

Pathology Tender Project

Trust Board Update July 2007

1. Introduction

This paper seeks to update the Trust Board on the progress of the Pathology Tender Project and outline the current thinking on the following commercial issues:

- Corporate Structure for the project
- Employment model for staff working within the project
- Heads of terms for the collaboration agreement between the three Trusts

The final output of these three issues will influence the way in which the project will operate over the life of the contract and in the short term will allow the Project Board to negotiate the contract with bidders.

The Trust Board is asked to note the content of this paper.

2. Project Progress

The aim of the project is to secure high quality, sustainable and value for money pathology services, which it is believed, cannot be achieved by the individual Trusts operating alone. The aim is to achieve this by the three Trusts working together with a specialist pathology services provider and through service reconfiguration.

Since advertising the project last summer, the Project Board has shortlisted five bidders from the 14 that responded to the Pre-Qualification Questionnaire. Of the remaining five bidders, there are four private companies and one Foundation NHS Trust.

On 29th June the bidders submitted proposals in response to the Descriptive Document, a high level document that outlines the overall requirements of the Trusts. The Project Board is now in the process of evaluating these bids, holding preliminary discussions with bidders and providing more detailed information, in order to progress to the selection of up to three bidders to move to the next phase of negotiations.

3. Commercial Issues

The Commercial Group, led by Sarah Crowther, Deputy Chief Executive, East & North Hertfordshire NHS Trust, identified three key commercial issues that required agreement between the three Trusts, before any discussions with the bidders could commence. These are:

- Corporate Structure for the project
- Employment model for staff working within the project
- Heads of terms for the collaboration agreement between the three Trusts

In order to facilitate this agreement, two commercial workshops have taken place, during May and June, attended by senior managers/directors from each Trust (across clinical, finance, HR and procurement), together with legal and financial advisers. The outcomes of these workshops are outlined below:

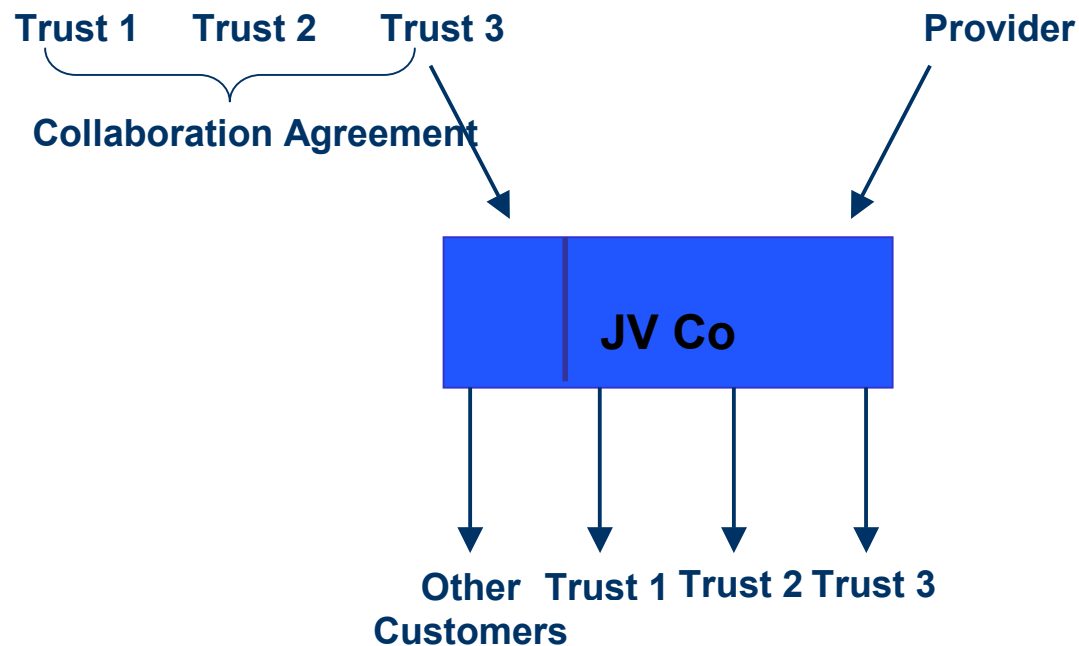
3.1 Corporate Structure

A number of alternative corporate delivery structures were explored at the workshop, including outsourcing, contractual joint venture and incorporated joint venture. There are examples of all three models currently operating within the NHS.

The structure preferred by workshop attendees, which the Project Board proposes to pursue, is an incorporated limited liability joint venture company ("JV Co"). This is where a company is set up to deliver and bear the risks of the provision of the services, with share ownership being held by the three founder Trusts and the preferred bidder and, in the absence of any other specific arrangement, profits earned by the JV Co from the service provision are shared between the shareholders in accordance with the equity subscribed. In this model the Trusts would be minority shareholders and the actual level of shareholding will be determined during the competitive dialogue phase. An example of an existing incorporated joint venture within the NHS is the NHS Shared Business Service.

