Annex C2
Guidance on the process for agreeing Variations and resolving disputes.
Updating two-year contracts for 2018/19

Contents

1 Background and scope

National planning guidance published in September 2016 (*NHS Operational Planning and Contracting Guidance 2017 – 2019)* set a clear expectation that commissioners would agree two-year contracts with all of their major providers, covering 2017/18 and 2018/19.

In this context, this document

- describes the provisions within the NHS Standard Contract which deal with variation and updating of contractual terms during the course of a multi-year contract;
- reminds commissioners and providers of the arrangements in the Contract for dealing with disputes which arise once contracts have been signed; and
- sets out the expectations of NHS England and NHS Improvement as to how any disputes on updating of contracts for 2018/19 are to be dealt with (with particular regard to NHS Trusts and Foundation Trusts).

Although we anticipate that commissioners will generally already have two-year contracts in place, there may be some circumstances where they need to agree new contracts with their major providers for 2018/19. Separate guidance, updated from 2017/18, has been published describing the national arrangements for resolving disputes in relation to the agreement of new contracts; this is available at https://www.england.nhs.uk/deliver-forward-view/.

2 Updating contracts for 2018/19

The national expectation was that, in signing their two-year contracts in December 2016, commissioners and providers would be able to reach comprehensive agreements covering both years – and, in such cases, there will be no need for any form of contract updating for the second year, 2018/19. However, there may be instances where some aspects of two-year contracts will need to be revised in advance of the 2018/19 Contract Year; revised projections for future activity levels may be required, for instance, reflecting more recent actual data and demographic projections and the impact of updated QIPP/efficiency plans may need to be reflected.

Changes of this kind would update the content of the locally-populated Schedules of a contract and would be given effect through a Variation to the contract. The Variation process is set out in General Condition 13 of the NHS Standard Contract, and further guidance on the practical process for implementing a Variation, including a template Variation Agreement, is available via https://www.england.nhs.uk/nhs-standard-contract/17-18/.

The parties may not immediately see eye-to-eye in respect of such updates. In order to minimise the risk of avoidable disputes, we have re-stated below the key provisions of the Contract which will affect a Variation for 2018/19.

2.1 Overall approach to Variation

The implicit expectation in the Contract is for sensible negotiation between the parties, in good faith, to agree updated schedules where necessary.

As a general rule, a Variation must be agreed by both parties: it cannot be imposed by one on the other (a National Variation, of course, may be mandated by NHS England). In the absence of agreement to vary the local contract, its original terms will remain in place and will continue to apply.

However, the national terms of the Contract do set out specific default positions in certain key areas, which will apply where local agreement to update specific Schedules for a new Contract Year cannot be reached. These are described further below.

2.2 Indicative Activity Plan

The Contract sets out in Service Condition 29.5, that the parties should seek to agree an updated Indicative Activity Plan (Schedule 2B), in advance of the new Contract Year.

The two-year contracts agreed in December 2016 may, of course, have set out a firm Indicative Activity Plan for 2018/19 as well as 2017/18 – and the parties may be content that the 2018/19 Plan remains appropriate. Where this is not the case, however, NHS England and NHS Improvement expect commissioners and providers to hold sensible discussions to agree realistic, updated Indicative Activity Plans for 2018/19. These must

- take, as their starting point, current actual levels of activity (unless otherwise agreed locally, for the 12 month period up to September 2017);
- take appropriate account of changing health needs and demographics, planned changes in commissioning policies or patient flows, and the requirements for patient waiting times; and
- reflect robust plans for efficiency/QIPP schemes, with these based on sound clinical engagement and containing measurable objectives, success criteria and milestones, ensuring that there is sufficient capacity to meet demand in a safe and sustainable way.

Technically, the Contract (again at Service Condition 29.5) sets a default position that, where the parties cannot agree an updated Indicative Activity Plan, a zero plan will apply. The impact of this is that there would be no agreed Expected Annual Contract Value – so the provider would invoice retrospectively for activity undertaken, rather than being paid prospectively. Retrospective invoicing is the norm for non-contract activity, of course, where very low volumes are involved – but, in other cases, moving to retrospective invoicing would have serious consequences for cash-flow, payment of staff and levels of central financial support. As a general rule, therefore, an Indicative Activity Plan of zero is not acceptable within contracts between NHS commissioners and Trusts, and all parties must ensure that this outcome is avoided.

