

Protecting Public Service Workers

Procuring employment rights

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1. Introduction

1.1 The externalisation of public service workers – a neo-liberal agenda

The transformation of public services into competitive markets is part of the much larger, global, ideological shift towards a neo-liberal, economic model, that includes a global grab for public services accompanied by an attack on the size of the state and the role of public services, which is being played out at every level of world and national government and regulation.

Despite the spectacular failure of the neo-liberal model in the finance sector, the attack on the public sector has accelerated and the Coalition government is in the forefront of pushing back the boundaries of the state and transferring what is left to the private sector, using instruments such as the Health and Social Care Bill and the Localism Act 2011.

In this context, what is happening to public service workers in the UK is a microcosm of what is happening across the globe and what has already happened in other sectors like manufacturing and construction.

The size of the 'Public Service Industry'¹ in the UK – those public services already exposed to the market and run by the private and the community and voluntary sectors - is estimated to be at least £80 billion employing over one million public service workers, many of whom are in the services represented by UNISON. (Financial Times 2010)

The drive to privatise public services and to externalise the workforce has been accompanied by moves to deregulate employment and remove the limited protections won by unions from the last Labour government and from the European Union for privatised public sector workers. These changes are about exposing public service employees to crude,

¹ The Public Services Industry was defined by Dr. DeAnne Julius as “All private and third sector enterprises that provide services to the public on behalf of government or to the government itself”

market forces which will in turn put more pressure on the sustainability of collective agreements for those still directly employed. (Bach 2011) Thus when the Coalition government abolished the Two Tier Code in England, they sent a clear signal to the market that competition should be on labour costs. Contracts will inevitably go to the contractor who can reduce jobs, pay and conditions the most.

The impact of outsourcing on the workforce and on the quality of the services they provide has been generally ignored by governments (Whitfield 2010) but the clear evidence is that privatised workers experience lower wages and inferior terms of employment and that the quality of the services they deliver inevitably suffers².

Outsourcing of public services poses great difficulties for public service unions whose organisation has traditionally been around large, centralised employers. It leads to a fragmentation of employment, with workers often spread among many employers, or over many locations, on contracts of varying lengths. This creates multiple tiers of terms and conditions as successive waves of workers on differing contracts move between employers, in turn creating huge logistical demands on union resources.

However, the scale and pace of these changes is not inevitable and there is clear scope to defend the current protections and to increase trade union influence over future changes and agendas. There are also organisations that are taking an interest in sustainable procurement whose interests overlap with trade unions.

Under Labour, the trade unions were able to secure a number of employment protections which made a real difference to the terms and conditions of workers employed by private sector contractors. None were without problems but without them outsourced workers are at the mercy of market forces and in a race to the bottom on their terms and conditions as contractors compete to lower labour costs the most.

The challenge for trade unions is to develop a strategy for retaining the employment protections that are still in place, to organise externalised workplaces around that and to develop a longer term agenda for the regulation needed to curb market forces that adversely affect employment in public services.

A concerted effort to defend and improve these protections will help to set a floor for terms and conditions and ultimately reduce the attractiveness of privatisation, thereby also supporting in-house service delivery. This creates an organising challenge for trade unions both within privatised and directly employed workforces.

This report:

- Traces the global origins of the marketisation of public services
- Shows the impact of marketisation on employment
- Identifies positive procurement agendas
- Looks at the existing employment protections
- Suggests a trade union agenda for getting decent employment standards for outsourced workers

² See UNISON studies on Hospital Cleaning and School Meals in Davies (2005,2009)

2. The Values of Globalisation

2.1 Procurement is a tool of globalisation

The development of international procurement regulation and the growth of a market for public services have gone hand in hand with the development of global free trade. The World Trade Organisation oversees the Agreement on Government Procurement (GPA), which opens up public procurement markets across the world, indicating which market access opportunities must be open to international tendering. The GPA is updated at the various rounds of multilateral trade negotiations and it sets global procurement regulations which are then incorporated into national regulations, and in the case of Europe, in to EU regulations. The GPA is very detailed and covers issues such as the non-discrimination for products and suppliers; contract award criteria and the extension of procurement regulation to services and to sub-national governmental authorities such as municipalities and to public utilities. It even sets the thresholds at which procurement regulations are triggered.

The EU Procurement Directives embody the GPA regulations and set the framework for the UK. The most recent EU Public Service Procurement Directive³ was passed in 2004 and was transposed into UK law in January 2006⁴, applying to England, Wales and Northern Ireland. In the UK procurement is a devolved issue – allowing minor differences in the devolved administrations. This directive is currently being reviewed by the EU.

2.2 Neo-liberal subordination of social issues

There has been a long history of government procurement being used to achieve social and environmental policy goals in the UK and across the globe. As early as 1891 the UK House of Commons passed a resolution on Fair Wages that stated that all government contracts with private employers should stipulate that workers should get the generally accepted rates for the job. In 1926 government contracting made provision for work by disabled ex-servicemen from World War I which was later opened to the rest of the disabled workforce. In 1949 the International Labour Organisation adopted the principle of the UK Fair Wages resolution in Convention No.94. After World War II the emphasis – especially in the USA – was on tackling discrimination. The post-Apartheid government of South African has embedded policy goals to be achieved through procurement into its Constitution. And most recently, environmental considerations have risen up the policy agenda for procurement. (McCrudden 2004)

McCrudden describes how there had been an international acceptance “*that national public procurement was used to secure important national social policy goals (such as increasing social welfare) and that these social goals were not subject to international or (European) Community restrictions*”⁵. However, “*an alternative neo-liberal consensus*” emerged in the 1990’s that “*considered it was appropriate to separate the economic forces of globalization from the social and political realm.*”⁶ This consensus viewed everything from democracy to human rights and equalities as ‘luxury goods’ that could only be afforded from the fruits of economic progress, generated mostly by the finance sector.

³ Directive 2004/18/EC

⁴ The Public Contracts Regulations 2006

⁵ McCrudden 2007 p.106

⁶ Ibid p.107

The tension over the place of social and environmental policies has persisted in the EU especially when they come into conflict with the perceived operations of the ‘free market’. Thus, during the progress of the last EU Procurement Directive which was implemented in 2004, trade unions and civil society groups battled to get social and environmental issues taken into account during the procurement process. The result was Recital 33 and Article 26 (Appendix I) which gave some grudging recognition of the legitimacy of these issues during the procurement process and also mentioned “*the basic International Labour Organisation (ILO) Conventions.*”

Whilst this was an improvement on the previous procurement directives in practice it is still weak and largely subordinate to market forces. This has been demonstrated by the recent rulings of the European Court of Justice (ECJ) on the Directive for the Posting of Workers (Viking, Laval, Luxembourg and Rüffert) which clearly prioritise the rights of businesses to operate above the rights of trade unions to take industrial action and to safeguard their members’ interests. (See section 2.5 below.)

