Cabinet Office

MUTUALS TASKFORCE

Procuring services from public service mutuals*

Contents

*For the purposes of this paper, the term 'public service mutual' means an organisation that has spun out of the public sector, continues to deliver public services and involves a high degree of employee control. These organisations can take on a variety of legal forms, including those of limited company, community interest company and industrial and provident society

Introduction

The government wants to enable people working in public services to form Public Service Mutuals. This means groups of workers would come together to establish an organisation they have a significant degree of control over, empowering them to innovate to deliver a better, more responsive, service.

There are some important issues that people wishing to form Public Service Mutuals, and the people who will buy the services they deliver, need to think about when they are being established.

Who this paper is for

This paper looks at high level procurement options in relation to the creation of new Public Service Mutuals. It is not legal or commercial advice.

The decision about which procurement route to take is made by the authority buying the services (the contracting authority). **This paper is designed to give employees an introduction to the issue and options available to help answer initial questions and start conversations.**

You can get more detailed information on public service mutuals and support to establish one by visiting http://mutuals.cabinetoffice.gov.uk/ or calling the Mutuals Information Hotline on 0845 5390543

The issue

When purchasing public goods, services or works, contracting authorities must comply with EU Treaty principles (which exist to provide openness, transparency, non-discrimination and the freedom to provide services across the European Community). In addition to this, procurements over a certain financial threshold must follow the rules set out in the EU Procurement Directives (implemented by domestic regulations in the UK).

Any application to form public service mutuals must comply with the legal and policy framework which governs public procurement, as well as value for money policy and competition law, employment law, statutory duties and state aid rules where applicable.

There may be certain circumstances when employees would not have to go through a full competition in order to become a mutual and deliver public services.

This paper outlines the different circumstances and approaches that can be taken by contracting authorities to involve new mutuals in providing public services. It explains the different considerations for each one.

These options are not mutually exclusive and the decision about the best approach will depend on the contracting authority, the service being provided and the form of the mutual seeking to spin out of the public sector. Employees wishing to spin out and the contracting authority will need to agree the best route taking into account their individual circumstances[1].

[1] Contracting authorities will need to consider whether State Aid issues arise when considering these options. Further information is available on the BIS website; http://www.bis.gov.uk/policies/europe/state-aid/advice-on-state-aid

Options

1. 'No market' Option

If there is no market for the service being provided, then a competitive tender is not required by law. Contracting Authorities need to be able to define the market, show there is a need for this market, demonstrate there are no other operators in the market who would be interested in and capable of bidding to deliver the service for this option to work. In this scenario a time limited contract could be awarded to a new Public Service Mutual

Points to consider:

There would be no need to compete the service until the end of the time limited contract which could be several years depending on the circumstances;

Gives time to develop a market.

The contracting authority would need to be able to demonstrate that it is necessary to develop a market over time, which may involve advertising the opportunity.

There are only limited circumstances where it can be demonstrated there is no existing market.

This might work for you if...

You operate in an area where there are no existing providers of similar services, for example a niche market.

2. 'Joint Venture' option

Some public service employees may need to join with another independent organisation to become a viable business in a 'joint venture'. If this is the model agreed on then an open competition for the opportunity to become a joint venture partner providing the service would be run by the contracting authority.

Points to consider:

For the employee ownership model to be effective, employees must have a real say in the criteria for who becomes their joint venture partner

The element of competition reduces risk of running against procurement law.

Joint ventures can enable new public service mutuals to access finance and bring in business expertise.

Extensive advice and guidance exists already on forming joint ventures, although the employee ownership element is quite new[2].

This might work for you if...

You need start up capital and/or business expertise to get off the ground

[2] See http://www.hm-treasury.gov.uk/d/joint_venture_guidance.pdf

3. “In house incubation” option

Public service mutuals can start their lives being retained ‘in house’ by their contracting authority, effectively operating as a ‘shadow organisation’. There are certain conditions laid down by European case law (the ‘Teckal’ case), under which a public body may award a contract to an in-house entity without competition.

To meet these conditions, the public authority/authorities must exercise control over the in-house body*, and the in-house body must undertake the essential part of its operations for the parent (controlling) public authority/authorities.

This option would allow a new organisation to be set up and kept in house for a limited “growing” period to enable the workers to adapt to the new arrangements.

Points to consider:

Employees would not need to compete for the work until after an initial period, perhaps two years, of providing the services;

Employees could have more independence in the day to day running of the service.

The market has time to develop whilst the services are in-house

Private sector involvement would not be possible, so the new mutual would not be able to get investment from outside

The new mutual would not have complete freedom over how it is formed and run as the parent authority retains ultimate control

The ability to attract additional business is restricted as the essential part of the work done would have to be for the parent authority

This might work for you if...

Your initial business plan centres on one main contractor

You want to move to being an independent organisation gradually

*Meaning they must exercise no less control over the in house body than they exercise over their own departments

Options

4. Competitive Tender Option

In some cases, a competitive tender will be the right approach. An open competition is held and the new mutual will have to show it can provide the best value for money to win the contract to deliver services.*

Points to consider:

Employees will have complete freedom to decide on their organisational structure and ways of working, including complete freedom to choose a joint venture partner if they wish to operate as a joint venture

Public Service Mutuals with no previous experience of bidding for contracts may struggle to compete with other providers in the market when they first get started.

This might work for you if...

You're confident you can win contracts

Operational and organisational freedom are central to you

5. Service Concession Option

Where services are paid for by a third party, for example members of the public paying to cross a toll bridge, use a licensed service or use a hospital shop, the contracting authority can use a 'service concession'.

A service concession works when a significant proportion of revenue comes from directly selling the service. Therefore any organisations taking on the concession also takes on the risk of running it, as their success will depend on how much business they can generate.

When a service concession is used EU procurement rules don't apply, but a service concession does have to follow EU Treaty Principles, and therefore some element of competition is likely to be necessary.

Points to consider:

Service concessions are not covered by EU procurement rules.

Value for money policy and EU Treaty principles will usually require some form of competition.

As there are only a limited number of services that a third party directly pays for, only a limited number of public services are covered by this option.

This might work for you if...

If you sell your services directly to members of the public

•There are many different ways to run a competitive tender. You can find out more by visiting http://www.cabinetoffice.gov.uk/resource-library/policy-and-standards-framework-best-practice-guidance

Next steps

Further information and next steps

- **Cabinet Office Mystery Shopper Service:** The Cabinet Office's mystery shopper initiative allows suppliers of all kinds and sizes to raise concerns and report instances of where SMEs, voluntary organisations, social enterprises and other suppliers to the public sector are shut out of the market or experience poor practice. Cabinet Office will investigate these cases and look to put things right where poor practice is uncovered. We want to hear more – if you spot poor practice this service can make a difference and we want to hear from you.

  http://www.cabinetoffice.gov.uk/content/supplier-feedback-service

- EU procurement is one of many issues to be considered when forming a public service mutual.

  You will be able to get more information from the **Cabinet Office Mutuals Information Service** http://mutuals.cabinetoffice.gov.uk/ or calling the Mutuals Information Service Hotline on **0845 5390543**.

  As your plans develop it is important to get expert advice for your specific circumstances.