



**RISK
MANAGEMENT
SERIES**

The “Do’s” and “Don’ts” of Contracting for Behavioral Health Services

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Section 330 of the Public Health Service Act (“Section 330”) specifically requires all health centers to provide, at a minimum, “referrals to providers of . . . other health-related services (including substance abuse and mental health services).”¹ Throughout the past several years, the Health Resources and Services Administration (“HRSA”) and, in particular, the Bureau of Primary Health Care (“BPHC”) have recognized that meaningful access to behavioral health services is critical to assuring the overall health and well being of underserved populations. As such, BPHC has recently emphasized that health centers not only should ensure the availability of appropriate referrals to behavioral health providers, but should also initiate and expand the provision of behavioral health care programs within existing health center facilities. In this regard, HRSA has, over the last few years, earmarked a portion of the annual appropriation of funds under Section 330 to be used to increase and enhance, among other things, the behavioral health care services provided by health centers.²

In Fiscal Year 2005, HRSA allotted approximately \$7,600,000 to “increase the availability of primary [behavioral health] services by establishing first-time primary [behavioral health] services at a Health Center site that lacks on-site access,” as well as \$8,800,000 to “increase the availability of primary

1 See 42 U.S.C. § 254b(b)(1)(A)(ii), as amended by Pub. L. 107-251 (October 26, 2002) (emphasis added). Healthcare for the Homeless programs also are required as a condition of their grants to provide (in addition to the services required of all health centers) substance abuse services. See 42 U.S.C. § 254b(h)(2).

2 See BPHC Program Information Notice (“PIN”) # 2005-04: *Service Expansion for Mental Health and Substance Abuse, and Oral Health in Programs Funded Under the Health Centers Consolidation Act of 1996 (SEXP)—Competitive Supplemental Grants HRSA-05-103* (November 23, 2004).

[behavioral health] services by significantly enhancing or expanding services at a Health Center site that currently provides limited [behavioral health] services (*e.g.*, providing new services, increasing provider capacity).”³ BPHC PIN # 2005-04 indicates that the preferred model for establishing or expanding a behavioral health program is an integrated approach, stating that “[I]deally, [behavioral health] services should be integrated into Health Center clinics serving all ages ... and providing all types of services ... to diverse populations.”⁴ However, BPHC specifically recognizes that an integrated model could encompass services delivered either directly by the health center or by contract with local behavioral health providers, so long as the services are located on-site at the health center facility (which, in turn, improves patient access to and acceptance of such services).⁵

Given the above, initiating or expanding behavioral health care services to health center patients presents numerous opportunities for existing and emerging organizations. However, it also presents

considerable challenges, in that infrastructure must be developed and resources (financial, administrative, clinical, and otherwise) must be obtained. Accordingly, each health center should ask itself the following questions:

- ◆ **Should I initiate or expand behavioral health services?**
- ◆ **If so, how can I initiate or expand services in the most economical, yet effective, manner?**
 - **Should I obtain or enhance internal capacity and provide the behavioral health services directly? OR**
 - **Should I procure behavioral health services from another community-based provider who will provide the new and/or expanded scope of services (in whole or in part) to the health center’s patients on behalf of the health center organization?**

This Information Bulletin provides an overview of the later alternative as a means for health centers to obtain necessary resources to achieve their service expansion goals.

This Information Bulletin:

- ◆ Explores the definition and key elements of a procurement (or “purchase of services”) contract;
- ◆ Addresses specific federal requirements and standards that must be observed when executing the procurement arrangement; and
- ◆ Provides common contractual terms that, as a matter of good practice, should be included in all agreements, focusing on elements that generally make up a “sound and complete” contract.

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3 See BPHC PIN # 2005-04 at p. 2.

4 See BPHC PIN # 2005-04 at p. 5.

5 Id.

DEFINITION AND KEY ELEMENTS OF A PROCUREMENT (PURCHASE OF SERVICE) AGREEMENT

As a preliminary matter, before executing and implementing a procurement agreement, the health center should understand what a procurement contract is and when it would be employed. A health center would use a procurement contract when it wishes to purchase certain goods and/or services for the direct benefit of the health center.⁶

Definition of Procurement Contract

Under a procurement contract for behavioral health services . . .

The health center would contract for specific services from a “vendor” (i.e., a behavioral health care provider) and would pay the vendor an arm’s length rate, reflecting fair market value, for the services provided on behalf of the health center.