Meanwhile, the Conservative-led government has embarked on a programme of deregulation of employment protections that follows on from those of Thatcher and extends to procurement. It was Thatcher who abolished the Fair Wages resolutions and denounced ILO Convention No.94 in 1983, paving the way for the free market decline of jobs, employment terms and conditions under Compulsory Competitive Tendering (CCT). Thatcher was in denial about the application of TUPE to public services until forced to concede by a persistent trade union campaign and helpful ECJ rulings. And now the Cameron government has removed the Two Tier codes in England and is reviewing Fair Deal for Pensions and the Cabinet Office Statement.

The marketisation of public services is part of a global, neo-liberal agenda that emanates from the WTO. Trade unions need to be aware of where key decision making takes place in order to influence it whilst at the same time developing organising strategies to defend terms and conditions.

2.3 Labour government values

a. Procurement

The Labour government (1997 – 2010) invested in creating a large cadre of procurement professionals to develop and manage the growing market for public services. Time and again market failures have been blamed on poor public procurement rather than on the inherent flaws of a privatised market.

Labour set up the Office of Government Commerce (OGC) in 1999 to oversee the procurement technicalities of the marketisation of public services and to develop a procurement profession. OGC produced a huge body of advice and training and, with other organisations such as Partnerships UK, assisted in the development of new markets for public services. In addition every central government department was required to set up a procurement section and training programmes for civil servants and the more devolved procurement activities in the NHS and local government were greatly expanded.

Under Labour the OGC was also responsible for procurement policy, including representing the UK at international levels such as the EU, and for interpreting the application of any regulations. Procurement policy was treated as a highly technical subject that needed OGC experts, many of whom were brought in from the private sector, to interpret and implement. The Labour government went along with the very pro-market approach that came out of the EU. So, for example, when in 2007, the UK government was asked to comment on its failure to sign up to ILO Convention No.94 on labour clauses in public procurement for a periodic ILO review, the official answer was:

“The inclusion of labour clauses can add cost and bureaucracy to contracts, without any clear indication of benefits, and the contracting authority runs the risk of contravening EU rules. With this in mind, the UK Government has no intention to ratify Convention 94 at this present time.”

UK Government report to ILO 2007

This very orthodox answer from the OGC completely failed to acknowledge the social clauses already implemented by Labour around the two tier workforce and pensions, for example. It was symptomatic of Labour’s lack of joined up thinking on procurement and employment issues and ultimately revealed a failure to appreciate the wider value of protecting employment standards.

b. Social issues

As it advanced the market for public services Labour also introduced a broad set of measures to offer some protection to the terms and conditions of the outsourced workforce and undoubtedly to reduce resistance to privatisation. They are currently being dismantled by the Coalition.

Labour appeared to accept the link between decent employment and good quality services and its Two Tier Code stated:

“...there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well”⁷

Labour also recognised that improvements in equalities in the public sector needed some safeguard if they were not to be greatly diluted by a private sector which had much weaker equalities policies.

When Labour ended CCT in local government in favour of Best Value, they acknowledged that lowest price was not the most important criterion for contracts, since wider costs and benefits had to be taken into account as well. They also undid the Thatcher prohibition on taking workforce matters into account in local government contracts⁸ – a necessary precursor to introducing the Two Tier Code. However, they merely made exceptions to it rather than take the opportunity to remove it completely, which would have opened procurement up to more initiatives around decent employment.

⁷ Code of Practice on Workforce Matters in Public Sector Service Contracts Cabinet Office 2003 – now removed from government websites and archives. However, the slightly adapted local government version is here: <http://www.lge.gov.uk/lge/core/page.do?pageId=119749>

⁸ Contained in Part 2 Local Government Act 2 – [LG ACT 1988 !!!!](#)

Labour tackled some of the shortcomings of TUPE (Transfer of Undertakings (Protection of Employment) Regulations 1981) by ensuring that TUPE was generally presumed to apply even if not strictly legally. (Cabinet Office 2000) This ended a period of intense litigation over whether or not TUPE applied to individual contracts and gave the private sector greater certainty about what was required of them in contracts.

Important pension protections for transferred staff were added in 1999 and further clarified in 2004, (Treasury 2004) which required that transferred staff should receive a “broadly comparable” pension. From 1999 the Local Government pension scheme had allowed “admitted body” status to a range of organisations, including contractors, allowing employees to stay in the local government pension scheme even if they worked for a new employer. And similarly, the NHS pension scheme could grant Direction Body Status to employees transferred out of the NHS, however the civil service did not have similar provisions. The Best Value Authorities Staff Transfers (Pensions) Direction 2007 further strengthened the rights of transferring staff to enforce contractors obligations to provide pensions.

These protections highlighted the fate of new starters on contracts, as they were outside their scope. This became known as the two tier workforce – where people worked alongside TUPE transferees but on inferior terms and conditions and few had any pension provision at all.

UNISON launched a vigorous campaign to end the two tier workforce and produced strong evidence (UNISON 2002) of its existence and unfairness which helped to win support from the Labour Party. The Labour government eventually responded with an array of protections which varied in different sectors, different devolved administrations and different types of privatisation like PFI and PPPs. There were all sorts of problems with the complexity of the protections, not least that significant groups of staff – such as in social care where spot purchasing was common – were not within its scope. The government also arbitrarily excluded some of its pet, market projects like academies and Independent Sector Treatment Centres (see UNISON 2008 b). Nor were the Codes mandatory – they could be circumvented and were never properly monitored nor enforced. Their application was more consistent in the NHS, where a centralised system of guidance and accountability encouraged their implementation and where there was a ‘voluntary agreement’ with the main facilities management contractors, that guaranteed adherence to the terms and conditions if the NHS (known as Agenda for Change) for TUPE staff and for new starters. Also in Scotland where there was a protocol on PPPs as well as consolidation in local government legislation, as well as less outsourcing.

The greatest strength of the Codes was the message they sent to the market. They created the potential for a positive, enabling environment where responsible employers could make provision for pay and conditions and contractors knew the government favoured reasonable relationships with trade unions.

However, when the Two Tier Code were abolished in England in December 2010, there was no visible reaction from Labour politicians. More recently Ed Milliband did make an announcement at the Labour Party Conference that recognises the potential for procurement to achieve social objectives:

“... all major government contracts will go to firms who commit to training the next generation with decent apprenticeships. And none will go to those who don’t.”

