

STATUTORY GUIDANCE TO LOCAL AUTHORITIES ON CONTRACTING.

THE TREATMENT OF EMPLOYMENT ISSUES WHEN EXERCISING A POWER TO ENTER INTO A CONTRACT

1. Introduction

1.1 This statutory guidance is issued by Scottish Ministers under section 52 of the Local Government in Scotland Act 2003. It relates only to contracting by Scottish local authorities. It is the duty of a local authority to have regard to this guidance and all other relevant legal and professional advice when exercising a power to enter into a contract.

1.2 The Scottish Executive is a coalition government based on a Partnership Agreement. This Agreement includes a commitment to help improve local public services, in partnership with local authorities 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.”

1.3 It also contains the commitment to help improve the public service infrastructure in a way that delivers Best Value.

1.4 This statutory guidance is a response to both those commitments. It has been prepared after consultation with CoSLA, APSE, the STUC, the CBI, the FSB and the wider public. It examines workforce and employment issues in all forms of contracting for services where local authority staff may transfer or where workforce and employment issues are otherwise relevant to performance of the contract.

1.5 This statutory guidance applies only to Scottish local authorities and to any exercise which involves the consideration of a change of service provider or where the transfer of local authority staff is at issue. It has been designed to complement the Protocol and Guidance concerning Employment Issues in relation to Public Private Partnerships in Scotland. It is also intended to support local authorities in their pursuit of Best Value, which places a premium on fair employment practice.

1.6 The guidance covers the interests of local authorities¹, prospective contractors, and sub-contractors and is seen as an important measure in removing the scope for two-tier workforces. It seeks to ensure that sound and fair practices are adopted by local authorities during the making of decisions about how local authority functions should be exercised and by whom, and any related procurement process, and that good practice should continue during the lifetime of any subsequent contractual agreement. Where there is a decision to outsource which may involve a transfer, and even where TUPE does not apply as a matter of law, the local authority should undertake to behave in a manner consistent with the good practice identified in this guidance.

¹ As provided by s61(c)(iii) of the 2003 Act, for the purposes of this statutory guidance ‘local authorities’ means Scottish councils constituted under s2 of the Local Government etc (Scotland) Act 1994, Joint Fire and Rescue Boards and joint police boards.

1.7 Local authorities will require to warn potential bidders in advance that consistency in complying with the statutory guidance will be a formal part of the contracting process.

1.8 Local authorities enter into contracts with organisations of a range of different sizes. The decision to contract might be the outcome of a Best Value review, service review, options appraisal or voluntary competitive tendering process. The justification should always be Best Value, but may include the desire to improve service outcomes for the service user, to procure an economic benefit to the authority, to promote local economic development, or to support partnership solutions to complex local problems.

1.9 One result of the decision to invite tenders is the need to consider whether a staff transfer might be an issue, although it is not an inevitable consequence. Where there is potential for staff transfers, local authorities have a duty to have regard to this guidance and all other relevant professional advice. It covers all negotiations which might result in a transfer of staff, and aims to promote, establish and support good employment practices within and throughout all relevant contracts. Its **principles** should apply no matter how large or small the size of contract or number of staff to be transferred.

1.10 To ensure fair competition all potential service providers, including those that are already part of the authority, must be subject to the same requirements and be treated equally throughout each procurement process. Local authorities are also subject to application of the Public Procurement Regulations, which in the UK implement EU Procurement Directives. If a contract is not above the thresholds contained in the Public Procurement Regulations, or within the strict terms of the Regulations then an authority must still comply with certain principles as stated in the decisions of the ECJ and the general obligations contained within the EU Treaty (e.g. to support transparency, to avoid discrimination on grounds of nationality and to treat all suppliers fairly and equally) and to relevant UK law. In particular Part II of the Local Government Act 1988 continues to apply to all contracts.

1.11 Within the context that the principles outlined in this guidance should apply wherever possible to all contracting exercises where staff may transfer or where workforce or employment and employment issues are otherwise relevant to performance of the contract, the guidance on **process** in this document should be consistently, fairly but proportionately applied within any procurement exercise. See section 8. The authority must balance the need to obtain sufficient information to form a view of the competence and potential behaviours of potential contractual partners, so as to assess their suitability to perform the contract to the required standard, with the need to avoid placing an undue burden upon them.

