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Primary medical services contracts: advertising and appeal

Guidance for GPs

Primary medical services contracts: advertising and appeal

There is considerable variation in practice regarding the advertisement of primary medical services contracts. This paper discusses requirements for advertising and outlines appeal mechanisms for parties that feel the tendering process has been unfair or obscure.

Consultation requirements

There are requirements under the Health and Social Care Act 2001 for PCOs to consult with patient representatives and (depending on the nature of the service development) overview and scrutiny committees when putting contracts out for tender. PCOs are also expected to consult LMCs, partly to ensure that new services fit well with existing services provided by GPs in the area. LMCs can play a critical role in ensuring a level playing field for potential contractors.

PCO advertisement of contracts

Medical services are subject only to limited controls under the EU Procurement Directive; health and social services procurements with a total value, throughout the life of the contract, over a certain amount (£136,844 in 2006) must involve a technical specification and the publication of an award notice following the award of the contract. Beyond these requirements, rules for advertising and procurement of primary medical services contracts are ambiguous.

Some believe that EU treaty obligations of transparency and fairness in tendering processes indicate that tenders should be advertised at least as widely as there is likely to be an interest in providing the service. Advice to PCOs seems to vary. They have been advised by the NHS Confederation to tailor advertisements to the value of the contract available,¹ but the NHS Purchasing and Supply Agency recommends that contracts should be advertised in at least one local and one national publication to reduce the risk of legal challenges and ensure competition.

The paucity of explicit tendering requirements and the mixed advice to PCOs indicates that advertising processes will vary. This variety may be formalised by individual PCOs standing orders that may set out procedures for procurement. Some PCOs may, for example, be directed to use the Official Journal of the European Union to advertise major contracts, while other PCOs may only advertise contracts locally.

The Department of Health document *Delivering Investment in General Practice: Implementing the new GMS contract* (2003) sets out certain guidelines for primary care trusts (PCTs) filling vacancies in general practice. For 'greenfield' sites (new surgeries that cover essential services as a result of significant increases in population) PCTs are expected to invite bids from existing general medical services (GMS) and personal medical services (PMS) contractors and are not expected to progress to inviting bids from alternative providers unless there is no interest from GMS and PMS contractors, or if those contractors do not satisfy the criteria set out in the specification. For 'brownfield' sites (pre-existing surgeries that were but are no longer delivering essential services, for example in the event of a single-handed GP retiring, or essential services in areas of historic under-provision), PCTs have the option of inviting interest from existing primary medical services contractors, employing a GP using the primary care trust medical services (PCTMS) route, or advertising the vacancy and entering into a GMS, PMS or APMS contract.

The guidance in *Delivering Investment in General Practice* is still current, though choosing not to advertise contracts may open PCOs to accusations that the selection process was not truly open and transparent and also therefore not compliant with EU Treaty obligations.

Appealing the process or outcome

¹ The NHS Confederation (2005) *Alternative providers of medical services: a contracting guide for primary care trusts*. London: NHS Confederation.

In some instances, interested parties may wish to appeal against a tendering process or procurement outcome. This could happen for example where potential contractors were not made aware of the availability of a contract or where the process appears to have been non-transparent or biased towards (a) particular applicant(s).

There is no formal procedure for appealing unsuccessful contract applications, advertising or tendering processes. The Parliamentary and Health Service Ombudsman, which carries out independent investigations into complaints about UK government departments and their agencies, and the NHS in England, has no locus to intervene in commercial or contractual issues such as tendering.

GPs who are unhappy with any aspect of tendering or vacancy advertisement should start by contacting their LMC. PCOs should be honest and open and in most cases approaches to the PCO chair, strategic health authority chair and PCO audit committee will be appropriate. These avenues should usually be exhausted before pursuing other options. [It should be noted that the Freedom of Information Act may be useful in obtaining information about the process, though requests regarding bid or contract values are likely to be refused on the basis that they are commercially sensitive.] Under some circumstances it may be advisable for the LMC to involve bodies working at a higher level or even local MPs. As a last resort, and only after other avenues have been explored, there may also be the option of using judicial review.