2.4 Coalition government values

a. Procurement

The Conservative-led government has launched a programme of reform that they hope will see most public services procured from the private, community and voluntary sectors and which will require an army of procurement officials. However the OGC has been downsized and absorbed into the Efficiency and Reform Group (ERG) which is part of the Cabinet Office, directly under the Cabinet Office Minister, Francis Maude and Chief Secretary to the Treasury Danny Alexander, a more direct political positioning. The huge resource of the OGC website has been archived and is now rendered practically useless as it does not even have a search facility.

Central government departmental procurement for a range of goods and services has been centralised in order to give Whitehall additional leverage with its buying power when negotiating with suppliers and Maude has also negotiated a modest reduction in costs for existing central government contracts with the largest suppliers, which includes public service contracts.

The Government's attitude is reflected in its response to the EU Green Paper on Modernising Procurement which identifies 4 key priorities that are mainly deregulatory:

- Allow temporary exemptions for employee-led organisations/mutuals
- Reduce 'lengthy and burdensome' procurement processes
- More flexibility for purchasers to follow best commercial practice
- Support SME access to public procurement

b. Social issues

Francis Maude, Cabinet Office minister, has led the reform of procurement and under the guise of opening up the public service market to Small and Medium Sized Enterprises (SME), he has begun to dismantle employment protections and loosen up on equalities provisions, arguing that they are too burdensome for smaller enterprises.

The government did consider whether to retain the Cabinet Office Statement of Practice in the Public Sector and the annex to it - A Fair Deal for Staff Pensions. Removal of the pension provision would have a significant impact on TUPE transferred workers, who would lose their future pensions rights. It would also end the export of final salary pensions from the public to private and voluntary sectors. Both Admitted Body Status to the Local Government Pension Scheme and Direction Body Status for transferred NHS staff could be affected. However, Fair Deal appears to have survived the recent negotiations over public sector pensions.

The Two Tier Code for England was removed in December 2010, followed by the Code for Local Government in March 2011. However, procurement is a devolved issue and the Wales Assembly still has it under review and in Scotland the anti two tier provisions set out in the

PPP Protocol and the S52 statutory Guidance for Local Authorities under the Local Government in Scotland Act remain in force for now.

It should not be assumed that this policy of deregulation is being done at the request of all the private contractors. Whilst bodies like the CBI and BSA support deregulation and welcomed the scrapping of the two tier codes, established contractors also want to protect their market dominance and do not necessarily wish to compete on labour costs. In a case study report commissioned jointly with UNISON and the Centre for Public Service Partnerships, a group of major contractors supported the view that a race to the bottom does not benefit anyone, and that outsourcing can produce higher quality public services when there is good workforce practice and the workforce is fully engaged in procurement, service design and delivery. (CPSP 2010) Now that the regulatory environment has changed, these contractors will have to compete on labour costs along with all the other companies in the marketplace.

The government has replaced the Two Tier Code with a weak, voluntary code – ‘Principles of Good Employment Practice for Government contracting authorities and suppliers’. This sets out six entirely voluntary areas: Government as a good client; training and skills, a commitment to fair and reasonable terms and conditions; equality; dispute resolution; employee engagement. However an accompanying note to suppliers reveals the government’s real intentions:

“ These principles should not act as a barrier to those wishing to contract with central government as these principles are not mandatory, nor will their adoption be part of the formal procurement or decision making process. Therefore, there is no obligation on suppliers to implement the principles and contracts will still be awarded on the basis of value for money and not on the basis of who signs up to the principles as these are a voluntary set of principles.”

Cabinet Office 2010

Removal of the Codes does not prevent responsible, contracting authorities from maintaining such clauses in their contracts – but alongside the financial pressure they are under, such approaches will be increasingly difficult to maintain, without strong trade union pressure and campaigning.

The Conservative led government’s deregulatory zeal has not, however, extended to the London Living Wage, on which it has remained silent. The London Living Wage is a clause included in GLA and some other public contracts that sets a minimum wage specific to London that is substantially higher than the national minimum wage. Politically, the London Living Wage, which was originally introduced by Ken Livingstone, is crucial to the Conservative Mayor of London who has pledged support for it, as no mayor can afford to renege on a policy that has such well organised, popular support. This pragmatism signals a more ‘political’ and opportunistic approach to procurement.

Before the election the Conservatives announced they would rein in TUPE but this has now taken a lower priority, whilst they pursue more labour market deregulation in Europe .

The Conservative led government, with implicit support from the Liberal Democrats, is removing employment protections that will leave public service employees at the mercy of market forces. The contradictory approach to the London Living Wage can potentially give some leverage in support of those contracting authorities that wish to continue setting employment standards in their contracts.

2.5 European values

European Directives create the framework for procurement and labour market regulation within which national governments must operate. Public procurement has been a battleground between free market forces and supporters of social considerations but the rights of economic operators have tended to win out over the interests of workers and public service users. This has been particularly evident in recent judgements of the European Court of Justice.

Four recent European Court of Justice (ECJ) judgments pose serious problems for the advancement of social rights through procurement: Viking, Laval, Ruffert and Luxembourg. These judgments assert the rights of economic operators over member states and their industrial relations systems and values, particularly focussing on the freedom of association, the right to collective bargaining and the right to strike. They are bound up with another Directive for Posted Workers that was meant to create minimum employment standards for workers who were temporarily working in, or 'posted' to another European member state. Instead, the judgements perversely create a ceiling above which contract provisions and collective action cannot be justified. These judgments have the potential to undermine labour standards and allow social dumping⁹.

The main defence that UK trade unions can deploy is that so far, there have been no posted workers used to provide public services. Public services by their nature, are not likely to be 'temporary' and the fact is that there are plenty of European companies working in the UK public service market such as ISS, Sodexo and Veolia, that all have UK subsidiaries that bid for and win contracts. So a Posted Workers situation does not appear likely in this context.

The TUC advocate several approaches to address both the social deficit at the heart of the EU and more specifically the challenge of these judgements. These include the adoption of a social progress clause in EU Treaties that will confirm that economic freedoms and competition rules do not take precedence over social rights and revising the Posted Workers Directive so that amongst other things, it restores the ability of national governments to use national employment laws and procurement arrangements to protect posted workers on the same basis as national or migrant workers. (TUC 2011)

The current revision of the EU Procurement Directives has had support for the social side of procurement – from MEPs such as the Green MEP Heide Rühle and from a network of

⁹ A definition of Social dumping can be found here

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/SOCIALDUMPING.htm>

fair trade, environmental and human rights groups. All have a common interest with trade unions in relaxing the strict market interpretation of procurement that has tended to prevail. (see section 4 Sustainable Procurement).

