



September 2013

PSNC Briefing 098/13: Guide to NHS Standard Contracts and local authority Public Health Contracts

The new NHS structure which was implemented in April 2013 changed the arrangements for the commissioning of NHS services. To ensure that these are robust, NHS England has produced an NHS Standard Contract, and use of this contract is mandatory when Clinical Commissioning Groups (CCGs) commission NHS services.

This briefing concentrates on the final stage of commissioning – the drafting and agreement of the written contract.

Introduction

Pharmacy contractors are commissioned for the provision of pharmaceutical services (Essential, Advanced and Enhanced) by NHS England. The commissioning arrangements include the terms of service, Secretary of State Directions, and Service level agreements/contracts (usually contracts transferred from PCTs).

But there are additional opportunities available, and pharmacies may be contracted to provide other services, for example minor ailments services, by Clinical Commissioning Groups (CCGs) under 'any qualified provider' commissioning arrangements.

There will be several stages before a pharmacy is commissioned – there may be a request for expressions of interest, and there may be tender or pre-tender exercises. Local Pharmaceutical Committees (LPCs) may negotiate directly with CCGs to seek to win contracts for their contractors. These steps are the most difficult – in a cash starved NHS there is immense competition to provide services. Commissioners may also seek to commission services from a small number of large providers, relying on sub-contracting to deliver services through a broad range of providers. Once pharmacy has overcome these obstacles, and agreement has been reached on the provision of services, this agreement must be translated into a formal written contract.

Structure

The NHS Standard Contract is published by NHS England and is available at www.england.nhs.uk/nhs-standard-contract.

There are three parts to the contract:

- General Conditions
- Service Conditions
- Particulars

The general conditions are mandatory, and are 'legal' in nature. The service conditions are modified locally, and set out the conditions that are relevant to the service that is to be provided. The particulars are largely administrative details, such as the identity of the parties to the contract. There is also technical guidance available.

The contract is available either in hard copy format, or in an eContract. The benefit of electronic versions is that irrelevant provisions are omitted, which can reduce the overall size. But, it may still be daunting to see the volume of material that must be checked before signing such a contract.

As with all contracts, pharmacy owners must be sure that the contract accurately reflects the agreement that has been reached as to what services are to be provided and that the pharmacy is able to meet any conditions specified. The consequences of non-compliance can be costly, not only the loss of the income if the contract is terminated, but also some of the costs of commissioning an alternative provider may be borne by the defaulting contractor.

Pharmacy owners are familiar with the services that they provide, and may be comfortable with reading contract terms. But, if there are any doubts as to the meaning of the terms or the potential impact of the contract, legal advice may be required. This PSNC briefing is not, and must not be considered to be, legal advice.

LPC involvement

Local Pharmaceutical Committees have historically negotiated with commissioners (PCTs, DAATs etc.) to secure agreements to contract pharmacies to provide Enhanced and other services. LPCs may negotiate with CCGs on behalf of their contractors and, as part of agreeing service specifications, will have an interest particularly in the NHS Standard Contract's service conditions. They will be familiar with what their contractors can provide, and will communicate with them to ensure there is a level of interest in providing services. Although the LPC may in these circumstances have a substantial involvement in what ultimately appears in the contract, they are not in a position to agree the final text of the contract on behalf of the contractors. Similarly, they cannot give legal advice to contractors on the appropriateness of the terms of the contract.

PSNC's work on the NHS Standard Contract

As representative of the general contractor base, PSNC seeks to ensure in national matters that pharmacy contractors have maximum opportunity to expand their provision of services and have access to support tools (including through LPCs).

PSNC hosts a services database, which is populated by LPCs with details of services that have been negotiated locally, so that these can be used to inform further negotiation in different areas. In addition, PSNC provides guidance to LPCs to help them support their contractors. Briefings on the NHS Standard Contract have been given at national level, and further guidance is given where requested.

