

CABINET MEMBER FOR ADULT SERVICES – 5 JULY 2011

PROPOSAL TO INCLUDE THE SERVICES PURCHASED BY OXFORDSHIRE COUNTY COUNCIL FROM RIDGEWAY PARTNERSHIP (OXFORDSHIRE LEARNING DISABILITY TRUST) IN THE NHS MERGER & ACQUISITIONS PROCESS

Legal Appraisal

It is proposed that following the selection of an NHS provider to acquire the Ridgeway Partnership existing contracts between the Council and the Ridgeway Partnership would transfer from the Ridgeway Partnership to the new acquiring entity. In legal terms such a transfer is called a novation and requires the agreement of all three parties.

Novation of a contract under general law principles is not a new contract. However public procurement law takes a wider view of what constitutes a contract and there are a number of situations where a novation will amount to a new contract. If deemed to be a new contract then the usual procurement rules would apply including advertising and holding an open competition.

The legal concern is that the Council may be in breach of procurement rules if it novates its existing contracts from Ridgeway to a new entity directly without conducting a competitive procurement process. There are however justifying arguments in these circumstances which reduce the risk:

1. The merger and acquisition will be a competitive one and the Council will be involved in setting evaluation criteria. As long as the bidding entities are made aware of the contracts that will be novated and the terms and conditions (including duration) will not be changed it can be argued that the Council has satisfied EU treaty principles of fairness and transparency. The process needs to be open to bidders in the same way it would be for service contract procurement and the Council will need to ensure that the selection process is fair and transparent (including setting evaluation criteria that will be notified in advance to bidders).
2. It could be argued that a change in ownership of the Ridgeway Trust does not amount to a change in the provider. For example if a provider company's majority share ownership was transferred from one parent company to another there would be no change in the legal identity of the provider. Case law suggests that novation from parent company to a subsidiary does not amount to a new contract. Counsel's advice has also indicated that neither would a change of corporate control of the provider company.

This situation in this scenario is more complex as the entities involved are NHS bodies rather than companies with shares and there is no case law specifically dealing with these circumstances. If it can be successfully argued that the body providing the services is essentially

unchanged during the acquisition (albeit with a change of ownership akin to a change of share ownership for a company) then the Council has a strong argument that the contracting entity has not changed.

3. The services are classed as “Part B” services under the Public Contracts Regulations 2006 (“the Regulations”). As such they are not subject to the full rigours of the Regulations. So although the Council is required to demonstrate that it has acted in accordance with the EU Treaty-based principles of fairness, transparency, non-discrimination and proportionality (“the EU Principles”) the Council is not required to follow the full procedural requirements for competitive procurement as set out in the Regulations. It can therefore be argued that the competitive merger and acquisition process as described in paragraph 1 above satisfies the Council’s requirement to follow the EU Principles.

The justifying arguments set out above significantly reduce the risk of challenge that the Council would be breaching procurement law by agreeing to novate its contracts to the new acquiring entity. In view of this and subject to the Council having sufficient involvement in the competitive merger and acquisition process to ensure that the process is compliant with the EU Principles Legal Services approves the proposals set out in this report to Cabinet.