

**EXPLANATORY MEMORANDUM TO THE
SCHOOL GOVERNANCE (CONTRACTS) (ENGLAND) REGULATIONS
2005**

2005 No. 1508

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments and the House of Lords Merits Committee.

2. Description

- 2.1 Section 19 of the Education Act 2002 (“the Act”) provides for each maintained school to have a governing body which is a body corporate. Section 19(6) provides that Schedule 1 (which contains general provisions relating the governing body as a body corporate) shall have effect. Paragraph 3(3)(c) of Schedule 1 to the Education Act 2002 empowers the governing body of a maintained school to enter into contracts. Paragraph 4(a) of Schedule 1 to the Act empowers the Secretary of State to make further provision as to the governing bodies general powers in regulations. These regulations make further provision as to those general powers by requiring every governing body, when entering into contracts, to have regard to the Code of Practice included in the Schedule. The wording of the Code of Practice in the Schedule reflects that of the Code of Practice on Workforce Matters Public Service Contracts issued by the Cabinet Office on 18th March 2005.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

4. Legislative Background

- 4.1. The School Governance (Contracts)(England) Regulations 2005 are made under Paragraph 3(3) (c) and 4(a) of Schedule 1 of the Education Act 2002 which empowers the governing body of a maintained school to enter into contracts and empowers the Secretary of State to make further provision as to the governing bodies general powers in regulations.

5. Extent

- 5.1. These regulations apply to England.

6. European Convention on Human Rights

- 6.1 No statement is required

7. Policy background

- 7.1 Last year we consulted on draft Regulations which would bring the governing bodies of maintained and their service contract suppliers into the same position as local authorities by requiring them to have regard to any relevant provisions of the 'Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts' (local authority BV Code).
- 7.2 These Regulations are most likely to benefit school support staff who work in services that may be subject to procurement exercises and we believe that this action will be welcomed by the school workforce unions and school staff with its emphasis on protection it will afford to school support staff.
- 7.3 Details of the questions and responses during the consultation process are attached as Annex A

8. Impact

- 8.1. Please see attached Annex A which details the questions that were raised during the consultation process and responses to these questions.

9. Contact

Peter Windram

Department for Education and Skills

01325 391149

Annex A

Point raised	Raised by	Line to take
Code should not be applied to the governing bodies of maintained schools. Although the principle is fair, this would put onerous responsibility on schools which do not have the experience or facilities to check conditions of employment of different contractors.	Mrs Margaret Matthews, Malden Manor Primary and Nursery School	<p>The vast majority of respondents to the consultation agreed with the intention of the Regulations and believed that it is ‘fair’ to put school support staff in the same position as [other] local authority staff vis a vis the Best Value Code, now supplanted in our Regulations by the ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’. Guidance and a detailed Q&A will be published to help Governors, and all those involved in contracts in schools, apply the Code.</p> <p>That said, governing bodies should already be in receipt of advice when they plan to contract out services and in drawing up contracts, so any advice needed in relation to these Regulations could simply be part of this process. Indeed, some LEAs already provide HR and other advice to their schools and may, therefore, be willing to provide advice here.</p>
In relation to pensions – should ‘employers’ seek admitted body status to the Local Government Pension Scheme. Staff would feel a greater measure of security if the regulations provided meaningful protection for them in this area.	David Doran, Bedfordshire County Council	The ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’ outlines specific provisions in relation to pensions, namely two pension options – either membership of a good quality employer pension scheme or stakeholder pension. This is what governing bodies and service providers need to consider.
The employment rights of an employee who moves back to a former employer should be preserved. This would help staff feel that their interests were being looked after at the point of transfer.	David Doran, Bedfordshire County Council	This falls outside the scope of the Code as it is currently drafted and it is not, therefore, within our gift to make provision for this in our Regulations.

