

2018/19 Contract Alignment Exercise Guidance on the national process for resolving disputes

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Background and scope

This document sets out the national approach to managing contractual disputes between NHS commissioners and Trusts under the 2018/19 Year To Date Contract Alignment Exercise.

Resolving in-year contract disputes

1.1 The dispute resolution process within the Contract

The dispute resolution process, set out within the Contract at General Condition 14, comprises three stages:

- **Escalated Negotiation** – that is, discussion at Director and Chief Executive level;
- **Mediation** – discussions between the parties facilitated by an external body or bodies (such as NHS England and NHS Improvement), aimed at enabling the parties to reach agreement; and
- **Expert Determination** – the appointment by the parties of an independent expert who will examine the local contract and the parties' arguments and reach a decision, binding on the parties, as to the basis on which the dispute is to be settled.

1.2 Expectations where disputes involve NHS Trusts or FTs

In cases involving either an NHS Trust or an NHS Foundation Trust, NHS England and NHS Improvement's expectation is that disputes will be kept to an absolute minimum. It should be utterly exceptional for any dispute to reach the Expert Determination stage; this would be seen as a failure on the part of the local parties involved. Any disputes which do arise must be resolved swiftly and in a cost-effective manner, without excessive expenditure on third-party input.

We have therefore set out below a process which we strongly recommend should be followed in relation to in-year disputes between NHS commissioners and NHS Trusts / Foundation Trusts, identified as part of the ongoing Year To Date Contract Alignment Exercise.

1.3 Advice

Where there is a risk of dispute, the parties are encouraged to seek advice from NHS England and NHS Improvement. NHS England and NHS Improvement can help to clarify the issues, interpret guidance, share knowledge of how other parties have resolved similar disputes, and in appropriate cases make suggestions about the management of the negotiation process.

Advice on technical issues is available as follows:

- on the 2017/19 NHS Standard Contract and CQUIN through the Contract Technical Guidance and CQUIN guidance, available via <https://www.england.nhs.uk/nhs-standard-contract/17-18/> and <https://www.england.nhs.uk/nhs-standard-contract/cquin/cquin-17-19/> and through the email helpdesks nhscontractshelp@nhs.net and e.cquin@nhs.net; and
- on the National Tariff Payment System for 2017/19 through the guidance available via the email helpdesk pricing@improvement.nhs.uk.

NHS England and NHS Improvement will not, however, make decisions on behalf of the disputing parties when offering advice. When it appears that mediation rather than advice is required, NHS England and NHS Improvement will consult with the parties and consider offering mediation themselves – or they may offer to arrange the services of a third party, as described in the next section.

CCGs and Trusts are urged to discuss potential disputes with their NHS England financial assurance manager or NHS Improvement finance lead respectively, at the earliest opportunity. They will be able to provide advice on technical issues and assist organisations in achieving resolution by ensuring there is a thorough and joint understanding of their positions.

Direct commissioning teams should discuss any potential disputes with the NHS England Regional Directors of Finance and Commissioning.

1.4 Arranging mediation

Where local parties are not confident of reaching agreement on contract disputes, mediation paperwork should be submitted to NHSE/NHSI regions.

Local decisions on whether mediation is required should be made by no later than 30 November 2018. After agreeing the position with the provider, the Co-ordinating Commissioner must email NHS England and NHS Improvement, using the contact details set out in Appendix 3, and copying the provider, to confirm whether the parties are:

- entering local mediation, and therefore wish to agree if this will be offered by NHS England/NHS Improvement or if an external mediator will be appointed (all cases involving NHS England as commissioner); or
- confident of agreeing their Variation by the national deadline and therefore not entering mediation.

The appointed mediator will require briefing as to the nature of the issues on which the parties have been unable to agree. At the stage of entering mediation, therefore, the parties must complete Appendices 1 and 2 and provide these to the mediator. This paperwork will facilitate a common understanding of the outstanding issues, support the mediation process and therefore improve the prospect of facilitated resolution so as to avoid expert determination.

To assist the mediator, Appendix 1 must be a joint statement from the two parties, with Appendix 2 being completed jointly with each party setting out the justification for the position it has taken on each disputed issue. All paperwork must be shared between the parties to ensure transparency of opinion on the disputed items. Any paperwork submitted that has not been completed on the terms outlined above will be returned to the parties for revision/correction.

1.5 Principles of mediation

The core principle of mediation is that the mediator does not impose solutions; rather, ownership for solutions remains with the parties themselves.

