

## Report on Building Schools for the Future – Related Staff Issues

### Functional Transfer

1. Building Schools for the Future is a programme of capital funding, delivered through long term partnering, that aims to improve educational standards through the transformation of accommodation over the whole secondary school estate.
2. As such it is proposed to deliver the new projects comprising

PFI Design Build and Operate contracts for new build schools and design and build and operate "Design Build and Operate" contracts using conventional procurement for refurbished or remodelled schools.

The "Operate" will include:

- repairs and maintenance
- cleaning
- caretaking
- grounds maintenance
- security

There will also be a separate project for an ICT managed service.

Education services are not included in any of these contracts and remain the LEA's function.

3. The PFI contracts will be for 25 – 30 years. The conventional contracts will be for the initial construction period plus a contract for 5 or 6 years for the "operation" (commonly known as "FM" (facilities management)).
4. The long term partnering arrangement is proposed to be delivered by a joint venture company, called an "LEP" (Local Education Partnership) who will:
  - provide design development ("partnering") services to work up the new projects
  - have exclusive rights to the contracts for the new projects (and any others identified for the secondary school estate).

The LEP is a company limited by shares, in which a private sector partner will have an 80% shareholding.

5. "Partnering Services" are, broadly speaking, design development services but would include:

- architects
- quantity surveyors
- engineers
- valuers
- planning advisors
- finance support
- legals
- specialist procurement
- ICT services
- LEP management/executives

Staff currently engaged to do detailed work for secondary schools in the above areas, and where this is wholly or mainly their job will be affected and the implications are considered in paragraphs 14 onwards of this report.

6. "Long term" means for an initial period of 8 years and for further possible increments up to a total of 15 years, if more new secondary school projects are identified.

7. The Need for a Client Side

Building Schools for the Future will also necessitate a very strong client side within the Council to do the following in particular:

- work with the LEP during design development stages
- develop (with schools) the Council's requirements and target prices for new projects
- monitor the performance of the LEP in delivering the partnering services
- monitor the performance of the LEP (and/or its Project Companies)

In particular, this will include senior officer time representing education/children's services (resources and planning, school improvement and children's services), property services, legal and finance.

### **Staff Transfer**

8. TUPE

TUPE (Transfer and Undertakings Protection of Employment Regulations) operates to continue as a matter of law employees contracts of employment with a new service provider on the same terms and conditions (except as to pensions). TUPE cannot be "contracted out" and employees do not need to consent except if the employee objects (in which case the contract of employment will terminate but without a dismissal) or if the employee objects on the grounds of a substantial and detrimental change (in which case the employee can treat the contract of employment as terminated and seek compensation).

In the case of Building Schools for the Future the "new employer" will be:

- for partnering services – the LEP
- for DBO contracts – the LEP or a Project Company
- for PFI contracts – a Project Company
- for ICT managed service – the LEP or a Project Company

A Project Company will be a separate company nominated by the LEP but in which the LEP will have a prescribed minimum state.

For TUPE to apply to a particular employee the following conditions need to occur:

- there must be a “transfer” of work or services provision to a new provider
- there must be an identifiable business unit or units (or a “part” of an undertaking which could even be just one person) which is effectively self contained
- that unit (or part of a unit) must be carried on by the new employer
- the employee must be employed in that unit (or part) wholly or almost wholly or predominantly (case law indicates an 80% threshold, but concessions have been made at 60%. In other words, but for TUPE, their employment would have to be terminated).

The protection of TUPE is that an employee will be automatically unfairly dismissed (with the remedies of unfair dismissal law) if he/she is dismissed as a result of the transfer.

An initial assessment has shown that about 44 staff (e.g. premises officers) in schools would transfer under phase 1 projects (either PFI or FM contracts).

The position with staff within LCC is still unclear as information and decisions about what managed service (both FM and ICT) will actually be offered to procurement are still awaited. The principal areas affected are:-

- Property Services Projects and initial indications are that 2 staff may transfer (one of these is likely to be a vacant post shortly) and between 4-6 other staff may be at risk. However, this is subject to a review of requirements generally, and for client side for BSF in particular.
- central education (resources, planning, facilities, etc).
- ICT (both in the Education Department and possibly corporate ICT). The precise proposals have yet to be finally determined but it is likely that 2 FTE technicians may transfer.

Other support staff may be affected in other areas but insufficient information is forthcoming to arrive at an accurate picture.

## 9. TUPE Plus

This is a contractual term which would be in the contract for services or employment or as part of a business transfer agreement under which the new employer gives some guarantees about longer term certainty.

The Building Schools for the Future Standard Documentation incorporates this and provides:

- that there will be no adverse change in terms and conditions for 3 years for TUPE transferring employees.
- a 3 year tie in to the NJC conditions for TUPE transferring employees.

