public matters newsletter

September 2013

brownejacobson

law, less ordinary

public matters newsletter - September 2013

index

talk to us…

Peter Ware | 0115 976 6242 | peter.ware@brownejacobson.com

So you're thinking of setting up a framework agreement…

Framework agreements are now widely used as a means of purchasing goods, services and works without the need to follow a full blown procurement procedure for every individual contract. A framework agreement is an agreement with a provider or providers that sets out the terms and conditions under which specific purchases or 'call offs' can be made throughout the terms of the agreement.

But what are the key issues that need to be addressed prior to setting up a framework agreement that is governed by the Public Contracts Regulations 2006 and what are the common pitfalls that procurers need to avoid? For those thinking about setting up a framework agreement, the following are some of the key issues that should be explored at the outset.

1. Is the subject matter of the procurement suitable for purchases to be made via a framework agreement?

Framework agreements are most commonly used for repeat requirements where the exact quantities of goods, services or works required are unknown. They are often used for purchases of commodity goods such as stationery items, printing equipment, uniform supplies but may also be used for the procurement of works and services such as vehicles repairs or roads maintenance. Framework agreements may not be the most appropriate form of contracting where it is not possible to specify the proposed purchases with sufficient precision up front or where the requirements for each call-off contract are likely to require substantial amendment to the terms of the framework agreement. It is not possible to enter into detailed negotiations with the appointed providers at the call-off stage resulting in making substantial contract amendments.

2. Have you considered how the market might change in forthcoming years and how this might be dealt with in the framework agreement?

You will need to consider the intended scope of the framework agreement including the different solutions available to meet your requirements, whether new products are likely to emerge on the market in the next few years and the price volatility of the sector in which you are purchasing. It will be crucial to ensure that your specification is scoped appropriately and drafted with sufficient flexibility to allow for upgrades for example and that a suitable price change mechanism is inserted where this is required.

3. What type of framework agreement do you require?

Framework agreements may be set up for a single contracting authority or may be opened up to many different contracting authorities. You will need to take special care in describing the category of potential users of the framework agreement in the OJEU Notice. Also consider also engaging with other contracting authorities to gauge the level of interest in using the framework.

You will also need to decide whether you are going to set up a single-supplier or a multi-supplier framework agreement. A single supplier framework might be useful, for example where you are seeking to obtain a pricing discount from a supplier and thereby ensure value for money. It might also be suitable where you want to establish an ongoing relationship with an individual supplier or, for IT related contracts, where you need to establish a common system or platform set up by a single supplier.

On the other hand, a multi-supplier framework agreement might be more appropriate when you need to ensure security of supply or if you want to distribute the work more widely. There may also be circumstances where the best supplier for each order is only ascertainable when the details of the order are known (e.g. availability of personnel for consultancy projects).

In addition, you will need to decide whether your framework agreement is going to be binding or non-binding on the purchasers and suppliers. Your decision in this regard will largely depend on your objectives and the market in question.

4. For multi-supplier framework agreements what method of call-off is most appropriate?

For multi-supplier framework agreements you can either choose the supplier for each call-off contract based solely on their original tenders or hold additional mini-competitions to place the call-off order. The framework agreement will need to set out what process to follow at the call-off stage.

For example, in the original procurement suppliers might be invited to submit prices for 100 different electrical items with delivery charges for different parts of the region. The supplier for each call-off might then be selected by reference to the lowest cost (price plus delivery charge) for the specific order.

Alternatively, for a consultancy services framework, the original procurement might establish the rates that each supplier on the framework will charge for the services. At the call-off stage, the supplier might be chosen based on proposals submitted for an individual project as part of a mini-competition. The supplier could be selected based on the expertise of the personnel available, the quality of proposals plus the rates originally tendered.

5. What legal constraints apply to running mini-competitions?

When running mini-competitions for framework agreements you must invite all of the framework suppliers that are capable of performing the contract to submit a mini tender. You will need to fix a reasonable time limit for submission of mini tenders, require them to be in writing and keep all mini tenders strictly confidential. You must also award the contract based on the award criteria set when the framework agreement was established.

Whilst the mini-competition may involve the suppliers supplementing their original tenders to adapt them to the particular order, it is not possible to include terms that are substantially amended from the terms laid down in the framework agreement.

