



## Levelling the Playing Field Withdrawal of the Two Tier Code

### *Overview*

This week has seen a very important development in the area of public sector outsourcing which is designed to provide greater flexibility for companies which undertake public sector contracts and to help open up the public sector procurement market for small and medium-sized businesses, social enterprises and the voluntary sector. This development builds on the Government's plans to open up Government procurement generally and its aspiration of awarding 25% of Government contracts to businesses in the SME sector.

The Government has this week announced the withdrawal of its Code of Practice on Workforce Matters in Public Sector Service Contracts, commonly known as the Two-Tier Code. Until now, compliance with this Code has tended to form part of the service specification and contract terms for all public sector service contracts.

### *The Two – Tier Code*

Under the Two-Tier Code, organisations inheriting staff from the public sector were governed by anti-two-tier workforce provisions which restricted their ability to recruit a new workforce to work alongside the ex-public sector employees on lower pay terms.

The anti-two-tier workforce obligations were to offer employment to these new recruits on:

- “fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees” and
- with “reasonable pension arrangements”.

In essence, these “reasonable pension arrangements” meant membership of final salary pension schemes, or membership of defined contributions schemes or stakeholder pension schemes in which the employer had to match employee contributions up to 6%.

In practice, many businesses were actively deterred from pursuing procurement opportunities in the public sector because of these obligations under the Two–Tier Code.

A separate Code of Practice has operated, and at least for the time being continues to operate, so far as the local government sector is concerned.

### *Practical Implications*

The key implications of the abolition of the Two–Tier Code will be that businesses will have flexibility to offer different terms and conditions to new joiners, and terms and conditions which may be less

favourable than those enjoyed by the employees transferring across from the public sector.

What has not changed however is the obligation on new service providers to offer membership of a “broadly comparable” pension scheme to staff transferring from the public sector. This means a pension scheme which, according to assessment by a professional actuary, meets the condition that there are no identifiable employees who would suffer material detriment overall in terms of their future accrual of pension benefits under the alternative pension scheme. This obligation will continue to represent a significant obstacle for many businesses wishing to follow public sector procurement opportunities. However the Government has said that this obligation will be reviewed during 2011.

There will also be some situations where the Two – Tier Code will continue to apply, for example in the extension or re-awarding of contracts which have previously applied the Code.

### *The new Principles of Good Employment Practice*

The Two-Tier Code has been replaced with new Principles of Good Employment Practice. The principles are intended to reflect good employment practice, and while supported by Government are voluntary in their adoption.

The stated objectives in this document are that:

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

“ *The Two-Tier Code has been replaced with new Principles of Good Employment Practice* ”

In summary, the six principles are:

- **Government as a good client**
  - central Government to promote good

workforce practices in the delivery of public services, through its commissioning, procurement standards and processes. This will include consideration of the supplier's workforce practices throughout the procurement process.

- the use of outcome-based commissioning wherever possible, rather than prescribing how services are to be delivered
- **Training and skills**
  - recognising importance of basic skills in letting and managing public contracts
  - ability for suppliers to demonstrate appropriate staff training, qualifications and access to continuing professional development, with support given to staff to develop their skills and experience
  - consultation on training and development issues where there is a recognised trade union
- **Commitment to fair and reasonable terms and conditions**
  - new entrants recruited to work alongside former public sector employees should have “fair and reasonable pay, terms and conditions”

“ *New entrants recruited to work alongside former public sector employees should have “fair and reasonable pay, terms and conditions”* ”

- **Equality**
  - suppliers should demonstrate compliance with their responsibilities as employers under the Equality Act 2010, and should show that their working practices support their responsibilities as good employers
- **Dispute Resolution**
  - suppliers should have good regard to good industrial relations practice on dispute resolution
  - their employees should be aware of and have access to clear processes for dispute resolution, with suppliers to consider the option of using ACAS' services when internal processes have not resolved the dispute
  - working with representatives of recognised trade unions in resolving any dispute
- **Employee Engagement**
  - leadership, design and delivery of service improvement, communications and a

framework for staff engagement are recognised as vital components in ensuring and enhancing employee engagement

- there is a recognised correlation between an engaged workforce and improving performance, so suppliers should develop effective staff engagement strategies
- engagement with employees and recognised unions can be a key to unlocking productivity and creating a motivated workforce

“ *The new principles are clearly far more aspirational than prescriptive* ”

The new principles are clearly far more aspirational than prescriptive, and it remains to be seen how

these principles are put into practice in future procurement processes by both contracting Government departments and prospective suppliers.

### *Local government contracts*

It is widely anticipated that the local government sector will soon follow suit and that its version of the Two-Tier Code, the Code of Practice on Workforce Matters in Local Authority Service Contracts, will be discontinued by the Department of Communities and Local Government (DCLG).

For the time being however, the Local Government Code remains in place and local authorities will continue to apply this Code in their outsourcing contracts.

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