



**The Royal College of Pathologists  
London**

# MARKET TESTING OF PATHOLOGY

## Guidance to Pathologists

**Report of the Working Party on Market Testing  
March 1996**

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## **INTRODUCTION**

### **BACKGROUND TO MARKET TESTING**

1. The remit of this Royal College of Pathologists Working Party is to provide guidance to pathologists on how they can best deal with the process of Market Testing.
2. The response of pathologists to Market Testing is very varied; some embrace it with enthusiasm whilst others are uncertain and require advice regarding the procedures. Many departments are already involved with the exercise. The Working Party felt it was essential that this report provides advice to all, irrespective of their point of view.
3. There are a number of arguments for and against participation in a Market Testing process:
  - The process of Market Testing may result in Trusts losing their "in house" NHS pathology service. Pathology is an integral part of clinical activity of a Trust and Pathologists together with Clinical Scientists are essential and valued members of the clinical team. If, in the long term, a commercial approach proves unsatisfactory, expertise will have been lost and it would be very difficult to reconstruct the service.
  - Assessment of short term costs is easier than long term appraisals of quality. Therefore Market Testing tends to emphasise the short, rather than the long term solutions.
  - In many departments there may be underlying problems that need addressing. By shifting the burden of these problems elsewhere, Market Testing may mask rather than address these issues, providing symptomatic relief instead of solving fundamental problems. The Market Testing process should not be used as an alternative to dealing with existing ineffective management of pathology departments.
  - Within a Trust, the process inevitably creates internal tensions. The use of such a complex process may be viewed as inappropriate and clear guidelines on Market Testing would provide reassurance.
  - The present position of excellence in pathology services has only been maintained by a process of continuous review and development.
  - It is accepted that providing better value for money is an important element of this process and Market Testing is one way of seeking better value for money.
  - Many pathology departments lack essential funds for capital developments. Market Testing provides both access to capital funding that may not be currently available from Treasury sources and to expertise in financial management.

- Currently the NHS Executive allows Market Testing to take place provided it is carried forward on the basis of strong clinical support<sup>(4,12,13)</sup>.

## SECTION 1

### OVERVIEW OF THE MARKET TESTING PROCESS

- 1.1 The process of Market Testing takes up considerable time, typically between a year and eighteen months. Whilst it is in progress the routine work of the departments has to continue in the face of the disruption and possible loss of morale. It can be costly, particularly if outside management consultants are employed. The costs associated with management and the clinical time involved in competitive tendering must always be taken into account in reporting the overall savings from a tendering exercise. Therefore, managers and pathologists need to understand clearly the reasons for undertaking a Market Testing exercise.
- 1.2 The purpose of the process is to establish whether the service could be run more cost-effectively. It should not be used by individual pathologists or Trust management as a means of simply costing the existing service.
- 1.3 Improvements in cost effectiveness may be achieved without resorting to Market Testing and before considering the process, attention should be given to maximise the efficiency of the existing service. This exercise should include such matters as flexible working conditions, new staff skill mix and improved information technology. This approach may be a better way of cutting costs whilst maintaining a high quality clinical service than a Market Testing exercise.
- 1.4 Reasons for Market Testing vary from Trust to Trust and include improving efficiency of service, quality outcomes, dissatisfaction with current providers, the wish to develop pathology services and the need to obtain greater value for money<sup>(8)</sup>.
- 1.5 To be driven successfully, the Market Testing process requires commitment by consultant pathologists. There must be a very careful analysis of the costing process. It is axiomatic that after a Market Testing exercise pathology services should be as efficient as they had been previously. It is therefore vital that any savings proposed are true gains in efficiency rather than cuts in the volume or the quality of the service<sup>(8)</sup>.
- 1.6 Market Testing of clinical services affects not only the individual department such as pathology, but has wider implications. Re-arrangements for one service must not destabilise the whole Trust.
- 1.7 Even if the final decision is to use the Market as a benchmark<sup>(9)</sup>, accurate costing is necessary in order to make an effective "in house" bid. The accumulated experience that exists within NHS Trust laboratories should enable them to be successful over outside agencies.
- 1.8 The timing of the decision to employ Market Testing is also important. Where a pathology department has just completed an "in house" review and reorganisation of its own services, a reasonable period of time should elapse to see the impact of any changes

and the decision to employ Market Testing may need to be delayed.

