

Primary care and community contracting

Top 10 contracting tips

Our primary care and community contracting team deal with a wide range of contracting queries from PCTs and LHBs. We are aware of recurring issues which arise in relation to the negotiation and drafting of contract terms, and have put together these tips for good practice which may help you avoid some common contracting pitfalls.

1. Get the basics right

The essential ingredients of a legally enforceable contract are clear and comprehensive descriptions of the following:

- The **parties** to the contract
- The **subject matter** of the contract (e.g. the service to be provided)
- The **price** to be paid
- The **quantity** or **volume** of the service to be provided
- The **time** for which the contract will have effect

It is also important that service specifications clearly define the scope of the service and provide an objective basis for determining whether or not the required service has been delivered (such as KPI's).

If any of the above are not clearly addressed in contract documentation there may be arguments as to what has been agreed, or the agreement may simply be considered to be so vague as to be unenforceable by a court or the NHSLA.

2. Pre-contract negotiations

There may be a process of negotiation before contracts are agreed, so it is vital that matters discussed during such negotiations can be clearly distinguished from the final agreement reached by the parties. One way of achieving this is by heading pre-contract correspondence as being "subject to contract".

3. Sign contracts sooner rather than later

Clients sometimes see little point in signing contracts with providers until a service is ready to commence. In addition, circumstances sometimes arise whereby a service commences without a contract in place. It is important contracts are signed as soon as possible following the conclusion of negotiations to ensure that providers are legally bound to commence a service, even when the anticipated service commencement date may be months away. Otherwise, there is a risk that a provider may seek to walk away and the PCT/LHB's means of legal redress may be severely limited.

4. Ensure contracts are properly executed

The requirements for validly executing contracts vary between different kinds of business organisations such as companies and partnerships. PCT/LHB's should seek to ensure that those signing on behalf of providers are authorised to do so. The means by which PCT/LHB's should execute contracts is usually set out in their standing orders or standing financial instructions.

5. Read the fine print

Be sure to read through contracts when they are presented to you for signature. Although rare, it is not unknown for contracting parties to present agreements for signature which, while at first glance appear to reflect the outcome of the parties' negotiations, may contain some significant changes. In addition, providers' standard terms and conditions are often (understandably) heavily weighted in their favour. Courts assume those who sign contracts have read their contents and are generally not sympathetic to those who fail to do so.

6. Fill in the gaps

NHS model contracts often contain various 'blanks' which must be completed by the parties. In addition, some of the optional clauses are mutually exclusive so that failure to choose one or the other may make it difficult to determine what the parties have actually agreed. Ambiguous clauses can be declared void by a court or, where the ambiguity relates to a fundamental point such as those referred to in the paragraph above, the entire contract may be unenforceable.

7. Check the underlying law

Health services which form the subject matter of a contract between a PCT/LHB and a provider often involve activities which are regulated by legislation. This may include, for example, the Medicines Act 1968, the Care Standards Act 2000 or the Data Protection Act 1998. You should ensure that contract terms are consistent with, and subject to, the requirements of relevant legislation. A contractual provision which obligates a provider to act in breach of the law is void.

8. Obtain indemnities

On occasion an individual who suffers harm at the hands of a provider may choose to sue the PCT/LHB who commissioned the care rather than the provider itself. You should therefore seek to ensure your organisation has the benefit of an indemnity from the provider in respect of any claims which may arise.

9. Protect your right to vary the contract

The NHS is constantly changing and there is a risk that contractual provisions may be superseded by changes in legislation, Department of Health/Welsh Assembly Government guidance or local policies and procedures. You should seek to retain the right to unilaterally vary contracts held with providers to take account of such changes.

10. Comply with notice requirements

Where you are seeking to decommission a service, pay particular attention to the requirements set out in the contract regarding notices of termination. Failure to strictly observe notice requirements may mean that an attempt to terminate a contract is ineffective. Providers will obviously be pedantic about such issues where a successful termination will mean the loss of a significant source of revenue.

As effective commissioning assumes an ever more important role in the way in which the health service operates, you should seek to ensure that contract terms are robust and that relationships with providers are actively managed. If you have any queries regarding primary care contracting issues please contact:

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