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Public Private Partnerships in Scotland - Protocol and Guidance Concerning Employment Issues

1 Introduction

- 1.1 The Scottish Executive and the STUC are committed to the elimination of the two-tier workforce. In making this commitment, the Minister for Finance and Public Services undertook to review issues of employment practice arising from Public Private Partnership (PPP) contracts across the public services in Scotland. Within the context of the Memorandum of Understanding between Scottish Executive (SE) and the Scottish Trades Union Congress (STUC) he established a joint, SE/STUC short-life working group to undertake such a review and to draft a protocol and guidance concerning employment issues that would apply to all public sector organisations (PSO's) in Scotland where they contract for facilities and services from 'service providers' under a PPP.
- 1.2 PPP is one of several procurement options available to PSOs: it is not the only, or preferred, option. It constitutes a relatively small proportion of public investment in Scotland. No PPP can proceed unless it is demonstrated to offer better value for money than provision by the public sector through rigorous application of the appropriate criteria.
- 1.3 This protocol seeks to ensure that sound and fair processes are applied by PSO's and potential private sector partners as the decision-making and procurement processes proceed, including consultation with relevant trades unions. In this protocol, "trades unions" is deemed to mean recognised trades unions and, where there is no recognised trades union, other representatives of the workforces which are affected under a PPP situation.
- 1.4 The recommendations of the Joint Working Group have been approved by Scottish Ministers and this document sets out the agreed protocol. It supplements existing PPP guidance in Scotland. Accordingly, compliance with the Protocol should be a condition of service specifications and subsequent contracts for PPP projects in order to support the use of funding agreements between the Scottish Executive and PSOs as an enforcement mechanism. It covers the interests of PSO's, PPP consortia, and sub-contractors and is seen as an important measure in removing the scope for two-tier workforces

2 Aims

- 2.1 The aims of this protocol and guidance are:
 - to emphasise the need for effective communication and consultation between PSO's and the relevant trades unions when considering prospective PPP schemes

- to make clear the expectation upon prospective and actual private sector service providers to demonstrate a constructive approach to employee relations, including recognition of appropriate trades unions.
- to ensure consistency of good practice in the handling of employment issues as a consequence of PPP contracts in Scotland.
- to safeguard the employment terms and conditions of individual public sector employees who transfer to private sector ‘service providers’ as a consequence of PPP’s
- to provide guidance on how PSOs should ensure that the terms and conditions of service of new employees appointed by contractors to PPP workforces post-transfer, should be such as to eliminate the scope for the creation of so-called “two-tier” workforces.
- To provide guidance on the pension provisions that should be offered to transferred employees and new appointees in PPP situations

3 Principles

3.1 The following principles underpin the more detailed guidance provided in this protocol

a) Procurement decisions should reflect quality criteria as well as other value for money factors. The procurement process should promote improvements in efficiency, effectiveness, and delivery of service. Procurement decisions should not be dependent upon dilution of employees’ pay and conditions of employment, and sub-paragraphs e), f) and g) below are intended to safeguard that outcome in local negotiations.

b) Where a public sector organisation decides that a PPP should include services which are currently being provided by directly-employed staff, the PPP process is, in principle and in practice, open to bids incorporating the use of such staff, for example DSO/DLO. Such bids would be considered on the same value for money criteria as other bids and overall the PPP would have to meet all the requirements of extant PPP guidance and any Scottish Executive funding conditions.

c) The quality of public services is enhanced by fair employment practices. All potential service providers should be required to demonstrate commitment to fair employment practices and a constructive employee relations ethos, including positive attitudes to trades union recognition and demonstration of best practice in health and safety and equal opportunities.

d) In all potential PPP situations the employees and trades unions affected should be fully informed and consulted in advance of, and throughout, the process.

e) The terms and conditions of transferred employees shall be safeguarded by application of the principles and accepted practice of TUPE. Changes to the terms and conditions of transferred employees should only be achieved by agreement between employer and trades unions.

f) Public sector organisations are expected to ensure no two-tier workforce in PPPs. The terms and conditions for any new appointee to the workforce should therefore be no less favourable overall than for transferred employees.

g) 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.

h) Transferred employees and new appointees to a PPP workforce should have access to the same or broadly comparable pension arrangements to those currently available to employees. Where possible, this shall be achieved through admitted body status.

i) The Protocol shall be applied to all PPP contracts. Its implementation will be jointly monitored and enforced.

4 Overview of the Protocol

4.1 PPP is one of a number of procurement methods available to the public sector. It is a method which invites private sector finance and service provision of a specified service over a long-term contract. It is defined in a series of ‘Treasury Taskforce’ guidance notes issued by HM Treasury, supplemented in Scotland by various guidance notes issued by the Scottish Executive.