It is not envisaged that there will be any transfers of teaching or classroom assistant staff in schools, but ICT technicians will be affected. Some schools are considering retaining a IT based curriculum support post and this will require workforce re-modelling (see later).

#### 10. TUPE Equivalent or Code of Practice Transfers

Under the Best Value Statutory Guidance (circular 2/2003) where existing staff would, but for a technicality, transfer under TUPE, the Council is under a duty to effect a transfer and conditions as if there were a TUPE transfer.

As this is not, technically, a statutory transfer unless the existing contract of employee provides for its assignment, the employee must consent. The Building Schools for the Future standard documentation does this by requiring the new employer to make an offer of employment to affected employees on the same terms and conditions including full continuity of employment.

#### 11. Pensions

For TUPE and TUPE equivalent transfers, the new employer has to offer either:

- the LGPS, or
- a "LEP" pension scheme which will be actuarially assessed as "broadly equivalent".

#### 12. Other Models

##### The NHS retained service model

This is where the "management" of the service only is externalised and bought back by the Local Authority. The non-management staff remain as employee of the Local Authority, but are managed by the external managers. The big disadvantage is that the chain of responsibility is blurred.

##### The Mental Health Section 31 Partnership

This is a pooled budget/integrated service agreement with the NHS bodies in Leicester. Leicester NHS East operates as host and manager ("lead provider") and staff are basically

assigned into the pool. The contract of employment remains with the Council but employees are paid and managed through the pooled budget/lead provider arrangement.

### Workforce Remodelling

This is where, for genuine business reasons, units and job allocations are re-organised so that, at a reasonable period before a transfer (case law indicates that a few weeks would be enough) so that there is, immediately before the transfer, no relevant employee meeting the "TUPE" test.

In our case this appears to be a genuine option to explore, especially as to the need to form a "client side" and in areas already under either recruitment pressure or non-BSF workload pressure.

Great care needs to be taken over information provided to the bidders/new employee to avoid a mismatch in the information provided. Under the PFI contract for example the contractor is compensated for any mismatch through an adjustment to the Unitary Charge.

The disadvantages are that the new employer may be expecting to take over a ready made workforce and may be bidding on that expectation. Also employees may wish to claim that they should in fact have transferred under TUPE, particularly if the new employer is a large, national expanding firm able to offer better prospects.

### Secondment

This is where the Council continues to employ staff but their services are offered to, say, the LEP, under a contract for services. Care needs to be taken over responsibilities for discipline, health and safety, etc.

This model could not apply to "TUPE" staff as they would transfer employment as a matter of law, in that case workforce remodelling could be considered. Staff contracts may need varying to allow for secondments.

This could also be a useful model for staff groups affected by a predicted downturn in work as a result of functional transfer. There would otherwise be potential for redundancy or early retirement or loss of temporary jobs.

### Prior Consideration

Where staff are surplus to requirements and not subject to TUPE or TUPE equivalent transfer redundancies may be created. An agreement with the new provider as which gives staff at risk prior consideration (subject to suitability) for recruitment to new posts with the Provider may avoid redundancies and retain skills and experience within the projects as a whole.

## 13. Redundancy

There is always a possibility that staff may be affected to the extent that, although not wholly or mainly engaged, there is nonetheless a downturn in work and/or recharges as a result of functional transfer to a new employer. Typically, this would be support staff who service a range of clients, e.g. payroll.

It is possible that the LEP in particular may be interested in secondment or prior consideration for LEP vacancies. This will need to be addressed in the contract documents, for the first phase projects it will probably be possible to reach definite proposals but for subsequent phases this would have to be addressed by making a satisfactory proposal for a secondment or prior consideration category one of the acceptance criteria before any new project can proceed.

