



**CabinetOffice**

# Code of Practice on Workforce Matters in Public Sector Service Contracts:

## *Q&A Briefing*

November 2008

**Making  
government  
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**NOTE:**

*This briefing is an updated version of that originally issued when the Code was introduced in 2005. It has been revised for greater clarity using experience of implementing the Code; references to recent legislation have also been added. This updated briefing does not change the policy set out in the Code. The Code itself has not been altered and remains the primary document.*

## SCOPE

### 1.1. Does the Code cover all public sector service contracts?

The Code applies to public sector service contracts (subject to the exemptions listed) which involve:

- a transfer of staff from the public sector authority to the service provider; or in which
- staff originally transferred out from the public authority as a result of an outsourcing who are TUPE transferred to a new provider under a re-tender of a contract.

### 1.2. To which public sector organisations does the Code apply?

The Code applies to Central Government, its Agencies and NDPBs, and the NHS with some exceptions indicated below in 1.3.

### 1.3. What is exempt?

There is a list of exemptions provided as a footnote on the first page of the Code. What follows expands on the list in that footnote, for greater clarity.

Exemptions:

- Public corporations;
- Trading funds (when outsourcing and contracting for services on their own behalf);
- Independent Sector Treatment Centres;
- HE and FE institutions;
- Academies;
- Best Value Authorities are exempt as they are covered by the Code of Practice on Workforce Matters in Local Authority Service Contracts (2003);
- NHS Soft Facilities Management is technically covered by the Code but in fact the provisions of the Agenda for Change NHS/Contractors Joint Statement apply and these build upon the Code. (The differences between the Joint Statement and the Code are drawn out in 1.6.); and
- NHS PFI contracts (where the Retention of Employment model applies).

### 1.4. What is the rationale for these exemptions?

Public corporations and trading funds are exempt as the Code could limit the flexibility that these commercially driven organisations require to operate successfully in a competitive market.

Independent Sector Treatment Centres are not covered as they represent a complete transfer of function to the independent sector and are unlikely to receive TUPE transferred NHS staff.

HE and FE institutions are independent and autonomous organisations.

Academies are independent schools (but staff transferring from predecessor schools will be protected by TUPE).

NHS PFI contracts will continue to use the Retention of Employment model agreed (2005) with the NHS Trades Unions.

### 1.5. How is Local Government covered?

The Code of Practice on Workforce Matters in Local Authority Service Contracts (2003) (“The Best Value Code”) covers local authorities only. The Best Value Code has been rolled out to the other best value authorities by the sponsor Government Department. Currently, the Best Value Codes cover:

- Local Authorities
- Police Authorities
- Fire Authorities
- Metropolitan County Passenger Transport Authorities
- National Park Authorities
- The Broads Authority
- GLA
- London Development Agency
- Transport for London
- London Fire and Emergency Planning Authority

On 27 October 2008, the *Department for Communities and Local Government* issued a consultation paper<sup>1</sup> to re-issue the Best Value Code alongside other Best Value Workforce guidance. As part of this consultation the Government is seeking to further roll out the Best Value Code to the following best value authorities:

- Waste Disposal Authorities
- Joint Waste Authorities

Other bodies in Local Government which are not best value authorities are not covered by the Best Value Code.

### 1.6. How is the NHS covered?

The NHS is covered by the Code of Practice on Workforce Matters except in the case of the listed exemptions: Independent Sector Treatment Centres and PFI schemes where Retention of Employment applies. In that case employment is retained within the NHS and the Code cannot apply.

The NHS Joint Statement applies as well as the Code, however, to soft Facilities Management services (typical examples of soft FM are cleaning and catering services) in the NHS which are outsourced to the private sector. Its basic requirement is that all those employed on such contracts should be given pay and terms and conditions that are no less favourable than Agenda for Change (the framework that governs pay and terms and conditions for NHS employees). Signatories to the Joint Statement include Trades Unions (UNISON, the GMB, the TGWU and Amicus), the CBI and Business Services Association representing contractors, the Secretary of State for Health and NHS Employers.