6. What steps should be taken to guard against corruption and bid-rigging?

Recent research has shown that some types of framework agreements increase the opportunity for suppliers to engage in collusive practices such as bid rigging. Framework agreements, by their nature, create a closed and relatively stable market of widely known suppliers. You should therefore consider how best to protect against collusive practices by, for example, establishing a range of methods for call-offs whilst of course still ensuring compliance with the EU public procurement rules. This would create more uncertainty on the part of the suppliers and decrease the incentive for them to engage in collusive practices.

You might also consider carrying out some training for employees so that they become more aware of the factors likely to create an environment for bid rigging and are able to carry out effective monitoring.

It is standard practice now to require bidders to sign anti-collusion certificates when bidding for public tenders. Best practice would be to use such certificates at the call-off stage also.

7. How will the framework agreement be managed?

You will need to consider the extent to which you want to include performance and monitoring mechanisms in the framework agreement. For single supplier framework agreements intended for the use of an individual contracting authority, similar considerations to those that you would take into account for standard contracts apply. For large scale multi-supplier framework agreements, it is not uncommon to include a management fee payable by the suppliers for receiving orders from the framework users. This could be calculated, for example, according to the percentage of the value of the orders they have received on an annual basis. Also, how will you manage the use of the framework agreement by other users? You might want to put in place access agreements with other users for this purpose.

8. Is it possible to admit suppliers during the term of the framework and to mandate the use if the framework?

The EU public procurement rules do not allow for the admission of suppliers after the framework agreement has been set up so this is something you will need to bear in mind when deciding on the duration of the framework agreement.

9. What if I am being made to use a particular framework agreement?

Framework agreements are seen as key to streamlining the procurement process and reducing administration costs. For this reason, you might experience pressure from above to use certain framework agreements rather than setting up your own. Binding framework agreements should be set up as part of the original tender process. The very recent case of Copymoore Limited and others v The Commissioners of Public Works in Ireland[1] indicates that where a framework agreement has been set up on the basis that potential users have the 'option' to procure their requirements via the framework, any effort on the part of a public authority to mandate or strongly encourage the use of the framework agreement may be vulnerable to challenge if its effect is to materially change the scope of the original procurement. It is important to keep up to date with the case law developments as they are likely to impact on your decision making process and the way in which you decide to set up your own framework agreement.

talk to us...

Steven Brunning | 0115 934 2056 | steven.brunning@brownejacobson.com

[1] [2013] IEHC 230

TUC and Co-operatives UK Best Practice Guidance: Public Services, Co-operatives and Mutuals

A number of public bodies are considering employee-led mutuals and co-operatives (referred to below simply as 'mutuals') as alternatives to outsourcing or maintaining in-house provision of services. After significant efforts by the UK Government, the European Commission has agreed to include specific provision in the new EU procurement directive for the award of contracts to employee led mutuals. The intention behind this is to assist public authorities in establishing and contracting with mutuals who might otherwise struggle when competing in tender exercises against established organisations with a stronger financial history.

Although the directive does not include a right to award a contract directly to mutuals, public bodies will be entitled, providing certain conditions are satisfied, to limit tender exercises so that only mutuals can take part. We expect this to lead to a rise in the number of mutuals established and the number of contracts awarded to them.

The TUC and Co-operatives UK have jointly published new guidance setting out their views of best practice in 'the establishment, implementation and delivery of public service co-operatives and mutuals' which should be of use to public bodies considering establishing and contracting with mutuals.

The guidance covers five key areas, namely:

- workforce engagement and consultation
- governance
- commissioning of services
- safeguarding of assets
- employment standards.

Perhaps unsurprisingly, the guidance focuses heavily on employee and trade union consultation and engagement, going so far as to suggest conducting a ballot of all affected employees on any proposals to form a mutual. Whether or not a ballot is the most effective approach to deciding whether to establish a mutual is debateable but, as mutuals are employee-led organisations, having employees 'buy in' to the proposals will undoubtedly be crucial to a mutual's success.