#### 14. Market Response

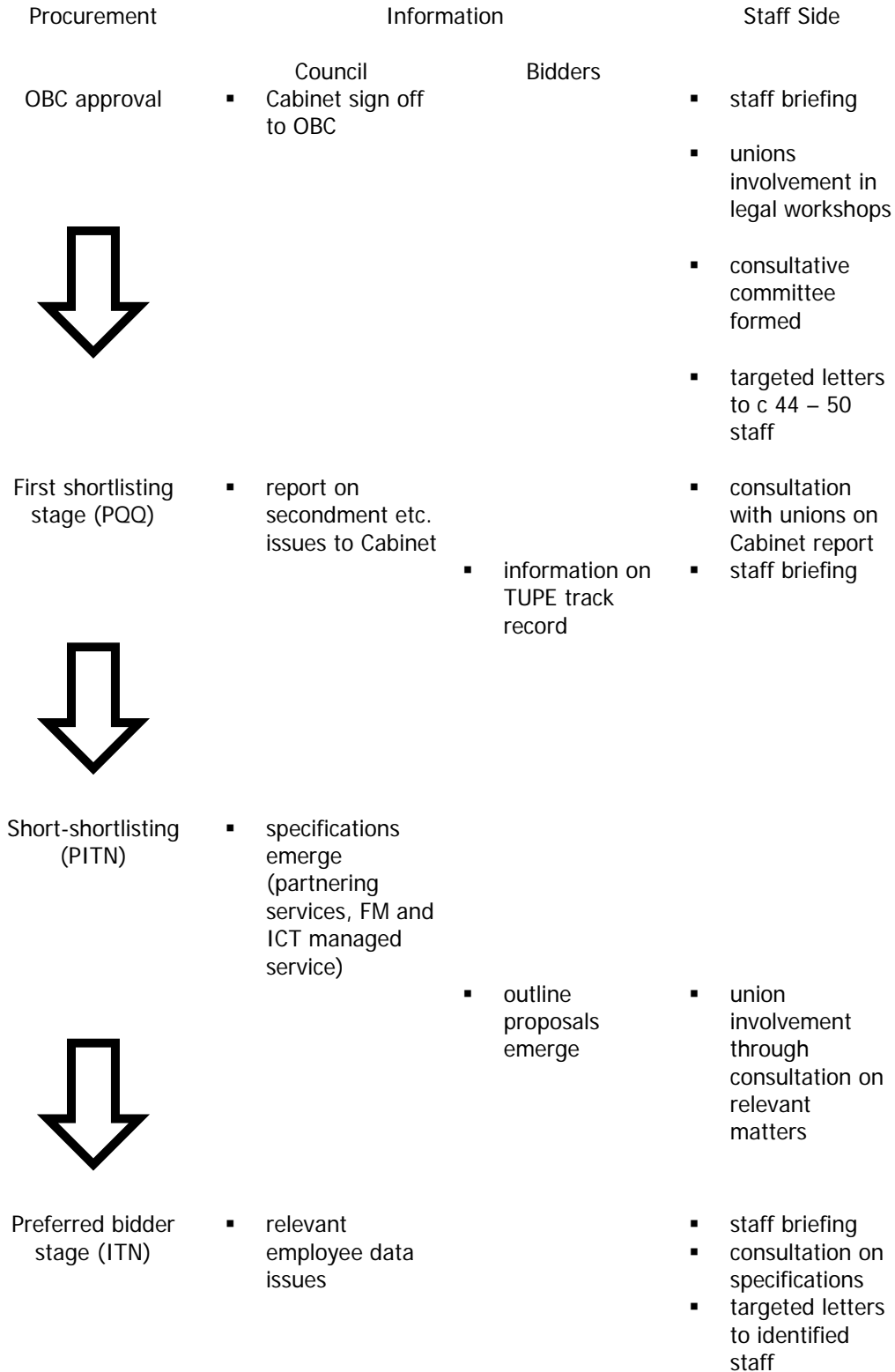
It must be stressed that the market is only aware, and was consulted on, the TUPE and TUPE equivalent transfer models by Partnerships for Schools who is a wholly owned DfES agency set up to implement the Building Schools for the Future programme nationally. Any other model will need to be appraised and a business case demonstrated. The reaction of the market would be unknown but may be seen as a "Leicester complication" and deter bidders, or extend negotiations. On the other hand, particularly on a temporary basis, there could be advantages seen in having access to staff resource over and above what TUPE and TUPE equivalent would bring.

It should also be stressed at this stage that no firm proposals are known until we get detailed proposals from our short short listed bidders and even then full details will only be settled with the preferred bidder as part of a lengthy negotiation. Until then we do not know what proposals or other innovative options may be offered to us.

In theory the exclusion of "soft" facilities management services from the "Operate" Contract may have the effect of a small reduction on bid prices, this is because the contractor will not have to tender or sub-contract the support services and the Council would avoid the costs of a TUPE transfer and on-going monitoring costs. On the other hand, the Council's proposals have already demonstrated a sound business case which, as it has to meet HM Treasury requirements, will have demonstrated both value for money and achievement of overall benefits of improved standards of service delivery as specified by the Council.

## 15. Process

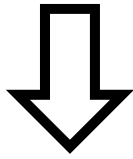
The following chart summarises the proposed process



Procurement

Information

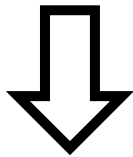
Staff Side



Contract negotiations with preferred bidder

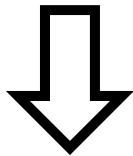
- report to Cabinet on selection of preferred bidder
- detailed proposals

- consultation on emerging proposals
- union involvement in evaluation of relevant "workforce matters"
- statutory TUPE consultation



Financial close

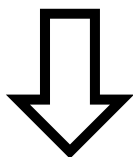
- possible prior consideration procedures
- staff transfer (partnering)



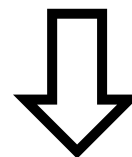
handover of phase 1 projects to FM provider

- ongoing notification of details of relevant staff

- staff transfer (FM)



subsequent phases



subsequent phases