

## ICT SERVICES AGREEMENT SCHEDULES

### SCHEDULE 9.2

#### TERMS AND CONDITIONS OF SERVICES EMPLOYEES

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## **Section A**

### **Product Description**

**1. PRODUCT TITLE**

ICT Services Agreement - Schedule 9.2 (Terms and Conditions of Services Employees).

**2. PURPOSE OF PRODUCT**

The purpose of the schedule is to enable the Authority to comply with its obligations under the Workforce Code. The Workforce Code forms part of circular 03/2003 issued by the Office of the Deputy Prime Minister and has been given statutory effect by the Local Government Act 2003. It requires local authorities and best value authorities to ensure that any new employees recruited by the Contractor to work alongside any employees who transfer from the Authority to the Contractor under the Employment Regulations are employed on no less favourable terms and conditions.

**3. COMPOSITION**

The schedule should contain a mechanism to delegate to the Contractor the Authority's responsibilities under the Workforce Code and to ensure compliance with the Workforce Code. The schedule should also contain or refer to a dispute resolution mechanism which reflects the requirements of the Workforce Code.

**4. DERIVATION**

Authority to draft

**5. RELATED CLAUSES & SCHEDULES**

Clauses: 28.11 (Terms and Conditions of Services Employees)

Guidance: Guidance Note 1 (Key Commercial Principles), section 1-15 (Termination for Convenience by the Authority)

**6. ALLOCATION**

Authority to prepare and to be sent to bidders at the ITT stage.

## **7. QUALITY / REVIEW**

- The Authority will need to carefully review any amendments to the standard wording proposal by bidders during the dialogue phase.
- Authority expertise: Commercial, procurement and legal.

## Section B

### Guidance

#### 1. INTRODUCTION

- 1.1 The Office of the Deputy Prime Minister published a circular (03/2003) in statutory guidance on 13 March 2003 following a review of local authority contracting in England. The circular contains the Workforce Code at annex D. The circular and the Workforce Code apply to all local authority contracts in England first advertised following the date of publication. Similar arrangements will apply to other best value authorities. The intention of the Workforce Code is to eliminate the prospect of suppliers operating a two tier work force with Transferring Employees employed on different sets of terms and conditions to new employees.
- 1.2 The Workforce Code also gives statutory effect to the provisions set out in the Cabinet Office Statement of Practice on Staff Transfers and the annex to the Statement relating to pension matters. The Statement applies to first and second generation outsourcing situations in which the public sector organisation is the employer or the client (see schedule 9.1 (Staff Transfer)). The Statement provides that in all such cases the Employment Regulations will apply save in exceptional circumstances. In circumstances where the Employment Regulations do not apply in strict legal terms the principles should nevertheless be followed and the staff involved should be treated no less favourably than had the Employment Regulations applied. Compliance with the Statement is dealt with in schedule 9.1. (Staff Transfer)

#### 2. APPLICATION OF THE WORKFORCE CODE

The Workforce Code will apply in all situations where the Contractor recruits new staff to carry out the Services alongside Transferring Employees ("**New Employees**") in the same or similar roles as the Transferring Employees. In such circumstances the Authority is under a statutory duty to ensure that the terms and conditions of employment offered to the New Employees are overall no less favourable than those of the Transferring Employees. The Workforce Code also requires the Authority to ensure that the Contractor offers the New Employees one of a number of pension alternatives comprising:

- 2.1 Membership of the local government pension scheme, where the Contractor has admitted body status within the scheme and makes the appropriate contributions;

- 2.2 Membership of a "good quality" employer pension scheme, either being a contracted out final salary based defined benefit scheme, or a defined contribution scheme. In the case of a defined contribution scheme the Contractor must match employee contributions up to 6%; or
- 2.3 A stakeholder pension scheme, under which the Contractor will match employee contributions up to 6%.