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

The Joint Statement complements the cross-government Code of Practice on Workforce Matters. There are some cases where the NHS Joint Statement goes further, however; the main ones being:

- (a) The NHS Joint Statement is limited to soft FM services: the Central Government Code of Practice is not; it is of wider application;
- (b) The NHS Joint Statement (unlike the Central Government Code of Practice), is not limited to "new joiners"; it applies to all staff employed by the private sector who work on the outsourced contract.
- (c) The NHS Joint Statement applies to all contracts, including those currently in progress. Unlike the Central Government Code of Practice, it is not limited to new contracts or re-tenders of existing contracts;
- (d) In the NHS Joint Statement the comparator is current NHS terms and conditions for similar positions whereas in the Central Government Code of Practice the comparator is the current terms and conditions of the ex-public sector staff.

The NHS Joint Statement does not apply to hard FM services, such as Estates maintenance.

### **1.7. Are Foundation Trust Hospitals covered by the Code of Practice?**

The Code of Practice on Workforce Matters applies to public sector service contracts which involve a transfer of staff from a public sector organisation to a private sector service provider. NHS Foundation Trusts are public sector organisations and they are therefore subject to the Code if they enter into contracts of this type.

There are certain exemptions from the Code as set out at 1.3 above. There are no other NHS-related exemptions. There is no general exemption from the Code for NHS Foundation Trusts.

If an NHS Foundation Trust entered into a PFI contract with Retention of Employment, then this contract (like any other PFI contract with Retention of Employment) would be exempt for the reason given above.

## **2. STATUS**

### **2.1. What is the status of the Code of Practice?**

A code of practice is a documented set of recommended or preferred actions to be applied in a given setting. As such the Code is a Government policy document: it sets out a framework to be followed by public sector organisations to implement the Government's policy on the treatment of new joiners to an outsourced workforce. The Code does not attempt to provide the same exact prescription of action as a legal document.

### **2.2. Are public sector authorities bound to follow the Code of Practice?**

The Code will form part of the service specification and conditions for all public sector service contracts, except those where the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts already applies, or where other exemptions have been announced.

The Code of Practice on Workforce Matters in Local Authority Contracts (“The Best Value Code”), which applied to local authorities in England, sets out the Secretary of State’s view for how to achieve best value when contracting for services. The “Best Value Code” does not apply automatically but each authority must have regard to the Secretary of State’s view that a ‘two tier work force’ does not achieve ‘best value’ in the provision of that contract. Local authorities are under a duty to achieve best value and whether or not the Code should apply, in a particular case, is a matter for the local authority to decide having had regard to the guidance.

### **3. PROVISIONS**

#### **3.1. What is the effect of the Code?**

The Code requires that where a service provider recruits new staff whose main role is to work on a public sector service contract alongside staff transferred from the public 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 set out at 3.3.

#### **3.2. What employment terms are covered by the Code?**

The requirement for overall no less favourable treatment in the Code covers all pay and non-pay terms and conditions, for example: pay, holidays, sick leave and contractual redundancy benefits. There are separate provisions for pensions (see below). This does not imply that each aspect of terms and conditions should be identical but that overall they should be no less favourable.

#### **3.3. What pension arrangements are specified?**

The Code requires one of the following pension arrangements:

- 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; or
- A stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

The Code of Practice on Workforce Matters in Local Authority Service Contracts (“The Best Value Code”) additionally offers membership of the local government pension scheme, where the employer has admitted body status within the scheme, as one of the permitted pension provision arrangements.

#### **3.4. From what date does the Code apply?**

The Code applies to public sector service contracts from the day of the announcement, 18 March 2005. The Code applies to new contracts, including projects in procurement up to the Invitation to Negotiate stage, from the date of the Government’s announcement. It will not apply retrospectively to existing contracts. (For provisions regarding extensions to contracts and re-tendering, see sections 5 and 6, below.)

