

## **Prior Information Notice - Arbitration Referral and Management Services**

UK Shared Business Services Ltd (UK SBS) on behalf of Pubs Code Adjudicator (PCA), wishes to establish a sole supplier Contract for Arbitration Referral and Management Services.

UK SBS is managing this procurement process in accordance with the Public Contracts Regulations 2015 (as may be amended from time to time) (the "Regulations") and the EU Treaty Principals. This is a services agreement.

The contract is intended to be for a duration of 2 years with the option to extend for a further 1 year and then again for a further 1 year (2+1+1).

Ahead of commencing this procurement, we would like to raise awareness of this project by way of a Prior Information Notice (PIN) so we can introduce our plans and ensure that this requirement is well placed when it hits the market in the near future. There are contact details contained within this notice and we welcome supplier feedback at this early stage to ensure all foreseen requirements are appropriately captured. We welcome feedback as to whether a single supplier can provide all mandatory and optional requirements as detailed within the Prior Information Notice document attached to this notice or whether these need to be tendered as separate work streams.

This PIN is being issued in order to undertake a market consultation exercise with regard to the current view of requirements detailed below. If you believe that this will be of interest to you and your organisation, please register your interest by sending an email to [fmprocurement@uksbs.co.uk](mailto:fmprocurement@uksbs.co.uk)

By registering and attending you will be engaging in non-competitive dialogue which will enable the PCA to develop and assess the market's appetite, concerns, and views on formulation of its requirements. The PCA may consider the information and responses received as part of the preliminary market consultation. This will help to inform the specification and further decision making in relation to the planning and conduct of the procurement ensuring all valid options are considered.

Not registering an interest will not prevent any supplier participating in a future procurement. Nor is it intended that any information supplied as part of the preliminary market consultation will place any supplier at an advantage in a potential procurement process.

### **Background to the PCA**

Historically, the UK pubs sector has been dominated by the 'tied model' under which pub tenants are required to purchase their beer and often other products and services from the company that owns their pub premises.

Until the early 1990s, these companies were typically the brewers of the beer sold in the pubs.

By the late 1980s, the UK beer market had come to be dominated by six national brewers who collectively accounted for 75 per cent of UK beer production as well as controlling more than half of all UK pubs.

This concentration of ownership and market control gave rise to competition concerns and following an investigation by the Monopolies and Mergers Commission, the Government enacted the 'Beer Orders' in 1989 to loosen the control of the large brewers and to bring new players into the market. This led to the emergence of the first pub companies (or 'Pub Cos'), and by the early 2000s the tied pub sector had come to be dominated by a few large Pub Cos with estates of several thousands of tied pubs.

Following more than a decade of political debate about the balance of risk and reward between these large Pub Cos and their tied tenants, and after a short-lived experiment in industry self-regulation, the

Government announced in June 2013 its intention to legislate for a statutory Pubs Code underpinned by dispute resolution and enforcement by an independent regulatory body. Legislation, to give Ministers the power to enact a Pubs Code and creating the office of the Pubs Code Adjudicator, was enacted in Part 4 of the Small Business, Enterprise, and Employment Act 2015 (SBEE Act 2015).

The Pubs Code gives effect to the twin Pubs Code principles of fair and lawful dealing by pub companies in relation to their tied tenants and that tied tenants should be no worse off than if they would be free of the tie. It requires greater levels of information to be provided to tied tenants and significantly, also gives tied tenants the right to opt to go free-of-the-tie under a 'Market Rent Only' option. The Pubs Code came into force on 21 July 2016.

Fiona Dickie was appointed Pubs Code Adjudicator on 03 May 2020, having previously served as Deputy Pubs Code Adjudicator from 1 November 2017.

For further information, please visit the Pubs Code Adjudicator's [website](#). The PCA's latest annual report is also available [here](#).

### **Services Required under this contract.**

Dispute resolution under the Pubs Code is by way of a referral for arbitration. This contract is for the management of those referrals, including the process for any appointment of an alternative arbitrator that the PCA may make in relation to each case.

