



Best Value and Procurement
Workforce Matters in Best Value Authority Contracting
Statutory Guidance: Draft for Consultation



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Statutory Guidance: Draft for Consultation

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Foreword

Since the introduction of best value in 1999, the Government has shown its commitment to ensure the fair treatment of staff, while preserving the necessary flexibility in service delivery.

Both central and local government's ambition is to improve local public services and customer satisfaction with the service they receive. This includes the delivery of integrated services which fit the needs and circumstances of each recipient, and the positive engagement of front-line professionals who always think about the customer first. Services to citizens should be delivered by the body most able to deliver high quality services, whether through in-house delivery or by contracting out to the private or voluntary and community sector, including social enterprises.

However, services which are outsourced cannot deliver best value where it is on the basis of poorer terms and conditions for employees working on public sector contracts. With this in mind, we have taken steps to improve the treatment of all employees working on local government contracts. We want to see public services and public servants in tune with, and accountable to, the people they serve.

This consultation is on proposed statutory guidance concerned with the *Handling of Workforce Matters in Contracting* and the *Code of Practice on Workforce Matters in Local Authority Service Contracts*, commonly known as the "Two Tier Code".

Since these documents were originally published, some aspects of policy and legislation surrounding best value workforce issues have changed. In proposing revised versions, our intention is that the guidance should remain substantially as originally drafted and that there should not be any dilution of either document. But with the opportunity provided to re-issue this guidance it makes sense to update and clarify aspects where necessary.

Your views on the draft statutory guidance contained within this document would be welcomed.

Rt Hon Hazel Blears MP, Secretary of State for Communities and Local Government

About this Consultation

Scope

This consultation paper seeks views on the draft statutory guidance: *Best Value and Procurement: Workforce Matters in Best Value Authority Contracting* set out at **Chapter 6**.

This draft statutory guidance contains:

- *Valuing the Workforce* as statutory guidance made under the power at section 3 (as amended) of the *Local Government Act 1999*
- *Handling of Workforce Matters in Contracting* as statutory guidance made under the power at section 19 of the *Local Government Act 1999*
- the *Code of Practice on Workforce Matters in Best Value Authority Service Contracts* (“the Two Tier Code”) as statutory guidance made under the power at section 3 (as amended) of the *Local Government Act 1999*.

This consultation paper also explains the steps that are being taken with regard to future audit arrangements for the *Two Tier Code*.

This consultation paper applies to all best value authorities in England, and Police authorities in Wales.

How to respond

The Government welcomes your views on the proposals set out in this consultation paper.

Consultation responses should be submitted electronically, via an electronic form or to the e-mail address below. It would be very helpful if all responses can be annotated with the relevant paragraph number to which the comment relates.

Please let us have your comments no later than 19 January 2009, by e-mail to:

LTIE@communities.gsi.gov.uk

or by post to:

Andrew Cornelius
Department for Communities and Local Government
4/J6 Eland House
Bressenden Place
London
SW1E 5DU
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Will my comments be made public?

The Government will use the responses in finalising its proposals set out in this consultation paper. According to the requirements of the *Freedom of Information Act 2000*, all information contained in the response including personal information may be subject to publication or disclosure. Where respondents request that information given in response to the consultation be kept confidential, this will only be possible if it is consistent with Freedom of Information obligations.

The Consultation Criteria

The Government has adopted a code of practice on consultations. The criteria below apply to all UK national public consultations on the basis of a document in electronic or printed form. They will often be relevant to other sorts of consultation.

Though they have no legal force, and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law), they should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure.

- A. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- B. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- C. Ensure that your consultation is clear, concise and widely accessible.
- D. Give feedback regarding the responses received and how the consultation process influenced the policy.
- E. Monitor your Department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- F. Ensure your consultation follows better regulation best practice, including carrying out a Impact Assessment if appropriate.

The full consultation code may be viewed at: <http://www.berr.gov.uk/files/file44364.pdf>

Are you satisfied that this consultation has followed these criteria? If not, or you have any other observations about ways of improving the consultation process please contact:

Communities and Local Government Consultation Co-ordinator
Zone 6/H10
Eland House
London
SW1E 5 DU
or by e-mail to: consultationcoordinator@communities.gsi.gov.uk

Chapter 1

Introduction

1. The Government's public service reform strategy focuses on giving service users the opportunity to shape services in ways that meet their needs. The delivery of high quality public services depends on many factors but this outcome is unlikely to be achieved without the commitment of a highly motivated, flexible, diverse and skilled workforce, capable of providing high quality, personalised public services. Getting the relationship right between employers and employees so that staff are supported, enabled and empowered to deliver those services is key. Developing the right workforce policies and new ways of working underpins this relationship.
2. This Consultation Paper seeks views on updating and re-issuing existing guidance which sets out how staff who work on best value authority contracts are treated. This existing guidance is as follows:
 - *Valuing the Workforce* (Section 2 of ODPM Circular 03/2003)
 - *Handling of Workforce Matters in Contracting* (Annex C of ODPM Circular 03/2003)
 - the *Code of Practice on Workforce Matters in Local Authority Service Contracts* (Annex D of ODPM Circular 03/2003)

This Consultation Paper also sets out new arrangements for monitoring the *Two Tier Code*. The new draft Statutory Guidance is set out at **Chapter 6**. Throughout this document any reference to the "Two Tier Code" is a reference to the *Code of Practice on Workforce Matters in Local Authority Service Contracts* and related Codes for best value authorities.

Background

Best Value Review

3. On 1 October 2001, the then Secretary of State for *Transport, Local Government and the Regions* announced a review of the Best Value regime for local authorities aimed at improving the quality of services. The key terms of reference of the Best Value Review, announced on 29 October 2001, were:

"to identify practical ways in which Best Value can deliver high quality services efficiently and effectively whilst ensuring that terms and conditions amongst the staff charged with delivering them are fair, both in terms of the work being done and incentives for better performance".

4. A key part of the subsequent package of terms announced by the Secretary of State on 26 March 2002 was for the Department to draw up a Code of Practice on the treatment of new recruits working on local authority contracts alongside transferred staff. The Code would oblige contractors to offer employment to new staff on fair and reasonable terms and conditions, and provide a pension.

The Two Tier Code

5. On 23 July 2002, the Government published a draft Code of Practice covering workforce matters in local government for consultation. On 13 February 2003 the Government made available the *Code of Practice on Workforce Matters in Local Authority Service Contracts* ("the Two Tier Code") which was subsequently published as Annex D of ODPM Circular 03/2003 *Local Government Act 1999: Part 1 – Best Value and Performance Improvement*¹ on 13 March 2003. An *Alternative Dispute Resolution* (ADR)² procedure agreed between local authorities, trade unions and private sector contractors was announced on 11 March 2004.

Public Sector Code

6. On 18 March 2005, the then Prime Minister announced a major extension to the *Code of Practice on Workforce Matters in Public Sector Service Contracts*³. Until then, the Two Tier Code had operated in local government only. The extension applied it to the wider public sector – including the Civil Service, NHS and maintained schools.

Handling of Workforce Matters in Contracting

Section 17 of the Local Government Act 1988

7. Section 17 of the *Local Government Act 1988* ("the 1988 Act") prevents authorities from introducing political or other irrelevant considerations into the procurement process. Section 17 achieves this by defining certain matters as 'non-commercial' and by prohibiting authorities from having regard to these matters in the contractual process. Relevant matters, as set out in section 17(5) of the 1988 Act, include:

- 'the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or other opportunities afforded to, their workforces' (section 17(5)(a)); and
- 'the conduct of contractors or workers in industrial disputes between them' (part of section 17(5)(d)).

Section 19 of the Local Government Act 1999

8. Section 19 of the *Local Government Act 1999* ("the 1999 Act") provides the Secretary of State with a power to specify that matters cease to be considered as 'non-commercial' for the purposes of section 17 of the 1988 Act. Section 19(4) of the

¹ <http://www.communities.gov.uk/publications/localgovernment/odpmcircularbest>

² <http://www.communities.gov.uk/documents/corporate/doc/752664.doc>

³ http://www.cabinetoffice.gov.uk/newsroom/news_releases/2005/050318_twotiercode.aspx

1999 Act requires local authorities to have regard to guidance issued by the Secretary of State in exercising a function regulated by section 17 of the 1988 Act, which is also the subject of an order made under the 1999 Act.

9. The *Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001* (SI 2001 No 909), made under section 19 of the 1999 Act provides, in respect of local authorities, for the workforce matters described in paragraph 7 to cease to be defined as 'non-commercial' matters for the purposes of the 1988 Act. This is to the extent that the workforce matters are considered necessary or expedient to the achievement of best value, and also in circumstances where they are relevant for the purposes of a TUPE transfer.

