

Overview & Scrutiny

Commissioning: Staff Terms and Conditions Review

**Report of the Commissioning: Staff Terms
& Conditions Scrutiny Task Group**

Commissioning: Staff Terms and Conditions Scrutiny Task Group Membership

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Contents

	Page No.
Task Group Membership	
Chairman's Foreword	
1. Background and Purpose of the Scrutiny	1
2. Methodology for the Review	1
3. Findings of the Review	2-9
A. Commissioning processes - What powers or duties does the Council have when commissioning providers in relation to staff terms and conditions?	2
B. Commissioning Models	3
C. Social Value	4
D. How does the Council ensure that there is a provider market?	4
E. How does the Council evaluate tenders and what account is taken of employee conditions?	5
F. How does the Council monitor the quality of services provided by contractors which may be affected by staffing quality or turnover? Does the Council monitor contractors' employment conditions and if so, how?	5
G. Homecare (Domiciliary Care) Staff	6
H. Scrutiny's Role in Quality Assurance	7
I. Terms and conditions of staff transferred from council employment to an external provider	7
J. Feedback from Unison – Commissioning Expertise	8
K. Feedback from Providers	8
4. Recommendations	10
Appendices	
• Appendix A - Documents reviewed as part of the Task Group Review	11
• Appendix B - Schedule of Task Group Activity	12



Chairman's Foreword

Councillor Kit Taylor
Lead Member, Commissioning:
Staff Terms and Conditions Task Group

This Scrutiny Task Group was set up following a request from the late Councillor Jim Parish who expressed concerns primarily regarding the pay and conditions of workers within the homecare sector but which soon expanded into a general examination of staff conditions following the commissioning of a service.

The expansion of the terms of reference coupled with changes in the Task Group membership and lead scrutiny officers has made this a challenging scrutiny and one which has run for far longer than usual but has allowed an examination into the commissioning process that may not have otherwise happened.

The recommendations that the Task Group have arrived at are simple and achievable even if they do not go as far as some Members may wish and allows a review of the process within 12 months.

I am grateful to all Members past and present who have contributed and would like to thank the service providers who agreed to be interviewed for their time and straightforwardness in assisting us.

Finally, I would like to thank all the officers and Cabinet Members for the information provided and especially the Scrutiny Officers for their guidance and patience in the preparation of this Report.

Commissioning: Staff Terms and Conditions Report

1. Background and purpose of the Scrutiny

1. The aim of the scrutiny was to examine what influence the Council has to ensure that those it commissions from are fair employers.
2. In July 2015, the Overview and Scrutiny Performance Board agreed to scrutinise the way the Council commissions services and what influence it has on terms and conditions of staff employed by external providers.
3. The scrutiny was initially prompted by concerns raised about the terms and conditions of some staff employed by the Council's contractors, in particular relating to the minimum wage, travel time, zero hours contracts and access to union representation.
4. It was agreed that the exercise would be led by the Scrutiny Board Member with responsibility for commissioning processes, Cllr Kit Taylor.
5. A Task Group was set up to look at:
 - What powers or duties the Council has when commissioning providers in relation to staff terms and conditions
 - Whether and how the Council monitors contractors' employment conditions
 - How the Council evaluates tenders and what account is taken of employee conditions
 - How the Council monitors the quality of services provided by contractors which may be affected by staffing quality or turnover
 - How the Council ensures that there is a provider market

2. Methodology for the Review

6. The scrutiny exercise started with an overview of commissioning from the Council's Director of Commercial and Change (COaCH) who has responsibility for commissioning, and the Head of Commercial. The Task Group was provided with information on the Council's commissioning

cycle, processes, the Procurement Code, options for delivery models and draft commissioning plans.

7. The Task Group went on to meet with those responsible for commissioning services within each service area (Strategic Commissioning Officers), as well as some of the managers who oversee specific services.
8. An important part of the scrutiny process was to hear from some of the companies commissioned to provide services for the Council, and discussions took place with a small group of providers including the account managers for IT, customer service and a domiciliary (homecare) provider.
9. Information was also sought on Transfer of Undertakings (Protection of Employment) (TUPE), employment legislation and the Council's contract specification.
10. A list of Documents reviewed as part of the Task Group review and a Schedule of Task Group Activity are attached as Appendices A and B respectively.