3. Employment in the public service market

3.1 Public sector employment standards

Compared with the private sector, employment in the public sector tends to be characterised by strong trade unions, relatively centralised collective bargaining structures, a more equal distribution of pay across grades, stronger equalities policies and stable employment where workers stay longer in jobs. (Brandt and Schulten 2009) A report on women in the Northern Ireland economy notes that, “*Terms and conditions of employment are often better for women in the public sector including with better pension provisions.*” (Hinds 2011)

Partly as a result of the more favourable working environment, the public sector “*became a reservoir for decent jobs for low and medium qualified workers*” (Gyes 2009). These are the very workers most likely to be outsourced to the private sector and who have the weakest market power and are in occupations overwhelmingly undertaken by women. In fact, women are twice as likely as men to work in the public sector and four in 10 women work in public-sector occupations.

Inequality in private sector pay is illustrated by a recent study into executive pay that found that “*none of the ‘public service industry’ organisations we examined paid their CEO less than 59 times UK median earnings*” and that at the other end of the pay spectrum they also paid their executives much more than the highest paid public sector employee:

“For example Serco, which receives over 90% of its business from the public sector, paid Christopher Hyman an estimated £3,149,950 in 2010. This is 6 times more than the highest-paid UK public servant and 11 times more than the highest-paid UK local authority CEO.” (One Society 2011)

3.2 The impact of competition

Once public services are opened up to market forces, companies can either compete to win contracts on quality and innovation, or they can compete on labour costs, which inevitably leads to a downward spiral with deteriorating wage and employment conditions. “*In order to avoid competition that is primarily carried out at the expense of the employees, liberalised markets need a strong labour regulation that creates a common level playing field for all competitors.*” (Thorsten 2009) And like any other market, the effects are worse for those with the weakest market position, including those on the lowest pay. Box 2 illustrates what has happened to pay in the social care market, where a recent study shows that it has sunk so low that around 9% of workers are being paid less than the minimum wage.

Commenting on the impact of the market on the NHS, Colin Leys found: “*From the point of view of the staff, work got harder while conditions got worse.Support staff like cleaners and cooks found themselves transferred to outside firms on lower wages and inferior terms of employment, typically non-unionised.*” (Leys 2001)

In a report of the link between equal pay problems and the marketisation of public services it was found that:

“ the link between privatisation and pay inequality is three fold. First, market testing and Compulsory Competitive Tendering exercises tended further to weaken women’s disadvantaged position in the labour market at the point of transfer. In the second place, the ongoing operation of outsourced services or of defensive arrangements to maintain services in-house often entrenched pay inequality. Finally tensions between and defects in equal pay law and TUPE potentially create hurdles for women seeking to bring equal pay claims following transfer.” (Jaffe, McKenna, Venner 2008)

When it dismantled the Two Tier Code and began a review of Fair Deal for Pensions the Coalition government sent a clear and urgent signal to the market that competition should be based on labour costs.

Once market forces are unleashed their effects are not confined to the private sector but also impact across all providers. This has been the experience with school meals, social care and hospital cleaning, where exposure to the market also led to job and pay cuts in the public sector as well and to a serious decline in service standards across the service. ¹⁰

Box 1: Employment in the Social Care Market

The social care market is a stark example of what happens to public service workers when they are exposed to the full force of the market. Social care has been transformed from 90% publicly provided in the 1980’s to 90% privately owned today. It has also been subjected to the refined market processes of private equity providers who tend to be “short-term holder of assets, seeking fast returns on investments” (Gosling 2008) which typically means that they lay off workers and reduce their pay and conditions before they sell companies on at a huge profit. Lord Myners, a finance minister in the last Labour government commented on private equity that, “The one party that is not rewarded is the employees, who, generally speaking, suffer an erosion of job security and a loss of benefits.”¹

Table 1 compares the pay rates for social care workers across the public, private and voluntary sectors between 2008 and 2010. It shows that the pay of care workers in the private sector actually fell for both senior and basic grade care workers, during a time of rising inflation. UNISON evidence also shows that in addition, private sector staff typically also have to pay for their own uniforms, phones and travel between clients.

Table 1: Public and private pay rates in social care*

Job Role¹	Private	Community Voluntary	Public
Care Worker	Up to NVQ1 - 2		
2008	£6.30	£7.04	£6.80
2010	£6.00	£7.03	£7.73
Senior Care Worker	NVQ2+		
2008	£6.75	£8.34	£9.11
2010	£6.70	£8.08	£10.69

*Median Pay Rates (NMDS-SC, Dec 2008 – Feb 2010)

3.3 Community and voluntary sector

The community and voluntary sector are also experiencing a squeeze from competition as their work is increasingly contractual and they become players in the market for public services, rather than being grant funded as they were previously. The effects are well documented, “*Faced with greater market pressure, third sector bodies begin to behave like private sector companies.*” (Cunningham 2007; Davies 2007) Even employers who previously kept public sector terms are now being forced to make cuts to pay and to reduce conditions, or risk being undercut when they bid for public service work and losing contracts. As long as the pressure to reduce costs is paramount, then the lowest bidders will win contracts.

This was illustrated when the flagship employee-owned, Central Surrey Health failed to win the first major contract that it bid for, a five year, £500m contract for community services, which instead went to a private company Assure Medical, which is majority-owned by Virgin Healthcare. (Butler 2011)

3.4 Subcontracting

Subcontracting is a tool of globalisation, common in manufacturing and construction, but not as widely recognised in public services. As many as 90% of UK workplaces, public and private, subcontracted at least some or part of their work, according to the British Workplace Employee Relations Survey.¹¹

Subcontracting poses particular problems for employees and for their trade unions. Jane Wills found that, “*Subcontracting divorced these workers from the people who made decisions about them and for whom they worked*” and “*is an effective way for employers to cut costs, shed responsibility, increase flexibility and disempower the workers involved.*” (Wills 2007) Subcontracting has contributed to the growth of vulnerable employment as it also weakens the bargaining power of employees.

The PIQUE study found that for public services, “*union density is markedly lower at the newly established subsidiaries and among the subcontractors providing outsourced services.*” (PIQUE

¹¹ As quoted in Wills 2007

2009) The problems of subcontracting are particularly evident in PFI projects, where the soft facilities companies are often subcontracted to the Special Purpose Vehicle (SPV), which is a shell company specifically set up to finance and run each project. Whilst the contractor employs the public service workers, it works within the tight, financial constraints set by its contract with the SPV.

