

## Contents:

1. **Unsuccessful Tenders**
2. **Employing Illegal Workers**
3. **Private Firms and Their Role in Commissioning**
4. **Express LIFT**
5. **Freedom for "Freed-Up Resources"**
6. **Trade Mark Rules 2008**
7. **Lease Assignment**
8. **National Wills Register**
9. **Cause for Concern System**

---

## 1. Unsuccessful Tenders

We are increasingly being approached for advice by practices who have been unsuccessful bidders in a PCT tendering process. It is certainly possible to challenge a PCT decision to award a contract (whether it is an APMS contract, a contract for out of hours services or a contract to provide specialist medical services), but only on limited grounds. It is essential to act quickly if there is to be any hope of setting the decision aside.

The Primary Care tendering process is governed by the Public Contracts Regulations 2006 ("the Regulations"). This sets out procedures which must be followed by a PCT putting a contract out to tender. Once the PCT has chosen the bidder to whom it will award the contract, it must send out a "contract award notice" to unsuccessful bidders which sets out the decision, including the name of the successful bidder, the criteria for the award of the contract and, where practicable, the score obtained by the successful bidder and the unsuccessful bidder to whom the notice is addressed.

Once this notice has been despatched, there is a ten-day "standstill period" during which unsuccessful bidders can ask for information about why they were unsuccessful and the relative advantages of the successful tender. If the unsuccessful bidder submits its request early enough (by midnight at the end of the second working day after the notice is despatched), then the PCT must extend the standstill period if necessary in order to ensure that the unsuccessful bidder has at least three working days to consider the information provided.

If the unsuccessful bidder believes that the PCT has breached the Regulations, an action can be brought in the High Court. The Court may ultimately order the setting aside of the decision to award the contract, award damages, or do both. However, the Court will only set aside the decision if the contract has not already been awarded. This is why it is so crucial to act quickly upon the receipt of a contract award notice. Applicants will need to apply for an interim order in the High Court before the PCT enters the contract with the successful bidder to suspend the process while the matter is tried. Otherwise the only remedy (if any) will be damages, and it may prove difficult to obtain damages which compensate adequately for not being awarded a potentially lucrative contract.

It is important to understand that the grounds for challenging the PCT's decision must be on the basis that it has failed to follow the necessary procedures. Courts are reluctant to concern themselves with the *substance* of a decision made by a public authority and will only do so in extreme situations where there is "manifest error" (Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007]). The fact that a decision is flawed or unpopular with patients, for example, will not usually, in itself, be sufficient to overturn the decision.

An unsuccessful bidder will therefore need to demonstrate to the Court when applying for an interim order that the PCT has breached its obligations under the Regulations and that, if the breach had not occurred, it stood

a good chance of being awarded the contract. The Court will need to be convinced that if the matter goes to trial and it is established that the PCT did indeed breach the procurement procedures that correction of the breach could result in the unsuccessful bidder being awarded the contract. If the Court is of the view that the unsuccessful bidder was unlikely to succeed in being awarded the contract even if the breach had not occurred, or that the unsuccessful bidder's claim is "frivolous or vexatious" it will not suspend the process even if there was a procedural breach.

It is important to seek advice immediately that you receive a contract award notice advising you that you have been unsuccessful so that you can ask the right questions of the PCT in a timely fashion and take further action as required within the standstill period.

For further information please contact Michael Rourke on [mbr@lockharts.co.uk](mailto:mbr@lockharts.co.uk).

---

## 2. Employing Illegal Workers

Sections 15-25 of the Immigration, Asylum and Nationality Act 2006 had effect from 29<sup>th</sup> February 2008. This means that employers must verify that all prospective employees that are employed after 29<sup>th</sup> February 2008 have the right to work in the UK.

If an employer 'negligently' employs someone who is illegally in the UK the employer could face a fine of up to £10,000 per illegal worker. If the employer 'knowingly' employs someone who does not have the right to work in the UK the employer could face unlimited fines or a prison sentence of up to two years, or both.

There are many documents that can be used to verify a person's status. These include a passport that shows that the holder is a British citizen or a national of the European Economic Area or Switzerland, a national identity card and a permanent residence card issued by the Home Office or the Border and Immigration Agency.

It is also important to note that offers of employment for any staff member must be made subject to the satisfactory completion of these checks, in the same way that an

appointment would be made subject to satisfactory references.

