

Care Services Improvement Partnership 

Health and Social Care
Change Agent Team

A GUIDE TO FAIRER CONTRACTING: PART 1

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Section 1 Background

1. Introduction

Purpose

This guide is for the use of Local Authorities/Joint Commissioning bodies in purchasing care placements and domiciliary care services and for those who contract to provide such services. It has been developed through extensive consultation with providers, local authorities and representatives of central government departments. It is designed to explore a range of issues concerning how contracts for placements and services are constructed and to provide helpful examples of how clauses in contracts may be amended or enhanced to provide a fairer approach to contracting.

It is not intended that this work provides a model contract or prescribes how local authorities carry out their contracting practice. It does not address the Registered Nursing Care Contribution (RNCC) element of placements in care homes with nursing, or fully health funded continuing care contracting processes. Part 1 does not deal with important matters concerning how services are specified; including any differences of requirement between different service user groups; and how users and carers may be involved in this process. The intention is that these topics will be the subject of a Part 2 to be developed and released in 2006.

The need for a guide

Since the introduction of the National Health Service and Community Care Act 1990, Councils with Social Services Responsibilities (CSSRs) have had the main responsibility for arranging the purchase of community care services for people in need of care and support. Whilst they may, in formal or informal partnership arrangements with health colleagues, have a shared responsibility for commissioning services, at present the responsibility for contracting for care tends to fall to the local authority. Despite a model contract having been produced by the Local Government Association (and its predecessors) there are still many variations in contracts between authorities in terms of their scope, content and language.

Whilst such contractual variation may reflect local need and conditions, for provider organisations who work with more than one CSSR, it has meant having to comply with a wide range of contracts, terms and conditions, sometimes for very small volumes of care such as a single out-of-authority residential home placement. In addition, some providers have felt excluded from influencing the contracting approach and purchasing intentions of CSSRs on whom they may be financially dependent. Martin Knapp reported that

“... the majority of providers would still like local authorities to be more transparent about their purchasing intentions and in house policies... Many providers also felt that local authorities were ignoring their experience and expertise”

“Domiciliary Care Providers in the Independent Sector”, Knapp et al, PSSRU 2002

In some instances the absence of close working relationships has led to providers cutting costs in unsustainable ways or by failing to invest adequately in their staff or attempting to

be unrealistically price-attractive and competitive. Providers may also have been complicit with bad practice in order to keep costs down and maintain contracts in order to stay in business. Conversely, local authorities have felt that some providers have sought to increase margins without fully explaining the rationale behind this, or the size and purpose of their profit. This has raised suspicions among purchasers that public money has not been spent well.

The inherent unfairness of this situation was brought to the attention of the Department of Health's Strategic Commissioning Group, who undertook to examine the diversity in contracting documentation and to make some recommendations for revision towards a fairer and more consistent approach to contracting for care. To that end a reference group comprising a variety of providers and commissioners (listed in Appendix 4) was brought together to draft recommended clauses for use by CSSRs which has led to this guide. The work has subsequently been aided by the Department of Health's Change Agent Team and the Better Commissioning Learning and Improvement Network, with support from the Institute of Public Care.

The need for a guide was given further impetus by Dr Stephen Ladyman, the former Minister for Community Care, when launching the Better Commissioning Learning and Improvement Network in March 2004¹. He asked that commissioners and providers build upon the principles of partnership working established in "Building Capacity and Partnerships in Care" (2001) The minister saw commissioning and contracting as needing to pass four tests of fairness:

"It has, above all, to be fair to people using services and to ensure they get good quality care, in the right place, in the right quantity, at the right time. Inevitably that will almost always mean they have been involved in designing the package of services they are receiving. Secondly, it has to be fair to tax payers and ensure that the services they are supporting are giving value for money and being targeted at the right priorities. Thirdly, and this is the part we sometimes forget, it has to be fair to providers, ensuring that they receive a fair return for their services and they have not been set impossible objectives or given tasks for which they are not funded. Last but not least, it has to be fair to commissioners, councils and primary care trusts who are entitled to choose between the services on offer and pay a price that they can afford, to get the quality that they need."

Stephen Ladyman MP, 19th March 2004:

Therefore, the intention of this document is fourfold:

- To open up the debate about what constitutes a fair contract between local authorities and providers.
- To distinguish between four contracting activities, ie, how is something to be purchased, at what price and payment terms and for what service (this document deals with the first three of these topics).

1
http://www.dh.gov.uk/NewsHome/Speeches/SpeechesList/SpeechesArticle/fs/en?CONTENT_ID=4077577&chk=dgqV8x

- To suggest clauses that those contracting may want to use in developing their contracts with local providers and hopefully in beginning to standardise and improve practice. This could save costs and time for local authorities and providers alike.²
- To provide a vehicle for seeking feedback and examples of good practice. The desire is that this document is regularly reviewed and updated to take account of feedback, new innovative practice and key legal developments that might influence contracts. To that end there is a comments form linked to this guide on the change agent team website.³

The guide relates primarily to pre-placement and pre-purchase agreements with providers of care homes for the local authority element, and domiciliary care packages. Many of its recommendations are also applicable to cover volume contracts that are the result of formalised tendering processes as well as the subsequent stages of negotiation and re-negotiation that lead to a final form of block or cost-and-volume contract. Further work is currently being undertaken by the Change Agent Team on contract tendering processes and it is intended that subsequent companion document(s) will follow.

The guide does not attempt to consider the contracts formed between providers of services and individual people who are paying for their own service. In the case of these contracts guidance is available from the Office of Fair Trading (OFT) on unfair contract conditions “Unfair Terms in Consumer Contracts Regulations”⁴ and particularly “Care homes for older people in the UK” also by OFT which is designed to help people decide whether the terms of their care home contract are fair and gives details of where advice can be obtained.

² There are other sources of model clauses, such as the Office for Government Commerce, but these are not specific to this area of contracting.

³ www.changeagentteam.org.uk/_library/docs/CATReports/Guide_to_fairercontracting.doc