The JVCo structure can also be established in a way which allows other NHS organisations to subsequently become members of the JVCo, with the approval of the founder Trusts. We are not at this stage envisaging opening up the JVCo to other Trusts as the first priority is to the three founder Trusts. However, discussions at the workshops indicated that future flexibility should be an option.

This model is illustrated overleaf:



This model has several key benefits. It allows the Trusts to take a strategic role in the management of the JV Co and, as shareholders, the Trusts will seek to protect their position with veto rights over important decisions, such as new business developments, raising new capital etc.

The day-to-day operational management and responsibility and service risks will remain with the JV Co and, as the preferred bidder would be the majority shareholder, they would, in practice, be under the control of the preferred bidder. Service contracts, which will be legally enforceable, will be entered into between the JV Co and each Trust for the provision and receipt of pathology services and will include quality standards and performance mechanisms.

A benefit of this corporate joint venture structure is that NHS staff will be working for a partially NHS owned organisation, something which pathology staff are expressly keen to do. Additionally, although the Trusts are proposing to enter into the arrangements in order to achieve high quality pathology services and not for the purpose of making profits, if the joint venture is profitable the Trusts may receive the benefit of dividends on their shareholdings.

This model does require the approval of the Secretary of State for Health and discussions are already underway with the Commercial Directorate at the Department of Health.

3.2 Employment Model

The employment implications of the project for the Trusts' staff have also been under consideration, including the implications of TUPE and RoE. The effect of TUPE (the Transfer of Undertakings (Protection of Employment))

Regulations) is that certain employees of the Trusts would transfer automatically by operation of law from the Trusts to a new provider of pathology services. ROE is a “retention of employment” model under which effectively the staff opt out of TUPE and elect to remain employed by the Trusts and to work for the new provider (in this case the JV Co) on a secondment basis. These two employment models were explored at the workshop and again there are many examples of both models operating within the NHS. The group agreed that the main principle to be adhered to is one of equal treatment for all grades of staff and professionals, including employed doctors. Clearly the implications of TUPE in the context of medical and nursing staff will need to be considered in the light of government policy. This was a particular issue for staff at East & North Hertfordshire NHS Trust where different categories of staff were treated differently when services were outsourced some years ago.

The employment model preferred by workshop attendees was the RoE model, this being the approach taken by the two Hertfordshire Trusts in the negotiations relating to the Independent Sector Treatment Centre project. This model has the advantages that it can be applied to all staff, has a lesser impact on employment costs than TUPE, staff retain their existing terms and conditions of employment and the responsibility for day to day management of staff transfers to the JV Co pursuant to the terms of the secondment arrangements.

Initial discussions with staff and trade unions on this approach are positive and supportive.

3.3 Collaboration Agreement

The collaboration agreement will set out how the three founder Trusts will collaborate to manage their interests in the joint venture. It will be split in to three main areas:

- setting up the joint venture including classes of shares and share rights – voting powers and rights to dividends and capital, the number of, and right to appoint, directors, the business plan and sharing of the costs of set up;
- operation of the joint venture including attendance and decision making at directors’ meetings, dividend policy and veto rights; and
- management of the contracts for pathology services including separate or joint management issues.

Further details of these aspects would also be set out in the articles of association of the JV Co and in the shareholders’ agreement between the Trusts and the provider.

The consensus view was that each Trust must be treated equally within these areas and therefore costs and voting rights (attributable to minority shareholding held by the Trusts) would be shared equally between the three

Trusts. Only in a small number of areas might adjustments according to volume of activity be appropriate e.g. in the case of share income.

3.4 Project Programme

The Project Board is currently assessing the project programme in line with the requirements for competitive dialogue and consequently the dates indicated below are indicative at this stage.

The Project Board is aiming to select three bidders with whom to engage in competitive dialogue by the end of October 2007. An Invitation to Submit Final Bids is planned to be issued to remaining bidders in December followed by bidders submissions of the final offers. The Project Board will then make a recommendation to Trust Board on the preferred bidder and commercial agreements in the New Year (2008), for consideration and approval. This will be coupled with an internal Trust report outlining whether the recommendation demonstrates value for money for the Trust.

4. Conclusion

When considering these issues the key priority for the three Trusts is procuring clinically safe, high quality and sustainable pathology services, in a way that achieves best value. The preferred models and principles outlined above are key to achieving these principles whilst still allowing the Trusts strategic influence over an important clinical support service.

The next stage is to commence drafting legal documents that embody these principles and commence negotiations with the shortlisted bidders. The commercial group, supported by members of the workforce, IT and clinical specification groups, will lead this process.

As such the Trust Board is asked to note the preferred corporate and employment structure at this stage of the project. The Project Board will explore these models, with bidders through the competitive dialogue process. The final outcomes of this process will be reported to Trust Boards towards the end of the calendar year.