2012/13 NHS Standard Contracts

Model Consortium Agreement Legal Guidance

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Executive Summary

This document provides supporting guidance to commissioners who are drafting the consortium agreement for the 2012/13 NHS Standard Multilateral Contract and accompanies a model consortium agreement which commissioners may wish to use

1. Introduction

1.1 These notes provide detail on the Co-ordinating Commissioner arrangements in the context of commissioning acute, ambulance, community and mental health and learning disability services, and they are the Guidance Notes referred to in the relevant Consortium Agreement.

1.2 The Consortium's structure and the rules or procedures governing the operation of the Consortium are entirely a matter for local agreement. It is stressed that the consortium documents are also entirely for local agreement and as explained below, the model consortium documents are offered as a guide, and are not mandated.

1.3 It is essential that the members of each Consortium write a constitution, which explains the structure of the Consortium and sets out the necessary rules and procedures constituting the operating framework of the Consortium. In order to indicate a possible structure for the operation of the Consortium, a model consortium agreement and a model constitution have been produced (referred to as the Model). A Consortium may adopt the Model as it stands (having completed the necessary details), may modify or add to the Model, or may enter into a totally different agreement, according to what best meets the needs of that Consortium. Where a Consortium chooses to adopt different agreements, it is nevertheless suggested that the Model (in association with this Guidance) may serve as a useful checklist to ensure that the new documents cover the full scope of the relationships and responsibilities that exist between the Co-ordinating Commissioner and the Associate Commissioners.

1.4 The aim of these Guidance Notes is to put forward a list of subject headings on the basis that a constitution should, where appropriate, include detailed rules dealing with the operation of the Consortium in the areas covered by those subject headings.

1.5 Once settled, the constitution will be the basis for all members of the Consortium to work together. In the Model, the Constitution is adopted as Schedule 2 to the Model Agreement, and therefore binds the members of the Consortium as part of that agreement.

1.6 Consortium arrangements should provide a strong commissioning focus and will reduce the bureaucracy and transaction costs involved in the contracting process. The Consortium arrangement will reduce the number of contracts that an individual provider of services will have to manage.

1.7 The members of the Consortium must maintain a close working relationship with one another and should perform their Consortium obligations in a timely fashion and with transparency, openness and utmost good faith.

1.8 Although these Guidance Notes suggest certain content for the constitution of the Consortium an overriding principle that applies to all aspects of the constitution is that no provision of the constitution should conflict with or in any way limit a provision of the main contract with the provider in a manner not envisaged by the main contract.

1.9 The Model contains some content which is highlighted for completion locally (of course, this does not preclude other local variation, as described in paragraph 1.3). Details to be completed are highlighted (for example, the names of parties), as are suggested timescales (for example, for the giving of notices, and for reporting requirements). Provisions dealing with a Management Fund (see 13.2 below) and with contracting outside the Consortium (see 9.3 below) are also highlighted, since these may not be appropriate for all Consortia.

2. Appointment of Co-ordinating Commissioner

2.1 The members of the Consortium will be required to decide on a procedure for the selection and appointment of the Co-ordinating Commissioner, and to include provisions dealing with these issues in their constitution (the relevant Strategic Health Authority will have agreed or determined the fundamental structure with their PCTs for acute services). Alternatively (as provided for in the Model), the Co-ordinating Commissioner may be appointed at the same time as the consortium agreement is entered into. Once appointed, the Co-ordinating Commissioner will sign the main contract (with the provider) both for itself and on behalf of the members of the Consortium. In this way (by the Co-ordinating Commissioner acting as the "agent" of the members of the Consortium), the members of the Consortium individually will be bound by the main contract.

3. Completion of Consortium Agreement

3.1 The Consortium Agreement may be signed by a method called "counterpart", which means that the members of the Consortium do not need to sign the same document but can sign their own individual copy of the agreement. In practice, this process would involve each member of the Consortium signing Part 2 of Schedule 1 to the Consortium Agreement and sending the signed document (whether by post, fax or email) to the Co-ordinating Commissioner. The Consortium Agreement will come into force and can be dated by the Co-ordinating Commissioner once the Co-ordinating Commissioner has received all the signed versions of all the relevant Schedules (or "counterparts"). This method avoids the need for the same document to be passed, in turn, to each member of the Consortium.

3.2 When completing the Consortium Agreement, the Co-ordinating Commissioner should deal with the following matters:

- Copies of all signed counterparts should be filed together;

- The version of the Consortium Agreement circulated for signature to the members of the Consortium should include, on the front page, the completed details of (i) the description of the services, (ii) the name of the proposed services provider, and (iii) the title of the proposed main contract;
- Once all counterparts have been signed, a "master" copy of the Consortium Agreement should be prepared by inserting the details of the Co-ordinating Commissioner and each member of the Consortium (or Associate Commissioner) into the Schedule to the Consortium Agreement.