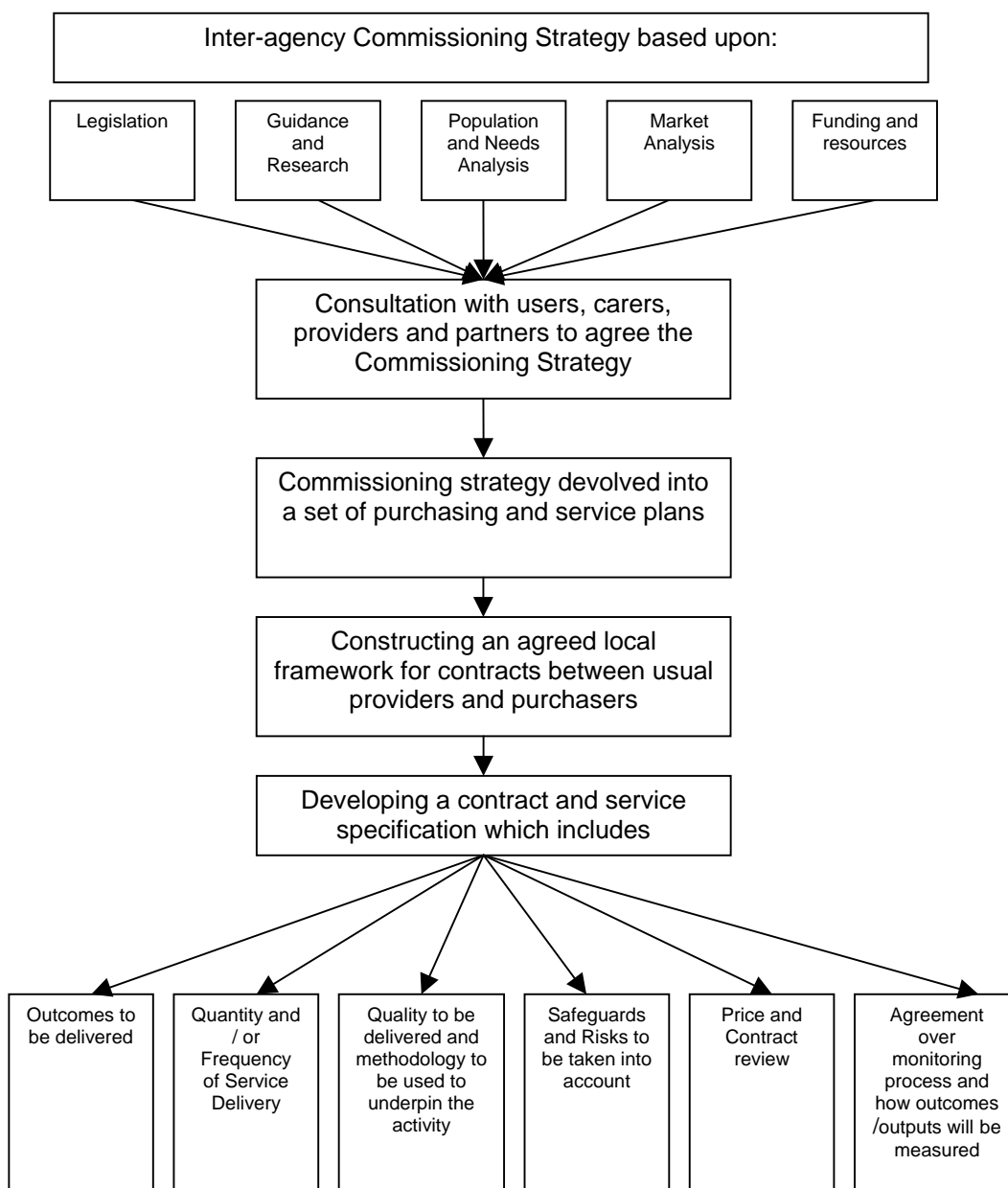
⁴ www.offt.gov.uk/consumer/unfair+terms+in+contracts

2. The Contracting Context

Distinguishing contracting from commissioning

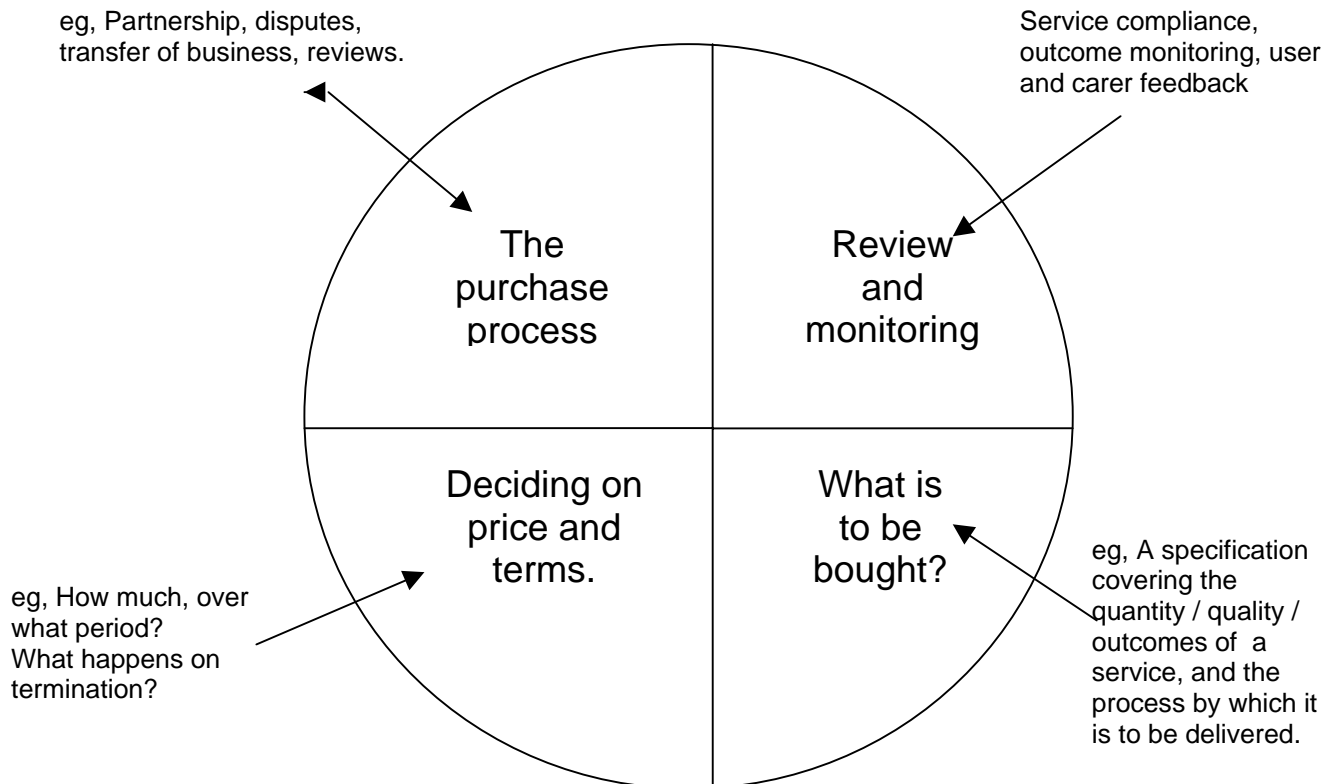
Commissioning is the process of identifying needs within the population and of developing policy directions, service models and the market, to meet those needs in the most appropriate and cost effective way. Contracting is the means of purchasing a specific area of service from one or more providers. Essentially, commissioning of services is the context within which contracting takes place. However, throughout this document the term commissioner has been used to mean all who commission and/or contract for a service.

Fig 1. The relationship between commissioning and contracting



As Fig 2 illustrates, contracting is not one single activity but includes a range of tasks and functions.

FIG 2. The four components of traditional contracting activity



New approaches to purchasing or contracting

Purchasing a service may also involve making some strategic decisions about what exactly it is the commissioner wants to buy. Traditionally the efficacy of any single contract has been decided by a mixture of probity, eg, 'Has our money been spent appropriately and for the purpose intended' and measurements of delivery, eg, 'Has the organisation delivered the amount of service expected and to the quality or standard desired.'