2.3 Local Prices

Local Prices (set out in Schedule 3A) apply to those services where National Tariff Payment System guidance does not specify a price to be paid. They may be prices for specific treatments or activities or broader block payments for a range of services.

The parties may have set out specific Local Prices for each Contract Year in their contract – in which case no Variation will be necessary. Or they may have described within the contract an annual adjustment mechanism for Local Prices – in which case the Variation will be a matter of applying that agreed mechanism, rather than a matter for negotiation.

Where neither of these is the case, the Contract states that the parties must review and agree updated Local Prices for 2018/19. But the default position in the absence of agreement, set out in Service Condition 36.9, is that the Local Prices for 2018/19 will be the Local Prices for 2017/18, adjusted for the 2018/19 efficiency and uplift factors set out in National Tariff Payment System guidance.

The efficiency requirement for 2018/19 set out in National Tariff Payment System guidance is 2%; the cost uplift factor, excluding CNST allocated to specific chapters, is 2.1%. For full information, see the detailed guidance at:

https://improvement.nhs.uk/resources/national-tariff-1719/.

2.4 Expected Annual Contract Value

Updating the Indicative Activity Plan and applying to it the updated Local Prices as well as any relevant National Prices will then give a revised Expected Annual Contract Value (Schedule 3F), and this should be included within the agreed Variation.

We understand that there may be instances where agreed contracts contain an Expected Annual Contract Value for 2018/19, but without an Indicative Activity Plan for 2018/19. In this situation, the parties should ensure that the Indicative Activity Plan is updated for 2018/19 in accordance with section 2.2 above and the Expected Annual Contract Value for 2018/19 is then also updated, so that the two are fully aligned.

2.5 Local Quality and Reporting Requirements

Local Quality Requirements – locally-determined standards or outcome measures – are set out in Schedule 4C. Local Reporting Requirements – datasets or reports to be submitted by the provider to the commissioner locally – are set out in Schedule 6A. When these are updated for 2018/19, the general rule of 'sensible negotiation in good faith' will apply – but the default positon is as described in paragraph 2.1 above, ie the requirements agreed in the original signed contract remain in place, unless the parties agree a Variation to update them.

The Contract does, however, set out some specific provisions in these two areas which are worth highlighting.

- **Local Quality Requirements.** The Contract makes clear at Service Condition 37.3 that, other than in exceptional circumstances, Local Quality Requirements for 2018/19 must not be lower or less onerous than those for 2017/18.

- **Local Reporting Requirements.** Commissioners should specifically be mindful of the requirements on them in the Contract (at Service Condition 28.4)

  - to have regard to the burden which local reporting flows create for the provider; and

  - to be able to demonstrate the "purpose and value" which their proposed Local Reporting Requirements will serve.

2.6 Activity Planning Assumptions and Prior Approval Schemes

Activity Planning Assumptions are set out at Schedule 2C; they typically describe the commissioner's expectations and requirements with regard to factors which will drive

levels of activity undertaken in the coming year – referral levels, follow-up rates and conversion ratios, for instance.

The Contract makes clear at Service Condition 29.7 that it is for the commissioner to notify the provider of the Activity Planning Assumptions which will apply for a given Contract Year – so these are a matter for the commissioner to determine, not one which requires mutual agreement. Nonetheless, Activity Planning Assumptions should of course be realistic, in line with the principles set out in paragraph 2.2 above, and must not require provider to run services in a way which contravene Good Practice as defined in the Contract.

Similarly, the Contract allows the commissioner set out a Prior Approval Scheme (Service Condition 29.21-27) which the provider must operate within. The clinical content of such policies is therefore a matter for the commissioner to determine, rather than requiring provider agreement. However, the Contract does place specific requirements on commissioners to:

- adopt consistent clinical policies and thresholds and prior approval processes across a local area wherever possible (in order to minimise the complexity of providers having to manage multiple different commissioner requirements for the same service); and
- to take into account, when designing Prior Approval Schemes, the administrative burden these may place on providers.

2.7 Sub-contractors

Details of a provider's material sub-contractors are to be listed at Schedules 5B1 and 5B2. Should a provider wish to establish additional sub-contracting arrangements for 2018/19, General Condition 12 makes clear that this can only take place with the consent of the commissioner.

2.8 Implementation and notice periods

Most of the updates described in the preceding sections will, by definition, take effect from 1 April 2018 – but where, as part of a Variation for 2018/19, commissioners and providers wish to make changes to the way in which services are provided to patients, it is worth being clear about timescales for implementation.