At present the PCA has an in-house process for delivering the PCA's statutory arbitration function - procuring the services of external bodies to recommend suitable arbitrators where required. However, to ensure a more streamlined service that allows the office to refocus its staff resource, the PCA is now looking to procure an end-to-end arbitration management service.

The PCA is looking to appoint a sole supplier that will take on the end-to-end case management and administration of the arbitration service. The sole supplier will be responsible for sourcing a suitable arbitrator for the PCA to consider for appointment in appropriate cases. This is in accordance with the exercise of her statutory powers once a referral has been made.

The below is an indicative list of the types of arbitration situations that may occur under the life of the agreement – this is not exhaustive:

A dispute between the tied pub tenant and the pub-owning business about:

- the compliance of the Market Rent Only Full Response (proposal for the tenant to go 'free of tie')
- the compliance of the Rent Assessment Proposal for the new tied rent
- the Independent Assessor's determination of the market rent
- the Business Development Manager's dealings with the tied pub tenant

Party consent is sought to publish arbitration awards on the PCA's website. Published awards can be found [here](#).

The proposed tender includes an optional element to provide Pubs Code training and knowledge management of arbitrators. The PCA is anticipating a sole supplier could deliver both the mandatory and optional requirements (if the PCA was to also take up the optional element). However, the PCA is open to other arrangements to ensure it sources the most suitable supplier/s for both elements. Feedback is therefore welcomed on whether the interest and capabilities of potential bidders would support a separate tender for the optional element.

### **Mandatory Requirements**

The referral and arbitration management process must achieve the following outcomes.

Note: Where a service level has been stated, this is the minimum the PCA requires. The PCA will look to set key performance indicators under the contract to ensure performance against service levels which will be discussed with the successful bidder.

<b>1. Arbitration referral is received and processed</b>	
1.1.	Referrer (tenant or pub-owning business) is able to make a referral to the provider with submission of required information. This information includes party and representative details, relevant dates, and details of the dispute.
1.2.	Referrer is able to pay £200 referral fee to the provider as required under regulation 3(2) of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016.
1.3.	Provider processes £200 referral fee. Where referral is rejected (in line with 1.4. below), provider refunds referral fee minus an administrative charge, which is currently £25 but subject to change. Provider transfers referral fees to PCA on a monthly basis. Records must be kept on the date the referral fee is received and the date any refund is made with the reason.
1.4.	Provider confirms that the referral relates to an arbitrable Pubs Code dispute, that the parties have provided all required information and that the referral fee has been paid (liaising with the parties as necessary).
<p><b>Note:</b>            In accepting a referral for arbitration, the information on the form is taken at face value. There may be instances where the information clearly suggests the referral cannot proceed. Protocols for handling these situations will be agreed with the provider. The PCA may decide that the referral should be accepted on the basis that the arbitrator can consider their own jurisdiction to hear the case (the principle of Kompetenz-Kompetenz).</p> <p>A referral is likely to be rejected in exceptional circumstances, but may include where:</p> <ul style="list-style-type: none"> <li>• the dispute does not relate to an arbitral provision of the Pubs Code</li> <li>• the dispute is not between a regulated pub-owning business and a tied pub tenant</li> <li>• the referral is obviously made outside of the relevant time limit*</li> </ul> <p>*The PCA is only likely to reject a referral as out of time where the time limit for the referral has been exceeded by a considerable and undisputed period. Where acceptance of the referral relies on arguable and disputed factors, such as the date the time limit runs from, it is likely to be more suitable for an arbitrator to consider the matter.</p>	
1.5.	Provider requests documentation which the PCA requires from the pub-owning business in her regulatory capacity and ensures this is provided.
<p><b>Service level:</b> Provider should assess whether the referral is valid and accepted or rejected (or request more information if needed) within <u>two working days of receipt of both the form and referral fee.</u></p>	
<b>2. Suitable arbitrator is recommended to the PCA for appointment</b>	

2.1. Provider identifies the knowledge and experience that an alternative arbitrator requires to be recommended for appointment as arbitrator in the case (should the PCA decide to appoint one) or exceptionally seeks the view of the PCA as to that knowledge and experience. The PCA would discuss with the provider on undertaking the contract the general knowledge and experience requirements by case type. The provider would need to consider whether these were appropriate in each case. For example, in some cases particular professional expertise may be necessary or desirable. The parties are also given the opportunity to put forward their views on the required knowledge and experience of the arbitrator.