In recent years there has been a gradual recognition that it is possible for an organisation to be perfectly capable of meeting the twin criteria above and yet still deliver a service that does not meet the outcomes that service users may require or need. A new approach of outcome based contracting has begun to arise, particularly in the fields of purchasing services designed to tackle drug and alcohol addiction. As Plantz, Greenaway and Hendricks state, outcome based contracting is designed to:

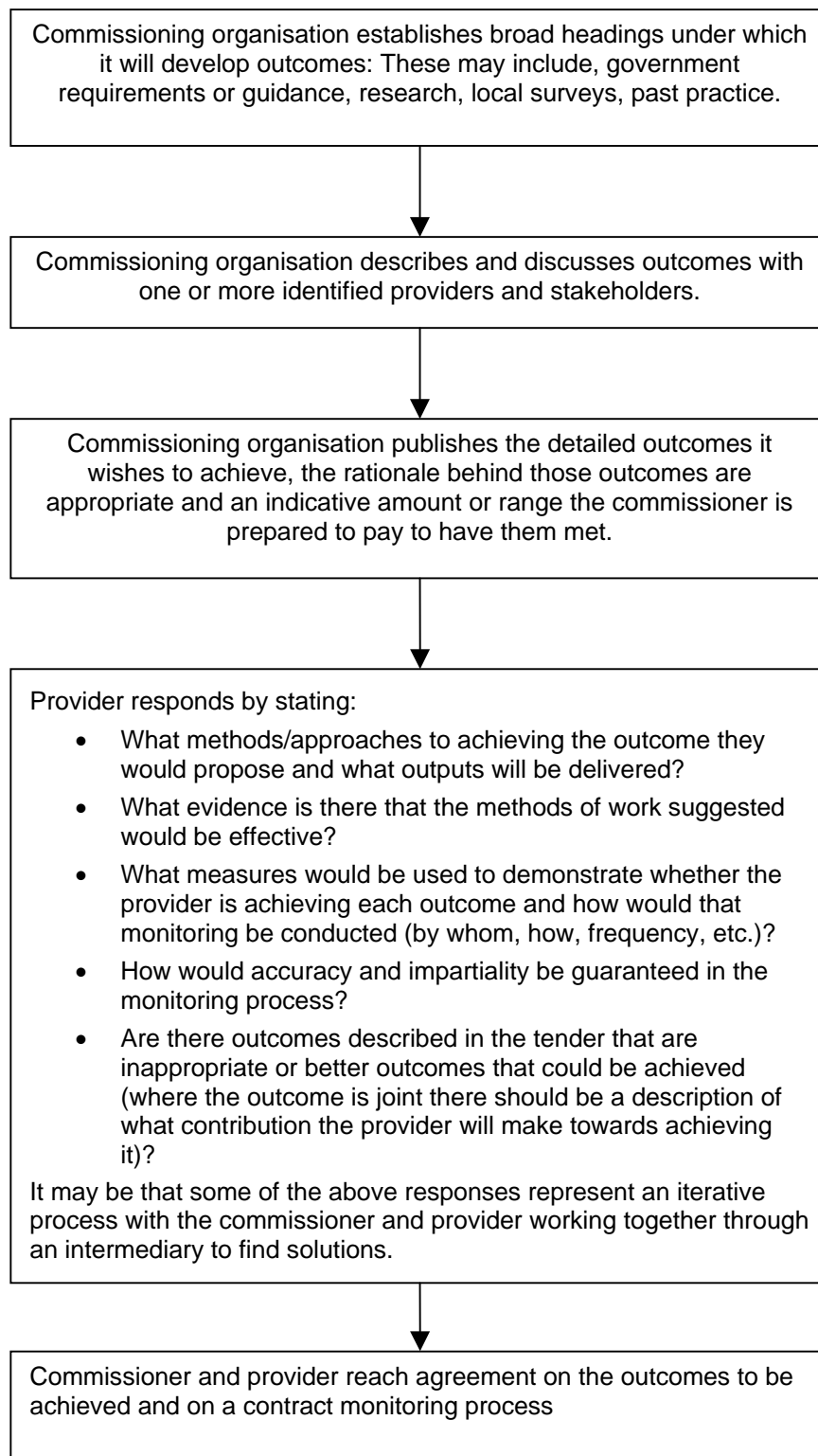
"...shift the focus from activities to results, from how a programme operates to the good it accomplishes."

Plantz, Greenway and Hendricks 1999⁵

As Fig 3 below shows, contracting that is driven by outcomes can lead to a very different type of process.

Fig 3 An example of an outcome based contracting process.

⁵ Margaret Plantz, Martha Greenway & Michael Hendricks (1999). *Outcome Measurement: Showing Results in the Non-profit Sector*. United Way of America Online Resource Library



Whilst the above diagram represents something of a stylised or ideal process it nonetheless illustrates changes in the nature of the relationship between commissioner and provider that outcome based contracting encourages. Whilst such an approach may not always be the best process for contracting for all services, it may still help commissioners and providers think about what they are devising a contract for. It would be anticipated that the companion

document to this guide, (Part 2 on service specifications) will contain more information about outcome based contracting processes.

As stated in the introduction the relationships that exist between commissioners and providers play a crucial part in determining how well contracts meet the needs of people using services and how commissioners and providers manage their resources efficiently. Even if a full outcome based approach to contracting is not adopted or is felt to be unfeasible then a number of sources argue that relationships are more fruitful if a collaborative approach is used. The Office of the Deputy Prime Minister (ODPM) sets out a target in the National Procurement Strategy for Local Government that by 2006 it wants to see local government achieve;

'Delivering significantly better quality public services that meet the needs of all local citizens through sustainable partnerships they have forged with a range of public, private, social enterprise and voluntary sector organisations'
The National Procurement Strategy 2004

The dialogue between commissioners and providers should be on-going before the contracting process begins. Providers need to be involved at the earliest possible stage so that their input can help to shape contract clauses and/or specifications. Ideally a contract should be written jointly between the two parties or, for similar types of service and arrangements, written with representatives of that providing sector.

Commissioners should develop with providers a rolling programme of drafting and reviewing contracts in a similar way to their programme for commissioning strategies. In addition, they should regularly meet with stakeholders, especially those who provide the services, to discuss areas of concern from any party. The relationship, which is one of mutual dependency, goes beyond the contractual relationship. In addition, users' views should be sought on all aspects of service delivery and they should be consulted before any major change is made to contract arrangements that directly affect them.

If commissioners and providers are to develop the trust and security on which to build relationships, they must have confidence in each other. Commissioners should be certain that providers will deliver services to at least a minimum standard and will ensure an acceptable and appropriate quality of service for those using the services and fund these services appropriately. Providers need to have confidence that commissioners will not try and enforce pernicious terms and conditions.

Commissioners also need to ensure that potential and existing providers are not discouraged by having to face a bureaucratic and expensive contracting process or have to cope with unnecessary burdens. A disproportionately complex approach to the contracting process should be avoided as this may damage commissioner/provider relations and may not achieve desired outcomes.

Sharing risk

Good contracting calls for a recognition of risk. Fair contracts seek to ensure that each signatory to the contract bears some of the risk. Yet it is often in this area that contracts fail. Risk becomes more (or less) significant depending on the likelihood of the risk happening and the impact of the risk when it does. One function of a good contract is to seek to reduce both the impact and likelihood of risk to within acceptable levels and to define what each side must do to make this possible. The contract may also wish to establish ways of responding when risks remain high and require resolution. Risk to the service user must also be borne in mind. If there is too much risk placed on a provider then there is, for example, the possibility of home closure and service users losing where they live. Every effort should be made by commissioners and providers to avoid unplanned home closures.

In writing contracts, commissioners should, with the cooperation of their providers, undertake a risk assessment in relation to the service they want so that they can assess the risks they are seeking to accept or assign. It is also the responsibility of the provider to assess risks from their own standpoint as businesses and employers in order to understand the level of their exposure and to inform discussion and contract development with commissioners. It remains unusual to see explicit risk assessments by either side in any contracting process.