4. Consortium Structure

4.1 Although the Associates themselves will not need to sign the main contract, they nevertheless will be parties to it (see 2.1 above) and be treated accordingly (as having contractual rights and responsibilities, which can be enforced directly by or against them, as the case may be). This includes, for instance, being liable under the indemnity provided by each Associate under clause 50.1 of the main contract.

4.2 The Co-ordinating Commissioner role will simplify the process of commissioning and introduce a degree of consistency of practice. The Co-ordinating Commissioner will be appointed under the Consortium Agreement at the same time as the agreement is signed, meaning that the aspects of the constitution dealing with the appointment of the Co-ordinating Commissioner will need to be finalised before the Consortium Agreement is signed (whether or not any other aspects of the constitution are finalised at that stage). To minimise the risk of disputes arising later on, however, finalising the entire constitution prior to signing the Consortium Agreement would be a sensible approach. This is the approach used in the Model, whereby the constitution is adopted on completion of the consortium agreement.

4.3 However, it is the responsibility of the relevant Strategic Health Authority to determine a local consortium structure and process in respect of each services provider.

Structure of the Consortium Constitution

The following sections detail the matters that should be addressed by the Consortium to ensure proper management of the commissioned services by the Co-ordinating Commissioner on their behalf. The Model suggests an approach for covering these functions and responsibilities, though Associate Commissioners are free to adopt other forms of constitution where this is appropriate to their needs.

5. Committee

5.1 The formation of a Committee to manage and run the Consortium is recommended. In forming such a Committee, the members of the Consortium should consider the following:

<u>Formation</u>

- The process governing the appointment of the Committee members.
- The scope of authority for members of the Committee.
- The appointment by the Co-ordinating Commissioner of a representative and deputy representative to facilitate day-to-day contact with the services provider as envisaged by clause 48 of the main contract.
- Whether each Associate should appoint a representative and, if so, how any such representative is to be selected, how long it will remain in post and how it will be remunerated.
- The scope of functions to be carried out by the Committee.

Meetings and Quorum

- The appointment of a secretary (with responsibility, for instance, for convening meetings and notifying Committee members of the time and location of each meeting).
- The frequency of Committee meetings and the need to distinguish between regular ordinary meetings and ad hoc special meetings (along with any specific requirements for convening a special meeting).
- Whether the location for each Committee meeting will be fixed or, if not, how the location will be determined.
- The quorum required for each meeting of the Committee.
- The nature of any supporting papers to be circulated to Committee members prior to a Committee meeting.
- Whether a Committee member can attend or vote at a Committee meeting either by a deputy with full delegated voting rights or by proxy.
- Whether voting can occur by email on notice to, for instance, the Committee secretary.
- Whether “Executive Officers” will be appointed (whether by the Co-ordinating Commissioner or otherwise) to manage the Committee and how such officers will be remunerated.

Decisions

- If it is agreed that decisions are to be taken by way of simple majority voting (as opposed, for instance, to some other method of reaching consensus), the number of supporting votes required in order for any resolution to be passed or any decision to be made (although a unanimous decision must be required in respect of any decision required by the main contract to be passed unanimously).
- Whether the Committee secretary should be required to keep the minutes or actions arising from Committee meetings and to circulate them to Committee members (whether or not present).
- Whether an Associate is to be granted a right to dispute any decision of the Committee (and whether a disputed decision is to be suspended pending the resolution of the dispute).
- Whether an Associate is to be granted a right to refer to the Committee (for consideration in a special meeting, for instance) any decision made by the Co-ordinating Commissioner (whether

arising out of any meeting between the Co-ordinating Commissioner and the service provider or otherwise).

Consultation and feedback on the operation of a number of existing consortium arrangements has suggested that, in some cases, decision-making has not always taken into account the needs of those Associate Commissioners who carry less 'bargaining power' in financial terms within a particular consortium. In order to address this, the Model Constitution suggests a decision-making process under which the simple majority to approve decisions must contain within it the vote of an Associate Commissioner responsible for less than 10% (for example) of the aggregate expected contract value. A Consortium may adopt other decision-making processes, but it is recommended that some mechanism to ensure that smaller Associate Commissioners are represented and engaged in decision-making should be adopted. The Model Constitution includes this engagement of smaller Associate Commissioners as an underpinning principle of the constitution.

6. Provision of Information

6.1 The constitution should include provisions reflecting any requirement under the main contract for the commissioners to provide information (such as an Indicative Activity Plan and Service Specification) to the Co-ordinating Commissioner. Provisions requiring the supply of additional information (beyond the scope of the main contract) are a matter for local agreement.

6.2 The commissioners should agree the range and scope of the information that the provider is required to make available to the Co-ordinating commissioner to ensure that the needs of all the commissioners are met and that the provider is not overburdened with unnecessary or near duplicate requirements.