1.12 Potential bidders should understand clearly from the outset what information and service standards will be expected, and must be provided with adequate, accurate and timely information at all relevant stages of the procurement process. A consequence of EU Procurement law (ie Treaty, directives and consequent UK procurement regulations) is that information taken into account in the selection (ie short-listing) of bidders must be relevant to their suitability to perform the contract in question. Similarly, information taken into account in the evaluation of bids must be relevant to the award criteria notified to bidders (where the directives apply, the authority should use the principle of most economically advantageous tender). The emphasis given to any particular factors at selection and award stage must also be proportionate.

1.13 Local authorities should also recognise that organisations may seek to satisfy their requirements in a variety of ways. Care should be exercised to avoid taking too narrow a view of how outcomes should be achieved (such as how a service might be delivered).

1.14 While workforce issues may be a crucial consideration within the procurement process (depending on whether the contract is for services, works or supplies) they are not the only factor. Where a contractor complies with this guidance their tender should receive equal treatment in the evaluation process.

1.15 Where there is scope to improve productivity and secure service improvements through more effective management of a workforce and through negotiated changes to employment packages which do not dilute or undermine terms and conditions, then this should continue to be a feature of evaluation in the competitive process. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes that would undermine the integrated nature or quality of the workforce.

2. Assumptions

2.1 Where this guidance refers to consultation with relevant trades unions, “trades unions” is deemed to mean recognised trades unions and, where there is no recognised trade union or where otherwise required by law, other representatives of the workforces affected by a negotiation or renegotiation of a contract.

2.2 Adherence to this guidance gives staff and trades unions active involvement in discussions and decisions relating to contractual negotiations where staff may transfer. Openness and communication should be the default approach, with restrictions confined only to those required to comply with the Procurement Regulations (where these apply) and to details which are genuinely related to the commercial interests of contractors (where these outweigh the need for disclosure) or are otherwise necessary to ensure fair competition (see section 7).

2.3 Where the main contractor under a contract transfers staff originally in the employ of the local authority to a sub-contractor as a result of the main contractor’s obligations to the local authority, the main contractor should have been made responsible by the local authority for the observance of this guidance by the sub-contractor insofar as it applies to conduct throughout the life of the contract.

3 Overview

3.1 Local authorities are under a statutory obligation to make arrangements which secure Best Value. These may include contractual arrangements which involve the transfer to and employment by a contractor of local authority staff who have been taken on with the primary function of undertaking work on behalf of the local authority.

3.2 This guidance provides:

- 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
- guidance on the arrangements for employee terms and conditions and pensions on transfer
- guidance on the terms and conditions and pensions provisions to apply to staff who are recruited for or allocated to that part of the contracted service provider’s workforce dealing with the local authority contract(s) post-transfer

- principles to underpin the provision of access to information and involvement of staff and the relevant trades unions where staff may transfer or where workforce and employment issues are relevant to performance of the contract.

3.3 This guidance has been informed by and where applicable complements policy and principles laid down elsewhere. This includes guidance from the Cabinet Office, HM Treasury and other UK Government Departments and the Scottish Executive; and relevant professional associations. Key sources include –

- Statutory Guidance on Best Value, issued pursuant to section 2 of the Local Government in Scotland Act 2003;
- ODPM Circular 03/2003 on Best Value and Performance Improvement, in particular Section 2, “Valuing the Workforce”;
- UK Public Procurement Regulations and Scottish Executive Procurement guidance, including evaluation of sub-contractors for public sector service provision;
- The Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) – ‘TUPE’;
- the Cabinet Office’s Statement of Practice on Staff Transfers in the Public Sector ;
- Disclosure of Information and Consultation with staff and other interested parties (the Treasury PFI Taskforce’s Policy Statement No 4) and its conversion for local government by 4ps.co.uk
- ‘Working together for Best Value’ by APSE
- PPPs in Scotland – Protocol and Guidance concerning Employment Issues (Scottish Executive); and
- ‘Race Equality and Procurement in Local Government’ (Commission for Racial Equality July 2003).