4.2 The Protocol provides the following:

- a framework for a fair, consistent and transparent approach across the public services in Scotland in relation to consultation and employment practices in PPP situations
- 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 new appointees to a PPP service provider’s workforce post-transfer
- references to the key legislation and guidance covering these issues
- the main principles in regard to access to information and involvement of staff and the relevant trades unions

4.3 The protocol complements the policy and principles laid down in guidance from the Cabinet Office, HM Treasury and other Central Government and Scottish Executive Departments. Key sources of guidance are -

- Scottish Executive guidance on PPP, including procedures to be followed in the event of an in-house bid in a PPP situation;
- 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 ;
- the Treasury PFI Taskforce’s Policy Statement No 4 which sets out principles relating to the disclosure of information and consultation with employees and other interested parties;

5 Valuing the Workforce

- 5.1 The Scottish Executive and STUC are clear about the positive link between high quality services and good employment practices. Quality and good value will not be provided by organisations which do not manage workforce issues well. PSOs should therefore select only those service providers who offer employees a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality employees to work on the contract, and designed to integrate those employees within the workforce transferred from the PSO.
- 5.2 When considering a reorganisation of services that may involve a PPP project, the PSO should review the options for an existing in-house workforce in relation to future service requirements and procurement options.
- 5.3 Notwithstanding the commitment within this Protocol to ongoing good employment practices being established and maintained within all PPP contracts, 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 PPP contracts.
- 5.4 If it appears that a scheme may involve a transfer of undertaking as determined by TUPE regulations, and employees may be required to transfer to another employer, then the PSO should ensure that there is a level playing field and that the in-house team is provided with appropriate support to prepare an in-house bid.

6 Principles of Staff and Trades Union Involvement and Consultation

- 6.1 At the earliest stage, employees and trades unions should be consulted about options for providing services through procurement where this is being considered by a PSO. Full, effective and continuous communication is key to managing a PPP process well. PSO’s should consult their employees and

trades unions throughout the process, with full disclosure of information on all matters affecting the workforce.

- 6.2 Employees who are directly affected by a PPP scheme have an interest in potential bidders, as they may become their future employees. PSOs 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 before these are reported in the media.
- 6.3 Public services should ensure they follow the Treasury Taskforce Policy Statement No 4 - *Disclosure of Information and Consultation with Staff and other Interested parties*. The Treasury guidance makes clear those legal requirements and value for money criteria which all public sector procuring bodies should observe and take into account when awarding a PPP contract.
- 6.4 Openness should be the default approach, with restrictions confined only to details which are agreed with contractors as genuinely related to their commercial interests or otherwise necessary to ensure a successful procurement. The term “Commercial Confidentiality” must not be used as an excuse to withhold legitimate information from employees and trades unions. It is part of the process of managing a competitive procurement that the Project Team must remain in control of the nature and timing of how specification and bid information is made available, internally and externally.
- 6.5 Employee and trades union involvement and consultation should be handled by PSO's with care and be conducted in good faith. The role of trades unions is important in informing the decision-making of PSO's. The PSO should ensure that a strategy is agreed with employees and trades unions from the outset on exactly what information will be made available to them, and when, and how the discussions and reporting requirements will be handled. This strategy should form the most important part of the internal communications strategy which the PSO will adopt for a PPP scheme.
- 6.6 Contractors selected to provide services to PSO's and to take on public service employees should also have policies that ensure good communication and consultation with the workforce and their trades unions on key issues following a transfer.
- 6.7 The process of involvement and consultation must be transparent and fair. Any representations which employees and trades unions wish to make about particular bidders during the process must be formally communicated in writing or at a minuted meeting. There should be someone present from the PSO 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. Therefore, for the market to respond to trades unions' concerns, these must be communicated back to individual bidders by the PSO.

- 6.8 Trades union input into the appointment of a preferred bidder by the PSO should comply with the relevant procurement regulations. 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 criteria adopted by the organisation for selection or appointment), or use of information at the incorrect stage in the procurement process, could be challenged under the procurement regulations. The use of information supplied by the trades unions that is not capable of being substantiated could also expose the PSO.
- 6.9 Each PPP scheme is required by the guidance to set up a project board as the decision making group. Membership will include advisors and other interested parties, subject to its size being manageable. Trades union representation should be included on PPP project boards unless there is conflict of interest which breaches procurement regulations.

7 Access to Information and Evaluation of Shortlisted Bidders

- 7.1 Under European Public Procurement legislation, 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.
- 7.2 Contract award criteria can be selected on the basis of either 'most economically advantageous tender' or 'lowest price'. PPP contracts should not be awarded only on the basis of 'lowest price'. The best option will involve other factors such as whole-life cost, quality, and good employment practices related to service delivery. Contract award criteria therefore, 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 general award criteria to be used must also be clearly stated.
- 7.3 At the pre-qualification or selection stage, only workforce matters that affect the suitability of a candidate, as determined by those criteria, can be considered. As part of the qualitative evaluation of bidders who respond to the Final Invitation to Negotiate (ITN), the PSO should evaluate the bidders' proposals in relation to:
- the arrangements for managing the application of TUPE where transfer of employees is involved
 - the 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 including their approach to trades union recognition and facilities, such as the deduction of union subscriptions at source
- Health and Safety
- equal opportunities
- the principles contained within any human resources strategy which applies to the PSO in question (eg the Human Resources Strategy for NHSScotland).
- the identification and approach to use of subcontracted labour, including being assured that there will be safeguards to prevent individuals being wrongly classified as self-employed.

