



**UNISON Response to**

**Cabinet Resources Committee**

**14 December 2011**

**Item 12 - Award of Contract – Parking Enforcement  
and Related Services**

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**Barnet UNISON**

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**2011**

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## Barnet Parking Services

### Key Issues for Cabinet

It is understood that the cabinet is minded to award its parking services contract to NSL. There are a number of points that UNISON would like to bring to the attention of Cabinet which it is believed are relevant to the making of a safe decision on this matter.

#### 1. The tender evaluation process

- 1.1 The issue here is whether the Council can be satisfied that the NSL offer is genuinely the one that is Most Economically Advantageous. It is clear from the report that the NSL bid is not the lowest priced, so for the award to be lawful there must be other objective evaluation factors that tip the balance in favour of NSL. Given the 60/40 split between quality and price, there could be no expectation that the lowest price tender would prevail but since the bid price of NSL is some 34% higher than the lowest, it is important, if the Council is to avoid the possibility of a challenge under the Remedies Directive, to be clear that the quality differentiators are genuine and robust.
- 1.2 The report indicates that the closest overall score to NSL was only a few marks adrift. Given that this was the lowest priced offer, it will be important to be certain that the rationale for awarding low marks for quality is robust. The report is a little vague on this, in that whilst it states that, *'the company was unable to provide evidence of where such a system has been used elsewhere and could not therefore convince the evaluators that it offered a reliable solution and that existing activity levels could be maintained'*, it also points out that *'the Company's an experienced operator who has been providing such services in London since the late 1980s'*. Councillors should satisfy themselves that the evidence provided is sufficiently compelling to warrant a difference in the quality score in excess of 50%. The question is whether NSL can reasonably be said to be 50% better on quality than Company A.
- 1.3 A further issue arising from the evaluation concerns Company D which also offered a lower price than NSL. In this case the quality score is reduced because *'Company D is primarily a vehicle removals operator with ambitions to widen their scope to include other activities. This lack of experience was clear throughout their offer where an inability to provide evidence of similar activity elsewhere resulted in low scores'*.
- 1.4 This relates to factors covered at the pre qualification stage, i.e. Experience and Capacity. The question therefore is whether having got through to the second stage these general factors should have been given such weighting without reference to any specific shortfalls in the proposed approach?

#### 2. The PaybyPhone element of the contract

- 2.1 This is the most pressing issue that elected members should consider. The available evidence suggests that the relationship between Verrus UK, now

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rebadged as PaybyPhone since its acquisition by Pay Point Plc, raises serious concerns going back to the invitation to Verrus UK to participate in a competitive trial of pay by phone systems and the subsequent award and extension of a contract with further competition.

2.2 There is strong reason to believe that the basis on which the pay by phone trial participants were selected contravened European competition rules and little doubt that the contract itself fell to be tendered under the provisions of the Public Contract Regulations 2006. No such tender process was undertaken.

2.3 If the contract was awarded unlawfully its extension without competition can only have compounded the breach. If the contract was not let unlawfully i.e. because for some reason it was not subject to either the competition rules or general treaty obligations there would still be the issue of how the Council could be certain that it represented value for money given the lack of price comparison in the procurement process.

2.4 These matters may in themselves be historic and whilst worthy of investigation, would not have a direct bearing on the current decision were it not for the fact that PaybyPhone is to be a part of the NSL supply chain. Given that the OJEU Contract Notice stipulates that consortium bids would only be allowed on the basis of joint and several liability it seems that there is to be a direct continuing contractual relationship with PaybyPhone.

2.5 This raises questions around how exactly the joint and several relationship is to operate but it is also understood that PaybyPhone was mentioned as pay by phone suppliers in more than one of the other bids. The issue for members is whether competition for this element of the service has been restricted or distorted. If PaybyPhone was somehow nominated as a 'preferred supplier' by the Council or if the price for this element of the bid was fixed independently of the rest of the tenders, this would suggest that PaybyPhone has been given a potentially unlawful advantage over other prospective providers of pay by phone services. Detailed questions around this have been raised with the Council's Monitoring Officer but as he has refused to answer them, UNISON feels obliged to draw the matter to the attention of members. The questions are attached as an appendix. In our view the contract cannot be safely awarded until the Council has satisfied itself on these issues.

