



Briefing 09 -05 January 2009

APSE response to CLG draft statutory guidance on workforce matters in contracting

This briefing provides details of APSE's response to the Department for Communities and Local Government consultation on the draft statutory guidance on contracting and workforce matters. It is intended for local authority contacts in England, Wales and Northern Ireland and for information to Scotland

Key Issues:

- Changes to the best value regulations required additional changes to the existing code of practice on workforce matters in contracting
- Staff who transfer to a private or third sector provider carrying out services on behalf of a local authority are generally covered by the code
- This APSE briefing includes APSE's response to the draft revised code

1. Introduction

The Code of Practice on Workforce Matters was introduced in March 2003 in order to protect the terms and conditions of staff that were subject to transfer as a result of local authorities awarding contracts to private or third sector service providers.

The code was designed to protect employees from the development of a 'two tier' workforce whereby new starters under a contract could be employed on less favourable terms and conditions than those staff who had transferred across from the local authority and were therefore protected by TUPE.

As a result of changes to the Best Value regulations in 2007 the Secretary of State for Communities and Local Government, Hazel Blears MP, undertook to review the code and issue any necessary amendments. The remainder of this briefing replicates APSE's response to the consultation. Thanks are extended to those member authorities who responded to our initial briefing on the draft code and many views of member authorities have been incorporated into the APSE response where possible.

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About APSE

APSE is a not for profit local government organisation working with over 250 local authorities throughout the UK. APSE's manifesto, agreed with our member authorities, supports democratic accountability for local services and includes as part of our aims and objectives:

- Accountability for and promotion of the role of in-house services in delivering best value to the public.
- Ensuring that employment standards and practices are of the highest quality and that training is a vital component of service delivery.
- Involvement in strategic procurement and commissioning decisions involving a balanced consideration of options for service delivery including in-house services.

Response to specific questions:

Q1. Do the amendments to *Valuing the Workforce*, in chapter 6, update and accurately reflect the current statutory and policy position?

Whilst the provisions in relation to valuing the workforce provide a useful statement of the Government's intention the terminology used is at times confusing and indeed in some cases it runs contrary to what in practice happens during procurement situations.

For example in reference to the involvement of third sector providers and small to medium enterprises the draft guidance states that different size organisations may satisfy the purchaser's requirements in different ways. In practice, and more specifically for those contracts governed by the EU procurement regulations, once contracts have been advertised local authorities can be

fairly limited in terms of tenderer selection and therefore, in effect, it is pre-tender or 'option appraisal' stage at which the involvement of SMEs needs to be considered as these issues are essentially governed by the way in which contracts are packaged.

Whilst APSE welcomes the draft guidance reiterating that employees and trade unions should be involved in the earliest stages of the decision making process we are concerned by the terminology used in paragraph A.46. This would appear to fetter local authorities far more than any restrictions provided by procurement regulations. The EU Public Procurement Directive 2004 (2004/18/EC) clearly allows member states to permit the inclusion of social, economic and employment matters in contracting. The guidance does not accurately reflect this. The current economic climate arguably makes it all the more important to look at all potential benefits that can be obtained from procurement arrangements.

Whilst APSE would always seek to explore the involvement of directly provided local government services, where this provides a best value option, should a local authority engage in an outsourcing arrangement it is vitally important to the local economy to maximise social, environmental and employment benefits from that arrangement. Local authorities should therefore be able to maximise such benefits.

Further to this point APSE is extremely disappointed that the consultation report reiterates the intention to retain the remaining restrictions within Part II of the Local Government Act 1988. In APSE's view this legislation is unduly restrictive and prohibits the development of community benefits in procurement. Its origins, within the compulsory competitive tendering framework, no longer apply and in reality the purposes of the Part II restrictions are already dealt with by the overriding requirement on local authorities to deliver 'Best Value' which would not generally be met by the measures which the Part II arrangements were designed to restrict. In short the retention of these provisions fetter good local governance by councils when procuring goods or services and, in the current economic climate create an unnecessary barrier to maximising the use of resources for the benefit of the local economy.

