



Briefing 08/52 November 2008

# Best value and procurement

## Workforce matters in best value authority contracting

### Statutory Guidance: Draft for consultation

This briefing provides details on proposed statutory guidance concerned with the '*Handling of Workforce Matters in Contracting*' and the '*Code of Practice on Workforce Matters in Local Authority Service Contracts*' commonly known as the '*Two Tier Code*'. This briefing is provided to local authority chief executives, council's leaders and all APSE contacts throughout the UK.

#### Key issues

- The historical origins of the Two Tier Code and reasons for a revised code
- The differences between the old and the proposed new code
- What the implications are for local authorities, trade unions and employees and the new inspection framework
- APSE's response to the draft code and consultation deadline

## 1. Introduction

With the abolition of compulsory competitive tendering and the introduction of 'Best Value' in 1999, as the driver for improvement in local government services, Government made a commitment to address long standing concerns relating to the issues of staff transfers.

Concerns included:-

- Inadequate involvement of employee and trade unions in procurement decisions leading to the outsourcing of a service
- Inadequate pension protection under the terms of TUPE (Transfer of Undertaking Protection of Employment Regulations) for staff transferring to a new employer as a result of an outsourcing exercise and

- The emergence of a two tier workforce whereby new starters employed on contracts being carried out for best value authorities were employed on less favourable terms and conditions than those formerly local authority staff who were transferred and protected by the terms of TUPE regulations.

Accordingly a series of measures were put into place to address these concerns agreed between Government, the Local Government Employers, the CBI and local authority Trade Unions.

## **2. Current situation**

Best value in its legislative form has been subject to revised guidance from time to time issued by the relevant Secretary of State and through the devolved administrations in Wales and in Scotland.

The main elements of changes in relation to procurement and workforce matters are found in

*Valuing the workforce (Section 2 of Office of the Deputy Prime Minister (ODPM) circular 03/2003)*

*Handling of workforce matters in contracting (Annex C of ODPM circular 03/2003)*

*The Code of Practice on Workforce Matters in Local Authority Service Contracts (Annex D of ODPM circular 03/2003)*

These provisions specifically related just to local government, but in July 2005 the *Code of Practice on Workforce Matters* was extended to cover the wider public sector including the civil service, NHS and maintained schools. This was known as the 'Cabinet Office Guidance'. The '*Code of Practice on Workforce Matters in Local Authority Service Contracts*' applied to England and powers were devolved to the Welsh Assembly to create what was essentially a parallel code with similar provisions operating within Scotland. The revised draft code will apply to English best value authorities <sup>1</sup>and to police authorities in Wales.

## **3. Preserving the guidance**

The two tier code is intrinsically linked to the old best value regime which was amended by the introduction of the *Local Government and Public Involvement in Health Act 2007* which reformed best value. Essentially the reforms removed the procedural elements of best value including the

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<sup>1</sup> Best value authorities are local authorities and other public bodies i.e. Metropolitan Passenger Transport Authorities, National Park Authorities, Joint Waste Disposal Authorities, GLA, TFL, LDA Combined Fire and Rescue Authorities and London Fire and Emergency Planning Authority

requirements to produce annual Best Value Performance Plans (BVPPs) and replaced the former arrangements with new requirements, including a new 'duty to involve' stakeholders on service provision, ensuring that local people have greater opportunities to influence decision making and get involved.

The reform of best value was coupled with changes to the inspection framework and the introduction of Comprehensive Area Assessment, (CAA) a new set of national indicators and the ability for local authorities to prioritise 35 national performance indicators at a local level, on the basis that this would allow greater choice over local priorities, helping to improve local services and strategic outcomes.

However, the removal of the requirement to produce a BVPP meant that the enforcement and compliance provisions on the '*Code of Practice*', have also been removed. These were essentially a requirement on the best value authority to certify their compliance with the code within the BVPP, and during audit of the BVPP to provide a route for concerns surrounding non compliance with the code to be raised and dealt with. An interim measure, requiring councils to still certify that they have complied with the code, was put into place for contracts let in 2007/2008, but in the absence of a new code arrangements surrounding compliance and indeed in respect of the application of the code itself would have led to confusion.

