

# **South West London Collaborative Commissioning (“SWL CC”) on behalf of South West London Clinical Commissioning Groups (“SWL CCGs”)**

## **Draft scope for Legal Due Diligence on Primary Medical Services Delegated Responsibility**

### **Introduction and background**

In May 2014, NHS England invited clinical commissioning groups (CCGs) to submit expressions of interest to assume a greater role in the commissioning of primary medical services. The declared intention was to give CCGs more influence over the wider NHS budget and to facilitate local health commissioning arrangements capable of delivering better, integrated care for local people, both in and out of hospital. Three broad commissioning models were offered at this time, namely:

- Greater involvement in GP commissioning decisions (Level 1);
- Joint commissioning responsibility with NHS England (Level 2);
- Full delegated responsibility (Level 3)

The 6 South West London CCGs (Wandsworth, Merton, Sutton, Croydon, Kingston and Richmond) successfully applied for Level 2 arrangements (joint commissioning with NHSE), and duly established a joint committee with NHS England, for this purpose. Through SWL CC, Capsticks provided them with advice on all aspects of the application process and the subsequent creation of the joint committee with NHSE.

The SWL CCGs are now considering whether to apply for full delegated (Level 3) arrangements to take effect from 1 April 2016. If successful on any such application, the SWL CCGs would assume sole day to day responsibility (albeit on a delegated basis) for the discharge of functions in relation to primary medical services that they currently exercise jointly -with NHSE, and for the associated budget. The CCGs are required to submit an expression of interest by 6 November 2015.

Accordingly, the CCGs have commissioned a high level financial and legal due diligence exercise on the GMS, PMS and APMS contracts (“primary medical contracts” or “PMC”) through which the primary medical services are provided for which they may assume delegated responsibility from NHS England. Baker Tilly have been appointed to deal with the former, and Capsticks have been asked to provide the latter.

### **Legal due diligence: proposed scope and outputs**

The SWL CCGs have already indicated in the tender document for the financial advisors, that the legal due diligence scope of work in this matter should include the following elements:

- A review of current contractual arrangements and commentary on the types of contracts for each CCG area – expressed as number of contracts and population coverage<sup>1</sup>.
- Review of any significant legal risks related to the contracts transferring, based on written advice from NHSE legal advisers.
- Details of any regulatory, quality or service issues related to the PMC contracts transferring<sup>2</sup>.
- Current NHSE arrangements for managing financial and other risks and consideration of future impact on CCGs.
- Any other legal and governance issues identified that might be relevant to the CCGs receiving the primary medical services budgets, including the delegation agreement.

More specifically, as the result of a telephone call on 16 October, and subsequent clarification provided by SWL CC, we now understand the following:

- There are (approximately) 130 PMS contracts, 60 GMS contracts and 15 APMS contracts in the SW London area
- NHS England has a list (**the List**) of those contracts in relation to which it has identified legal or other risks in its current role as joint commissioner of primary medical services in SW London.
- The SWL CCGs would like (i) a steer on the generic issues in relation to GMS, PMS and APMS contracts respectively to which they should give consideration, based on Capsticks' experience of advising on those contract forms and (ii) analysis of the specific legal risks (actual or potential) associated with a sample range of the contracts, which appear on List, as selected by SWL CC (and subject to the upper limit on the number of such contracts for review stipulated in the assumptions section of this proposal document).

## Documents required

We anticipate therefore that we will need the following documentation:

- i. Copies of the specific PMCs mentioned on the List, and chosen by SWL CC for our review (up to the maximum number specified in the assumptions section of this document), together with
  - a. any remedial/breach notices; and
  - b. any related performance data,
 associated with those chosen contracts.
- ii. Written confirmation from NHSE of its current systems for contract and performance review and any reports and recommended mitigation actions in this regard; and
- iii. Any other legal advice from NHSE which is relevant to this project

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<sup>1</sup> It has since been suggested that Baker Tilly will lead on this. We assume the output here is purely a statement of the number of contracts and what type they are, and the population coverage. We will not cover this aspect

<sup>2</sup> This has also, since been suggested that Baker Tilly will lead on this but we expect to have a role in this element of the DD

## Our Detailed proposed outputs

We envisage that the work programme for the legal due diligence review will take the following form:

1. **Stage One: An initial (one hour) meeting with the SWL CC, Capsticks and Baker Tilly** to:
  - a. discuss and agree the parameters of, and interface between, the legal and financial due diligence work streams going forwards, and communication protocols between all parties;
  - b. clarify with Baker Tilly and SWL CC which requests relevant to this review have already been made to NHS England, and the nature of any further requests for additional information that are to be made to them by Capsticks;
  - c. agree with SWL CC a single point of contact who will ensure delivery of the documents mentioned above that we will require in order to complete the legal due diligence in relation to relevant risks, regulatory, clinical and otherwise.
  - d. agree timescales for delivery of documentation mentioned above (see *Documentation required*); milestones for the DD project; and parties' respective responsibilities in relation to the wider due diligence exercise

### **Suggested budget:**

2. **Stage Two: Part 1: a high level desk top review** of the documentation we receive as described above<sup>3</sup> to consider:
  - a. Whether the contracts provided for our review are compliant with the regulatory framework for 2015/16
  - b. Material performance issues raised
  - c. Risks (contractual, regulatory, quality and service) arising, and associated mitigations, in relation to those contracts (subject to the assumptions below)

### **Suggested Budget:**

3. **Stage Two Part 2: a legal/governance review** to include:
  - a. Provision of advice about NHS England's delegation agreement, covering in particular analysis of the powers and duties which it creates, and the allocation of risk between the parties to it
  - b. A review of NHSE's current arrangements for managing the SW London PMCs and, in particular, the associated contract and performance issues, and all relevant risks (including legal and governance risks), and its related arrangements for mitigating those identified risks. This review will be based solely on the written confirmation received from NHS England about these

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<sup>3</sup> Note we need to get all documents which require review by the cut-off date (see assumptions)

issues (see above items ii. and iii. in the *Documents required* section of this proposal).

- c. Analysis of the potential impact of these issues on the SWL CCGs if and when they get Level 3 delegation, with specific reference to the template delegation agreement and the results of the table top review conducted as Part 1 of Stage Two above

**Suggested budget:**

**4. Stage Three: Interim Progress Report**

- a. Telephone conference call Mid-November 2015 with SWL CC to report on progress on the legal due diligence exercise

**Suggested budget:**

5. **Stage Four: Final Due Diligence Report:** Summary of key findings, to be delivered to the SWL CCGs on 15 December 2015, and to include details of the work undertaken as part of the scope detailed in this document, and the corresponding financial due diligence work completed by Baker Tilly, the latter to be inserted by Baker Tilly into an agreed final report template prepared by Capsticks on or before Friday 4 December 2015.

**Suggested budget:**

**Catch up calls as necessary (but limited to three in total) with Baker Tilly (max 1 hr)**

**Suggested budget:**

**Pricing subject to assumptions below:**

Assumptions:

- a) We will not be required to interview, or meet, any contractors or NHS England and our review will be based entirely on documents we receive as set out above
- b) Our review will cover only (i) a generic steer based on our experience of the high-level issues in relation to each category of PMC contract used in SW London of which the SWL CCGs should be aware and (ii) specific risks in relation to the particular contracts on the List which SWL CC identifies for our review, up to the maximum number of such contracts specified in d) and e) below.
- c) The PMC will be based predominantly on one model for the PMS and APMS contracts respectively (namely the Lockharts PMS model and NHSE Model APMS contract)
- d) We will review a maximum of 20 PMC contracts identified from the List by SWL CC.

- e) The pool of contracts for our review referred to in d) above will include no more than 2 APMS contracts.
- f) We will receive the necessary documentation set out above by no later than Tuesday 3 November 2015. We will not be able to review any documentation received after that date and meet the currently prescribed deadlines
- g) There will be one mid period telephone conference call as scoped above with SWL CC to provide an update on the legal due diligence work, and further catch up calls with Baker Tilly, as required, up to a maximum of three, no such call to last more than one hour.
- h) Baker Tilly will notify SWL CC and Capsticks, at latest by Friday 13 November 2015, of any risk that they will miss the 4 December deadline for delivery of the final draft of the financial due diligence. In the event of any such notification, Baker Tilly will immediately organise a three-way telephone conference call with SWL CC and Capsticks to agree a revised timetable, as necessary.
- i) The Baker Tilly financial due diligence report will slot into the agreed report format without the need for material rewriting of the final Due Diligence Report to accommodate it.
- j) The split of individual budgets for the specific stages above are indicative only and we may reallocate costs/time as between the stages as necessary.

## **The Capsticks Team**

The team which we propose to lead on and conduct the legal due diligence in this matter is as follows:

- i. Matthew Smith – Partner, Public Law Team
- ii. Charlotte Harpin – Senior Lawyer, Public Law Team
- iii. Jessica Kohler – Partner, Commercial Department
- iv. Mark Jarvis – Senior Lawyer, Commercial Department

We will also ensure we use more junior lawyers and paralegals under our supervision where appropriate in order to maximise our efficiency in delivering this project.