### **3. The performance and control mechanism**

3.1 The parking manager has stated that the Council will retain control over the parking operation. This extends to determining the numbers of staff employed and where and how they are to be deployed. This is consistent with the requirement as set out in the contract specification.

3.2 Whilst this level of control over contract inputs may be welcome to some members, it should be pointed out that it will undermine the effectiveness of the output performance indicators that are to be used as the basis for overall contract management. This is because of the difficulties that will inevitable arise from attempting to enforce penalties for non achievement of outputs when the contractor does not have full control over inputs. In essence the Council is

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limiting, if not totally obviating, transfer of risk which, if it is to avoid adverse consequences, will necessitate a significant and effective client side operation.

- 3.3 Given that the decision to outsource is based in no small part on a perception that the internal service has been poorly managed, it is difficult to envisage the client operation being as effective as the specification envisages. This creates real dangers from both a performance and financial perspective. Moreover, there is no indication that the cost of an effective client operation has been considered. Had there been full evaluation of the in-house option this could have been a crucial factor in the cost comparison.

#### **4. The Employee Equalities Impact Assessment**

- 4.1 The EEIA identifies that some of Barnet's staff will be subject to unlawful discrimination as a result of moving the back office element of the service to Croydon. The EEIA is clear that this will impact disproportionately on women with caring responsibilities. At present there is no clear strategy to mitigate this impact beyond the following 'We will ask NSL to redeploy them, if necessary and where possible, to offices closer to Barnet though it is unlikely to be on the Barnet contract and could result in them changing from their Barnet terms and conditions. Failing that, NSL will be required to make them redundant after the TUPE transfer'.

- 4.2 Members must satisfy themselves as to whether this is a sufficient response but they should also consider how consistent it is with the law governing the transfer of workers in these circumstances, as well as the Council's ability to direct its contractors to make their employees redundant.

- 4.3 The first point relates to what happens when an employee refuses to transfer. Under the TUPE regulations they are deemed to have resigned and ordinarily would not be entitled to a redundancy or other compensation payment. However, in the current case and especially given the findings of the EEIA, it is likely that anybody who refuses to transfer because of the new office location could well be able to claim constructive dismissal. This would be a claim against the Council rather than NSL. No information is provided as to the potential number of staff in this position and no estimate is provided of the potential cost of compensation. Clearly this is relevant to the financial evaluation but does not appear to have been taken into account and no allowance has been made for any additional expenditure on the part of the Council.

- 4.4 The second point is that the Council envisages a level of control over the contractor which is unlikely to be enforceable. The statement that 'NSL will be required to make them redundant after the TUPE transfer' indicates an intention to shift the risk associated with the issue to NSL. This will happen if the affected employees do not object to transfer but the Council will not be in a position to 'require' NSL to make them redundant. Dismissals relating to the transfer itself are automatically unfair under the TUPE regulations. Whilst changes for Economic Technical or Organisational reasons i.e. genuine

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redundancy are allowed, it is difficult to see how dismissal under these circumstances could be construed as such. In essence the Council would be requiring NSL to act unlawfully, which whatever the contract purports to allow, is not possible,. Whether or not resigning employees are entitled to compensation will turn on the extent to which the change to working conditions amounts to constructive dismissal but in any event it is likely that employees will object to transfer rather than wait until it has taken place.

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## Appendix A

### Questions for LB Barnet Monitoring Officer on the relationship with Verrus UK/PaybyPhone

Following the receipt of independent advice UNISON is concerned that aspects of the relationship with the company now known as PaybyPhone may create a reputational and possibly legal risk for the Council. UNISON believes that it has a legitimate interest in this because of the impact that a challenge to a Council procurement process could have on its members. Clearly any damage to the reputation of the Council also impinges on our members. Beyond this, many UNISON members are also Barnet residents with a direct interest in the effective administration of the Council.

The following questions are designed to explore these concerns and hopefully assist the Council's monitoring officer to comply with her own wider public duties with regard to safeguarding the legal integrity of the Council's procurement practices. We are of the view that the current tender process could not be safely concluded without consideration of the issues raised and would therefore not envisage any significant difficulty in responding to the questions in a timely manner.