The guidance also suggests that governance mechanisms should be included to enable service users to be involved as members of public service mutuals. While this may not be appropriate in certain cases (for example mutuals providing children's services) there are services which would benefit from service user

input at the member level as this would increase the mutual's accountability. However, care should be taken to ensure an appropriate degree of separation where confidentiality or sensitive information is an issue.

The guidance recommends that mutuals commit to the policies and principles of the 'parent', including some form of access to information similar to the public sector's freedom of information obligations. Clearly governance of mutuals will be a key issue as service users and 'parent' public authorities will want to ensure that the mutual retains the key principles and values of the parent with appropriate levels of accountability. However, care should be taken to ensure the new organisation is not so heavily burdened with red tape that it is not able to improve on the services originally provided by the parent.

The guidance also sets out the preferred approach to commissioning and provides a number of sensible suggestions, many of which public authorities should already be complying with. These include consultation with affected employees prior to any transfer of services and on any adaptations to the delivery of services. The authors suggest that the design and commissioning of public services should be undertaken in such a way that 'protects against the take-over of services by private for-profit organisations'. The protection of public services from outsourcing to the private sector is a contentious issue but regardless of the parent authority's views on the matter, they will be required to comply with wider obligations (for example under the Public Contracts Regulations 2006) which may or may not support such an approach. As highlighted above, the current draft procurement directive (due to be adopted by the UK in summer 2014) permits public bodies to restrict tender exercises to only allow bids from mutuals. Until then, public authorities should be careful to ensure that in seeking to commission services from mutuals they are not breaching any wider procurement obligations.

Safeguarding of assets will also be a key issue. The guidance suggests that assets held or used by mutuals are 'asset-locked' to ensure that they continue to be used for the benefit of the community and can be transferred back to the parent authority upon the expiry or termination of the contract. Whether or not the parent authority wishes to retain assets will depend on the nature of the assets. Office equipment and furniture used by a mutual is unlikely to be of particular value to an authority at the end of a contract but expensive equipment or property should be considered carefully and, if necessary, adequately controlled through the contract for services and/or the mutual's constitution documents.

The authors of the guidance have provided comprehensive proposals on the protection of employment standards in the establishment and operation of mutuals. The guidance focuses heavily on consultation and engagement with recognised trade unions on a number of key issues such as changes in workforce pay, terms and conditions, development of new employment solutions, pension and other benefits and TUPE. Engagement with unions experienced in advising on these issues will undoubtedly be valuable, but mutuals should also consider engagement with wider stakeholders such as service users and the parent authority as situations may arise where the interests of employees and wider stakeholders do not align exactly.

In summary the best practice guidance contains a number of useful suggestions and principles which parent authorities and mutuals should strive to comply with. However, public authorities should also carefully balance these suggestions against (i) wider public law obligations (particularly in relation to public procurement and state aid) and (ii) the parent bodies' objectives in establishing the mutual, such as costs savings or innovation in service delivery.

talk to us...

Alex Kynoch | 0115 976 6511 | alex.kynoch@brownejacobson.com

The LGA stoking the debate on localism?

As many of you will be aware, the Local Government Association (LGA) spent 12 months travelling up and down the country garnering the views of stakeholders as to how local government can face a range of challenges both now and moving into the future. This has resulted in the policy paper 'Rewiring Public Services' issued in late July. This paper sets down the LGA's response to the coalition government's challenge to local authorities both in terms of financial constraint but also the radical re-thinking of local government's role in society.

It is worth considering for a moment Mr Pickles' supporting statement that accompanied the localism bill back in December 2010.

"The localism bill will herald a ground-breaking shift in powers to councils and communities overturning decades of central government control and starting a new era of people power".

Further, Lord Heseltine's report on local growth 'No stone unturned: in pursuit of growth' also sought to move responsibilities for local growth and the funding which will support that away from central government to localities. This idea and theme is at the heart of Rewiring Public Services with the LGA advocating a radical shift in power from Whitehall to local government. Therefore, with both central and local government in favour of such a shift one would imagine, that we should now be seeing the movement, in short order, of powers from central government to local government?

Perhaps unsurprisingly, but certainly disappointingly, this shift has not happened and in an open letter, Sir Merrick Cockell (Chairman of the LGA) has thrown down the gauntlet to local government to debate and consider the 10 big ideas set out in the paper. To this end they have put together a tool kit containing a draft motion and a suite of supporting materials to help local authorities in joining the debate about the future of the sector (www.local.gov.uk/rewiring-debate).