---

## 3. Private Firms and Their Role in Commissioning

As part of the Department of Health's desire to achieve World Class Commissioning, it has been progressing with its Framework for procuring External Support for Commissioners (FESC) to enable it to achieve that goal. Under this framework, private healthcare firms, such as Assura and BUPA, will be involved in helping the PCT commission services. A list of private firms will under the FESC help the PCTs nationally. The PCT procurements will lead to an External Support Services Agreement (ESSA).

The functions covered by the FESC will include assessment and planning, contracting and procurement, performance management, settlement and review and patient and public engagement. The commissioning function itself will remain a responsibility for the PCT board and the firms involved will be paid by the PCT board.

Most doctors are very concerned about this, especially as they have not been consulted and feel that they should be leading the commissioning agenda. Of particular concern is the possibility for conflicts of interest where commissioning support teams are also involved in bidding for primary care services as well. However, in the FESC Policy Statement it is stated that the relevant Strategic Health Authority will exclude any Bidder at the ESSA procurement stage, where there is a conflict. This is also consistent with the vertical interpretation provisions that are, increasingly, being written into APMS contracts.

It is feared that the functions of the PCT will eventually end up being delegated to these private firms who will end up taking a greater control of the commissioning function. General practitioner's will be understandably concerned that the firms will influence PCTs in deciding which GP surgeries should be closed down and which should be moved into new premises which are similar to polyclinics.

A Department of Health spokesman said FESC suppliers had been appointed on the basis of their 'technical and commercial ability to deliver a range of services.' However, for example, South West Essex PCT spokesman said that bringing in a private company would prevent PCT executives from being burdened with too much work on service redesign. Statements like this seem rather to reinforce the fears of GPs.

For further information please contact Mark Jarvis at [mj@lockharts.co.uk](mailto:mj@lockharts.co.uk).

---

#### 4. Express LIFT

Are you considering moving premises, then there could possibly be some good news. The Department of Health launched Express LIFT on 1<sup>st</sup> August 2008 and it should come into effect from January 2009. This should cut costs for bidders and time, especially in relation to local procurements which should now only take four to six weeks (they previously took two years). This is a nationwide scheme and should make LIFT available to all PCTs.

Trusts and local authorities will now be able to pick a private sector partner from a list of six to ten approved partners for local LIFT schemes. These selected partners must have demonstrated that they have been successful in the past in providing the LIFT Company services. This will include providing strategic advice, good design and an ability to provide funding.

Mark Britnell, Director General, Commissioning and System Management at the Department of Health said, 'Allowing the LIFT scheme to rapidly expand will enable more PCTs and local authorities to take advantage of its benefits – faster builds, improved working conditions for staff, better care environments for patients, and better overall facilities available for the local community.'

Our Property Team is always ready to provide help and advice, please contact Varsha Pattni at [vap@lockharts.co.uk](mailto:vap@lockharts.co.uk).

---

#### 5. Freedom for "Freed-Up Resources"

Where consortia have achieved freed up resources ('FURs') through effective service redesign under PBC, a common concern is what restrictions and flexibilities apply to their use.

In the first instance, consortia should take note of the available Departmental guidance, in particular; *Practice Based Commissioning: Achieving Universal Coverage* (Jan 06) and *Practice Based Commissioning: Practical Implementation* (Nov 07).

Paragraph 44 of *Universal Coverage* states that:

**"Resources freed up must be used to fund services for the benefit of patients locally. Resources freed up may be spent on equipment, training, clinical and non-clinical staff. They may also be spent on premises development with specific PCT board approval."**

Practices/consortia were required to agree a PBC Plan with the PCT which set out the use of FURs, although the *Practical Implementation* provided that:

**"...practices will be entitled to use at least 70 percent of resources released for reinvestment in patient care, irrespective of whether these were included in practice business plans or not."**

Given that the PCT is accountable for the use of public money, it is understandable that they would want to ensure FURs are used for the benefit of patients but the guidance does envisage a degree of autonomy:

**"Where practices make recommendations for small contract changes, or relatively small purchases, these should be agreed with a minimum of bureaucracy by the PCT."** (para 49 – *Achieving Universal Coverage*)

Finally, whilst consortia will be keen that PCTs do not deviate too far from the spirit of the guidance, many are working under locally agreed criteria for the use of FURs and should

have regard to local restrictions on their use to ensure effective planning.

