



Anthony Collins

solicitors

In pursuit of fairer contracting –
working with public sector
commissioners

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Workshop content

- Setting the legal scene – commissioning landscape
- Local Authority obligations:
 - Care Act and the Statutory Guidance
- Top tips for dealing with commissioners
 - Negotiating position
- Legal Remedies
 - Contractual negotiations
 - Procurement Challenges
 - Judicial reviews
 - Other options

Setting the Legal Scene – Anna Dabek

- Increasing costs

 - Demographics and increase in demand

 - National Living Wage

 - Brexit

 - Regulatory regime

- Unrealistic and unsustainable fee rates

 - Cheapest “past the post”

- The Budget

 - 2% council tax precept

 - Better Care Fund

Care Act 2015 – Statutory Guidance – Emma Watt

■ Promoting Wellbeing

Defined

- Dignity
- Physical, mental health and emotional wellbeing
- Protection from abuse and neglect
- Autonomy
- Participation in work, education, training or recreation
- Social and economic wellbeing
- Domestic, family and personal
- Suitability of living accommodation
- Community

Care Act 2015 – Statutory Guidance

■ Meeting needs

Must take into consideration the individual's preferences

- Person-specific
- Holistic approach
- Diverse range of support

Local Authority Budget

- Must be reasonable
- Cannot set arbitrary limits
- Deliver outcomes for best value

Care Act 2015 – Statutory Guidance

■ Market Shaping Duties

Diversity of providers and quality services

- Section 5
 - Variety & Quality
 - Demand
 - Continuous improvement
 - Skilled workforce

Care Act 2015 – Statutory Guidance

■ Market Shaping Duties

The Homecare Deficit 2016

“Unless authorities complete a [calculation of the costs of homecare] with their local providers, it is difficult to see how they can make objective judgments about whether the fees they pay are likely to sustain a stable care market in their local area.”

Care Act 2015 – Statutory Guidance

■ Market Shaping Duties

Working collaboratively with relevant partners

- Address needs and aspirations **based on evidence**
- Outcomes-based payment

Staff remuneration

- National minimum wage
- Effective training and development
- Retention of staff
- Local economic environment

Care Act 2015 – Statutory Guidance

■ Market Shaping Duties

Understand the local market and providers' risks

- Market tools – UKHCA Minimum Price
- Engage with smaller providers

Market Position Statement

- Current and future demands
- Link to housing and partnerships with NHS bodies

Negotiating position – Anna Dabek

- Understand:

- Historic relationship with the Commissioner

- Local Authority resources

- Overarching consideration

- Consider:

- Leverage

- Dependencies

- Research:

- Competitors

- Actual costs



Contractual challenges – Hilary Harrison



Potential solutions

- Termination clauses (can use this as leverage if provider has a good bargaining position)
- Contractual uplifts providing for automatic uplift in price
- Variation clauses preventing unilateral change to price by the commissioner

Case study

■ Learning disabilities care home provider

- Inbuilt contractual uplifts on annual basis by use of a formula: paid to providers each year for several years until 2009
- In 2009, local authority wrote to providers unilaterally stating no more uplifts would be applied. Providers acquiesced and had little choice
- Provider brought a debt claim seeking back payment of 6 years worth of uplifts (over £100,000) and pushed for current fees to be paid on basis of correctly applicable uplifted price

Case study

- Elderly care home provider, rolling contract with local authority
- Sought higher fees commensurate with actual costs
- When rejected, sent pre-emptive termination letters
- Local authority capitulated and paid higher fees as no cheaper alternative provider
- Negotiating position determines whether this is possible
- Around £100k back payments recovered

Procurement challenges – Anna Dabek

- Brexit implications
- Obligations on commissioners
 - Must be transparent and treat bidders equally
- Award criteria – may take into account:
 - The need to ensure quality, continuity, accessibility, affordability, availability, comprehensiveness of services;
 - The specific needs of different categories of users including disadvantaged and vulnerable groups;
 - The involvement and empowerments of users; a Innovation.

Procurement challenges

- Common grounds for challenge
 - Inadequate information as to how the evaluation criteria has been applied/answers have been scored
 - Evaluation criteria is unclear/has been unfairly applied
 - Inadequate information available at ITT stage
 - Lack of transparency/unequal treatment in many forms

Procurement challenges

■ Initial process

- Read and understand the tender terms and conditions – what you can and cannot do
- Raise clarification requests
- If not getting the answers, consider “gently” suggesting the process may be unfair – remember the time limits
- Consider writing to the Monitoring Officer

Procurement challenges

■ Issue proceedings

- Will halt the award of contract
- Time is “of the essence” – 30 days *“beginning with the date when the bidder first knew or ought to have known that grounds for starting proceedings had arisen”*
- Clock may re-start on provision of further information leading to multiple claims
- High risk and costly strategy:
 - Many challenged have been successful
 - Commissioners agree to re-run the process

Judicial review – Hilary Harrison

Maintaining the relationship while challenging the commissioner?



Breach of public law duties



- Acting outside the scope of their powers (ultra vires)
- Delegating a decision to another body or fettering their decision
- Taking into account irrelevant matters
- Not taking into account relevant considerations

- Not complying with relevant statutory or other guidance
- Making an unreasonable or irrational decision
- Not following the correct procedure, for example not consulting affected stakeholders
- Breaching equality law duties or the human rights of those affected by the decision or policy

Timing: 3 months from decision



Ask for reasons for decision



The process



- Permission
- How quickly will the claim be resolved?
- What to expect in court
- Length of hearing

Remedies available to the Judge

- Injunctive relief: prohibiting an action
- Declaratory relief, including declaring an action unlawful
- Mandatory order: requiring the defendant to do something
- Entirely discretionary, including any backdating

Outcome: what happens to the decision itself?

Either:

Decision is re-made properly: outcome uncertain

Or

Decision is one that no reasonable authority could make: decision is re-made and the outcome has to be different



The court does not impose a decision

- Damages
- Costs
- Settlement out of court

Judicial review of unviable fees?

- Untested as yet
- Macro decision, setting prices across the board, *may* be capable of challenge
- Contractual arrangements with provider are likely to be a private law matter, not reviewable
- Consider potential group action or trade body challenge

Case study

‘the courts will not be enthusiastic about enforcing the sustainability provision in the context of fee-setting decisions’.

- Recent court decisions indicating reluctance to unpick local authority price setting
- ‘macro’ price-setting decision may be capable of challenge, but perhaps not the application of that decision to individual providers pursuant to contracts – distinction may be complex

Conclusion – Judicial review

- Each case should be reviewed on a case-by-case basis
- Obtain advice early
- Choose your battle

Other options – Anna Dabek

- Claims by individuals
- Local Government Ombudsman complaints



Questions



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Anthony Collins
solicitors

Anthony Collins Solicitors LLP
134 Edmund Street
Birmingham B3 2ES
MDX 13055 Birmingham I
Tel: 0121 200 3242
www.anthonycollins.com