The Code of Practice on Workforce Matters in Local Authority Contracts which applied to local authorities in England applied to contracts which were first advertised following publication of the Code in statutory guidance on 13 March 2003. Subsequently the Code has been issued to all Best Value Authorities.

#### 4. TREATMENT OF CONTRACTOR'S EXISTING STAFF

##### 4.1. Are all staff working on existing contracts required to be given 'no less favourable' terms under the Code?

No. The Code does not envisage that existing staff working on the contract should have terms and conditions adjusted so that they are, overall, no less favourable than those of transferred employees. Nor, on re-tender, does it require existing staff to be given no less favourable terms than ex-public sector colleagues.

##### 4.2. If a contractor moves existing employees on to the workforce for a public sector service contract, does the Code apply?

No. The Code does not envisage that existing staff who are asked to work on the contract should have terms and conditions adjusted so that they are, overall, no less favourable than those of transferred employees. The Code applies only to 'new joiners' (i.e. new recruits) to the workforce for that contract from the date the contract is let; it does not apply to a contractor's 'historic' workforce. The principles in the Code, however, set out good employment practice and the provider should seek to prevent the damaging two tier situation where TUPE-transferred staff work beside existing staff whose terms and conditions are much poorer.

#### 5. RENEWING/EXTENDING CONTRACTS

##### 5.1. Does the Code apply if a contract is renewed or extended?

Unless the extension of the contract was allowed for in the original contract award, all extensions, renewals and re-lettings of contracts should be treated as a new contract, to which the Code would apply.

Illustrations:

Example A: an NHS Trust awards a cleaning contract in December 2004, for a period of 4 years, with an option for the Trust to extend the contract for a further period of one year. In 2008, the Trust exercises its option for the one year extension. Does the Code apply?

No. The original contract was awarded before the Code came into effect and because the extension was allowed for in the original contract, it is treated in the same way as the original contract.

Example B: As Example A, but at the end of the one year extension, the Trust extends the contract again. Does the Code apply to the further extension?

In principle: yes. There was no provision for a further extension in the original contract, so it should be treated in the same way as if a new contract had been awarded.

Example C: As Example A except that, at the end of the contract, the Trust carries out a new procurement. The outcome is that the same contractor is re-appointed. Does the Code apply?

Yes. See section 6 below. This is a new contract, awarded after March 2005. It does not matter that there is no change in provider, and no TUPE transfer. As long as some of the original ex-public sector staff remain in the workforce, new joiners must be offered no less favourable terms and conditions.

## 6. RE-TENDERING CONTRACTS

### 6.1. Does the Code apply to re-tenders?

Yes. The Code applies both to 'new' contracts which involve a transfer of staff from the public sector authority to the service provider and where staff originally transferred out from the public authority as a result of an outsourcing are TUPE transferred to a new provider under a re-tender of a contract, even where the original contract to be re-tendered was entered into before the introduction of the Code (see Example C, above).

### 6.2. Does the Code apply to workforces that have transferred out prior to the introduction of the Code?

Yes. The Code will apply where staff originally transferred out from the public authority as a result of an outsourcing are TUPE transferred to a new provider under a re-tender of a contract. It will apply to 'new joiners' to that outsourced workforce.

### 6.3. Would the Code still apply to a re-tender situation if there are no longer ex public sector staff employed?

No. The Code only applies to a re-tender situation where at least some of the original public authority transferees remain employed.

### 6.4. On re-tender are all staff working on the contract required to be given 'no less favourable' terms under the Code?

No. The Code does not envisage that on re-tender existing staff should be given no less favourable terms than ex-public sector transferred staff. The Code is concerned with 'new joiners' to the outsourced workforce on the re-tendered contract (where the Code is applying for the first time). The principles in the Code, however, set out good employment practice and the provider should seek to prevent the damaging two tier situation where TUPE-transferred staff work beside existing staff whose terms and conditions are much poorer.