Academies should be included within scope of the Regulations	David Curtis, Audit Commission; Ms Chris Keates, NASUWT; Raj Jethwa, TUC; Helga Pile, GMB; Barry Fawcett, NUT; Tony Woodley, T&G	<p>In keeping with the announcement made by Cabinet Office, Academies are exempt from the 'Code of Practice on Workforce Matters in Public Sector Service Contracts'. This is because Academies are registered independent schools and are run by Trusts which are charitable companies limited by guarantee. As such, they are not bound by the same legislative framework which applies to maintained schools, including the School Teachers Pay and Conditions Document (Academies are allowed to determine the terms and conditions of staff, including teaching staff). This allows Academies to adopt radical and innovative approaches to governance, staffing and management arrangements in order to raise standards of achievement and this flexibility is a key attraction to sponsors of Academies (that said, staff transferring from predecessor schools to Academies or from Academies to independent contractors through outsourcing are protected under TUPE).</p> <p>Seeking to bind Academies to some of the same requirements of maintained schools, but in other respects treating them as independent schools, is inconsistent and will create confusion and instability for schools which are trying to overcome enormous challenges. While the right balance has to be struck between safeguards in the form of conditions set by central Government and the freedoms from red tape needed to tackle deep-seated problems of deprivation and under-achievement, the Government believes it has already struck this balance.</p>
The exclusion of Facilities staff employed under a PFI arrangement in maintained schools	David Curtis, Audit Commission	<p>In most PFI deals catering, cleaning, caretaking and grounds maintenance staff transfer to the private sector provider under the Transfer of Undertakings (Protection of Employment) TUPE Regulations. In some LEAs these services may already have been outsourced by the LEA and may result in a further TUPE transfer for the staff concerned. The Employers Organisation for local government (EO), Improvement and Development Agency (IDeA) and the 4ps have developed new contract clauses for local authorities that provide a standardised approach to adopting the principles in the Code. These clauses are integrated into the standard documentation for schools PFI projects and the standardised documents being produced by Partnerships for Schools and the 4ps for use in BSF procurement.</p>

Schools and Governors will need detailed guidance, and the regulations will need to be brought to their attention.	Ms Margaret Jones, Information for School and College Governors	<p>Guidance and a detailed Q&A will be published to help Governors, and all those involved in contracts in schools, apply the Code. We will target information at Governors through ‘Governors’ newsletter and GovernorNet, and ‘Spectrum’.</p> <p>That said, governing bodies should already be in receipt of advice when they plan to contract out services and in drawing up contracts, so any advice needed in relation to these Regulations could simply be part of this process. Indeed, some LEAs already provide HR and other advice to their schools and may, therefore, be willing to provide advice here.</p>
How will implementation be monitored/enforced (ADR)? And what will sanctions be?	Ms Margaret Jones, Information for School and College Governors; Raj Jethwa, TUC; Helga Pile, GMB; Tony Woodley, T&G	<p>The ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’ provides for specific ‘monitoring’ and ‘enforcement’ arrangements.</p> <p>Trades Unions and employee representatives would also play a role. We would expect them to draw our and others’ attention to areas where there were difficulties.</p> <p>Locally there would ultimately be recourse to the law in instances where there has been a breach of the regulations.</p> <p>There would also be scope for the Secretary of State to intervene in certain circumstances. The Secretary of State for Education and Skills has specific powers under sections 496 and 496 of the Education Act 1996 –where she is satisfied that a governing body has acted unreasonably or that it has failed to perform a statutory duty.</p>
The fact that the regulations will only apply to new contracts may mean that support staff who are subject to existing contracts may be to a disadvantage.	Ms Kate Reynolds, Education Department, Swindon Borough Council	<p>The ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’ will apply to new or re-tendered service contracts, including projects in procurement up to the Invitation to Negotiate stage, from the date of the Government’s announcement. It will not apply retrospectively to existing contracts. We can, therefore, only mirror this position in our Regulations.</p> <p>Of course the Code of Practice will apply when existing contracts expire.</p>

It may be difficult to introduce 'choice' for governing bodies if providers are having to replicate local authority terms and conditions.	Ms Kate Reynolds, Education Department, Swindon Borough Council	The 'Code of Practice on Workforce Matters in Public Sector Service Contracts' and our Regulations will ensure that new joiners will be offered terms and conditions which are, overall, no less favourable than those of transferred employees. This does not mean that the terms have to be the same. Flexibility is important but this must not result in an outcome overall that is less favourable.
NASUWT recommends that under paragraph 65 (1) (4) (b) of the Education Act 2002, the Secretary of State should specify that it is a condition of the agreement that the Best Value Code of Practice on Workforce Matters is applied.	Ms Chris Keates, NASUWT	<p>This provision in the Act applies to Academies.</p> <p>In keeping with the announcement made by Cabinet Office, Academies are exempt from the 'Code of Practice on Workforce Matters in Public Sector Service Contracts'. This is because Academies are registered independent schools and are run by Trusts which are charitable companies limited by guarantee. As such, they are not bound by the same legislative framework which applies to maintained schools, including the School Teachers Pay and Conditions Document (Academies are allowed to determine the terms and conditions of staff, including teaching staff). This allows Academies to adopt radical and innovative approaches to governance, staffing and management arrangements in order to raise standards of achievement and this flexibility is a key attraction to sponsors of Academies (that said, staff transferring from predecessor schools to Academies or from Academies to independent contractors through outsourcing are protected under TUPE).</p> <p>Seeking to bind Academies to some of the same requirements of maintained schools, but in other respects treating them as independent schools, is inconsistent and will create confusion and instability for schools which are trying to overcome enormous challenges. While the right balance has to be struck between safeguards in the form of conditions set by central Government and the freedoms from red tape needed to tackle deep-seated problems of deprivation and underachievement, the Government believes it has already struck this balance.</p>
With regard to the draft regulations, NASUWT would prefer to see 'so far as relevant' deleted	Ms Chris Keates, NASUWT; Helga Pile, GMB	The words "so far as relevant" will be deleted from our revised Regulations.