The need to ensure the code was preserved has therefore led to a review of the code and new arrangements to ensure its continuance and compliance with the code following changes to the best value framework.

#### **4. The draft revised code**

The revised draft code of practice is little changed from the original code. In terms of employment the following provisions will apply subject to the outcome of the consultation exercise which ends on the 19 January 2009:-

##### **4.1 Two Tier Code**

Where an authority transfers its employees to a private or voluntary sector partner as part of a contract to provide any service to the authority the code should be applied.

- It ensures that new joiners to the transferred-out workforce are offered terms and conditions that are overall no less favourable than those of the transferred staff.

- The 'no less favourable formula' does not apply to pensions however new starters must be offered either
  - membership of the LGPS;
  - membership of a good quality employer pension scheme; or
  - membership of a stakeholder scheme with employer contributions of up to 6%, but either side could pay more if they wished.

#### **4.2 TUPE and transferred staff**

As with the previous guidance on workforce matters in contracting the draft statutory guidance makes it clear that even if TUPE were not to apply in strict legal terms, the principles of TUPE ought to be followed and the staff treated no less favourable than if they were subject to a TUPE transfer.

The TUPE regulations 2006 provide for:

- two categories of transfer being the transfer of an undertaking or business or a service provision change. Neither are mutually exclusive as a 'relevant transfer';
- a relevant transfer does not operate to terminate the contract of employment but has the effect that after the transfer the contract shall have effect as if originally made between the person employed and the transferee;
- the transferor's powers, duties rights and liabilities under or in connection with that employment contract shall transfer to the transferee;
- a variation to the employment contract by reason of the transfer is prohibited but that shall not prevent an employer and his employee from agreeing to a variation to the contract for a reason unconnected with the transfer or a reason connected with the transfer that is for economic, technical or organisational reasons entailing changes to the workforce;
- the dismissal of an employee by reason of the transfer is unlawful, but dismissal for a reason connected with the transfer that is an economic technical or organisational reasons entailing changes to the workforce is **potentially** lawful; and

- the regulations do not apply to so much of contract of employment as relates to any provision of an occupational pension scheme relating to old age survivors or invalidity benefits

The regulations apply to a relevant transfer that takes place on or after 6 April 2006 whilst the 1981 TUPE regulations will apply to a transfer to whom the 1981 regulations applied that took place before 2006.

#### **4.3 Pensions protection for transferred staff**

Staff subject to transfer must be given access to the LGPS or a good quality occupational pension scheme, under which they can continue to earn **future** pension benefits (as well as protection of past pension under the terms of TUPE).

The *Best Value Authorities Staff Transfers (Pensions) Direction 2007* provides that:

*“Where an authority enters into a contract with a person for the provision of services and those services are, in the period immediately before the contract is entered into, provided by the authority and carried out by the employees of the authority then the contract between the authority and the contractor to secure pension protection for each transferring employee and provide that the provision of pension protection is enforceable by the employee and*

*Pension protection is secured if the transferring employee, after change in employer, has rights to acquire pension rights that are the same as or are broadly comparable to or better than those he had as an employee of the authority*

*The Direction also requires similar pension protection in relation to those former employees of an authority, who were transferred under TUPE to a contractor, in respect of any retendering of a contract for the provision of services.”*

### **5. Handling of workforce matters in contracting and relationship to procurement**

The draft guidance contains within Annex information on how best value authorities can handle workforce matters during contracting. It reiterates the repeal of the provisions that under compulsory competitive tendering restricted the ability of local councils to consider certain non-commercial matters such as taking into consideration issues of race and gender and the background to a potential contractor’s treatment of such issues. Whilst the Statutory Instrument that repealed these provisions, *The Local Government Best Value {exclusion of non commercial*

*considerations*} Order 2001 (SI 2001 No 909), was welcomed by APSE certain parts of the 1988 Act remain in force. It is APSE's view that these remaining provisions are unnecessary and create a burden on local authorities seeking to secure the best from procurement arrangements including expanding the use of 'community benefits' in procurement.

The guidance does however contain a 'position statement' from CLG which essentially reiterates the need for authorities to seek independent advice on the issue of social clauses in procurement and the need to comply with EU regulations. Even where a contract is not subject to EU directives on procurement the principles of the EC treaty in terms of fairness and transparency would essentially dictate that any criteria must be non discriminatory.