## SECTION 2

### ROLE OF OUTSIDE PROFESSIONAL BODIES

- 2.1 Market Testing is supported by the NHS Executive and many more pathology services will be affected by the process. It is essential that the College is involved in the process and provide a mechanism to help consultants and scientific staff with the procedures related to Market Testing.
- 2.2 In order to provide help, firstly it is necessary for the Royal College of Pathologists to collate all relevant information and develop a data base relating to the process of Market Testing at a national level. Secondly, at a local level, advice should be made available to an individual Trust to help it deal with its own specific problems.
- 2.3 Activities of other outside bodies have a bearing on, and contribute to, the Market Testing process, for example, professional bodies and trade unions. Those groups that represent medical or scientific staff will have a major role to play in any detailed negotiation, in redundancies, regrading or other restructuring.

## SECTION 3

### LEGALITIES

- 3.1 In any restructuring that may arise from Market Testing, legal considerations are of immense importance. Not only to provide a contract between a Trust and a new provider agency, which may be outside the "umbrella" of the NHS, but also in the protection of the rights of individual consultants and biomedical scientists in the event of transfer of contracts.

#### **Personnel Contracts**

- 3.2 Where employment contracts and pensions rights are transferred to another company the staff must be taken on by the new company on equivalent terms to the existing arrangements for salaries, conditions of employment and pensions<sup>(1,3,15,16,18)</sup>.
- 3.3 If TUPE (Transfer of Undertakings and Protection of Employment) regulations do not apply the Trust must make all employees in the transfer redundant.
- 3.4 Private laboratories are not allowed to continue membership of the NHS superannuation scheme. NHS superannuation pensions are based on final earnings not contributions. The new partner must provide a pension based on final earnings.
- 3.5 The new employer takes over the liability for contracts of all employees who were employed and is bound by all terms and conditions of the contracts which are taken on, with the exception of occupational pensions.

- 3.6 Dismissal connected with the transfer may be deemed unfair except where it is necessary for economical, technical or organisational reasons. This may be due to fall in output to the extent that profit cannot be maintained, new technology not used by previous employer or when it is not possible to relocate staff if the service is moved off-site.
- 3.7 If redundancy takes effect before transfer, the previous employer will be liable for redundancy payment. If after transfer, the new employer must provide the same contractual redundancy payment that was in force before transfer.
- 3.8 Even if the transfer is covered by TUPE, the new employer can still, at a later stage, make redundancies, lower wages or offer inferior pensions.
- 3.9 It is important that the new working relationships are clearly identified. In particular it is important to establish the number of laboratory staff that will be transferred to the new contracts and whether consultants together with their secretaries should be excluded. If consultants are to remain under Trust authority what will their professional lines of responsibility be within the new department? Will they have any managerial or financial control? Lines of responsibility should be clearly established as this will aid resolution of any possible disputes.

#### **Service Contracts**

- 3.10 The new provider agency shall not make alterations, additions or omissions from the agreed contract except by written variation notice.
- 3.11 In discharging the service the new provider agency shall carry out its obligations with all due care, skill and diligence to the Trust's requirement.
- 3.12 All staff shall possess qualifications and competence in the tasks for which they are employed.
- 3.13 The new provider agency shall indemnify the Trust against all actions, suits, claims, demands, losses, charges, costs and expenses, negligent or wrongful act or omissions which the Trust may suffer or incur resulting directly or indirectly from the contracted out services.
- 3.14 The provider agency shall effect, with a reputable insurance company, a policy or policies of insurance covering all matters which are subject to indemnities.
- 3.15 Due recognition shall be taken of the obligations for teaching and research in all teaching hospitals and university affiliated hospitals.

## **SECTION 4**

### **MANAGEMENT CONSULTANTS AND MARKET TESTING**

- 4.1 Very few Trusts have the "in house" capacity to carry out a Market Testing process effectively and will have to employ outside management consultants which adds to the cost of the exercise, usually between fifty and one hundred thousand pounds. The

laboratory staff will be heavily involved incurring further expenditure. Software programmes exist for the evaluation and criteria weighting processes.

- 4.2 The process of selecting an outside management company is a tendering process in its own right. Several management consultancies need to be interviewed. It is essential to insist that personnel interviewed are the ones that will be involved in a particular Market Testing exercise. Many firms have an excellent sales team but may provide less able people to carry out the work.
- 4.3 There are a number of phases in the Market Testing process and management consultants can contribute to many or all of these<sup>(8)</sup>:

*Phase 0* Establish Market Testing Steering Group. This group must include the existing consultant pathologists as they have the local expertise necessary to construct the specification. However at a later phase, if there is to be an in-house bid, there may be a conflict of interest.