For example, if a health center wants to enter into an arrangement with a local community mental health center (CMHC) under

which the CMHC will furnish certain behavioral health services, on behalf of the health center, to health center patients served either at the health center’s site or at the CMHC’s facility, the arrangement would be executed through a procurement (or purchase of services) agreement because the CMHC is functioning as a vendor of services to the health center.

Responsible Parties in a Procurement Contract

When entering into a procurement arrangement, the health center should keep in mind that it will be financially and legally responsible for the services provided by the behavioral health care provider and its personnel (collectively, the “BH Provider”). Accordingly:

- ◆ The BH Provider would furnish all contracted services on behalf of the health center (i.e., the health center would be the provider of record for the services rendered under the arrange-

ment). All patients to whom the BH Provider’s employees furnish services would be the health center’s patients, regardless of whether the health center 1) contracts for the BH Provider’s personnel to furnish services to *health center patients served at the health center’s site* (as would be the case under the service expansion funding opportunities presented by PIN#2005-04) or 2) arranges for the BH Provider to furnish services to patients “referred” to it by the health center and *served at the BH Provider’s facility*⁷;

- ◆ The health center would bill (in its own name) for any contracted services provided by the BH Provider, would retain the revenues generated, and would compensate the BH Provider for the provision of services based on a fair market, arm’s length negotiated rate (which would be incorporated, along with the specific payment methodology, into the written procurement contract).
- ◆ Any and all contracted services would be provided under the control of the health center, in accordance with the health center’s policies and procedures (as opposed to the BH Provider’s policies and procedures) and in a manner that assures that the health center maintains appropriate oversight, accountability, and responsibility for the services provided to its patients.

Of great importance, the BH Provider does not have to meet governance and various other grant-related requirements applicable to the health center.

6 This principle derives from the language of the Federal Grants and Cooperative Agreement Act (“FGCAA”), 31 U.S.C. §1601 et. seq., which directs Federal agencies to use a procurement contract when “the principal purpose . . . is to acquire . . . property or services for the direct benefit or use . . .” of the procurer. See 31 U.S.C. §6303.

7 In situations where the health center does not provide a specific Section 330-required service itself, it is common to contract with another provider to provide such services for the health center’s patients within its service area. In this type of arrangement, the other provider furnishes services to patients referred by the health center (and applies the health center’s schedule of discounts for patients below 200% of poverty) and bills the health center for the fair market value of such services.

While the procurement standards contained in 45 C.F.R Part 74 (or 45 C.F.R. Part 92 for state and local governments) specify that certain contractual provisions be included in procurement contracts entered into by recipients of federal grant funds (*i.e.*, Section 330-supported health centers), they do not generally require that the vendors to such grantees comply with all requirements that apply to the grantees themselves. Nevertheless, the health center should retain flexibility to require the BH Provider to comply with certain grant-related requirements if deemed necessary by the health center. For example, the health center may require that the BH Provider prepare and furnish certain programmatic and financial reports (or, at a minimum, certain data), which, in turn, the health center is required to submit to the Department of Health and Human Services (DHHS) under its Notice of Grant Award.

...the health center should retain flexibility to require the BH Provider to comply with certain grant-related requirements if deemed necessary by the health center.

CONTRACTUAL CONSIDERATIONS REGARDING PROCUREMENT/PURCHASE OF SERVICES AGREEMENTS

Organizational Structure and Governance

As noted above, a procurement contract generally does not impact the organizational or the governance structures of either party (*i.e.*, the health center or the BH Provider).

- ◆ The health center and the BH Provider remain separate independent corporations, governed by separate Boards of Directors (as applicable), and operated by separate management teams.
- ◆ Except as discussed below, in the course of its normal business dealings, the BH Provider would not be required to comply with or operate under Section 330-related laws, regulations and requirements, nor would it be eligible for federal benefits available to FQHCs (*i.e.*, the health center should not provide payment to the BH Provider equal to the enhanced reimbursement the health center receives to provide services, but rather, would pay the BH Provider an appropriate rate based on fair market value).