4 Aims

4.1 The aims of this guidance are:

- to provide guidance on how local authorities should ensure that the terms and conditions of service of new employees appointed by contractors to their workforces post-transfer, should be such as to eliminate the scope for the creation of so-called “two-tier” workforces;
- to emphasise the need for effective communication and consultation between local authorities and the relevant trades unions when considering prospective changes of service provider where local authority staff may transfer (or have transferred as a result of previous changes of service provider);
- to make clear the expectation upon prospective and actual service providers to local authorities to demonstrate a constructive approach to employee relations, including the involvement of appropriate trades unions;
- to ensure consistency of good practice in the handling of any relevant employment issues as a consequence of local authority contracting exercises in Scotland;
- to safeguard the employment terms and conditions of individual local authority employees who transfer to other ‘service providers’ as a consequence of a contracted-out service; and
- to provide guidance on the pension provisions that should be offered to transferred employees and to new recruits to local authority contracted-out workforce situations.

5 Principles

5.1 The following principles underpin the more detailed guidance provided in subsequent paragraphs:

a) To secure Best Value, the procurement process should promote improvements in the performance of the local authority's functions. It should also be transparent, open and fair, with decisions being based on objective criteria that are justified in terms of the performance specified under the contract. Local authorities therefore need to have clear strategies, procedures and policies for evaluating tenderers and tenders.

b) Best Value also means that local authority procurement decisions must balance quality criteria with value for money factors, and have regard to the equal opportunity requirements and the need to contribute to the achievement of sustainable development. This means taking into account social and environmental concerns as well as economic concerns at the options appraisal stage.

c) Procurement decisions should not be dependent upon dilution of employees' pay and conditions of employment. Section 17(5) of the Local Government Act 1988, as amended by Section 7 of the Local Government in Scotland Act 2003, allows local authorities to take certain employment matters into account in choosing between potential contractual partners in certain circumstances. Sub-paragraphs g), h) and i) below are intended to safeguard that outcome in local negotiations.

d) Where a local authority decides to put out to tender services which are currently being provided by directly-employed staff, the tendering process should be open, in principle and in practice, to bids incorporating the use of such staff or developed by the relevant trading operation within the local authority (the process usually known as Voluntary Competitive Tendering). Such bids should be considered on the same Best Value criteria as other bids and be treated equally throughout the procurement process.

e) There is a positive link between fair employment practices and a local authority's ability to secure Best Value. Section 17 of the Local Government Act 1988 (as amended) provides that a local authority may reasonably seek to ensure that the employment practices of potential service providers will not prevent the authority from securing Best Value or hinder it in doing so. Where relevant to performance of the contract, potential service providers should be asked to demonstrate a commitment to fair employment practices and constructive employee relations. This includes, but is not limited to, the demonstration of positive attitudes to trade union recognition, good practice in health and safety, arrangements for ensuring that the equal opportunity requirements are met, and reasonable pension arrangements for staff (as described in paragraphs 10.5-10.7)

f) In all potential negotiations and re-negotiations of service provision which would affect the terms and conditions or pension arrangements of local authority employees, those employees and relevant trades unions who would be affected should be fully informed and consulted in advance of, and throughout, the process. The precise nature of the arrangements for consultation is for agreement between the parties (subject to any overriding statutory requirements)

g) 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.

h) Local authorities are expected to ensure no two-tier workforce situations arise as a result of contracted-out services where staff transfer. The terms and conditions for any new appointee to the workforce should therefore be no less favourable overall than for transferred employees. The underpinning principle is to consider employees' terms and conditions (other than pension arrangements - see paragraph 10.4) in the round - as a 'package'.

i) There can be flexibility for negotiation between employers and trades unions to agree local adjustments to working practices and terms and conditions for transferred employees and new appointees, to provide an overall package which is better suited to the needs of the service.

j) Transferred employees to a contractor's workforce should have access to the same or broadly comparable pension arrangement to those available to them at transfer. Staff who are recruited for or allocated to that part of the contracted service provider's workforce dealing with the local authority contract(s) will be offered a choice of pensions provision broadly comparable to transferees.

k) This guidance covers all contracts where local authority staff may transfer or where workforce and employment issues are relevant to performance of the contract, and local authorities have a duty to have regard to it. It should be consistently but fairly applied. Local authorities whose behaviour is not consistent with the guidance will have to defend their position given the duty to have regard to the guidance.