Concerns over the use of FURs, further highlights the importance of negotiating a considered contractual arrangement with the PCT at the earliest opportunity.

If practices or consortia are concerned about contractual arrangements in PBC or PCT policies in relation to PBC guidance then we would suggest they seek specialist legal advice.

---

## 6. Trade Mark Rules 2008

The Trade Mark Rules 2008 (the Rules) came into effect on 1<sup>st</sup> October 2008. This is secondary legislation that governs the UK Trade Mark system. The Rules consolidate all the amendments that were made to the 2000 Rules and in addition make procedural changes.

A summary of the most significant changes follows:

- Third parties now have two months in which to file an opposition to the registration of a mark. This period can upon application be extended for an additional month;
- The 'cooling off period' in opposition proceedings which allows the parties to negotiate will now be a nine month period, which can be extended to eighteen months at the joint request of both the applicant and opponent;
- The deadline for filing a counterstatement will now be two months;
- In non-use revocation proceedings the proprietor of the mark must file a counterstatement within two months (as above). If the statement is not accompanied by proof that the mark is already in use, the evidence must be filed within a further period of two months. This two month period is the only opportunity the proprietor has to file the evidence;
- Automatic refusal of an application where the applicant fails to file a counterstatement is opposition proceedings will cease to apply. Late defences will now be accepted if they are justified; and
- The Registrar will be given express power to set a timetable for filing of evidence by the parties and to manage proceedings. He is also given power to decide which issues require evidence to be adduced, the sort of evidence that is to be adduced and the form in which it is to be adduced.

For further advice on the changes to the Rules please contact Michael Barrett at [mb@lockharts.co.uk](mailto:mb@lockharts.co.uk).

---

## 7. Lease Assignment

An important consideration in any lease negotiations are the alienation provisions and in particular those relating to assignment, which under a standard commercial lease will always require the consent of the Landlord, that with such consent may not be unreasonably withheld.

In such a lease there will be numerous conditions to be fulfilled by the Tenant in order to obtain such consent. Furthermore, such consent is formally documented and can incur substantial professional costs for the Tenant (eg, solicitors, surveyor, etc) as the Tenant pays all of the costs including those of the Landlord. There are also the further 'soft' costs of the time of the person tasked with dealing with the professionals.

Tenants should be aware that any consent required from the Landlord under a lease involves paying the Landlord's costs.

Due to the strength of the usual Doctor's Tenant covenant and the rent reimbursement arrangements under GMS/PMS we are able to argue that where a Tenant receives such rent reimbursement, Landlord's consent to a proposed assignment should not be required, provided that the proposed assignment is not less than 2 partners or the PCT or other NHS body. This is necessary to allay the Landlord's fear of assignment to a sole

practitioner whose covenant is less substantial.

The assignee tenant will need to enter into a direct covenant (in a reasonable form) with the Landlord and notice given to the Landlord of the assignment.

These revised assignment provisions will significantly reduce the administrative burden and cost when leaseholding partners die, retire or there are other changes to the partnership and there has to be an assignment of the lease of the surgery premises.

If you need advice on drawing up a lease, or any problems you might be experiencing with your current one, then please contact us, asking for Varsha Pattni in the first instance or email [vap@lockharts.co.uk](mailto:vap@lockharts.co.uk).

---

## 8. National Wills Register

Lockharts are pleased to announce they are founder members of the UK's National Online Will Register '[Certainty.co.uk](http://Certainty.co.uk)' endorsed by both the Law Society and STEP. The Register is fully electronic and provides a simple three step process to record the details so that your Will is not lost, misplaced or forgotten over the passage of time. Readers are invited to enquire of Lockharts both as to writing a new Will (see our private client page) or register an existing Will at any time. All wills written prior to 1<sup>st</sup> February 2008 are eligible to be registered on the national register at nil charge.

For an enquiry to be made by the general public (as to an existing will) [Certainty.co.uk](http://Certainty.co.uk) charge an entry fee of £20.00.

### Why Register?

In a recent survey 67% of people in the UK did not know where to find their parents' Wills.

### What Does The Register Do?

- The Register records that we are holding your Will – the Register entry records only the name and date of the Will, but specifically excludes any content.