Federal Procurement Standards

The federal government has established certain requirements that all grant recipients must adhere to when procuring goods or services paid for, in whole or in part, with federal grant funds. These requirements apply when the cost of the item or service procured is treated as a direct cost of the grant award, *e.g.*, consultant contracts, equipment purchases, purchase of services agreements. The federal procurement requirements are published by the Office of Management and Budget (“OMB”) in Circular A-110 for nonprofit organizations and in Circular A-102 for state and local governments. DHHS has implemented these circulars in regulations codified at 45 C.F.R. Part 74 (nonprofit organizations) and at 45 C.F.R. Part 92 (state and local governments).⁸ These regulations define the minimum administrative and procedural standards that health center grantees must follow when procuring goods and services with federal grant funds, and mandate that all procurement contracts contain certain clauses. Additional

⁸ Please note that DHHS has announced that, at some point in the next several months, it will move those administrative requirements from title 45 (Parts 74 and 92) of the Code of Federal Regulations to title 2, subchapter B of the Code of Federal Regulations. There is no indication, however, that DHHS plans to make any substantive revisions to those requirements when it effectuates that move.

requirements apply when the procurement is expected to exceed \$100,000 in value (*i.e.*, is greater than the “small purchase threshold”).

General Requirements

In general, the federal procurement standards are intended to ensure that all procurement transactions are conducted in such a way as to provide “to the maximum extent practical, open and free competition.” Essentially, the regulations require that health center grantees:

- ◆ Ensure that goods and services are acquired in an effective and efficient manner that is most advantageous to the grantee.
- ◆ Establish safeguards in order to protect itself, and therefore the government, from the inappropriate use of funds. Included in such safeguards are general rules pertaining to the manner by which the health center grantee solicits and reviews bids for contracts, *e.g.*, requirements that all procurements must include some form of cost or price analysis and that all analysis must be documented.

Administrative Requirements

In addition to the general requirements pertaining to the way in which health center grantees conduct the procurement process, the procurement standards require the grantee to have certain policies and administrative procedures in place for all procurements. These admin-

istrative procedures can be divided into three main categories – procurement procedures, standards of conduct, and contract administration.

Procurement Procedures

The procurement standards require health center grantees to establish and implement written procurement procedures that contain provisions designed to obtain the best quality of goods and services at the lowest cost. A grantee’s procurement procedures, therefore, should include provisions that assume that it will:

- ◆ Avoid purchasing unnecessary items.
- ◆ Award contracts to capable vendors who have not been debarred or suspended by the federal government (taking into account factors such as vendor integrity, past performance, and resources available).
- ◆ Analyze lease versus purchase alternatives to determine which would be most economical and practical.
- ◆ Define the manner by which the health center grantee will determine the type of contract to utilize (*i.e.*, a fixed price contract, cost reimbursable contract, purchase order, or incentive contract), taking into consideration which contract is most appropriate to the particular procurement and promotes the best interests of the program and/or project involved.

◆ Maximize competition. Unless a particular vendor is uniquely qualified, or sole source procurement can be otherwise justified, health centers should seek competing bids in response to clear and accurate requests for proposals. As such, the health center’s procurement procedures must also address the information to be provided in solicitations, which serve as notice and invitation to potential vendors, informing them that the health center grantee is in the market for certain goods and services, and would like them to submit applicable proposals. Consequently, a health center grantee’s solicitations should contain:

1. A clear and accurate description of the goods and/or services desired by the health center;
 2. Expectations regarding the vendor and the product/service; and
 3. As applicable, whether the health center: (i) requires a brand name or its equivalent (and, if so, why); (ii) will accept goods and/or services that use the metric system; and (iii) is promoting a clean environment through this procurement.
- ◆ In selecting a vendor, evaluate bidders based on the following criteria:
1. The estimated total cost/price of the submitted bid (including travel expenses);
 2. The appropriateness and accuracy of the bidder’s

response to the specific description of the services sought and the other elements of the health center's solicitation; and

3. The bidder's qualifications/experience, or in the case of goods, the quality of the goods.

- ◆ Make "positive efforts" to ensure the use of small and minority or women owned businesses to the fullest extent practicable. The health center grantee must, among other things, provide information on upcoming procurement opportunities and arrange convenient times for purchases and contracts.

Standards of Conduct

The procurement standards require each health center grantee to establish, maintain and comply with written standards of conduct that address the actions of officers⁹, employees, and agents engaged in the award and administration of procurement contracts. The regulations do not provide extensive guidance on the contents of the Standards but instead provide information regarding three areas that grantees must address. Standards must:

- ◆ Include a "conflict of interest" provision, which specifically prohibits anyone associated with the health center grantee (*i.e.*, employees, contractors, agents, directors, officers) from partici-

pating in the procurement process if a real or apparent conflict of interest exists. A conflict of interest may arise when anyone associated with the grantee, any of their immediate relatives or partners, or any organization that employs or is about to employ any of these individuals, has a financial or other interest in the firm or individual that is awarded the contract.