Where models of service are changed at the request of commissioners to meet changes in local patterns of need, it is reasonable for providers to expect commissioners to share some of the risks associated with the introduction of new service types or reflect in the price any additional risks passed on to the provider. Agreement needs to be reached, in a spirit of collaboration and partnership, over the proportion of risk borne by the commissioner and the provider to introduce a new form of service and to overcome slow take-up of a new service until it is bedded in, or the burden of 'double-running' whilst one form of service is phased out and another phased in. It will be in the interests of individual service users already in the service to ensure that this process is properly managed and may involve short term additional costs to support overheads of continued operation, as a service is wound down.

In order to re-provision existing services or introduce new services, commissioners may wish to offer incentives to providers to encourage them to adopt a new approach. Such incentives might include offering guaranteed contracted volumes of work or time-limited premiums on the cost of care in order to off-set any additional costs to the providers in changing their services. Equally, providers may, at any time, decide to diversify into new forms of service delivery: if this is without any consultation with local commissioners it would not be realistic for providers to expect commissioners to automatically purchase the new service or to contribute to its development costs.

Open Book Accounting

“Open Book Accounting is a method of providing transparent accounting methods that allows providers to describe their expenditure whilst enabling commissioners to understand all aspects of service delivery and forward investment. Resultant discussions provide a means of arriving at a better understanding and resolution of pricing issues. It can also provide a mechanism for year on year negotiations in a rapidly changing market place. It assumes mutuality of purpose and a mature attitude from both parties together with a willingness to resolve sometimes difficult discussions.”

Getting Started – Open Book Accounting, Change Agent Team January 2005

Open Book Accounting is a process that can assist commissioners and providers to reach a transparent partnership arrangement and demonstrate their commitment and confidence to each other through sharing information on income and expenditure. It is particularly useful where there is no market comparator so a fair price has to be agreed on the basis of the costs incurred. This approach could also be applied in relation to setting a fair price for specialist or small providers.

The commitment between commissioners and providers to enter into this way of working is best made early in their relationship. This will help both parties describe the type and depth of information to be made available to each other. The purpose of this arrangement will be to enable:

- Mutual understanding of costs.
- Agreed performance monitoring.
- Initial tender promises and costings to be given developmental consideration by both sides.
- An agreed process for deciding upon future expenditure and investment.
- A clear description of the benefits of developing a contract.
- An agreed approach for considering the costs of the providers risk and hence reward.

Developing Mature Contracting Relationships

Fair contracting relies on professional maturity based on knowledge and experience and an ability to resolve difficult issues equitably. In some economies this will take time to develop and there is a direct correlation between fair and mature contracting and open and realistic understanding of the pressures, priorities and problems affecting the other parties' area of operation. There are a number of features that usually exist in mature relationships including:

- Clarity as to purpose and a shared set of values.
- Clarity about what is required and joint planning to achieve results.
- Placing those who use services at the centre of the process in a genuine attempt to arrange service provision well and to allow continuous improvements.
- A willingness to meet and talk.
- Openness in describing difficulties and a non-defensive and non-adversarial approach to resolving them.
- A good understanding on both sides of the pressures and tensions faced by the others, often through a shared approach to risk management.
- A "no blame" culture that seeks realistic alternatives and sustainable solutions.
- Holding some joint responsibility for service development (eg a joint workforce development plan that works across the sector and harnesses the power of the commissioners and energy of providers).

3. The Purchase Process

Different types of contract

Contracts for social care can be categorised into three groups

- Spot contracts (and Call Off contracts) within the context of a pre-placement or pre-purchase agreement (PPA):
- Block Contracts
- Cost and Volume Contracts

Spot and call off contracts:

Spot and call off contracts are where services are purchased on a case-by-case basis. This is done by using a unique contract for each individual. These can be either Individual Placement Agreements where the commissioner purchases a single placement for an individual without there being any other agreement or by Individual Purchase Agreements. These are usually where there is a spot contracting arrangement under the umbrella of an over-arching Placement Purchase Agreement. These agreements involve the provider consenting to meet a standard service specification and set of contract conditions which may be linked into an approved list or accreditation process. Once the Placement Purchase Agreement has been entered into by the provider, the agreement gives the purchaser an option to 'call off' individual arrangements on the pre-agreed terms.

Block contracts:

Block contracts are where a fixed level of services is purchased at a given price over a set period of time to an agreed written specification. Contract documents often refer to this as the agreed or guaranteed contracted volume. The salient feature of a block contract is that payment is made for the guaranteed contracted volume irrespective of how much of the service has been called off. This type of contract is particularly suited to circumstances where a service must be readily available, and capacity must be maintained at all times, and where call off may be required on a highly variable or emergency basis. Examples might include emergency respite services, drug and alcohol services or rapid response.

Cost and Volume Contracts:

Cost and volume contracts combine some of the features of block and spot contracts. A certain number of units of service are guaranteed to be purchased in a block arrangement. If places are required over and above the agreed number of block places, then they can be purchased on a spot basis. There is normally some correlation between the volume of service purchased and the cost – for instance, more places may attract a more cost-effective unit price.

For most purchasing authorities, spot purchasing remains the main type of contract used to purchase from independent providers of residential and domiciliary care. The table below illustrates some of the alleged advantages and disadvantages of these different types of contracting arrangements. However, there is nothing absolute about the advantages and disadvantages of any arrangements. It is quite possible for authorities to pay a higher price under block contracting arrangements than they do for spot

purchasing arrangements. Equally, long term commissioning plans and hence the capacity of providers to plan ahead may still be present under spot purchasing.

Table 1. The advantages and disadvantages of different types of contracting arrangements

Type of Contract	Advantages	Disadvantages
<i>Spot Contracts</i>	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • Flexibility about numbers placed. • More choice for those using services. • A more individualised service and price. • No costs to commissioners for unused services. • An easier route for new service providers to enter market. • An environment where it is easier for commissioners to shift from old to new providers. 	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • Lack of security for providers leading to lack of capital investment. • An insecurity of supply for commissioners. • Potentially higher prices to be paid. • An inhibition about closer working relationships between providers and commissioners.
<i>Block Funding</i>	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • More security for the provider enabling better planning. • More mature, long-term relationships enabling both parties to concentrate on non price issues. • An attraction to capital investment (if required). • Less time spent by care managers in searching for and making placement arrangements. • High occupancy levels that may mean that placements cost less. 	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • Less flexibility for those using services. • A situation where commissioner may be tied into outmoded and outdated services. • Less choice for those using services and more standardised services. • Periodic instability for purchasers and providers due to re-tendering. • Under-used capacity. • Tendering processes that increase transaction costs. • An environment where new market entrants are discouraged.