The LGA is clearly pushing for central government to make good on its promises in relation to the movement of power from central government to local government in a way that has already happened in the devolved administrations in Wales, Northern Ireland and Scotland.

Many of the ten big ideas for re-wiring public services can be viewed as proposals to shift power from central government to local government. Ideas such as local determination of tax and spending decisions and reducing central government's power to intervene in local decision making, shows a genuine desire to re ignite the localism agenda which has seemingly faltered in recent months.

However, perhaps more importantly, what the paper proposes is greater stability and less interference. Local government remains largely at the whim of central government decisions which has the effect of increasing voter apathy as confidence in local government is continually eroded. It also has, the paper suggests, a hugely detrimental impact on local government's ability to plan for the longer term. Carefully laid plans are thrown into chaos as successive governments change the rules of the game, destroying plans without consideration of whether they are a success or not or whether the local voters were in favour of them or not. To this end suggestions include multi year funding settlements aligned to parliamentary elections and putting settlements beyond future Whitehall revision by giving some form of constitutional protection to local democracy.

There is no doubt that things are going to have to change if local government is going to meet the huge challenges before them. In order to do this central government is going to have to begin to trust local government more, make good on its promises and stop expecting local government to do this work with one hand tied behind its back. Rewiring Public Services takes the debate to government, it is certainly radical in places and some proposals have little chance of beating the Whitehall machine. However, it represents aspirations which are good and should be listened to, it is now up to councils to join the call to arms and help win those arguments!

talk to us...

Peter Ware | 0115 976 6242 | peter.ware@brownejacobson.com

Private Finance 2 (PF2) – a tool for local authorities?

The recent consultation on the PF2 draft shareholders agreement indicates the problems, and perhaps opportunities, arising from PF2.

The Private Finance Initiative (PFI) was the vehicle used by many local authorities during the last government to fund infrastructure projects. Schemes were primarily funded through project finance and, as the market matured, ever more closely based on the Standard form of Project Contract ('SoPC4') or sector specific model contracts.

Despite many positives, PFI proved controversial and the withdrawal of central government funded 'PFI credits' to incentivise its use was perhaps the final nail in the coffin of further 'old style' PFI projects. Paradoxically, infrastructure investment, including the possibility (or even the necessity) of private sector funding, remains very much at the forefront of Coalition government thinking as key to its stated policy priority of strong and sustainable economic growth.

Indeed, publication of PF2 documentation indicates that, although PFI projects may not return in force there may be life yet in the project finance model. A further question is whether PF2 will remain primarily a tool for central government rather than local authorities. PF2's first significant use – the Priority School Building Programme ('PSPB'), is being procured centrally. Local authorities have, understandably given current financial constraints, approached the model cautiously.

However, PF2 is potentially an important weapon in the armoury of local authorities as they seek to maintain key services and infrastructure.

PF2 – what's the difference?

Like PFI, PF2 is intended to be *"wholly or partly"* funded by limited recourse debt. That is, the lender's ability to recover the loans made will largely depend on the income from the project. However, to those familiar with PFI there are a number of key changes:

- removal of 'soft FM' (such as cleaning and catering) from the project. Councils will be expected to provide these services in-house or procure them separately. The interface between the PF2 contractor and the provider of soft FM services will have to be managed

- significant equity investment (current thinking suggests between 15% and 30%) by government, in an attempt to create a genuine delivery partnership between public and private sectors. This will be

familiar to anyone experienced in Building Schools for the Future or NHS LIFT, but the government is striving under PF2 for a greater alignment of interests and, therefore, a more genuine partnership

- an attempt to bring new forms of equity participation (in particular, institutional investors such as pension funds) into projects

- a number of additional risks being borne by the public sector. For example, unforeseeable changes in law, off-site contamination and utilities consumption risk

- by removing some of these more problematic risks, and enhancing standardisation, the process is intended to be more straightforward and a procurement 'guillotine' of 18 months has been introduced (after which funding for the project could be removed).