Accordingly, the standards should include a definition of a conflict of interest and require that anyone associated with the grantee disclose such conflict and refrain from participating in the selection, award or administration of the particular contract.

- ◆ Prohibit anyone associated with the health center grantee from soliciting or accepting gratuities, favors, or anything of monetary value from vendors, other contractors, or parties to sub-agreements. The grantee may, however, set standards excluding situations where the financial interest is insubstantial or the gift is an unsolicited item of nominal value.
- ◆ Provide for specific disciplinary actions for violations of the standards. The level and extent of such actions can be determined by the individual health center grantee. Part 92 further provides that the awarding agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

System of Contract Administration

Since the federal procurement standards do not make the federal government a party to the contract, the contract will not affect a health center grantee's overall responsibility for the grant-supported project or its accountability to the federal government for the proper use of federal grant funds. Accordingly, each health center grantee must maintain a system for contract administration that allows it to:

- ◆ Track the vendor's performance and accountability.
- ◆ Ensure that vendors comply with all terms, conditions and specifications of the purchase agreement and that there is adequate and timely follow up of all purchases.
- ◆ Evaluate and document the vendor's performance. It is also a good idea to include provisions relating to contract disputes, *i.e.*, how they are processed, settled, etc.

Part 92 further provides that the awarding agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

⁹ While 45 CFR Part 74 refers to "officer," we recommend extending the standards of conduct to all health center Board members.

Part 92 additionally requires grantees that are state and local governments to:

- ◆ Maintain records sufficient to detail the significant history of a procurement, including, but not limited to, documenting the rationale for the method of procurement, selection of contract type, vendor selection or rejection, and the basis for the contract price. Because such documentation is a good procurement practice, all health center grantees (whether public or private, nonprofit organizations) may wish to follow this guidance for procurements involving significant dollar amounts and for any contract awarded without open and free competition.

Procurement Records and Files

The federal procurement standards specify certain record-keeping requirements for procurements that are expected to exceed \$100,000 (although we recommend all health center grantees establish such record-keeping standards). Specifically, health center grantees entering into procurement arrangements must:

- ◆ Establish and maintain records and files that, at a minimum, include:
 1. A detailed description of the scope of the contracted services;
 2. The basis for vendor selection; and

3. An analysis and justification pertaining to the cost/price of the contract, and, if competitive bids are not obtained, a justification for the lack of competition in terms of price and vendor qualifications.
- ◆ If requested by DHHS, provide procurement documents such as requests for proposals and independent cost estimates for pre-award review by DHHS if the procurement:
 1. Will be issued without competition (or only one bid is received);
 2. Specifies a brand-name;
 3. Will be awarded to a vendor who is not the lowest bidder under a sealed bid process; or
 4. Is increased to more than \$100,000 by a contract modification.

Contract Provisions

In addition to requirements regarding the procurement process, the federal procurement standards require that all contracts and sub-contracts for the procurement of goods and services contain certain provisions. In general, all contracts must include provisions that define a “sound and complete” contract. Other provisions vary depending upon the amount and type of contract. Specifically, all procurement contracts should:

- ◆ Include the vendor’s record keeping and reporting responsibilities.
- ◆ Require that the vendor notify and receive prior approval from the health center grantee in the event that there is a material change in the approved scope of work or the approved budget for such services.
- ◆ Assure the vendor’s compliance with certain specified laws:
 1. Non-Discrimination/Equal Employment Opportunity requirements found in Executive Order 11246, as amended by Executive Order 11375, and as supplemented by regulations at 41 C.F.R. Part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor;”
 2. Copeland “Anti-Kickback” Act (for construction or repair projects over \$2000);
 3. Davis-Bacon Act (if required by the authorizing statute); and
 4. Rights to Inventions Made Under Contract or Agreement.

In addition to the aforementioned provisions, contracts that exceed the “small purchase threshold” amount (currently set at \$100,000), must:¹⁰

- ◆ Include remedial actions available to the health center grantee (administrative, contractual or

¹⁰ While not required for contracts under \$100,000, we recommend including provisions regarding remedial actions, termination and access to records in all negotiated contracts.

legal remedies) in instances where the vendor violates or breaches the terms of the contract.

