

Subject:	TUPE Transfers and Trade Union Recognition and Involvement		
Date of Meeting:	8 December 2016		
Report of:	Executive Director for Finance and Resources		
Contact Officer:	Name:	Alison McManamon	Tel: 29-0511
	Email:	Alison.mcmanamon@brighton-hove.gov.uk	
Ward(s) affected:	All		

FOR GENERAL RELEASE

1. PURPOSE OF REPORT AND POLICY CONTEXT

- 1.1 This report follows recent discussions between Brighton & Hove City Council (the 'council') and the Trade Unions (GMB and UNISON) about the TUPE transfer of staff to other organisations.
- 1.2 As the Council makes changes to services to meet the current financial demands it is likely that there will continue to be transfers of council staff into other organisations through TUPE arrangements. As a result of this, the Trade Unions requested that consideration be given by the Council to the following:
- Requiring Trade Union recognition in contracted or commissioned services where council staff will be TUPE transferred;
 - Involving the Trade Unions more in the tender process when evaluating contracts that will result in the TUPE transfer of council staff.
- 1.3 A report on this matter was considered by the Procurement Advisory Board on 13th September 2016 and comments from this meeting have been incorporated and addressed in this report.

2. RECOMMENDATIONS:

That the Committee approve the following:

- 2.1 That the Council makes clear in the tender documentation for new contracts which involve the potential TUPE transfer of council staff that consultation is required ahead of the transfer where any changes to Trade Union recognition are envisaged by the new contractor, whether the automatic transfer principle applies or not (see 3.3 below).
- 2.2 That, subject to the considerations described below in 3.6 and 3.7, the following criteria question is included during the evaluation stage for all tender processes that are likely to involve the TUPE transfer of council staff:

'Brighton & Hove City Council is a collective bargaining organisation and recognises GMB and UNISON Trade Unions for this purpose. The Council believes that Trade Union recognition provides a good indication of a constructive approach to employee relations and would therefore ask that bidders confirm whether these arrangements will be continued or, in the alternative, to explain how they consult and engage with unions and / or the workforce to ensure best practice in terms of employee relations'.

- 2.3 That, where Trade Unions request to be involved as stakeholders during the procurement process in order to comment on prospective providers of commissioned and contracted services where there will be a TUPE transfer of council staff, the process set out in 3.9 below is followed.

3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 The Council currently recognises Trade Unions for collective bargaining purposes. This is a voluntary agreement and Trade Union recognition is not incorporated into individual contracts.
- 3.2 The Council are supportive of the contribution that Trade Union recognition makes to effective employee relations and would like to encourage the continuation of Trade Union recognition following tender processes that involve the TUPE transfer of staff.
- 3.3 Under the TUPE regulations, Trade Union recognition automatically transfers under Regulation 6(2)(a) TUPE if the group of staff transferring retain their distinct identity from the remainder of the new contractor's undertaking after transfer. Where the group of staff transferring will not retain their distinct identity, the previous Trade Union recognition lapses, and it will then be up to the new contractor to voluntarily recognise the Trade Union. The Council acknowledges that where recognition transfers following the transfer recognition may be varied or rescinded according to the relevant Trade Union legislation and therefore the TUPE Regulations do not provide on-going assurance of Trade Union recognition by new contractors.
- 3.4 Tenderers have a duty to consult along with the Council where they envisage taking measures in respect of affected employees. A 'measure' has been interpreted quite widely in case law and covers any 'action, step or arrangement' taken in connection with the transfer. Any proposal by a potential transferee to derecognise council recognised unions post-transfer where the automatic principle applies, and/or to not voluntarily recognise Trade Unions are both likely to be considered measures and accordingly consultation must be undertaken to comply with TUPE Regulations in respect of either.
- 3.5 It is not possible to impose a blanket requirement as to automatic recognition of Trade Unions for commissioned and contracted services where there is an outsourcing of staff. There are restrictions imposed in legislation, which limit the discretion of the Council. The legal position is summarised in Appendix 1. .

- 3.6 Whilst there are these restrictions, the Council could consider in certain circumstances using a criteria question in the evaluation process related to Trade Union recognition and this approach is recommended by this report (see 2.2). The inclusion of this question would need to be appropriate and proportionate both from a legal point of view and with regard to the financial implications in terms of restricting the market place.
- 3.7 In deciding whether it would be appropriate and proportionate to use this criteria question a number of issues would need to be considered by the council to avoid the risks related to legal challenges from losing bidders:
- Establish whether there is a legally robust justification for adopting the criteria question with regard to the Public Services (Social Value) Act 2012 and the Public Contracts Regulations 2015.
 - Establish that the inclusion of the clause will not adversely impact on the market and the council's ability to achieve value for money from the procurement.
 - Only include where contracts are let by the council alone rather than in joint procurement exercises with other organisations.
 - Apply appropriate weighting to the criteria question to ensure that it is proportionate.
- 3.8 Where a new provider intends to continue with Trade Union recognition the Council will seek agreement with the provider to include a clause in the contract on a voluntary basis. Such a clause can only be included by agreement both initially and on an ongoing basis.
- 3.9 With regard to the request from the Trade Unions to be involved as stakeholders during the procurement process when a potential TUPE transfer of BHCC staff is involved it is proposed to provide a process to facilitate this.
- 3.10 It is proposed to amend the Contract Standing Orders to delegate authority to the Executive Director (Finance & Resources) to agree involvement of the Trade Unions where requested on a case by case basis. Trade Union involvement will only be considered where:
- Contracts are let by the council alone rather than in joint procurement exercises with other organisations;
 - Where there is a potential TUPE transfer of council staff to another employer.

