

New rules for tendering for public sector services

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When a public sector body outsources or re-tenders its services, there is a plethora of legislation and statutory guidance that regulates how it goes about doing this. Much of this protects the staff originally employed by the public sector body to provide those services ('the transferred staff'), but until 2003 there was little in the way of clear protection for those employed to work alongside these staff ('new joiners').

This led to concerns about what is commonly referred to as the 'two-tier workforce', whereby new joiners would be recruited by private sector service providers on low pay and benefits to save cost. This in turn led to concerns about the quality of public services being provided by these private employers.

In 2003, this gap in protection for new joiners was first filled, in part, by the Best Value Code (*Code of Practice on Workforce Matters in Local Authority Service Contracts*). That Code – which forms part of the service specification and conditions for all local authority service contracts – states clearly that new joiners must be offered: *'fair and reasonable terms and conditions which are, overall, no less favourable than those of the transferred employees'* and *'reasonable pension arrangements'* (which are detailed).

In 2005, the principles of the Best Value Code were extended to the wider public sector – including much of the NHS, civil service and maintained schools – by the Two-Tier Code (Code of Practice on Workforce Matters in Public Sector Service Contracts).

Two-Tier Code replaced by voluntary Principles

On 13 December 2010, the new Coalition Government withdrew the Two-Tier Code with immediate effect, indicating that the Code acted as a barrier to SMEs, charities and others and it wanted a 'more competitive market place' for the procurement of public services. The fate of the Best Value Code (in relation to local government contracts) remains uncertain.

In place of the Two-Tier Code, the Government has issued six '*Principles of Good Employment Practice*' applicable to public procurement.

The third of these new Principles – '*A commitment to fair and reasonable terms and conditions*' – states: 'Where a supplier employs new entrants to 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.'

The other five Principles are:

- '*Government as a good client*' (encouraging contracting authorities to promote good workforce practices and use outcome-based commissioning wherever possible);
- '*Training and Skills*' (recognising the important of relevant basic skills such as literacy, numeracy and spoken English, and of appropriate training, qualifications and professional development as well as consultation on these issues);
- '*Equality*' (ensuring that supplier policies and processes are legally compliant);
- '*Dispute Resolution*' (ensuring staff have access to good internal processes for dispute resolution, with appropriate representation, and considering ACAS as an option when these processes have not resolved matters); and
- '*Employee engagement*' (recognising the correlation between employee engagement and improved performance, and encouraging the development of effective staff engagement strategies).

Key differences with regard to new joiner pay and benefits

The third of the new Principles is in line with the fundamental principle underlying the withdrawn Two-Tier Code. However, unlike the Code, the Principles:

- are expressly stated to be voluntary and outside the formal procurement decision making process; and

- contain no express requirement in relation to minimum pension provision for new joiners.

It is therefore open to public sector authorities putting services out to tender, or re-tender, to decide what (if any) emphasis they place on the Principles, and it may be that organisations will be able to bid more competitively for contracts by reallocating costs that would otherwise be spent on upgrading the pay and benefits of new joiners. That in any event appears to be the intention behind the Code's abolition.

However, it is important to remember that *transferred* staff will continue to be protected by, amongst other things, TUPE, the Pensions Act 2004 (and associated regulations) and the Government's 'Fair Deal' Guidance.

Clarification for new and existing contracts

The Government has clarified that:

- Where contracts that have previously given effect to the Code are being **re-competed** and result in a **new contract**, the Code will not be invoked upon award of the new contract.
- When contracts are being **extended**, any provisions in those contracts giving effect to the Code will continue to apply unless both parties agree otherwise.
- Where contracts are **renegotiated**, and any provisions giving effect to the Code are removed as part of the renegotiation, the changes will apply only to future new entrants. Existing employees' terms and conditions will be unchanged.

In essence, this position reflects the general contractual principle that existing contracts can only be changed by agreement, whereas there is much more flexibility when it comes to new contracts.

Review

The Government has announced that the impact of this change will be reviewed by the Public Services Forum in January 2012.

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