PAPER 07

Legal and Financial Due Diligence Report on Primary Medical Services & Delegated Responsibility for SWL Clinical Commissioning Groups (15/1/16)

NHS
Croydon Clinical Commissioning Group

NHS
Kingston
Clinical Commissioning Group

NHS
Wandsworth
Clinical Commissioning Group

NHS
South West London Collaborative Commissioning

NHS
Richmond
Clinical Commissioning Group

Capsticks

RSM

South West London Collaborative Commissioning ("SWL CC") on behalf of six South West London Clinical Commissioning Groups (the "CCGs")

Legal and Financial Due Diligence Report on Primary Medical Services & Delegated Responsibility

Executive Summary

1. Introduction

1.1. The CCGs successfully applied for Level 2 arrangements (joint commissioning with NHS England) and duly established a joint committee with NHS England for this purpose. Through South West London Collaborative Commissioning ("**SWL CC**"), Capsticks provided the CCGs with advice on all aspects of the application process and the subsequent creation of the joint committee with NHS England.

1.2. The CCGs, except for Croydon CCG, submitted an expression of interest for full delegated (Level 3) arrangements to take effect from 1 April 2016 (the "**Application for Delegation**") on 6 November 2015. If successful on any such application, the 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 NHS England, and for the associated budget.

1.3. Accordingly, the CCGs have commissioned a high level financial and legal due diligence exercise on the GMS, PMS and APMS Contracts through which the primary medical services are provided for which they may assume delegated responsibility from NHS England. RSM (formerly known as Baker Tilly) have been appointed to deal with the former, and Capsticks have been asked to provide the latter, which together, forms this report ("**Report**"). NHS England has been involved in the design of and have approved the scope of the financial and legal due diligence exercise. NHS England have also seen and commented on this Report and where possible, these comments have been incorporated into this Report and/or the NHS England Statements for Reliance at Annex 4.

1.4. This Report comprises the Legal Due Diligence Executive Summary and Financial Due Diligence Executive Summary for SWL. This Executive Summary is a summary of the key findings which are contained in the Legal Report and should not be read without reference to the scope, and any assumptions specifically set out in the Legal Report in Schedule 1.

1.5. It should be note that in undertaking this work, NHS England and NHS Property Services have not always been able to provide the detailed information and documentation that was requested. This necessitated changes to the scope of this due diligence exercise and has limited some of the conclusions that have been drawn. Also, where information was provided it was often outside the agreed timescales which has resulted in the exercise taking longer than expected. NHS England has confirmed that this was influenced by capacity issues in their primary care team during the timing of this exercise. The CCGs are advised to consider undertaking practice based assessments to help ascertain the full picture on a practice level which will assist in devising an appropriate process to manage the primary medical contracts on full delegation.

1.6. The legal and financial due diligence has captured and formalised the opportunities, issues and risks which the CCGs have begun to better understand through the current Level 2 co-commissioning arrangements. In addition, the report highlights the need to strengthen contract and performance management of primary care contacts, as well as improving communication with practices. The issues identified in the report need to be understood in the context of the NHS England Statements for Reliance at Annex 4.

1.7. Each CCG will need to consider its own position in respect of taking on delegated commissioning, and the timing of that delegation. This report provides key supporting information to assist with these decisions.

2. Legal Report: Executive Summary

2.1. Changed scope

As set out in paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** of Schedule 1 to this Report, the availability and clarity of information received from NHS England has resulted in the scope of the legal due diligence changing substantially throughout the course of the review and this has made it difficult to adapt the process to the information which has been provided. Nevertheless, there have been a number of areas of concern which we have considered and this has led to some action points, which can be considered alongside areas of good practice. The CCGs can use this Legal Report as a basis for discussion with NHS England as to the next steps, terms and implementation of finalisation of the delegation and developing a robust model of contract management if the delegation is confirmed. We have set out our key issues and action points in the table below:

Issues	Actions
Primary Medical Contracts (PMC) **Summary:** The PMC across the CCGs utilise a variety of models and due to the nature of each PMC, there will be differences in how they are managed. The PMC models have varying dates of commencement and consequently, there are variances over the degree to which they reflect the current legislative requirement. Whilst GMS Contracts, being based on a national contract, can be updated using the model variation notices available on NHS England's website, it is not clear whether the other model PMCs have been updated since the date of their signature. The GP Survey does suggest that contractors have received contract variations but it is not clear whether these relate to statutory updates or general contract management variations such as change of premises or contractor status. This has an overall impact in that additional resource and expertise may be required in order to manage the different contracts, particularly if this is an area the CCGs identify to make savings and share resources. In addition this may mean duplicate payments are being made for the same services.	
Issue: The PMC are in different states with regard to legislative updates and also service detail, KPIs and performance management processes.	**Actions:** 1. **CCGs with NHS England**: Due diligence exercise on the PMCs at individual practice level, to ascertain whether up to date. In addition, a review of services for which GPs are claiming payment. An individual practice

Issues	Actions
	review would be advisable for comprehensive/reliable outcomes. 2. **NHS England and the CCGs**: PMS Review using the standard NHS England PMS Agreement as comparator with a view to commencing a programme of bringing PMS agreements into line. See NHS England Statements of Reliance (Annex 4) where it is confirmed that the Joint Committee is considering such a PMS review. 3. **NHS England and the CCGs**: To extent they are not up to date, NHS England and the CCGs to issue variation agreements and ensure they are signed **These actions are likely to be a joint action for the CCG and for NHS England if this is already being pursued as part of the decision of the Joint Committee**.
Performance Management	
Issues: There are a number of differing contract management schedules in place across and within CCG areas depending on the PMC used. Most, if not all, were agreed with Contractors prior to the inception of CCGs. The GP Survey has highlighted an apparent lack of performance reviews. It is also not apparent from the information which we have been provided whether performance data has been being obtained from each Contractor in accordance with their individual PMC performance frameworks.	**Actions:** 1. Develop a consistent framework for performance management, within and across CCG localities in relation to specific PMC types. 2. new performance framework to be developed in conjunction with the LMCs and should aim to focus on being manageable in terms of the CCG's ability and resource pool for monitoring this. As noted above, the proposed PMS review will be an opportunity for **NHS England and the CCGs** to resolve some consistency issues.

Issues	Actions
Given the differences of the services being provided under GMS, PMS and APMS, particularly where the latter relates to GP led health centres with walk-in elements, it is unlikely that a single performance framework would be appropriate across all PMC.	
Legacy Issues	
Issues: NHS England has confirmed that all of the issues on the original Legacy List have now been closed save for one claim (see paragraph 7.1.9) in relation to the Avoiding Unplanned Admissions DES. As the claim relates to an unpaid component of the DES, NHS England has advised that the risk on this matter is within the AUA DES budget. However, as noted above, the GP Survey has highlighted several areas where Contractors believe that disputes and issues are still "live" and the CCGs are advised to explore these with NHS England to identify the potential risk relating to these. Please see paragraph 7 of the Legal Report for more information.	**Action:** 1. CCGs need to be both consistent in their treatment of Contractor issues and to follow NHS England guidance on disputes and contract management. Please see paragraph 7 of the Legal Report for more information. 2. The CCGs should consider directly the responses (out of scope of Capsticks' review) to the Outstanding Information requested in paragraph **Error! Reference source not found.** which were received on 21 December 2015 from NHS England, and forwarded to the CCGs. In addition, CCGs can take due cognisance of NHS England's statement in the reliance letter in regard to the non-materiality of such potential issues.
Breach and CQC	
Issues: The Breach and CQC Table has identified a number of breach and remedial notices which have been issued across the CCGs. Many of these are breach notices (three contract breach notices and a further three 'remedial breach notices') and	**Action:** **1.** remedial action: CCGs to establish whether NHS England has checked if the remedial action has been carried out and if not, to ensure that they have appropriate follow up procedures in place to confirm remedial

