

**Joint Staff Employer Forum
7th November 2009**

**Pension and holiday entitlements of workers employed by the
Council's contractors and sub-contractor**

1 INTRODUCTION

- 1.1 This information paper responds to a matter raised by GMB at the meeting of this Committee on 28th April 2009. At that meeting GMB sought confirmation that contractors on the Council's approved contractor list and any sub-contractors used by them, had legal holiday entitlement and an appropriate pension scheme.

The Committee agreed that the subject was a procurement issue and that the Procurement team would be asked to provide information to a future meeting of the Committee.

In summary, the Council does require contractors on the Approved List and, if appointed, any subcontractors used by such contractors, to comply with the law. However, the Council is not entitled to impose additional requirements with regard to holidays and pension entitlement for the reasons set out in this report.

2. NON-COMMERCIAL CONSIDERATIONS

- 2.1 Other than the exceptions listed in para 3 below (and the requirement to comply with the law), the terms and conditions under which contractors employ their staff and sub-contractors are deemed by to be "non commercial matters" for the purposes of procurement legislation.
- 2.2 A council's power to take account of non-commercial matters when carrying out its procurement activities were substantially limited by legislation in 1988 which prohibited consideration of a wide range of such issues.

These restrictions apply to all procurements – works, services and supplies – regardless of contract value and extend to:

1. the inclusion or exclusion of people from an approved supplier list;
2. the decision to award a contract
3. the approval or otherwise of subcontractors named by contractors or the nomination by the Council of sub-contractors.

- 2.3 The “non-commercial” matters include “work force issues”. Work force issues include “the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, [transfer or training – see *below*] of or the other opportunities afforded to their workforces”.
- 2.4 The Council’s way of dealing with workforce issues is for the Council to require contractors appointed by it to comply with the requirements of the law. As regards pensions, the only legal requirement is for employers (of more than 5 employees) to provide a stakeholder pension but under this scheme, the employer is not obliged to make any contributions.
- 2.5 However, if a contract manager is concerned about the performance of a contractor eg because staff employed are working excessively long hours/not being allowed to have holiday entitlements etc such that **the delivery of the service is adversely impacted**, then the issue should be dealt with and, if necessary, escalated in accordance with the provisions in the relevant contract.

3. **THE EXCEPTIONS TO THE NON-COMMERCIAL CONSIDERATION RESTRICTIONS**

- 3.1 The restrictions referred to above were relaxed, to some extent, by legislation in 2001, which identified two circumstances in which work force issues could be considered.
- 3.2 The first case is where workforce issues are relevant to the cost and quality of the services to be provided. Guidance makes it clear that we can only consider workforce issues where they relate directly to “best value and the delivery of the contract”. Case law has limited the application of this but it does permit us to look at how (where/frequency) staff are trained to deliver the particular services in question.
- 3.3 The second case is where a procurement may involve a transfer of staff under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) applies. The Council, in these circumstances, is

permitted to take measures to protect the working conditions of staff transferring from it.

3.4 Where a TUPE transfer of Council staff is a possibility, the Council will, in inviting tenderers, require potential applicants to protect pension entitlements of transferring staff in one of two ways either:

3.4.1 for the applicant to have their own pension scheme with a current Government Compliance Statement attesting to actuarial equivalence with the LGPS; or

3.4.2 for the applicant to apply for admitted body status in the LGPS.

Debbie Quincey
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