Identify services to Market Test  
Publicise Market Testing plans

*Phase 1* Sound out proposed tenders and establish any interest

*Phase 2* Draw up detailed service specification  
Prepare contract documents and timetable  
Decide on tender evaluation criteria/procedures

*Phase 3* Advertise and invite providers to tender (European Journal)  
Receive tenders.  
Evaluate tenders including site visits and company searches  
Receive presentations from selected tenderers  
If there is an in-house bid, local pathologists should not be involved in the evaluation process

*Phase 4* Select provider  
Inform successful provider  
Post tender negotiations  
Award contract

*Phase 5* Implement and monitor contract

*Phase 6* Review and re-tender

## SECTION 5

### PROCESS OF MARKET TESTING

#### Establishing Standards

- 5.1 Each step of the process requires a decision. The central problem is that most

pathologists have no direct experience of a Market Testing exercise.

- 5.2 The driving force behind the process is the assessment of comparative costs between different tenders. To achieve an accurate comparison it is essential to compare like with like.
- 5.3 The development of both options and criteria involves extremely wide discussion between all medical and biomedical scientists as providers of the service, together with the views of all users of the service as to the impact of changes implied by a particular option. These discussions have to be thorough and can be very time consuming<sup>(14)</sup>.
- 5.4 Therefore the first step for pathologists and managers is to identify high service standards both in terms of content and methods of delivery, against which any tender has to be set<sup>(10)</sup>.
- 5.5 Key issues in setting standards are:
- (i) Maintaining or improving quality of patient care.
  - (ii) As with any clinical service, research and development are essential activities for both medical and scientific staff and must be supported by adequate funding<sup>(13)</sup>.
  - (iii) Tenders from any agency must take into account the full range of modern pathology services. These services are an integral part of clinical practice providing and interpreting investigations for diagnosis, management, early detection and prevention of disease.
  - (iv) Pathology services both clinical and laboratory should remain consultant led in each specialty with provision for 24 hour cover<sup>(13)</sup>. Of particular importance is cover for Accident and Emergency, Special Care Baby Units and specialist transplant and burns units.
  - (v) Irrespective of the overall configuration of services there must be effective integration of the work of pathology departments with other clinical units within the Trust and with General Practitioners.
  - (vi) In order to provide a 24 hour emergency cover sufficient elements of the service must be accessible to the Trust.
  - (vii) The cost implications of maintaining national and local quality control of technical standards must be accepted.
  - (viii) There must be a budget for staff education involving senior medical staff, junior medical staff and biomedical scientists. This budget must include resources for continuing medical education (CME)<sup>(13)</sup>. There must also be a commitment to protected staff time for educational activity.
  - (ix) There must be active participation in clinical audit.
  - (x) Sufficient funding must be available to establish and maintain standards for Clinical Pathology Accreditation.

- (xi) Contractual arrangement must take into account present and future recommendations from professional bodies.
- (xii) There must be support for wider service commitment to infection control and to the epidemiology network.
- (xiii) When necessary, consultant pathologists must be allowed to make tertiary referrals for second opinions to specialist centres of their choice.

### **Development of Options**

- 5.6 The development of options and their evaluation are completely separate stages in the process.
- 5.7 Market Testing in essence consists of obtaining proposals from suppliers to provide a specific service which ultimately enables the buyer to make informed judgement about their value<sup>(11)</sup>.
- 5.8 Market Testing involves the development and evaluation of a number of management options. To compile a successful business case it is essential to look at ALL possible options, not just one or two that might represent a preferred outcome for a particular agency. This is necessary to avoid, as far as possible, biasing the final judgement.
- 5.9 Without this degree of detailed analysis it will be impossible to decide whether it is the actual process of Market Testing that has directly led to a better management operation. Essentially all other variables have to be avoided.

### **List of Options**

- 5.10 Market Testing is not the only option. A number of options must be considered, some of which are set out below:

#### ***Option***

The list of options must include an option of doing nothing to change the existing service. Although in practice this option would never be taken up, it provides the essential base line against which all other options can be compared.

#### ***Option***

No change in configuration of services, apart from upgrading buildings and changes of practice that would have to be made to comply with changing Health and Safety Regulations.

#### ***Option***

Complete review of all costing both capital and revenue to maximally improve efficiency of existing NHS pathology services.