The services database can be accessed on the PSNC website at psnc.org.uk/database, and PSNC briefings can be accessed at psnc.org.uk/briefings

PSNC recognised that the NHS Standard Contract was going to cause potential problems for some pharmacy contractors and LPCs that had limited experience of these sorts of contracts. It also identified some areas within the standard contract that do not reflect some of the unique factors applying to the commissioning of pharmacies. PSNC has provided to NHS England's team that prepared the template, an analysis of areas within the standard contract that may usefully be amended to better reflect the commissioning of pharmacies, and it is hoped that revisions to the NHS Standard Contract may be made in due course to incorporate the suggestions.

Further support provided by PSNC for use by LPCs and contractors is a list of items within the NHS Standard Contract that are worthy of special attention. This does not suggest that other areas of the contract are unimportant as all parts of all contracts must be given attention before being signed – the purpose is to highlight areas that may be surprising or unexpected, or to comment on sections that have been the subject of questions from LPCs. The remaining part of this briefing identifies those areas for which an LPC and contractors should ensure they give careful consideration.

Areas of the contract for which special consideration is merited

Note – this is not an exclusive list of the sections that should be considered (see above).

Before considering the detailed provisions, it is worth making the point that by the time a contract is being drafted, both parties are generally in agreement as to what services are wanted, and what the pharmacy will provide. The drafting of the contract is intended to simply formalise the agreed position. Pharmacy owners and commissioners should approach the drafting of the contract in good faith, aiming to reach a position where the contract does just what has been agreed. It would not be acceptable to try to draft terms that caused surprise to either party further down the line.

Particulars

Contract term

The contract term has a default period of one year. Some pharmacies and LPCs had experienced short term commissioning by PCTs, often through pilot schemes. It is likely that there will continue to be pressure on short term contracts, which can impact on the period needed to break even where there are training or equipment requirements. There needs to be a balance between the risk for contractors (and commissioners) in being tied in for too long and the period needed to cover start-up costs.

Conditions Precedent

These are the conditions that must be satisfied between the date of signing the contract and beginning to provide the services. This is likely to include any accredited training if required, and it is important that pharmacies ensure that they achieve these stated conditions by the time of providing the services.

Governance

Pharmacy contractors have been required to have an acceptable system of clinical governance since the contractual framework changed in 2005, and many of the governance requirements will be familiar. In the particulars, the identity of individuals with identified responsibility such as Caldecott guardians are set out in detail. There is a requirement for a 'Prevent' lead – pharmacy contractors will need to research the requirements for a 'prevent lead' and not simply insert the name of the pharmacist.

Importantly for pharmacy contractors, if they decide to sub-contract the provision of any parts of the service, they must have written arrangements ensuring carry through of the governance requirements to any sub-contractors.

Regulatory

For traditional pharmacy services, there is no requirement for pharmacies to register with the Care Quality Commission or to hold a Monitor licence. It will be necessary to ensure that the range of activities undertaken to comply with the contract does not extend into areas where CQC registration becomes a requirement (or if it does, to ensure that such registration is obtained).

Service Conditions

These conditions can be modified locally, and pharmacy contractors should ensure that all are achievable (or agree with the commissioner that they will not be included in the contract).

SC2 Regulatory requirements

This is a broad brush section, which requires compliance with any standards or guidance from a professional regulator (in the case of pharmacy from the General Pharmaceutical Council) and other relevant bodies, as well as NICE guidance.

SC8 Unmet Needs

SC8.2 requires the contractor to notify the commissioner if he believes that a service user has any unmet health or social care need. This ensures that commissioners can try to join up care provision, but it does also mean that the interest in service users will extend beyond the provision of the service for which the contract has been granted. The strength of Pharmacy's position is that many hard to reach groups access pharmacies but no other health or social care providers – this allows pharmacy to help identify service users who need more services than the pharmacy is contracted to provide.

SC10 Care Planning

All providers must share decision making in the development of care plans with the service user. Many interactions in pharmacy do not involve care plans, as the interaction is a short term one off intervention. But in areas where a care plan is appropriate, pharmacies may need to establish these, and involve service users in decisions.

