



*Revision of Local
Government (Best Value
Authorities) (Power to Trade)
(England) Order 2004*

A consultation document



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(England) Order 2004*

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1 Introduction

1.1 Purpose of consultation

1.1.1 This consultation seeks views on the options on what should happen with the transitory provisions in relation to trading by Fire and Rescue Authorities (FRAs) in England as set out in the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004. The transitory provisions for FRAs are due to expire at midnight on 29th September 2007.

1.1.2 We welcome responses to the specific questions posed in this document and any other general comments that you may have. Please ensure that responses to any of the specific questions posed clearly identify the question number to assist with the compilation and analysis of responses. If possible, responses should be submitted electronically.

1.1.3 Responses and comments, to be received by midday on 20 July 2007 should be sent to:

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Communities and Local Government
Fire & Rescue Service Development Division
Zone 5/B, Allington Towers
PO Box No 50200
Allington Street
London
SW1E 5WY

Email: fsed6@communities.gsi.gov.uk

Tel: 020 7944 5672

1.2 After the consultation period

1.2.1 A feedback document will be produced which summarises the:

- received responses and comments;
- impact on the proposals as a result of the consultation

1.2.2 Please note that responses, including the names and addresses of respondents, will be made available to anyone who asks for them unless confidentiality is specifically requested or disclosure would prejudice third parties.

1.3 The consultation criteria

1.3.1 The Government has adopted a code of practice on consultations. The criteria below apply to all UK national public consultations consisting of a document in electronic or printed form.

- i. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- ii. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- iii. Ensure that your consultation is clear, concise and widely accessible.
- iv. Give feedback regarding the responses received and how the consultation process influenced the policy.
- v. Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.
- vi. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

1.3.2 The code does not have legal force but is regarded as binding on UK departments and their agencies unless Ministers conclude that exceptional circumstances requires a departure from it. The full consultation code may be viewed at:
http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/consultation_guidance/index.asp#codeofpractice

1.3.3 If you are not satisfied that this consultation has followed the above criteria or you have any other observations about ways of improving the consultation process, then please contact:

Albert Joyce
Consultation Co-ordinator
Communities and Local Government
Room 2.19
26 Whitehall
London SW1A 2WH;
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2 Consultation

2.1 Background

- 2.1.1 The Local Government White Paper, *Strong Local Leadership – Quality Public Services* (DTLR, December 2001)¹, proposed powers to trade for authorities by giving the best performers the widest freedom and flexibility to trade. It expressed the view that the Government wished to see a dynamic and entrepreneurial public sector, which would increase diversity and choice in the delivery of public services and that councils should be able to trade in any service in which they have a strong performance on delivery.
- 2.1.2 The Local Government Act 2003 provides powers for the Secretary of State to make an order enabling best value authorities in England² to trade in any of their ordinary functions, provided they are functions which they are not obliged to provide³. Trading is charging beyond full cost recovery and the power must be exercised through a company. The power was made available to better performing local authorities by linking the power to Comprehensive Performance Assessment⁴. However, the power did not apply to local authorities when acting in their capacity as a Fire and Rescue Authority.
- 2.1.3 An amending Trading Order, (Statutory Instrument 2004 No 2307) came into effect on 1st October 2004 to provide transitional provisions for those English FRAs that had interpreted the Fire Services Act 1947 as including a power to trade. It names the FRA and the specific service that the FRA was trading in on or before 1 April 2004.
- 2.1.4 The Trading Order was amended in 2004 (Statutory Instrument 2004 No 2573) in order to correct an error. It was subsequently amended in 2007 (Statutory Instrument 2007 No 385) to allow for the combination of two Fire & Rescue Authorities.
- 2.1.5 The power to trade in relation to Fire & Rescue functions is only transitional and will cease to have effect at midnight on 29 September 2007. It was originally intended that after this date that FRA trading powers should be linked to Comprehensive Performance Assessment (CPA). However, the Local Government White Paper, *Strong and Prosperous Communities*⁵, has indicated that the current system of CPA will cease in 2009.

1 http://www.communities.gov.uk/pub/215/StronglocalleadershipQualitypublicservicesDTLR2001PartOne_id1165215.pdf

2 For the purposes of the Secretary of State's powers under section 95 Best Value Authorities are local authorities (namely county councils, district councils, parish councils, parish meetings, London borough councils, the Council of the Isles of Scilly, the Greater London Authority as it exercises its functions through the Mayor, county borough councils and community councils) and national park authorities, the broads authority, fire and rescue authorities, the London Fire and Emergency Planning Authority, waste disposal authorities, metropolitan county passenger transport authorities, and Transport for London.

