



February 2010

Briefing 10 -08

Joint ventures: a guidance note for public sector bodies forming joint ventures with the private sector

This briefing is provided to APSE contacts in England, Scotland, Wales and Northern Ireland

Key issues;

- In October 2009 HM treasury issued draft guidance together with Partnerships UK to guide public sector bodies entering into joint venture arrangements with the private sector
- Previous guidance was issued in 2001 and the latest guidance is intended to draw upon recent developments to bring the guidance up-to-date.
- This briefing replicates APSE's response to the draft guidance and our concerns about issues that ought to be fully considered, particularly by local authorities in entering into joint venture arrangements but which are not fully drawn out in the draft guidance.
- APSE worked closely with Eversheds LLP in this response to the draft guidance in particular on employment related matters

1. Introduction

In 2001 guidance was issued on ways in which the public sector engage with the private sector in joint venture arrangements. During recent years a number of policy developments have changed the dynamics of public / private arrangements. The Audit Commission report, for example, *'For better; For worse'* questioned the ability of savings to the public purse to be realised in outsourced arrangements. Lack of flexibility was found to be a key issue in returning services to in-house provision as part of APSE ground-breaking research on insourcing public services. Therefore the draft guidance is a timely reminder that there are always lessons to learn in the delivery of shared arrangements. In welcoming the opportunity to comment on the draft APSE has produced a detailed response to HM Treasury .

The APSE response is replicated on the pages overleaf and we would of course always welcome further comments from our member authorities.

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Response to consultation from APSE (Association for Public Service Excellence)

APSE is the Association for Public Service Excellence and is a not-for-profit membership based organisation working with local authorities throughout the UK. The primary focus of our work is in supporting local authority frontline service providers, providing advice and research on continuous improvement and supporting the operation of the UKs largest voluntary benchmarking arrangement for local government '*performance networks*'.

In terms of Joint Venture arrangements APSE has in recent years offered training and development courses and master-classes for local authority directors and heads of service, in exploring the appropriate vehicles to facilitate joint working, particularly in the area of shared services. It is in that context that we respond to the consultation draft '*Joint Ventures: a guidance note for public sector bodies forming joint ventures*'.

Our comments are as follows:

Tax considerations: Whilst it is recognised that tax considerations are mentioned at various points within the draft guidance APSE believes that there needs to be a more robust analysis of taxation issues both prior to and post the commencement of a joint venture arrangement. For example where a JV arrangement involves capital works / infrastructure projects then taxation issues should be a fundamental part of the options appraisal process. Therefore this matter should be given significantly higher prominence within the draft guidance. It is APSE's view that there ought to be certain key points drawn out, for example, in relation to the VAT implications of certain routes from a local authority perspective. It is accepted that the parties to any JV agreement will have a responsibility to consider tax issues and liabilities, but it is appropriate to remind the parties through the guidance that this should be considered very early on within the process, with the aim being to avoid any disadvantage to the public sector partner.

Competition law: Section 9 references the need to abide by competition law / European procurement rules where they apply. However there appears to be gap within the draft guidance in that it fails to draw out consideration of post JV issues (for local authorities). For example, the ability or otherwise, for the local authority to award certain work to a company operating within the JV arrangement. This could have a detrimental impact on public service delivery and on business planning and should therefore form part of the upfront consideration as to the structure and form of a JV at the outset of discussions.

Classification of a company as governed by Part 5 of the *Local Government and Housing Act 1989*:

Whether or not a company is considered to be a public or private influenced company is merely referenced within a foot note at page 38 of the draft guidance. APSE would consider this issue to merit a more drawn-out deliberation explaining the differences and why it is an important consideration in terms of the type of company model and the potential impact on local authority finances and borrowing in particular.