2.2. Provider recommends suitable arbitrator to the PCA along with information about the referral, such as the referral form. This recommendation is provided to assist the PCA in deciding whether to appoint an alternative arbitrator and so a recommendation will be required in all cases, but this does not necessarily mean an alternative arbitrator will be appointed.

**Note:**

The recommended arbitrator must:

- not have a conflict of interest and disclose any potential or perceived conflict
- have the capacity to undertake the case in line with the PCA arbitrator standards and agree to adhere to these with no concerning evidence of previous failures to do so
- have the necessary knowledge and experience to competently arbitrate the case - as a minimum this should usually include:
  - a good understanding of commercial leases and a high-level understanding of the surrounding law and legal process
  - knowledge of the Pubs Code statutory framework
  - successful completion of any relevant training which the PCA requires
  - in some cases, valuation experience in the hospitality industry is likely to be required

The PCA currently seeks a recommendation from either of two independent recommending bodies depending on the knowledge and experience that the arbitrator requires. The provider may replicate this model, but it is not necessary, as the PCA is open to other solutions. Recommended arbitrators must meet the requirements set out above.

**Service level:** A recommended arbitrator should be provided to the PCA within 20 working days of accepting the referral.

Where a recommended arbitrator is not deemed suitable, a further recommendation should be provided within 10 working days of the PCA seeking an alternative recommendation.

**Please note:** 20 working days is the usual time the PCA currently works to, and proposals should not therefore exceed this. The PCA wishes to reduce this timescale where possible and bidders should advise of the shortest timescale in which this could be achieved. The PCA would discuss this with bidders and look to set a key performance indicator which meets the PCA's objective that this timescale is as short as reasonably possible.

2.3. Provider to facilitate the provision of further information (including from the recommended arbitrator) where the PCA requires this to decide whether to accept the referral, make an appointment of an arbitrator or seek an alternative recommendation/s where the recommendation is not deemed suitable.

2.4. Provider confirms appointment to parties and the appointed arbitrator
<b>Service level:</b> Provider confirms arbitrator appointment to parties and arbitrator within <u>two working days</u> of PCA decision to appoint.
<b>3. Case correspondence is appropriately and efficiently managed</b>
3.1. Provider ensures arbitrator provides copies of awards, orders, pleadings and directions to the PCA in a timely manner once issued (and/or to its advisors to include for the purpose of seeking consent to publish an award). Provider also facilitates any other PCA request for information to the parties or arbitrator under Section 52 of the 2015 Act and regulation 61 of the Pubs Code.
3.2. Provider communicates with and updates both parties and arbitrator as appropriate in a timely and customer focussed manner. Where a representative has been appointed, the provider should correspond with the representative only. Where the representative is a company, there may be a maximum of two nominated contacts at that company.
3.3. Where the arbitrator raises any delay by the pub-owning business in paying their costs, provider informs the PCA for consideration in her regulatory capacity.  <b>Note:</b> In accordance with paragraph 3(3) of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (for MRO referrals) and section 51(6) of the 2015 Act (for non-MRO referrals), the pub-owning business is required to pay the arbitrator's reasonable fees and expenses, except where the tenant makes the referral and the arbitrator concludes that the referral or notice was vexatious.  The paying party pays the arbitrator directly. Where the PCA has acted as arbitrator, the PCA will continue to invoice these costs and be paid directly on case closure.
3.4. Provider confirms the arbitrator has completed all the required steps before closing the case (as confirmed on the closure form which the arbitrator completes).  <b>Note:</b> Arbitrations can vary in length depending on the case. There is no statutory time limit in which an arbitration must be completed, but arbitrators are expected to proactively manage the case to ensure there is no unreasonable delay in resolving the dispute and/or in a tenant accessing their Pubs Code rights (in line with PCA arbitrator standards).  Where an arbitrator has not adhered to the PCA's standards, the provider should consider this in making any future recommendation and report this to the PCA as appropriate where the case remains open. Where the provider considers there is reason for the PCA to consider terminating an arbitrator's appointment, protocols will be agreed with the provider for handling these situations.
<b>Service Level:</b> Provider should send documentation received (including awards) to the PCA within <u>two working days of receipt from the arbitrator</u> .

