

Lessons learned from contract dispute resolution

Top ten helpful hints for commissioners
and providers to avoid conflict

NHS England
NHS Improvement

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Below we set out some lessons which we think can be learned from recent experience of contract dispute resolution across the country:

- 1. Make sure that you are familiar with national business rules (National Tariff, the NHS Standard Contract, CQUIN).** Being clear about the national rules will limit the time you waste on avoidable local disputes. Do not assume that you remember everything correctly, re-read the contract and guidance, making sure you have found the relevant sections.
- 2. If there is disagreement or doubt about how the national business rules are to be understood, seek advice.** The relevant national teams at NHS England and NHS Improvement all offer email helpdesk support. Please refer to the list of useful websites at the end of this document.

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3. Remember that a dispute is likely to be resolved on the basis of what your local contract **actually says**. So:
 - ✓ **ensure that your local contract covers all of the important matters you have agreed before you sign it:** it must be absolutely clear to both parties (and to anyone else reading the contract) what the provider is expected to deliver and how much it will be paid for doing so;
 - ✓ **avoid “long-stopping” difficult issues to be resolved after contract signature** – that is not what GC4.1 and Schedule 1A are there for; make sure you complete all of the relevant schedules; you can use Schedule 2G to include local agreements which do not neatly fit in other schedules, but remember that they must not contradict the nationally set terms of the contract;

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- ✓ **make sure that the wording you use to document important local agreements is clear.** Disputes often arise because the two parties interpret locally-agreed wording in their contract in different ways. So don't assume that time spent getting the wording of such agreements right is time wasted – rather, put the effort in up front to ensure that all the parties have exactly the same understanding of the agreement. If in doubt, stress-test draft wording with colleagues who are not close to the issues and/or with some “what if” scenarios so that everyone is clear, in advance, what the agreement will mean under a range of different outcomes; and
- ✓ **if you agree something new and material after signing your contract, vary the contract immediately (following the process set out in General Condition 13), so that the new agreement is included within it and its nature and status are clear;** for important matters, be cautious about relying on exchanges of correspondence or meeting notes as a record of what has been agreed, the status of these may allow doubt in a way that a formal contract variation will not. For particularly critical content, it may be worth seeking external advice to review or draft wording to ensure that it is clear, unambiguous and in keeping with the rest of the contract.

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4. **Your ability to exercise your rights under the contract may be jeopardised if you don't follow contract processes properly.** Pay particular attention to these three areas:
- ✓ **Contesting payment.** Other than for block contracts, the contract sets out a process for monthly financial reconciliation in Service Condition (SC) 36 – with a clear deadline, each month, by which the commissioner must raise formally any issues which it wants to contest. **So follow the discipline of this monthly reconciliation process, rather than assuming that you can “save up” issues and raise them at the year-end;** if you do the latter, then – as a general rule, subject to point 5 below – you will have missed your opportunity.
 - ✓ **Notifying and agreeing changes to services.** Providers should not assume that they are at liberty to change the nature of the services they provide or the way they provide them at their own discretion. A material change to services or the way in which a service is provided is likely to require a variation to be agreed under GC13. The scope which a provider has to make changes without an agreed variation will depend on how tightly or loosely services are defined and prescribed in the contract service specifications.. But as a general rule, **providers should ensure that they seek commissioners' consent to planned service changes as proposed variations;** if they make such changes without commissioner agreement, the commissioner may be entitled under the contract to refuse to meet any increased costs which ensue.

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- ✓ **Notifying counting and coding changes. Providers must tell their commissioners in advance (usually by 30 September of one contract year for implementation at the start of the following year) about any systematic changes which they are planning to make to the recording of activity.** If the provider implements a change without notification, the commissioner will be likely to contest payment of the financial impact; the commissioner can insist that notice is given properly in the following contract year; and the date from which the provider can earn ultimately additional income from the change will be deferred by a further year. **The duty to notify proposed changes to activity recording applies equally to commissioners, of course.**

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5. **Disputes can often centre on whether a party can gain financial redress for a historic issue which has had a financial impact over months or even years.**
 - ✓ Although payment under the contract is chiefly governed by SC36, with its monthly process and deadline (see 4 above), other sections of the contract set out other rights which providers and (particularly) commissioners have affecting payment. These include the provisions of GC 9 (Contract Management), GC11 (Liability and Indemnity), GC13 (Variation), GC15 (Governance, Transaction Records and Audit), SC28 (Information Requirements) and SC29 (especially breach of Prior Approval Scheme). Generally, speaking, these rights are not subject to the monthly deadlines set out in SC36, so there is greater scope for them to be applied retrospectively.
 - ✓ **If in doubt about the extent to which a party can seek retrospective financial redress under a contract, commissioner and provider should seek advice jointly from nhscb.contracts-help@nhs.net.** (Bear in mind that each new contract is a separate agreement, and matters arising in past contracts will be governed by the content of that contract, not by the current contract).