Annex C of Circular 03/2003

10. The *Handling of Workforce Matters in Contracting* guidance, made under the provisions of section 19(4) of the 1999 Act and set out in Annex C of ODPM Circular 03/2003, provides guidance to local authorities on how to handle workforce matters when contracting.

Chapter 2

The existing guidance

11. The guidance on workforce matters, for local authorities, is contained within ODPM Circular 03/2003. It is divided into 3 distinct sections: *Valuing the Workforce*, *Handling of Workforce Matters in Contracting*, and the *Code of Practice on Workforce Matters in Local Authority Service Contracts*.

Valuing the Workforce

12. *Valuing the Workforce* sets out key workforce principles which a local authority should consider when delivering services. It sets out principles for:
 - dealing with transferred staff either under TUPE or the provisions contained in the Cabinet Office issued *Staff Transfers in the Public Sector: Statement of Practice*⁴, and
 - the treatment of “New Joiners” recruited to work on local authority service contracts to be dealt with in accordance with the provisions in the *Two Tier Code*

Handling of Workforce Matters in Contracting

13. The *Handling of Workforce Matters in Contracting* guidance sets out:
 - background on section 17 of the *Local Government Act 1988* and section 19 of the *Local Government Act 1999*
 - details of the Statutory Instrument, the *Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001* (SI 2001 No 909)
 - the context of best value and EC Procurement Directives, implemented in the UK by Public Procurement Regulations
 - principles of good procurement practice, and
 - how workforce matters can be handled at the different stages of the contractual process

⁴ <http://www.civilservice.gov.uk/documents/pdf/employment/stafftransfers2.pdf>

Legislative Amendments to Part II of the *Local Government Act 1988*

The *Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001* (SI 2001 No 909) has modified the prohibition on considering workforce matters in tendering set out in Part II of the *Local Government Act 1988* so that authorities **may** consider certain workforce matters in best value contracting decisions. Section 17 of the 1988 Act (before amendment) required local authorities to carry out contractual functions without regard to specified “non-commercial” matters. On a strict reading this could have been taken to mean that local authorities could **not** take workforce matters (ie the terms and conditions of employment under which contractors employ their workforces) into account even when relevant to the value for money of a contract.

The *Two Tier Code*

14. The *Two Tier Code* sets out the principles for the treatment of “New Joiners” recruited to work on local authority service contracts.

Code of Practice on Workforce Matters in Local Authority Service Contracts (New Joiners)

The Code sets out an approach to workforce matters in local authority service contracts which involve a transfer of staff from the local authority to the service provider, or in which staff originally transferred out of the local authority as a result of an outsourcing are TUPE transferred to a new provider under a re-tender of a contract.

The Code provides that where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the local authority, it will offer employment on fair and reasonable terms which are, overall, no less favourable than those of transferred employees.

The service provider will also be required to offer new recruits taken on to work on the contract beside transferees one of the following pension arrangements:

- membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions;
- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished;
- a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

15. The *Two Tier Code* has been extended to other best value authorities⁵ through Circulars from the lead policy Department for that best value authority. The *Two Tier Code* has not yet been extended to Joint Waste Disposal authorities.

Current monitoring arrangements for the *Two Tier Code*

16. Until 1 April 2008, best value authorities were required to prepare annual *Best Value Performance Plans* (“BVPPs”) which identified progress on performance and improvement. As part of the requirements of the *Two Tier Code*, best value authorities were required to certify in their BVPPs that individual contracts comply, where applicable, with the workforce requirements in the *Two Tier Code*.
17. The responsibilities of the Audit Commission’s appointed auditor are set out in the Code of Audit Practice, published in 2005, which requires auditors of best value authorities to consider the audited body’s compliance with the requirement to prepare and publish a BVPP. This includes checking that councils are meeting their statutory duty of certifying their compliance with the *Two Tier Code*. The *Two Tier Code* required that, during the audit of the BVPP, the Audit Commission’s appointed auditor would:
 - provide assurance that councils are meeting their statutory duty of certifying their compliance with the Code and that they have put in place adequate arrangements to ensure compliance
 - receive information from third parties about any concerns with the council’s compliance
 - consider the information received and decide how to deal with those concerns
 - decide on a proportionate response to investigate the concerns where the subject of any concern was of material significance (eg large contracts or where a major breach of the Code was alleged)

⁵ Best Value authorities are local authorities and other public bodies i.e. Metropolitan Passenger Transport Authorities, National Park Authorities, Joint Waste Disposal Authorities; GLA, TfL, LDA, Combined Fire and Rescue Authorities and London Fire and Emergency Planning Authority.

18. If, as a result of investigations, the auditor had concerns about an authority's compliance with the *Two Tier Code*, they could exercise their appropriate statutory powers, which included:
 - requiring the authority to respond publicly to a written recommendation;
 - recommending that the Secretary of State should give a direction under section 15 of the *Local Government Act 1999*.

From 1 April 2008 the requirement for best value authorities to prepare BVPPs was removed by the provisions of the *Local Government and Public Involvement in Health Act 2007*. However, savings provisions were made requiring these authorities to continue to certify compliance with the *Two Tier Code* for contracts let in the year 2007/08. By 2008/09 it is anticipated that new audit arrangements for the *Two Tier Code* will be in place.

Previous consultation on monitoring the *Two Tier Code*

19. During the passage of the *Local Government and Public Involvement in Health Act 2007* through Parliament, the Department carried out a consultation exercise on future arrangements for monitoring compliance with the *Two Tier Code*. Powers were identified under section 230 of the *Local Government Act 1972* which would enable the Secretary of State to require authorities to provide information as to whether they were complying with the *Two Tier Code*. The outcome of that consultation exercise and next steps is discussed further in **Chapter 4**.

Chapter 3

Proposals for the new guidance

Preserving the guidance

20. The consultation document *Creating Strong, Safe and Prosperous Communities Statutory Guidance: Draft for Consultation* (“the draft statutory guidance”) (published by Communities and Local Government on 20 November 2007) sought views on new statutory guidance to local authorities and their partners on creating strong, safe and prosperous communities, specifically relating to new legislation introduced in the *Local Government and Public Involvement in Health Act 2007*. It covered: Local Strategic Partnerships, Sustainable Community Strategies, the new duty to involve, Local Area Agreements, the revised best value regime and commissioning.
21. The consultation document made clear that the draft statutory guidance will replace the guidance contained in ODPM Circular 03/2003⁶ and that the Government intends to publish a separate Workforce Matters consultation document covering the annexes in the Circular relating to Workforce Matters. This Consultation Paper fulfils that commitment.
22. Although the *Creating Strong, Safe and Prosperous Communities Statutory Guidance* has now been published and preserves the previous workforce guidance contained in the ODPM Circulars this is only a short term measure. The Government is now seeking views on the draft statutory guidance contained in **Chapter 6** to this Consultation Paper. The proposal is to:
 - update and re-issue *Valuing the Workforce* under provisions in section 3 (as amended) of the *Local Government Act 1999*
 - update and re-issue *Handling of Workforce Matters in Contracting* under provisions in section 19(4) of the *Local Government Act 1999*
 - update and re-issue the *Code of Practice on Workforce Matters in Best Value Authority Service Contracts* (“Two Tier Code”) under provisions in section 3 (as amended) of the *Local Government Act 1999*

⁶ Which includes *Valuing the Workforce*, *Handling of Workforce Matters in Contracting*, and the *Two Tier Code*

23. This Consultation Paper also sets out the new arrangements for the *Two Tier Code* under the Comprehensive Area Assessment.
24. The documents identified above will comprise a single suite of statutory guidance covering *Workforce Matters in Best Value Authority Contracting*. Further details on the proposed amendments to update the specific sections is set out in paragraphs 25 to 27 below. It should be noted that the amendments are primarily intended to clarify and update the effect of the guidance and are not intended to alter the purpose which lay behind the original policy. In the case of the *Two Tier Code* the revised draft guidance is also amended to secure a single Code for all best value authorities and to set out a new approach to monitoring arrangements given the legislative changes brought about by the *Local Government and Public Involvement in Health Act 2007*.

Valuing the Workforce

25. *Valuing the Workforce* has been updated to reflect changes in legislation⁷ and to update policy references. The most significant updates are to reflect the provisions in the *Local Government Act 2003* which received Royal Assent after the publication of the Circular, and the *Best Value Authorities Staff Transfers (Pensions) Direction 2007*⁸ issued under that Act. *Valuing the Workforce* has been updated to provide clarity on aspects of the *Two Tier Code* in relation to a re-tender of a contract.

Handling of Workforce Matters in Contracting

26. *Handling of Workforce Matters in Contracting* has been updated to reflect the current position on a number of issues including relevant features of public procurement policy and where good practice advice and resources may be found. The document has also enhanced references to health and safety considerations and puts workforce matters in contracting in a wider equalities context, primarily to reflect changes in legislation.