3. Findings of the Review

A. Commissioning processes - What powers or duties does the Council have when commissioning providers in relation to staff terms and conditions?

11. The Council has set itself the task of becoming an excellent commissioning authority, to source the right service from the right provider at the right price for the taxpayer.
12. There are hundreds of contracts with the Council, wide ranging in time, complexity and delivery. Although the Council's decision to become a commissioning authority is relatively recent, many services have been commissioned out for a long time, specific examples being domiciliary (home) care, the majority being small contracts and highway maintenance, which is a large, high value contract.
13. The Director of COaCH in his original briefing and subsequently the Head of Legal and Democratic Services made clear that the Council does not interfere directly with contractors' employees' Terms and Conditions and that it is a matter for all providers to decide and consult on their own employment practices. The Director and Strategic Commissioning Managers were clear that the Council commissions for outcomes and providers are responsible, through the contracts, for delivering those outcomes.
14. The Director pointed out that the delineation of responsibilities is not only important to ensure that outcomes are delivered effectively; it also avoids any expensive duplication between different teams or between the commissioner and the provider. Although, depending on the service, there can on occasion be small areas of overlap. It is key to the success of the commissioned service that the commissioner does not assume the role of the provider and vice versa.
15. However, the Director, Head of Legal and Democratic Services and Commissioning Managers were also clear that the Council can and does ensure that all providers comply with all relevant

legislative requirements, including those relating to employees including compliance with regulations relating to payment of the National Minimum Wage (NMW). The NMW applies to all employees regardless of age whereas, the National Living Wage (NLW) only applies to employees aged 25 and over. The NLW for these employees is the same as the NMW so we have referred throughout the Report to the NMW as this is the most appropriate description.

16. The Regulations relating to public sector procurement are stringent although, nationally, there is an increasing emphasis being put on the social value of award criteria. Social value is viewed as how the money a council spends on external contracts can help and support the local community. Examples could include volunteering by supplier members of staff, apprenticeships, work experience, using the local supply chain, or sponsoring a local sports event.

B. Commissioning Models

17. The commissioning programme has so far resulted in a variety of different models with different types of provider, for example:

- **The Voluntary and Community Sector (VCS)** - some libraries now being managed by community groups and the drug and alcohol service and Living Well are now being provided by a VCS provider.
- **The Private sector** - the Council's IT Infrastructure service is now being provided by Hewlett Packard (HP) and the shared customer service HUB has successfully transferred to Civica.
- **Partnership models** - the innovative Place Partnership Ltd is a commercial joint property vehicle wholly owned by six public sector partners in and around Worcestershire.

18. In general, the responsibilities relating to commissioned services are split as follows:

- Strategic and Lead commissioners have remained within service areas (mainly the Directorates of Economy and Infrastructure, Children's Services and Adult Services or joined with other partners such as the NHS) and are fully responsible for the **outcomes** delivered to service users and customers. This includes the initial setting of the outcomes and developing and monitoring the performance measures against those outcomes as well as monitoring of the quality of the services delivered.
- The Commercial Team takes full responsibility for the process of managing the market, sourcing the contracts and monitoring and managing the **commercial** performance of the service including financial and legal compliance.
- The provider takes full responsibility for the **delivery** of the services and will design and manage all elements related to that service including customer interaction, structure, staffing, price, income generation and collection within the boundaries of the contract to deliver the defined outcomes.

19. The commissioning cycle is made up of four stages: evaluate, design, source and review, this is a robust way of determining the most efficient and effective way of commissioning a service. Procurement rules are adhered to and Strategic and Lead Commissioners in each Directorate are responsible for outcomes, whilst providers are responsible for delivery.

