

BIDDING FOR NHS CONTRACTS – SETTING UP A CONSORTIUM TO TENDER

Justin Cumberlege and Andrew Firman look at the legal aspects of building a successful joint venture for GP Magazine.

You may be able to go it alone if you are bidding for the GMS or PMS contract of a neighbouring practice, but larger projects will probably require greater resources than you and your partners have or can risk.

For example, developing a GP-led health centre is likely to start at £10 million and take an enormous amount of time. Such a venture is better suited to a consortium of practices. It may also make sense to team up with a private provider with expertise and financial stability.



Define the project

Who you need depends on the nature of the project. Elements might include buying and developing a purpose-built building, running it, letting or licensing parts of the building to occupiers to provide different services and managing the contracts of the different service providers. This could be on top of the responsibility for the upkeep and maintenance of the building and any shared accommodation.

These elements could be run by different people, and you may employ a project manager to take you through the development. The underlying value of the project will be the GP practice and patient list because the rent reimbursement which GPs are entitled to on their premises is government backed.

With good advice, GPs can use this to their advantage in ensuring that they have a big say in any bid for a contract.

It is important that you agree with the other members of the consortium the basis on which it will be run beforehand and the first thing to decide is the legal structure you are going to adopt.

Limited Company

The most common structure is a limited company in which all the consortium members (GPs/practices and other members) take shares. A company is flexible, easy to set up and protects the shareholders' and directors' personal assets. Its constitution will be governed by what you include in the Memorandum and Articles of Association.

However, it is common for the detail of the relationship between the shareholders to be laid out in a separate joint venture or shareholders' agreement. This will not be filed at Companies House and therefore the details can be kept confidential.

While a standard company can be formed easily and quickly, time invested in agreeing the terms is well spent to avoid misunderstandings at the outset and legal costs if members fall out.

In your bid submissions you will be asked to provide details of the relationship between the different members, so a well-drafted joint venture or shareholders agreement will demonstrate that you have a properly regulated relationship (see box).

In setting up your joint venture company, bear in mind the tax consequences. For example, the directors will be taxed as employees, and HM Revenue & Customs will not allow a director to reduce their tax by paying themselves in dividends for their shareholding. Dividends may be more tax efficient, but they are not pensionable.

Like all commercial relationships, a well-drafted contract will go a long way to ensure that differences between consortium members are quickly resolved without escalating into a damaging dispute.

Shareholders' Agreement:

You need to consider:

1. How much will each member contribute towards the consortium's set-up costs, making bids and financing projects? Usually this will dictate how profits are divided.
2. What will your share of the joint venture be? And what will your liability be? By using a company, your personal liability will be limited unless you give personal guarantees, act fraudulently or negligently, or continue the business when it is clearly insolvent.
3. Which decisions taken by the consortium members must be unanimous? What happens if there is a deadlock? Consider a mechanism for resolving different views.
4. Does the structure prevent or limit the holding of a GMS/PMS contract? Be aware of the uncertainties that APMS contracts can bring and the impact they could have on your investment return.
5. Whether the goodwill element of the medical services offered by the consortium can be valued and sold at a later date? What protocols are going to be observed to give proper choices to patients to receive those services from outside the consortium?
6. What happens if one or more members want to leave? How will they get paid out?

*This article appeared in GP Magazine in April 2009. You can find all the articles from GP magazine's bidding for NHS contracts series at www.healthcarerepublic.com/bidding
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