Buying and Selling a Dental Practice – the legal process

Part 8: Due Diligence – NHS contracts

It is important for both the buyer and seller of an NHS or mixed practice that the contracts with the Primary Care Trust (or Local Health Board in Wales) are saleable, transferable, do not risk being terminated as a result of the expiry of a fixed term or due to breaches of contract and that there are no latent or potential liabilities that would prevent a buyer wanting to buy and a seller being able to sell for full value.

Therefore, in preparing for a sale it is important that a seller ensures that the contracts that are held can be transferred and it is important that the buyer carries out thorough and comprehensive due diligence, both in relation to the nature and terms of the contract and the way it has been performed by the seller since its commencement.

What contracts - GDS, PDS, PDS Plus...?

Most practices are valued and the sale price set as a result of the value of goodwill, which is often calculated by reference to the annual turnover (income) of the practice. In an NHS and mixed practice a substantial amount of that turnover will be attributable to one or more NHS contracts.

Consequently it is important for the buyer to ensure that he identifies what the contracts are and that the turnover is assured for the future.

Whether or not the contract is transferable and can be obtained by the buyer often depends on the nature of the contract.

An open-ended GDS contract contains the mandatory terms required by the GDS Regulations 2005 in relation to a sole practitioner’s entitlement to opt to practice in partnership with another. That mechanism is often used to “transfer” the GDS contract, eventually into the sole name of a buyer, following a period during which the seller and the buyer practice in partnership together and at the end of which the seller retires from the partnership.

Without that mechanism, the consent of the PCT is needed to transfer or novate the contract to the buyer. Due to the application of European procurement rules to which every public body is subject, the PCT will often refuse such consent. It is worth noting that the GDS partnership mechanism is not available for a PDS agreement holder or the holder of a PDS Plus agreement.

Similarly, agreements with dentists with special interests (DwSI), for example, orthodontic contracts and contracts for the delivery of minor oral surgery, are often PDS agreements and therefore the consent of the PCT is needed.

For a holder of a PDS agreement it is important that the GDS partnership mechanism is available in order to “sell” the goodwill in the practice and therefore a PDS agreement holder has to go through a PDS to GDS conversion pursuant to their entitlement under Regulation 21 of the PDS Regulations 2005. However, for holders of PDS Plus agreements, such a conversion process is not financially viable.
Turnover assured?

It is important for a buyer to obtain a copy of the contract (although this may often be a very thick document!) and it is dangerous to presume that the contract may be based on the standard Department of Health template for GDS contracts or PDS agreements. That is because many PCTs since 2006 have attempted to make many of their own amendments and time-limited GDS contracts, “sessional” GDS contracts and GDS contracts containing the performance of emergency sessions or sessions for urgent treatment that can be brought to an end unilaterally by the PCT do exist.

Also, PCTs have been known to top up contracts with additional UDAs without making such increases permanent and it is quite possible that in such circumstances PCTs can reduce the UDAs being performed by a seller back down to the original number. If additional UDAs have been awarded to top up contracts, it is important that a buyer obtains evidence that the formal written variation process has been gone through.

Does the seller have title?

It is important that both the seller in preparing to sell and the buyer when conducting his due diligence ensures that the seller has full title to the contracts. This can often be an issue for example where associate/performers were given their own PDS agreements or GDS contracts in 2006 in error. In such circumstances, it is important for the buyer to check that such performers have been working under a BDA standard PDS/GDS contract associate agreement whereby they have agreed that the patients and any goodwill resulting from their performance of the contract belongs to the practice owner (not withstanding the fact that the contract is not in the name of the practice owner).

This is also a common scenario in relation to agreements for specialist dentistry, for example MOS agreements, where often the MOS agreement is in the name of the specialist performer, who is obliged and restricted to perform services from the premises of the practice owner.

Risks and liabilities

It is worth remembering that when going through the partnership route of “transfer” for a GDS contract the buyer becomes bound to the PCT under a pre-existing GDS contract that may have been performed since 2006 and not a brand new contract. Therefore, the buyer becomes liable to the PCT for any historical liabilities that have arisen or may arise from the first day the contract came into force.

Consequently, whilst it is important that the buyer obtains indemnities from the seller both in the sale and purchase agreement and the partnership agreements, the seller must investigate whether any such liabilities or risks exist.

For example, the buyer should investigate the seller’s record of performance and underperformance in every year since the contract started, ensure that all patient charge revenue has been paid by the seller to the PCT, that no breach or remedial notices have been served by the PCT on the seller, that the seller has been delivering the full spectrum of mandatory services and that there are no unusual anomalies that the PCT may investigate, that the seller has complied with NICE recall guidance and that the practice premises are appropriate, satisfactory and likely (if not definitely) to comply with HTM01/05.

It may also be worth the buyer checking that nothing unusual has been occurring in relation to the mixing of NHS and private services and that if the PCT has withheld monthly payments for any reason that the full details are known and that such withholding has now ceased.

In the event that the seller is behind the cumulative target for the performance of UDAs in the current year, the buyer should ensure that the purchase price is reduced proportionately, as of course the buyer will have to catch up whilst the seller has already received payment for such UDAs.

Documents

Consequently, it is important for a seller to be prepared by compiling the following appropriate documents which the buyer will no doubt request:

- copies of all contracts;
- recent NHS pay and activity statements;
- correspondence with the PCT and any variations;
- annual reconciliation reports;
- PCT practice inspection reports (including in relation to HTM01/05);
- all documents in relation to any PCT investigations or patient complaints.

In summary

A buyer must not be shy when demanding information and investigating a target NHS or mixed practice. Failing to do so comprehensively can lead to the acquisition of a practice that loses its contracts or which turns out to have a guaranteed NHS turnover of far less than expected. Similarly a seller must prepare for the sale and ensure that the contracts are saleable if the seller is to achieve full market value for the practice.

For more information speak to Alexander Hall on: 0845 55 55 321