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6. The contract rules on **Managing Counting and Coding Changes** (SC28) involve obligations to notify proposed changes and to neutralise their financial impact for specified period. They are carefully balanced to be fair to both commissioners and providers – but they are complex and can be a source of disputes.
 - ✓ So read the detailed section (section 44) of the **Contract Technical Guidance** which explains how the contract provisions should be understood and ensure that you follow your obligations under them. If in doubt about a specific scenario, commissioner and provider should seek advice jointly from nhscb.contractshelp@nhs.net.

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7. Where a disagreement arises, **a local audit of the provider's practice can often be a useful tool in reaching a resolution.** External third-party audits can be arranged under GC15, or the parties can separately agree, for instance, that the provider itself will carry out an audit and report the results to the commissioner. **But difficulties often arise where audits are carried out without clear agreement on their purpose and scope and on how their findings are to be given effect.** Specifically:
- ✓ note that, for third-party audits, GC15 sets out clear provisions on when the audit findings are to have retrospective financial impact and for how long – and when not;
 - ✓ for audits undertaken outside GC15, it is essential to agree, in advance, on whether the audit findings are to have any retrospective financial impact (and if so for how what period) or are to affect Trust practice / commissioner payment only prospectively; and
 - ✓ for audits of any kind, it is essential to agree in advance whether any financial adjustments are to apply only to the specific cases audited or whether the overall financial adjustment is to be calculated by extrapolation from the audit sample to the full range of relevant cases (which will in turn raise questions of sample size and statistical significance).

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8. **Disputes will be minimised if commissioners and providers take a reasonable approach to in-year financial reconciliation and contesting of payment and avoid “gaming”.**
- ✓ Commissioners – only contest payment under the SC36 reconciliation process where you have proper grounds to do so and can make a reasoned case, with evidence, for why payment should not be made. Don't put forward an inflated list of spurious 'challenges' as a bargaining chip, knowing that you will later withdraw most of them – that just wastes everyone's time and energy.
 - ✓ Providers – don't seek to benefit in-year from improvements in your activity recording which you have not properly notified under SC28 (see 6 above). If you become aware of changes which you should have notified and have not done, be transparent about what has happened and offer to make good the financial impact.
 - ✓ Don't let disputes build up over the year, act quickly as soon as a disagreement arises. Organisations should ensure appropriate governance is in place through reporting contract disputes and associated financial risks to Audit Committees, Boards and Governing Bodies.

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9. If a serious disagreement starts to emerge locally, discuss it fully with the other party, before entering the formal dispute resolution process set out in GC14.
- ✓ The timing of when and whether to initiate the GC14 process is a local decision for the injured party – except under the financial reconciliation process at SC36.45, where the contract allows a period of four weeks for local discussions before the GC14 process must be triggered. There is a balance to be struck here – the dispute process should not be triggered lightly, but nor should serious issues be allowed to continue unresolved for months.
 - ✓ Remember that the first stage of the formal dispute resolution process (Escalated Negotiation) simply involves discussion between senior officers (Directors / Chief Executives). **Ensuring that Escalated Negotiation is based on a full understanding of each party’s position – and the scope for compromise – will often resolve the issue.**
 - ✓ Where Escalated Negotiation fails, a resolution must be sought through the second stage (Mediation, facilitated by a third party). Mediation involves the third party facilitator helping the parties resolve the dispute themselves. The facilitator is impartial and can help the parties see opportunities for compromise and practical solutions. A resolution reached through mediation will be more likely to preserve local relationships than one imposed through the third stage, Expert Determination. **So approach mediation with commitment and good faith.**

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10. **And – most important of all, remember that an effective contractual relationship is not all about what’s in the contract and how it is enforced. Rather, it will be underpinned by:**
- ✓ **shared goals and good relationships between commissioner and provider;**
 - ✓ **good faith and integrity on either side; and**
 - ✓ **a culture of reasonableness, transparency and trust, with good ongoing communication.**

If you don't have that sort of relationship now in your local patch, think about why that is and try to do something about it. That will be the most effective way of preventing local disagreements from arising in the first place and from escalating into formal and potentially time-consuming / expensive contractual disputes.

Useful websites



NHS Standard Contract:

Available via <https://www.england.nhs.uk/nhs-standard-contract/>

Current Contract Technical Guidance available at <https://www.england.nhs.uk/publication/nhs-standard-contract-2017-18-2018-19-technical-guidance-may-2018/>

Helpdesk for queries nhscontractshelp@nhs.net

National Tariff Payment System:

Current guidance available at <https://improvement.nhs.uk/resources/national-tariff-1719/>

Helpdesk for queries pricing@improvement.nhs.uk

CQUIN:

Current guidance available at <https://www.england.nhs.uk/nhs-standard-contract/cquin/cquin-17-19/>

Helpdesk for queries e.cquin@nhs.net

NHS Data Dictionary:

Available via <https://digital.nhs.uk/services/nhs-data-model-and-dictionary-service>

Helpdesk for queries informationstandards@nhs.net

Responsible Commissioner:

Current Who Pays? guidance available at <https://www.england.nhs.uk/who-pays/>

Helpdesk for queries england.responsiblecommissioner@nhs.net

Commissioner Assignment Method guidance available at <https://www.england.nhs.uk/data-services/commissioning-flows/>