The *Two Tier Code*

27. The *Two Tier Code* has been updated to reflect changes in legislation and to update policy references, for instance to the Alternative Dispute Resolution (ADR) which was agreed after the publication of the original *Two Tier Code*. The Code will also cover all best value authorities under a single Code. The most significant update is to reflect

⁷ For instance to reflect the new TUPE Regulations 2006

⁸ www.communities.gov.uk/publications/localgovernment/authorities-staff-transfers

the need to secure a new monitoring arrangement following the removal of the requirement to prepare BVPPs, and the associated audit of the Plans. Further details on the new monitoring arrangements for the *Two Tier Code* are set out at **Chapter 4**.

Chapter 4

Future monitoring arrangements

28. The Local Government White Paper *Strong and Prosperous Communities*⁹ announced that the Government would remove the requirements for best value authorities to prepare annual BVPPs and conduct best value reviews.

The previous consultation

29. On 26 January 2007, Communities and Local Government wrote to stakeholders (Local Government Employers, trade unions and the CBI) to consult about possible future arrangements for monitoring the compliance of local authorities with the requirements of the *Two Tier Code*.
30. The context of the consultation letter was that Communities and Local Government was considering the mechanism for monitoring compliance with the *Two Tier Code* in the light of the proposed repeal of BVPPs for English Best Value authorities and Police authorities in Wales (at the time this was included as clause 107(3) of the *Local Government and Public Involvement in Health Bill*). Communities and Local Government was considering an option to use an alternative statutory route under section 230 of the *Local Government Act 1972* ("the 1972 Act") to monitor a local authority's compliance with the *Two Tier Code* and the consultation exercise was being carried out before making a final decision on this. It was made clear that Communities and Local Government were not proposing any change to the *Two Tier Code* itself, simply the mechanism for monitoring compliance. Responses to the consultation letter were received from the LGE and CBI.
31. The LGE noted that the proposal gave very little detail on the alternative reporting route. They asked to know the thinking behind the proposal and how Communities and Local Government intended to use section 230 of the 1972 Act in practice. The CBI required clarification on exactly what the alternative mechanism would have been and how it would have been implemented. They had concerns that a new stand alone approach might run counter to the Government's intention to reduce regulation. They queried whether this could not be covered by revised best value guidance.

⁹ <http://www.communities.gov.uk/publications/localgovernment/strongprosperous>

32. Following this consultation exercise Communities and Local Government concluded that the Department could undertake the role of monitoring compliance using powers under section 230 of the 1972 Act but that it might be more appropriate to make use of the proposed mechanisms in the new Performance Framework.

Monitoring arrangements for the Two Tier Code and audit arrangements

33. Local authorities are responsible for ensuring that they have proper arrangements to meet relevant statutory and other relevant requirements. They are also responsible for monitoring compliance with these requirements. It is, therefore, the responsibility of authorities to ensure that they comply with the requirements of the *Two Tier Code*, where appropriate, and for monitoring compliance.
34. With regard to audit arrangements, the Audit Commission has recently consulted on its proposals for a new approach to assessing local authorities' arrangements for use of resources to support the Comprehensive Area Assessment (CAA) framework from 2009. In May 2008 the Commission published key lines of enquiry for the new use of resources assessments. The Commission has developed guidance to support the key lines of enquiry which include characteristics of performance to help auditors reach scored judgements. The guidance refers auditors to the need for local authorities to have appropriate arrangements in place to ensure that authorities consider workforce matters when services are outsourced and, where appropriate comply with the *Two Tier Code*.
35. Arrangements for other best value authorities will be put in place by the lead policy Department. The general approach is that where the use of resources judgement is not available for that best value authority, the relevant Department will seek to include new arrangements within an existing reporting mechanism.

Chapter 5

Consultation Questions

36. The Government would welcome the views of stakeholders on the following consultation questions:
- Q1. Do the amendments to *Valuing the Workforce*, in chapter 6, update and accurately reflect the current statutory and policy position?
 - Q2. Do the amendments to *Handling of Workforce Matters in Contracting*, in chapter 6, update and accurately reflect the current statutory and policy position?
 - Q3. Do the amendments to the *Code of Practice on Workforce Matters in Best Value Authority Service Contracts*, in chapter 6, update and accurately reflect the current statutory and policy position?
 - Q4. The previous guidance has not yet been extended to Joint Waste Disposal Authorities, or to proposed new Joint Waste authorities (powers for the establishment of which are contained in the *Local Government and Public Involvement in Health Act 2007*). Are there any particular considerations for applying the statutory guidance to Joint Waste Disposal Authorities or the new Joint Waste authorities envisaged in Part 11 of the *Local Government and Public Involvement in Health Act 2007*?

Chapter 6

Draft Statutory Guidance

Best Value and Procurement Workforce Matters in Best Value Authority Contracting

The statutory guidance is made under provisions in sections 3 and 19 of the *Local Government Act 1999* and is divided into three parts:

- **Valuing the Workforce**
- **Handling of Workforce Matters in Contracting** (Annex A)
- **Code of Practice on Workforce Matters in Best Value Authority Service Contracts** (Annex B)

This applies to all best value authorities in England, and Police authorities in Wales.

Valuing the Workforce

1. Best value cannot be delivered without a well trained and motivated workforce. This is the responsibility of local government, both as employer and client, and applies irrespective of whether work is carried out in-house or externally. Where there is outsourcing, a consistent and certain application of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* ("TUPE") is central to the achievement of best value. Where there is a TUPE transfer, authorities need to provide bidders with accurate and timely information on all relevant matters. Bidders also need to be able to demonstrate that they understand and can manage their obligations under TUPE, with no detriment to the terms and conditions of transferred employees in connection with the transfer.
2. Full, effective and continuous communication is key to managing transfers well. Best value authorities should consult their employees and recognised trade unions or staff representatives throughout, with full disclosure of information on all matters affecting the workforce. Contractors selected to provide services to best value authorities and to take on local government staff should also have policies which ensure good communication and consultation with the workforce on key issues following a transfer.
3. Good employment practices will underpin the provision of high-quality local services. Best value authorities are able to take into account employment issues such as staff training and management practices when selecting tenderers and awarding contracts. *Handling of Workforce Matters in Contracting (Annex A)* sets out guidance on how best value authorities can consider workforce matters when selecting tenderers and awarding contracts. The guidance sets out in more detail the way in which workforce matters should be considered at each stage of the contracting process. Employees' pensions entitlements should also be secured in staff transfers (see paragraph 12).

Best Value Review

4. The Best Value Review, announced on 1 October 2001, was established to find ways to improve the quality of local services whilst ensuring fair treatment for employees working on local authority contracts. It looked at concerns that some providers who had a poor approach to workforce matters were still winning work from local authorities and thereby jeopardising the quality of services. It also looked at concerns that on some occasions authorities were not taking proper account of workforce matters in their contracting. The Review reaffirmed the link between quality services under best value and good employment practices and recommended ways to ensure that all contractors to local authorities have employment practices that will secure high quality delivery throughout the life of a contract. In particular, it identified a need to ensure that the quality of a workforce transferred to a provider in an outsourcing exercise would be enhanced and not undermined during the period of the contract.

5. On 26 March 2002, the then Secretary of State announced details of a package of measures for local authorities in England that were intended to address the need under best value to protect and build on the quality of the workforce. Key measures addressed the position of transferred staff and new joiners taken on by providers to work alongside outsourced workforces. The details of the package were:
 - to legislate to make statutory within local government the provisions in the Cabinet Office *Statement of Practice on Staff Transfers in the Public Sector* (January 2000, revised November 2007)¹⁰ and the Treasury Annex, *A Fair Deal for Staff Pensions*
 - the Department to draw up a Code of Practice on the treatment of new recruits working on local authority contracts alongside transferred staff
6. Subsequently the Government:
 - secured provisions in the *Local Government Act 2003* and issued a Pensions Direction which came into force on 1 October 2007 (see paragraphs 8 to 12)
 - issued the *Code of Practice on Workforce Matters in Local Authority Service Contracts (New Joiners)* which came into force on 13 March 2003 (see paragraphs 15 to 19)

Transferred Staff

7. The *Statement of Practice* sets out a framework for public sector organisations to implement the Government's policy on the treatment of staff transfers where the public sector is the employer or the client in a contracting situation. The *Statement of Practice* provides that contracting exercises (including re-tendering) should be conducted on the basis that the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE) should apply unless there are genuinely exceptional reasons why this should not be the case.