The Contract allows specific notice periods to be set locally for early termination of a contract – but there is no standard notice period required for agreement and implementation of a Variation. Rather, the timescale for implementation of a Variation is discussed and agreed as part of the Variation process itself; simple changes can be implemented immediately, whereas those requiring more complex planning and preparation will take longer.

Nonetheless, although there is no formal notice period involved, it is clearly advisable for commissioners and providers to share, at the earliest possible stage, their detailed intentions in respect of what they are seeking to achieve through agreement of a Variation for 2018/19, and this is strongly encouraged.

3 Resolving disputes in advance of 2018/19

As described above,

- because the Contract sets out specific default positions for updating certain schedules from year to year, where agreement cannot be reached; and

- because the key principle in respect of other Variations is that each Variation must be agreed by both parties – the default position therefore being "no change",

the scope for disputes relating solely to failure to agree a Variation for 2018/19 is in fact quite limited.

What is perhaps more likely is that a material in-year dispute may arise between a commissioner and a provider during 2017/18 which will, if unresolved, mean that their contractual arrangements are unclear as they go into 2018/19. Resolving such disputes in a timely manner is therefore critical, and the next section of this document deals with the process for this.

3.1 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.

3.2 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 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 contracts between NHS commissioners and NHS Trusts/ Foundation Trusts. **The key deadline is that, where they are required, Variations for 2018/19 should be signed by 23 March 2018**, failing which the parties will enter the Expert Determination process.

3.3 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 2017/18-2018/19 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 nhscb.contractshelp@nhs.net and e.cquin@nhs.net; and

- on the National Tariff Payment System for 2017/18-2018/19 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.

3.4 Arranging mediation

Where, even after escalation, the parties in dispute are not confident that a 2018/19 Variation will be agreed by 23 March 2018, they should initiate a process of mediation, as the Contract requires.

Local decisions on whether mediation is required should be made by no later than 2 March 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 the local STP if all parties agree this is appropriate) 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.

3.5 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.

3.6 Principles of Expert Determination

It is hoped that following a process of local negotiations, advice and mediation, all Variations should be signed by the national deadline. However, where Variations have not been signed by 23 March 2018, the expectation is that the parties will enter the Expert Determination stage of the dispute resolution process. Parties that fail to reach agreement by this stage 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.

3.7 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 – but they are also available for disputes involving other types of provider where agreed locally.

- NHS England and NHS Improvement will identify 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 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 will either have served as members of the national Arbitration Panel or Independent Trust Financing Facility or have been identified via NHS IMAS as being appropriately qualified.

- 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 come at no additional cost to the parties. 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 will also consider putting in place appropriate arrangements for independent peer review of Expert reports.

- Where a commissioner or provider triggers the Expert Determination process, 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 (published alongside this document). 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.

3.8 Overall timetable

The intended timetable for disputes which require Expert Determination 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
Parties hold local negotiations to agree the terms of any necessary Variation for 2018/19	January to March 2018
Local decision whether or not to enter mediation, and communication of this to NHS England and NHS Improvement	By close of business on 2 March 2018
Mediation undertaken	5 to 22 March 2018
National deadline for signing of Variations If mediation unsuccessful and Variation not signed, 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)	23 March 2018
Parties to present themselves to the Chief Executives of NHS Improvement and NHS England (or their representatives).	26-30 March 2018
Expert selected and Expert Determination Agreement signed locally, clarifying questions for the Expert to answer	13 April 2018
Party initiating dispute supplies detailed statement of case to the Expert, copied to other parties	20 April 2018
Party responding to dispute replies to Expert, copying other parties, giving its position on the issues	27 April 2018
Expert reviews the parties' written statements, carries out any necessary investigations and provides written Determination to the parties	No later than 8 June 2018
Contract Variation reflecting Expert Determination outcome completed and signed by both parties.	No later than 22 June 2018

Appendix 1

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)**
This should be the person to whom all queries and requests for further information should be addressed	*This should be the person to whom all queries and requests for further information should be addressed*

5. What are the issues under dispute?

List all of the disputed issues briefly and factually, giving the value of each

Issue 1 Description

Commissioner Proposal	£X
Issue under dispute	£X
Difference	£X

6. What is the total value of the dispute?

Complete the table below; the difference should equate to the sum of the disputed issues.

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?

Must demonstrate that negotiations have been escalated to chief executive / chief officer level

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:**

Appendix 2

Summary of disputed issues

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

Appendix 3

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