Issues	Actions
Capsticks has highlighted the need to establish whether any further monitoring or follow up steps have been taken by NHS England with respect to these practices. Please see paragraph 8 of the Legal Report for more information.	action has been carried out within any specified timeframes. **2.** CCGs to be both consistent in their treatment of contractor issues and to follow NHS England guidance on contract management. See paragraph 8 of the Legal Report for more information.
GP Survey **Summary:** The GP Survey (see paragraph 5 of the Legal Report) was intended to be used to verify and supplement information received from NHS England and to establish how closely the information provided, particularly with regard to the areas of contract management, reflected the position as the Contractors themselves saw it.	
Issues: Whilst NHS England has confirmed that the Legacy List contains only one "live" issue (see paragraph 7.1.9 of the Legal Report), the responses from the GP Survey identified a wide range of concerns which the GPs considered to be active. In some instances, these may not be considered "live" issues if they have not been formally raised but they do represent a concern over reliance on the Legacy List as a true measure of the extent of any contractual claims from Contractors.	**Action:** **1. CCGs to establish** more accurately and directly with Contractors the precise nature and extent of any issues they may have by way of (a) undertaking timely practice annual reviews in accordance with the PMC and (b) by way of the PMS Review previously mentioned and/or some form of granular local due diligence **2. CCGs** to discuss with NHS England and agree the extent to which these are material issues. See NHS England's statements in this regard in the Reliance Letter.
Issue: A strong area of concern from the practices related to contract management and this includes late payments, overpayments, and a lack of responses from NHS England over concerns.	**Action:** 1. **CCG**s to develop robust, standardised as far as possible, and effective performance management framework.

Issues	Actions
Issue: There is a risk that where a performance framework is too robust or action heavy, it can become a burden to commissioners which can lead to failures in the monitoring of contracts which could be as damaging as having no performance framework at all.	
Issue: A number of concerns raised related to DES payments and this is reflected in the issues noted below at paragraph 7 of the Legal Report in relation to legacy claims over DES payments. NHS England have confirmed (see NHS England Statements for Reliance at Annex 4) that the majority of these are now closed matters, the CCGs should make enquiries	**Action**: 1. CCGs to make enquiries into reasons for these claims arising and to establish with NHS England if any lessons can be learned about the collection of data and payment of components of the DES to feed into development of robust, consistent contract management framework
Issues: Whilst the Legal Report scope has not included and does not investigate any premises issues, the GP Survey highlighted a number of potential disputes relating to rent reimbursement. The delegation agreement does indicate that functions relating to the Premises Costs Directions have been delegated to the CCGs As noted in paragraph 9 of the Legal Report, under the delegation agreement, the CCGs will be responsible for managing payment requests under the Premises Costs Directions and the original Legacy List and GP Survey suggests that this is a common area of dispute.	**Action:** **1. CCGs and NHS England** in undertaking the PMC reviews suggested above, should ensure that the Premises Cost Directions have been (or if not, they are so) expressly incorporated into Contractor's PMS or APMS Contracts, that it is appropriately managing any payments made thereunder. **2.** The CCGs should ensure that it understands the operation and application of the Directions. **See further Annex 7 of this Legal Report where we have set out (as requested) briefly some guidance on this matter for the CCGs.**

Issues	Actions
Delegation Agreement	
Issue: There is a concern that the version of the delegation agreement used for delegations from 1 April 2016 will not have been updated to reflect the relevant timeframe for assumption of liability. **Issue:** The information sharing arrangements envisaged for delegated commissioning are essential and there is a concern that CCGs taking on such responsibilities will not have sufficient access to information.	**Action: CCGs:** Request version of delegation agreement to be signed and review (Capsticks can assist with this review). Confirm with NHS England whether any amendments have been / will be made to the delegation agreement. **Action CCGs:** Confirm that the timeframe referred to for the assumption of liability by CCGs taking on delegated functions will be 1 April 2016. **Action CCGs and NHS England:** Ensure that appropriate information sharing arrangements are agreed with NHS England and keep these under active review.
Delivery of Full QIPP Requirement	
Issue: NHS England has stated that the CCGs must give an explicit assurance as to ownership of the full QIPP requirements. The financial reports have identified this as a challenge and so this is a risk in the context of the delegation agreement.	**Action: CCGs and NHS England:** Explore the possibility of local variations in this regard as part of the feedback discussion for which NHS England have asked once the Legal and Financial due diligence reports are finally delivered.
Joint Working – Governance	
Issues: Some form of joint working will remain important. There is a concern that the governance arrangements developed will be unclear / unlawful and create a risk of challenge on this basis.	**Action:** Ensure that clear governance arrangements are developed to enable joint working across those CCGs taking on delegated functions. This will help achieve some of the at-scale actions noted in the RSM reports, as well as enabling more strategic discussions.
Conflicts of Interest Management	
Issues: Delegated commissioning brings with it a greater risk of conflicts	**Action:** Ensure that 'best practice' from CCGs already exercising delegated authority is adopted,

Issues	Actions
of interest arising (or potentially arising) and there will be increased scrutiny on CCGs exercising these functions. There is a higher risk of challenge to such decisions and, potentially, reputational damage arising from the way conflicts are managed.	where appropriate. **Action:** Consider developing template documents to record how conflicts are managed and decisions taken. **Action:** Actively review arrangements and ensure regular training for all relevant personnel.