- ◆ Clarify circumstances under which the health center grantee can terminate the contract, including for default and circumstances beyond the control of the vendor.
- ◆ Include a provision stating that the health center, DHHS, the U.S. Comptroller General, and any of their duly authorized representatives, shall have access to any of the vendor's books, documents, papers, and records which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.
- ◆ Assure the vendor's compliance with certain specified laws:
 1. Contract Work Hours and Safety Standards Act (for construction projects);
 2. Clean Air Act and Federal Water Pollution Control Act;

3. Byrd Anti-Lobbying Amendment;
4. Debarment and Suspension provisions¹¹; and
5. Minimum bonding guarantee standards (for construction projects).

BPHC Standards

While Section 330 specifically permits health centers to provide services directly or by contract, BPHC prefers a direct staffing model under which health centers directly employ their management, clinical, and administrative staffs.

Accordingly, whenever a health center considers purchasing some level or type of clinical service capacity, it should first consider whether it is more beneficial for it to contract for the services rather than to perform such services directly (*e.g.*, if the work cannot be performed directly on a more efficient basis).

If a health center can demonstrate that the purchase agreement will

result in programmatic benefit and that the health center will maintain sufficient accountability for 1) the operation of the grant-approved project, 2) the expenditure of funds, and 3) the services provided through the contracted provider(s), BPHC might approve an exception to its direct staffing preference. Health centers, however, must establish appropriate monitoring and oversight of a vendor's performance and retain ultimate authority with respect to who provides the services and the manner in which they are provided. In this respect, BPHC has issued two policies¹² that address certain criteria of accountability, including, but not limited to:

- ◆ Maintenance by the health center's governing Board of autonomous decision-making with respect to the health center's policies and procedures, such as financial, health care and personnel policies (set forth more specifically in 42 C.F.R. '51c.304(d)), which are applicable to the provision of services to the health center's patients by the contracted personnel.
- ◆ Maintenance by the health center's Executive Director of the ultimate authority to select and dismiss the contracted personnel.
- ◆ The health center's reservation of sufficient rights and control to maintain overall responsibility for the direction of the Section 330 project, as originally funded.
- ◆ The implementation of appropriate systems and processes to assure satisfactory performance by the contracted personnel, in

11 While not required for contracts under \$100,000, we recommend that health centers receive assurances from each contractor with which they conduct business that neither the contractor nor any of its principals or employees have been debarred or suspended from participating in Federally-supported contracts or from participating in Federal health care programs.

12 BPHC affiliation policies set forth in Policy Information Notices ("PINs") # 97-27 & # 98-24 address these accountability requirements, and set forth the policy and process by which a health center can request and obtain an exception to direct employment preferences. Please note that, the health center is not required to obtain a formal exception to the direct staffing model if it purchases or leases less than a majority of its primary care clinicians; however, in all circumstances, it should maintain accountability for the services provided by contracted clinicians. While the affiliation policies apply solely to community and migrant health centers, the requirements are derived from Section 330 and its implementing regulations, DHHS administrative regulations at 45 CFR Part 74 and Part 92, and the Public Health Service Grants Policy Statement. Therefore, it is advisable for all grantees to consider implementing these or similar safeguards when contracting for substantive programmatic work and/or certain key personnel.

accordance with Section 330 requirements.

- ◆ The execution of a written agreement that complies with current DHHS administrative requirements (set forth in Part 74 and Part 92).

BPHC policy does not specify the contractual provisions that would address the accountability criteria; however, in general, the following types of provisions should be sufficient to assure accountability and should be included within the purchase of services agreement between the health center and the BH Provider.

...all agreements under which health centers purchase the services provided by non-health center clinical personnel should contain certain provisions ensuring that the health center maintains appropriate oversight, accountability and responsibility for the services provided to its patients through the purchased capacity.