The London Living Wage campaigns recognise the dichotomy of direct and indirect employers and take their campaigns to both - to the chief executives of the contracting organisations – whether it is Homerton Hospital or Barclays Bank – as well as to the contractors. Subcontracting does not just happen at the level below the public authority, but can continue down a chain of providers.

Trade unions in other sectors and other countries¹² have developed strategies to curb the harmful effects of subcontracting and public sector unions need to learn from them in order to develop effective public service strategies¹³.

Understanding how subcontracting works strengthens the case for engaging in the procurement process and for holding public authorities to account for the terms and conditions of the organisations they indirectly employ to provide services. It is essential that all contract provisions clearly apply to subcontractors as well as to contractors.

4. Sustainable procurement

4.1 Treatment of Social and Environmental Issues

As the market for public services has grown so too has the interest in its effects and in the potential for it to achieve social, environmental and ethical goals. Organisations as diverse as ethical trading and human rights groups share an interest in ensuring that the market for public goods and services is sufficiently regulated to be able to reflect their interests and values.

There is just one section within the European Public Procurement Directive that covers social and environmental issues together (see Appendix I), so there is a powerful, shared interest in getting these issues acknowledged in both the current revision of the directive and in its interpretation.

Environmental issues have progressed much further and faster than social issues and within social issues those concerning the workforce have been the hardest to take forward. The task now is to build on the progress already made and to make it simpler and clearer for employment issues to take their place in responsible procurement.

A helpful term, Sustainable Procurement, has been coined which recognises the wider policy aspirations of government and public authorities who seek to achieve a balance between the

¹² For example see this article on subcontracting and health and safety for public construction contracts in Spain <http://www.eurofound.europa.eu/eiro/2002/12/feature/es0212205f.htm>

¹³ See also discussion in Wright 2011

three pillars of sustainable development - economic, social and environmental - when procuring goods, services or works.

4.2 Green procurement advances

There has been a marked difference in the way that 'social' issues have been treated in comparison with 'environmental' issues. The European Commission produced a guide to green procurement as long ago as 2004 which was followed by a comprehensive set of tools and advice that include a helpdesk and a monthly newsletter. The EU Commissioner for Environment says:

“Europe's public authorities are major consumers. By using their purchasing power to choose environmentally friendly goods, services and works, they can make an important contribution to sustainable consumption and production – what we call Green Public Procurement, or GPP.”¹⁴

Furthermore, targets have been introduced for achieving Green Procurement, “At EU level the European Commission set an indicative target that, by 2010, 50% of all public tendering procedures should be green, where ‘green’ means compliant with endorsed common core EU GPP criteria.”¹⁵

There is no equivalent clear policy or guidance for social issues and for example, it took the Commission until 2010 to even produce a guide – ‘Buying Social’ (EU 2010) – and this guide is anything but clear about how social issues can be included in public procurement. Rather it leaves a grey area of uncertainty that inhibits procurement officers from including social issues, for fear of failing to comply with EU regulations and of being open to challenge from contractors and the European Commission.

Social issues are further disadvantaged in comparison with green issues by the fact that there are restrictions around the stage of the procurement process at which social issues can be considered and they must always relate to the ‘subject matter of the contract’. The EU guide buying social says:

“..... labour conditions of the workers involved in performance of the contract are not technical specifications or selection criteria within the meaning of the Procurement Directives. In addition, given that such social considerations are difficult to link to the subject matter of the contract, it would generally not be possible to include them in the award criteria for the contract (except as an ‘additional criterion’ to make the difference between two equal tenders).”
EU 2010

And the Scottish government comments:

“The need to relate factors to the subject matter of the contract means that the opportunities for incorporating social issues into public procurement are more limited than is the case for environmental issues.”

¹⁴ http://ec.europa.eu/environment/gpp/index_en.htm

¹⁵ http://ec.europa.eu/environment/gpp/gpp_policy_en.htm

(The Scottish Government 2011)

UK guidance on social issues is similarly restrictive. After producing a guide that focussed on what could not be done (OGC 2006) the Office of Government Commerce, the guardians of procurement policy and practice, were instructed by the Labour Minister responsible for procurement at the time, Angela Eagle, to produce a more enabling guide, '*Buy and Make a Difference*', but this too showed procurement as a minefield of restrictions. (OGC 2008 a)

There is scant recognition of the economic value of the wider social objectives of government bodies that could be furthered through procurement.

The EU guidance does not allow the explicit consideration of social and environmental issues until a late stage of the procurement process when technical specifications around the performance of the contract are being formulated.

The case for widening the scope of the 'subject matter of the contract' to include wider social objectives – such as employment standards - is made by the Informal Network for Sustainable Development in Public Procurement, of which UNISON is a member. In its response to the EU Green Paper 'On the Modernisation of EU Public Procurement Policy' the Network state that public authorities should be allowed to reference their social and environmental procurement objectives in the subject matter of the contract. Not only does this make procurement a tool of public policy but by putting these requirements upfront the procurement process will be more transparent and allow authorities to openly judge contractors on their ability to meet these criteria¹⁶. (Informal Network 2011)

Trade unions can build on the precedents set for green procurement to advance social issues.

4.3 Equalities Downplayed

Equalities should have a high policy priority. Equalities and non-discrimination are founding principles of the European Union and have been further strengthened in subsequent treaties. Article 2 of the Treaty of the European Union states that the EU is:

"founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." The member states share a "society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

However the Conservative led government rejected the opportunity to promote equalities when they abandoned the Labour government's suggestion that procurement could be used to promote equality in the 2010 Equality Act:

¹⁶ The legal basis for widening the subject matter of the contract and for enabling social and environmental policy goals to figure more prominently in procurement is well argued by Client Earth <http://www.clientearth.org/sustainable-public-procurement-briefings>

“ 5.21 We do not believe it is necessary to impose burdensome additional processes on public bodies telling them how to conduct their procurement activity: they will be judged on the outcomes that they deliver.”

Promoting Equality through Transparency 2010

Furthermore in February 2011 the Cabinet Office issued a worrying guidance note that effectively instructs contracting authorities not to take equality criteria too seriously:

“Contracting authorities should not place disproportionate or unnecessary “selection” criteria or marking schemes including those related to equality, on economic operators.”
(Cabinet Office 2011a)

The note also says that the European Commission (EC) *“has raised concerns about the manner in which contracting authorities have taken into account equality-related matters in some procurement processes.”* Another signal that social issues – even those like equalities that are legitimised as core European values – should not stand in the way of the interests of economic operators.

