

A brief guide for academies

What's it all about?

Heralded as the successor to [Building Schools for the Future](#) ('BSF') (albeit on a much smaller scale), the [Priority Schools Building Programme](#) ('PSBP') is designed to revitalise those schools and academies in greatest need of replacement, repair or refurbishment. The programme will be procured centrally by the [Education Funding Agency](#) ('EFA'), the executive arm of the Department for Education ('DfE'), on behalf of the Secretary of State for Education ('SoS').

42 schools, colleges and academies in greatest need will be rebuilt or refurbished using capital grant funding from the DfE totalling £400million. The remaining 219 will be delivered by private finance at a cost of £2.3billion.

How will it work?

The programme is intended to avoid the bureaucracy, complexity and delays which beset BSF by simplifying and managing the procurement process centrally to ensure quicker delivery, cost savings and consistent value for money outcomes. Centralised management of the procurement process will mean that school leaders will not have to spend endless hours at meetings as they did under BSF and will be freed up to concentrate on delivering education. The programme will be aligned with the government's reformed PFI model which, at the time of writing, has not yet been formally announced, although early indications are that little will change. No contractual documentation has yet been issued - it currently remains in draft form and subject to consultation - so the views expressed in this note inevitably involve a degree of speculation on our part.

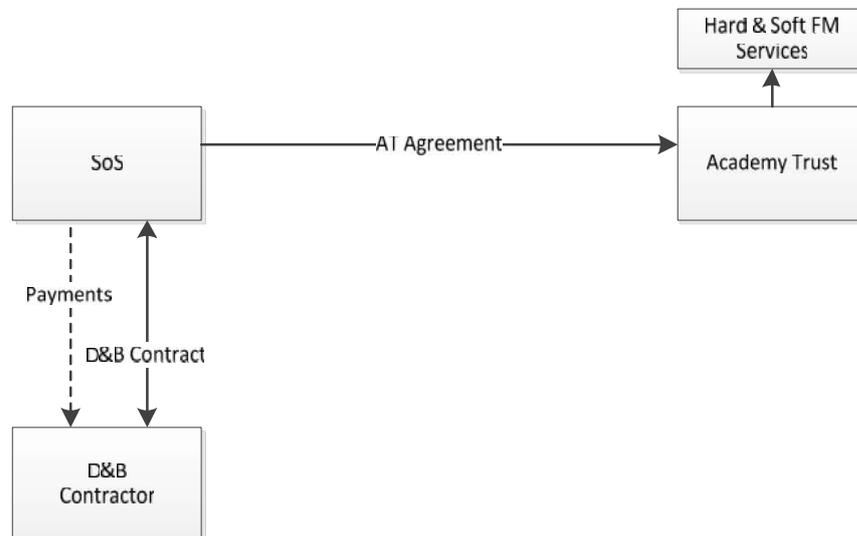
As noted above, that there are two basic elements to the programme:

1. Capital grant funding

The capital funded strand will be carried out in batches of between 4 to 10 schools with a capital build cost of £20m-64m and will involve the DfE entering into a contract for the design and construction of new or refurbished school, academy or college buildings ('D&B Contract') with a contractor selected from the existing Contractors' Framework. Contractors' familiarity with the use of this Framework should help minimise potential procurement delays. Payments will flow directly from the DfE to the contractor under the D&B Contract.

This approach will be supported by a back-to-back agreement between the DfE and the Academy Trust to deal with responsibility for the procurement and take over of the new academy buildings. We understand that the DfE has written to dioceses with schools in the programme confirming that it will fund 100% of the rebuild costs on both the capital and the private finance elements of the programme.

The contract structure diagram below shows how the capital funding arrangements are intended to work:



Where the Academy Trust is the freeholder of the site or has a 125 year lease from the landowner (probably the local authority), the Academy Trust will grant the contractor a licence to occupy the site and carry out building works. Where there is a lease, however, consent of the landowner might still be required.

The Academy Trust should receive the benefit of 12 years’ latent defects protection for the fabric of the academy building, but (unlike in a PFI-type transaction) will remain responsible for procuring and meeting the cost of facilities management in terms of ensuring the maintenance and upkeep of the building (‘Hard FM Services’) and of cleaning, catering, security and some grounds maintenance services (‘Soft FM Services’).

2. Private finance

Projects will (as with BSF) be batched but contractors will be procured by the DfE (through a more ‘streamlined’ competitive dialogue) using a form of contract based on the BSF standard form of Project Agreement. Again, back-to-back arrangements will need to be agreed between the DfE and the Academy Trust to flow down those risks to the Academy Trust which it may be best able to manage or control. Other risks will be borne centrally by the DfE.