Mediators can have impact at three levels. They can:

- restructure the process – the mediator may push for changes to the negotiating process. For example, the mediator may attempt to de-couple issues, pushing the parties to ‘bank’ what can be settled rather than adopting a ‘nothing is agreed until everything is agreed’ attitude;

- facilitate the discussion – as well as redesigning the process, the mediator may also join the conversation. For example, a mediator can calm tensions by recommending speakers rephrase statements; and
- engage on the content – the mediator can go further than restructuring the process and guiding the discussion: they can engage on issues of content. For example, the mediator can propose (non-technical) solutions that draw on elements of each party's offer or generate a creative solution by looking at the issue in a new way.

1.6 Principles of Expert Determination

Where, despite mediation, disputes have not been resolved by 21 December 2018, the parties will enter the Expert Determination stage of the dispute resolution process. Parties that fail to reach agreement by the national deadline will be required to present themselves to the Chief Executives of NHS Improvement and NHS England (or their representatives) to explain the nature of their dispute and why they have been unable to reach agreement.

Expert Determination is a different process from the Arbitration Panel arrangements which apply in the national dispute resolution process relating to new contracts – although both involve the use of an objective third-party to determine the outcome of the dispute. The fundamental differences are that

- the parties appoint and pay the Expert, whereas the Arbitration Panel is appointed by NHE England and NHS Improvement and funded through charges levied on organisations entering arbitration
- the Expert reaches his / her determination based on interpretation of the agreed contract and can give a more nuanced decision, striking a balance between the parties' positions – whereas the Arbitration Panel makes its decision on a binary 'pendulum' basis, siding entirely with one party or the other.

1.7 Expert Determination process

The key steps in the Expert Determination process, set out with timescales in General Condition 14 of the Contract, are as follows.

- Where mediation has not been successful, either the commissioner or the provider will refer the disputed issue or issues for Expert Determination by submitting an Expert Determination Notice to the other party, setting out the questions to be resolved and the solution it believes it is entitled to. (Technically, it is possible that the commissioner may choose to refer some issues, and the provider may separately refer others – but the completion of Appendix 1 as part of the mediation process should generally allow all disputed issues to be dealt with through a single referral.)
- Once an Expert has been identified and engaged, the party initiating the dispute must submit a detailed statement of case to the Expert, copied to the other party and setting out details of the circumstances giving rise to the dispute, the reasons why it is entitled to the solution sought, and the evidence upon which it relies.
- The party responding to the dispute then has the opportunity to submit a response to the Expert, giving details of what is agreed and what is disputed in the statement of case and the reasons why.

- On the basis of this information – and any further information which the Expert requests or gathers through other routes such as interviews or site visits – the Expert then reviews the issues and produces a written report giving his/her decision, which the parties are then contractually obliged to implement.

Where Expert Determination is required, it is vital that the process is carried out swiftly and at minimum cost. It is essential that there is no waste of scarce public resources, particularly in terms of expensive external legal input, on resolving disputes within the NHS family. With this in mind, NHS England and NHS Improvement have put in place arrangements to support the Expert Determination process as set out below. Where disputes requiring Expert Determination involve NHS Trusts and Foundation Trusts, it is very strongly recommended that these support mechanisms are fully utilised.

- NHS England and NHS Improvement have identified a small pool of individuals who have suitable experience to fulfil the role of Expert, who are prepared to provide their services at a reasonable and competitive day rate and have agreed to conduct expert determinations in accordance with the terms set out below and in the Expert Determination Agreement (see below). These individuals have served as members of the national Arbitration Panel or Independent Trust Financing Facility or have been identified via NHS IMAS.
- Experts from this pool will have direct access to specialist advice from the teams at NHS England and NHS Improvement which deal with national business rules, such as the National Tariff, the NHS Standard Contract and CQUIN. Advice from national teams will of course be free of charge. However, subject to the terms of the local Expert Determination Agreement (see below), the Expert may also, where unavoidable, call upon additional third-party expertise which would be charged to the parties in dispute.
- To ensure consistency in decision-making by Experts, NHS England and NHS Improvement have also put in place appropriate arrangements for independent peer review of Expert reports.
- Where a commissioner or provider triggers the Expert Determination process, therefore, it should contact NHS England and NHS Improvement, using the contact details at Appendix 3. NHS England and NHS Improvement will then allocate an appropriate Expert from the national pool, ensuring that any potential conflicts of interest are avoided.
- NHS England and NHS Improvement have also made available a model Expert Determination Agreement. This can be adapted locally as necessary and used to underpin the engagement of the Expert by the commissioner and provider.
- Local organisations should ensure that, in appointing Experts, they comply with any requirements set out in their Standing Financial Instructions and any approval requirements from NHS Improvement / NHS England such as the consultancy spending criteria in place.