Performance-Related Assurances and Representations by the BH Provider

As noted above, all agreements under which health centers purchase the services provided by non-health center clinical personnel should contain certain provisions ensuring that the health center maintains appropriate oversight, accountability and responsibility for the services provided to its patients through the purchased capacity. In particular, the agreement should contain assurances and representations that the BH Provider (and, as applicable, its personnel) will:

- ◆ Ensure services that are available and accessible, promptly, as appropriate, and in a manner that assures continuity of care.
- ◆ Furnish services in compliance with the terms of the agreement and all relevant laws, regulations, and generally accepted principles and practices (including Section 330, its implementing regulations and related policies and expectations).
- ◆ Furnish services consistent with the health center's policies, procedures and standards related to clinical services, including, but not limited to clinical guidelines,

productivity and quality assurance standards, and preparation of medical records (without regard to any contrary policies, procedures, or protocols established by the vendor).¹³

- ◆ Act in accordance with other applicable health center policies and procedures, such as standards of conduct and patients' rights and responsibilities.
- ◆ Recruit, hire, and retain sufficient staff and contracted personnel, qualified by training and experience, to provide the services required by the agreement.
- ◆ Satisfy certain health center professional standards, including, but not limited to, 1) licensure, certification and/or other qualifications, and credentialing and privileging requirements; 2) be (and remain) eligible to participate in the Medicaid and Medicare programs; and 3) not engage in any action that may adversely affect the ability of such personnel to provide services under the agreement.
- ◆ Develop, maintain, and furnish to the health center certain programmatic and financial records and reports that pertain to the services provided, and provide appropriate access to such reports.

¹³ If the BH Provider will maintain a separate practice in which it will provide the services not furnished by the health center under its scope of project and the health center intends to refer patients to the BH Provider for the provision of such services (in addition to the services provided by the BH Provider on behalf of the health center), the health center and the BH Provider may want to develop a method by which they can share referral records and notes or have access to each other's medical records to make entries and for other purposes

Oversight, Evaluation and Monitoring by the Health Center

In addition to the assurances and representations provided by the BH Provider, the health center should retain certain rights in order to fulfill its oversight responsibilities. In particular, the health center should retain:

- ◆ All authority placed in it by law or customary practice, as well as all permits, licenses, certifications and approvals necessary to operate the health center.
- ◆ The authority to establish and implement all policies and procedures for the operation of the health center, consistent with the Board's authorities and the health center's scope of project. The agreement should also establish which of the policies developed by the Board (including those listed above) will apply to the BH Provider's personnel providing services to health center patients, and that the health center will determine the work schedules of all contracted personnel.
- ◆ The right to exercise general oversight authority over the performance of services by the BH Provider's personnel, and the right to monitor and evaluate

whether the BH Provider and its personnel are performing satisfactorily and in compliance with applicable policies, procedures, and operational and professional standards, as specified by the BH Provider's assurances and representations.

- ◆ The right to terminate the contract (if the contract is with an individual provider), or to require removal and replacement of personnel (if the contract is with a BH Provider entity) in the event that performance is deemed unsatisfactory or not in compliance with applicable policies, procedures and/or standards, or the health center determines, in good faith, that the health, safety and welfare of patients may be jeopardized by the continuation of services.
- ◆ The right to receive notification from the BH Provider if it or any of its personnel fail to meet insurance or licensure requirements (or other criteria required by the health center) and/or engage in any actions that could result in the revocation, termination, suspension, limitation or restriction of such licensure, certification, or qualification to provide such services, and the right to require removal and replacement under such circumstances.

In addition to the assurances and representations provided by the BH Provider, the health center should retain certain rights in order to fulfill its oversight responsibilities.

Freedom to Contract

In general, BPHC has voiced concern regarding "exclusive" arrangements under which health centers are not permitted to contract with other parties under any circumstances (whether for the same or for different services), or that grant contractual partners absolute rights to provide other services to the health center without requiring that the health center first comply with federal procurement standards (*i.e.*, procedures that maximize competition by offering multiple parties notice and opportunity to bid and requiring a fair and objective analysis of all bids received).

To avoid exclusivity concerns, the health center should explicitly retain the ability to contract with other parties (including other BH Providers):

- ◆ If, and to the extent that, it determines that such contracts are necessary to implement the Board's directives with respect to scope, location, and hours of service, or
- ◆ As may otherwise be necessary to assure appropriate collaboration with other local providers (as required by Section 330 (1)(3)(B)) and/or to enhance patient freedom of choice, accessibility, availability, quality, and comprehensiveness of care.

Additional Terms for Procurement Contracts

In addition to the terms described above, there are certain terms that are common to all contractual arrangements that, as a matter of good practice, health centers should include in procurement contracts.

