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Briefing 10 - 69

Removal of Cabinet Office Guidance on the 'Two Tier' Code

To all APSE contacts in the UK, including Council Leaders and Chief Executives

Key issues:

- Cabinet Minister Frances Maude has announced the withdrawal of the Cabinet Office' two-tier' code in relation to staff transfers on public service contracts
- The moves do not yet include the Local Government 'two-tier' code but are likely to be included in the future
- A new guidance note has been issued by the Cabinet office but this is a voluntary code and does not have statutory effect
- Implications for local government are considered in this briefing

1. Introduction

Minister for the Cabinet Office Francis Maude announced on the 13 December that the 'two-tier code' has been withdrawn with immediate effect. The two-tier code known formally as the '*Code of Practice on Workforce Matters in Public Sector Service Contracts*' regulated the employment benefits of new staff recruited by contracted providers of outsourced public services. This code was established in 2005 following the establishment of a similar code for local government contracts in 2003.

So far Government has not announced its intentions in respect of the 2003 Local Government Code of Practice. However it is likely that the Department for Communities and Local Government will shortly begin a consultation process on this.

2. Why remove the Two-Tier Code?

The Minister has argued that the decision to remove the Two-Tier Code is intended to remove '*a significant barrier to smaller organisations that want to deliver public service contracts*'. This includes SMEs, charities, social enterprises, voluntary groups and staff owned mutual providers of public services. This reflects Government thinking in the Decentralisation and Localism Bill which purports to support ways to '*tackle public sector monopolies across the board, not piecemeal*'. DCLG guidance on the Bill states that the Governments' default position is that '*...all public services should be open to diverse provision, with monopoly provision justified on an exceptional basis. This principle will be embodied in the*

form of the rights that the Localism Bill will give to new and established service providers'. These new provisions include:

- **A Community right to challenge** – which will give communities a right of challenge to run local authority services.
- **A Community right to buy** – The Bill will give community organisations greater opportunity to identify and bid for assets of value to them, from which they can deliver existing or new services.

However whilst the Decentralisation and Localism Bill refers to removing barriers to the third or social enterprise sector in the running of local [government] services the Bill of itself does not withdraw the 'Best Value' or 'local government code of practice on workforce matters'. However this move as referenced above is anticipated.

3. A new guidance document 'Principles of Good Employment Practice'

The Cabinet Office 'two-tier' code has been replaced by new non-statutory guidance note entitled '*Principles of Good Employment Practice*'. This provides a guide to employers which the Cabinet Office is encouraging transferring employers and incoming contractors to follow. It is accompanied by a 'Suppliers guide'.

The wording of the new guidance is as follows:

The Coalition Government has committed to opening up government procurement and reducing costs. It has also set itself the aspiration that 25% of government contracts should be awarded to small and medium-sized businesses.

Government understands that value for money means securing the best mix of quality and effectiveness for the least outlay. This applies to the whole lifetime of goods or services from purchase through to disposal.

In support of its aspirations, Government has developed a statement of principles of good employment practice that will form part of good practice literature and be shared with contracting authorities and suppliers.¹

Government wants:

- *employers of all sizes and from all sectors to have the freedom and flexibility to motivate and reward their workforce, to meet business needs.*
- *public, private, voluntary and community organisations to learn from each other and share best practice in the spirit of continuous improvement.*
- *employers to be aware of the best practice that fosters employee engagement, access to skills and development whilst securing quality outcomes in the provision of public services;*

¹ This set of principles is voluntary and sits outside of the formal procurement decision making process, but will be disseminated to suppliers and commissioners

Six principles

This document is a statement of principles that reflect good employment practice. These principles are supported by Government and are voluntary.

1. Government as a good client

- i. Through its commissioning, procurement standards and processes, central Government should encourage contracting authorities and suppliers to promote good workforce practices in the delivery of public services. Government will ensure that the workforce practices of the supplier are considered throughout the procurement process, where appropriate.*
- ii. Government will use outcome-based commissioning wherever possible; this is instead of prescribing how services are to be delivered. Using outcome-based commissioning will encourage more innovative approaches to the delivery of public services.*

2. Training and skills

- i. In letting and managing public contracts, the procurement process of contracting organisations will recognise the importance of basic skills such as literacy, numeracy and spoken English where these skills are relevant. These skills are often required in the delivery of public services, and enable the workforce to provide better quality services, particularly those in customer facing roles.*
- ii. Suppliers will be able to demonstrate that staff have appropriate training, qualifications and access to continuing professional development as befits their role; and that staff are supported to develop their skills and grow their experience in line with any future roles that maybe expected of them.*
- iii. Where there is a recognised trade union, suppliers will consult on workforce training and development issues.*

3. A commitment to fair and reasonable terms and conditions

- i. Where a supplier employs new entrants that sit alongside former public sector workers, new entrants should have fair and reasonable pay, terms and conditions. Suppliers should consult with their recognised trade unions on the terms and conditions to be offered to new entrants.*

