NHS
Blackburn with Darwen
Clinical Commissioning Group

PRIMARY CARE CO COMMISSIONING COMMITTEE

Alternative Provider Medical Services (APMS) Contract Mandating Premises – Chair's Action			
Date of Meeting	15th March 2016	**Agenda Item**	8.

CCG Corporate Objectives	
To extend the life of our citizens and their quality of life adding life to years as well as years to life.	Y
To ensure there will be no gaps, no duplication – with integrated services and partnership working; including better relationships with voluntary, community and faith sector organisations	Y
To engage and encourage patients and the public to participate in everything we do and the importance of self-care and family wellbeing.	Y
To improve services and tackle inequality, evidence best practice to inform decisions and root out poor practice.	Y
To offer effective service interventions which will provide a better experience for patients with privacy and dignity.	Y
CCG High Impact Changes	
Delivering high quality Primary Care at scale and improving access	Y
Self-Care and Early Intervention	
Enhanced and Integrated Primary Care and Better Care Fund	Y
Access to Re-ablement and Intermediate Care	
Improved hospital discharge and reduced length of stay	
Community based ambulatory care for specific conditions	
Access to high quality Urgent and Emergency Care	
Scheduled Care	
Quality	Y

Programme Leadership:	
Clinical Lead	**Dr Stephen Gunn**
Senior Lead Manager	**Mr Peter Sellars**
Report authorised by	**Dr Malcolm Ridgway**
Decision Recommendations	
That the PCCC reviews the paper and ratifies (Chairs Action) option A.	

Alternative Provider Medical Services (APMS) Contract Mandating Premises – Chair's Action

March 2016

1.1 Following recent advice from both NHS England Legal Team and North East Commissioning Support (NECS), we are unable to mandate premises when re-procuring a contract. This is in light of a recent case and further details are attached for information

1.2 Senior colleagues at NECS have reviewed the legal circumstances and provided additional comments (Appendix 1 & 2) regarding the planned APMS procurement that they feel would mitigate any risk of a potential challenge.

1.3 NHS England Legal has agreed that the points NECs have raised are useful mitigating factors when considering the risk of challenge and when preparing a rationale for the preferred approach and has suggested that these are considered and used as part of and to inform the audit trail for the procurement.

1.4 Lancashire CCGs are being asked to review the options and provide a decision to NHS England by the 29th January. The Chair of the PCCC provided 'Chairs action' supporting option A.

From advice received, two options are available:

A. Proceed as intended – mandate current APMS premises within the procurement

Pros

- Can proceed imminently, with minimal disruption to the current project plan
- Market engagement has been carried out and has resulted in no issues being raised by potential providers in regards to mandated premises
- Patient engagement has been carried out which has detailed that the premises will remain the same
- Current premises are fit for purpose and will be available* (see further comment below)

Cons

- Limiting the market. There is a risk of challenge from potential providers and services could be provided just as easily from other premises
- *Premises may not be vacated by current provider by the commencement date. However this is mitigated by a statement in the tender documentation around the use of temporary accommodation if necessary

B. Do not mandate premises

Pros

- Removes the risk of limiting the market and risk of challenge from potential providers

Cons

- Tender documentation (including evaluation criteria) would need amending to reflect the change and this would have to be agreed through the CCG's internal governance arrangements
- Greater impact on the current timescale and project plan, potentially having to re-extend the current APMS contracts further (which in itself could incur a challenge)
- Patient consultation would have to be carried out and factored into the project plan
- Could result in commissioner having to pay void costs on current premises if alternative premises are sourced creating additional financial pressure and would not demonstrate value for money through procurement activity
- Detrimental effect on reputation and risk of negative publicity if commissioners took the decision to allow the use of alternative premises, when a fit for purpose solution is available
- Patient engagement has been carried out which has detailed that the premises will remain the same. If alternative premises were to be used, this could result in challenges from patients

2. Conclusion

2.1 Given the CCG's previously preferred option to provide primary medical services to the population from the current premises and deliver the contract on the previously agreed time table the CCG needs to proceed as per option A.

3. Recommendation

3.1 That the PCCC reviews the above and ratifies (Chairs Action) for option A.

Peter Sellars
Primary Care Transformation Lead
February 2016

Appendix 1

NHS Legal correspondence

Further to our call yesterday, I have set out below the key issues around specifying the location from which APMS services must be provided from a procurement perspective. They expand in more detail on the issues already raised by my colleague Sally Banham.