7. Reporting

7.1 If agreed locally, the constitution should include provisions requiring the Co-ordinating Commissioner to provide each member of the Committee or member of the Consortium (as the case may be) with quarterly as well as annual financial and activity reports following the end of the relevant quarter or year.

8. Notices

8.1 The constitution should deal with the service of notices (the addresses to be served and the timescales for service). The timescales set out in the main contract (in clause 75) for the service of notices could be adopted.

9. Suspension and Termination

9.1 It is only the Co-ordinating Commissioner who, under the main contract, can exercise any rights relating to suspension or termination. Therefore (if agreed at a local level), the constitution may need to grant

rights to the Associates, enabling them individually to instruct the Co-ordinating Commissioner (as their agent) to suspend or terminate any part or all of the main contract insofar as the services provided to the individual Associate (and set out in the relevant Service Specification) are concerned. Any procedural matters relating, for instance, to the service of a notice by the Associate to the Co-ordinating Commissioner, setting out such an instruction, and any requirement for a special meeting of the Committee should also be addressed.

9.2 The Associates (or any number of them) may negotiate with a replacement service provider after a valid notice of termination in respect of the whole of the services has been served under the main contract.

9.3 The Model includes provisions limiting the circumstances in which Commissioners can commission additional volumes of the contract services from other providers (rather than through the main contract). These provisions are highlighted, and should be considered by each Consortium and modified accordingly if a particular Consortium does not wish to limit commissioning in this way or where it would be inappropriate to limit commissioning in this way.

10. Consequences of Termination

10.1 The constitution should also address the consequences of any termination of the main contract and the Consortium. The following matters should be considered:

- The basis on which any final accounts will be prepared, dealing with any adjustment payments from either party to the other;
- The closure of all Consortium bank accounts (if any were set up);
- The dissolution of the Committee and the unwinding of the Consortium;
- The secure retention of all relevant records by the Co-ordinating Commissioner or other nominated party and the rights of access (if any) to be retained by the other members of the Consortium.

11. Co-ordinating Commissioner

11.1 The constitution should set out any specific responsibilities of the Co-ordinating Commissioner. These may include the following:

- An obligation to keep minutes or actions arising from all meetings and negotiations with the service provider, and to circulate the same to all members of the Consortium within a specified timeframe;
- An obligation to have due regard to information provided and opinions expressed from time to time by the Associates with respect to any aspect of the main contract. This includes, for

example, the following (which list is not exhaustive and is not intended to limit in any way the provisions of the main contract):

- opinions expressed by the Associates on matters to be reviewed by the Co-ordinating Commissioner and the service provider under clause 46.1 of the main contract;
- the requirements of the local health economy as explained by any Associate;
- any requirement for an audit of the service provider's charging of any prices under clause 54 of the main contract; and
- any query raised by an Associate in connection with the service provider's performance under the main contract.

12. Pre-Contract Negotiations

12.1 The constitution may even cover the period leading up to the signing of the main contract. In particular, it may operate to require the Co-ordinating Commissioner, during any pre-contract negotiations with the service provider, to have due regard to any information, proposals or commissioning intentions received by it from the Associates.

12.2 Furthermore, the constitution may require the Co-ordinating Commissioner, once it has concluded any pre-contract negotiations with the services provider, to send comprehensive details of the final recommendations for the main contract to each Associate. At this stage, there may also be an important role for the Committee to play in considering the recommendations.

12.3 It may be appropriate for the Committee (before the main contract is signed) to approve the final form of the main contract and (if such form is approved) to instruct the Co-ordinating Commissioner to sign the same. In this regard, the decision of the Committee would need to be binding on all members of the Consortium.

13. Payments

13.1 If necessary in order to accommodate the terms of the main contract (clause 7, for instance), the constitution will need to require the Associates to make payments to the Co-ordinating Commissioner or the Committee (as the case may be).

13.2 The Model includes optional provision for the establishment of a management fund, which may be a useful vehicle where the costs and expenses of acting as Co-ordinating Commissioner are focused on one Commissioner. Where these duties are shared between all Associate Commissioners over a number of main contracts, consortium members may decide not to establish a management fund.

14. Dispute Resolution

14.1 The main contract prescribes a detailed dispute resolution procedure that takes into account the important role of the Strategic Health Authority and incorporates a multi-layered procedure for resolution.

14.2 The dispute resolution provisions in the main contract are deemed to be incorporated into the Consortium Agreement to achieve parity in respect of dispute resolution between both contracts. The constitution should not include any provisions in respect of dispute resolution which conflict with or in any way limit a relevant dispute resolution provision in the main contract in a manner not envisaged by the main contract.

15. General

15.1 A provision in these Guidance Notes will survive any termination of the Consortium if it is clear that the provision is intended to survive in that way.

15.2 Nothing in these Guidance Notes is meant to prevent the members of the consortium from reaching agreement on local matters in accordance with the main contract.

15.3 The Authority (as defined in the Consortium Agreement) reserves the right to amend these Guidance Notes from time to time.

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