4. Equality

- i. Contracting organisations will ensure that supplier policies and processes are entirely consistent with the responsibilities they have as employers under the Equality Act 2010. Government will ensure it delegates relevant legal obligations when suppliers are carrying out public functions.*
- ii. Government expects that suppliers will be able to demonstrate how working practices support their responsibilities as good employers.*

5. Dispute resolution

- i. All suppliers delivering public services should have regard to good industrial relations practice on dispute resolution. This includes treating employees fairly and ensuring compliance with the law on trade union membership.*

- ii. *Suppliers will ensure that where there is a dispute, employees are aware of and have access to clear processes for dispute resolution. Government expects suppliers to consider the services of ACAS² as an option that is explored when disputes have not been resolved by internal support systems and processes.*
- iii. *Where an employee has a right to be represented by a trade union, the employer will work with the employee and recognised trade union representative in resolving any dispute.*

6. Employee engagement

- i. *The themes identified in Drive for Change³ place leadership, the design and delivery of service improvements, communications and a framework for staff engagement as vital components in ensuring and enhancing employee engagement.*
- ii. *The MacLeod Review⁴ on employee engagement cited evidence of a positive correlation between an engaged workforce and improving performance. Building on the findings of the review, Government will encourage contractors to develop effective staff engagement strategies that enable people to be the best they can be at work.*
- iii. *Government recognises the premise that engagement between employee, employer and a recognised trade union where appropriate can be a key to unlocking productivity and creating a motivated workforce that feels respected, involved, heard, is well led and valued by those they work for and with.*

As part of the introduction of this new guide the Government has pledged to carry out a review on the impact of the principles in January 2012.

4. Interface with TUPE

As with the surviving 'Code of Practice on Workforce Matters in Local Government' the new guidance document is not a substitute for compliance with the TUPE (Transfer of Undertakings Protection of Employment) regulations, where public service workers are transferred to new organisations. The provisions in the Employment Act 2008 would also apply.

Public authorities still need to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity, which can apply to contracting authorities and to suppliers in some circumstances.

² ACAS is the Advisory, Conciliation and Arbitration Service. ACAS provides free, confidential and impartial advice on a wide range of employment and industrial relations issues

³ Drive for Change is a practical tool for staff engagement in service improvement. The Drive for Change initiative was developed and supported by Cabinet Office and the Trades Union Congress and is currently in the process of being refreshed.

⁴The MacLeod Review was commissioned by the Department for Business, Innovation and Skills to take an in-depth look at employee engagement and to report on the potential benefits for organisations and employees.

5. What does this mean to local government?

As part of the approach to localism the Coalition Government has made it clear that it would like see around 25% of contracts awarded to SMEs (Small to Medium Enterprises). The Decentralisation and Localism Bill also supports this approach and the involvement of the social enterprise sector in the delivery of local government services. Therefore, as the Minister has referenced that he saw the Cabinet Office Two-Tier Code as a barrier to involvement of these groups. It is likely a similar view would be expressed in terms of the outsourcing of local government contracts within the context of the Department for Communities and Local Government.

However, as the local government two-tier code was provided by way of direction, under Sections 101 and 102 of the Local Government Act 2003, it will not be capable of the rapid dismantling that has applied on the Cabinet Office Two-Tier Code. This could however mean that, following a consultation process, we see the future withdrawal of the Two-Tier Code in local government terms to be replaced by a non-statutory framework.

6. APSE Comment

It is important to remember that the two-tier codes, as applied by the Cabinet Office and within the context of local government, came about through genuine and evidenced concerns that workforce issues were not given due consideration during outsourcing arrangements. A key concern related to new employees working alongside staff who had transferred across from a public body, who were often employed on less favourable terms and conditions than those staff protected by TUPE.

TUPE of itself has not been amended or strengthened to reflect these issues and therefore, in the context of outsourcing arrangements, transferring employers and trade unions relied upon the 'two-tier' code arrangements to safeguard against:

- New starters working on less favourable terms and conditions
- High turnover of staff that would ultimately 'pull downwards' the overall pay rates applicable to a contract as new starters entered the contract area.
- Incentivising breaches of TUPE protection through moving staff on to new contracts on less favourable terms – so called 'equalisation downwards' of the overall terms and conditions.

These issues are still important at both a strategic level, in terms of good quality employment for those working on public service contracts, particularly within the local economy, and in industrial relation terms, in reassuring staff that outsourcing will not mean a lessening of terms and conditions.

It would appear to APSE that the removal of the two-tier code sends the wrong signal to contractors at a point where the vast majority of contractors are prepared to

recognise that high quality services need not, and ought not to be, delivered at the lowest possible price. Ironically the removal of a degree of certainty on employment matters could help create new barriers to plurality of provision and involvement of the social enterprise sector in local government services.

APSE will be asking contractors to engage in a dialogue on this matter, with a view to establishing an industry based view on the merits of a charter, which effectively commits contractors, seeking public service contracts, to place at the fore of their bids a commitment to safeguarding both employment rights of transferred staff and the need to develop workable, and effective principles, in respect of newly recruited employees to public service contracts.

APSE would welcome the views of member authorities and their contractors on this matter. Please send comments to Mo Baines on mbaines@apse.org.uk

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