6 Valuing the Workforce

6.1 Fair employment practices encourage staff to deliver high quality services. Organisations not effectively managing workforce issues may be unable to comply with their obligations under the contract (including any TUPE obligations) or may prevent or hinder the authority from securing Best Value in the provision of services. Local authorities should therefore look for service providers who offer employees a package of terms and conditions encouraging high quality service delivery throughout the life of the contract. These conditions must be sufficient to recruit and motivate high quality employees to work on the contract designed to integrate new recruits within the workforce transferred from the local authority.

6.2 When considering a reorganisation of services that may involve a contracting exercise, the local authority should review the options for an existing in-house workforce in relation to future service requirements and procurement options.

6.3 Notwithstanding the commitment within this guidance to ongoing good employment practices being established and maintained within all contracts where relevant, it is also recognised that the levels of individual pay and conditions of service within a contract are not the only determinant of total labour costs. It is expected therefore that where scope exists to improve productivity and secure service improvements through more effective, high quality management of a workforce, this will continue to be a key feature of evaluation in the competitive processes leading to the award of contracts.

6.4 If it appears that a scheme may involve a transfer of undertaking in terms of the TUPE regulations, and employees may be required to transfer to another employer, then the local authority should ensure that there is a level playing field, that any in-house team is provided with appropriate support to prepare an in-house bid, and that all negotiations are consistent with the following principles.

7 Principles of Staff and Trades Union Involvement and Consultation

7.1 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 and inform potential bidders that consistency with the behaviours identified in the guidance will be a condition of the contracting process.

7.2 Staff and unions should be invited to participate in the selection process and in the subsequent detailed work around the transfer. Full, effective and continuous communication is key to managing a contracting process well. Local authorities should consult their employees and trades unions throughout the process, with full disclosure of information on all matters affecting the workforce (subject to paragraph 7.5). The local authority retains the full and final responsibility for final selection of the preferred bidder which will also need to take into account all the other evaluation criteria for assessing overall best value (paragraph 8.16 refers).

7.3 Employees who are directly affected by a decision to invite competitive tenders have an interest in potential bidders, as they may become their future employers. Local authorities should be pro-active in keeping employees and trades unions informed, and respect the workforce's position – for example by ensuring that they hear of developments in a tendering process before these are reported in the media.

7.5 Those leading the procurement process must remain in control of the nature and timing of how specification and bid information is made available, internally and externally. Openness should be the default approach, with restrictions confined only to those required to comply with the Procurement Regulations (where these apply) and to details agreed with contractors as genuinely related to their commercial interests. The term “commercial confidentiality” must not however be used as an excuse to withhold legitimate information from employees and trades unions.

7.6 Employee and trades union involvement and consultation should be handled by local authorities with care and be conducted in good faith. The role of trades unions is important in informing the decision-making of local authorities. The authority should ensure that a strategy is agreed with employees and trades unions from the outset which covers exactly what information will be made available to them, and when; how commercial confidentiality issues are to be dealt with and when confidentiality undertakings will be required; and how the discussions and reporting requirements will be handled. This strategy should be agreed and made available to employees. It should form the most important part of the internal communications strategy that the authority will be expected to adopt for a contracting-out exercise.

7.7 Contractors selected to take on public service employees and provide services to local authorities should also have policies that ensure good communication and consultation with the workforce and their trades unions on key issues following a transfer. These policies should be declared and recorded for reference by employees.

7.8 The process of involvement and consultation must be transparent and fair. Any representations trades unions wish to make about particular bidders during the process should be formally communicated in writing or at a minuted meeting. There should be someone present from the local authority to make an official record of any such meeting. One of the objectives of this exercise is improving the quality of contractors working in the public sector. For the market to respond to trades unions' concerns, these should be communicated back to individual bidders by the local authority.

7.9 Trades unions and the local authority should reach agreement in advance of formal discussions about how information should be passed to and dealt with by the authority. It is the responsibility of the local authority to decide how representations about bidders made by the trades unions are to be taken into account. If not managed properly, this process may lay the organisation open to legal challenge. Inappropriate use of information by the organisation (including information which is not relevant to the contract specification or the criteria adopted by the organisation for selecting tenderers and evaluating tenders), or use of information at the incorrect stage in the procurement process, could be challenged under the procurement regulations. Any trades union input into the appointment of a preferred bidder by the local authority must comply with the relevant procurement regulations.