Description of Services and/or Products

In developing the description of services (the “Scope of Work”), it is critical to provide as much detail as possible under the circumstances. There will, of course, be situations in which the health center will prefer to retain flexibility, for example, by generally authorizing performance while indicating that a detailed list of services will be negotiated with the BH Provider at a later date (or as the need for such services arises). However, putting expectations on paper, in detail, is an important means to avoid disputes and potential lawsuits. The following topics should, as relevant, be addressed in the Scope of Work:

- ◆ Detailed description of services provided under the purchase agreement;
- ◆ Amount or units of services (*i.e.*, by specific service, number of hours of service provision);
- ◆ Time schedules for performance;
- ◆ Key persons (if known);
- ◆ Equipment or supplies furnished by the health center.

If the BH Provider will maintain its own practice in which it will provide services not furnished by the health center under its scope of project and the health center intends to refer patients to the BH Provider for the provision of such services (in addition to the services provided by the BH Provider on behalf of the health center), the parties also may want to agree upon:

- ◆ Specific services that will be excluded from the purchase agreement, but will be available from the BH Provider separately;
- ◆ Appropriate referral mechanisms to ensure that the services are both available and accessible to the health center’s patients (and that the patients themselves follow-up on appointments); and
- ◆ Case management and consultation systems (including, but not limited to, the sharing of medical records and notes for treatment purposes, in accordance with applicable privacy and confidentiality requirements) to ensure continuity of care and the provision of proper follow-up care.

Payment Amount

Contracts for services should specify a ceiling on how much the health center will pay for the services (unless the contract is for a fixed price). If the BH Provider’s proposal included a proposed budget, the budget and related rates and/or schedules (after negotiation and agreement of the health center)

should be incorporated in the contract. Further, the contract should require the health center’s prior written approval for any expenditure that exceeds the ceiling/budget, as well as any significant changes to the budget.

Timing and Method of Payment

The contract should include provisions indicating the type and timing of payments (*e.g.*, prospective payment, monthly invoices paid retrospectively), as well as documentation required for payment (*e.g.*, proof of satisfactory progress on the work, invoices for expenses, time records). If the contract includes a budget, payment should be conditioned upon a demonstration that the amounts billed are within the budget and, if relevant, allowable in terms of other restrictions that may apply, *e.g.*, federal cost principles, hourly rates. Finally, if possible, it is advisable to make payment contingent on the health center’s receipt of grant funds.

Record-Keeping and Reporting

As discussed above, the contract should specify the programmatic and financial records and reports that the health center requires the BH Provider to prepare and maintain, as well as the timeframe for preparation and submission. These reporting requirements should be structured so as to assure that the health center is able to meet all of its grant-related reporting requirements. Further, it is important to

keep in mind that Part 74 and Part 92 require grantees to retain financial records, supporting documents, statistical records, and all other records pertinent to the grant award for a period of three years from the final expenditure report (or a later date if an audit, claim, litigation, or a financial management review is started before, and continues after, the end of the three-year period).¹⁴ Accordingly, the health center should require submission of all information it may require to comply with these federal obligations.

Access to Records

The contract should include a provision allowing its representatives access to the BH Provider's records pertaining to the contract, upon reasonable notice and at reasonable times. As noted above, the procurement standards require all contracts in excess of \$100,000 for non-profit organizations (and all contracts entered into by state and local governments) include a provision allowing representatives of the health center, DHHS and the U.S. Comptroller General access to the vendor's records.

"Freedom of Choice"

To the extent that the contract is executed between the health center and any other health care provider, it is always advisable to include a "freedom of choice" provision that specifies that:

- ◆ All health care professionals employed by or under contract with either party retain sole and complete discretion to refer patients to any and all providers that best meet the health care requirements of such patients; and
- ◆ Each patient will be advised of such and may request referral to any provider of their choosing.

Confidential and Proprietary Information

If the BH Provider will have access to personal information about health center patients, the contract should include provisions requiring the BH Provider to:

- ◆ Protect information from unauthorized disclosure, in accordance with currently applicable

laws, including, but not limited to the privacy standards required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA");¹⁵

- ◆ Prohibit the BH Provider from disclosing or using confidential and/or proprietary information without the health center's prior written approval (or unless required by law) and requiring it to return all information upon termination or non-renewal of the contract.

Contract Term

The contract term should be explicitly stated and renewals should be permitted only upon mutual written consent of the parties (after re-negotiation of key terms, as necessary).

Termination

There are several approaches to termination clauses.