Local Government Act 2003

8. Sections 101 and 102 of the *Local Government Act 2003* ("the 2003 Act") confer powers on the Secretary of State (and equivalent powers on the National Assembly for Wales and Scottish Ministers) to require best value authorities to deal with matters affecting who employs best value authority staff and on what terms, following contracting out of services, in accordance with directions. Section 101 also requires authorities to have regard to guidance on such staff matters issued by the Secretary of State, the National Assembly for Wales or Scottish Ministers. Section 102 provides that the Secretary of State (the NAW and Scottish Ministers) shall exercise their powers under section 101 to give directions so as to ensure that best value authorities, in contracting for the provision of services, secure specified pension benefits.

¹⁰ <http://www.civilservice.gov.uk/documents/pdf/employment/stafftransfers2.pdf>

TUPE Regulations

9. In broad terms, TUPE makes provision for the treatment of employees, and related matters, on the transfer of an undertaking or business or a service provision change.

TUPE Regulations 2006

The principal provisions of the Regulations provide that:

- there are two categories of transfer to which these Regulations apply (which are not mutually exclusive). These are the transfer of an undertaking or business to another person and a service provision change (“a relevant transfer”)
- a relevant transfer shall not operate to terminate the contract of employment of a person employed by the transferor and assigned to the organised grouping of resources or employees subject to a relevant transfer but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee
- the transferor’s powers, duties, rights and liabilities under or in connection with that employment contract shall transfer to the transferee
- a variation to that employment contract by reason of the transfer is prohibited but that shall not prevent the employer and his employee from agreeing a variation to the contract for a reason unconnected with the transfer or a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce
- the dismissal of an employee by reason of the transfer is unlawful but a dismissal for a reason connected with the transfer that is an economic technical or organisational reason entailing changes in the workforce is potentially lawful
- the Regulations do not apply to so much of a contract of employment as relates to any provision of an occupational pension scheme relating to old age, survivors or invalidity benefits
- the Regulations apply to a relevant transfer that takes place on or after 6 April 2006 whilst the 1981 Regulations will apply to a transfer to which the 1981 Regulations applied that took place before 6 April 2006

Directions

10. In May 2004 (and again in June 2005) the Department consulted the Local Government Association and Trade Unions on draft Directions under section 101 of the 2003 Act. There were 2 draft Directions:

- *The Best Value Authorities Staff Transfers (General) Direction*
- *The Best Value Authorities Staff Transfers (Pensions) Direction*

11. Following consideration of consultation responses to the draft Directions and a review of the need for these Directions in the light of the new TUPE regulations, it was concluded that no general staff transfer Direction under section 101 of the 2003 Act was needed. However to secure a broadly comparable pension for transferring staff a pensions Direction was still needed to secure pension protection for employees of best value authorities where the provision of services are contracted out, and staff transfer under TUPE, to a new service provider.
12. *The Best Value Authorities Staff Transfers (Pensions) Direction 2007* (“the Direction”)¹¹ came into force on 1 October 2007. The intention of the Direction is to provide pension protection for employees of English best value authorities (and Welsh Police authorities) where the provision of services are contracted out, and staff transferred under TUPE. Where staff are not offered the option of access to the Local Government Pension Scheme (LGPS), they must be offered membership of an alternative scheme by the new employer which is actuarially certified as being ‘broadly comparable’ with the public service scheme.

The Best Value Authorities Staff Transfers (Pensions) Direction 2007

The Direction provides that:

- where an authority enters into a contract with a person for the provision of services and those services are, in the period immediately before the contract is entered into, provided by the authority and carried out by employees of the authority then the contract between the authority and the contractor must require the contractor to secure pension protection for each transferring employee and provide that the provision of pension protection is enforceable by the employee, and,
- pension protection is secured if the transferring employee, after change in employer, has rights to acquire pension rights that are the same as or are broadly comparable to or better than those he had as an employee of the authority

The Direction also requires similar pension protection in relation to those former employees of an authority, who were transferred under TUPE to a contractor, in respect of any re-tendering of a contract for the provision of services.

13. Where the transfer to a broadly comparable scheme is offered, the relevant authority must be in a position to offer bulk transfer terms to the scheme provided by the new employer. Individuals are not required to be party to such a transfer, which should be sufficient to provide service credit in the new employer’s scheme on a day for day basis (or such equivalence determined by actuaries taking account of differences between schemes) for those who wish to transfer their accrued rights from the LGPS.

¹¹ www.communities.gov.uk/publications/localgovernment/authorities-staff-transfers

14. Negotiations to establish fair treatment in respect of pensions for transferring staff as part of business transfers should be based from the outset of the procurement process on a careful identification of the appropriate pension options, the full costs, liabilities and actual transferee data. Throughout this whole process, best value authorities should ensure that staff are treated fairly, trades unions are informed and that the operation is open and transparent.

New Joiners

15. The *Code of Practice on Workforce Matters in Best Value Authority Service Contracts* (**Annex B**) should be applied where an authority transfers its employees to a private or voluntary sector partner as part of a contract to provide any service to the authority. It ensures that new joiners to the transferred-out workforce are offered terms and conditions which are, overall, no less favourable than those of the transferred staff. This 'no less favourable' formula does not apply to pensions, but under the Code new joiners must also be offered a reasonable pension provision, which may be either membership of the LGPS, membership of a good quality employer pension scheme or membership of a stakeholder pension scheme with an employer contribution.
16. The Code will ensure that the provision of quality services is not undermined by poor employment practices in respect to new joiners. It will prevent the damaging 'two-tier' situation where TUPE transferred staff work beside newly recruited staff on much poorer terms and conditions. The Government is clear that partnerships with the private and voluntary sectors should be selected where these will drive up service performance standards, not in order to drive down staff terms and conditions. Best value is more likely to be achieved in circumstances where all parties are focused on service improvements.
17. The Code will not prevent authorities or contractors from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver. Whilst the overall package must be no less favourable, this does not mean that its elements cannot be changed. Indeed, a contractor would be unlikely to provide best value if it did not consider the various elements that make up the terms and conditions and ensure that it provided a package best suited to delivering an improved service. It will therefore be important for local authorities to discuss with contractors, from an early point in the procurement process, how they intend to recruit and motivate staff under the Code in order to raise service standards.

Application of the Code

18. The Code sets out some general principles and does not cover the detail of every possible scenario. The working principle should be that authorities must comply with the general duty of best value and be aware that the Secretary of State's view is that a two tier workforce does not achieve best value in the provision of that outsourced service.
19. The Code applies to all service contracts, including a re-tender of a contract, entered into following the issue of the original Code on 13 March 2003.

Annex A

Handling of Workforce Matters in Contracting

1. This Annex contains guidance to local authorities made under the provisions of section 19(4) of the *Local Government Act 1999* ("the 1999 Act"). It covers:
 - background on section 17 of the *Local Government Act 1988* ("the 1988 Act") and section 19 of the 1999 Act
 - details of the Statutory Instrument, the *Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001* (SI 2001 No 909) ("the 2001 Order")
 - the context of best value and EU Procurement Directives, implemented in the UK by Public Procurement Regulations
 - principles of good procurement practice, and
 - how workforce matters can be handled at the different stages of the contractual process.

Section 17 of the *Local Government Act 1988*

2. Section 17 of the 1988 Act prevents authorities from introducing political or other irrelevant considerations into the procurement process. It achieves this by defining certain matters as 'non-commercial' and prohibiting authorities from having regard to these matters in the contractual process. The relevant matters, as set out in section 17(5) of the 1988 Act, include:
 - 'the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or other opportunities afforded to, their workforces' (section 17(5)(a)), and
 - 'the conduct of contractors or workers in industrial disputes between them' (part of section 17(5)(d))'.

Section 19 of the *Local Government Act 1999*

3. Under section 19 of the 1999 Act the Secretary of State may by Order provide, in relation to local authorities, for a specified matter to cease to be 'non-commercial' for the purposes of section 17 of the 1988 Act. Section 19(4) of the 1999 Act requires best value authorities to have regard to guidance issued by the Secretary of State in exercising a function regulated by section 17 of the 1988 Act, which is also the subject of an Order made under the 1999 Act.

The Statutory Instrument

4. The 2001 Order made under section 19 of the 1999 Act provides, in respect of best value authorities, for the workforce matters described above to cease to be defined as 'non-commercial' matters for the purposes of Part II of the 1988 Act to the extent that they are relevant to the achievement of best value, and also in circumstances where they are relevant for the purposes of a TUPE transfer. Workforce matters that are not directly relevant to the delivery of the service in question should not be taken into account (eg corporate training unrelated to the contract). The provisions of section 17(5) of the 1988 Act that are not modified by the 2001 Order remain in force.

Guidance

5. This guidance sets out how workforce issues should be taken into account in local government tendering, where such matters are relevant to the achievement of best value and also in circumstances where the requirements of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE) are to be applied.
6. The guidance is consistent with Procurement Regulations and with the achievement of best value. This guidance does not purport to be an authoritative guide to public procurement law, and best value authorities will continue to need to interpret the relevant legislation and seek legal advice as necessary. It will always be for authorities to decide, in the light of their own legal advice, how to handle these matters in each individual contract.
7. The Department's views on the use of social clauses in best value authority procurement are set out in a note at the end of this Annex.