Employment and staff considerations: APSE is disappointed by the paucity of the employment and staff considerations in the draft guidance. In consultation with *Eversheds LLP* the following comments are made:

Applicability of TUPE and scope issues:

- I. Within any outsourcing arrangement there ought to be consideration of whether there is a need to retain key people within the public sector. For example client side officers or within an accounts framework to monitor a JV arrangement. There needs to be reference to this and encouragement to have a dialogue about whom, in practice and by agreement, should remain with the public sector.
- II. Whilst recognising the legal difficulties with secondment options there may be the opportunity to explore retained employment models as part of a JV arrangement (for example the 'Choices' model within the NHS). This should be flagged as a point for consideration within the guidance.
- III. Government has made successive announcements about the need for consultation and involvement of trade unions and staff in the public sector transformation agenda such as the Bichard report, McLeod report , Public Services Forum etc. Again the draft guidance does not given sufficient weight to involving the workforce at the earliest opportunity. Existing guidance in this area such as the as 4ps' March '05 Disclosure of Information etc should perhaps be cross-referenced. The early and good quality engagement of staff /representatives is often key to a successful mobilisation.
- IV. The guidance should ensure that any staff severance implications such as may arise from any workplace relocations or duplications of roles (including pensions related) are costed into the affordability model.

- V. Whilst legal issues arise under TUPE from harmonising terms and equal pay aspects have also to be borne in mind what is the policy/strategy in respect of the terms and conditions? Where the JV continues to provide services under a contract to the public sector the so called *two tier code* would seem to be applicable. Further guidance would be welcomed as to where the JV would be regarded as a private sector body providing services to the public sector for the purposes of these codes of practice.
- VI. Guidance would be welcomed, in particular, on the applicability of the Pensions Direction 2007 under sections 101/102 LGA 2003. We note in this regard that DCLG Consultation on Workforce Matters in Best Value Authority Contracting in October 2008 does not appear to have led to any further/amended statutory guidance.
- VII. The provisions in the Draft Equality Bill as regards using public sector procurement as an equality/diversity "lever" are of significance to this guidance. There is a need to balance equality objectives/duties (note the proposed revised and, broadly, consolidated statutory duties in the Bill) with EU and domestic procurement obligations. It can be argued that, when faced with an apparent conflict between so called social aspects and procurement/free market considerations (e.g. the Viking v Laval case), the ECJ has preferred the latter.
- VIII. On a specific point there is a reference that the JV "must" offer broadly comparable pension arrangement or continued access to their public sector scheme. The "must" is perhaps an over simplification - essentially often there is no absolute and general legal obligation to do this - it is more a matter of compliance with codes of practice/guidance and such a requirement being included in the commercial contract. APSE would however favour a strong reference to this being of primary importance to safeguard the pension rights of public sector transferred workers.

Post contract award monitoring: The 'two tier' code requires post contract monitoring (by a local authority) and similar provisions exist within the Cabinet Office guidance. The draft guidance does not provide sufficient weight as to how the public sector will seek to monitor/have any influence over working practices, terms and conditions and major HR decisions (such as substantial redundancy exercises). Such arrangements would range from "light touch" mere compliance with discrimination laws and the public sector's equality duties to "heavier touch" involving perhaps a right of veto over terms and material HR decisions. All may have an impact on the company form of a JV.

Exit/termination arrangements: There is no specific reference (table at page 11 and at page 98) to staff on exit/termination arrangements. In practice, staff issues at this point are often key. In circumstances where there is anything other than a straight "business as usual" transfer of staff to a new provider (whether the new public sector body or a new JV or purely private sector contractor) there will be staff severance costs implications. These may be substantial (eg pension related costs and enhanced redundancy compensation expectations if not rights). Who will bear these? How should they be mitigated? Whilst in 2010 it may be likely that tupe will apply on exit (where the services will continue) what if it does not? What if the services are fragmented at that stage such that tupe may not apply? There is no one solution but these are the questions and risks which should be considered at the point of planning and initial contracting.

The draft guidance would benefit from a robust reference to such matters.

General staffing issues: Given the range of staff related guidance/codes/practices/legal obligations across the public sector, the HM treasury guidance ought not to operate in a vacuum to the wider matters that need to be taken into account. This includes the issues such as new equality and diversity obligations and, perhaps most importantly, the pressure to deliver cost effective and appropriate quality public services which should not be at the expense of the workforce.

In closing thank you for taking the time to consider our comments. As a representative body for over 250 UK wide local authorities we believe that the challenges facing the public sector are many. Whilst we welcome innovation in service delivery it is important that appropriate safeguards are in place which protect and enhance the capacity and ability of the public sector and safeguard the principles of Best Value. In this context we would ask you to consider amendments to the draft guidance reflecting our concerns made in this response.

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