20. Once an invitation to tender is published there is no ability to change it, except in limited circumstances, therefore market engagement is vital. The Regulations in relation to tendering are tight and aspects could be challenged if not adhered to.
21. The social value aspect of the procurement process is increasing nationally and the Director felt that criteria may change in time to reflect a greater emphasis on this aspect, in line with the Public Services ("Social Value Act 2012").

C. Social Value

22. The Director of COaCH has revealed that the Council are already looking to do more with the Social Value Act 2012 in commissioning. For example:
 - Implementing social value more consistently into the Tender process.
 - Officers formally measure annually how much of Council spend ends up in the local economy. The formula is an industry standard measure called Local Multiplier 3 (LM3). LM3 shows that for every £1 coming into the organisation the local economy benefits by £2.12 - this is a high figure as the theoretical maximum is £2.50.
23. The Chairman of the Task Group met with Council Officers on behalf of the review to discuss the Social Value Act 2012, how it was being applied in Worcestershire and what benefits it could bring to the Commissioning process. The importance of social value in the commissioning process has never been greater, at a time when budgets are under constant pressure, it is even more critical to remember that the lowest offer is not necessarily the best one and that worth cannot be judged on price alone.
24. The Social Value Act 2012 sets a legal requirement on public bodies to consider improvement of economic, environmental and social benefits when procuring services. As a commissioning body, Worcestershire County Council already has some good examples of using social value as detailed by the Director of COaCH. However, there is no clear statement, framework or agreed definitions of what social value means to the Council.

D. How does the Council ensure that there is a provider market?

25. Market analysis and engagement is a key element of commissioning. Prior to any formal procurement process, there is a requirement to understand the market, its strengths and whether there is a sustainable market to commission services from.
26. In relation to Homecare contracts, it was suggested to us that there could be a review of the market to ensure provider resilience, in fact a Review had already been commissioned by the Council and reported early 2016. This has also been monitored by the Adult Care & Well-being Overview and Scrutiny Panel. Some initial findings from the Review highlighted the financial challenges facing providers and the Council and the need to review the commissioning models and significant issues with recruitment and retention of staff.

E. How does the Council evaluate tenders and what account is taken of employee conditions?

27. The Director is clear that the Council does not engage directly with contractors' employees' Terms & Conditions; it is a matter for all providers to decide and consult on their own employment practices. The Council can and does require that providers comply with all relevant legislative requirements including those related to employees, and this includes compliance with regulations relating to payment of the NMW. The Council cannot go beyond this and make a contractor's terms and conditions a criterion against which to award the contract. This would potentially result in a challenge.
28. Across directorates, the tender process sets out clear expectations of providers including meeting NMW requirements and being able to demonstrate their track record as an employer. Staff are expected to be properly employed and trained.
29. The Domiciliary (Homecare) Contract Monitoring Team advised that all providers were subject to employment legislation, which includes the HM Revenue & Customs Regulations about ensuring the NMW is paid. The monitoring team checks staff pay rates and levels of travel time when undertaking a quality monitoring check.
30. The Task Group sought clarification on travel time payments for staff, this being one of the issues which prompted the scrutiny exercise and information was provided by the Council's Legal Services team. Taking domiciliary care as an example, the Council requires providers to ensure that staff salaries are no less than the NMW, taking time to travel from one visit to another into account. Depending on the provider, staff may be paid a higher rate for 'client' time, and a lower rate for travel time, but the average overall must be no less than the NMW.
31. The Council does not require the contractor to pay for travel time between the worker's home and the first/last visit of the day – recent European case law¹ has not yet affected this and in fact the NMW regulations specifically exclude time spent travelling between home and the workplace.

F. How does the Council monitor the quality of services provided by contractors which may be affected by staffing quality or turnover? Does the Council monitor contractors' employment conditions and, if so, how?

32. The Task Group met with Commissioning Managers across a range of service areas. The consensus is that the County Council is not the employer and is therefore not responsible for staff terms and conditions of providers. There is no follow-up to see how many employees continue with the provider after a defined period of time, since the Council is no longer the employer.
33. However, the example of highway maintenance was highlighted, where there are staff that have remained on their original terms and conditions after 3 or 4 contract transfers, helped by the fact that their skills are in demand.