### **3. KEY PROVISIONS**

- 3.1 The Authority is under a statutory duty to ensure compliance with the requirements of the Workforce Code. The schedule must therefore include sufficiently detailed provisions requiring the Contractor to comply with the applicable Workforce Code obligations. The Authority should ensure that there is a requirement on the Contractor to use all reasonable endeavours to comply with the requirements of the Workforce Code. The schedule must include provisions which require the Contractor to ensure that any New Employees holding the same or similar positions to any of the Transferring Employees are engaged on a package of terms and conditions which are overall no less favourable than those of the Transferring Employees. It is advisable not to be too prescriptive about the meaning of "no less favourable" for these purposes. However, the Authority may wish to consider including a non-definitive list of relevant terms and conditions such as rates of pay, sick pay entitlement and annual leave entitlement.
- 3.2 The Authority may be asked by the Contractor to include provisions requiring the Contractor to seek prior certification that the terms and conditions to be offered to New Employees are Workforce Code compliant. It is suggested that the Authority should resist such an approach and should avoid going beyond the strict requirements of the Workforce Code.
- 3.3 The Authority will need to ensure that the Contractor is contractually required to consult with the representatives of the relevant trade union (where one is recognised) or other elected representatives on the terms and conditions to be offered to the New Employees. The Contractor must enter into a genuine dialogue with the relevant representatives and such dialogue should be with a view to reaching agreement as far as possible. The Authority should avoid being overly prescriptive about the format of such consultation.

- 3.4 The schedule should contain the various options in relation to the provision of pension arrangements for the New Employees. In practice this usually involves replicating the relevant section from the Workforce Code but specialist pensions advice should always be taken.
- 3.5 The Authority should continue to monitor the application of the Workforce Code throughout the length of the Agreement to ensure compliance. The schedule will therefore need to include suitable drafting to require the Contractor to supply all information which is reasonably necessary to allow the Authority to monitor compliance. It is suggested that this information should include details of the terms and conditions for Transferring Employees and the terms and conditions for New Employees. It is likely that the Contractor will require any such provision of information to be subject to Data Protection Legislation. The Contractor may also seek a costs contribution from the Authority in relation to the costs of providing such information.
- 3.6 The drafting must also contain a suitable enforcement mechanism. The statutory obligation is on the Authority to enforce the obligations under the Workforce Code. New Employees and any recognised trade union should seek to resolve any complaints directly in the first instance with the Contractor. Where such discussions fail to produce agreement then the enforcement mechanism will apply and should adopt the following process:
- 3.6.1 the Authority will initially write to the Contractor to seek an explanation for its failure to comply with the Workforce Code;
  - 3.6.2 if the response is unsatisfactory then the Authority will write to the Contractor to request remedial action is taken;
  - 3.6.3 if following such request the Contractor is still not complying with the Workforce Code then the matter will be referred to the dispute resolution procedure, the outcome of which will be binding; and
  - 3.6.4 the Authority should ensure that a strict timescale is applied in relation to the enforcement mechanism.

#### **4. DISPUTE RESOLUTION PROCEDURE**

4.1 Following consultation between local authorities, trade unions and contractors a draft dispute resolution procedure has been published. In most cases the Authority and Contractor will simply agree to follow the requirements of the draft procedure which can be annexed to the schedule or set out in a separate schedule. The Authority should always consider whether the terms of the draft procedure are appropriate in each case. The dispute resolution procedure is relatively straightforward and provides for the appointment of an independent person from an approved list supplied by ACAS. The procedure contains a relatively tight timescale for the resolution of any dispute.

#### **5. GENERAL**

As a general point bidders may seek the inclusion of an indemnity from the Authority in relation to any costs they may incur resulting from the bidders' breaches of the Workforce Code. The Authority should strongly resist the inclusion of such an indemnity. Whilst the provisions of the Workforce Code are somewhat open to interpretation it is ultimately the Contractor's obligation to ensure that it engages any new employees on broadly comparable terms and conditions and the inclusion of such an indemnity would significantly impact on the Contractor's incentive to ensure compliance.