1.8 Overall timetable

The intended timetable for Expert Determination for in-year disputes identified through the 2018/19 Year To Date Contract Alignment Exercise is set out below. This reflects the expectation in General Condition 14 of the Contract that the Expert will complete his/her work and issue his/her determination within 30 working days of receipt of a clear brief from the parties in dispute.

Stage	Date
Local decision whether or not to enter mediation, and communication of this to NHS England and NHS Improvement	By close of business on Friday 30 November 2018
Mediation undertaken	Monday 3 to Thursday 20 December 2018
National deadline for reaching agreement on 2018/19 YTD disputed issues If mediation unsuccessful and disputes not resolved, one party triggers the Expert Determination process by issuing an Expert Determination Notice and contacts NHSE / NHSI to access pool of Experts(submitting an updated copy of Appendix 1 and Appendix 2)	Friday 21 December 2018
Parties to present themselves to the Chief Executives of NHS Improvement and NHS England (or their representatives).	7-11 January 2019
Expert selected and Expert Determination Agreement signed locally, clarifying questions for the Expert to answer	18 January 2019
Party initiating dispute supplies detailed statement of case to the Expert, copied to other parties	25 January 2019
Party responding to dispute replies to Expert, copying other parties, giving its position on the issues	1 February 2019
Expert reviews the parties' written statements, carries out any necessary investigations and provides written Determination to the parties	No later than 15 March 2019
Parties take the necessary local action to give effect to the Determination	Immediately thereafter

Questionnaire for parties entering mediation

These notes are intended as a guide for completion of the template, which must fill no more than two sides of A4 when submitted.

1. Name of commissioner	2. Name of provider
3. Key contact at commissioner (name and full contact details)	4. Key contact at provider (name and full contact details)
<i>This should be the person to whom all queries and requests for further information should be addressed</i>	<i>This should be the person to whom all queries and requests for further information should be addressed</i>
5. What are the issues under dispute?	
<i>List all of the disputed issues briefly and factually, giving the value of each</i>	
Issue 1 Description	
Commissioner Proposal	£X
Issue under dispute	£X
Difference	£X
6. What is the total value of the dispute?	
<i>Complete the table below; the difference should equate to the sum of the disputed issues.</i>	
Commissioner proposed contract value	£X
Provider proposed contract value	£X
Difference	£X
7. How have you attempted to resolve this dispute and why have you been unable to?	
<i>Must demonstrate that negotiations have been escalated to chief executive / chief officer level</i>	
8. Is there anything else the Mediator needs to know?	
9. Signature of Chief Executives	
Name of Chief Executive Email: Date:	Name of Chief Executive Email: Date:

Summary of disputed issues

Area	
<i>Issue 1 – heading</i> <i>Please complete a new sheet for each dispute.</i> <i>The summary for each dispute should not be more than 2 sides of A4 and must not include any embedded documents.</i>	
Issue	
<i>Provide brief description of issue under dispute</i>	
Value of each issue under dispute	
<i>Agreed difference in value for each issue (£s)</i>	
Guidance	
<i>Please specify any relevant guidance that you have used in making your cases</i>	
View from XX Trust	View from XX Commissioner
<i>Please provide a concise description of the dispute</i>	<i>Please provide a concise description of the dispute</i>

Contact details for 2018/19 mediation and expert determination

The contact e-mail addresses for arranging mediation and expert determination are set out below. Please refer to the main body of the guidance for process and timetable details and Appendices 1 and 2 for standard templates that must be submitted.

NHS England contact details:

NHS England region	Contact email address
North	england.planning-north@nhs.net
Midlands and East	philipmorris@nhs.net
London	england.londonsubmissions@nhs.net
South	ENGLAND.Financesouth@nhs.net

NHS Improvement contact details:

NHS Trust region	Mediation and arbitration papers email address for submission
North	NHSI.planningnorth@nhs.net
Midlands and East	NHSI.planningmande@nhs.net
London	NHSI.planninglondon@nhs.net
South	NHSI.planningsouth@nhs.net