3 And provided that the authority does not have other powers to carry out the function for a commercial purpose.

4 By virtue of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (Statutory Instrument 2004 No 1705) ("the Trading Order").

5 www.communities.gov.uk/strongprosperouscommunities

2.2 Options

2.2.1 The partial Regulatory Impact Assessment (Section 3) has identified three options:

- Option A – Do nothing
- Option B – Extend transitional powers until 2009
- Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions.

2.3 Option A – Do Nothing

2.3.1 This would cease the powers for Fire and Rescue Authorities to trade as from 30 September 2007.

2.4 Option B – Extend transitional powers until 2009

2.4.1 This would maintain the status quo by continuing the existing powers for FRAs to trade in specified powers until 30 September 2009. In 2009 trading powers will need to be amended in the light of revised freedoms and flexibilities following removal of CPA. Trading powers for FRAs would then be considered in the context of this broader review. Any requests for new specified trading powers for a FRA before 2009 would have to be supported by a business case.

2.4.2 A forum would be set up to review business cases for new specified powers and would involve key stakeholders.

2.5 Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

2.5.1 This would allow all Fire and Rescue Authorities to trade in any of their ordinary functions rather than limiting the power to specified activities. It would be similar to Option B in that it would be reviewed in the light of the changes in 2009 to CPA. A business case and risk analysis would be required to be prepared and approved by the authority to trade in functions.

2.6 Other options considered but rejected

2.6.1 The FRA trading powers were originally set as transitional as the powers were intended after 2007 to be linked to CPA. The Local Government White Paper has indicated that the system of CPA will cease in 2009 and it would serve no purpose to attempt to link FRA trading to this system.

2.7 Preferred Option

- 2.7.1 The Government's current preferred choice is for Option B since this maintains the status quo until 2009 when trading activities for local authorities will also be considered in light of the removal of CPA.
- 2.7.2 This also allows time to continue gathering data on potential benefits, costs and risks.

2.8 Further Research

- 2.8.1 Further questionnaires and surveys will be undertaken in 2007 and 2008 to help benchmark the use of the trading powers and to monitor future developments.

2.9 Questions

Q1. Which of the three options (A, B or C) do you consider to be the most appropriate choice?

Q2. Please explain the reasons for your preference?

Q3. Are there any alternative options that have not been considered?

Q4. Is there any information that you can supply on the benefits and costs of each option?

Q5. Is there any information that you can supply on the risks of each option?

3 Partial Regulatory Impact Assessment

3.1 Purpose and Intended Effect of Measure

Objective

- 3.1.1 To examine the options to replace the current transitory trading powers for English Fire & Rescue Authorities under the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2004.

Background

Trading Powers

- 3.1.2 The Local Authorities (Goods and Services) Act 1970 governs the way in which local authorities are allowed to ‘trade’ with each other and with other public bodies. It authorises local authorities to enter into agreements with public bodies (which by definition includes local authorities) for the provision by local authorities to those bodies, of goods, materials and administrative, professional and technical services, for the use of vehicles, plant and apparatus, and for the carrying out of maintenance. A Fire and Rescue Authority is a local authority for the purposes of the 1970 Act. This is public to public trading. There is also a power for the Secretary of State to designate by Order that any person(s) exercising functions of a public nature shall be a public body for the purposes of the Act (NB this is solely for the purposes of designation under the 1970 Act – it has no wider implication).
- 3.1.3 The Consultation Paper, *Working with Others to Achieve Best Value: Section 16 of the Local Government Act 1999 – A Consultation Paper on Changes to the Legal Framework to Facilitate Partnership Working* (DETR, March 2001), proposed to provide a new power alongside existing powers to enable best value authorities to provide a full range of goods and services to others working in partnership with them. The Local Government White Paper, ‘*Strong Local Leadership – Quality Public Services*’ (DTLR, December 2001) went further than the earlier Consultation Paper, proposing to provide wider powers to trade for all authorities where this helps achieve best value and the delivery of public services.
- 3.1.4 The Local Government Act 2003 (“the 2003 Act”) provides power for the Secretary of State to make an Order enabling Best Value authorities to trade for a commercial purpose in any of their ordinary functions (with certain important exceptions). The powers contained in the Trading Order are primarily concerned with *public to private* trading.