#### ***Option***

Collaboration between existing NHS pathology services on one or more Trust sites.

#### ***Option***

Provision of service by collaboration between NHS pathology services and non-Trust agencies.



### *Option*

Plan for non-Trust agency to run existing services on an NHS site.

### *Option*

Plan for non-Trust agency to completely re-configure services with possible off site operation.

## **Evaluating the Options**

- 5.11 The next stage is benefit analysis which requires the development of a wide range of criteria against which to test the options.
- 5.12 These criteria will flow from, and reflect, the list of standards which were established at the beginning of the exercise.
- 5.13 The valuation of a particular option may well differ depending on the criteria against which it has been assessed<sup>(5)</sup>.
- 5.14 As an example, using the standards list (para 5.5) the criteria used to test the options could be as follows. This list is not in order of importance, nor is it exhaustive:
- Do the options provide and improve patient care?
  - Would they address the need for a comprehensive local service?
  - Would the service be consultant led?
  - Would they allow integration of other hospital units?
  - Would they provide a 24 hour service?
  - Would they be best for quality control?
  - Would they be best for training and education?
  - Would they be best for research not only in academic units but in all NHS hospitals?
  - Are they compatible with the Trust business plan and strategic objectives?
  - Do they ensure users would find the service satisfactory?
  - Do they ensure Clinical Pathology Accreditation (CPA) standards?
  - Is there support for clinical audit?
  - Do they support existing and on-going good relationships between provider and Trust?
  - Do they establish the credibility of the bidder both financially and professionally?

- Do they encourage the recruitment of consultant and scientific staff?
  - Do they include responsibility for the computer systems?
  - Are the computers used by the outside agency compatible with the Trusts systems?
  - Do they cover all laboratory departments including the mortuary service?
  - Do they allow for replacement equipment and maintenance of premises?
  - Would expansion of laboratory space be possible to accommodate future development of service?
- 5.15 The first round of analysis would probably eliminate a number of options on the basis of the evaluation criteria. However, once the list of options has been narrowed it may be necessary to refine the assessment process by giving a weighting value to the evaluation criteria. In the example above, if a particular option was satisfactory from all criteria except that it would no longer provide a consultant led service, it would be necessary to reconsider whether this single failure should be allowed to invalidate the bid.
- 5.16 Good long term relationships between purchaser and provider are important ingredients in the provision of good health care. This also applies to the relationships with clinicians in primary care. Therefore any new structure should provide not only immediate improvement in cost efficiency, but also enhance the long term benefits within the Trust.
- 5.17 Any outside agency must be checked for financial viability, as well as its competence and experience as a provider of a pathology service<sup>(2,12)</sup>.

## **SECTION 6**

### **SUCCESSFUL "IN HOUSE" BID**

- 6.1 To be successful, any "in house" bid by an NHS laboratory would need to be constructed by a thorough and rigorous analysis of existing costs. This may involve not only extensive restructuring within the department but possibly collaboration with pathology services of an adjacent Trust.
- 6.2 It is essential that any pathology department must be able to deliver the standard of service described in their bid. Therefore they must be aware of any potential consequences and be prepared to address any restructuring, regrading or redundancies that arise from a successful bid.

## **SECTION 7**

## UNSUCCESSFUL "IN HOUSE" BIDS

- 7.1 The unsuccessful "in house" bid will inevitably lead to extensive restructuring of pathology services.
- 7.2 The consultant pathologists may no longer be providers of laboratory services. In spite of efforts to define standards in the Market Testing process, this loss of influence may well lead to the service no longer being developed from the point of view of medical excellence, but solely led by commercial motives.
- 7.3 Even though most consultant pathologists may retain their Trust contracts the career prospects of many may suffer in respect of diminished career development and professional satisfaction. For those whose contract is transferred to the new company it would be difficult to guarantee the same degree of job security and long term prospects.
- 7.4 Of equal importance are the careers of the biomedical scientists and other personnel in pathology departments <sup>(13)</sup>. If they are no longer employed by the Trust it is important before the event, to ensure that any contractual arrangements, in terms of career structure and pension plans, are carried over by the new providers of the service. Whilst a department run by a commercial firm may offer short term advantages, even increased employment, long term stability will depend on commercial success.