European procurement law is less restrictive for health services, but it does require that bidders are treated equally and not discriminated against. For example, I mentioned a recent case in the European court around specifying an area from which hospital services must be provided. In that case, the services were required to be provided in Bilbao, although some of the services were to be provided to patients outside this area. The Court in that case found that the location requirement did not allow equal access to bidders, was discriminatory and, as such, was an artificial barrier to competition.

The APMS contracts here relate to services which have historically been provided out of purpose built properties in remote areas to a specific patient list. To that extent, it is possible to distinguish between the circumstances here and the facts in the Spanish case in which the services were not limited to patients in Bilbao and could have just as easily been located elsewhere.

As set out in the advice below, the question is whether the provision of the services is 'sufficiently linked to the subject matter of the contract'. If it is not, and services could be provided just as easily elsewhere you may find a challenge hard to defend. You mentioned that there was a link with the provision of community services out of the same premises. If integration of services requires co-location this may be another argument to support the approach.

Unfortunately, however, assessing the likelihood of a procurement challenge is not an exact science and we have seen scenarios in which providers issue proceedings on the basis of failure to treat bidders equally without warning and even where they have been appraised of the approach before-hand. Such a challenge has the effect of stopping the procurement pending resolution, and so litigation is both costly and problematic in terms of providing continuity of service.

As I mentioned, whilst there may be a risk of challenge, this may never crystallise as providers may be content to provide the services from the premises mandated. Indeed this may be preferable given that the premises are designed to serve remote communities, are purpose built and are made available through NHS PS. You confirmed that having engaged with providers on the forthcoming procurement, no one has queried the use of the proposed sites or suggested that they would favour their own premises over the purpose built properties on offer as part of the contract opportunity.. I understand that the contract will not be competed on price, only on quality. The key issue will be around whether a bidder could argue that the requirement to provide the services from the premises in question is an unjustifiable obstacle to competition – i.e. it affects their ability to submit a quality bid.

We discussed, that an alternative option would be to offer the premises, rather than mandate them. This would have an impact on the tender, however as you would need to be able to compare the differing offers. There would also be an issue around patient consultation as no change to location has been considered so far.

Unfortunately, the proposed approach of mandating the premises is not entirely risk free, but you may decide that, on balance, that the risks of offering alternative premises outweigh the procurement risks in this case. Your knowledge of the market and the extent to which services could be provided elsewhere will help you assess the risk and whether that risk warrants a change to the approach. In this case, all providers are being given the opportunity to respond (for example, you are not directly limiting the type of providers who can respond), so, again, the risk is arguably less.

It is worth noting that a provider has 30 days from the date they knew or ought to have known they had a claim to issue proceedings, so the clock would start running from the commencement of the procurement, rather than at contract award. Should a bidder complain, that the mandated premises are proving an obstacle to their response, you could reconsider the offer to the market at that point.

I have copied in my colleague Keira Liburd in case there is any policy reason why the premises should not be mandated.

If you would like to discuss further, please just give me a call.

Kind regards

From: Banham Sally (NHS ENGLAND)
Sent: 15 January 2016 09:50
To: Bellamy Emma (NHS ENGLAND)
Cc: roberts donna (NHS ENGLAND)
Subject: RE: Lease Requistion_for_Legal_Advice_Annex_A.docx

Dear Emma,

The reason for the comment comes from some advice we have obtained that relates to the subject. This is set out below and details why there could be concerns about a requirement such as you suggest. I recognise that some of the outlined difficulties may not apply if NHS PS are the landlord and prepared and happy to provide the premises and grant a lease but as a commercial organisation they could decide not to make it available.

If NHS England goes out to procurement for a new GP practice, could it require the practice to be in that building?
There are both practical and procurement problems with this suggested approach.

From a procurement perspective, there are two potential issues. One is that you are only allowed to include requirements which are "sufficiently linked to the subject matter of the contract". This effectively means that if it is not really necessary for the services to be provided only from this particular building, the requirement could be challenged as breaching

procurement rules. On the face of it, it seems unlikely that this is an essential requirement in order to provide effective APMS services. It seems likely that offering another location could equally be viable. By insisting that the provider takes a lease in that building, you are potentially restricting their ability to put forward their best bid. It may be, for example, that a provider already has another suitable alternative within the practice area, which they could use at a lower cost.