Trading Orders

- 3.1.5 The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (S.I. 2004/No1705) (as amended), (“the Principal Order”) which came into force on 29 July 2004, authorises local authorities that have been categorised by Comprehensive Performance Assessment (CPA) on the basis of their performance as “excellent”,

“good”, or “fair” to trade in any of their ordinary functions. This is subject to conditions requiring the approval of a business case, and the recovery of any costs incurred in anything the local authority supplies to a company through which the trading power is exercised. Where a local authority’s performance is re-categorised as below “fair” a transitional provision permits an authority to complete anything started in exercise of the power to trade (any agreements or arrangements which have been entered into are allowed to continue for a period of 2 years). The Order did not apply to local authorities when acting in their capacity as a Fire and Rescue Authority.

- 3.1.6 The Principal Order was amended by The Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2006 (S.I. 2006/3102)⁶ to extend the power to trade to those local authorities whose performance has been categorised by an order, made under section 99(4) of the 2003 Act, as “4 stars” “3 stars” “2 stars” and “1 star” under CPA 2005.

Fire and Rescue Authority Trading Orders

- 3.1.7 The Principal Order was amended by the Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2004 (S.I. 2004/2307)⁷ to provide the power to trade to:
- certain named local authorities in England, when acting in their capacity as a fire and rescue authority
 - certain named metropolitan county fire and rescue authorities in England and
 - certain named fire and rescue authorities in England constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 (“the 2004 Act”) or to which section 4 of that Act applies.
- 3.1.8 For FRAs, the power to trade only applied in respect of certain named functions, namely those functions which authorities had been trading in previously using powers in the Fire Services Act 1947 which was repealed by the 2004 Act. The power to trade in relation to fire and rescue functions is only transitional and ceases to have effect on 30 September 2007.
- 3.1.9 The Local Government (Best Value Authorities) (Power to Trade) (Amendment No.2) (England) Order 2004 (S.I. 2004/2573)⁸ was made to correct an error in respect of the functions for which Essex County Council was authorised to trade in. The Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2007 (S.I. 2007/385) was made to allow for the combination of Devon and Somerset Fire and Rescue Authorities.
- 3.1.10 The terms of any future trading order for Fire & Rescue Authorities will not differ from those that apply to local authorities, the trading order is subject to conditions requiring the approval of a business case, and the recovery of any costs incurred in anything the local authority supplies to a company through which the trading power is exercised.

6 <http://www.opsi.gov.uk/si/si2006/20063102.htm>

7 <http://www.opsi.gov.uk/si/si2004/20042307.htm>

8 <http://www.opsi.gov.uk/si/si2004/20042573.htm>

Rationale for government intervention

- 3.1.11 The transitional Order for existing powers to trade for Fire and Rescue Authorities (FRAs) ceases at midnight on 29 September 2007.

3.2 Consultation

- 3.2.1 Information was sought from previous RIAs produced in relation to the trading powers in the 2003 Act and findings are included in the Competition Assessment (section 3.6 of this RIA).
- 3.2.2 Information was also sought from previous charging and trading consultations that had been undertaken since 2004.

3.3 Options

Three options have been identified:

- Option A – Do nothing
- Option B – Extend transitional powers until 2009
- Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

Option A – Do nothing

- 3.3.1 This would cease the powers for Fire and Rescue Authorities to trade as from 30 September 2007. This option would mean that FRAs would be deprived of existing income streams and thereby possibly increase the burden on tax payers. Some FRAs are already trading and they would need time to plan the winding down of any existing schemes.

Option B – Extend transitional powers until 2009

- 3.3.2 This would maintain the status quo by continuing the existing powers for FRAs to trade in specified powers until 30 September 2009. In 2009 trading powers will need to be amended in the light of revised freedoms and flexibilities following removal of CPA. Trading powers for FRAs would then be considered in the context of this broader review. Any requests for new specified trading powers for a FRA before 2009 would have to be supported by a business case.

Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

- 3.3.3 This would allow all Fire and Rescue Authorities to trade in any of their ordinary functions rather than limiting the power to specified activities. It would be similar to

Option B in that it would be reviewed in the light of the changes in 2009 to CPA. A business case and risk analysis would be required to be prepared and approved by the authority to trade in functions.

Alternative approach considered but rejected

Linking to Comprehensive Performance Assessment (CPA)

- 3.3.4 The FRA Trading powers were originally set as transitional as it was intended after 2007 to be linked to CPA. The Local Government White Paper has indicated that the system of CPA will cease in 2009 and it would serve no purpose to attempt to link FRA trading to the CPA system for such a time limited purpose.