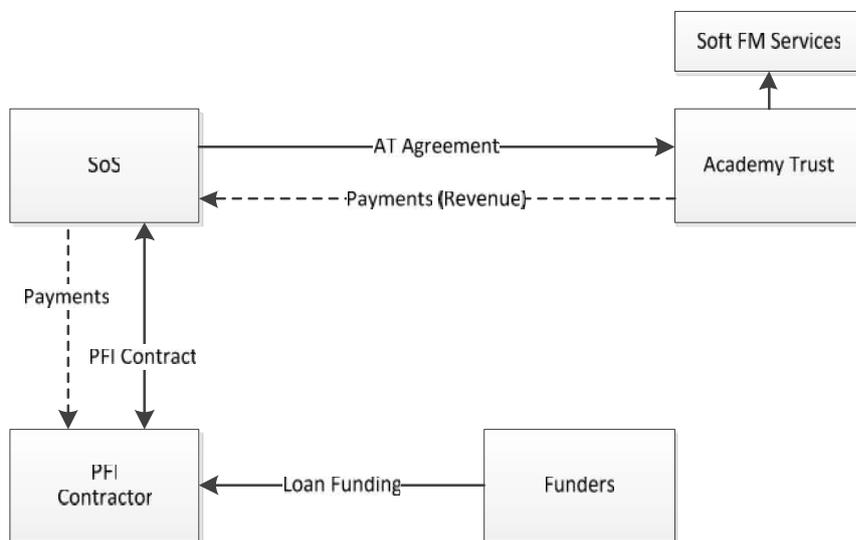
The same requirements for a licence that exist in the case of the D&B contract may also apply here. The main difference being duration, as the Project Agreement will probably last anything up to 25 years.

Hard FM Services will be provided by the contractor under the Project Agreement, but academies will be responsible for providing Soft FM Services. There should, therefore, be no transferring employees so no complicated TUPE arrangements and, because ICT provision is being excluded from the contract (only basic ICT infrastructure will be provided), there will be no need for complex ICT interface arrangements.

However, interface between the academy's Soft FM Services provider and the contractor providing Hard FM Services will need to be addressed. Given that the contractor will be responsible for the upkeep and maintenance of building fabric and some fixed installations, the academy will be required to meet certain standards in the performance of Soft FM Services so that there is no adverse impact upon the contractor (and vice versa).

Loan funding will be made available direct to the contractor by lending banks and other institutional investors. Payments under the Project Agreement will flow directly from the DfE to the contractor to cover the cost of building works and Hard FM Services. Academies are likely to have to make a contribution towards these payments in order to meet certain revenue costs (i.e. building maintenance services) in the services phase.

The contract structure diagram below shows how the private finance arrangements might work:



As soon as draft documentation is published, we will review and summarise its key mechanics and areas of particular interest to the academies sector. These bulletins and updates will appear on our [Education Portal](#) but if you would like to receive automatic e-mail updates from us, please register by [clicking here](#).

How long will it take?

The DfE expects to engage with all 42 schools and academies being delivered using capital grant (and most of the private finance schools) by the end of 2012. Things should move quickly from now on.

The private finance schools, colleges and academies will be procured in approximately four batches over the next five years. The DfE expects contracts for each batch to be signed within 12 months of the issue of an OJEU Notice - the first OJEU Notice should appear some time this autumn. This should see the new institutions opening for the start of the 2014/15 academic year, in line with DfE expectations.

How are the schools/academies themselves involved?

The back to back agreements described above will underpin the contracts entered into by the DfE and will make academies and governors responsible for Hard FM and/or Soft FM Service provision and for a number of project risks. Certain key project risks which were normally assumed (in whole or in part) by the contractor under BSF are now likely to be taken back by the DfE and shared with or allocated to the academy. In order to agree an early allocation of risks with schools and academies, the DfE is proposing to draw up a Memorandum of Understanding (MoU) with them to identify such risks and agree where responsibility should lie.

The need for a centralised approach to commercial terms may well place some constraints on schools' and academies' ability to negotiate. Nevertheless, these contracts are likely to have significant implications for Academy Trusts and governing bodies are likely to require independent advice before entering into them.

For example, issues likely to feature in MoU discussions and subsequently in the back-to-back agreements include:

- affordability and budgetary issues (i.e. for privately financed academies, the long term implications of contributing to the Unitary Charge (payment to the contractor under the Project Agreement) - it is not clear yet whether or not this will be supported by the DfE)
- liability for title and other 'historic' information
- responsibility for delay events and breaches on the part of the SoS caused by the Academy Trust under the D&B Contract and/or the Project Agreement
- utilities tariff and consumption risk

- change in law risk
- Soft FM Services provision; interface with Hard FM Services; liability for damage and destruction
- community or third party use and income generation
- taking out and maintaining insurance and payment of premia
- contract variations and change management
- monitoring of contractor service performance and allocation of service deductions under the Project Agreement

Will academies have much say in how their building looks?

Academy Trusts, in the same way as schools, will be entitled to have a say in how their building looks but there will be ‘significant constraints’ on their ability to influence design and appearance of the building. The programme is essentially seeking to standardise designs with the overall aim of achieving value for money and curbing what might have been considered as design excesses in previous projects. For now, schools and academies should be engaging with the EFA in developing a detailed and accurate School Brief reflecting their culture and ethos, emphasising what is important to the academy; its past, present and future. This is absolutely key in order to derive maximum benefit from this programme and, at the same time, help bidders in developing their bids.

It will be essential for academies to fully understand the workings and implications of the contractual arrangements being put in place centrally and the back to back agreements they are going to be required to sign up to. Appropriate professional advice is, therefore, recommended in order to safeguard the academies’ interests and expectations.

Want to find out more?

At Browne Jacobson we are passionate about education and supporting schools, colleges and academies in rising to the challenges they face. We continually monitor developments in the education sector. If you are concerned about how the PSBP might affect you or you would simply like to know more about it, please contact Craig Elder or Simon Chappel. We would be happy to come and speak with you in person. Alternatively, [click here](#) to register your details and we will send you updates on the PSBP as they occur.

talk to us...

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