

Chapter Nine The purchasing process

The importance of well worded contracts in commissioning

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Abstract

Commissioning intentions and strategies are increasingly being seen as an area where joint working and mature relationships with providers are important. Contracts themselves can sometimes set back such relationships by not reflecting such a partnership approach. However, well worded and agreed clauses can do much to facilitate good working relationships between commissioners and providers of social care, whilst at the same time offering protection to service users and carers. This paper will look at some of the key issues in designing contract clauses that have a particular impact on all parties.

Key words: fairer contracting; contract clauses; service users; purchaser provider relationships.

Introduction

Government guidance, such as Building Capacity and Partnership in Care¹, sets out the need for improved relationships between commissioners and providers of public welfare services. It is hoped that these will facilitate the development of a market that can meet increasing needs in ways that align with society's changing expectations about service provision and quality. Increasingly, such a partnership approach is being adopted by social care commissioners.

However, commissioners don't always seem to think through the need to carry this approach into actual contracts, and can leave the nuts and bolts of the contracting process to people with different priorities, such as corporate lawyers or contract officers without a background in the social care issues. This can mean that service provider 'partners' are presented with a contract for service that embodies a much less mature approach.

A contract with terms that appear only to reflect the interests of the purchaser will seem to give the impression to other expressions of partnership and can set back other work to build relationships and manage the market together.

Contracts of course have to reflect the interests of service users too. Although not a legal party to a contract between the local authority and an independent provider, they are the reason for it.

This paper discusses ways in which the development of a contract can better reflect a partnership approach – both between purchasers and providers and with service users – and it describes the process of developing 'model' clauses for recent Care Services Improvement Partnership guidance on Fairer Contracting.

Background

The Institute of Public Care (IPC) has recently been involved in the development of A Guide to Fairer Contracting, Part One (the Guide), which was published in December 2005 on the Care Services Improvement Partnership (CSIP) website².

¹ Department of Health (2001). Building Capacity and Partnership in Care.

² Change Agent Team (2005). [A Guide to Fairer Contracting Part One](#).

This first part of the Guide addresses how residential and domiciliary care should be purchased and how price and payment terms should be agreed. A second part, planned for autumn 2006, will address what is to be purchased – the service specification – and a third in 2007 will consider tendering processes.

The purpose of part one of the Guide is to:

- Open up a debate about what constitutes a fair contract.
- Distinguish between different contracting activities.
- Suggest actual clauses that purchasers may want to use in developing contracts with local providers.

During the development of the Guide – which involved providers, commissioners and representatives of service users – the process of writing the suggested clauses in itself highlighted some of the difficulties of achieving fair contract terms. Some of the discussions that took place are represented in this paper.

Contract Terms

Price and price review

The price asked for, and the price paid, are the most common areas of potential unfairness (perceived or actual) between purchaser and provider. The purchaser will often believe that the provider is setting prices arbitrarily high, and requesting excessive annual increases. Even more often, the provider feels that the purchaser is offering unrealistic payment terms which take no account of the true cost of the service and the increasing regulatory requirements.

In fact there are, of course, pressures on both parties; the purchaser has a limited resource to play with, and has a duty to make the most effective use of public funds; the provider has to cover costs and do more and more to deliver the quality that the national requirements and the purchaser demand (and that the overwhelming majority of providers wish to deliver).

The need to be open with each other and appreciate each other's pressures is essential in building up a mature relationship between commissioners and providers. However, as noted, this may not be reflected in contracts drawn up by officers not directly involved in the wider commissioning discussions, who have other drivers influencing them, such as a general requirement to make efficiency savings.

Pricing also has an indirect impact on the service user. For example, if price, price review and payment terms too closely favour the purchaser, there is the possibility of a business becoming unsustainable, with the potentially devastating effects that can have on care home residents.