7.10 Ideally, workforce matter should be considered at the selection stage of the procurement processes, since that is when the potential tenderers' ability to perform the contract are assessed. Consideration of workforce matters at the tender evaluation stage should only be used to clarify responses to clearly expressed requirements set out in the tender documents, and must relate directly to a tenderer's ability to deliver the service in question (where "delivery" has been notified to tenderers as one of the award criteria).

7.11 Many competitive tendering exercises will involve a project board or tender evaluation panel as the decision making group for the contract award, as a matter of good practice. The objective of the board or panel will be to decide what outcome best represents Best Value for the authority. Membership will include advisors and other interested parties, subject to its size being manageable. Local authorities should include trades union representation on such boards or panels in order to ensure that relevant information about contractors may be taken into account as necessary by the authority. Relevant information is information which may be taken into account under s17(5) of the Local Government Act 1988 as amended by s7 of the Local Government in Scotland Act 2003.

8 Access to Information and Evaluation of Short-listed Bidders

8.1 Under European Public Procurement legislation and the Public Procurement Regulations, workforce matters may come into consideration at the pre-qualification and tender evaluation stages of the contractual process. Under the EU rules the criteria for short-listing candidates are restricted to technical capacity, economic and financial standing and, for service contracts, ability. At this stage, only workforce matters that affect the suitability of a candidate against those criteria can be considered. Candidates may be asked to disclose their track record including details of cases over the last three years where the bidder has been found by a court or tribunal to have breached the requirements of employment law, and any appropriate remedial actions taken.

8.2 They may also be asked to provide details of their approach to workforce and employment related issues, such as pay and training, where these are relevant to their ability to meet the required service levels.

8.3 Contract award criteria for use at the tender evaluation stage can be either 'most economically advantageous tender' or 'lowest price'. Contracts should not be awarded only on the basis of 'lowest price' other than in exceptional circumstances and unless detailed quality requirements have already been included in the tender specification. Basing contract award decisions on lowest price is not generally compatible with best value and is likely to encourage potential contractors to focus on price at the expense of quality of service. The Best Value option is likely to depend on a range of factors such as whole-life cost, quality, and good employment practices related to service delivery.

8.4 Contract award criteria should not simply rely on price alone, unless the authority is satisfied that the specification for the work incorporates all these matters. In practice, these conditions are unlikely to be satisfied in all but the simplest contracts. Choosing the 'most economically advantageous' tender allows contracting authorities to consider more general matters, provided that these matters relate to the performance of the contract itself and do not result in discrimination between contractors within the European Community. The award criteria to be used must also be clearly stated in the contract notice and/or invitation to tender.

8.5 Tender specifications should set out the proposed relationship between the local authority and contractor and clearly describe the local authority's objectives for the service which is to be provided. Those which are written with quality in mind should attract bids which incorporate staff management practices suitable to the attraction and retention of a skilled and motivated workforce. A specification which fails to address quality issues will allow poor employment practices and workforce relations to affect delivery of the contract.

8.6 Otherwise, tender specifications should be couched in terms of output and performance, and should stick to what is really necessary to achieve them. Where standards are specified, the term 'or equivalent' needs to be included in order to avoid infringement of EU procurement rules. Other issues should be dealt with in other documents sent with the invitation to tender, including, as appropriate, the need for:

- a transition plan for taking staff on under TUPE (or equivalent, if TUPE does not apply in a strict legal sense);
- adoption of the practices designed to prevent the development of a two tier workforce on the contract (see section 10); and
- a training and development plan (sometimes agreed and co-resourced by the authority).

8.7 Matters addressed at the pre qualification stage should not be revisited at the tender evaluation stage (unless a tenderer has had a change in circumstances) but matters relating to the deliverability of the contract must be considered. For some contracts, there is a Final Invitation to Negotiate (ITN). As part of the qualitative evaluation of bidders who respond to an ITN, a local authority should take into account those workforce matters relevant to deliverability.