Type of Contract	Advantages	Disadvantages
<i>Cost and Volume Contracts</i>	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • Lower financial transaction costs than spot purchasing. • Providers feeling more secure about long term purchasing requirements than spot contracting. • The development of more mature long-term relationships which enables concentration on non price issues. • The best of spot and block contracting through flexibility. 	<p>Generally considered to create:</p> <ul style="list-style-type: none"> • More standardised service and reduced choice and flexibility for those using services. • One-sided security of supply for commissioners – obligation to supply with no guarantee of work and little real security for providers. • Pressure on accurate contracting in that specialist market knowledge is required to get the balance right between cost and volume and spot elements. • A tendering process that may increase transaction costs. • Periodic instability for purchasers and providers due to re-tendering. • An environment where new market entrants are discouraged.
<p><i>Making the decision</i></p> <p>Commissioners and providers should aim to achieve; consistency of arrangements and placements, a good quality of care, effective management of emergency placements and special needs, and to do so within a fair and transparent pricing approach. It is in this context that the commissioner as the purchaser of residential placements and domiciliary care needs to plan which of the contracting arrangements will best meet requirements and why. It follows that differing contractual arrangements may be appropriate within a single local authority area.</p>		

Tendering for Services

Tendering for services is a process which often draws adverse criticism from service providers, many of whom feel that some tendering practices are adversarial, antagonistic and militate against more trustful relationships developing between public and independent sectors.

For many providers the methods by which contracts are awarded and work allocated are not always clear. It is incumbent upon the commissioning authorities to ensure that their methodologies are clear, consistent and conveyed to any potential provider and that there are no covert means by which providers can be excluded from the process. Tendering processes can seem particularly onerous to smaller or inexperienced providers especially if the amount of the contract is for relatively small sums. Equally commissioners should not be inhibited or reluctant to commission services simply because they do not readily fit into a competitive tendering process.

In devising their tendering processes, commissioners are bound by standing orders and financial regulations which govern their conduct. It is important that these standing orders and financial regulations reflect the particular nature of contracting to allow the process to be geared to best outcomes for the end users and not to relate to the sorts of methods suitable for procuring goods and supplies.

It is also important to ensure that the users of service are consulted over the qualities and competencies of anyone allocated the business of providing the service. In some cases, particularly when services are of a very personal or familial nature, it is appropriate for service users to be included in the selection process. Commissioners may need to ensure that their standing orders are sufficiently flexible to enable this involvement.

Commissioners must ensure that all contact and dialogue with providers is open, equal and shared, to avoid any collusive or complicit relationships developing, however inadvertently. Contravention of this requirement is normally grounds for termination of any contracted arrangement.

In order to test the market, purchasers might consider the benefits of a preferred provider list, entry to which is open at all times rather than using periodic re-tendering. This may give greater stability in the market and enable greater provider diversity, user choice and competition.

Re-tendering / reallocation of large scale block or cost and volume contracts can cause disruption, distress and distortion to providers and their workforce and also to service users. Sudden loss of large contracts can put providers out of business. Sudden acquisition of large contracts can be under resourced to meet demand. Extended contract periods can work as barriers to new market entry, where there is a single dominant purchaser and may work against effective competition.

Within the tendering arrangements there is a decision to be made about how any switch from and old to a new provider might be made. It may be preferable that a new provider only takes on new service users from the date at which the contract is awarded although this may make it difficult over time for the old provider to maintain a viable service. Wherever there is a potential change of provider, negotiation should take place between the old and new provider and the commissioners as to the best arrangements for transferring the care of service users.

Due weight should be placed on continuity of service provision, proven delivery and long-term supplier commitment. The continued operation of a range of local providers who have a track record of delivering in accordance with requirements is essential for market stability. Recognition of providers who have been prepared to 'go the extra mile' is also appropriate. Such considerations may outweigh potential but unproven financial gains from untried providers.

It is the responsibility of the commissioner to give explanatory feedback to any unsuccessful provider, in order to help that provider better prepare themselves for any future tendering work.

Choice for service users

This guide (Part 1), as stated earlier, concerns the process by which care home or domiciliary provision is purchased. Whilst obviously what is to be purchased (Part 2) is of primary concern to service users some of the clauses in this section can also have a major impact on service users and carers, eg, transfer of undertakings, disputes etc. At the very least these terms, conditions and the arrangements by which they are agreed should not disadvantage service users. In addition, any plain English guide for service users based on the Part 2 material should cover the intent behind some of the clauses contained here.

Where Direct Payments (cash payments made, in lieu of social service provision, to individuals who have been assessed as needing services.⁶) are offered, individuals must be able to choose freely how to meet their needs, including by acquiring care from a regulated service, as well as by direct employment of personal assistants or by purchase of assistive aid.

Commissioners must also ensure compliance with the Choice of Accommodation Directions 1992 and the regulations and guidance in LAC 2004 (20) which are intended to ensure that when councils make placements in care homes, within reason, individuals are able to exercise genuine choice over where they live. However, choice is not the only important criteria. It needs to be balanced against quality, accessibility and price of, and for, any service that is commissioned. There is little point in offering choice between services that do not offer the quality required or at an unacceptable distance. For some services, eg, specialist domiciliary care for people with dementia it may not be financially and demographically viable to commission more than a single service.

Writing the Contract

The contract needs to cover the legal necessities, avoid ambiguity, inaccuracy and inconsistency, and spell out the precise intention of the parties. It also needs to have an agreed format that reflects the risks and rewards assumed by both the commissioner and the provider of the service. Where lawyers have not written contracts the parties should seek legal opinion in relation to the contracts to ensure that they are properly drafted before they are signed.

Guidance published by the Office of Fair Trading⁷ indicates that contracts between individuals and providers of care should be particularly clear and offer no scope for misinterpretation or abuse by any party to the contract. Many of the principles in that guidance hold true for contracts between commissioners and providers.

⁶ www.dh.gov.uk/PolicyAndGuidance/OrganisationalPolicy/FinanceAndPlanning/DirectPayments/fs/en

⁷ Unfair Terms in Care Home Contracts 2003

Table 2. Characteristics of good and bad practice in writing contracts

TOPIC	GOOD PRACTICE	POOR PRACTICE
Language	<p>Written in clear and concise language which avoids jargon as far as possible, but should contain a glossary that explains particular legal terms used within the body of document.</p> <p>Offers explanatory guidance for different audiences in terms of service providers and recipients – definition of terms.</p> <p>Is clear about which documents form the contract, ie an agreed model of care and any specification(s) that relate to the contract, a pricing schedule, a monitoring and reviewing schedule, a risk assessment/agreement and any further contractual requirements (for example where there may be a licence to occupy premises or shared access to IT systems).</p>	<p>Document is filled with legal jargon and technicalities.</p> <p>Document is excessively long and filled with references to other sub-sections and clauses.</p> <p>No glossary to explain technical terms- definition of terms.</p> <p>Contract is in a muddle with no clarity as to which sections are about the arrangements which are about the price and what relate to the quality and standard of service to be delivered.</p>
Fairness	<p>Contracts reflect working together between commissioners and providers. They should acknowledge and protect the interests of both.</p> <p>All parties should have a reasonable and equal opportunity to negotiate amendments, terminate, extend or renew a contract, if appropriate.</p> <p>Whatever the relationship is between the commissioner and provider it should always minimise jeopardy to a service user.</p>	<p>Contracts reflect only the interests of the commissioners, whether in price setting and review or other unreasonable demands on the provider that make it impossible for them to run a sustainable and quality service or would encourage reasonable providers from making applications.</p> <p>There is no requirement on the provider to give the rationale behind requests for price increases.</p> <p>Excessive and unreasonable monitoring demands, particularly if retrospectively imposed.</p>
Legality and compliance with guidance	<p>Reference is made to key legislation with which both providers and commissioners should comply.</p> <p>There is clarity about who the contract is between and who it is for.</p>	<p>No reference is made to key legislation, or requirements under such legislation or guidance are duplicated in the document.</p> <p>Clauses designed to obscure their real purpose.</p>
Deliverability	<p>Requirements on providers and commissioners are proportionate and measurable.</p>	<p>Terminology and requirements are based on an ideal or expressed in non-specific or subjective language.</p>

4. Price and Price Review

The pricing of contracts is amongst the most contentious and difficult areas of contracting in social care. Whilst agreeing an initial price is properly an act that forms a part of the tender process the contract will need to refer to a number of price issues of on-going importance to both service purchasers and providers. For instance, contracts need to be clear about the price agreed as a part of the tender process, by whom it is to be paid, when and in what circumstances it will be paid (or withheld) and how and when it will be reviewed.