During the development of the Guide there was a great deal of discussion about the approaches to price setting and review that could be proposed. All involved were agreed on the need for an open approach, possibly open book accounting³, and the value of spelling out within the contract those elements that would be used to determine price. These can be based on standard costing models such as Laing and Buisson⁴ for residential care, United Kingdom Home Care Association for domiciliary care⁵, or other measures such as agreed measures of service user 'dependency'.

³ Change Agent Team (2005). Getting Started – Open Book Accounting.

⁴ William Laing (2003). Calculating a Fair Price for Care: a Toolkit for Residential and Nursing Care Costs. Joseph Rowntree Foundation, The Policy Press

⁵ United Kingdom Home Care Association (2003). Calculating the Real Cost of Home Care

Clearly there can be no central determination of exactly how price negotiations should best take place, but the Guide does propose some approaches, and clauses, to give an acceptable local structure.

It is not just the price paid that can militate against a partnership approach. Providers can feel that they are dealing with a slow, bureaucratic system that does not recognize business requirements such as maintenance of cash flow and reduction of administrative overheads. A local authority that is slow in payment, or delays payment, e.g. due to a disputed round up of pennies, is clearly not giving equal weight to the needs of the provider. The Guide makes it clear that the contract should set out clear responsibilities about payment terms.

Duration, renewal and extension

Commissioners want to invest in building up long term partnerships in order to ensure that the right services are in place for the right people at the right time. Again, the contract may be pulling in a different direction.

If the provider does not feel confident about the duration of a contract, feels that the ability to terminate it is mostly with the purchaser, or that termination may be invoked without open attempts at resolving issues, then they will not be willing to make the appropriate investment in the service. This may lead to reduction in quality and potential problems with continuity of service. The service user also has a significant interest in the stability and continuity of service provision. However, the purchaser needs to feel confident that resources are not locked in supply in a way that reduces their ability to reconfigure services to meet need flexibly.

As with price setting and review, there cannot be one correct length of time for all contracts, but the Guide sets out example clauses to facilitate local agreement on duration, with or without break clauses, and a sound disputes process that allows for open discussion of any difficulties on either side.

The Guide also emphasises that, when coming to the end of the life of a contract, negotiations on contract renewal should be planned well ahead, to ensure all aspects can be reviewed and discussed fully between the parties. A rushed negotiation can leave either party feeling dissatisfied with the result, and may mean that existing contracts have to be extended. If a contract does have to be extended, the purchaser should not assume that the provider is willing for this to be on the same terms, but the provider should not use this as an opportunity to raise prices unreasonably.

Service user specific terms

Where people enter into their own, self funding, contracts with care homes, the terms should comply with the Office of Fair Trading (OFT) Guidance⁶. Many of the principles in that guidance also hold true for contracts between purchasers and providers.

Most of the standards required in the actual delivery of the service will be contained within a service specification, but there are some areas specifically relating to the service user that are appropriately addressed in contract terms, for example:

- Temporary absence of service user.
- Death of service user.
- Dealing with complaints.

⁶ Office of Fair Trading (2003). Guidance on Unfair Terms in Care Home Contracts.

Temporary absence of service user or death of service user

It is helpful in a contract to be clear whether a service user's place will be held for them during temporary absence, e.g. hospital admission. If so, both parties will have to think through how long a place will be held, and whether there will be any variations in price over that period.

The main direct beneficiary of such agreements is the service user. In the case of a care home resident, these discussions are fundamental as they are about whether or not a person being can retain their own home. For a recipient of home care the issues relate more to:

- Avoiding delay in resumption of service; such delays can leave a person in hospital longer than needed, or mean that they are discharged elsewhere than home, possibly to a 'holding' bed in a care home.
- Continuity of the people delivering care, which is also fundamental when it concerns whether it is someone familiar, or a stranger, undertaking a person's intimate personal care.

It is also important to have thought through and agreed what happens when a service user dies. Again, the focus here is on the service user or, in this case, their family. Particularly for a care home resident, thought needs to be given to the opportunity to deal with registration of the death, funeral arrangements, dealing with belongings, etc, as if the person were living in their own home.