Involvement should be requested and responded to in writing to ensure a record of decisions is kept. As the head of the Procurement, HR, and Finance functions, the Executive Director (Finance & Resources) will be in a position to effectively consider the involvement of Trade Unions, as stakeholder, from the perspective of impacts on timelines, industrial relations, processing efficiency and will be aware of potential links with other current or planned procurements.

- 3.11 If accepted the Trade Union would need to provide a named contact who would be engaged on a confidential basis in the process. This involvement would be prior to the final decision being made, and there would be no Trade Union involvement in evaluation of tenders or the final decision making panel. Once it is

agreed that the Trade Unions will be involved as stakeholders in the process bidders will be informed in the ITT of what information is going to be shared with the Trade Unions and what their involvement in the process will be (i.e. as stakeholders but not scoring / decision makers).

4. CONSULTATION

- 4.1 Unison and GMB were sent a briefing paper on 29th July 2016 to request comments with regard to the proposals from the council regarding TUPE and Trade Union recognition.
- 4.2 Both UNISON and GMB have responded with comments.
- 4.3 UNISON felt the wording in the original recommendation was not robust enough and it was not clear who would be responsible for deciding if the evaluation clause in relation to Trade Union recognition could be included. As a result it has been agreed that it will be the decision of the relevant Procurement Advisor as to whether to include the evaluation criteria question following advice from the Legal Services. With regard to the wording of the recommendation in 2.2 it is considered that this is the limit to which the Council is reasonably able to encourage Trade Union recognition in line with the legal advice. However a further recommendation has been added (see 2.1) to ensure that any proposed changes to Trade Union recognition are consulted on as measures during the TUPE process.
- 4.4 GMB raised Barnet Council as an example of an organisation that goes further and requires contractors to maintain union recognition for 12 months after the start date of the contract. Having considered the Barnet Council policy, it does not actually extend recognition to council recognised Trade Unions over and above that already provided for under the TUPE Regulations. In addition, whilst it refers to those unions being consulted regarding changes to the employees' terms and conditions no earlier than a year after transfer, the informal requirement to acknowledge Council recognised Trade Unions ends on the first anniversary. Given that the wording requires only consultation and negotiation 'with its [Barnet's] recognised trade unions', it may not include this Council's recognised Trade Unions. Given these limitations, the Council does not consider the Barnet Council policy provides a satisfactory alternative to the Trade Union protections already afforded by the TUPE Regulations, and the additional provisions recommended by this report.
- 4.5 The recommendations of this report were considered by the Procurement Advisory Board on 13th September 2016. The main issues raised have been incorporated into the approach recommended by this report. Specifically there was concern that the Procurement Strategy Manager would be placed into a position of making a political rather than a professional decision with regard to Trade Union involvement in the procurement process. This has been addressed by setting out clear guidance (see 3.9 above) and a recommendation that the CSO's are amended to place the delegated authority with the Executive Director (Finance & Resources).

- 4.6 There was also concern that small providers would be put off from submitting tenders if they had not previously had union recognition arrangements. The criteria question suggested addresses this concern as includes the potential for companies to demonstrate how they effectively engage with their workforce either by recognising Trade Unions or by other approaches.

6. CONCLUSION

- 6.1 The recommendations of this report address the issues raised by the Trade Unions with regard to tender processes that involve the TUPE transfer of council staff.
- 6.2 The recommendations reflect the council's positive approach to working in partnership with our recognised Trade Unions and provide for an appropriate level of involvement in tender processes as well as ensuring that assurances are sought from contractors regarding how they plan to engage and communicate with staff.

7. FINANCIAL & OTHER IMPLICATIONS:

7.1 Financial Implications:

Any conditions placed on providers has the potential to restrict the number of interested providers. Any potential restriction could impact on the potential competitiveness of the procurement process and may therefore have financial implications.

Finance Officer Consulted: Nigel Manvell

Date: 31/10/16

Legal Implications:

The legal implications are set out in the body of the report and in the attached appendices.

Lawyer Consulted: Isabella Sidoli

Date: 14/11/16

7.3 Equalities Implications:

The recommendations of this report promotes effective communication and engagement with staff and Trade Unions during TUPE transfer processes. This ensures that any equalities issues raised by transfer proposals can be considered and addressed appropriately.

7.1 Sustainability Implications

None

7.2 Any Other Significant Implications:

None

SUPPORTING DOCUMENTATION

Appendices:

1. Legal Advice