

# Influencing outcomes in social care

Funding, Commissioning Behaviour and  
Provider Leverage

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*There is real expertise at Hempsons at every level, from newly qualified to senior partners.*

# Commissioning Landscape

- Local authority and ICB budgets under considerable pressure.
- Large-scale redundancies across ICBs leading to a loss of sector-specific experience and relationships.
- Ever greater focus on keeping costs as low as possible.
- Delays in eligibility assessments & reviews of packages of care.
- Reviews focusing on 'doing more with less'.

# Legal Framework

- Money – always central!
- Contract terms.
- Procurement law – Procurement Act 2023, Provider Selection Regime and existing Public Contracts Regulations 2015 frameworks.
- Rational decision-making.
- Care Act 2014 obligations to have regard to market stability and financial viability of the social care sector.

## Pressure Points

- Budgets & Social Care Funding “Black Hole”.
- Historic contracts & contract terms.
- Increases in National Living Wage, Employers’ National Insurance, inflation and cost of delivering care.
- Cross-subsidisation of publicly funded care by private residents.

## New Contracts

- Understand the terms before you sign up!
- Stress-test contracts before you sign. Work through and ask 'what if'.
- Delivering services without a contract in place – high risk.
- Undue influence & economic coercion are very difficult arguments indeed for commercial providers.

# Procurement Processes

- If the contract provided with the procurement is not appealing, it probably won't get better if you win.
- Very common for commissioners to procure frameworks rather than individual contracts. Make sure you've seen the individual placement agreements as well.
- Pricing thresholds and caps – bidding outside the financial envelope very risky and often unsuccessful.
- Ask the difficult questions during the process, rather than waiting until you win (or lose). Strict limitation periods apply.

# Existing Contracts

- Understand the terms – key terms include:
  - Variation
  - Specification & scope
  - Term
  - Termination
  - Price Reviews
- Is the price actually being calculated properly?
- FNC/CHC assessments – has anything changed?
- Does the contract reflect the care being provided?
- Watch out for reviews that may affect the number of hours or the model of care.

## Price Reviews – if your contract has one

- Matter of contractual interpretation.
- Commissioner will only be required to do what the contract provides for – if you have a price review clause, but it only allows for a very small uplift, likely to leave you with no room for challenge to that outcome.
- Some contracts have objective measures (RPI, a percentage uplift, etc). Some are subjective or discretionary.

## Discretionary Price Review

- Will always depend on the exact wording.
- Will often be subject to an express obligation of reasonableness, or an implied duty to act rationally (*Braganza* duty).
- Make sure you trigger a review, and do so within any time limit set by your contract.
- Opportunity for you to demonstrate to a commissioner why the price should increase – BUT:

# Discretionary Price Review

- Won't only take into consideration your costs.
- Commissioners will often consider:
  - Their own budgetary pressures
  - The overall viability of the service or the provider
  - The average costs across their area
  - Planned future cost of care reviews
- The mere fact that a service now costs more to deliver does not mean that a decision not to increase the price is necessarily irrational.
- No obligation to ensure that all services are profitable/not loss-making.
- A price review is an opportunity, not a guarantee.

## What can you do?

- Have detailed costings available.
- Consider providing information covering an entire service/the provider as a whole.
- Have your parameters worked out in advance – helps with any negotiation.
- Engage with requests for information – if the commissioner thinks it needs information to make a decision, then not providing may delay a review or be unhelpful.

## How can you challenge a decision?

- Get it in writing and seek provision of a full set of the underlying decision-making documents.
- If the decision is across all care providers, consider FOIA requests (less useful if only relates to your contract).
- Look for obvious errors or (more often) failures to consider relevant information.
- Link any challenge back to the information you provided and the basis for an uplift.

## What if your contract doesn't have a price review?

- Ask, supported by evidence.
- Consider working with other providers to seek a wider review.
- Push for a decision – either to review prices, or not to review prices. Either can potentially give you additional rights or grounds for a challenge.
- Consider FOIA requests and other steps to obtain information regarding the local market and the commissioner's position.

# Legal Challenges

- Different routes depending on which stage you're at:
  - Procurement – either challenge through the Courts (PCR 2015, PA 2023) or representation to IPCPP (and then judicial review). Often very strict time limits from when you knew of potential breach. Have to act! Get legal advice early.
  - Contract dispute – contractual dispute resolution processes, or challenge through the Courts.
  - Public law challenge – judicial review. Strict time limits from the point of any decision (whether you know about it or not). Have to act! Get legal advice early.

## Contractual Dispute Resolution Processes

- More and more contracts have them.
- Usually mandatory.
- Sometimes helpful! Can force commissioner to sit down with you, explain its position, or even allow you to refer issues for an external determination.
- Often a first step required before legal proceedings, and generally cheaper.
- Use as an opportunity to push negotiations.

# Strategies

- Work out what your leverage is and establish your negotiating position, and the reasons for that position, before you start.
- Be willing to walk away (and know what the terms are around termination before you start!)
- Consider working with other providers to adopt a coordinated position on the cost of delivering care (while avoiding collusion).
- Work out whether you would escalate if necessary – budget for it, and plan a strategy with your representatives.
- Be consistent and be open.
- Don't over-promise or exaggerate – even in informal discussions.
- Hardship funds exist – but likely narrow eligibility.

# Cost of Care & Market Reviews

- Engage, and be helpful.
- If the commissioner is asking the wrong question – say so at the outset.
- Give more rather than less. The more information the commissioner has, the harder it is to overlook.
- Safety in numbers – talk to your local care association and other providers.
- Use your expertise to identify areas that may be overlooked – e.g. learning disability needs – and where Care Act responsibilities to individuals may not be met by proposed models of care.
- Ultimately judicial review to challenge – but not straightforward.

Questions?



## Feedback

We would be grateful if you could fill out our [feedback form](#) and let us know which topics you would like us to cover in future sessions.



# Contact

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