raised with the Scottish Government that this currently does not properly emphasise the Section 52 guidance. We would prefer a specific reference here as well as ensuring the key points of the Section 52 guidance are referred to at the appropriate sections of the Social Care Procurement guidance.

Equalities and other duties

The guidance includes only a short paragraph on the important legal requirement for Equality Impact Assessments and then a link to the Equality and Human Rights Commission website. We believe it would make more sense and ensure the guidance was more useful for the staff implementing it, to include a brief summary on the Public Sector Equality Duties, making reference to specific EHRC guidance, as well as information on the forthcoming Equality Act and the changes that will introduce.

Equality Impact Assessments should be carried out on any decisions to outsource and related commissioning and procurement policy decisions. When done properly, we believe these assessments could well find such decisions would be discriminatory against certain groups.

We also believe the guidance should state that bidders must be notified in the first tender adverts about any legal requirements falling under the Public Sector Equality Duties, sustainable development under Best Value and the forthcoming Climate Change public bodies duty, due to come into force in January 2011 – as well as the Section 52 Guidance and the Human Rights Act. We note that Edinburgh City Council has not included these requirements in the tendering advert for their current externalisation proposals.

Financial context and false economies

The current financial context in April 2010 is of a gravely mistaken broad political consensus that drastic public spending cuts are necessary either imminently or in the near future. UNISON Scotland rejects that financial analysis and would draw attention to our Call for Written Evidence to the Scottish Parliament Finance Committee in relation to the 2010 Budget Strategy and Public Services, in which we propose an alternative UK Budget.²

Due to this financial context, pressure is on councils to outsource and privatise services. UNISON opposes these measures and would particularly argue against them being used with the objective of delivering considerable savings. As stated above, the only way in which the proposals will bring significant savings in public expenditure is if they are used to drive down the quality of the service and staff wages, terms and conditions in a 'race to the bottom'. We are very concerned at the threats to social care services in this climate.

Care services for vulnerable and elderly people should not be sold off to the 'lowest' bidder. That approach leads to fragmentation and a patchwork of variable services with a high risk that some, perhaps many, of those needing care will fall through the net entirely, while those receiving services may find reduced levels of care and a high turnover of staff, with resultant lack of continuity of care and the associated poorer outcomes for health, wellbeing and quality of life.

We note that on page 13 of the draft guidance, at '3.3 Financial Context', it is stated that:

² <http://www.unionscotland.org.uk/response/budgetresponse20march202010%5B1%5D.pdf>

*“...social care procurement will continue to be affected by the current economic climate and the recession, with a significant squeeze on public spending and financial pressures on councils, potentially over a number of years. **There will, therefore, be a requirement to find savings through social care procurement in response to reduced budgets.**”*

This wording goes far too far in stating this will be a requirement rather than something councils can consider and can also reject. We strongly believe that this sentence should be deleted.

Re-tendering

UNISON does, however, welcome, on page 22, under ‘Re-tendering’, the point that, to ensure quality and continuity of care, a local authority may decide that, if it is satisfied with the quality of a contract and best value is being achieved, it could renew or roll forward/extend its contract with the existing provider. We would suggest adding here, however, that there would still be a need to carry out an Equality Impact Assessment on this decision.

National Framework for Public Sector Contracts and Fair Funding for Voluntary Sector Services

UNISON Scotland has called, in a Fair Funding campaign with other groups, for the Scottish Government to establish a National Framework for Public Sector Contracts in the voluntary sector. Along with SCVO, the STUC, UNITE and Community Care Providers Scotland, we called for a range of measures^{3, 3} including:

- public sector purchasers to fund wages and conditions of employment for front line workers in third sector providers at the same level as front line workers in the public sector;
- five year contracts to replace short term funding arrangements;
- limits on routine competitive retendering;
- training of public sector commissioners.

We welcome, as noted above, the re-tendering advice in the draft guidance and particularly that it proposes three year contracts where appropriate as an improvement on some short term funding - reflecting agreement in the Third Sector Statement agreed by the Scottish Government, COSLA, SCVO and SOLACE (Scotland). However, we would urge consideration of five year contracts to provide stability and continuity.

³ www.stuc.org.uk/campaigns/fair-funding-for-voluntary-sector-public-service-contracts

³ www.scvo.org.uk/scvo/PolicyAndParliament/ViewPolicyInformation.aspx?al=t&page=&all=&from=PDSR&Info=1570&TCID=55&PageName=Procurement%20and%20Public%20Service%20Reform&CatID

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