Exercising caution

It pays to manage risk so that you avoid ever being served with a breach/remedial notice by the PCT. Tim Lee explains

For a GDS/PDS contractor, it’s serious to be served with a breach/remedial notice by the PCT. They are increasingly using these powers and the risks to contractors need careful management.

The PCT’s powers to serve such notices are set out at clauses 528 to 556 of the standard GDS Contract, (509 – 515 of the standard PDS Agreement – this article will refer to GDS Contract only for simplicity, but the provisions are similar for both GDS Contracts and PDS Agreements).

Once a notice has been served, if the contractor either repeats the breach; otherwise breaches the contract resulting in either a (further) remedial notice or further breach notice, the PCT can serve a termination notice.

There is some protection for contractors. The PCT must not serve a notice to terminate the contract unless satisfied that the “cumulative effect of the breaches” is such that the PCT “considers that to allow the contract to continue” would be prejudicial to the efficiency of the services to be provided under the contract.

A complex situation

The sharp-eyed will notice that these limitations are not clear-cut. But what does “the PCT considers” mean? An alternative less severe than termination is for the PCT to “withhold or deduct” monies payable under the contract “in respect of the obligation which is the subject of the breach”.

The sharp-eyed will also notice that these provisions are unclear. Do they mean that the PCT has the power to “fine” the contractor? Does there have to be a monetary loss or can the PCT withhold/deduct monies even if there is no monetary loss?

My view is that the PCT’s powers to withhold/deduct monies can only be exercised if there is actual financial loss, and only to the extent to reflect that loss, pound for pound. However, the point is unclear.

Remedial notices

The PCT can serve a remedial notice if the contractor has breached the contract and the breach is “capable of remedy”. A remedial notice must contain:

a) Details of the breach
b) The steps the contractor must take to satisfy the PCT in order to remedy the breach

c) The period during which such steps must be taken (no less than 28 days unless necessary for patient safety / avoidance of material financial loss).

If the contractor fails to remedy the breach, the PCT may serve a termination notice. But you must take into consideration the importance of the remedial notice containing the prescribed information. I have in the past been successful in challenging remedial notices, which failed to contain sufficient information.

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What’s the difference?

Some feel that remedial notices are less “serious” than breach notices but this is not necessarily so. If the breach is not “capable of remedy” then the PCT may serve a breach notice.

In practice, less serious breaches may be capable of remedy, so sometimes less serious breaches attract remedial notices and more serious breaches may attract breach notices, but this does not necessarily follow.

Challenging a notice

Contractors often wish to dispute the validity and/or fairness of remedial/breach notices. The contract contains nothing specific to enable a challenge. Compare this to a termination notice where the contract provides for a challenge to the NHSLA.

The options available to a contractor to challenge a remedial/breach notice are:

a) Local Dispute Resolution with the PCT. It may be possible to negotiate a withdrawal of the notice. But bear in mind that the PCT served the notice in the first place and will probably be reluctant to negotiate!

b) An application to the National Health Service Litigation Authority. Even though the contract does not provide a specific provision for challenge, it is likely that a dispute about a remedial/breach notice could be taken to the NHSLA under the general contractual dispute provisions.

a)– b) are available if you have opted for NHS Contract Status. The application might seek an order to have the notice declared invalid and/or restraining the PCT from relying upon the notice and/or other remedies.

Of course, (but caution is strongly counselled) you have the option not to challenge the notice unless and until the PCT take further action. Be careful though – it could be argued that by taking no action, you have accepted the validity of the notice.

Please also remember that even a successful challenge on technical grounds could still leave the PCT the option of serving a second and valid notice.

Time limits

Consider speedy action and do not delay as time may be against you. Time limits may apply, and if you are in any doubt, seek immediate advice.

About the author

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