Moreover, the government's intention is that major programmes (such as the flagship 'Priority Schools Building Programme' or 'PSPB') are centrally procured. This, and the absence of central government support through PF1 credits (or, at the time of writing in autumn 2013, a significant deal-flow) makes PF2 a very different creature from its PFI predecessor.

Share and share alike - will local authorities use it?

PF2 may be geared at central procurements, but the model is available for local authorities to use (with or without central government support). The key question is whether PF2 will enable local authorities to access otherwise unavailable finance and, in turn, whether the contracting and lending market is willing and able to fund PF2 deals.

The recent consultation on the draft PF2 shareholder's agreement (which closed on 21 August 2013) indicates some of the difficulties:

- current thinking is that the Treasury will only decide whether to take up its equity stake, and at what level that stake will be, at preferred bidder stage. Contractors have expressed concern about the level of uncertainty this may create

- the aspiration to bring third party institutional investors on board has not been developed in great detail, perhaps reflecting that government enthusiasm for this idea is cooling

- the cost of capital, which remains a major concern, may actually be increased by the Treasury's option to take an equity stake. The private sector may be concerned that the public sector is taking all of the 'upside' in a deal, and avoiding the concomitant risks.

Infrastructure UK has also made it clear that where there is funding at the centre, it should be controlled from the centre. But it is not clear that equity participation from government will be compulsory. Where central government is not offering funding, local authorities are free to use PF2 (including participating as equity stakeholders) without a direct link to a centrally procured government programme (such as PSPB).

And despite the understandably tentative approach both of local authorities and the private sector to this model, there remains a need for social infrastructure (albeit on a smaller scale than under PFI) and the PF2 model is available to local authorities seeking a new model to fund it. Following a first use of PF2 by a local authority, it would be unrealistic to imagine that the floodgates will open.

But it might precipitate the first trickle of local authority PF2 deals.

We will shortly be running a number of free sessions discussing these issues for local authorities, so do please contact us to register your interest.

talk to us...

Craig Elder | 0115 976 6089 | craig.elder@brownejacobson.com

Summer's over and the decision makers in Brussels are back after their August holidays. What better time to look at a round up of some recent state aid developments and what changes are coming up.

Latest on football clubs and stadia

I've previously written in the public matters newsletter about state aid, sporting clubs and stadia.

Proposals in the draft General Block Exemption Regulation (see below) are intended to set out clearer rules to enable authorities to fund, build and refurbish sporting stadia without providing illegal state aid. The conditions include these requirements:

- 80% or more of the new/upgraded capacity of sport infrastructure must be used for sporting purposes
- where the main user is a professional sports club, at least 20% of the annual capacity must be used by other professional or non-professional sports users annually
- aid mustn't exceed the funding gap and the aid intensity cap is 75% of eligible costs
- the maximum public funding for new sports infrastructure is €15 million and the total project cost must not be more than €30 million.

Meanwhile, we are still waiting for the Commission to go public on its various investigations into football clubs, tax breaks and land deals. Maybe Ronaldo and Fabregas will end up at United in a fire sale...

Making life easier

The Enabling Regulation was amended in July (by Regulation (EU) 733/2013) to give the Commission the ability to declare various additional categories of aid compatible with the internal market – if they do so, this means that the aid in question will not have to be notified to the Commission. It is all part of the State Aid Modernisation agenda, with the Commission expressing itself to be keen to make simpler and impose lighter touch control on those areas which are 'public good' related. The new categories include:

- research, development and innovation
- various types of broadband infrastructure
- culture and heritage conservation
- conservation of marine and freshwater biological resources
- sports
- infrastructure which supports the list of objectives/categories of aid in the Enabling Regulation.

Leaving aside the role of the Commission (and not member states or the European Parliament) in making the decisions – cue further outbreaks of teeth grinding by critics across Europe – this is a really positive move which should result in more certainty and greater flexibility in structuring projects.