#### Illustration

On re-tender, TUPE transferred staff may comprise both staff that originally transferred out from the public authority and staff that have been recruited into the

workforce by the outgoing contractor. The Code does not apply to these two latter groups. It applies only to new joiners to the workforce for that contract from the date the contract is let.

**6.5. What terms and conditions should be used as a comparator for new joiners? Do these relate to the equivalent staff still employed by the public sector client?**

No. The comparator is the terms and conditions of the staff originally transferred from the public sector authority. The comparator is not the current terms and conditions in the public sector organisation of origin.

**6.6. What happens if on a re-tendering very few ex-public sector staff remain in the contractor's workforce?**

The intention behind the Code is to end a 'two-tier workforce'. It would appear contrary to this intention if, at a re-tender, new joiners were recruited using a small number of ex-public sector staff as the comparator, rather than on the conditions enjoyed by the large majority of the workforce. In such circumstances, contracting bodies would be expected to apply the guidance in a common-sense way that secured the intention behind it. The principles in the Code set out good employment practice and the contracting body should seek to prevent the damaging two tier situation where two groups of staff with widely differing terms and conditions work alongside each other.

**6.7. The transferred employees are no longer on public authority terms and conditions when a contract is re-tendered: what happens?**

At re-tendering the relevant terms and conditions are the existing terms and conditions of staff that originally transferred from the public authority i.e. this is the 'benchmark'.

If the terms and conditions of employees originally transferred from the public authority have become harmonised with the rest of the workforce over the period of the original contract then, on a re-tender and a transfer to a new contractor, new joiners to this transferred workforce should be covered by the Code and get no less favourable terms than the transferred workforce.

The harmonised terms and conditions would be the comparator terms and conditions against which an incoming contractor could identify a package of 'no less favourable' terms and conditions.

**6.8. The 'trigger' for application of the Code is a TUPE transfer. Does the Code apply when there is a re-tender followed by an award to an existing provider i.e. where there is no TUPE transfer?**

Strictly speaking the Code does not apply. However, in such circumstances, given that the policy behind the Code is to prevent the development of a two tier workforce in public authority contracting, it would seem consistent to the achievement of that policy for the Code to apply. The Government's view is that there should not be a Two Tier workforce when a service provider recruits new staff to work alongside staff transferred from a public authority. It would be out of line with that policy for the Code not to apply in these circumstances.

### 6.9. What is the position of 'new joiners' within the first contract if that contract is terminated and the work given to another contractor?

The existing terms and conditions of staff should be protected by TUPE transfer to the new contractor. Those staff who originally transferred from the public authority should receive a 'broadly comparable' pension to the public pension scheme they left in accordance with HM Treasury *Fair Deal for Staff Pensions* guidance (1999 & 2004).<sup>2</sup>

Ex-best value authority staff who transfer are covered by *The Best Value Authorities Staff Transfers (Pensions) Direction 2007*<sup>3</sup> which requires the authority to secure a 'broadly comparable' pension for these transferring employees. 'New joiners' who transfer should be offered one of the pension options in the Code if they had a right to one of these pension options under the previous contract. Limited pension protection following a TUPE transfer is provided in the *Pensions Act 2004*.

In detail:

#### **Terms and Conditions**

In relation to terms and conditions of existing staff, for the re-tender of a first round contract (where staff first transferred from the public sector), re-tendering would mean that, except in exceptional circumstances, staff working on the contract should transfer and TUPE should apply. This would protect each employees existing terms and conditions.

#### **Pensions: Re-tender of a first round contract to which the Code applied**

Staff who originally transferred from the public authority should receive a pension which would at least be 'broadly comparable' with the public pension scheme they were in originally, in accordance with HM Treasury *Fair Deal For Staff Pensions* guidance (1999 & 2004). Ex-best value authority staff are covered by *The Best Value Authorities Staff Transfers (Pensions) Direction 2007* which requires the authority to secure a 'broadly comparable' pension for the transferring employees.