Modern procurement and best value

8. Under the 1999 Act best value authorities are required to make arrangements to secure continuous improvement in the way in which they carry out their functions, having regard to a combination of economy, efficiency and effectiveness. Best value recognises that good procurement practice is essential if local government is to obtain real improvements to service cost and quality.

Workforce issues in the context of best value procurement

9. In taking account of the workforce issues that arise in procurement under best value, authorities will need to recognise:
 - the connection between service quality and handling of workforce issues. Good quality services depend on appropriately skilled, healthy, safe and motivated workforces. Neglecting relevant workforce matters in order to drive down costs can have adverse effects on the desired quality and value for money of the service

- the necessity of achieving the appropriate balance between considerations of cost and quality. This will depend on the nature of the service to be provided and the requirements of the service users. It is unlikely that either a purely cost-driven or an unjustifiably expensive service will represent best value
 - that a transparent, open and fair procurement process is essential to attracting bids that provide the optimum combination of whole life cost and quality. All decisions should be based on objective criteria that are justifiable in terms of the performance of the service specified under the contract. Authorities should therefore have clear procurement strategies, procedures and written policies for evaluating tenders
 - the emphasis on continuous improvement within best value and the implications for how strategic contracts in particular are structured
 - the relevance of equal opportunities to the delivery of contracts
 - the importance of handling TUPE well, so as to allay workforce reservations about transferring to new employers
10. Procurement decisions by best value authorities should take proper account of workforce issues. Staff and unions should be involved in the option appraisal stage and where there is a decision to outsource, staff and unions should be involved in the selection process and in the subsequent detailed work around the transfer. Effective systems of management should be employed and a risk assessment carried out to identify potential work related stressors arising from changes affecting workers. Suitable methods of controlling these risks should be identified and implemented by the current and new employer. Where TUPE applies, the current employer is obliged to make information available to workers' representatives and the new employer and to consult workers' representatives on matters relating to the transfer.
11. Ensuring that a prospective contractor's workforce who are performing the contract either has the skills required to effectively deliver the contract, or that they are willing to provide their staff with the skills training that they would need to develop those skills in accordance with the public procurement framework, can be an important driver of value for money and standards in service delivery. EU procurement rules and the Government's procurement policy provide scope for incorporating workplace skills in the public procurement process in circumstances where skills are relevant to the subject of the contract, and lead to successful service delivery whilst achieving value for money. Public procurers should make these assessments on a contract-by-contract basis. OGC's publication, *Social Issues in Public Procurement*¹², provides guidance on how skills requirements can be incorporated into the procurement process.

¹² http://www.ogc.gov.uk/documents/Social_Issues_in_Public_procurement.pdf

EU procurement rules

12. This guidance covers all best value contracts, whether or not they are subject to the European Public Procurement legislation (eg below the relevant threshold or specifically excluded). It is consistent with EC Treaty based principles and EU Procurement Directives, as implemented in the UK by Public Procurement Regulations (“Procurement Regulations”). Contracting authorities will need to bear in mind that:
 - if a best value contract is subject to the Procurement Regulations then the contracting authority must apply the relevant procedures
 - if a best value contract is not subject to the Procurement Regulations then the contracting authority will still need to adhere to general obligations contained within the EC Treaty (eg not to discriminate on grounds of nationality and to treat all suppliers fairly) and to the relevant UK law. The European Commission released an Interpretative Communication in July 2006 to remind Member States of European Court of Justice rulings such as ‘Telaustria’ (C-324/98) that highlight that contracting authorities letting contracts outside of the full scope of the Directives, must nevertheless comply with the fundamental principles of the EC Treaty¹³
 - in particular contracting authorities should be mindful that Part II of the *Local Government Act 1988* as modified applies to all best value contracts
13. Under the Procurement Regulations, workforce matters may come into consideration at the pre-qualification and tender evaluation stages of the contractual process. Under the Procurement Regulations the criteria for short-listing candidates are restricted to technical capacity, economic and financial standing and, for service contracts, ability. At the pre-qualification or selection stage, only workforce matters that affect the suitability of a candidate, as determined by those criteria, can be considered. Contract award criteria can be selected on the basis of either ‘most economically advantageous tender’ or ‘lowest price’.
14. For most best value contracts, awarding on the basis of ‘lowest price’ is unlikely to be satisfactory. The best value option will involve other factors such as whole life cost, quality and competent and safe service delivery. Contract award criteria therefore, should not simply rely on price alone, unless the authority is satisfied that the specification for the work incorporates all these matters. In practice, these conditions are unlikely to be satisfied in all but the simplest contracts. Choosing the ‘most economically advantageous’ tender allows contracting authorities to consider more general matters, provided that these matters relate to the subject of the contract and provide a benefit to the contracting authority and do not result in discrimination

¹³ The Interpretative Communication suggests best practice in order to help Member States reap the full benefits of the Internal Market and emphasises the need to encourage open, competitive and transparent award methods. The Office of Government Commerce (OGC) has produced a Procurement Policy Note (<http://www.ogc.gov.uk/documents/ProcurementPolicyThresholdProcurement.pdf>)

between contractors. Workforce matters can be taken into account in so far as they relate to contract award criteria that concern the performance of the contract (e.g. whole life cost, solution, risk sharing, transition, delivery etc). The general award criteria to be used must also be clearly stated.

Principles of good procurement

15. There is a range of advice and guidance on good procurement practice which best value authorities can draw on. Sources include the Office of Government Commerce (OGC), IDeA, 4ps, Audit Commission, LGE, Regional Improvement and Efficiency Partnerships (RIEPs) and Communities and Local Government. See [Addendum A](#) for weblinks to these and other bodies. Communities and Local Government and the LGA have recently published the Final Report on the *National Procurement Strategy for Local Government* (NPS)¹⁴. This Report shows that much has been achieved over the three-year life of the NPS, including the development of a more strategic approach to procurement in local government. This has helped create a platform for the realisation of efficiency gains and more sustainable procurement.

16. Some common principles of good procurement apply in all circumstances:
 - the procurement process should give the contracting authority sufficient information to form a view of potential service providers' competence but without placing an undue burden on them
 - requirements and criteria should be consistently and fairly applied. For example, prequalification questionnaires should indicate that equal consideration will be given to organisations and service providers of all sizes provided that they are able to fulfil the core requirements of the contract. The Government recognises that firms/organisations of different sizes (by number of employees) may satisfy purchasers' requirements in different ways. This is consistent with the aim to encourage third sector providers and small and medium enterprises and, in particular, small community businesses. The Government's aim is to take proper account of the circumstances of third sector providers and small businesses and also to help best value authorities discern the best contractor to carry out the work. Quality small businesses stand to benefit as much as larger organisations
 - potential service providers should understand clearly from the outset what categories of information and service standards may be expected. They should be provided with adequate, accurate and timely information at all the relevant stages of the procurement process
 - all potential service providers, including those that are part of the authority, must be subject to the same requirements to ensure fair competition and be treated equally throughout the procurement process

¹⁴ <http://www.communities.gov.uk/publications/localgovernment/procurementstrategy>

- care should be exercised to avoid taking too narrow a view of how the service might be delivered as this may limit the options and deter potential providers
 - in order to be able to demonstrate that procurement has been undertaken in an open and transparent manner, fully consistent with the requirements of the Procurement Regulations, authorities should ensure that bidders are fully aware of the basis for bid evaluation and that all stages of the procurement process can be audited satisfactorily with reference to a clear, written policy on evaluating tenders and awarding contracts, which is publicly available and made available to all bidders
17. The modifications made by the 2001 Order to Part II of the 1988 Act permit local authorities to develop a strategy for the disclosure of information and consultation at the various stages in the procurement process to the extent that this is relevant to the performance of a particular contract. Authorities may find the 4ps' revised guidance *Disclosure of Information and Consultation with Staff and Other Interested Parties*¹⁵ (March 2005) helpful in this respect.

The approach to workforce matters: contract procedures

Introduction

18. Workforce matters will come into consideration at the pre-qualification, service specification, invitation to tender and tender evaluation stages of the contractual process. Ideally the service specification will be largely finalised before the pre-qualification stage, although in practice an outline specification will often be sufficient. This part of the Guidance sets out in detail how workforce matters can be taken into account in each of these stages.

Assessing Need

19. All procurement activities should align with the objectives of the authority and should be managed and delivered on time, within budget and to agreed quality standards. It is essential that at an early stage in the procurement process issues relating to workforce matters are identified and a plan for dealing with them is developed. Procurement staff and internal customers, for example those responsible for staff transfers, diversity and equality should work closely with each other throughout the process.

