



New Year Housekeeping Tips for Commissioners

As 2007 dawns, we are promised more change and developments in the commissioning environment. Now is the ideal time to take stock of some key issues in your contracting arrangements. Our legal expert Mark Johnson provides some practical tips for success over the coming year.

Fairness in procurement procedures

Recent court decisions and policy guidance from the European Commission have placed the spotlight firmly on the transparency of procurement procedures. Last July the EU Commission published a notice which states that procurers should expose Part B services contracts (e.g. health and social care services) and those below the usual value thresholds (£93,738 for services) to a minimum degree of advertising if they are likely to be of "cross-border interest" (i.e. to bidders with a presence in another EU state). Although not technically legally binding, the Guidance may of persuasive effect if a disgruntled provider mounts a legal challenge to the award of a contract which he believes should have been exposed to competition. This does not necessarily require a full OJEU process. In practice this may mean placing an advert in a trade journal or even just on the authority's website. Why not take the opportunity to create a procurement opportunities section on your corporate website to satisfy this requirement?

Recent cases have underlined the need to have a credible scoring systems for evaluating tenders and proposals objectively. Also, where a tender is conducted under OJEU procedures, bidders now benefit from a mandatory standstill period of 10 days between the announcement of a winning bid and the formal signature of a contract. During this period, a losing bidder is entitled to be informed of the reasons why he was unsuccessful and the characteristics and relative advantages of the winning bid. Now would be a good time to review the effectiveness of your procedures for evaluating bids and keeping an audit trail so you can respond effectively to these requests within the time limit.

Consultation and communicating change

The case of Pam Smith v North Eastern Derbyshire PCT last year provided a salutary lesson. Pam Smith was a local councillor who successfully challenged through judicial review the award of a contract for GP services by Eastern Derbyshire PCT to United Healthcare. The Court of Appeal ruled that it was not enough for PCTs to use the Patients Forum (now Local Improvement Networks - LINKs) – a proper consultation is required. The tender process had to be re-run, no doubt at considerable expense and inconvenience.

Before NHS bodies can make decisions affecting or varying the provision of health services they have a legal duty to consult with service users and staff over the changes. Section 11 of Health and Social Care Act 2001 creates a legal duty on Strategic Health Authorities, Primary Care Trusts and NHS Trusts to consult with service users and staff on any proposed changes in:

- the planning of the provision of services
- the development and consideration of proposals for changes in the way those services are provided and
- decisions to be made by that body affecting the operation of those services.

NHS bodies also have a legal duty to consult the Overview and Scrutiny Committees of relevant local authorities under Section 7 of the 2001 Act , where there is consideration being given to a proposal for a substantial development of local health services or a substantial variation of local provision.

For consultation to be effective – it must be meaningful. Consultation should take place while the proposals are still in a formative stage, to provide an opportunity for representations to be made and for them to be taken into account before a final decision is reached. The public body must give sufficient reasons for any proposal to permit intelligent consideration and response, adequate time must be given for consideration and response, and that the product of the consultation must be properly taken into account in finalising the proposals.

The only circumstance in which such consultation is not required is where the decision has to be taken without time for consultation “because of a risk to safety or welfare of patients or staff”. Financial issues such as deficits will not normally be a reason to avoid consultation.

This statutory consultation must also be carefully distinguished from the separate consultation requirements in respect of the workforce, where TUPE transfers are in contemplation or if redundancies are likely.

As contestability and the plurality of providers increases, now is the time to review how you communicate impending changes. For more detailed guidance on this topic visit www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/PrimaryCare.

Intellectual property rights – preserving the family silver

Outsourcing and contracting exercises may entail handing over valuable ideas and processes to external contractors. How do you ensure that these are used only for the intended purposes of delivering the services required? Commissioners should give some thought to what valuable rights and information they may own - these could be manuals, disks, databases, processes, bespoke software or other media. These should be carefully logged and itemized in any contract. The terms of use for these should be explicitly set out and there should normally be a requirement to return these at the end of the contract. You may wish to ensure that any enhancements or refinements are also captured for the benefit of the service.

Keep it confidential

It is also important to remember that the law protects the processing and transmission of people's personal data. When entering into contracts with external providers, Commissioners will need to impose obligations to keep data, such as patient lists and employee records, safe and secure and to process them lawfully in accordance with the Data Protection Act.

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10 January 2007

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