#### Transfer of existing work

The provider will be required to take over management of existing cases, so all open arbitrations will be managed by the provider from the stage at which they have reached at transfer. It is anticipated that

where the arbitrator appointment process is in progress at the time of transfer, the PCA will complete the appointment process and then transfer the case to the provider.

As part of the bidder's response to this tender, detail should be provided as to how this transfer of open cases would be undertaken in alignment with the bidder's approach to managing the arbitration referrals. The existing caseload currently sits at around 60 cases at different stages in the arbitration process.

### **Other Mandatory Requirements:**

The provider will be required to:

- Operate and/or have access to a pool/panel of suitably qualified and competent arbitrators who can arbitrate Pubs Code disputes in line with the legal framework and the PCA's arbitrator standards. Arbitrators will be expected to have an understanding of the Pubs Code framework - the PCA is developing publications and seeking to develop (and/or contract out the development of) Pubs Code training.
- Manage and own a complaints procedure in respect of the provider's service (complaints to be periodically reported to PCA for oversight).
- Operate an exceptional internal quality assurance procedure to ensure the successful delivery of the framework, ensuring quality control of the appointment of, and operation by, appointed arbitrators in line with PCA arbitrator standards.
- Ensure provider staff and appointed arbitrators attend Pubs Code training as required (including where delivered onsite, remotely or through e-learning) and maintain suitable records of attendance/completion.
- Apprise the PCA of provider performance and arbitration caseload e.g. through periodic reporting or access to dashboards. The provider will be required to have a fully auditable IT system that can be used to log, monitor and track all cases. Quarterly reporting will need to be provided to the PCA on live cases.
- Attend periodic contract review meetings with the PCA (frequency and format to be agreed).
- Ensure secure document transfer and that operational procedures comply with Data Protection Act and GDPR (e.g. for data handling and storage), confidentiality and PCA retention requirements. Information should also be handled in accordance with Part 9 of Enterprise Act 2002.
- Have in place suitable contingency plans for the provision of all services to ensure business continuity.
- Provide an innovative solution to case managing arbitration referrals - an exceptional level of customer service is key to the reputation of the PCA and bidders will need to ensure these values are built into the proposed approach.
- Promote diversity and inclusion in its own case management processes, to include ensuring systems are fully accessible in alignment with Government guidance, and promotion of diversity through the pool of arbitrators and stakeholders as a minimum.
- Adopt suitable methods of communication with parties, arbitrators and PCA staff with availability to respond between weekday office hours (9am-5pm) as a minimum. The provider must be able to communicate electronically as the default method but provide reasonable adjustments to communication and referral methods where appropriate and in accordance with the Equality Act 2010.
- Collect and hold the £200 referral fee paid at the time of referral and enable partial refund of this fee where appropriate. The provider must be able to transfer referral fees to the PCA on a monthly basis.

### **Optional Requirements – Training and Knowledge Management of Arbitrators**

- Provide or facilitate Pubs Code training to ensure the successful onboarding of new arbitrators (e.g. onsite, remote and/or e-learning)

- Provide or facilitate ongoing training as required to address arbitrator knowledge gaps and refresh knowledge on Pubs Code related matters (e.g. onsite, remote and/or e-learning).
- Knowledge management and dissemination of relevant information/updates to arbitrators (e.g. through a portal).
- Manage continuing professional development compliance where it forms part of PCA arbitrator standards.

### **Contact Information**

If you have any feedback or questions in relation to the above proposed scope please do provide this feedback directly to UK SBS by emailing [FMprocurement@uksbs.co.uk](mailto:FMprocurement@uksbs.co.uk)

There is no commitment at this stage that the above-mentioned opportunity will proceed in its current format however at this stage and subject to the relevant approvals this is the intention.