Pre-qualification

20. For most contracts it is good practice to follow a pre-qualification process. The purpose of pre-qualification is to produce a shortlist of organisations that have the capability to perform the contract. Candidates who do not meet the minimum requirements can be rejected, and the contracting authority can then invite the best of those candidates, who do meet the minimum requirements, to tender.

¹⁵ http://www.4ps.gov.uk/DownloadDetails.aspx?id=0&tp=Y&d=http%3a%2f%2fwww.4ps.gov.uk%2fUserFiles%2fFile%2fPublications%2fDisclosure_Info_Cons_with_Staff.pdf

21. At the pre-qualification stage the criteria for short-listing candidates are restricted to personal standing, economic and financial standing, technical capacity and for service contracts, ability. At this selection stage, only workforce matters that affect the suitability of a candidate as determined by those criteria should be considered.
22. For certain classes of contract, pre-qualification shortlisting could be simplified by using appropriately recognised databases, although this does not preclude the need to advertise the contract and follow the Procurement Regulations where relevant. Such databases can be used to identify contractors who are fitted to carry out the work and to ensure that there is a sufficient core of likely or possible tenderers. For all contracts a database can also reduce the burden on clients and contractors of issuing and responding to requests for information in any advertisement, including OJEU, or a pre-qualification questionnaire. However, the presence of a contractor on a database does not automatically mean that it should be invited to tender, nor can the absence of a contractor from a database preclude a potential contractor from consideration.
23. Procurement Regulations set out the criteria and the nature of the evidence for assessing potential bidder's suitability and general competence, including their economic and financial standing, technical capacity and, for service contracts, ability to perform a service taking into account skills, effectiveness, efficiency, experience and reliability. The criteria should be set out in the OJEU notice, and in any other advertisement or the tender documents. Alternatively, potential providers can be invited to complete a questionnaire. The Office of Government Commerce (OGC) provides procurement guidance, tools and services and OGC's standard pre-qualification questionnaire¹⁶ (PQQ) enables public sector purchasers to identify the most suitable suppliers to invite to tender for contracts. It is recommended that authorities should use this as a basis for their own questionnaire.
24. There are also examples of standard prequalification questionnaires in local government eg the West Midlands Procurement Hub now offer standardised pre-qualification questionnaires¹⁷.
25. In terms of information that will be relevant to the handling of workforce matters, authorities may wish to consider enquiring about the following matters:
 - experience and track record over the past three years (five years for works contracts) in providing similar services, and referees that can be called upon to vouch for performance (such references can be a particularly valuable source of information especially with well established contracts). Reference site visits can also be useful and provide reliable evidence of track records

¹⁶ http://www.ogc.gov.uk/tools___services_pqq.asp

¹⁷ <http://procurementhub.wmcoe.gov.uk/page.asp?PageRef=34>

- quality – details of accreditation, documentation and procedures, including health and safety management, environmental management, human resources procedures (staff management and employment practices), as relevant to the performance of the contract. This could include: background information on the organisation; average annual staffing for the previous three years; details of staff involved in the provision of the service in question; their qualifications and training; and the organisation’s TUPE track record where relevant
 - details of convictions for criminal offences or any acts of grave misconduct relating to the bidder’s business or profession, including details of cases over the last three years where the bidder has been found by a Court or Tribunal to have breached the requirements of employment protection, including legislation on sex, race, disability, and health and safety matters. Details of any appropriate remedial actions taken should also be included
26. This list is not intended to be exhaustive and there will be instances where it will be appropriate for contracting authorities to ask further detailed questions. The key test will always be relevance to the performance of the contract.
27. In some circumstances only the bidding entity and not the company as a whole should be evaluated with regard to workforce matters. The workforce of an associated or parent company will, in some circumstances, be irrelevant and information relating to such a company should not be requested. However, it is acceptable to use evidence produced by the associated or parent company to meet a request for information.

Service specification and conditions of contract

28. The purpose of the service specification and contract conditions is to define the contracting authority’s objectives for the service to be provided and to set out the terms of the relationship between the authority and the contractor. The authority’s objectives should take account any statutory or regulatory requirements as well as the authority’s own objectives for the contract and the views of service users.
29. Writing the appropriate level of quality and safety into the specification should attract bids which incorporate suitable staff management practices. The successful bidder would need to attract and retain a suitably skilled, safe, healthy and motivated workforce in order to achieve satisfactory delivery of the contract. A poor specification that fails to address quality and safety aspects is likely to lead to poor handling of staff management practices and poor delivery of the contract and hence to fail service users.
30. As far as possible, requirements should be specified in terms of output and performance, with effective co-operation secured between authority and contractor rather than how the contractor is to go about providing the service. This will provide

for sharing of best practice and scope for innovation in service delivery. Care must be taken not to infringe the procurement rules, for example by referring exclusively to national standards or schemes without including the term 'or equivalent', or by failing to refer to relevant EU standards where available. Authorities should avoid deterring private or voluntary sector organisations, or smaller firms and new entrants to the market, by specifying requirements that may not be necessary and which these types of organisations may have difficulty in meeting.

Invitation to tender

31. The invitation to tender documents, sent to those organisations being invited to bid, would normally consist of the covering letter, instructions to tender, background information, terms and conditions of contract, specification and price schedule and, where relevant, the *Code of Practice on Workforce Matters in Best Value Authority Service Contracts* (**Annex B**). The invitation letter, or an annex to it, should set out the information that tenderers should include in their tender. This information should as appropriate include, for example, a transition plan for taking on staff under TUPE, training and development plans, as well as how the tenderer would meet specific service and quality issues.
32. Where appropriate, there should be a joint commitment between contracting authority and contractor to service improvement during the life of the contract, including an agreed training and development plan. A view should be taken on whether the existing skills of the workforce are appropriate to the requirements of the contract and, if not, it should be made clear in the invitation to tender what additional skill levels may be required and ask how tenderers propose to make up any skills gap. This should be actively monitored as part of the contract.

Tender evaluation

33. The purpose of tender evaluation is to select the bid that meets the authority's requirements and delivers best value. It is essential that this is undertaken fairly and is seen to be so. The evaluation should be systematic, objective and well documented to provide a clear and logical audit trail. The approach taken on workforce issues at tender evaluation will depend on the service to be delivered and the proposed relationship between the contractor and the contracting authority. Consideration of workforce matters at evaluation stage should be as a means of clarifying the tenderer's response to clearly expressed requirements set out in the service specification including those in the *Code of Practice*, and should relate directly to the contractor's ability to deliver the service in question. Training policies and development of the workforce may be relevant to the delivery of the contract, for example, where it will be necessary for staff employed on the contract to keep abreast of any technical or other developments reflecting best practice during its term.

34. Care should be taken that matters addressed at the pre-qualification stage are not revisited at the tender evaluation stage (unless a tenderer has a change of circumstances), where only matters relating to the deliverability of the contract should be considered.
35. Contracting authorities should ensure that all bidders, successful and unsuccessful, are debriefed as soon as possible after the contract has been awarded. Unsuccessful bidders should be told the outcome of the tender and why they were unsuccessful. Under the Procurement Regulations there is a mandatory timescale of 15 working days from a request to carry out a debrief. This will help to improve the market for future tendering exercises. Contracting authorities should also be aware that the revised Procurement Regulations (2006) include a number of procedures and requirements not included in the previous rules. This includes the requirement for a 10 calendar day standstill period at the award stage to permit unsuccessful tenderers to seek further information about an award decision and enable them to take action in the courts should they feel they have sufficient grounds¹⁸.

Contract management

36. Successful contract management depends on the soundness of the agreement made between the contracting authority and the contractor, and the effectiveness of their relationship (which also recognises the perspective of service users). Contract management should be conducted in a positive and co-operative fashion, in a way that is time and cost effective for both contractor and contracting authority, which will in turn be supportive for staff. Whilst monitoring compliance with the contract and ensuring co-operation and co-ordination between contractor and the authority is essential, heavy handed and over-detailed monitoring arrangements are likely to lead to distrustful relations and should be avoided. Supplier development, partnering and relationship management initiatives and other incentives can be important in building a mutually beneficial and fruitful partnership, where relevant, and proportionate, to the contract.
37. Monitoring of workforce-related issues should be concerned with those matters identified as relevant to the performance of the contract, as well as to statutory and regulatory requirements, and should fit into the normal reporting regime to avoid unnecessary burdens on contractors. Monitoring of the contractual requirements should be the same between in-house and external providers although in-house providers may have additional corporate requirements to meet.
38. A positive approach to contract management will not only have direct benefits for the service being provided: it will also give contractors the opportunity to develop or enhance their reputation as a good employer, providing good quality services.