APSE is disappointed that the opportunity to repeal Part II has not been taken and is further disappointed by the practical implications of re-emphasising what is in our view unhelpful restrictions based on unnecessarily legislation which was designed to police a competition framework (CCT) which is no longer used.

Q2. Do the amendments to *Handling of Workforce Matters in Contracting*, in chapter 6, update and accurately reflect the current statutory and policy position?

Whilst the amendments in effect replicate existing guidance the thorny issue of the application of the code to housing stock transfer situations is not dealt with. This matter was a major issue for local authorities and housing providers who would welcome certainty on the issue, as well as for trade unions that even now, some 6 years from the original code, face the prospect of members transferring under stock transfer arrangements, without the certainty of the code applying. Given the limited funding available to local councils for direct investment in housing stock, and for many councils the prospect of housing stock transfer in the future it would seem to APSE to be a missed opportunity to provide clarity to those who may face the uncertainty of a transfer of employment due to the transfer of housing stock.

APSE would urge this matter be reconsidered.

Q3. Do the amendments to the *Code of Practice on Workforce Matters in Best Value Authority Service Contracts*, in chapter 6, update and accurately reflect the current statutory and policy position?

Our main concerns in relation to Annex A are in within paragraphs 11 and 12 (page 47). Monitoring arrangements for the code have been generally poor. Whilst there is a reference to new monitoring arrangements, and the involvement of the Audit Commission in this process, it is difficult to see in practice how this could be specifically be addressed unless the code were to become one of the areas upon which council inspection processes were dependant. As with the retention of the provisions under Part II of the 1988 Act this again seems a missed opportunity. Having just reviewed the performance indicators and arrived at the new National Indicator set and comprehensive area assessment arrangements it would, in APSE's view, have been sensible for Government to include a strengthened role for the Audit Commission in monitoring the application of the code whilst implementing the new arrangements. It seems to us to be a disjointed approach to now consider such a fundamental issue as the workforce code outside of the new performance arrangements, if as the guidance suggest, Government is genuinely committed to ensuring the workforce is at the heart of contracting arrangements.

In terms of Annex A whilst the guidance references the different stages of procurement in taking accounts of equalities issues it would be helpful to draw out the gender equality duty requires public sector bodies to write into any contract their obligations under that duty. The ability for councils to write into their contract arrangements for compliance and monitoring on equalities issues is under stated and needs to be strengthened.

APSE would therefore ask for consideration under Question 3 for the development of an independent monitoring board with representation from commercial / contractor interest bodies, trade union representation from local government trade unions, and local government bodies to ensure that the Audit Commission is able to report on their findings from across local government. This would provide a degree of confidence that the Code was being effectively applied and monitored, providing much needed certainty to transferring employees, local councils and contractors and allow for more timely and appropriate recommendations as to future changes to the Code should the need arise. This would also provide the potential for a greater emphasis on equalities considerations and the sharing of best practice.

Q4. The previous guidance has not yet been extended to Joint Waste Disposal Authorities, or to proposed new Joint Waste authorities (powers for the establishment of which are contained in the *Local Government and Public Involvement in Health Act 2007*). Are there any particular considerations for applying the statutory guidance to Joint Waste Disposal Authorities or the new Joint Waste authorities envisaged in Part 11 of the *Local Government and Public Involvement in Health Act 2007*?

The most obvious situation for application of the code in these circumstances would be where workers currently employed by a local authority in terms of waste collection face a transfer to a new employer where a joint waste authority undertakes, on behalf of the local authority, both collection and disposal of waste. Whilst APSE believes this model of waste disposal and collection is fundamentally flawed there is no reason why the code ought not to apply to employees affected by such a transfer.

For further information in relation to the response please contact Mo Baines at the APSE secretariat on mbaines@apse.org.uk or telephone 0161 772 1810.

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