8.8 Relevant matters might include:

- arrangements for managing the application of TUPE where transfer of local authority employees is involved;
- management arrangements for the workforce;

- pay, terms and conditions of transferees and new appointees to the workforce, including pension arrangements;
- workforce training and development;
- the framework for, and conduct of, employee relations (e.g. trades union recognition);
- Health and Safety; local authorities have a statutory duty under the Health and Safety at Work etc Act 1974 with regard to the health and safety of their employees and others who may be affected by their undertaking. This duty cannot be delegated even where the work activity which forms part of the undertaking is contracted out. Authorities are required by the legislation to take reasonable steps to satisfy themselves that contractors have the ability and resources for managing health and safety in relation to the work being carried out;
- equal opportunities; the local authority is under an obligation, imposed by section 59 of the Local Government in Scotland Act 2003, to encourage equal opportunities and the observance of the equal opportunities requirements in the arrangements it makes to secure Best Value. In addition, the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 gives local authorities a strengthened legal duty to eliminate discrimination, promote equality of opportunity and good race relations. Procurement policy and contracts may be relevant to this duty;
- practices consistent with the principles contained within any human resources strategy which applies to the local authority in question;
- the identification and approach to use of subcontracted labour, including assurances of safeguards to prevent individuals being wrongly classified as self-employed; and
- track record, including details of cases over the last three years where the bidder had been found by a court or tribunal to have breached the requirements of employment law, and any appropriate remedial actions taken.

8.9 Such information should be supplied by bidders as part of their proposals in response to the Final ITN in a format appropriate to the size of the contract to be awarded. It should be evaluated by the local authority with the intention of establishing the quality of service delivery implicit in bidders' proposals.

8.10 Where a staff transfer involving staff covered by collective agreements is at issue, trades union representatives should be invited to hold discussions, through interviews for example, with all short-listed bidders. Bidders are not expected to have discussions with trades unions representing employees who are not expected to transfer to the private sector as a result of the contract.

8.11 The local authority should facilitate the discussion with the bidders and agree with the trades unions who should attend from the local authority. Minutes of any meetings/discussions should be formally agreed. In addition, trades unions should be invited to provide a report to the local authority about the outcome of the discussion.

8.12 It would be reasonable for the trades union representatives to discuss with bidders the local authority output specifications, the bidders responses to the Final ITN (which will contain the bidder's proposals for the scheme in respect of the principles of any human resources strategy, TUPE, staff management, pay, terms and conditions and training and employee relations) and their design proposals.

8.13 It should be made clear to employees and trades unions that they should respect bidders' requests that other than the reports to management of the local authority, their discussions remain confidential.

8.14 This should be in line with the Freedom of Information (Scotland) Act 2002, where possible information should not be automatically subject to a confidentiality clause.

8.15 As part of the information and reporting requirements referred to in section 7, the local authority needs to have formulated a strategy for dealing with a refusal by a bidder to participate in the process of discussions with the trades unions or to provide particular information (other than on bona fide grounds of commercial confidentiality). It would be reasonable to request the bidder to give reasons for its refusal. The local authority will then need to take legal advice on whether those reasons are legitimate in the context of the EU procurement regulations and the need for the local authority to verify the information already provided or claims made by the bidder in support of its bid.

8.16 The trades unions should be encouraged to discuss their views with the local authority first before any report by the trades unions on the outcome of their discussions with the bidders is submitted. Once such a report has been received by the local authority, the relevant sections referring to a particular bidder should be passed back to that bidder for comment. The authority must inform both bidders and trades unions whether, and if so what, elements of the report will be disregarded for the purposes of the evaluation exercise.

8.17 Bidders must be allowed time to respond to any specific concerns raised by the trades unions. It is not the intention that this process should have the effect of allowing bidders to revise their bids, which would be unacceptable. Its purpose is to ensure transparency and equal treatment of bidders and to enable the local authority to verify the information that it has been given before appointing the preferred bidder.

8.18 The local authority should take all the factors set out above: the information received, the minutes of the discussions held with bidders, the possible report and the response from bidders into consideration in the evaluation exercise for quality and the assessment of best value. In so doing, the authority must observe the criteria which it has adopted for making an award in accordance with the regulations. The local authority retains the full and final responsibility for final selection of the preferred bidder which will also need to take into account all the other evaluation criteria for assessing overall best value.