General Block Exemption Regulation (GBER) – extension and new exemptions

The existing GBER was due to expire at the end of this year. However, it has been extended till 30th June next year, not least because the Commission initiated a consultation exercise in July (and which has just closed) with a view to including certain of the new categories in the Enabling Regulation in the new GBER, which is intended to come into force on 1st July 2014. The draft GBER is here: http://ec.europa.eu/competition/consultations/2013_second_gber/index_en.html

Apart from the funding of sporting infrastructure, the inclusion of exemptions for aid to innovation clusters – and the funding of infrastructure for these – will go some way to raising the spirits of those depressed by the Leipzig-Halle Airport ECJ judgment. That said, a proposed aid intensity cap on infrastructure funding of 15% seems miserly.

State aid modernisation – Procedural Regulation

July was a busy month, as the Procedural Regulation was also revised. Various changes were made. These include:

- requiring complainants to demonstrate they are 'interested parties' and then produce specified key information in their complaint
- giving the Commission powers to require information when investigating complaints (so making state aid investigations more like other competition investigations)
- enabling the Commission to initiate sector wide inquiries
- enabling national courts to obtain information or an opinion from the Commission – and the Commission can initiate the provision of these to national courts.

De minimis

And finally in July, the Commission started consulting on its second draft of the new de minimis regulation, to come in at the end of this year. It clarifies and simplifies the existing rules and introduces a safe harbour for loans up to €1 million, which is welcome. The downside is that that current ceiling of €200,000 over three years is not increased.

So, all in all, it's been a busy few months for the Commission and for analysts of state aid, with key changes to be introduced at the end of this year and mid way through next year. The state aid modernisation agenda is by no means complete and we can look forward to further activity from the Commission – along with developments in case law and decisions over the coming months.

talk to us...

Sharon Jones | 0115 976 6284 | sharon.jones@brownejacobson.com

This month, Anja Beriro, an associate in our government and infrastructure team focuses in on the use of combined authorities as a form of governance.

What are they?

Combined authorities (CAs) are corporate bodies that can be established if two or more county and/or district councils within a particular area decide that their economic development, regeneration and strategic transport functions can better be delivered at a sub-regional, rather than local level. The powers to set up a CA are set out in Part 6 of the Local Democracy, Economic Development and Construction Act 2009 (the '2009 Act'). The 2009 Act also allows for Economic Prosperity Boards (EPBs) to be established if the local authorities in the area don't want to transfer strategic transport functions.

What can they do?

CAs are given the functions relating to economic development and regeneration that the local authorities within the CA's area (the 'constituent councils') believe will be better undertaken at a sub-regional level. Often these will be exercisable by both the CA and the constituent councils concurrently. With regard to the transport functions, sometimes these will transfer from the constituent councils and sometimes from the Integrated Transport Authority ('ITA'), if such a body existed for the same area (or part of the area) that the CA will cover. There cannot be an ITA and a CA for the same area.

Interestingly, under the Localism Act 2011, CAs have a version of the general power of competence (GPOC) akin to that of fire authorities. This means that a CA can do anything that will allow it to carry out its functions, even if this is very far removed. It can do things for a commercial purpose, utilising a company or an industrial and provident society. There are the same charging and pre- and post-commencement limitations as with GPOC for local authorities.

Are they a popular form of governance?

The Greater Manchester Combined Authority ('GMCA') was established by statutory order in March 2011 and to date that has been the only CA in England. However, recently there has been movement from a number of groups of local authorities to establish a CA of West Yorkshire, the North East, Liverpool and South Yorkshire. The latter being consulted upon by DCLG until early October 2013.

So, why the sudden interest? Money, mainly. The local growth agenda promoted by central government has continually referred to the strengthening of governance and accountability arrangements across sub-regional (usually LEP) areas. We saw this when City Deals were announced and very recently in the guidance to local

authorities relating to Growth Deals (the funding available from 2015 under the Local Growth Fund) and EU infrastructure funding.

Local authorities are currently the accountable bodies for funding coming into most LEPs. Therefore, the role that they have in distributing this funding is within a wider geographical area than they would have historically covered. Central government is clear that strong democratic accountability will be key in proving that an area should receive further funding. Given the focus of future funding being economic development and regeneration, it would make sense that within the area of a LEP, the local authorities pool these resources to ensure that decisions are taken which can be fully effected across the whole geographic area. However, the local authorities need to be confident that they will not lose control of these functions in a way which increases legal and reputational risk.

What is the purpose of them and what can they achieve?

