Top Tips on fee negotiations and challenges

Introduction

As Councils continue to impose freezes or impose cuts to fee rates, we have pulled together a list of legal and practical tips. Different factors will be relevant to different stages of the life of the contract (from tender to exit) but we hope members will find some of the following helpful in this latest round of fee negotiations and setting.

- ***Timing:*** at whatever stage you are looking to challenge a decision about fees you need to act quickly. Procurement challenges must be bought within 30 days and judicial review within 3 months of a decision and even contractual claims may require prompt action.
- ***Contractual rights*** – we recommend your starting point is to look at the contract you have in place with the commissioner; check in particular the following terms:
    - *Term* – if the term of the contract has expired you can argue that there should be a review of the pricing because this was only set for the original term.
    - *Termination* – some contracts give the provider limited rights to terminate (if at all) and the consequences of exiting without the right to do so must be understood – you may be liable for the costs of the Council making alternative arrangements for the service for example. Be careful also if notice must be given on a certain date.
    - *Pricing models* – if the contract includes a price review mechanism this should be proactively used in putting proposals to the commissioner.
    - *Variation* – these may be dealt with by a simple clause or a whole change control procedure. These may be useful in giving a provider the right to indicate the impact on price of a proposed change and in any event will generally require your consent.
    - *Dispute resolution* – where maters are likely to escalate it is worth looking at any dispute resolution procedure, even if only to ensure a discussion at executive level takes place.
    - *Quality and other performance standards* – these can sometimes be used to justify price increases. In short a challenge could be based on higher costs being incurred in order to meet the contractual obligations around quality etc.
- ***Actual costs*** – there were a string of cases in the residential care sector (the "*Sefton*" cases) in which the Courts found that commissioners must take account of the "*actual*" costs of providers when setting annual rates (in accordance with statutory guidance).

Whilst the authority can consider other factors it cannot ignore evidence around a provider's costs. A comprehensive analysis of your costs can be compelling evidence and having such figures available is vital in any negotiation.

- ***No contract*** – if there is no contract in place (either it was never executed or has expired) and there is a dispute with the Council over what rates should be applied, there may be grounds for arguing that costs should be set on a *quantum meruit* basis. This is a right to a reasonable payment for services rendered.
- ***Waiver*** – Councils in recent years have frequently sought to impose a unilateral freeze or cut on hourly rates. Even if other providers accept these, it is extremely important to formally reserve the organisation's rights and state any continued provision does not amount to a waiver of your contractual rights to a higher payment.
- ***Tenders*** – it may be possible to challenge the rates set out in a tender where the authority is in breach of its procurement law obligations.
- ***Regulatory requirements*** - the pressures which are coming to bear on providers in the wake of the new regulatory regime are considerable. There is an increasing conflict between meeting regulatory requirements and the payments being made to provide a service so that safeguarding concerns may be a way of challenging fee settings.
- ***Care Act obligations*** – Under Part 1 of the Care Act local authorities will be subject to many new duties, and there are a number of obligations which may be useful as further levers in this area, for example duties around market shaping and sustainability, the duty to ensure there is a range of quality services and a choice of providers and the duty to cooperate with providers.
- ***Consultation*** – commissioners will often have a duty to consult you on changes to fee rates/services. A recent Supreme Court decision puts the spotlight on Council's duty to provide all relevant material to those it consults, so make sure you are being given information on all the options available to it

If you have any queries in relation to the above please do not hesitate to contact Emma Young on 0121 212 7402 or at emma.young@anthonycollins.com

December 2014