3.4 Costs and Benefits

Sectors and groups affected

- 3.4.1 Businesses (including Small and Medium sized Enterprises), consumers, public and voluntary sectors.
- 3.4.2 The powers allow FRAs to engage in activities which are also undertaken by the private sector; however, it is not necessary to assume that Fire & Rescue Authorities will necessarily be displacing business from the private sector. The trading powers may be used to improve competition and contestability or to fill a gap in the market in the provision of services to the public.

Race equality assessment

- 3.4.3 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on race equality. FRAs are under a legal duty to eliminate race discrimination and to promote equality of opportunity and good race relations in carrying out their functions. When making use of the trading powers, as part of their legal duty, FRAs should consider whether there are any race equality considerations that need to be addressed.

Health impact assessment

- 3.4.4 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on health issues. When making use of the trading powers FRAs should consider whether there are any adverse health impact considerations that need to be addressed.

Rural considerations

- 3.4.5 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on rural issues. When making use of the trading powers FRAs should consider whether there are any adverse rural considerations that need to be addressed.

Breakdown of costs and benefits

3.4.6 Below are the most likely range of outcomes and likely impacts from both suppliers and FRAs points of view:

3.4.7 Option A – Do nothing

Economic	
Benefits	Suppliers – Potential to increase business for suppliers due to FRAs not eligible to compete in the market
	FRAs – None
Costs	Suppliers – Not known – further information is required
	FRAs – Loss of existing and potential income Costs for winding down trading companies
Environmental	
Benefits	Suppliers – None
	FRAs – None
Costs	Suppliers – None
	FRAs – None
Social	
Benefits	Suppliers – Dissipation of concerns over competition issues
	FRAs – Not subject to risk inherent in undertaking trading activities
Costs	Suppliers – Not known – further information is required
	FRAs – Diversity and choice of markets restricted Prevented from competing in market Loss of resource to the community should FRA companies provide fire safety services to sections of the community at below cost (i.e. a tiered costing approach to different sections of the community).

3.4.8 Option B – Extend transitional powers until 2009

Economic	
Benefits	Suppliers – Not known – further information is required
	FRAs – Potential to continue income generation
Costs	Suppliers – Potential loss of business through greater competition
	FRAs –
	Administration of trading arm
	Uncertainty in post 2009 arrangements
Costs for preparing and considering business cases	
Environmental	
Benefits	Suppliers – None
	FRAs – None
Costs	Suppliers – None
	FRAs – None
Social	
Benefits	Suppliers – Not known – further information is required
	FRAs – Wider diversity and choice of markets
Costs	Suppliers – Not known – further information is required
	FRAs – Concentration of resources away from core business

3.4.9 Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

Economic	
Benefits	Suppliers – Not known – further information is required
	FRAs – Potential to continue current income generation and explore new trading options
Costs	Suppliers – Potential loss of business through greater competition than Option B
	FRAs – Similar to Option B

Environmental	
Benefits	Suppliers – None
	FRAs – None
Costs	Suppliers – None
	FRAs – None
Social	
Benefits	Suppliers – Not known – further information is required
	FRAs – Wider diversity and choice of markets
Costs	Suppliers – Not known – further information is required
	FRAs – Greater concentration of resources way from core business than Option B

3.4.10 Given that more information on costs and benefits are needed the Government's current preferred option is Option B.

3.5 Small Firms' Impact Test (SFIT)

3.5.1 Whilst the trading powers mean that FRAs are potentially trading in competition with the private sector, various safeguards have been built in to the use of the powers. Safeguards include requiring authorities to adopt a genuinely risk-based approach, based on a sound business case prepared for the proposed trading activity and cleared by the authorities' executive.

3.5.2 The arrangements secure that FRAs are not able to distort markets through the provision of inappropriate subsidies to trading companies. In order to maintain a level playing field with local businesses, the powers to trade are subject to a requirement that trading must take place through a company within the meaning of Part V of the Local Government and Housing Act 1989. This means that surpluses on commercial operations under the power will be subject to taxation in the same way as other companies. FRAs like other bodies are subject to and must abide by competition law.