'New joiners' should have been given one of the pension provision arrangements laid down in the Code (*viz* a good quality employer pension scheme or an employer contribution to a stakeholder pension matching those of the employee up to 6%). On a re-tender of a contract to which the Code applies, the new service 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. This will not necessarily be the same option as provided by the first contractor.

#### **Pensions: Re-tender of a first round contract to which the Code *did not* apply**

Staff who originally transferred from the public authority should receive a pension which would at least be 'broadly comparable' with the public pension scheme they staff were in originally.

Pensions of staff who did not originally work for the public authority are not protected. However, from April 2005 the Pensions Act (2004) provides a degree of pension cover for people involved in a TUPE transfer. This provides a minimum guarantee on pensions.

<sup>2</sup> [http://www.hm-treasury.gov.uk/d/pensions\\_bta\\_guidance\\_290604.pdf](http://www.hm-treasury.gov.uk/d/pensions_bta_guidance_290604.pdf)

<sup>3</sup> <http://www.communities.gov.uk/publications/localgovernment/authorities-staff-transfers>

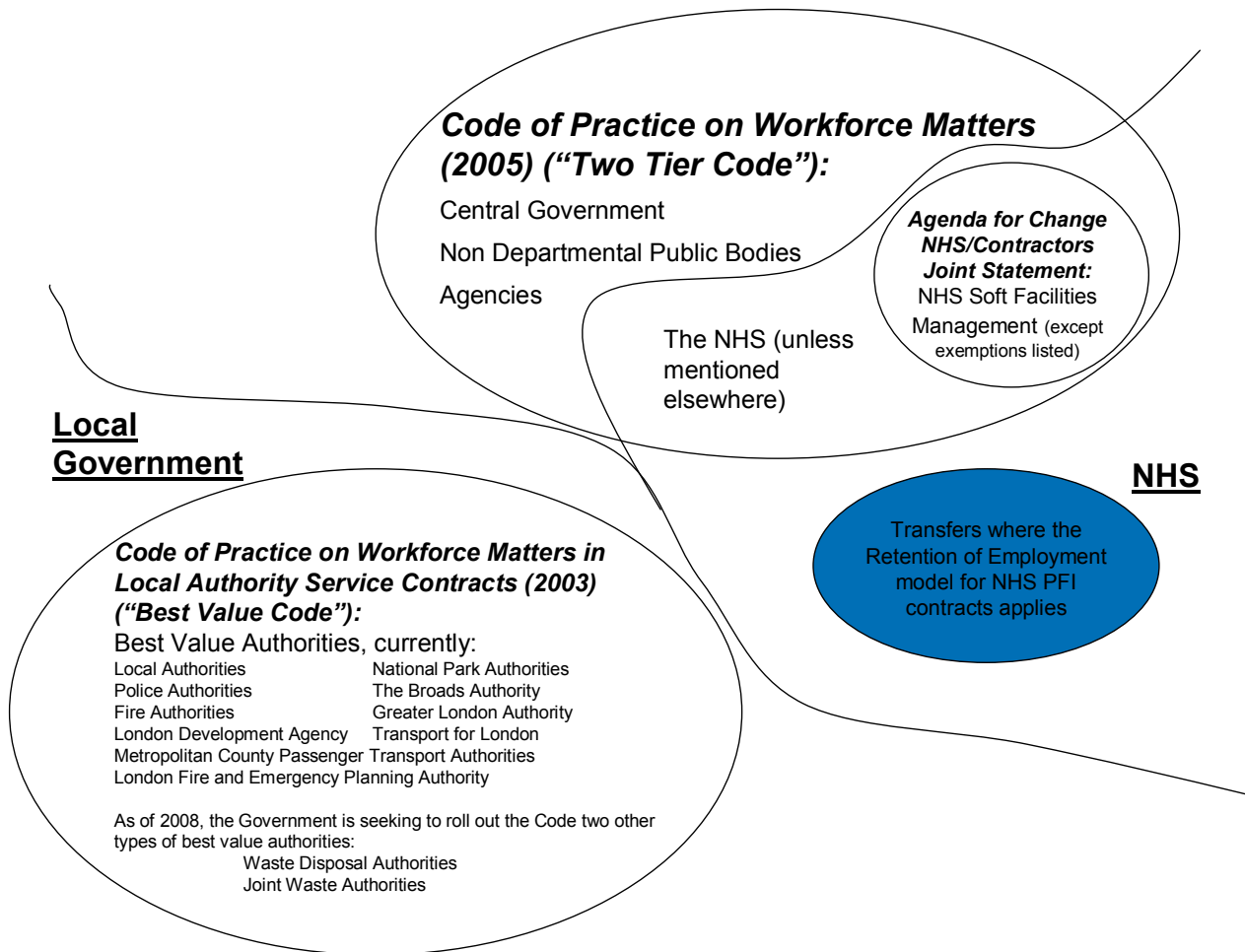
'New joiners' to the re-tendered contract, after it has been awarded, would be covered by the pension provision in the Code.