The clauses for these sections in the Guide went through a number of versions during drafting that reflected the different perspectives of those drawing them up, even though all concerned were trying to address the needs of the service user.

Purchasers have to address the following balancing act:

- Paying out for a vacant room, or to hold a domiciliary care place open (i.e., potential carer down-time) can be seen as inappropriate use of limited public funds.
- The domiciliary care place held may not prove to be what is actually needed on discharge, or the service user may move directly into extra care housing or residential care anyway, therefore not needing the 'retained' package.
- Not holding places for long enough can leave the service user in hospital with consequent delay and reimbursement.
- Holding a place for one service user can mean that there is not the capacity for others awaiting care.

For providers, holding a place without payment can mean:

- Down-time for carers, unless they can be used short term elsewhere.
- Loss of income – although there may be some reduction in other costs, such as food or cleaning in residential care.

There was recognition from all involved in the development of the Guide that a place could not be held indefinitely, and that what was needed was an agreement about the point at which discussion about suspension of the service, or reduction of fees took place. However, there were differences

of opinion as to what constituted a reasonable time, ranging from one week to four weeks. In the end, no recommended time for holding a place was included in the Guide, and this has been left for local agreement. However, the Guide is clear that a time limit should be agreed and suggests wording for contract clauses covering planned and unplanned service user absence.

Similarly no specific time limit was recommended for continuing an individual placement agreement after the death of a service user, although there were initially suggestions of a week for residential care. The emphasis is placed on the 'reasonableness of all parties', but the detail is left for local agreement.

Although the discussions in developing the Guide didn't come up with solutions to the perfect length of time for various clauses, it is hoped that consideration of the issues will help with local negotiation of similar terms.

Dealing with complaints

Complaints can be a confusing area for service users who are receiving their care from a contracted provider. Who should they complain to about what – the provider or the council – and where do they go if they can't get satisfaction? Service users can also feel anxiety – will there be a negative impact on my service if I am seen as a complainer?

For providers it can sometimes feel as if they are not being given the opportunity to put their own house in order before the commissioners become involved, possibly dealing with the complaint as a contract compliance issue.

For purchasers it can be difficult to get the balance right between having confidence in a provider's response to complaints and their own duty of care to service users they have placed in a contracted service. What if the concerns expressed relate to possible abuse? What should they do if they feel the provider is not dealing with the complaint effectively?

The suggested clauses in the Guide reflect these questions and spell out that there must be clear information, in appropriate formats, brought to the attention of users on how to complain. They recommend purchasers not to intervene in a provider complaint investigation, and that they should actively offer the provider the opportunity to investigate if a complaint comes to the purchaser first. In return, providers should respond promptly and courteously to complaints and record them all, with outcomes being made available to the purchaser for contract monitoring purposes.

However, the purchaser need not leave investigations to the provider if there is any concern about user safety arising from that. They should also intervene if they feel that the provider's investigations are inadequate or incomplete. Nevertheless, even in those circumstances it is right for the purchaser to keep the provider informed that they intend to conduct their own investigation.

Finally, it is important for contract clauses to spell out that no one should experience detriment through having brought a complaint to the attention of purchaser or provider.

Conclusion

This paper has illustrated just some of the ways in which, without due attention, an unfair contract can put back good commissioner/provider relationships, and be a hindrance rather than a help in delivering good quality care to service users. This is not inevitable however, and with goodwill and thought, a contract can build on underpinning partnership relationships and ensure benefit to all concerned.

The Guide itself develops these themes in more detail and gives example 'fair' clauses for all of the other terms that might normally be expected in a contract for a care home placement or domiciliary care, such as hardship, variation, indemnity and confidentiality.

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Biography

Deborah Clogg is the Assistant Director of the Institute of Public Care. She leads projects predominantly around older people and housing from IPC's Oxford office. She has spent over 20 years as a manager in local authority social care, both operational and policy and performance, with a spell in the then Social Services Inspectorate. To find out more about the work of IPC visit <http://ipc.brookes.ac.uk>