This leads to the next issue, which is equal treatment. Failing to treat all bidders equally is a breach of procurement rules. If some bidders would be more adversely impacted than others by the cost of locating in this building (particularly, for example, where they already have some other premises they could use, or are able to secure lower cost premises), this will be a problem and could be challenged. You need to ensure that bidders are free to put forward their best bids and are not restricted or in any way disadvantaged by the tender requirements.

From a practical perspective, there are also a couple of issues. One is whether you would get the best out of the procurement. The premises costs of this building may not be the best available in the area and so this could have a real impact on the cost of bids put forward. It could also mean that some providers who might have bid if they could use their own premises would choose not to do so. You should therefore consider how helpful this requirement would in fact be for the Area Team in going out to procurement.

The other issue is whether the Area Team has any control over those premises and is able to ensure that they are available for the new provider to use. Also, if this is about the new provider taking over the same part of the premises as the current provider uses now, you would need to ensure that the current provider's lease (i) allows for it to be assigned to the new provider (and on what basis, cost etc); (ii) will continue for as long as is needed by the new provider; and (iii) that the current provider agrees to assign it. You could not force the current provider to give up its lease, so if for instance it wished to continue using those premises itself, or wished to choose who to pass the lease on to, you could not stop them from refusing to hand over the premises to the new provider. In addition, bear in mind that you would not want to encourage the current provider to take a longer lease on the basis that it might be used by a new provider - this would go against the advice under heading four about ensuring that you are not giving any indication of support or responsibility for lease costs after the current contract expires.

Ultimately, whilst you could ask bidders to consider using those premises, it would be difficult to force them to do so. It may also be difficult to actually secure that those premises are available for the new provider.

Appendix 2

NECS Advice

Thank you for sharing the legal advice provided by NHS England legal team.

Supplementary to the advice detailed below – I think it's important to highlight some further key considerations:

- Premises costs – my understanding is that although your intention is to mandate the premises from which the service is delivered, all premises costs are be treat as "pass-through", so risk in relation to those costs lies with NHS England and all bidders will be on a level playing field in relation to those costs, thereby minimising any risk in relation to challenge on the basis of an unfair or inequitable process and this information will be shared with bidders, so is also transparent. I completely agree that there are situations where mandating premises could pose a risk of challenge, but as NHS England will be covering the costs in this case, the impact from a market/bidder perspective is minimal.

- In addition, as a result of the premises not being vacant at this point, you are intending to include a statement within the tender documentation to the effect that should the premises solution not become available by xx date (this needs to be sufficiently in advance of the service commencement date to allow safe mobilisation of the service and corresponding communication with patients/public) then NHS England will work with the successful provider to secure alternative premises on a temporary basis and that alternative premises costs will be treat as "passs-through" in the same way as intended for the permanent premises solution" (This offer will be made on the same basis regardless of who is success in being awarded the contract, so demonstrates equitable treatment and is entirely transparent as it is clear that this is the intention from the outset).

- The premises that you propose to mandate are new, purpose built premises and I understand that all pre-procurement engagement activity has referenced services being delivered from the proposed site, so from that respect, although not entirely clear cut, it could be argued that the premises are sufficiently linked to the subject matter of the contract, as any significant changes at this stage may require some form of engagement/consultation (depending on the nature/extent of the change). In mandating these premises you are also going some way to meeting your obligation under the NHS (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 in demonstrating how you will meet the needs of service users (information obtained through engagement).

- Any alternative solution would also introduce void costs in the existing premises for NHS England, therefore creating an additional financial pressure, therefore NHS England would need to consider this in relation to meeting their obligation to demonstrate value for money through procurement activity

- Although not directly a procurement issue, there is further consideration in relation to reputation and any publicity it may attract, if NHS England took the decision to allow the use of alternative premises in this situation, when a modern, purpose built solution is available.

My comments above are not intended to be contradictory to the advice detailed below (nor do I think they are), but perhaps provide some additional context which may not have taken into account when the advice was provided. In my opinion, based on the above, the actions/proposed actions reduce the level of risk of challenge in relation to mandating premises in this procurement.