¹⁸ http://www.ogc.gov.uk/documents/10day_Mandatory_Standstill_Period.pdf

This will raise the quality of the market and will in turn be valuable to the contracting authority in future tendering exercises.

Health and safety

39. Local authorities have a statutory duty under the *Health and Safety at Work etc Act 1974* with regard to the health and safety of their employees and others who may be affected by their undertaking. This duty cannot be delegated even where the work activity which forms part of the undertaking is contracted out. Authorities are required by legislation to take reasonable steps to satisfy themselves that contractors have the ability and resources for managing health and safety in relation to the work being carried out. In assessing such arrangements, authorities may request details of a contractor's health and safety management system in respect of the work concerned. Consideration of these issues at the pre-qualification stage, in so far as they relate to track record, quality management, criminal offences, is covered in paragraph 25.

40. The authority should ensure that the contract specifies the essential measures necessary to control significant risks to workers, service users or the public, arising from the work taking into consideration best practice and technological advances. This might include consideration of statutory matters outside the scope of occupational safety and health such as town planning and road safety matters. Contractors must have suitable management systems in place to secure the safety, health and wellbeing of their workers to keep them in work and capable of delivering an effective contract. No additional, non-statutory requirements should be placed on external providers that are not placed on inhouse providers supplying the same or a comparable service. After a contract has been awarded, authorities should have monitoring arrangements in place to ensure that any risks arising from the work contracted out are being managed properly. The level of monitoring necessary will depend on the hazards and risks associated with the work.

Equal opportunities

41. The 2001 Order provides that local authorities may consider workforce matters where they relate to the achievement of best value and the delivery of the contract. Best value works within the existing legal framework and authorities have to observe the requirements of all other legislation on equality.

42. The *Race Relations Act 1976* as amended by the *Race Relations (Amendment) Act 2000* gives best value authorities a strengthened legal duty to eliminate unlawful discrimination, promote equality of opportunity and good race relations. Procurement policy may be relevant to this duty; indeed the then Commission for Racial Equality (CRE) considered, when this guidance was first published, that it is likely to be so relevant. The *Disability Discrimination Act 1995* (as amended by the *Disability Discrimination Act 2005*) and the *Sex Discrimination Act 1975* (as amended

by the *Equality Act 2006*) introduced the Disability Equality Duty (in force from December 2006) and Gender Equality Duty (in force from April 2007) respectively. These are similar to the race duty in that they require public authorities to have regard to the need to eliminate unlawful discrimination and promote equality of opportunity. They are supported by statutory Codes of Practice and guidance.

43. Where appropriate, changes in policy should therefore be assessed for adverse impact on the equality duties, and existing policies monitored. If goods, works or services are provided by external suppliers, authorities retain responsibility for meeting their duties, and where the contract is relevant to the duties, authorities should ensure race, disability and gender equality are adequately considered in the contract to enable them to meet their duties. It will be for best value authorities to decide in the light of their own legal advice how far they should bring equal opportunities into the contracting process. This guidance suggests ways in which the treatment of equal opportunities may be relevant to each stage of the contracting process. The then Commission for Racial Equality (CRE), produced a detailed guide *Race Equality and Procurement in Local Government*¹⁹ (CRE, July 2003) to assist best value authorities in meeting race equality requirements.

Pre-qualification stage

44. Contracting authorities may take account of the practices of potential service providers in respect of equal opportunities (e.g. race, gender, disability, religion or belief, age, and sexual orientation) where it is relevant to the delivery of the service under the contract.
45. Contracting authorities should during the pre-qualification stage seek information as to the general competence, track record, details of criminal offences and acts of grave misconduct (as set out in the Procurement Regulations) including in relation to equality and health and safety legislation. Contractors may be excluded from the tendering exercise if they have been convicted of a criminal offence or have committed an act of grave misconduct.
46. At pre-qualification this should provide sufficient information to make a proper assessment as to whether an individual contractor should be invited to tender. Best value authorities should not make requirements of potential contractors that exceed what is permitted under the Procurement Regulations and they should be careful to strike a balance in their approach to seeking information. Neither will they wish to leave themselves vulnerable to the risk of poor performance during the life of the contract, but equally they should avoid making requests for information that are disproportionate to those risks and not strictly relevant to the contract. Where the contract is relevant to the duties to promote race, disability and gender equality it will

¹⁹ Authorities seeking further guidance on the equality duties can access this from a range of sources, including the Equality and Human Rights Commission (EHRC), which has now taken on the work of the CRE, EOC and DRC. Guidance is now available on the EHRC's website www.equalityhumanrights.com

be necessary to seek information to check capacity to deliver the contract in terms of race, disability and gender equality, covering both workforce matters and, where relevant, service delivery.

Equalities legislation

47. Section 71 of the *Race Relations Act 1976* places a duty on best value authorities to ensure that their various functions are carried out with 'due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity, and good relations, between persons of different racial groups'. Section 2 of the *Race Relations (Amendment) Act 2000* replaces section 71 of the 1976 Act. The intention of the new general duty on specified public authorities is to promote race equality and to avoid discrimination before it occurs. The general duty is supported by specific duties aimed to help public authorities better fulfil their obligation under the general duty. Best value authorities are required to produce a race equality scheme, setting out those functions and policies which are relevant to the duty including arrangements for assessing and consulting on the expected impact of relevant policies on the promotion of race equality, monitoring existing policies for adverse impact, publishing the results and ensuring public access to information and services. Authorities are also required to train staff on the duties under the *Race Relations Act*. Best value authorities also have a specific duty on employment, to monitor by racial group the numbers of staff in post, applications for employment, training and promotion, and, where authorities have over 150 staff they must conduct more detailed monitoring.

48. The *Equality and Human Rights Commission* has powers to enforce the equality duties. In recognition of the previous race duty at section 71 of the 1976 Act, before it was amended, section 18 of the *Local Government Act 1988* already provides, in respect of race relations, for best value authorities to be able to ask approved written questions and include terms in a draft contract if it is reasonably necessary to do so to secure compliance with the duty. Six approved questions were set out in *Department of Environment Circular 8/88*. Authorities will continue to be able to ask the six questions specified in the Circular 8/88 although they are no longer restricted to these six questions as a sole means of taking account of racial equality. In addition, and where relevant to the contract, and for the purposes of achieving best value, the authority will be able to ask some further questions in relation to racial equality, examples of the questions which may be asked and model contract clauses are contained in the guide produced by the CRE *Race Equality and Procurement in Local Government*. Consideration of these issues at the pre-qualification stage, in so far as they relate to track record, quality management, criminal offences, is covered in paragraph 25.

Invitation to tender and service specification

49. Services that involve regular contact between providers and the users of the service, or the wider community, may frequently require of providers specific attributes with regard to fair treatment and equal opportunities. Authorities should address such considerations fully in their contract specifications in a way that does not prejudice fair competition or best value considerations. For example, where the service requires particular qualities in the staff, contracting authorities should address these matters in output terms as part of the specification. This might be in terms of how the bidder would meet the needs of a particular community group, but not in terms of the composition of the contractor's workforce.
50. The authority may require the contractor to fulfil relevant commitments set out in the authority's race, disability and gender equality schemes, for example monitoring the contract for adverse impact and consulting service users.
51. The authority may require a contractor's staff, when those staff are employed on the contract, to abide by any staffing policies, including those on equal opportunities, which are in operation where the work is being carried out.

Tender evaluation

52. Best value authorities and private and voluntary organisations alike are subject to the requirements of equalities legislation (eg the *Sex Discrimination Act 1975*, the *Race Relations Act 1976* and the *Disability Discrimination Act 1995*). However, under the *Race Relations Act 1976* whilst private and voluntary organisations are prohibited from discriminating, they do not have the same legal duty as authorities to promote race equality. All sectors are directly subject to the *Human Rights Act 1998* if they are exercising a function of a public nature. At the evaluation stage, authorities should assess how, on the basis of the bid, the tenderer will deliver the service and meet the needs of service users. The contracting authority must also satisfy itself that the bid will meet legal requirements placed on the authority, in particular the duties to promote race, disability and gender equality which cannot be transferred to contractors, and those which are placed on the contractor in respect of equal opportunities and human rights legislation.
53. In view of their duties under the legislation on equality, authorities should also consider how they can promote good practice in equal opportunities outside the contractual process. For example, authorities can work with commercial partners to promote equality in employment and raise awareness of how the application of equal opportunities to staff recruitment and management can bring commercial and other benefits.