1. Can you confirm that Verrus UK was appointed to the pay by phone contract without formal competition following a competitive trial involving it and one other supplier of pay by phone parking services?
2. What process was followed to select the companies which participated in the trial?
3. How many companies are you aware of that provide pay by phone services in relation to car parking in the UK and/or other European states?
4. Was a contract award Notice published in relation to the trial?
5. Was a contract award Notice published in relation to the contract with Verrus?
6. Is the contract with Verrus within the scope of the European public procurement regime as incorporated into UK law by the Public Contracts Regulations 2006?
7. If so do you consider it to be a Part A or a Part B contract?
8. Can you confirm that the letting of the contract was not compliant with the requirements for Part A or Part B contracts?
9. If the contract is not considered to be caught by the competition regulations can you explain why not?
10. Do you agree that all public contracts, including those out of the formal scope of the regulations, are subject to general treaty obligations around equality of treatment, transparency, proportionality and mutual recognition.

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11. Are you satisfied that the way in which the contract was let i.e. without any form of formal competition, was compliant with competition law and/or consistent with the treaty requirements referred to above?
  12. Are you satisfied that the Council could be reasonably sure that the deal it struck with Verrus represented Best Value?
  13. If the answer to the above is yes could you explain how the Council established that the contract price offered by Verrus was competitive?
  14. Can you confirm that the contract with Verrus was extended without competition?
  15. Was an extension expressly authorised under the terms of the original contract with Verrus?
  16. What is the total expected value of the contract – including the extension?
  17. Are you satisfied that the extension is compliant with European and and/or domestic legal requirements?
  18. Can you confirm that Verrus is now owned by PayPoint and has been rebadged as PaybyPhone?
  19. Can you confirm that PaybyPhone is a named sub-contractor of NSL, the preferred bidder for the Parking Services Contract?
  20. If this is not the case can you describe the relationship between NSL and PaybyPhone?
  21. How many other bids named PaybyPhone as a sub-contractor or provider of pay by phone parking services within their bids?
  22. Did the composition of any of the bidding consortia change during the tender process?
  23. Did any of the bidders propose using a supplier of pay by phone parking other than PaybyPhone?
  24. Did the Council do anything that could reasonably be construed as identifying PaybyPhone as a 'preferred provider' to bidders during the tender process?
  25. If PaybyPhone was involved with more than one bid did the Council identify this as a risk to the integrity of the tender process and if so what steps were taken to mitigate the risk?
  26. Was the tender price for the PaybyPhone element the same for each of the bids that PaybyPhone was involved with?



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27. Are you satisfied that competition for the pay by phone element of the parking service contract has not been restricted or distorted and that other potential providers have had an opportunity to communicate their offers through the process followed?
  28. What relationship will the Council have with PaybyPhone under the NSL contract?
  29. How does the Council intend to apply the principle established in the Contract Notice that 'the Council will require that each consortium member has a joint and several liability'?
  30. Are you able to advise the Council that its dealings with Verrus/PaybyPhone create no risk of legitimate legal challenge and do not otherwise pose a reputational risk.

Given that the tender process is expected to be concluded within the next few weeks a response to these questions is required urgently as it will (or should) have a direct bearing on the decision process.

The above questions were first submitted to the Councils Monitoring Officer who responded to say that he had referred the questions to the Director of Environment Planning and Regeneration in order that she can arrange for the appropriate officers to respond to the points raised.

To date UNISON has not had any responses to the above questions.

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## Appendix B

The following questions were submitted to Scrutiny Committee on 6 December 2011 and senior officers working in Parking Services. To date UNISON **has not** had a response.

1. How many staff will see their jobs move outside of the borough?
2. Has NSL allowed for redundancy costs in relation to these staff in its bid?
3. Has the Council agreed any sort of indemnity against these costs?
4. What impact do these costs have on the financial evaluation?
5. Will the Council consider redeployment for affected staff prior to transfer to increase the chances of this taking place?
6. If not will they be considered for redeployment back to the Council post transfer?
7. Having identified that these staff are disproportionately female how does the Council propose to comply with its duties under equalities legislation? At present the mitigation strategy amounts to nothing more than 'asking' NSL to redeploy them and prejudging that if they are unable to do this NSL will have to pay redundancy costs. Does NSL agree with this and what commitments has it made?
8. Has the Council considered the likelihood that these women will bring claims for indirect discrimination?
9. Has the contractor/council allowed for damages claims under the Equalities Act 2010? If so how much and what impact does this have on the financial evaluation? Is this still the most economically advantageous tender in the event of successful claims for sex discrimination?