

Open Government status: Open	Paper Number: H16/03
	Meeting Date: 21 January 2014
Exempt material: None	Type of Paper: Above the line

HELA

The implications of contracting-out HSW delivery

A Paper by Gerry Kasprzok (LAU) & Nick Johnson (FOD HQ)

Cleared by Elaine Harbour on 10 January 2014

Issue

1. This paper seeks HELA's views on the extent and implications of contracting out delivery of functions under the Health & Safety at Work etc. Act following the discussion on the issue by HELA at its August 2013 meeting.

Timing

2. For discussion at the meeting on 21st January 2014

Recommendation

3. That HELA consider the issues relating to contracting out and their role in communicating the policy.

Background

4. At its last meeting HELA considered a paper on the legal implications for Enforcing Authorities (EA) under the Health & Safety at Work etc. Act (HSWA) contracting-out their work to private contractors. (Paper H15/03, attached at Annex A).
5. HELA recognised that EAs will increasingly look to novel ways, such as contracting out, to deliver their services as financial pressures increase.
6. HSE's view is that the delivery of the function can be contracted-out but the responsibility for enforcement cannot. This means ,that whilst EAs may authorise individuals who are not their employees as inspectors, the EA must retain the responsibility for the enforcement function.
7. HELA members confirmed that it was useful to understand the position and that It was important that EAs are aware of this restriction early in their deliberations on contracting out services.

8. Local Government HELA members agreed to consider the extent and implication of contracting out and return to the issue for discussion at its January meeting.

Discussion

9. The HELA paper H15/03 effectively communicates HSE's legal opinion and policy on contracting out. The paper has been published on HSE's website and discussed at the national Health & Safety Practitioner Forum for cascade to LA liaison groups.
10. HSE has received a small number of enquiries resulting from the paper which have mainly been to clarify understanding of legal position with regard to enforcement responsibility and delivery function.
11. The principles laid down in the National LA Enforcement Code will apply to both the LA's enforcement responsibility and any contracted out delivery function. LAs and their contractors should follow the principles within the Code when considering how to perform their relative responsibilities and functions.
12. The HELA paper H15/03 also made reference to the review of the existing powers of entry under the Protection of Freedoms Act 2012. HSE is working to finalise this review which is due to be laid before Parliament in May 2014.

Action

13. HELA members are asked to comment on :
 - a) the extent and implications of EAs considering contracting out HSWA delivery; and
 - b) how they can assist communication of the policy on contracting out HSWA delivery.

Contact

Gerry Kasprzok, LAU (gerry.kasprzok@hse.gsi.gov.uk)

Nick Johnson, FOD HQ (nick.johnson@hse.gsi.gov.uk)

Annex A

Open Government status: Open	Paper Number: H15/03
	Meeting Date: 1 August 2013
Exempt material: None	Type of Paper: Above the line

HELA

The implications of contracting-out HSW delivery

A Paper by Gerry Kasprzok (LAU) & Caroline Coleman (FOD HQ)

Adviser - Peter McNaught

Cleared by Elaine Harbour on 24 July 2013

Issue

1. This paper seeks HELA's views on the extent and implications of contracting out delivery of functions under the Health & Safety at Work etc Act.

Timing

2. For discussion at the meeting on 1 August 2013

Recommendation

3. That HELA consider the issues relating to contracting out and their role in communicating the policy.

Background

4. HSE are aware that some Enforcing Authorities (EA) under the Health & Safety at Work etc Act (HSWA) are considering contracting-out their work to private contractors.
5. The legal considerations are:
 - a) If an EA wishes to contract out and essentially sub delegate its enforcement function, it would need an express statutory provision to provide for this. Section 18 of HSWA 1974 states that the HSE shall enforce statutory provisions under the Act. Other authorities can be made responsible for enforcement by the Secretary of State creating the necessary Regulations (which it has done for Local Authorities by virtue of the Health and Safety (Enforcing Authority) Regulations 1998). Section 15(3)(c) also that affords the Secretary of State the power to make regulations to make a specified authority responsible for enforcement (e.g. under Control of Explosives Regulations 1991). HSWA does not provide any further provisions that allow

additional sub delegation in respect of enforcement responsibility.

- b) Section 19 of HSWA 1974 provides that an EA can appoint any person as an inspector so far as the person has suitable qualifications as they think necessary for carrying into effect the relevant statutory provisions. Therefore, a person other than an employee of an EA can be appointed as an inspector.
- c) However, although an EA can appoint a person other than an employee as an inspector, it does not follow that this would automatically allow them to contract out its responsibilities for enforcement of health and safety law. An EA can either appoint an employee, or another person, such as one employed by a private company; however, if it chose to do the latter, it would need to retain responsibility for enforcement otherwise the EA would be sub delegating its enforcement function to another company/organisation.
- d) There is also the general public law principle that where statute provides for a specific person to perform a function. There is a presumption that the responsibility cannot be delegated further. HSE's position therefore is that it would not be lawful for an EA to contract out its enforcement responsibilities to the private sector.
- e) Finally, Article 6 of the ILO Labour Inspection Convention of 1947 which states that "the inspection staff shall be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and improper external influences. The convention was ratified by the UK in 1949 and is therefore binding upon us. This raises an additional concern in relation to the independence and impartiality of the inspectors employed by a private company, with potential for conflicts of interest.

6. HSE's view based on the legal position is therefore that the delivery of the function can be contracted-out but the responsibility for enforcement cannot.

Discussion

7. EAs will increasingly look to novel ways, such as contracting out, to deliver their services as financial pressures increase.

8. Whilst EAs may authorise individuals who are not their employees as inspectors the EA must retain the responsibility for the enforcement function. It is important that EAs are aware of this restriction early in their deliberations on contracting out services.

9. Inspectors appointed under HSWA by LAs are expected to meet the requirements of the Regulators Compliance Code (due to be revised and re-launched shortly); HSE's Enforcement Policy Statement; the LA National Code; and protocols on working with co-regulators or other enforcing authorities.

10. A separate, but related, consideration is the on-going review of powers of entry. HSE and LAs have powers of entry and associated powers under HSWA. HSE is currently

reviewing those existing powers of entry as required by The Protection of Freedoms Act 2012¹. The review is expected to report in the autumn.

11. In addition, the Home Office has issued a draft Code of Practice on Powers of Entry. The draft Code of Practice (CoP) sets out how the powers of entry should be used post Review. This is to standardise approaches to powers of entry, and help drive transparency and accountability. EAs are accountable for the exercise of powers in accordance with the CoP and will need to be aware of this when considering contracting out HSWA delivery. HSE will consider the detailed impact of the Code once it has been published and has already commenced considerations on whether or how far operational practices may need to change to reflect its requirements

Action

12. HELA members to consider how to:
- c) seek early and continuing intelligence on EAs considering contracting out HSWA delivery;
 - d) communicate HSE's policy on contracting out HSWA delivery.

Contact

Gerry Kasprzok, LAU (gerry.kasprzok@hse.gsi.gov.uk)
Caroline Coleman, FOD HQ (caroline.coleman@hse.gsi.gov.uk)

¹ Ministers have a duty under the Protection of Freedoms Act to review the existing powers of entry and relevant associated powers by May 2014.