### **5.1 Workforce issues in the context of best value**

The guidance states that in the context of best value workforce matters that arise during procurement best value authorities need to consider and recognise that:

- there is a connection between workforce issues and service quality recognising that good services depend upon an appropriately skilled, healthy, safe and motivated workforce. That neglecting workforce matters in order to drive down costs can have an adverse effect on the desired service quality and value for money of the service;
- the necessity of achieving an appropriate balance between considerations of cost and quality. It is unlikely that a purely cost driven approach or unjustifiably expensive service will represent best value;
- that a transparent, open and fair procurement process is essential to ensuring bids that provide the optimum combination of whole life cost and quality and authorities should have clear procurement strategies, procedures and written policies for evaluating tenders;
- the emphasis on continuous improvement within best value and the implications for how strategic contracts in particular are structured;
- the relevance of equal opportunities to the delivery of contracts; and
- the importance of handling TUPE well so as to allay fears over transfer arrangements.

The guidance also reaffirms the previous position of government in that it states

*“ Staff and unions should be involved in the option appraisal stage and where there is a decision to outsource, staff and unions should be involved in the selection process and in the subsequent detailed work around the transfer. Effective systems of management should be employed and a risk assessment carried out to identify potential work related stressors arising from changes affecting workers. Suitable methods of controlling these risks should be identified and implemented by the current and new employer. Where TUPE applies the current employer is obliged to make information available to TU representatives and the new employer and to consult workers representatives on matters relating to the transfer”.*

Moreover the statutory equality duty which came into force in April 2007 provides for:-

- ensuring generally that when public money is spent it supports the promotion of gender equality;
- incorporating gender equality requirements into the obligations of contractors where appropriate to the performance of the contract; and
- incorporating gender equality into their procurement processes so far as is consistent with EU rules and UK regulations.

The use of this duty should strengthen the use of consideration of workforce matters in procurement.

Workforce matters will come into consideration at the pre-qualification, service specification invitation to tender and tender evaluation stages of the contract process.

## **6. APSE comment**

The reform of best value has created some uncertainty in relation to the long term security of the ‘Code of Practice on Workforce Matters’ the reissued and revised draft code is therefore generally welcome. However the code does not address some on-going gaps in the existing code.

**Exclusions from the code:** For example, the issue of staff transfer as it relates to housing stock transfer has always been a thorny issue. Whilst many authorities have simply chosen to follow the code on the transfer of housing stock to an RSL such arrangements mean that the RSL is managing the stock on behalf of itself, not under the terms of a contract from the best value authority. Therefore, technically it has been argued that the absence of a contract means such arrangements fall outside of the code. Similarly the transfer of work on gradual basis for some social care services such as Home Care, whereby one specific contract has not been entered into but work has diminished over time, through spot purchasing for instance, has allowed the development of different and reportedly less favourable terms and conditions of service to

develop within the home care sector.

**Efficiencies:** Within local government the efficiency agenda adopted across England, Wales, Scotland and Northern Ireland has encouraged the development of shared services. Where shared services are developed this could involve a transfer from one public body to another, but the position in relation to TUPE is a complex and TUPE may not apply hence the revision of the code could arguably have brought some much needed clarity to the transfer of staff working under shared services arrangements. This is an issue that APSE will continue to press with Government.

**Enforcement and monitoring:** Enforcement provisions have always been contentious and there is little scope within the revised draft code to address much needed clarity on enforcement. The Audit Commission has recently issued revised guidance to auditors on the use of resources provisions as part of the inspection reforms under CAA. These auditor guidelines should ensure that matters relating to the code are addressed but there is still a degree of confusion as to how enforcement and dispute resolution (using the Alternative Dispute Resolution (ADR) procedure agreed under the old code) would apply in practical terms.

The revised code is at this stage only a draft and consultation on the proposals will close on the 19 January 2008. APSE member local authorities and member fire and rescue authorities who are subject to the arrangements are invited to send their comments to Mo Baines at APSE on [mbaines@apse.org.uk](mailto:mbaines@apse.org.uk) and views will be taken into account in responding to the Government.

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