- ◆ **Termination "without cause"** permits either party to terminate for any or no reason with a certain amount of prior notice to the other party. While this approach may provide an easy "out" for the health center, the health center should consider whether it could afford to allow the BH Provider to walk away midstream.

14 Please note that other service-related laws, such as Medicare, may require longer retention periods. Accordingly, prior to agreeing upon a specific records retention period, the health center should review all applicable retention periods to ensure that the agreement sets forth that which is the longest.

15 In addition to HIPAA, there may be other federal and state laws and regulations that protect the privacy and confidentiality a patient's individual health care information with respect to the provision of behavioral health services. Accordingly, each health center should review such requirements prior to executing a purchase agreement for behavioral health services and incorporate relevant standards into the written agreement.

- ◆ **Termination “with cause”** permits either party to terminate the contract upon the occurrence of certain circumstances set forth in the contract and written notice by the terminating party of the existence of such a circumstance. The contract may or may not provide the alleged breaching party with a period of time to correct its performance before the contract is terminated.
- ◆ **Termination “for convenience”** permits the parties to terminate at any time, when both parties agree that there is nothing to be gained by proceeding with the contract. Finally, each health center should include a provision allowing automatic suspension or termination if its grant is suspended or terminated or if the health center determines, in good faith, that the health, safety and/or welfare of its patients may be jeopardized by the continuation of contracted services.

Insurance

It is advisable to include requirements that the BH Provider secure and maintain insurance coverage in specified amounts, as well as provide evidence of coverage for verification purposes. If the contract also specifies the health center’s obligations vis-à-vis insurance, it should be clear that, if the health center is deemed eligible for professional coverage under the Federal Tort Claims Act (FTCA), such coverage will be accepted by the BH Provider in lieu of malpractice insurance.

Indemnification

It is also advisable to include a comprehensive indemnification provision stating that the BH Provider will defend and hold the health center harmless for any and all claims or losses, including attorneys fees, expenses and disallowances by federal/state officials and agencies, incurred by the health center and/or any third party, arising out of the vendor’s failure to perform, negligent performance, or violation of any of its obligations under the contract.

Note that the BH Provider may insist that a parallel provision be included in the contract requiring the health center to indemnify the BH Provider for claims or losses caused by the health center. If so, prior to agreeing to such term, the health center should consult its general liability policy to determine whether it covers indemnification (indemnification is not covered under FTCA coverage).

Governing Law

If the health center and the BH Provider are located in different states, it is important to specify which state’s law governs the legal interpretation of the contract, and where it will be enforced. Typically, it is preferable to provide that the health center’s state law governs and, of equal importance, that disputes between the parties regarding the contract may be brought only in

that state. It also is advisable to include a provision in the contract making it subject to all applicable federal statutes and regulations.

Assignment

It is advisable to include a provision in the contract stating that the contract cannot be assigned or transferred to another party without the health center’s prior written consent, to ensure performance by the BH Provider, rather than an unknown third party.

Entire Agreement (Integration Clause), Amendments, Severability

The contract should state that the terms of the written document constitute the entire agreement between the parties and that no prior agreements or verbal communications have effect. Similarly, the contract should provide that no amendment to the contract is valid unless it is in writing and signed by both parties. Finally, the contract also should state whether any or all of its provisions will remain in effect if one or more is found by a court to be invalid (“severability”).

CONCLUSION

In today's health care market, health centers are experiencing unprecedented growth in their health care programs, including services within their scopes of project that previously had been provided through referral arrangements with other community-based providers. However, expansion opportunities also present numerous challenges with respect to the development of infrastructure and the securing of critical capacity and related resources (financial, administrative, clinical, and otherwise).

To overcome such challenges, health centers must learn how to choose and implement arrangements most appropriate for their particular circumstances. One of the most common methods by which a health center can obtain necessary infrastructure and resources to achieve its expansion goals is the procurement (purchase of service) contracts, which involves the health center's purchase of goods and/or services from a third party to be used by the health center in providing services to its patients. These types of purchases should be made pursuant to a written procurement or purchase of services contract drafted in accordance with certain federal standards and containing other "smart" contracting terms.

In order to ensure appropriate implementation and operation of health care services and programs and to maintain the health center's accountability and liability under a workable approach, it is critical that health centers understand when and how to utilize a procurement contract. Ultimately, the health center's ability to manage its contractual and third party agreements will impact its ability to provide cost-effective, quality care in accordance with its mission and goals.

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