7.4 This information should be supplied by bidders as part of their proposals in response to the Final ITN. These factors should be evaluated by the PSO with the intention of establishing the quality of service delivery implicit in bidders' proposals.

7.5 Trades union representatives should be invited to hold discussions, through interviews for example, with all short-listed bidders. The PSO should facilitate the discussion with the bidders and agree with the trades unions who should attend from the PSO. Minutes of any meetings/discussions should be formally agreed; In addition, trades unions should be invited to provide a report to the PSO of the outcome of the discussion. It would be reasonable for the trades union representatives to discuss with bidders the PSO 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 human resources strategy, TUPE, staff management, pay, terms and conditions and training and employee relations) and their design proposals.

7.6 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 PSO, their discussions remain confidential. 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 PPP contract.

7.7 As part of the information and reporting requirements referred to in paragraph 6.5 above, the PSO in conjunction with its legal advisers, 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 PSO 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 PSO to verify the information already provided or claims made by the bidder in support of its bid.

7.8 The trades unions should be encouraged to discuss their views with the PSO and its legal advisers 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 PSO, the relevant sections referring to a particular bidder should be passed back to that bidder for comment. The PSO must, having first obtained legal advice, 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. 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 PSO to verify the information that it has been given before appointing the preferred bidder.

7.9 The PSO should take all the factors set out above: the information received in response to the ITN, 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 for money. In so doing, the PSO must observe the criteria which it has adopted for making an award in accordance with the regulations. The PSO 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 best overall value for money.

7.10 In order to demonstrate that the process is meaningful, the PSO 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.

8 Staff Transfers and TUPE (including Pensions)

8.1 PPP 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 PPP 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 must be told immediately. They must be advised in writing of the intention to transfer employees, when such a transfer might take place and that TUPE (and other guidance on pensions) will apply. When TUPE does not apply in strict legal terms the principles of TUPE should be followed.

8.2 Bidders must 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 will be able to maintain pensions broadly equivalent to those they currently receive. So far as PPP is concerned this requires that:

- transferring employees should be offered a broadly comparable pension by the new employer, 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.
- Where possible, transferred employees should continue to have access to the PSO's pension scheme through admitted body status arrangements.

8.3 Bidders should be also 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).

8.4 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.

8.5 Bidders must 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.

8.6 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 on a structured disputes procedure to enable the effective resolution of differences.

8.7 Once final decisions have been taken on the way forward regarding any transfer, employees and trades unions must 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.

- 8.8 If there is to be an external contract, employees must 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.
- 8.9 Every effort will be made to minimise the disruption for the employees involved who will be given written confirmation of terms and conditions, transfer dates and all other relevant information at the earliest opportunity.
- 8.10 The PSO will 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.

9 Treatment of New Joiners to a PPP Workforce

- 9.1 Where the service provider recruits new staff to work on a PPP contract alongside employees transferred from the PSO, it will offer employment on fair and reasonable terms and conditions which are no less favourable overall to those of transferred employees.
- 9.2 The basis of comparison to ensure that paragraph 9.1 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 PSO, or set out in national agreements.
- 9.3 There can be flexibility for negotiation between service providers and trades unions to agree local adjustments to working practices and terms and conditions for transferred employees and new appointees. The underpinning principle is to consider employees' terms and conditions (other than pension arrangements which are dealt with in paragraph 9.4 below) in the round - as a 'package'. This Protocol does not therefore prevent service providers from seeking to agree, through negotiation with the trades unions, a package of terms and conditions for new recruits which differs from that of transferred employees, so long as the overall impact of the changes 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.

- 9.4 The service provider will 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. The intention is that contractors and recognised trades unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this protocol, to be offered to new joiners.
- 9.5 The service provider will be required to offer new recruits to a PPP workforce access to the same pension arrangements as transferred employees. These arrangements must be the same as, or broadly comparable to those currently available to PSO employees. Where possible, this will be achieved by access to the PSO's scheme through Admitted Body Status, with the new employer making the requisite contributions.
- 9.6 In circumstances where paragraph 9.5 does not apply, one of the following pension provision arrangements must be offered:
- 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 Monitoring and Review

- 10.1 Throughout the length of the contract, the service provider will provide the PSO with information as requested which is necessary to allow the PSO to monitor compliance with the conditions set out in this protocol. This information will include the terms and conditions for transferred employees and the terms and conditions for employees recruited to work on the contract after the transfer, including sub-contracted areas of work.
- 10.2 Such requests for information will be restricted to that required for the purpose of monitoring compliance, will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the PSO will also support any Scottish Executive-sponsored review and monitoring programme on the impact of the protocol and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

11. Review of this Protocol

- 11.1 Consistent with its commitment to the Memorandum of Understanding, the Scottish Executive will keep the operation of this protocol under review with the STUC. It will also consult with representatives of PSOs and service providers to assist in this process.
- 11.2 An initial review of the effectiveness of the protocol in meeting its aims will be undertaken by the within the first year of its introduction, with a view to early resolution of any difficulties which emerge from that review.