SOUTH WEST LONDON CCGS – FINANCIAL DUE DILIGENCE – TRANSFER OF PRIMARY CARE CONTRACTS TO THE CCG

3. Financial Report: Executive Summary

This is a high level summary of the work undertaken by RSM on the financial Due Diligence review of primary care contracts currently managed by NHS England and under consideration to transfer to the management of the six CCGs in South West London.

3.1. Financial Due Diligence

This review was requested by the South West London CCGs to help the Governing Body to consider the financial risks associated with the proposed transfer of responsibilities for the management of primary care contracts from NHS England. This element of the work was undertaken by RSM and this resulted in six detailed reports to go to the six CCGs.

3.2. RSM's Overall Finding

This due diligence review has concluded that there is a level of financial risk to the SWL CCGs in taking on Level 3 delegated commissioning responsibility. The level of risk is related to the budget setting process, QIPP requirements and the historic approach to accruing for costs at a GP Practice level. In addition, a GP practice survey undertaken as part of this review highlighted some issues that NHS England were not aware of, primarily in relation to premises related matters.

These risks need to be considered in the context of the opportunities that Level 3 delegated commissioning may provide, such as the scope for improved system-wide financial management is significant and should be weighed up against the likely short-term financial challenge that CCGs will inherit if they decide to proceed with Level 3 delegation.

RSM have made a number of recommendations to help CCGs mitigate these risks which will require the need to invest time and money to help ensure that CCGs can start their new function with a better service model and one which will be noticeably improved. With a 1st April 2016 start date for delegation, this would constitute a dedicated and focused piece of work over the January to March period to get everything in place.

It should also be noted that in delivering this assignment RSM encountered delays in receiving information requested and limitations with the detail available from NHS England which may reflect on how this function within NHSE has been resourced and organised in the last few years. More specifically NHS Property Services did not provide any detailed data despite significant chasing.

3.3. Key Financial Risks

In this review RSM identified the following financial risks:

3.3.1. Budgets

RSM found that the majority of budgets were overspending and many underspending. These budgets had not been shared with GP Practices and so this is an issue with how it has been dealt with by the centre.

The budgets are managed 'bottom line'. This does pose some financial risk for CCGs because if all budgets that are underspending were to spend to the budget level, CCGs could be exposed to an overspending of £7.3m as shown below:

CCG	Over Spend Potential	Under Spend Potential
Croydon	£3.6m	£1.2m
Kingston	£0.8m	£0.2m
Merton	£0.9m	-
Richmond	£0.5m	£0.5m
Sutton	£0.6m	-
Wandsworth	£0.9m	£1.5m
Overall	**£7.3m**	**£3.4m**

Going forward RSM are recommending a much tighter approach to budget setting and that budgets should be discussed with Practices directly and then monitored at a Practice level. This would bring Practices into 'mainstream' financial management and would help signal a cultural change, that they have a part to play in helping ensure that CCG targets are met.

3.3.2. QIPP

RSM report a large shortfall in delivering the 2015/16 target and that it looks likely that this deficit would flow through to initial 2016/17 budgets.

From the month 7 SWL finance report, annual budgets include £2.7m QIPP savings targets across South West London. RSM report that the QIPP shortfall for 2015/16 is in the region of £1.7m for SWL and that this is likely to flow through to create an opening deficit in the 2016/17 budgets.

In addition there is a large requirement for new 2016/17 QIPP plans. CCGs will need to plan to eliminate the carry forward deficit and meet the new QIPP target, all in the first year of taking on this responsibility.

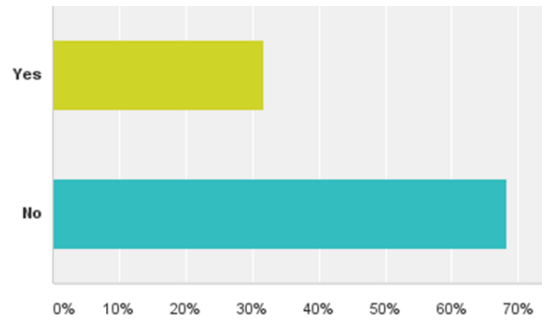
3.3.3. Accruals

Large NHSE accruals were held at SWL level in 2014/15, with £5.3m being unable to broken down to CCG or GP level. This was managed as part of the 'bottom line'. In 2015/16 accruals are now calculated at a more granular level, however this means that there is a lack of data on past trends which poses some financial risk to CCGs as they build budgets for 2016/17.