SC23 Service User Health Records

Contractors may be required by the commissioner to transfer service users health records to a third party (SC23.2 and 28.3). As pharmacies do not currently have access to the Care Records Service, the only records held tend to be PMRs, and Enhanced and Advanced service records. The sharing of records requires patient consent, and so any conditions requiring the potential sharing of records would need to set out the conditions under which records would be shared, and details of how consent to such sharing is obtained.

SC30 Emergency Preparedness and Resilience including Major Incidents

The contractor would need to have and maintain an up-to-date Business Continuity Plan (BCP). As pharmacy contractors know, this is also a requirement linked into the community pharmacy contractual framework through the Information Governance (IG) toolkit. However, whilst some pharmacies have a BCP and others may be working towards completing a BCP, it is not yet included in the terms of service as there is currently an exemption for the relevant requirement in the IG Toolkit. Pharmacies wishing to provide services commissioned by CCGs may be required by SC30 to have a BCP. The contract will need to be checked for this provision, and local agreement reached over any flexibility in this requirement.

Many of the requirements in SC30 deal with major incidents, and participation in major incident exercises. For many pharmacies this would be disproportionate, so the contract should be checked to ensure that any requirements are achievable.

SC32 Safeguarding

This section contains ‘regular’ requirements for safeguarding that would be recognised by pharmacy contractors. But, there are also references to ‘Prevent’ and ‘HealthWRAP’. These will not be familiar to many pharmacy contractors, and details should be checked to ensure that the pharmacy is able to comply.

SC35 Duty of Candour

In due course, the terms of service are expected to be amended to introduce a requirement for a duty of candour – following the recommendations in the Francis report. There will be nothing objectionable in adopting a duty of candour, but pharmacy contractors signing these contracts are likely to be required to comply with the general duty of candour, and should familiarise themselves with the requirements.

General Conditions

These are mandatory legal terms, and there is no facility for local flexibility. As such, the General Conditions should be given particular scrutiny. Whilst most of the conditions are appropriate, there are some conditions which are abbreviated by referring to a need to comply with conditions specified separately to the NHS Standard Contract, and which could impose a significant administrative burden.

GC5 Staff

There are extensive provisions relating to staff recruitment, appraisal and monitoring, including a need to carry out Disclosure and Barring Service checks. These requirements also apply to sub-contractors (in which case the contractor must ensure that sub-contracts include parallel terms).

GC6 NHS Counter Fraud and Security Management

There is a requirement for contractors to put in place and maintain appropriate counter fraud and security management arrangements, including completing an organisation crime profile using the NHS Protect toolkit. After completion of the toolkit, the contractor must take the action necessary to meet standards set by NHS Protect. This toolkit is a lengthy document, and pharmacy contractors will need to factor in sufficient resource to complete the toolkit and implement any action to meet standards set by NHS Protect.

GC9 Contract management

It is to be hoped that for the duration of the contract, the pharmacy will be able to comply with all the service requirements. If not, GC9 provides the tools allowing the commissioner to manage the contract, which could include remedial action and termination. These provisions are similar to new performance related parts of the pharmacy regulations introduced in September 2012, but pharmacies will have little experience of how they operate. Pharmacies should familiarise themselves with this section so that there is no surprise if the commissioner takes action for inadequate performance.

GC11 Liability and Indemnity

These are customary clauses expected in a contract of this nature. In the event of a claim against a pharmacy (including by the commissioner) the pharmacy would probably turn to his insurer. It is therefore necessary to check the terms with the insurers before signing, to ensure that adequate indemnity arrangements are in place.

GC14 Dispute resolution

Pharmacies will have little experience of formal dispute resolution procedures, and it is hoped that for the duration of the contracts, disputes do not arise. However, it is important that contracts do provide adequate arrangements to deal with disputes, and pharmacy contractors should understand the arrangements that are available to both parties in the event of a dispute.