as this is unnecessary and could lead some governing bodies to consider they do not need to adhere to the provisions of the Code because they think it may not be 'relevant'.		
Application of the 'Code' to maintained schools should be mandatory – therefore, the words “have regard to” should be removed from the Regulations.	Raj Jethwa, TUC; Helga Pile, GMB	Public sector organisations are only required to have regard to the Code. It is accepted that if an organisation is able to demonstrate that they have good reason, not to follow it they may do so. However, such a decision could be open to legal challenge.
Governing bodies should be explicitly required to carry out the steps for dealing with non-compliance by a contractor set out in paragraph 13 of the Code, in the same way that the requirement would apply to a local authority.	Raj Jethwa, TUC; Helga Pile, GMB	It is our intention that this be the case.
Trust that the comprehensive performance assessments (CPAs) that apply to authorities will not be invoked in schools.	Martin Ward, Secondary Heads Association	The 'Code of Practice on Workforce Matters in Public Sector Service Contracts' makes no provision for this and, therefore, this is not a consideration for our Regulations.
Will the ODPM circular's anticipation that the better performing councils be given greater freedom over resources and planning – and for the very best more radical freedoms which are designed to encourage real innovation in service delivery apply to schools?	Martin Ward, Secondary Heads Association	The 'Code of Practice on Workforce Matters in Public Sector Service Contracts' makes no provision for this and, therefore, this is not a consideration for our Regulations.
Will schools be affected by any application of inspection programmes, in the light of CPA outcomes, and Government intervention where performance is unsatisfactory?	Martin Ward, Secondary Heads Association	The 'Code of Practice on Workforce Matters in Public Sector Service Contracts' makes no provision for this and, therefore, this is not a consideration for our Regulations.

<p>The Education Act 2002 enables the governing bodies of maintained schools to join with other governing bodies, or other bodies, to form companies in order to enter into contracts as a group, or to provide services or facilities to other schools, or exercise functions which an LEA is able to contract out. Where a school company is acting as a contractor to a school, then the ‘client’ governing body would be bound by the proposed regulations to ensure that the school company abides by the Workforce Code. But when the school company acts as the ‘client,’ purchasing services from a contractor on behalf of its constituent governing bodies, then the regulations as currently drafted would appear not to oblige the school company to ensure that the parties it contracts with abide by the Code.</p> <p>We consider the regulations need to be amended to ensure that all governing bodies <i>and</i> any companies through which they enter into contracts are bound by the Workforce Code.</p>	<p>Helga Pile, GMB</p>	<p>This goes beyond the remit of the policy/ Code of practice. Generally the Code is aimed at the situation where school staff transfer to a contractor following the outsourcing of a service. The respondent appears to be discussing something entirely different.</p>
<p>The measures set out in paragraphs 15 and 16 of the Code relating to requirements for the local authority to demonstrate compliance with the Code through its performance plan, and the auditor’s role in auditing and</p>	<p>Helga Pile, GMB</p>	<p>The ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’ makes no provision for this and, therefore, this is not a consideration for our Regulations. However, the ‘Code of Practice on Workforce Matters in Public Sector Service Contracts’ provides for specific ‘monitoring’ and ‘enforcement’ arrangements. In relation to our regulations, the Secretary of State has specific powers under sections</p>

<p>monitoring compliance, are not easily translated to the school context. Yet without these there will be insufficient compliance monitoring. We consider that the Government could give an equivalent role to Ofsted, and that local authorities could also have a compliance monitoring role as part of the financial controls they exercise in relation to schools' delegated budgets.</p>		<p>496 and 497 of the Education Act 1996 – extending to a governing body's "failure to have regard to a statutory duty" and/or a governing body's "unreasonable" act.</p> <p>Local authorities, trades Unions and employee representatives will play a day to day role, and where governing bodies may be found to acting outside of our Regulations then may face sanctions, which ultimately could be legal action and the courts.</p>
--	--	--