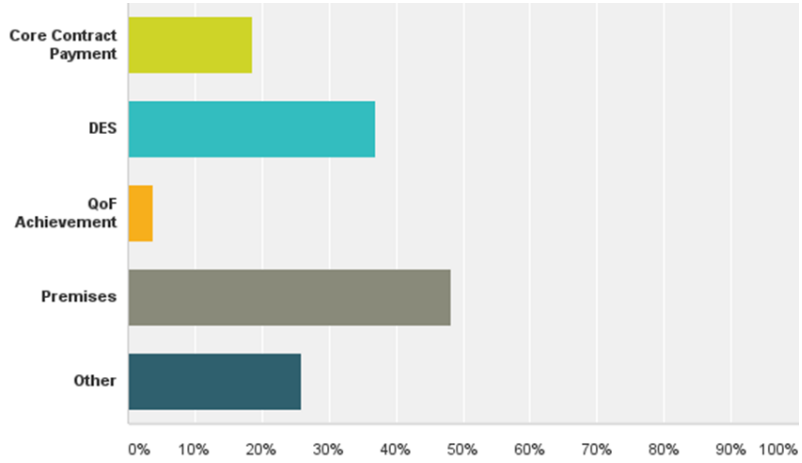
3.4. **Other Risks**

RSM ran an independent survey, asking all Practices to provide feedback on arrange of issues associated with the management of primary care contracts. A response rate of about 50% was achieved.

In this survey Practices were asked whether there are any unresolved financial issues. The results across South West London are summarised below:



For the 30% who stated that they did have unresolved financial issues, the reasons for the dispute were cited as follows:



For the detailed responses readers are referred to the detailed CCG reports.

The evidence from the survey indicated that there were more problems cited by Practices than NHS England or NHS Property Services were aware of. This correlated to the fact that only 8% (7 out of 88 respondents) said that there had been a minuted contract meeting with NHS England in the past year.

RSM also investigated the capacity of people to support this function going forward. They concluded that CCGs would need to invest in this service in the early days to ensure that systems and processes are improved, as the analysis will need to be at a more granular level when managing the GP Practices within a single CCG budget.

3.5. Recommendations

RSM make a number of recommendations for each CCG. Some of the key ones that are common across all CCGs are summarised below.

Financial reporting – the CCGs would need to invest so that a more robust reporting mechanism is in place to go live on 1st April 2016. This should include a training programme so that both CCG staff and Practice Staff agree the approach to monitoring contracts in 2016/17 and are jointly trained in the operating procedure.

Accruals – improved systems for accruing for costs at a GP Practice and CCG level would need to be developed and implemented to take effect from the start of the new financial year.

Financial Management – practices should be aware of the budget at the start of the year and there should be an on-going programme to monitor costs against that budget throughout the year.

QIPP – the gap from 2015/16 would need to be eliminated through the financial strategy. Planning for 2016/17 should start now so that schemes are designed and implemented by the start of the year.

Contract Management – a robust process of contract management with meetings minuted and actions followed up should be put in place. A training programme for GP Practices and CCG staff should be designed and implemented to support this change.

Property – meetings should take place with GP Practices to ensure that all property issues with NHSPS are flagged and an appropriate action plan is put in place to ensure that issues are resolved in a timely manner.

Capacity – additional capacity will be needed during the set up phase. Dependent on how the staff are allocated at a SWL or CCG level, there may be some economies of scale. Thereafter the levels of staff transferring could be adequate, though will require new ways of working e.g. the better use of systems to reduce manual intervention.

Shared Services – CCGs should consider working together so that common standards are applied to the management of these contracts going forward. A shared service approach would allow better staff structures and critical mass so that CCGs can build improvements on the current system, rather than risk going backwards if key skills are diluted.

FOR FURTHER INFORMATION CONTACT

Paul Brown
Partner

RSM
Unit 3 Hollinswood Court
Stafford Park 1
Telford

T 01952 237700
M 07736 961236
paul.brown@rsmuk.com