Outsourcing in the NHS in the wake of Carillion

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NHS organisations are all required to consider the efficiency of their contracting arrangements in line with the Carter Report recommendations. The collapse of Carillion in January this year brought issue of contractor financial viability into sharp focus and although NHS contractor insolvency has been a relatively rare occurrence, Carillion has caused many organisations to question the risks of outsourcing support services and what their options are if a contractor goes bust.

Firstly, where a supplier ceases to be able to provide services, the contract remains relevant and needs to be reviewed to understand the contracting authority's rights in this situation; including whether it will automatically terminate due to the triggering of an insolvency event, or whether the authority has to proactively notify the special manager of its intentions and/or to exercise step in rights.

Where a service provider, as part of a larger consortium under a PFI scheme (such as Carillion was) collapses, then the responsibility for their replacement will principally be governed by the PFI Contractor's relationship with them through the FM Contract (and associated parent company guarantee). However, under the terms of the Project Agreement with the PFI Contractor, consent to any appointed replacement is likely to be required. It's therefore sensible to enquire of your PFI Contractor what steps they have in place for this.

In the wake of the Carillion collapse, a number of their employees were members of a workplace 'defined contribution' pension plan, which wasn't affected by the firm's liquidation. Most (around 28,000 employees) belonged to one of Carillion's 13 'final salary' pension schemes, which are very likely to pass into the Pension Protection Fund (PPF) – in this instance this will happen automatically following the appointment of Insolvency Practitioners without NHS trusts having to take any steps. Former members who have already retired, will continue to receive 100 per cent of benefits due, whilst staff who retired early or are still working will end up getting around 90 per cent of what they are due, subject to an annual cap.

In an insolvency situation, the rules applying to the application of TUPE and, to anextent procurement, can be relaxed in certain circumstances to facilitate the transfer. In relation to TUPE, these relaxations may not apply where an insourcing or recontracting occurs. In any event, the key issue for NHS bodies is likely to be around preserving service continuity, and this is likely to mean respecting employees' existing terms and conditions.

Some NHS trusts are considering whether bringing services back in house can be a more cost effective option in the longer term, or trusts may decide to establish a shared service with other public sector organisations including through subsidiary companies with shared ownership across multiple NHS organisations/STP footprints. These models potentially provide the trusts with opportunities to benefit from greater commercial flexibilities for the relevant teams. Subsidiary companies can offer the governance model of a separate entity, whilst retaining the benefits of NHS ownership.

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