The ability to reach satisfactory conclusions on this issue has enormous implications in a market where staff can be difficult to recruit and retain, where regulation and legal requirements are changing, often quickly and certainly within the lifetime of most contracts, and where the quality and flexibility of care is essential to the service user and their families as well as underpinning government policy in extending choice and empowerment.

The price of the contract will be formed in recognition of four different pressures:

- The financial position of the Council and its responsibilities to Council Tax payers and service users under Best Value considerations (see also the “Four Tests of Fairness” and “Best Value”);
- The actual cost of providing the care service including:
 - Staffing costs in relation to the National Minimum Wage, local market conditions, and on-costs for employing staff which may include access to pension schemes, levels of holiday entitlement, travel costs and other key terms and conditions as well as statutory requirements and costs for companies in relation to National Insurance etc.
 - Costs of meeting administrative regulatory and legal requirements including the reasonable costs of safe storage of data and files, any necessary IT systems, Health and Safety, Criminal Record Bureau, Protection of Vulnerable Adults/Children checks.
 - The costs of managing and training of staff including induction and on-going development, supervision, team meetings, specialist training etc. This may include particular efforts made to improve staff recruitment and retention. Purchasers may choose to exclude some of these costs from overall price and pay for training via some other local consortium available to a range of providers.
- Any elements of reward for risk and investment in the development and management of the service and towards future improvements in service delivery. This could include past or current investment in buildings and adaptations or equipment, or future investment (for instance in developing a specific service or IT system) although these may be negotiated outside the main agreement (for instance initial start-up costs). All costs and pressures that are known at the time of pricing should be discussed.
- In the case of a contract renewal or price review, the consequences of any potential change for the service user, the provider and the commissioner.

The ease or difficulty with which prices and pricing mechanisms are agreed within the contracting process will be an indication of the maturity of the relationship between commissioning bodies and providers. This will often need to be developed through better understanding of the real pressures each side face. There are always likely to be tensions as providers attempt to meet and surpass regulatory requirements and purchasers try to ensure that the finances at their disposal are used to best effect without any excess profits being made at the public expense. Openness and reasonableness are the keys to being able to discuss this part of the contract.

Anti-competitive behaviour by purchasers or providers is unhelpful. Whilst it is clear that purchasers and providers have much in common and that mature relationships will enable those discussions and aid movement towards better understanding and agreements, it should also be noted that the Competition Act 1998⁸ may apply if a cartel is formed to manipulate or fix price. In addition purchasers and providers should take care in discussions between them that they do not form a “partnership” as defined in the Partnership Act of 1890. To do so would render parties jointly liable for debts of the other.

It is also clear that purchasing managers may not have the financial understanding to reach conclusions on price alone and will require support from colleagues within their organisation (particularly finance and audit) who may themselves have to be supported in fully understanding the issues involved in purchasing care services. Equally many providers do not adequately express their costs and risks and may need greater help from accountants to assist this process.

A number of costing models now exist that should help both providers and purchasers consider how costs are built and agreed. Even these may not always bring agreement, however, especially when they only take historical costs, rather than developing costs, into account. Two well regarded models are, for residential care, the Joseph Rowntree Foundation / Laing and Buisson model⁹ and for domiciliary care, the United Kingdom Home Care Association.¹⁰

Where block or cost and volume contracts are being negotiated it is recommended that purchasers consider whether open book accounting may be the best way forward in reaching agreement on price. This could also be beneficial when purchasers wish to develop a new service where comparators on price may not exist as it gives the protection of returning unspent money within the contract if the price is set too high as well or efficiencies are gained as negotiating a new price if set too low (see also “Open Book Accounting”).

⁸ See (www.ofc.gov.uk)

⁹ The Policy Press (ISBN 1 86134 426 0, price £11.95). www.jrf.org.uk/knowledge/findings/socialcare/612.asp.

¹⁰ UKHCA 2003 www.ukhca.co.uk/index_files/p1052

Section 2 The Clauses

Partnership Statement

Suggested Clauses

<p>Any contract between the parties should underline their intention to work together towards the shared and agreed objectives as defined in the service specification. This should be done in an equal partnership and the contract may include a statement to this effect.</p> <p>It is important to ensure that the parties to the contract will not be treated as partners or agents.</p> <p>Any preamble should also state which documents form part of the contract.</p>	<ul style="list-style-type: none"> ○ The parties agree to work together in an open and trusting style with a view to ensuring best value is achieved and a fair price is paid for the services provided. ○ Nothing in this agreement is intended to create a legal partnership or legal relations of any kind between the parties (including but not limited to the Partnership Act 1890). Neither party shall have authorisation to make representations to act in the name of, or act on behalf of, or otherwise bind that party.
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Third Party Rights

Suggested Clauses

<p>The Contracts (Rights of Third Parties) Act 1999 enables a third party, who is not a party to the contract, to enforce terms against a party to that contract. The third party which must be expressly identified in the contract is given the same rights of enforcement as the parties to the contract.</p> <p>The parties to the contract can expressly exclude or limit third party rights in the contract.</p> <p>It is not recommended that residents or any third parties have the rights to enforce a contract which has been made between the commissioner and the provider. Without excluding third party rights, commissioners and the providers would not be able to rescind, vary or alter the contract without residents or third party consenting to the changes. This is both impractical and can be expensive.</p> <p>However, there should be clear statements within a service specification about exactly what service is being purchased and via both the specification and adherence to national</p>	<ul style="list-style-type: none"> ○ A person who is not a party to this agreement shall have no right pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of this agreement.
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<p>minimum standards a clear guide for service recipients and their carers about the volume, type and quality of the service to be provided.</p>	
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Duration

Suggested Clauses

<p>There should be a clear duration to any block or cost and volume contract. This allows continuity for commissioner and service user, and confidence in investment for the provider.</p> <p>For contracts over a number of years there can be break points within the overall duration to allow mutual review of the terms and conditions. Such a review should not be left to the last minute and time should be left for re-tendering if required.</p> <p>Any extension of the contract must be properly negotiated and agreed by both parties. However, an extension of a contract should not be used as a means of avoiding discussions about contract renewal. By agreeing not to vary the price beyond inflation this should encourage providers to renegotiate contracts with the commissioner.</p> <p>Contract renewal should include the opportunity for all parties thoroughly to review the terms of the contract and to propose adjustments. Renewals in particular, should include the opportunity for the cost and price of services to be considered, as for a new contract, without reference by either party to those applicable to the expired contract</p> <p>Commissioners should not assume that automatic renewal on the existing terms is satisfactory to providers.</p>	<ul style="list-style-type: none"> ○ This Agreement shall take effect on the [Commencement Date] and shall expire automatically on the [Expiry Date] unless it is renewed by agreement in writing between the parties [for a further term of [] years] from that date or is terminated in accordance with clause [] or is otherwise lawfully terminated. ○ In the event of an extension beyond the contract period both parties will wish to review any changes [] months prior to the expiry of the original contract. ○ During any extension an increase in contract price will only be considered if the increase does not exceed the percentage change in the Office of National Statistics commercial price index (or other index specified in the contract) between the commencement date and date of giving such notice under clause [] above.
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<p>In the undesirable event that a contract renewal is not agreed in time to ensure continuity of care for the service user, explicit agreement should be obtained from the provider as to how existing service users are to be treated. This should be of the shortest duration possible to enable proper renewal.</p>	
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Trial Period