3.5.3 We are currently conducting a Small Firms Impact Test and the results will be made available in the full RIA. If you wish to take part in this test and have not already been approached by Communities and Local Government please send your request to:

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 Communities and Local Government
 Fire & Rescue Service Development Division
 Zone 5/B, Allington Towers
 PO Box No 50200
 Allington Street
 London
 SW1E 5WY
 Email: fsed6@communities.gsi.gov.uk

Tel: 020 7944 5672

3.5.4 The Small Business Service and other representative bodies for small businesses have been contacted concerning this.

3.6 Competition Assessment

3.6.1 A full Competition Assessment was carried out for the Regulatory Impact Assessment published to coincide with the introduction of the Local Government Bill 2003.

3.6.2 Though this assessment looked at Local Authorities, some of the findings would equally apply to Fire & Rescue Authorities.

3.6.3 The conclusions of the 2003 Bill Competition Assessment were:

- deducing the effects on competition was difficult due to the "enabling" nature of the powers and the inevitable uncertainty about the extent to which local authorities will seek to use them
- the powers could lead to increased contestability and/or increased competition in markets (especially those which are currently inefficient or less active)
- greater levels of trading by local authorities could lead to efficiency gains through increased economies of scale, and so could benefit consumers through lower prices, better quality, or both
- there could however be a number of adverse effects arising from certain advantages that local authorities may possess, with consequent potential for the abuse of market power
 - conflicts of interest may arise for local authorities in cases where they both regulate markets and participate in them (for example where withholding planning consents would create barriers to entry)
 - the legislation could potentially facilitate collusion between local authorities, thereby adversely affecting private sector businesses, either through increased information asymmetry or affecting bidding outcomes
 - in terms of existing markets, local authorities may be able to exploit the benefits of an existing customer base and crowd out the private sector
 - the legislation may alter the competitive process through increased consolidation and the possible exclusion of small businesses from particular markets.
- The power to trade is only exercisable through a company structure, which is subject to regulation in the same way as other commercial bodies (e.g. taxation). This helps ensure a level playing field with the private sector.

3.6.4 The consultations on charging carried out in 2004 and 2006 and other related correspondence were also looked at to gain any information on trading issues that was received from both Suppliers and Fire & Rescue Services.

- 3.6.5 Suppliers were concerned about FRAs offering competing services in fire protection, consultancy and training services. It was felt that there were no current mechanisms in place to ensure such services were being offered at the market rate. The public perceive FRAs as the experts in certain areas and this could lead to an unfair advantage in the market. There were also issues over the potential conflict of role with FRAs acting as both the giver of advice and the enforcer.
- 3.6.6 Many of the issues raised above, in relation to a local authority's assistance to a company, transparency, state aid and competition law, are addressed in the Trading Guidance. Such considerations would apply equally to a FRA as to a local authority.
- 3.6.7 From April to July 2006 the Chief Fire Officers' Association sent out a survey to all the English FRAs. This asked for information about what services they were currently trading in, how much revenue this generated, what impact setting up a company would have and if they were likely to require expansion for their trading activities.
- 3.6.8 Information gained from this was inconclusive though some FRAs indicated that they were unlikely to carry on with trading activities in the future.
- 3.6.9 A response to the 2004 consultation noted that in the past there had been a tendency to underestimate the full costs to industry and commerce and so suppliers, through the Business & Community Safety Forum and the Fire & Rescue Suppliers Association, were contacted in January 2007 to help complete the Competition Assessment.
- 3.6.10 The Office of Fair Trading and other representative have been contacted concerning this.

3.7 Enforcement, Sanctions and Monitoring

Enforcement

- 3.7.1 The trading power is an enabling power therefore there are no non-compliance issues.

Sanctions

- 3.7.2 As above there are no sanction requirements for the trading powers. Any sanctions for non-compliance with the legislative duties under the trading legislation, or under any other legislation, will be a matter for the courts if necessary.

Monitoring and review

- 3.7.3 If Option A goes ahead then no formal monitoring and review will be possible by the Department. It may be necessary to conduct a questionnaire of FRAs who were trading to get an idea of the costs involved in ceasing this activity.
- 3.7.4 If Option B goes ahead then requests for extending trading powers for named FRAs in specified functions will have to be submitted to Communities and Local Government as

a business case to extend the trading powers by Order. A forum will be set up to review these and would involve key stakeholders.

- 3.7.5 If Option C goes ahead then FRAs will clear their business case through their executive. We will monitor and review by April 2009.
- 3.7.6 Future questionnaires and surveys to both suppliers and FRAs will be sent out to benchmark current costs and benefits. These will be used to monitor potential developments.