Judicial review

Judicial review is a form of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. It is a challenge to the *way in which a decision has been made*. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. Judicial review is appropriate only if there is no alternative remedy which could solve the problem. The first stage of the process is to write to the public body which has taken the decision or action which you think is unlawful. Claims must be brought promptly and within 3 months of the event. This "letter before action" may often encourage the public body to rectify matters and 'settle', thus saving time and money.

Claims are made in two stages; the first stage (permission) allows the court to filter cases by deciding which should be allowed to go to a full hearing. This is decided on the basis of a written claim; the court will consider whether there is an arguable case and whether the case has been brought promptly or if any delay can be justified. This stage of the proceedings may take a few weeks. Many cases are "settled" following the decision of the court to grant permission. If permission is granted, then the second stage (full hearing) can take place. It can take up to a year to proceed to a full hearing. Judicial review can cost anything from a few thousand pounds for cases settled in and around the permission stage to over £20,000 for full hearings.

With regards to procurement for APMS contracts, GPC would like to be kept informed both of any problems that cannot be resolved locally and of examples of successful resolution of issues that could be used as examples of good practice.

Associated Issues

As the government seeks to commission more services and move away from providing, the PCTMS contractual route is likely to be phased out over a period of time. We are aware that this is taking place in a number of areas already. Where a change of service occurs, PCOs are expected to consult with LMCs, the Patient and Public Involvement forum (PPIF), patient representatives, local authority overview and scrutiny committees, community councils and groups, as with any practice vacancy.

If a service is replacing an existing service it may be affected by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) which preserve employees' terms and conditions when a business, or part of one, is transferred to a new employer. Generally speaking, staff employed in an existing undertaking will transfer on existing terms of employment, except for pensions, to a new undertaking carrying on the same business. This means that the new employer

inherits the contractual terms, rights, powers, duties and liabilities owed by the previous employer to the employee. This will include liability for any wages owed or where there is an unresolved claim regarding, for example discrimination, the new employer will be responsible. Individuals have the right to object to being transferred to a new provider. Normally this would result in them being deemed to have resigned but there is a possibility that the previous employer can agree to retain them and supply their services to the new provider. The NHS Confederation's model APMS contract contains clauses relating to TUPE.

Any member who was employed immediately before the transfer or who was dismissed in advance but in connection with the transfer (unless their dismissal was for an economic, technical or organisational (ETO) reason will be protected. Where only part of a business is transferred, then the member must have been assigned to the part which is transferred. However, where the employee has also carried out duties for non-transferred parts, then it is still possible that the employee will still transfer. If the position is unclear then an employment tribunal may look at all the facts (including the actual time spent in the differing parts). It is automatically unfair to dismiss an employee in connection with a transfer, unless the employer can show that the dismissal was due to an (ETO) unrelated to the transfer.

Where an employer believes that a transfer is likely to take place, the employer will be under an obligation to provide information to, and consult with, representatives of the affected employees. Usually this means contacting the recognised trade union representatives, in this case the BMA.

The employer is required to provide sufficient information to the BMA to ensure that consultation can take place in good time prior to the potential transfer. The employer must set out:-

- The fact that a transfer is to take place
- When it is to take place and the reasons for it
- The potential legal, economic and social implications for the affected employees
- What measures it envisages it will take in relation to the affected employees.

The BMA is permitted to reply to this and make representations on behalf of the employees. The employer is required to consider the representations and if it rejects any suggestions made by the BMA it must provide reasons for doing so. A failure to consult may lead to a complaint being lodged at the local Employment Tribunal by the BMA and a successful claim could mean that the tribunal orders the employer to pay compensation to the affected employees (this is capped at 13 weeks pay).

The NHS Pensions Scheme Regulations were amended in April 2005 to allow Scheme membership for certain APMS contractors. APMS contractors that offer NHS primary medical services and that would be eligible to enter into a GMS contract or PMS agreement with a PCO can apply to the NHS Pensions Agency for NHS Pension Scheme Employing Authority status. Where granted, its staff (including GPs) will be able to participate in the NHS Pension Scheme. Staff working for these APMS providers will therefore be able to continue to contribute to, or to join, the NHS pension scheme. APMS providers who are only eligible for APMS contracts are supposed to be required to provide 'similar' pension arrangements, but this is probably not enforceable. There is considerable leeway in the use of this term and these private arrangements may be less favourable than the NHS pension scheme.

BMA members should contact askBMA for further advice on TUPE related issues.