- Following your death the Register would give us details about anyone who asks about your Will.
- We answer the query if it is legitimate, but if not we ignore it, thus protecting your privacy.

Sadly, none of us are immortal and we cannot take our possessions with us. Regularly reviewing your Will and having it registered is one of the most important things you can do for your family and close friends.

The situation as to the transferability of Inheritance Tax (Nil Rate Band), following the Finance Act 2008, has simplified matters as to whether the Nil Rate Band should be left unused until the second death where spouses/civil partners are concerned.

If you do not have an existing Will, or alternatively are concerned that your Will is not up to date, please do not hesitate to contact our Wills and Financial Planning specialist, Andrew Murdoch by e-mailing him on [am@lockharts.co.uk](mailto:am@lockharts.co.uk) or telephoning him on 020 7383 7111.

---

## 9. "Cause for Concern" System

Following the Government's February 2007 White Paper (Trust, Assurance and Safety – The Regulation of Health Professionals in the 21<sup>st</sup> Century), which proposed wide-ranging reforms of healthcare regulation, the General Medical Council ("GMC") will be changing the way doctors within the UK are regulated. This will include a new system called 'revalidation' and the main purpose of this new approach to medical regulation is to give patients assurance that doctors are up to date and fit to practise. The revalidation process will rest within a legislative framework, namely the Medical Act 1983 and the Health and Social Care Act 2008.

The revalidation system involves two strands – relicensing and recertification. All doctors will have to demonstrate to the GMC that they are practising in accordance with the generic standards of practice set by the GMC and all doctors will be required by law to hold a licence to practise if they want to exercise

the privileges currently reserved for registered medical practitioners. Doctors will have to renew their licences every five years. Legislation will provide for the withdrawal by the GMC of a licence to practise where the doctor does not meet the GMC's requirements.

The second strand of revalidation is known as recertification. This will apply only to those doctors who are on the GMC's GP register or other specialist registers and these doctors will have to demonstrate that they continue to meet the standards that apply to their medical speciality.

The timetable for implementation will begin in Autumn 2009 when the GMC will introduce the licence to practise and the GMC will start to pilot the work around revalidation in 2009.

Lockharts will be watching the implementation timetable closely and further notes will appear in subsequent newsletters

---

## Previous Issues

If you would like to receive previous issues of the Lockharts Newsletter please contact Bhavika Shah at [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk).

---

## Distribution of our Newsletters

We prepare newsletters for practitioners at approximately monthly intervals and occasional newsletters for LMCs. LMCs are welcome to distribute these to their constituents in their entirety.

If LMCs or other persons or bodies wish to circulate only part of our newsletters, we are happy for them to do so provided that the following acknowledgement and disclaimer are printed immediately below the relevant extract:

*This article originally appeared in the Lockharts Solicitors' Newsletter dated [insert date] and is reproduced with their permission. The content of this article is only intended as information and should not be considered to be legal advice. Lockharts cannot be held liable for any loss caused by any act or*

*omission as a result of information in this article.*

If you have any questions about this, please contact Andrew Lockhart-Miramams at [alm@lockharts.co.uk](mailto:alm@lockharts.co.uk).

---

## Cessation

If at any stage you decide that you no longer wish to receive the Lockharts Newsletter, please inform Bhavika Shah by post or email at [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk).

---

## Disclaimer

The content of this newsletter is only intended as information and should not be considered to be legal advice. Lockharts cannot be held liable for any loss caused by any act or omission as a result of the information in this newsletter.

---

**Lockharts Solicitors**  
**Tavistock House South**  
**Tavistock Square**  
**London**  
**WC1H 9LS**

Tel: +44 (0)20 7383 7111

Fax: +44(0)20 7383 7117

Email: [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk)

Web: [www.lockharts.co.uk](http://www.lockharts.co.uk)



'... Lockharts leap frogs the lower tiers to the top, following market recommendation... Having acted for over 1,500 GP practices, the firm was pivotal in the formation of and structure of GP contracts, and regularly advises medical committees in London and across the country ... a team that "definitely knows its onions."

*Chambers UK, A Client's Guide to the Legal Profession 2008*



"Under Andrew Lockhart-Miramams, Lockharts is an 'established leader in medical law' that acts for over 1,500 GP practices on a variety of corporate and commercial issues, including private APMS contracts with PCTs"

[www.lockharts.co.uk](http://www.lockharts.co.uk)