¹ *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA*. In this case, the European Court of Justice held that where workers have no fixed workplace, the time that they spend each day travelling from home to their first customer and from their last customer to their homes should be counted as working time and not a rest period under the Working Time Directive.

34. The Council can and does require providers to pay at least the NMW. Commissioners are clear on expected outcomes. There is also an annual review of performance, against objectives with measured steps taken for any issues.
35. Commissioning Managers are clear that once a contract is in place, these elements are not proactively monitored, mainly because this would mean a 'huge resource commitment' – for example, the Directorates covering Adult Services and Health deals with over 70 providers.
36. However, service monitoring takes place through various channels, for example visits, spot checks, mystery shopper exercises and data analysis. Commissioning managers expect providers to demonstrate a culture of quality assurance.
37. Sub-contracting is more common as part of large contracts, particularly for specialised services. Contracts contain a number of controls and the Council's reputation is an important factor.
38. The Commissioning Managers who met with the Task Group would expect an open culture from providers, although a culture which enabled employees to report certain types of wrongdoing (whistleblowing) was not referred to in actual contracts.
39. Commissioning Managers pointed out that it was absolutely in the employers' interests to treat staff well and generally there was a relationship between how an organisation treats staff and the quality of work produced.
40. The providers who met with the Task Group were open in their praise for the Council monitoring teams and the good working relationships they build with council officers. Both the providers we spoke with and the Commissioning Managers reported that some new employee's terms and conditions may be more favourable.
41. Although staff could remain on original terms and conditions indefinitely, providers suggest that nationally, there is a trend to move towards the company terms as they were more favourable.

G. Homecare (Domiciliary Care) Staff

42. This scrutiny exercise was prompted by members' concerns about staff terms and conditions within the care sector in particular.
43. The Strategic Commissioner for services such as Homecare told us that within Adult Services and Health, providers were risk assessed using a range of criteria, including the number of hours' service provided, or whether the manager was new in post. There were spot checks on time sheets, wage levels and analysis of complaints. Intelligence was also gathered from those who actually saw the older person eg social workers and safeguarding mechanisms.
44. Providers receive annual monitoring visits, the detail of which depends on other intelligence received. If problems are discovered, the Council takes immediate action, which could be an unannounced visit the next day, and checks through the Care Quality Commission. Action taken would depend on the circumstances and sometimes problems were resolved by raising quality assurance. Suspension of business was an option used if necessary. The provider would need to

prove it was once again compliant, although repeated fails prompted questions about whether the provider should continue to be used.

H. Scrutiny's Role in Quality Assurance

45. The Scrutiny function is keen for scrutiny to have a greater role in quality assurance, which is being progressed separately (by the Vice Chair of the over-arching Overview and Scrutiny Performance Board, also a member of the Task Group).
46. The Commissioning officers were clear that services, for example, a care home, were seen as very much part of a local member's 'patch', and that local members should be informed where information was likely to reach the public domain. Members of the Task Group would very much welcome this approach.

I. Terms and conditions of staff transferred from Council employment to an external provider

47. Providers informed members that although TUPE Regulations specified that staff transferring to a new employer had the right to keep their existing terms and conditions indefinitely (although as paragraph 51 specifies, changes to terms and conditions can be made in limited circumstances), many staff chose to transfer to employers' terms in time, as they were often more favourable.
48. Some discussion was given to terms and conditions of staff transferred from council employment to a new provider - although the remit of the scrutiny was staff terms and conditions of staff employed across all providers.
49. TUPE Regulations protect employees indefinitely. Therefore existing terms and conditions remain the same, unless the employee wishes to change.
50. The Task Group was provided with the Council's own staff guide for staff going through the TUPE process, which states that 'the new employer inherits the contracts of employment of the people employed by the County Council immediately before the transfer. Employees have the right to transfer on the same terms and conditions of employment.' TUPE does however allow for external providers to make minor changes to employment arrangements after the transfer, and under the TUPE regulations these are called "measures". In this case the employers must consult about any measures they are thinking about or intend taking as a result of the transfer. Some minor changes to terms and conditions may be included as measures although there are tight restrictions under TUPE on when terms and conditions may be altered.
51. The guide also states that 'the general rule is that your contract of employment cannot be changed if the sole or principal reason is the TUPE transfer'. However, a new employer was able to consult about changes to working practices, for example work hours, and the Commissioning Managers agreed that any changes needed to be properly consulted on and handled well. If there is any intended change then existing contracts of employment can only be varied with the agreement of both parties either on an individual basis or through a collective agreement (ie: agreement between employer and employee or their representatives).