8.19 In order to demonstrate that the process is meaningful, the local authority must respond to the points raised in the trades unions' discussions with bidders and any subsequent report, and must be able to explain the reasons for any of its decisions which run counter to any valid concerns raised.

9 Staff Transfers and TUPE (including Pensions)

9.1 Contracting out a service requires careful consideration to be given in each case to the definition of service to be contracted, and the impact on employees' interests. It is not an automatic requirement of contracted-out services to transfer employees, although the defined contracted service will normally include some services currently carried out by public sector employees. The circumstances of each case will vary. Where there is a transfer of undertaking employees should be told as soon as possible, and certainly long enough before the transfer to enable the employer to consult all the persons who are appropriate representatives of any of those affected employees. They should be advised in writing of the intention to transfer employees, when such a transfer might take place and, where possible,

how far TUPE (and other guidance on pensions) is expected apply. When TUPE does not apply in strict legal terms the principles of TUPE should be followed.

9.2 Bidders should have drawn to their attention, in writing, the intention that employees will transfer, that TUPE (or the principles of TUPE) should apply and that employees should be able to maintain pensions broadly comparable to or the same as those they currently receive. So far as successful contract management is concerned this requires that:

- transferring employees should be offered a broadly comparable or the same pension by the new employer (whether through the employer securing admitted body status or otherwise), both on initial transfer and at second and subsequent contracting rounds
- the new employer's pension scheme should allow transferring employees the option of moving their accrued credits into that scheme on a fully protected basis
- instructions for the involvement of the Government Actuary's Department in assessing broad comparability and bulk transfer agreements should be followed.

9.3 Bidders should be advised that they can, if they wish, submit non-TUPE bids but that these will only be accepted if they fall within an agreed set of genuinely exceptional circumstances (as described in the Cabinet Office Statement of Practice).

9.4 These exceptional circumstances are broadly:

- where the activity is essentially new or a one-off scheme, or
- where goods or services are essentially a commodity bought "off the shelf" and no grouping of employees are specifically and permanently assigned to a common task, or
- where the features of the service or function subject to the contracting exercise are significantly different from the features of the function previously performed within the public sector, or by an existing contractor e.g. a function to be delivered electronically and in such a way that it requires radically different skills, experience and equipment.

9.5 Bidders should be advised that employees and their representatives will be involved in discussions about the transfer as early as possible in the process in accordance with the provisions for employee involvement and consultation set out above.

9.6 Contractors and recognised trades unions should work in a spirit of partnership on the full range of staffing issues associated with the transfer. All parties should agree to work reasonably. To underpin this all parties should negotiate, with a commitment to reaching agreement. Where this fails, an Alternative Dispute Resolution (ADR) procedure developed with local authorities, trades unions and private sector contractors should be used as a last resort.

9.7 Once final decisions have been taken on the way forward regarding any transfer, employees and trades unions should be told as soon as possible of the outcome. It is particularly important to make clear what, if any, direct impact there will be on particular staff groups and individuals. It is expected that project teams, trades unions, and personnel departments will work closely and constructively in these processes in the best interests of consultation, communication, and employee welfare.

9.8 If there is to be an external contract, employees should be advised as early as possible about proposed terms and conditions and transfer date. These must be in line with the earlier statement on complying with TUPE, pensions and other guidelines, including employee representation.

9.9 Every effort must be made to minimise the disruption for the employees involved who must be given written confirmation of terms and conditions, transfer dates and all other relevant information at the earliest opportunity.

9.10 The local authority should discuss and agree, at the earliest opportunity and through local consultative and/or partnership machinery, what options are available to employees who do not wish to transfer to the new employer. This will be expected to include application of redeployment policies and procedures.

10 Treatment of New Joiners to a Contracted-out Workforce

10.1 Where the service provider recruits or allocates staff to work on a local authority contract alongside employees transferred from the local authority, it should offer employment on fair and reasonable terms and conditions which are no less favourable overall to those of transferred employees doing like work, work which has been rated as equivalent, or work of a similar value.

10.2 The basis of comparison to ensure that paragraph 10.1 is met should be the package of terms and conditions which already applies to transferred employees, or the terms and conditions which apply for the same job in the public authority. These will be available within the local authority, or set out in national agreements.

