

Email: [joyce.thacker@rotherham.gov.uk](mailto:joyce.thacker@rotherham.gov.uk)  
Email the Council for **free** @ your local library!

Ref: JT/TM/JC/54

Contact: Joyce Thacker

1st April, 2011.

Dear Headteacher/Chair of Governors,

### **Transfer of Services**

We have been made aware recently that colleagues in schools are being approached by service brokerages and companies to take on the provision of services to schools. Initial contact with colleagues has suggested that these organisations and individuals are offering superficially attractive prices but closer examination has revealed there may be fundamental flaws with these arrangements, resulting in headteachers and governors being exposed to legal and financial risks.

The purpose of this letter is to outline some of these issues:

- In letting contracts headteachers and governors have a fiduciary duty to act in the best interests of council taxpayers and the community,
- In discharging the fiduciary duty schools are required to comply with bespoke Financial Regulations and Standing Orders, designed to protect the public purse by ensuring that schools get value-for-money.
- The Council follows strict procedures when drawing up and letting contracts. These include procedures for developing specifications, pricing models, risk analyses, TUPE, financial contract management, health and safety etc.
- The Council also adopts tendering strategies to inform the manner in which it engages with the market, compares the services it offers with other providers to ensure value-for-money, conducts due diligence exercises, requires performance guarantees and makes transitional arrangements to ensure the smooth continuity of a service from provider to provider.
- Schools must also ensure that they and any contractors they use comply with the law and discharge any legal requirement to provide the Council with accurate and timely data, including meeting any statutory deadlines associated with the operation of the service.

### **TUPE**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 protect employees' terms and conditions on the transfer of an undertaking or service provision change.

The Cabinet Office *Code of Practice on Workforce Matters* also applies to schools and requires them to respect the TUPE rights of any employees who may be affected by a change in service provider and therefore employer. Headteachers and governors should ensure they comply with the Code and meet their legal obligations to staff and their representatives.

## **Pensions**

Under the *Code of Practice on Workforce Matters* the pensions of staff who transfer to a new provider must be preserved, either through the new provider obtaining “admitted body status” with the appropriate pensions authority or providing a pension entitlement that is broadly comparable with the pensions authority’s scheme. Section 102 (staff transfers: pensions) of the Local Government Act 2003 make these provisions mandatory in the case of staff employed by a local authority.

Contractors appointed to provide services hitherto provided by local authority staff must therefore offer transferring staff a suitable pension. The options are:

- continued membership of the South Yorkshire Pensions Authority scheme via “admitted body status”; or
- admission to the contractor’s own pension scheme, which must be certified by the Government Actuary’s Department (GAD) as being “broadly comparable” to the local government pension scheme.

To achieve “admitted body” status it is necessary to request SYPA to obtain an actuarial valuation to determine an appropriate employer pension contribution rate to be paid by the appointed contractor and the level of the bond that the SYPA will require in case of default. The Human Resources & Payroll Service has expertise in this field and can assist and advise schools on the process.

There is a cost to undertaking a valuation, and the school, as the party taking the decision to transfer services, would have to meet that cost. The actuary’s fees depend upon the amount of work involved in arriving at a valuation. The cost of the bond is borne by the contractor, who will add this to the contract price.

It is important to stress that for employees to retain unbroken membership of the LGPS and not have their benefits affected, the admission agreement must be signed before the date of transfer; the pension regulations do not allow for retrospective agreements.

More detailed guidance on both TUPE and pensions is contained in the attached documents. Guidance on such matters can also be obtained from Legal Services or the HR Business Partner for Schools.

## **Specifications**

Specifications drawn up by schools, or on their behalf by brokers, are important documents that must comply with legal obligations, such as Health and Safety. Any school contemplating delivery of services by private contractors must also ensure that working practices and operational requirements comply with applicable Council policies and procedures. For example, if financial liability ultimately rests with the Council for the actions of contractors on school premises, the Council must be apprised of any proposals, so that it can satisfy itself as to any potential risks and steps to be taken to mitigate them.

## Conclusion

This is a complex and sensitive area. It is perhaps worthy of note that all of the above issues are taken into account by the Council when it provides a service or contracts for a service on schools' behalf. We are aware however that some headteachers and governors are electing to carry substantial personal risks, and in some cases may not even be aware of those risks, by letting contracts without complying with mandatory procedures.

In order to achieve economies of scale, the Council spreads the costs of letting and administering contracts for the services it provides across the whole range of services. A decision to cherry pick one or two of these services places all the others at risk of cancellation as the Council may lose its economies of scale and hence its ability to continue to provide them. Moreover, as the services were procured on schools' behalf, schools have an obligation to use those services for the term of the particular contract.

Accordingly, may I respectfully suggest that notices to terminate services where these have been issued are withdrawn pending further discussions with the specific service provider, e.g. for cleaning contracts Environment and Development Services.

We intend to add this as an agenda item at the next meeting of the Schools Forum, but should you have any questions or queries in the meantime, please speak to Paul Fitzpatrick of Human Resources or Richard Waller of Legal Services. Paul Fitzpatrick can be contacted on (01709) 823786 and Richard Waller on (01709) 823553. Richard is on holiday all next week, so please contact Tim Mumford on (01709) 823500 in his absence.

Yours sincerely,



Joyce Thacker  
Strategic Director,  
Children and Young People's Services



Tim Mumford  
Assistant Chief Executive,  
(Legal and Democratic Services)