The Women and Work Commission identified the potential role of procurement to help achieve gender equality and recommended that:

“Procurement in both public and private sectors should be used to encourage diversity and equal pay practice”. (Women and Work Commission 2006)

This was particularly important as there is evidence of the detrimental effect of privatisation on women, which has, for example, been a key factor contributing to the vast backlog of equal pay cases now before the Employment Tribunals. (Jaffe, McKenna and Venner 2008).

The Public Sector Equality Duty for England, Scotland¹⁷ and Wales includes a requirement for public authorities to ensure that their procurement policies and practices comply with the general and specific equality duties embodied in the Equality Act 2010 and that where their functions are undertaken by an external supplier, both the authority and the contractor have individual responsibility for meeting the duty.

And yet equalities are treated with the same caution as other social issues in procurement. And while there is some clarity on promotion of equalities for particular disadvantaged groups of service users for specific services, there remains the continuing difficulty of promoting good equality practice for the workforce, which is rarely ‘the subject matter of the contract’. For example, the OGC produced a guide devoted to equalities in procurement which gives an example of how a contractor may comply with a public authority’s equality and diversity policy, which is narrowly confined to where contractors’ employees work alongside public sector employees:

“ In a procurement for catering services in a central government office where the staff performing the contract will be on Government premises and have contact with the department’s staff in the building, the procuring department included as a contract condition

¹⁷ Scotland has separate Equality Duty Guidance

that the supplier's staff delivering the contract must do so in line with the department's equality and diversity policy.”
(OGC 2008b)

Despite this, McCrudden (2010) remains optimistic and comments that, “*The links between procurement and equality policies have increased significantly in Britain in recent years.*” He says the “*political approach adopted by New Labour has led to a change in attitude*” and cites both the move away from CCT and “*the development of the public sector equality duties*”. The question now is whether trade unions can prevent the Conservative led government from undoing this progress.

There are examples of excellent equalities practice including the GLA; Transport for London; the Olympic Development Authority and a group of local authorities in the West Midlands¹⁸ which established a common standard for equalities. McCrudden (2009) says that “*Public bodies need to be encouraged to think how the procurement function can be structured to deliver both the goods or services and equality*”.

Trade unions can play a major role in building on existing best practice in equalities and in extending it for the benefit of the workforce. If trade unions are not proactive then the momentum will go with EU and Conservative policy to downgrade equalities.

4.4 Human Rights Opportunities

The Human Rights lobby, under the auspices of the United Nations, has turned its attention to corporate social responsibility, culminating in the report of its special adviser, John Ruggie, “*Guiding Principles on Business and Human Rights: Implementing the United Nation : Protect, Respect and Remedy Framework*” in which there is an explicit recognition of the importance of procurement. Principle 6 says:

“States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.” (Ruggie 2011)

The Scottish Human Rights Commission engaged with the Scottish government on human rights in the commissioning and procurement of social care services. Their submission recognises the impact of commissioning and privatisation on employees and two of the three problems with social care commissioning and procurement which they identify are:

*“Secondly, the **decision to tender or re-tender social care services may in some cases systemically drive downward, rather than upward, standards of service provision.** Re-tendering exercises can be seen to cause a breakdown of co-operative relations and partnership between providers and contracting authorities as well as*

¹⁸ See the West Midlands
<https://wmf-commonstandardforequalities.gov.uk/wmf/portal.nsf/fcontent?readform&docid=SD-BDEX-7DXCUZ&contentid=1.003>

information sharing between voluntary providers. Furthermore, systematic re-tendering upon expiry of contracts may provide a disincentive to providers to invest and develop their workforce and re-tendering can lead to the casualisation of labour as staff are transferred from one employer to another.

*“Thirdly, there are concerns that poorly designed procurement strategies and a **prioritisation of cost considerations over quality considerations may further drive down standards**. Historically compulsory competitive tendering led to deterioration in service quality chiefly as a result of the severe downward pressure on pay and conditions of staff. It must be ensured that the same processes do not re-emerge when considering what constitutes best value and that there is a common understanding of service quality.”* (Scottish Human Right Commission 2010)

This led to the integration of human rights in the guidance to commissioners. (Scottish Joint Improvement Team 2010) Whilst employment conditions are not their primary objective, the Scottish Human Rights Commission is sympathetic to them and receptive to closer working with trade unions.

The European Group of National Institutions for the Promotion and Protection of Human Rights responded to the consultation on the European Commission’s Green Paper on the Modernisation of EU public procurement policy (EU 2011). The barriers to the full implementation of human rights in procurement which they identify are the same barriers that make it difficult for employment standards to be included in procurement. However, they also advocate two measures that would raise labour standards:

*“A promulgation of general contract performance clauses at an EU level, **particularly those relating to employment and labour conditions of workers** would give contracting authorities throughout Europe a readily accessible and objective standard by which contracts may be specified and contractors may be referred to.”* (EU NIHR 2011)

and

*“.. a Directive which makes it clear that objective and international minimum standards of employment and labour conditions can form part of the technical specification, the pre-selection criteria and award criteria in the public procurement process. **Permitting public procurement procedures to take account of employment and labour standards**, or such other objectively verifiable social or human rights standards, should not necessarily give rise to the risk of discrimination [between competing tenderers]. These standards would be issued to all parties interested in tendering for the contract thereby ensuring transparency and equal treatment.”* (EU NIHR 2011)

Human rights organisations are taking an interest in public procurement with its huge influence over the delivery of public services and over the people who both provide and receive them. Trade unions need to engage with them, not just because of the common ground they hold, but also to raise awareness of the employment agenda and its centrality to the quality of services and the wellbeing of users.

5. Employment Protections

There are a range of possible employment protections available for outsourced workers. Apart from TUPE they mainly consist of social clauses that are added to contracts during the procurement process¹⁹. These protections have fallen victim to the free market policies of successive Conservative governments.

5.1 TUPE

The Transfer of Undertakings (Protection of Employment) regulations, known as TUPE, strengthen the rights of staff involved in transfers, providing them with continuity of employment and the same terms and conditions as they had prior to the transfer. The Regulations also protect the accrued pension rights of transferred staff; protect against unfair dismissal and stipulate that trade union recognition and collective agreements in force at the time of the transfer must be maintained.

TUPE originates in the EU Acquired Rights Directive but its application to the public sector was resisted by Thatcher, despite having received advice from the Attorney General that it should apply. Before Thatcher was forced to accept TUPE, staff were routinely made redundant when services were privatised, and contractors only hired the employees they wanted and on inferior terms and conditions.