10.3 The underpinning principle is to consider employees' terms and conditions (other than pension arrangements which are dealt with in paragraph 10.5 below) in the round - as a 'package'. This does not prevent service providers from offering new recruits a package of terms and conditions which differs from those of transferred employees in the detail, so long as the overall impact of the changes to this package meets the conditions set out above. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes that would undermine the integrated nature or quality of the workforce.

10.4 The service provider should consult representatives of a trades union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to new recruits. The arrangements for consultation will involve a genuine dialogue, but otherwise the precise nature of the arrangements for consultation is for agreement between the service provider and the trades unions. The intention is that contractors and recognised trades unions should be able to agree on a particular package of terms and conditions to be offered to new joiners.

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

10.6 New recruits to an outsourced workforce ('new joiners') should be offered, where applicable, a choice of one of the following pension provision choices:

- where prevailing criteria apply, access to the local authority's scheme through Admitted Body Status, with the new employer making the requisite contributions.
- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished, or
- a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

- 10.7 On a retender of a contract to which the above provisions apply, any new service provider should be required to offer one of the pension options above to any staff who
- a) transfer to such subsequent retender and
 - b) who had prior to the transfer a right as a new recruit to the original outsourced workforce to one of these pension options.

11. Monitoring of contractual requirements

11.1 Monitoring of workforce-related issues should be undertaken as part of the contract management process. Successful contract management depends on the negotiation of a sound agreement between the contracting authority and the contractor, a relationship which recognises the perspective of service users, and the development of a positive and co-operative relationship. The outcome is time and cost effective for both parties and are supportive for staff.

11.2 Monitoring arrangements should fit into the normal reporting regime to avoid unnecessary burdens on contractors. Arrangements should be the same between in-house and external providers although in-house providers may have additional corporate requirements to meet.

12. Arbitration and enforcement

12.1 At the pre-tender and tender stage, in cases where unions do not reach agreement with the authority about the disclosure of information or the handling of confidential information, or where the authority feels that a union has an unmanageable conflict of interest such as involvement in an in-house bid, the parties should make local efforts to resolve the dispute.

12.2 Contractors and recognised trades unions should work in a spirit of partnership on the full range of staffing issues associated with a transfer. All parties should agree to work reasonably. To underpin this all parties should negotiate, with a commitment to reaching agreement. The expectation remains that disagreement under this guidance can be resolved at the earliest possible stage by agreement between the parties involved. Where this fails, an Alternative Dispute Procedure (ADR) developed with local authorities, trades unions and private sector contractors should be used as a last resort. Parties must agree to abide by the outcome of the ADR Procedure.

12.3 Where it appears to the local authority that the service provider is not meeting its obligations, or where an employee of the contractor or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the contractor, the local authority will first seek an explanation from the service provider. If the contractor's response satisfies the local authority that the guidance is being followed, the local authority will inform any complainant of this. If the response does not satisfy the local authority, it will

ask the service provider to take immediate action to remedy this.

12.4 If, following such a request, the service provider still appears to the local authority not to be complying with the guidance, the local authority will seek to enforce the terms of the contract, which will adhere to the principles of this guidance as much as possible.

12.5 In addition, where a service provider has not complied with this guidance, the local authority will take this into account when doing evaluations for future work.

12.6 The contract shall include a provision for resolving disputes about the application of this guidance in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The contractor, local authority and recognised trades unions or other staff representatives, shall all have access to this ‘alternative dispute resolution’ (ADR) process.

12.7 This guidance is issued under powers provided by section 52 of the Local Government in Scotland Act 2003 and local authorities are under a duty to have regard to it in exercising a power to enter into a contract. In addition, the constructive engagement with trades unions recommended in this statutory guidance is also recognised in guidance issued under section 2 of the same Act as being characteristic of a local authority which secures Best Value. A local authority which fails to demonstrate regard to the guidance therefore risks this being identified as symptomatic of a wider failure in Best Value under the scrutiny and enforcement arrangements which the Act provides.

13. Review of this Guidance

13.1 The Scottish Executive will keep this statutory guidance under review. It will consult with representatives of the STUC, local authorities and service providers to assist in this process.

Scottish Ministers