GC15 Governance, Transaction Records and Audit

As with the conditions above, the general terms include highly detailed governance arrangements, many duplicating the community pharmacy contractual framework. One of the areas where pharmacies will need to take special care is in disclosure of service user information. Unless consent is obtained, some disclosures could be unlawful – wherever the conditions require disclosure, ensure that the service specification includes obtaining patient consent to disclosure.

GC17 Termination

The respective rights to terminate the contract are set out in GC17 – and it should be noted that there are ‘no-fault’ rights to terminate with 12 months’ notice. This may not be a particular problem (for example with a contract of only 12 months duration) but if a contract was signed for five years – to allow a lengthier period to recover start-up costs, the contract could still be terminated early, with no recourse for the start-up costs. Contractors will need to be aware of the termination powers when deciding on the levels of risk and the appropriate remuneration to cover that risk.

GC18 Consequences of Expiry or Termination

Pharmacy contractors may not have entered into contracts previously which have conditions allowing the commissioner to claim their costs in re-commissioning from another provider in the case of non-performance, or termination due to the default of the pharmacy. Pharmacies will need to be aware that it may not be possible to walk away from a contract that has turned out to be wrong, or not providing sufficient remuneration for the level of risk / activity without facing costs of re-commissioning.

GC24 Change in Control

When pharmacy businesses change hands, there is currently a requirement for a change of ownership application to the General Pharmaceutical Council for the registration of the premises, and an application to the NHS England Area Team for a change to the pharmaceutical list. In addition to these, the commissioner of any contracted service would need to be informed, and this applies also where there is a change in control of a pharmacy business (for example appointment of directors).

Local Authority Public Health Contracts

Similar standard contracts (although simpler and much shorter) have been prepared for Local Authorities for the public health services that they commission (such as stop smoking services commonly commissioned through pharmacy). The difference with these contracts is that their use is not mandatory, and because local authorities have over recent years become expert at commissioning, they may have their own contracts that they use as standard.

Nevertheless the Department of Health has provided templates to try to assist local authorities when commissioning public health services. Their resources are available at <https://www.gov.uk/government/publications/public-health-services-non-mandatory-contracts-and-guidance-published>

The standard non mandatory contract is set out in one document (as opposed to three parts for the NHS Standard Contract), with appendices used for service specifications etc. Although a single document, it remains lengthy and must be read in its entirety before a pharmacy contractor signs to commit to provide the service.

Because this is a non-mandatory contract, and PSNC has seen that several local authorities have chosen to use their own variants, PSNC has not conducted as detailed an analysis of the terms as it has for the NHS Standard Contract.

But from what it has seen, the comments and questions raised by LPCs and contractors about local authority public health contracts are very similar to those raised for the NHS Standard Contract. This briefing may therefore be of benefit when examining any local authority developed contract.

Conclusion

As stated earlier, parties to a contract should approach the drafting of the written contract in good faith, and should ensure that there are no 'hidden' surprises to catch out the unwary. An LPC or pharmacy contractor should, before spending any time examining a contract that has been produced, enquire as to whether it faithfully reproduces the NHS Standard Contract or the Public Health Services Contract as appropriate, and request details of any departure from these. That is not to say any assertions that the contracts are as set out in standards should be relied upon, it just may help identify any modifications – the whole of the contracts must still be read and understood.

Pharmacies that are entering into contracts with commissioners (CCGs or local authorities) will have completed the difficult work by the time the contracts are being drafted – that is, securing agreement to provide a service. They must factor in the time to ensure they are content with the contract, and must seek legal advice if appropriate. A limited amount of support may be available from the LPC, but remember, they are not able to give legal advice.

LPCs will keep in mind the terms that will eventually end up in contracts when they negotiate with potential commissioners, and highlight any particularly important elements of the service, when they notify their contractors of the offers of commissioned services, so that the terms can be checked to ensure they reflect what was negotiated. LPCs needing general support can contact PSNC, and particularly can refer to the LPC support elements on the website.

If you have queries on this PSNC Briefing or you require more information please contact [Steve Lutener, Head of Regulation](#).