## SECTION 8

### MONITORING AND AUDITING THE SUCCESSFUL BID

- 8.1 The Market Testing process is valuable, mainly to improve short term cost efficiency. The initial process is expensive and time consuming and cannot be repeated at too frequent intervals. However, it is vitally important to put in place a system monitoring the quality of the service as judged by control standards and user satisfaction<sup>(13)</sup>. The process should be monitored by establishing local Trust hospital teams consisting of Medical Director, Pathologists, Finance Director and Contract Managers together with representatives from primary care.
- 8.2 In non-clinical areas, for example laundry services, Market Testing resulted in a 45% reduction in staff, initially producing a cash saving of 40%. However assessment 4 years later showed that only 12% of the total savings resulted from Market forces. The focus of continuing competitive tendering on saving costs must be associated with ongoing improvements in efficiency.
- 8.3 Outside agencies may initially "promise the earth" to win the contract and these promises should be counteracted by careful analysis of the bids at the time of the initial Market Testing. Of equal importance is the capacity of the Royal College of Pathologists together with other bodies such as fellow colleges, to be able, where necessary, to impose sanctions such as not recognising posts and removing training authorisation. Imposition of sanctions would be much better than seeking legal

redress as the complexity of contract law could make the outcome of such disputes far from certain.

## SECTION 9

### PRIVATE FINANCE INITIATIVE

- 9.1 Market Testing identifies the most cost effective option. If capital development is indicated<sup>(7)</sup> the option selected can then be developed into an Outline Business Case (OBC) to obtain the necessary funding.
- 9.2 All major capital and service developments are currently subject to the Private Finance Initiative (PFI) and it must be shown that serious consideration has been given to private financial options before Treasury funds can be allocated. In a successful PFI, the private sector provides capital finance and owns the asset.
- 9.3 The aim of PFI is for the NHS to benefit from the private sector's financial, design and project management skills to help obtain better value for money. There would also be wider access to capital funds than currently available through the public sector.
- 9.4 Presentation of OBCs for consideration either for private finance or Treasury funds is a complex process. For a successful submission, a management consultancy firm will almost certainly have to be employed though the expertise required may differ from that needed in the original Market Testing exercise.
- 9.5 Following a rigorous Market Testing exercise a substantial number of capital development projects could be taken forward for PFI and it is wrong to waste time and money on projects that might prove unsuitable. A central data base is being set up by the NHS Executive (NHSE) of the type of capital projects that are likely to succeed with PFI<sup>(6,17)</sup>. This information can be accessed through Regional Offices. Outline Business Cases (OBC) approval by Regional Offices will be conditional on following the plans and timetable for testing PFI for the project.
- 9.6 To satisfy Treasury guidelines on the PFI it is imperative to examine all the risks involved in OBCs and to ensure there will be genuine and substantial transfer of risks from the public to the private sector. These may include performance risks (both financial and non-financial), demand risks and availability risks. To share risks associated with variations in working patterns, payments should be linked to activity levels.
- 9.7 It may not be necessary for every part of a scheme to be financed in the same way. A joint venture in which both private and public sectors contribute capital to the project as well as both sharing the returns may provide a more effective solution. However, it should be noted the NHS should not hold equity in or earn money as part of a separate legal entity. The capital could be for pathology in return for facility managing non-clinical services (domestic, catering, portering). This might put pathologists in a difficult position within a Trust if they are seen to be improving the position of their service at the expense of others.

- 9.8 It is essential that any project with a private sector partner must be funded in a way that maximises the net present and future value for the public sector.
- 9.9 Following the business case review, feasibility study and assessment of risk allocation, a formal contract can be developed either with the private sector partner or the Treasury.

## SECTION 10

### CONCLUSIONS AND RECOMMENDATIONS

- 10.1 In the current climate there will be an extension of the Market Testing process which, at present, cannot be resisted.
- 10.2 The process is expensive, all alternative measures of achieving efficiency should be explored before resorting to Market Testing.
- 10.3 The process of Market Testing should be used for clearly defined purposes as, for example, to gain access to further capital and business expertise.
- 10.4 Ongoing monitoring of continuing efficiency improvements is essential.
- 10.5 Cost savings must be achieved by gains in efficiency rather than cuts in volume or quality of the pathology services.
- 10.6 The career prospects and conditions of service of consultant pathologists and all members of pathology departments must not be diminished as the result of a Market Testing exercise.
- 10.7 The College should provide guidance to all members on how to handle the process.
- 10.8 The College should develop and maintain a national database concerned with the process, results and progression of Market Testing.

## SECTION 11

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