Arguably, TUPE was never intended for the modern world of contracting, where contracts regularly change hands after just a few years. It can create multiple tiered workforces whose individual terms and conditions depend on which contract they transferred with or whether they were directly employed. There is also evidence that employers find ways to get round TUPE so that in practice, it is a transitional protection²⁰ especially for the weakest in the labour market and their transferred pay and conditions rapidly erode.

TUPE has played an important role in protecting terms and conditions and preventing an absolute race to the bottom but trade unions need to think about how to maintain and improve it.

5.2 TUPE plus

Some trade union branches have been successful in negotiating TUPE-plus agreements which typically contain a guarantee of no diminution in pay and conditions during the life of a contract and an extension of protection to groups of staff not covered by TUPE, including new starters who are employed after transfer. They may also contain additional pension protections.

Transferring workers rely on the very real protections afforded by TUPE but these can be transitional and the fragmentation of contracting out services has led to multi-tiered workforces. TUPE merits some thinking about how it could be strengthened and some

¹⁹ Secondment has been an effective way of maintaining the terms and conditions of staff who remain employees of the public authority but work for a contractor.

²⁰ See NAO 2008

longer term, inventive consideration about just what kind of employment protections would be most helpful if there were ever a new piece of legislation.

5.3 Pensions

The transfer of pension rights alongside TUPE through the provisions of the Fair Deal for Staff Pensions and the ability of some staff to remain members of both the Local Government and NHS pension schemes has been an extremely valuable and valued right. If occupational pensions are stripped out of outsourced public services by abolishing these rights then there will be a huge cost to the workforce which could add to the pressure on the remaining public sector pensions. So protecting the right to pensions for outsourced public service workers is a key plank in the defence of public sector pensions.

5.4 Two Tier Codes

The Two Tier codes were introduced by the Labour government to compensate for a built-in defect of the TUPE regulations which left anyone working on a contract that had not been transferred from the public sector - new starters – with inferior employment packages that rarely included pension provision. The intention was to avoid the creation of a "two tier" workforce by contractors employing staff on less generous terms than those enjoyed by former public sector staff.

The Codes required that where a contractor recruited new employees to work alongside those staff transferred from the public sector, it would ensure that those employees were employed on a package of 'overall no less favourable' terms and conditions of employment, although the pension arrangements were much less favourable.

There was not one overarching Code, instead there was a patchwork of at least six different agreements operating across the public sector and across the devolved nations. The UK government did not show a great commitment to the Codes and made little effort to monitor or enforce them. However, their most powerful effect was to set a more level playing field for contracts where bids could not overtly be tendered on the basis of competing on labour costs. It also extended some minimal pensions provisions to groups of workers for whom the private sector had not previously made any provision at all.

5.5 Living wage

The Greater London Authority adopted an ambitious London Living Wage (LLW) for their direct employees and for employees working on contracts in the GLA group which recognises that the Minimum Wage does not meet even modest living costs in London. It is also updated every year:

"It has been taken forward as a key element of the wider GLA group Responsible Procurement Policy²¹, which was established to pioneer socially, environmentally and economically responsible procurement to deliver improved quality of life and better value for money for our people, our businesses and our city"
GLA 2008

²¹ Further information on the Responsible Procurement Policy is available www.london.gov.uk/rp

The GLA announce their policy in the notices for their contracts published in the Official Journal of the European Union (OJEU) where all contracts must be advertised, like this one for cleaning Trafalgar Square:

“As part of its best value duties, the GLA is committed to treating its employees fairly, and equally, encouraging its contractors to treat their employees fairly.”

The GLA has had to carefully navigate the restrictive procurement regime to achieve this, taking legal advice at every stage. They have had to balance the LLW against their duty of Best Value and seek dual bids from contractors – with and without the LLW. The Living Wage is included as a weighted criterion in their procurement.

“The scope for implementing London Living Wage is considered on a case-by-case basis for each contract, within the context of the Mayor’s overarching commitment to promoting the London Living Wage. Through this approach we consider the relevance and proportionality of London Living Wage provisions to the subject of the contract, its size and duration. Applying this case-by-case approach the GLA Group has implemented the London Living Wage across a number of support services, most notably cleaning, catering and portering contracts within the parameters of the EU Public Procurement Regulations and Best Value.”

GLA (2009)

The GLA has been extremely successful in introducing the LLW into both existing and new contracts and since 2006 has extended it to over 3,000 employees working for companies with contracts with the GLA Group.

Furthermore, the example set by the GLA has emboldened other public authorities to follow suit with implementation in several London Boroughs, the Olympic Development Authority and 14 Higher Education institutions in London as well as some authorities outside London.

The politics of this social contract clause are interesting and complex. The LLW was first introduced by Ken Livingstone in 2006 responding to a very effective campaign by London Citizens, a faith based, community campaigning organisation. Livingstone pledged to introduce the LLW across the GLA group that includes, Transport for London, the London Development Agency, London Fire and Emergency Planning Authority and the Metropolitan Police Authority. London Citizens were also successful in gaining the support of Livingstone’s successor, the Conservative mayor Boris Johnson who has continued with the policy.

The LLW has never fitted with the restrictive approach to social issues taken by the Office of Government Commerce. The OGC actually issued a thinly veiled threat to the LLW when they reported the European Court of Justice (ECJ) judgment *Dirk Ruffert v Land Niedersachsen*:

“This judgment means that imposing a contract condition requiring the payment of the London Living Wage to workers on a contract creates a risk of a legal challenge against the UK, on the basis that it is restricting the freedom to provide services. It is therefore recommended that such a minimum wage requirement should only be pursued on a voluntary basis.”

(OGC 2009)

Since the Conservative led government came to power they have been silent on the LLW, a social clause, not daring to challenge such a popular and well supported policy that could be pivotal in the next London mayoral election.

5.6 ILO Convention No.94

International Labour Office Convention No. 94 is intended to prevent the downward spiral of pay and conditions for contracted out public service workers. It is based on the UK's Fair Wages Resolutions and it requires contractors to respect the prevailing standards, including those set out in collective agreements. Thatcher 'denounced' the convention in 1983 as part of her efforts to deregulate and remove employment protections as a precursor to opening public services up to the market. It has long been UNISON policy for the British government to ratify it again. It is also a policy widely supported in the international labour movement.

ILO 94 has been ratified by 61 countries of which 10 are member states of the EU. However, the last review of ILO 94 conducted in 2008 found that it was poorly implemented.

