

# Partnering with the public sector: Opportunities and challenges

In 2019, the UK public sector awarded contracts worth over GBP 93 bn. That number will almost certainly be exceeded in 2020, given spending on the NHS and COVID measures. This already significant market may grow further as public sector spending is used to stimulate the economy. The size of this market and a contraction in traditional private sector markets, coupled with the strong financial covenant associated with public sector contracts, means many suppliers who haven't previously bid for public sector work, may now be looking at this area. As public sector bodies must deliver value for money, large-scale, high value contracts are often structured on a partnering basis, allowing the public sector to extract added value and/or achieve long term benefits. There is no sign of this trend decreasing. This paper addresses the key issues for private sector parties considering partnering with the public sector.

## Winning the deal

Large-scale, high value contracts inevitably mean the public sector must usually competitively tender for its private sector partner. A good working knowledge of public procurement rules is an asset for a private sector body endeavouring to win work in this area.

- You should examine the tender documents in detail – not necessarily at the top of everyone's to do list when faced with a 500-page document. It is also not unusual for tender documents to contain contradictory requirements and you may need to submit a clarification query to the authority.
- The price:quality ratio will influence how you approach your bid submission.
- The public sector body can evaluate bids purely on the answer submitted to them. Do not assume that they will know about a particular deal or project – write it down in your tender response.
- The use of behavioural assessment, although not yet frequent, is on the increase in procurements for long term partnering arrangements, given the importance placed upon the partnering attitudes and behaviours of the prospective partner.

## Key considerations

- A good working knowledge of public procurement rules is an asset for a private sector body endeavouring to win work in this area.
- Partnering arrangements can range from a simple contract between the parties to a joint venture with the establishment of a public/private special purpose vehicle.
- Careful consideration as to the degree of control retained by the public sector is a key factor in determining whether a partnership is attractive to prospective bidders.
- Under freedom of information rules, the disclosure of the majority, if not all, of the terms of your contract is the price you pay for contracting with the public sector.
- Obligations on the public sector to demonstrate value for money and for the private sector partner to adopt a fully transparent approach are likely to continue to be expanded.

- It is standard for tenders to include provisions requiring the private sector to commit to additional environmental and/or social benefits, which can include training, guarantees of a specified number of apprenticeships, community supply chain opportunities and so on. These community benefits will be evaluated as part of the tender and reflected in the partnering agreement.

## **Structuring the partnering arrangement**

Partnering arrangements can range from a simple contract between the parties to a joint venture with the establishment of a public/private special purpose vehicle (SPV).

### **Partnering contracts**

Typically, the contract sets out the strategic objectives of the partners – the aim is for a win-win. Partnering signals a move away from confrontational employer/contractor or us/them behaviour, and often includes behavioural objectives.

The agreement will also specify how the partnering payment mechanism will operate. This may include:

- tiered pain/gain share mechanisms where the private sector retains all of the profit up to a specified amount, with the public and private sectors sharing specified percentages in cost savings and/or revenue above that amount;
- models where savings (or a percentage of savings) to the public sector are recycled into further projects between the partners, providing the private sector partner with a further pipeline of work; and
- pricing lists and supply chains being pre-agreed (usually as part of the tender process) with caps on increases over time.

### **SPVs**

Usually the SPV enters into a contract with the public sector as the public sector's supplier, whilst the public sector often owns shares in the SPV or, if the SPV is an LLP, through being a member. This model is attractive to the public sector as it allows it to have a degree of control over and/or insight into the operation of the SPV as its supplier and to share in revenue generated by it. As well as the benefit of having separate legal personality, SPVs have the advantage of ring fencing the respective parties' liability.

Careful consideration as to the degree of control retained by the public sector of the SPV is key. Public sector controls and/or right of veto on certain decisions by the

SPV may result in the private sector's ability to make a profit and ultimately the partnership being unattractive to prospective bidders. If the public sector requires the SPV to be off balance sheet, too much public sector control may result in the SPV being categorised as a public sector body itself, which could have balance sheet treatment implications.

Public sector control can also result in the SPV being regarded as a public sector body for procurement purposes, resulting in the SPV itself having to go out to the market to competitively tender goods and services. This can be an important point for the private sector if one of the strategic reasons for partnering is to exploit its supply chain or own products through the SPV.

## **Vires**

You must check whether the public sector body has the relevant power to enter into the partnering contract, and/or to establish and participate in a JV. If it does not it may be acting ultra vires and any contract entered into may not be enforceable.

## **Capacities**

Public sector bodies, such as local authorities, act in a number of different statutory capacities. Contracting with that body in a particular capacity, or through a JV, will not fetter the discretion of that body to act in a different way when wearing a different hat. Agreeing with your local authority partner that a particular application for planning be submitted, does not mean the same entity, acting as planning authority, will approve that application.

## **Audit and transparency**

Most public sector bodies have an internal audit team and are also subject to external audit (for instance by the National Audit Office or the Accounts Commission in Scotland). Partnering contracts are likely to provide for disclosure of information to government/local authority audit functions and open book accounting during and after termination or expiry of the partnering agreement.

## **Equality duty**

The public sector equality duty obliges public sector bodies to have due regard to the need to eliminate discrimination, advance equality and foster good relations between different people when carrying out activities. The duty does not apply to the private sector, but a contractual obligation not to discriminate is likely to be included in any partnering agreement.

## Freedom of information/ environmental information

The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 (and the Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004) give the public a general right of access to information held by public authorities. There are limited grounds upon which information can be withheld, and very often a restricted list of information can be included in the partnering agreement which the parties agree will not be disclosed without prior notification being given by the public authority to the SPV or private sector partner. It is however worth bearing in mind that the disclosure of the majority, if not all, of the terms of your contract is the price you pay for contracting with the public sector.

## Conclusion

Partnering with the public sector can provide opportunities for long term contracts with a solid financial covenant, which is attractive in an uncertain market. This market is not for those who are uncomfortable with open book accounting and information sharing with their customer/partner. The political and legislative backdrop is such that the price for public sector partnering is likely to continue to go beyond the hard money cost. We expect increased obligations to demonstrate value for money and added value to be placed on private sector partners and that the current transparency of approach required from the private sector is likely to continue to be expanded upon in the immediate future.



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