The aim of a CA is to allow constituent councils to pool their economic development, regeneration and transport functions so that their impact will be improved and enhanced. In fact, the legislation states that the Secretary of State should only consider making an order for a CA where he/she considers that:

"… to do so is likely to improve:

- *the exercise of statutory functions relating to transport in the area*
- *the effectiveness and efficiency of transport in the area*
- *the exercise of statutory functions relating to economic development and regeneration in the area*
- *economic conditions in the area".*

As well as this, the Secretary of State *"must have regard to the need to reflect the identities and interests of local communities; and to secure effective and convenient local government".* In other words, the establishment of a CA must be seen to have a positive impact on the area rather than maintaining the status quo. This is logical. Given the short-term impact that it will have on constituent councils involved, there will need to be long-term gain.

How can they be established?

Establishing a CA is not a quick process and it is not something that can be achieved by local authorities in isolation; the support of the Secretary of State and the approval of both Houses of Parliament are required. Helpfully, the 2009 Act sets out the process quite clearly. The local authorities whose areas would be covered by the proposed CA must carry out a review of the relevant functions to analyse whether the CA would enhance the delivery of economic development, regeneration and transport functions. This review must cover the whole of the areas for the proposed CA. They must then 'publish a 'scheme' which is consulted upon by the Secretary of State with both statutory consultees and others that may have an interest, including neighbouring local authority areas.

There cannot be an EPB and a CA in the same area, therefore, if there is already an EPB established (currently there are none) then a CA could be created instead if the relevant local authorities wished to include transport functions. If there is an ITA for the same area, this can be dissolved at the time when the CA is established and its functions transferred to the CA.

Once consultation on the scheme has been completed, the Secretary of State will then lay a draft order before Parliament and both Houses must approve it. The order will have a schedule setting out the constitution of the CA which will include the number of members of the CA, taken from the constituent local authorities, whether any members can be appointed by other local authorities, the voting rights of members, the ability to establish executive boards or sub-committees and how the activities of the CA will be funded.

How are they governed?

The detail of how a CA is to be governed and managed is left, in the main, to constituent councils as members of the CA rather than being set out in legislation. The GMCA has a lengthy operating agreement that sets out, among other things, the decision-making structure, the tiers of authority and the other joint committees that will be set up to work alongside the CA. As part of these arrangements there are scrutiny arrangements that will allow constituent councils to monitor the work of the GMCA and resultant committees. The proposals for the South Yorkshire CA include similar requirements.

It is vital that constituent councils are able to retain sufficient insight into the workings of their CA. This can partly be achieved through the membership of the CA, which will usually be at leader or elected mayor level, thereby ensuring that the decisions are being made with the aims and objectives of each constituent council at their heart. It will also be necessary to ensure that where economic development and regeneration functions are being carried out concurrently decisions support each other rather than contradict.

Constituent councils will remain the bodies that are accountable to the public; therefore if decisions are made by the CA that do not find favour with the public, it is the politicians in their role as elected members of the constituent councils that will be affected. This is one of the principal reasons why it is important that the decisions of CAs are properly scrutinised.

If members behave inappropriately in, or in relation to, their role with the CA, it will be the standards regime of the relevant constituent council that will need to be applied by that council if action is required. In order to pursue investigations into standards matters, constituent councils may require information about how the CA operates in relation to the function or decision in question and how the members are involved.

What's the verdict?

It is understandable why, in areas that have a strong history of joint local authority decision making, a CA is an attractive prospect for the strengthening of the powers that the joint arrangements may have. It is

obvious that to be in line to receive any serious amount of funding for economic development or regeneration in the future the sub-regional decision-making and accountability structures need to be robust. For those sub-regions where a CA is currently not possible, structures such as joint committees may be the answer, either because local authority boundaries don't allow for anything else, or because a CA is too big a leap.

In the long run, some LEP boundaries may change to allow for more CAs or those areas with younger joint working arrangements will mature to a point where a CA is a genuine possibility. One this is for certain; whether a CA is set up today, tomorrow or in a number of years time, genuine accountability back to constituent councils is key and is a necessity to show real democratic leadership at a sub-regional level.

talk to us...

Anja Beriro | 0115 976 6589 | anja.beriro@brownejacobson.com