The EU guide Buying Social does not mention ILO 94 but notes that the Procurement Directives do make reference to basic ILO conventions, that is the eight core ILO Conventions which have been ratified by all Member States. These set minimum labour standards that are generally exceeded by standards in Britain and Europe. The ILO believes that *"there is no contradiction between the requirements of ILO Convention No. 94 and the principles set out in the two public procurement directives."* (ILO 2008)

It would not be entirely straightforward to apply ILO 94 to the UK, not least because public sector pay and conditions are increasingly fragmented. However ILO 94 provides a meaningful statement of principle that has the potential to create an environment where public sector workers would be protected from the worst effects of the market and collective agreements would be supported. It is also a widely recognised labour standard, with broad labour movement support.

6. A trade union agenda for procurement

Trade unions need to follow a twin track strategy that fights for the direct provision of public services at the same time as asserting their rights and influence over procurement. To date, trade unions have broadly failed to develop effective organising strategies to influence the procurement process and to recruit and organise outsourced workers in the private and voluntary sectors.

6.1 Business and Trade union influence

Trade unions and other interest groups from civil society have a long way to go before they can match business interests that have an open door to government and are shaping the market for public services, the treatment of workers and the sorts of services that will be delivered.

The business lobby is well organised and well represented at all levels of national and international government. In the recent consultation on the revision of the EU Public Services Procurement Directive, 40% of the responses came from “*Economic operators ... and their industry associations*” whilst just 17% came from ‘civil society organisations’. Even member states and public bodies only amounted to 33%. (EU 2011)

And in the UK industry groups such as the CBI, the BSA and the PPP Forum are regularly consulted on policy by successive governments. There is no equivalent recognition of the legitimate concerns of trade unions and the workforce.

6.2 Reforms

The reforms needed for procurement mirror the reforms needed to curb the unfettered market forces that created the current global financial crisis. But both the EU and the British government have already placed the rights of companies and employers above the rights of workers.

The barrage of attacks on employment standards coming from the Conservative led government provide the context in which they have altered the public service market so that competition on contracts will be principally about cutting employment costs. A level playing field for employment conditions is needed, wherever public services are opened to the market, so contractors cannot simply compete through a race to the bottom on employment standards and ultimately service quality.

If trade unions do not seize this challenge then the terms and conditions of public service workers will inexorably decline as contracts are won and lost on the cuts that employers can achieve and ultimately this will rebound on the remaining, directly employed workers and their ability to maintain collective agreements.

Trade unions must be the champions of working conditions across public services and take the evidence and arguments to support this to every forum where procurement is on the agenda. And there are many organisations and movements who are already campaigning for a stronger emphasis on environmental and human rights standards in procurement that are sympathetic to employment rights but need support to take this agenda forward. Fighting for the employment standards of outsourced workers also provides a platform for organising.

A trade union agenda could contain:

6.3 Influence over procurement policy

- Locally – build on UNISON’s training and guidance on commissioning and procurement, by seeking to influence the procurement process at the earliest possible stage, before any decision to put services out to tender has been taken. This should include negotiating agreements with employers that guarantee consultation with the union on service review and service design issues before any key decisions are made. Unions also need to develop strategies for influencing commissioners of services .
- Trade unions need to place much greater emphasis on developing organising strategies for gaining greater influence over the procurement process, from the early

pre tender stages, through to options appraisal, challenging the business justification, and where appropriate influencing the active procurement stage.

- Trade unions need to devote more resources to identifying and challenging the widespread poor performance and value for money of many contracts.
- Engage with UK government and devolved administrations on procurement issues. Also national organisations such as Partnership for Schools (PsF) that have responsibility for guiding the outsourcing of schools through PFI and the academy programme and have influence over the way contracts for support staff are drawn up
- Work with progressive public authorities e.g. London Councils; the GLA; West Midlands Consortium on practical ways in which employment issues can be developed
- Work with EPSU and Network for Sustainable Development in Public Procurement for changes to the procurement directives and a more powerful role for sustainable procurement.
- Work for greater trade union involvement in trade agreements that affect procurement, including the WTO and guidelines produced by bodies such as the OECD

6.4 Building alliances

- Organisations campaigning to enable stronger social and environmental considerations to be taken into account in procurement can be sympathetic to setting decent employment standards. Amongst these are the Informal Network on Sustainable Procurement which is a loose grouping of environmental, fair trade and trade union groups and some Green MEPs who have worked together to develop an agenda on reform and a lobbying strategy for the European Parliament.
- Human rights commissions across Europe have started to engage with procurement issues and are also sympathetic to a trade union employment agenda.

6.5 Employment Protections

Trade unions need to argue for a level playing field on employment so that contractors do not compete on lowering labour costs and the quality of services.

- **Equalities** are central to the European Union treaties but are not given their due weight in procurement. Trade unions should work to get equalities the status that they deserve both for the users and providers of public services.
- **TUPE** protections are crucial for public service workers but it will need a concerted effort to maintain them against a hostile government.
- **TUPE plus** agreements are under threat from the restrictive climate around procurement but they represent a level of protection that can prevent public sector employment standards being undermined
- **Pensions** are a significant part of the public service payment package and every effort must be made to preserve the Fair Deal for Pensions
- **ILO No. 94** remains a common standard supported by many governments and trade unions and a valuable principle that establishes a level playing field for the pay of public service workers, whoever employs them

- **Subcontractors** can pose a threat to employment standards and it is important to ensure that they are not able to undermine and undercut terms and conditions and that procuring authorities can set standards which apply to them as well. Public service trade unions can usefully see how trade unions in other sectors have sought to deal with subcontracting.
- **Living Wage** campaigns for outsourced workers will become more important if the line is not held on other employment standards
-

6.6 A Forward agenda

Governments and policies change and trade unions need to develop a long term view of what, in an ideal world, would ensure that outsourcing was not a cheap option that undercuts employment standards.

- **Regulation** has been too easy to abolish for the incoming Conservative led government. Trade unions need to think about more robust systems of maintaining employment standards for outsourced workers.
- **TUPE and the Acquired Rights Directive** provide important protections but lead to complex and fragmented terms and conditions both for individuals and for employers. The Conservatives have not concealed their dislike for TUPE. Trade unions should take a longer view and think about what kinds of protections could improve on TUPE and also how to defend TUPE from the inevitable attacks that will come from the Conservatives.
- **Labour** introduced some important workforce protections but have not been vocal in defending them from the Coalition government attacks. There is a job to be done in getting Labour support for decent employment standards in public services and for the outsourced workforce.

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Appendix 1 Social and Environmental Issues in EU Directive

References to social and environmental considerations in the EU Procurement Directive 18/2004/EU

Recital 33

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

Article 26

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations.

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