Suggested Clauses

<p>When a service user first moves into a care home, they should have a trial period to ensure that the service they receive meets their needs and they are content with the service. It also allows providers the opportunity to ensure that they are able to provide the service user with the care that they require.</p>	<ul style="list-style-type: none"> ○ The parties agree that the first [days / weeks] of each individual placement shall be regarded as a trial period in order to ensure that the service is satisfactory in meeting the needs of the service user and before both parties agree to a permanent service being in place. If either party wishes to terminate the placement during the trial period they may do so by giving one week’s written notice to the other party. ○ The commissioner may in agreement with the provider extend the trial period on behalf of the service user after consultation with the service user [and/or] their representative.
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Care / Service reviews

Suggested Clauses

<p>It is intended that most of the material on the content of service reviews will be included in Part 2 of the guide on service specifications. However, some authorities may want to include some aspects of this material in their general contract document.</p> <p>It is important that any contract includes the provision to regularly review a service user’s care needs to ensure that the service being provided is still appropriate. This is likely to be undertaken as part of the wider Fair Access to Care Services review of the service user.</p>	<ul style="list-style-type: none"> ○ A care review shall take place at the end of the trial period and at least annually thereafter and also by agreement or at the reasonable request of any interested party. ○ A review must involve the person receiving services [and/or] their representative to help consider the needs of the service user. A representative of both parties to the contract must be present. ○ The commissioner shall ensure that a written report is made of every review meeting which, when agreed by both parties and the individual or their representative as a correct record, shall be distributed to all parties.
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Price determination and review

Suggested Clauses

Overall, the contract needs clearly to identify the following issues:

- The automatic triggers for a price review;
- The circumstances in which either party may require a price review;
- The mechanism by which any price review is undertaken and agreed;
- The factors which are to be taken into account in the make-up of the price.

In addition there may be particular aspects of the agreement that need to be included where local circumstances dictate, eg, where a TUPE agreement exists.

A number of inflation measures exist (see Appendix 2) and it may be appropriate to use more than one of these in proportion to those parts of the contract affected. For instance inflation indicators on wage increases eg, the Average Earnings Index or the New Earnings Survey, could take account of 70% of the contract price to reflect the proportion of cost associated with staffing. The remaining 30% of the price may be judged against a more general indicator (say the General Retail Price Index). Purchasers will need to decide which indicator(s) to use, in what proportions and for which month.

The price to be paid by the Commissioner shall be varied according to the provisions of this clause on the following events:

1. Annually.
 2. The care needs of the service user change.
 3. There is a change to the Care Specification.
 4. Changes in the cost of providing the Service
1. Annual Review: The provider shall with effect from the date on which the annual price adjustment takes effect, being [date] in the first Contract Year and every twelve months thereafter for the duration of the Contract, adjust the fee in accordance with clause [] below. The fee shall be adjusted by applying the Inflation Formula [include which formula is to be use] to the current fee.
 - On [date to be agreed] of the [year] and each subsequent year of the Agreement ("the Price Review Date") the price shall be varied in accordance with the following formula:
 - a. []% of the price shall be determined by the percentage change in average gross weekly earnings indicated in the New Earnings Survey for SIC (1992) Code 853 Social Work activities, most recently published as at each review date (including [state date])
 - b. []% of the price shall be determined by the average movement of the General Retail Price Index (excluding mortgages) over the previous 12 months.
 2. The price may be reviewed by either party at any time following an

<p>Wherever dependency-based fees are agreed, further clauses should be added to cover legislative and/or specification changes as opposite in Clause 4. The contract should determine a process for reviewing dependency based fees and ensuring that changes can readily be responded to. It would be equally important here to agree an arbitration process in the case of the parties not agreeing.</p> <p>In establishing on-going costs it is incumbent upon providers to detail year on year efficiencies within their services. Commissioners may also require providers to ensure that changes to working practices take place to provide efficiencies where these are beneficial to service users and Best Value considerations.</p> <p>It should be noted by both commissioners and providers that the government is clear that the cost of CRB and POVA/POCA checks for staff should be met as part of the contract costs and not by staff themselves.</p> <p>Timescales for agreeing price and price review need to be realistic for both parties.</p> <p>If there is an unanticipated change in the law or regulation which affects the financial viability of providing the service, the parties should have the opportunity to discuss the effect the change of law will have on the contract and where appropriate vary the contract to take account of the change of law.</p> <p>Where the legislative change is substantial, and where the change was not known in advance, ie, new case law, and hence could not be taken into account in the annual price review process then the party affected by the change should notify the other of the need for</p>	<p>assessment/re-assessment of a Service User's [care needs / category / dependency / dependency level and a consequent change in service. The fee shall be varied from the agreed date of change in circumstances the [care needs / dependency /dependency level]. The commissioner shall each [period to be agreed], or sooner if possible, publish a list of prices, which will specify the price that it will pay for the provision of the service for each care category.</p> <ol style="list-style-type: none"> 3. In the event that the parties agree a variation to the obligations set out in the Care Specification, the price shall be adjusted to reflect any change in the costs of providing the service. 4. The price may be changed in line with changes to the cost of providing the specified service. Such changes in price should be fair and reasonable, not lead to any deterioration in the quality of the service to be provided and may take into account any relevant legislative change or mandatory and statutory specification changes. <ul style="list-style-type: none"> ○ Upon a price review being triggered in accordance with clauses 1, 2, 3, or 4 above, the proposed contract price for the period to the next Price Review Date (or sooner if a further review is triggered) will be notified by one party to the other. The written notification and supporting cost breakdown (an "Adjustment Notice") will be submitted not less than one month prior to the Price Review Date. ○ In the event that either party does not agree to the proposed price change, the commissioner shall convene a meeting with the provider within [] days of the notification provided above. ○ If agreement has not been reached within [] days of the meeting convened the parties
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<p>a fee change in writing. The parties would then enter into discussions to consider the implications of the change and agree what action, if any, would be taken</p> <p>It may be appropriate to list the legislation which is pertinent to the contract and with which it is expected the provider organisation will comply.</p>	<p>will take immediate steps to appoint an independent arbitrator.</p> <ul style="list-style-type: none"> ○ The cost of the independent arbitrator shall be apportioned between the parties in such proportions as the arbitrator thinks fit. Any decision of the arbitrator shall be final and binding on the parties to this agreement. Any price adjustment so determined will take effect from the Price Review Date. ○ The provider shall comply with all statutes, orders and any regulations or bylaw applicable to the performance of this contract. Failure to do so may be regarded as a material breach.
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Payment Terms/Late Payment