52. Opportunities exist for contractors to speak to the Council informally and there are clauses within contracts to ensure shared understanding. However, the contract is between the Council and the provider.
53. The Director responsible for commissioning felt that building good relationships with providers was the key to success.

J. Feedback from Unison – Commissioning Expertise

54. Scrutiny and monitoring of contracts requires a high level of in-house expertise and detailed knowledge and this was acknowledged to be an issue. The Directorate of Adult Services had recently reviewed its commissioning structure and quality assurance capacity. The Economy and Infrastructure Directorate maintained its in-house design team and had to keep in mind the long-term management of the Council's assets.
55. The Council's reluctance to interfere directly with contracted employees' terms and conditions was questioned by Unison, West Midlands office – their understanding was that Councils could stipulate that contractors complied with specific clauses, such as complying with the living wage. Unison advised that a number of public sector employers were including this as a requirement in contracts.

K. Feedback from Providers

56. Having heard from the Council's officers, it was important to hear from some providers themselves, and we met with three providers of different services (customer service, IT support and home care).
57. Providers were involved in regular, often monthly meetings to monitor performance, and those we met could see no reason why performance information could not be shared with councillors – they saw it as a transparent process.
58. Recruitment was highlighted as an issue for the homecare market, which in general was not seen as a profession, and suffered from low pay rates in comparison to other sectors, such as retail – this perhaps, explained the number of staff from other countries, which have different work ethic values.
59. Commissioning managers told us that staff training was expected of providers; however a homecare provider told us that whilst training had a high value within their own company, and helped staff retention – anecdotally, elsewhere it could be an area which is overlooked when finances are stretched.
60. A homecare provider has said that that the contract rate for homecare had not increased over time, yet more is expected in terms of service delivery.
61. Travel time is a complex issue, especially for rural areas of Worcestershire, where there may be some distance and time between visits. At the time of the Scrutiny, we were concerned to hear that the contract rate was for contact time only, therefore travel time and waiting time was not factored in. Generally, calls were scheduled to try and minimise travel time and employees had

hand held devices which were swiped in the home on entry and exit, (sometimes their car may be parked some distance away from the property).

62. We have, however been subsequently advised by the domiciliary provider we visited, (a provider that has participated in the Council Directorate's own review of the care market) that it is not technically correct that travel time is not factored in as the Council has taken some account of travel time more recently but the figure used is not supported by realistic data and the figure is much too low. In the case of waiting time it is true that this is not factored in and it can amount to a substantial figure.
63. This provider also pointed out that the current approach to commissioning and in particular the large number of suppliers makes it almost impossible for a sensible and realistic figure to be calculated and added into the contract rate for both travel and waiting time, so the nature of current commissioning drives providers towards non compliance with NMW regulations as unless there are sufficient calls in a tight geographic area, the logistics simply do not work.
64. We also heard that employees could transfer to standard company terms and conditions if they wish and we heard examples where terms were more favourable with the new organisation. Indeed through transfer, some employees may have access to new or extended career paths, and the protection of being part of a larger organisation.
65. The providers were also of the opinion that in general local authorities are not always proactive in tackling individuals about under performance, whereas they thought that there was closer monitoring within the external marketplace. In general they thought that the staff that transferred were really good and had specialised knowledge.
66. When asked about the mood of staff being transferred, providers acknowledged nervousness, but Providers encouraged us to talk with staff to see whether they were happy with their transfer.