## **7. MONITORING THE IMPACT OF THE CODE**

### **7.1. Is the impact of the Code monitored?**

Yes. Departments should have put in place arrangements to monitor and evaluate the impact of the Code. Departments will identify a named person who can respond to concerns raised over compliance. Key evaluation issues will be addressed in the various sectors.

**PUBLIC SECTOR TWO TIER CODE COVERAGE SCHEMATIC**



The areas of the public sector listed in each oval are covered by the Code that oval represents.

Areas of Central Government responsibility not covered:

Higher and Further Education Institutions  
 Academies  
 Maintained Schools (which are covered by the School Governance (Contracts) (England) Regulations 2005)  
 Public Corporations and Trading Funds

Areas of the NHS not covered by any provisions:

Independent Sector Treatment Centres  
*N.B. Transfers where the Retention of Employment model for NHS PFI contracts applies are not covered by either the Code of Practice on Workforce Matters or the NHS Joint Statement but employees are protected because they remain within the public sector. The Retention of Employment model also applies to Independent Sector Treatment Centres.*

Areas of Local Government not covered:

Other bodies in Local Government which are not best value authorities are not covered by the Best Value Code.

## GLOSSARY OF TERMS AND ABBREVIATIONS

### Term

Agency	An executive agency is a public institution that delivers government services for the United Kingdom government, the Scottish Government, the Welsh Assembly Government or the Northern Ireland Executive. It does not set the policy required to carry out its functions - these are determined by the department that oversees the agency. Agencies are headed by chief executives, who are personally responsible for day-to-day operations. They are normally directly accountable to the responsible minister, who in turn is accountable to Parliament.
Best value authority	A best value authority is an authority listed at section 1 of the Local Government Act 1999
FE	Further Education – post-compulsory non-University education
HE	Higher Education
NDPB	Non-departmental Public Body - NDPBs are public bodies that, although not part of government departments, carry out functions on behalf of sponsor departments, who fund them and ensure they are effective. NDPBs are, however, independent of the department that sponsors them, and are considered to be 'at arm's length'. This independence allows them to focus entirely on their own objectives and make unbiased recommendations and decisions.
PFI	Private Finance Initiative
Public Corporation	A corporation created to perform a governmental function or to operate under government control.
Trading Fund	A government organisation established as a trading fund under the Government Trading Funds Act 1973. More than 50% of the trading fund's revenue will consist of receipts in respect of goods and services provided by the trading fund. The trading fund has standing authority under the 1973 Act to use its receipts to meet its outgoings. An example is HM Land Registry.
TUPE	The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) preserve employees' terms and conditions when a business or undertaking, or part of one, is transferred to a new employer.

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