Contract complexities, a real plus?

ASPD member Andrew Lockhart-Mirams discusses four particularly important aspects of the recently launched PDS+ Agreement

On November 16 2009, the Department of Health launched the new model PDS+ Agreement for improving dental access, which has since prompted much debate.

The main concerns are that the agreement seems very prescriptive, one-sided (favouring the PCT) and requires robust management systems to be in place, to the extent that fulfilling the requirements may be difficult both for the big dental corporations and to a greater extent, the small dental practice.

Changing times

The new agreement sees a shift from the standard GDS contracts and PDS agreements that dental contractors are familiar with, to more of a short-term contract based on the APMS (Alternative Provider Medical Services) model contract favoured by the Department for general practitioners.

PCTs will shortly commence procurement and contracting the new agreement and have, in some instances, already begun testing early model documentation.

If dentists are thinking about bidding, we would suggest that they first read carefully the agreement being tendered, the requirements being imposed, the viability of achieving the targets and whether any initial outlay can be recouped within the term of the agreement.

Unfortunately, it is an uncomplex agreement and before time and money is spent going through any tender process, it is advisable to seek the advice of specialist accountants and solicitors.

Termination of PDS

Most dentists are aware of the ‘Crouch’ judgement regarding a PCT’s right to terminate a PDS agreement. The case concerned a clause inserted into Dr Crouch’s PDS agreement, which apparently gave the PCT a freestanding right to terminate his agreement without cause, merely notice. The PCT claimed the clause derived from paragraph 67 (Termination by the Relevant Body; notice) of Schedule 3 to the NHS PDS Agreement Regulations 2005 (the Regulations).

The case was argued before the Administrative Court, which in favour of Dr Crouch. The clauses complained of were ordered to be removed, but the Secretary of State appealed this judgment.

The Court of Appeal held that the right to terminate by notice under PDS is not a ‘standalone’ right. The power argued for by the PCT was described as ‘exorbitant’ in the judgement, although the Court did allow the inclusion of clauses reflecting paragraph 67 of the Regulations. They ruled, however, that these must be interpreted as a procedural provision to be read in conjunction with those instances in the Regulations/Agreement where the PCT does have a specified cause to terminate (untrue information, grounds of suitability, etc.).

Reversion from PDS to GDS

Under Regulation 21 of the National Health Service (Personal Dental Services Agreements) Regulations 2005 (the Regulations), a contractor is entitled to revert from a PDS agreement to a GDS contract. The contract value of a GDS contract awarded pursuant to Regulation 21 is a difficult obstacle as the Regulations are silent on this issue. As such, a contractor cannot rely on an express right to have the same value they retained under the PDS Agreement.

The reversion to GDS is technically considered the award of a new contract and any provisions that are not pre-prescribed by the Regulations must be agreed between the parties. Thus, where a PCT issues a GDS contract pursuant to regulation 21, the contract value must be agreed between the PCT and the contractor. Guidance (dated January 2009) issued by the Primary Care Commissioning in respect of PDS to GDS transfers makes it clear that it envisages the contract value to be agreed between the parties.

In a NHSLA (NHS Litigation Authority) decision from August 20 2009, the contractor disputed the Negotiated Annual Contract Value (NACV) offered to it by the PCT, which was less than the contractor’s Negotiated Annual Agreement Value (NAAV). The NHSLA determined that the risk profile of the PCT and the contractor under the old and new arrangements needed to be examined as to whether it was reasonable for the contractor to offer a NACV which was lower than the NAAV under the existing PDS Agreement.

In this case, it was determined that moving from a short-term to an open-ended contract did change the risk profiles for both parties as the contractor had greater security and the risk to the PCT grew as a result. The NHS-LA determined that “it would not appear to be unreasonable that where the overall risk profile for the contractor has been reduced for the PCT to propose that the contract value to be decreased as part of the negotiations.”

This indicates how the NHS-LA is handling cases where the value is being decreased should the PCT fail to offer an equal or acceptable value.

Hot topic: incorporation

Unfortunately, however, PCTs are increasingly declining to permit practice transfers on incorporation. PCTs may raise the question that if there is to be a “transfer” to a company, the contract should be put out to tender as a result of the European Directives. Additionally, as the “transfer” brings about a new contract, PCTs may seek to impose additional conditions eg KPIs, extended access.

Other conditions

Further PCT conditions may be imposed, for example, including “change of control” provisions, which specify that the contract will come to an end if the owner sells. PCT approval may also be required for changes in the directors and shareholders. “Change of control” provisions should be avoided at all costs otherwise all of the contract value will be lost.

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