4. Recommendations

In drawing up the recommendations, the Task Group has been mindful of what the County Council can and cannot influence. Although not socially ideal, there is a clearer understanding that the County Council is the Commissioner and responsible for outcomes, the provider is responsible for delivery and both parties are responsible for monitoring performance.

The Commissioning: Staff Terms and Conditions Scrutiny Task Group therefore recommends that the Cabinet Member with Responsibility for Transformation and Commissioning:

1. Ensures that appropriate mechanisms are in place for the monitoring of the Council requirement for domiciliary care providers to ensure that staff salaries are no less than the NMW, including travel time and taking into account variances in approach but ensuring that the average overall was no less than the NMW.
2. Advise in relation to Homecare, how contract rates are being updated to take account of the duty of care within the recent Care Act legislation.
3. Develops a Social Value Policy and Framework that sets out the Council's approach to social value, addressing the value of weighting of social value for economic, social and environmental wellbeing and ensuring social value considerations throughout the Procurement Process. This will ensure that the Council develops a more consistent approach to social value within its commissioned services in order to ensure maximum social value benefit for our communities is achieved. It is important that the Council makes a clear statement on the importance of social value and ensure that all staff commissioning and procuring services have the necessary understanding and tools to ensure social value is clearly examined and quantified.
4. Reports back to the relevant Scrutiny Body in 12 months' time, to explain how social value has been incorporated more consistently into the commissioning process and how maximum social value benefit has been achieved for our communities.
5. Considers in the spirit of openness and transparency, introducing a voluntary staff feedback scheme for those staff, who have transferred to providers – this would help to inform the County Council in its mission to become an excellent Commissioner.
6. Ensures that there are mechanisms to share quality assurance information with Scrutiny, especially as the providers we talked to saw no reason why performance information could not be shared with Councillors and that Scrutiny has a legal and constitutional right to information held by the Executive relating to decisions made (including exempt commercially sensitive information).

Appendix A -Documents reviewed as part of the Task Group Review

Document
Extracts from the Council's Procurement Code
Extracts from Standard Council Contracts requiring compliance with the Law
Contract Monitoring Information from the Council's Website (Example Of Domiciliary Care) – Extracts From: Domiciliary Care Contract, Service Specification and Guidance to Providers on monitoring processes
Clarification on travel time payments (via The Council's Legal Services Team)
Transfer Of Undertakings (Protection Of Employment) Regulations (TUPE) – Staff Guide Http://Resource/Sites/Sidtools/Eig/Toolkit/TUPE%20faqs.Pdf.
Information Responses From The Council's Directors, Legal Services And Unison

Appendix B - Task Group Activity

Date & Activity	Purpose
Task Group Meeting - 5 November 2015 Witnesses: <ul style="list-style-type: none"> • Sander Kristel, Director of Commercial and Change • Simon Mallinson, Head of Legal and Democratic Services • Jo Charles, Head of Commercial 	Briefing on commissioning processes, models and procurement law
Task Group Meeting - 10 November 2015 Witnesses: <ul style="list-style-type: none"> • Peter Bishop, Strategic Commissioner for Service Transformation • Richard Keble, Strategic Commissioner for Adult and Health • Hannah Needham, Strategic Commissioner for Children's Services • Nick Twaite, Infrastructure Asset Manager 	The role of the Council's commissioners
Task Group Meeting - 17 November 2015 Witnesses: <ul style="list-style-type: none"> • (IT services – Hewlett Packard) - James Crosby, Service Delivery Manager • (Customer Service - Civica) - Paul Higgins, Director of Business Process Outsourcing and Fiona Harris, HR Consultant • Dawn Brant - ICT Commercial and Contracts Manager (WCC) 	Discussions with providers
Task Group Visit on 30 November 2015 to Eclipse Homecare (Head office, Hallow)	Visit to a provider
Task Group Meeting - 19 April 2016	Discussion of evidence gathered so far – further clarification sought from Council Directors, the Council's Legal Services and Unison
Task Group Meeting - 24 May 2016	Discussion of information received to date
Task Group Meeting – 10 January 2017	Discussion of emerging findings with the Cabinet Member for Transformation and Commissioning and the Director Commercial and Change

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