Department for Communities and Local Government's views on the use of social clauses [This is not statutory guidance]

The Department's view on social clauses in procurement is as follows:

Individual authorities may wish to use social clauses in contracts particularly in the interest of wider regeneration objectives. However, this needs to be done within the scope of the EC Treaty and the European Public Procurement legislation. The European Commission in 2001 provided clarification on the possibilities that Community law offers public purchasers who wish to take account of relevant social considerations in public procurement procedures. This clarification takes the form of an Interpretative Communication that explains how social concerns may be taken into account at each separate stage of the contract award procedure. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0566:FIN:EN:PDF>

The Interpretative Communication goes some way to clarifying these complex issues, but difficulties may remain about the boundaries of what is admissible. There is limited case law in this area. A contracting authority must make its own judgement about the use of social clauses in procurement based on its own legal advice. Each case will be different and must be judged on its merits.

Where the EU procurement directives apply, award criteria must be relevant to the subject of the contract and provide a benefit to the contracting authority. Even where the directives do not apply, award criteria must be consistent with the fundamental principles of the EC Treaty, particularly non-discrimination.

The Interpretative Communication makes it clear that relevant social and employment issues can be included as contract conditions provided that they are non-discriminatory and included in the contract notice or contract documents. A statement from a tenderer that they are presently and will in the future, be unable to comply, could rule them out of the competition.

If the subject matter of the contract (the supply or service in question) requires specific know how in the "social" field, specific experience or ability in this field may be relevant to the assessment of the technical capability of tenderers.

It remains the responsibility of individual authorities to make their own judgement about the use of social considerations in procurement, consistent with domestic law, including the duty of best value, and the EU legal framework. In this they may be assisted by guidance from the OGC *'Social Issues in Purchasing'*²⁰ (2006). This guidance focuses on the different stages of the procurement process, and the ways in which social issues can legitimately be incorporated into the purchasing cycle.

²⁰ http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

Addendum

This Addendum provides weblinks to key bodies involved in providing guidance and other support on local government procurement.

Audit Commission

<http://www.audit-commission.gov.uk/>

Communities and Local Government

<http://www.communities.gov.uk/localgovernment/efficiencybetter/nationalprocurementprogramme/>

Improvement and Development Agency (IDeA)

<http://www.idea.gov.uk/idk/core/page.do?pagelId=1589595>

Local Government Association (LGA)

<http://www.lga.gov.uk/lga/core/page.do?pagelId=1>

Local Government Employers

<http://www.lge.gov.uk/lge/core/page.do?pagelId>

Office of Government Commerce (OGC)

<http://www.ogc.gov.uk/procurement.asp>

The Public Private Partnerships Programme (4ps)

<http://www.4ps.gov.uk/>

Regional Improvement and Efficiency Partnerships (RIEP)

<http://www.idea.gov.uk/idk/core/page.do?pageid=8595264>

Annex B

Code of Practice on Workforce Matters in Best Value Authority Service Contracts

Workforce matters under best value

1. This document sets out an approach to workforce matters in best value authority service contracts which involve a transfer of staff from the best value authority to the service provider, or in which staff originally transferred out from the best value authority as a result of an outsourcing are TUPE transferred to a new provider under a re-tender of a contract. This Code applies regardless of whether the original contract was entered into before the coming into force of this Code or its predecessor. This Code should form part of the service specification and conditions for all such contracts.
2. The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the authority is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a 'two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts.
3. Service providers who intend to cut costs by driving down the terms and conditions for staff, whether for transferees or for new joiners taken on to work beside them, will not provide best value and will not be selected to provide services for the authority. However, nothing in this Code should discourage best value authorities or contractors from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver.

Treatment of transferees

4. In its contracting-out of services, the best value authority will apply the principles set out in the *Cabinet Office Statement of Practice on Staff Transfers in the Public Sector*²¹ and the annex to it, *A Fair Deal for Staff Pensions*. The service provider will be

²¹ <http://www.civilservice.gov.uk/documents/pdf/employment/stafftransfers2.pdf>

required to demonstrate its support for these principles and its willingness to work with the authority fully to implement them.

5. The intention of the Statement is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied. The Government indicated an intention to legislate to make statutory within local government the provisions in the Cabinet Office Statement and secured powers in the *Local Government Act 2003* to achieve this.
6. The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Staff must have ongoing access to the Local Government Pension Scheme or be offered an alternative good quality occupational pension scheme, as defined in the annex to the Statement, under which they can continue to earn pension benefits through their future service. There must also be arrangements for handling the accrued benefits which staff have already earned. Directions²² issued under the *Local Government Act 2003* secure pension protection for transferring best value authority staff. However, in the light of the new TUPE regulations, it was concluded that no general staff transfer Direction under the 2003 Act was required (see paragraph 11 of *Valuing the Workforce* for further details).

Treatment of new joiners to an outsourced workforce

7. Where the service provider recruits new staff to work on a best value authority contract alongside staff transferred from the authority, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10).
8. The principle underpinning the provisions of paragraph 7 is to consider employees' terms and conditions (other than pensions arrangements which are dealt with in paragraph 10) in the round – as a 'package'. This Code does not prevent service providers from offering new recruits a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 7. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.
9. The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new

²² <http://www.communities.gov.uk/publications/localgovernment/authorities-staff-transfers>

recruits. The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

Pension arrangements for new joiners to an outsourced workforce

10. The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:
 - membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions
 - membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished, and
 - a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

On a re-tender of a service contract, the new provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

Monitoring arrangements

11. Throughout the length of the contract, the service provider will provide the authority with information as requested which is necessary to allow the authority to monitor compliance with the conditions set out in this Code. This information will include the terms and conditions for transferred staff and the terms and conditions for employees recruited to work on the contract after the transfer.
12. Such requests for information will be restricted to that required for the purpose of monitoring compliance, will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the best value authority will also support a central Government-sponsored review and monitoring programme on the impact of the Code, drawn up in consultation with representatives of local government, contractors, trade unions and the Audit Commission and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

Enforcement

13. The best value authority will enforce the obligations on the service provider created under this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the contractor. Where it appears to the best value authority that the service provider is not meeting its obligations, or where an employee of the contractor or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the contractor, the authority will first seek an explanation from the service provider. If the contractor's response satisfies the authority that the Code is being followed, the authority will inform any complainant of this. If the response does not satisfy the authority, it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the best value authority not to be complying with the Code, the authority will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the authority will not be bound to consider that provider for future work.

14. The contract shall include a provision for resolving disputes about the application of this Code in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The contractor, best value authority and recognised trade unions or other staff representatives, shall all have access to this 'alternative dispute resolution' (ADR) process. An ADR procedure was developed by the TUC, the CBI, the LGA and the Local Government Employers and published on 11 March 2004²³.

15. Best value authorities will need to ensure that individual contracts comply with best value requirements. The arrangements to be put in place to assess how each best value authority considers Workforce Matters in contracting are set out below:
 - **Local authorities²⁴, Fire authorities²⁵, the London Development Agency and Transport for London** – the assessment of arrangements for complying with Workforce Matters in contracting, including the Code, will be considered as part of the Use of Resources judgement in the Comprehensive Area Assessment.
 - **Police authorities** – by virtue of regulations to be made under section 6Z(C) of the *Police and Justice Act 2006*, each Police authority will be required to certify that it has complied with the requirements of the Code, where applicable, as part of the Annual Policing Plan Report.

²³ <http://www.communities.gov.uk/documents/corporate/doc/752664>

²⁴ the definition of local authority in the Local Government Act 1999 includes the Greater London Authority by virtue of section 1(2)(a) of that Act.

²⁵ including the London Fire and Emergency Planning Authority

- **Passenger Transport authorities** – the Department for Transport will ensure that each Passenger Transport authority certifies that it has complied with the requirements of the Code, where applicable, as part of an annual report.
- **Joint Waste Disposal Authorities and Joint Waste Authorities** – the Department for Environment, Food and Rural Affairs will work with JWDAs and any new JWAs to consider the most appropriate way to ensure compliance.
- **National Park authority and the Broads authority** – the Department for Environment, Food and Rural Affairs will ensure that each National Park authority and the Broads authority certifies that it has complied with the requirements of the Code, where applicable, as part of an annual report.

16. It remains open to trade unions and other stakeholders to raise any query or matter of concern they have about issues concerning contracts and workforce matters with the appointed auditor, where they consider that such information is relevant to the functions of the auditor. If concerns are brought to the attention of the auditor about an authority's compliance with this Code, they may exercise their appropriate statutory powers, which include:

- requiring the authority to respond publicly to a written recommendation
- section 15 of the *Local Government Act 1999*.

Sub-contractors

17. This Code sets out procedures for handling matters between a best value authority and a primary contractor. Where the primary contractor to provide services to the best value authority transfers staff originally in the employ of the authority to a sub-contractor in consequence of the terms of the primary contractor's obligations to the authority, the primary contractor will be responsible for the observance of this Code by the sub-contractor.

Operation of this Code

18. The Government will monitor the operation of this Code and consult with representatives of local government, trade unions, contractors and the Audit Commission to assist in this process.

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