Suggested Clauses

<p>Normally the resident will pay their assessed charge direct to the commissioner. However, Section 26(3A) of the National Assistance Act 1948 provides for an exception to this rule for residents placed by local authorities in independent sector homes: where the resident, the commissioner, and the person or organisation managing the premises all agree. In this circumstance the resident may pay direct to the provider organisation the amount that he or she would otherwise pay to the commissioner. This will leave the commissioner responsible for paying the home the remainder of the cost. However, authorities should note that they remain responsible for the full amount should the resident fail to pay the home as agreed...(CRAG 1.023 and 1.024)</p> <ul style="list-style-type: none"> ● Where the commissioner pays gross, payment for the full cost of care is then a straightforward matter between the commissioner and the provider; with arrangements for the commissioner to collect the service user’s contribution and/or any third-party contribution (LAC (2000)20 3.5.1) falling outside this arrangement and subject to separate processes. 	<ul style="list-style-type: none"> ○ Where a third party contributes part of the agreed gross price of a care home placement, this arrangement is between the third party and the commissioner. Any proposed change in the gross price must be agreed between the provider and the commissioner. No requirement may be made by the provider on the third party to increase their payment without such an agreement and if such a requirement is made, the commissioner will not be liable
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<ul style="list-style-type: none"> • Where the commissioner is paying net of the service user’s contribution and any third-party contribution, it must set up separate arrangements to ensure payment of these contributions are made to the provider without fail. In the case of default, responsibility for full payment falls to the commissioner. <p>Any understanding agreed with the service user and/or any third-party contributor must be clearly recorded and agreed.</p> <p>Irrespective of the method used for payment, the contract between commissioner and the service provider should be explicit as to what has been agreed. Prices should shown as net of VAT and this should be clearly stated.</p> <p>It may well be appropriate to include in any contract a provision for a clear payment structure based on the submission of standard of agreed form invoices. Commissioners and providers should agree an acceptable format for submitting invoices.</p> <p>Where part of a consolidated invoice is in dispute, this should not delay payment of all the remaining amounts not in dispute. Where ‘rounding’ in multiple unit invoices creates differences in pennies on the total invoice, it is not acceptable to refuse payment, especially as such calculations are generally the result of computerised or automatic invoicing systems which will be costly to manually override. Internal financial mechanisms may require a revised invoice for the undisputed part or a credit note, in order to be able to deal properly from the commissioners accounting processes.</p> <p>Late payments can lead to serious cash flow problems for providers, they can reduce profits and threaten their viability and survival. If providers are continually paid late they may raise unit costs to reflect the cost of finance required, or go out of business.</p>	<p>for payment in the event that the third party defaults on payment.</p> <ul style="list-style-type: none"> ○ The provider shall at the end of every [name a time period] submit an invoice to the commissioner for [number of weeks] payment, taking account of any existing balance. This payment will be made in advance/arrears. The commissioner shall pay a properly submitted invoice within 14 days of receipt. ○ Where the calculation or amount of one or more parts of an invoice is disputed, all other undisputed parts of the invoice shall be paid promptly and within normal payment terms. ○ In the event of a delay or default by the commissioner in making payment of greater than [number of days] from receipt of an invoice, the provider shall be entitled to interest on any payment overdue at a rate per annum equivalent to []% above the Bank of England base rate (the base
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<p>Commissioners should include provision for interest if they fail to pay on time, or ensure that their payment cycle is in advance of the provider incurring costs of sales. Providers are legally entitled to charge interest on late payments under the Late Payment of Commercial Debts (Interest) Act 1998, even where explicit provision is not made within the contract.</p>	<p>rate) current on the date upon which such payment first becomes overdue.</p> <ul style="list-style-type: none"> ○ In the event of overpayment by the commissioner a refund shall be made by the provider within 28 days of notification of the overpayment. ○ In the event of a delay or default by the commissioner in making payment of greater than [number of days] from receipt of an invoice, the provider shall be entitled to interest on any payment overdue at a rate per annum equivalent to []% above the Bank of England base rate (the base rate) current on the date upon which such payment first becomes overdue.
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Hardship

Suggested Causes

<p>In the event of either party getting into difficulties, that party should have the right to approach the other to request relief. This will enable parties to openly discuss their respective difficulties with a view to agreeing an amicable and effective compromise</p> <p>Commissioners receiving such approaches should not reduce the rate of referrals for service or withdraw service users from the care of the provider unless it is clear that there would be a risk to their safety or it is apparent that the service is in danger of imminent closure.</p> <p>In many cases, where financial difficulties would result only in the appointment of an administrator and care would continue, premature action could precipitate the problem. Unless explicit reassurance is stated in the contract, providers may be unwilling to confess to problems of viability until it is too late.</p>	<ul style="list-style-type: none"> ○ In the event that either party considers that it is no longer able to provide or purchase a viable service, that party may serve a written notice to the other stating that it is unable to continue to provide or avail itself of the service and the reasons why it considers itself unable to do so. ○ Each of the parties shall be entitled to serve a Material Change Notice within six months of becoming aware of any Material Change in Circumstances which affects them. ○ Upon service of a Material Change Notice the Commissioner and the Provider shall each use all reasonable endeavours to negotiate and agree a variation to this Agreement or other mutually acceptable solution within the Material Change Negotiation Period ○ Upon receipt of a notice under clause [] above or a Material Change Notice the parties shall meet within [days] for the purpose of agreeing a course of action. If the parties fail to agree a course of action, either party may refer the matter to mediation in accordance with clause [].
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	<p>This is without prejudice to any right either party may have to terminate in accordance with clause [].</p>
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Complaints

Suggested Clauses

<p>It is important that both commissioners and providers have transparent complaints policy and that those using services and their representatives know how to access the complaints process should it become necessary.</p> <p>A provider needs to be aware of all complaints made in order to comply with its duty of care towards both residents and staff.</p> <p>Where the provider is part of a national or regional organisation with a national procedure, agreement should be reached with the commissioners as to the compatibility of their complaints procedure and the commissioners requirements.</p> <p>Complaints procedures and notices should take into account any disabilities or language or communication difficulties that service users and their carers / relatives may have.</p> <p>Commissioners should check that complaints procedures clearly state the right of appeal to the commissioner’s own procedures and to the Commission for Social Care Inspection.</p> <p>Commissioners will also find it useful to discuss with providers any accumulation of concerns that did not become formal complaints as part of contract monitoring.</p>	<ul style="list-style-type: none"> ○ The provider and commissioner shall each operate a complaints procedure that satisfactorily meets all statutory and legal requirements. ○ The provider shall agree a complaints procedure with the commissioner and display or distribute notices in the places and in a form approved by the commissioner, giving information as to how complaints about the provision of services may be made. ○ The commissioner shall notify the provider promptly of any complaints it receives in connection with the service provided under this agreement, in order that the provider may make timely investigations, unless the commissioner has reason to believe that the safety of the complainant or any other person would be compromised by such notification. ○ Where it is agreed that the provider is investigating or dealing with a complaint received from any source, the commissioner shall not intervene or carry out separate investigations unless and until they have reason to believe that the provider’s investigations are inadequate or incomplete. The commissioner shall inform the provider in the event that it intends to intervene or it commences its own investigation. ○ The provider shall deal with any complaints received from whatever source in a prompt, courteous and efficient manner. The provider shall keep a written record of all complaints received in connection with the service provided under this agreement and of the action taken in relation to such complaints. Such records shall be kept available for inspection by the
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	<p>commissioner at all reasonable times upon request.</p> <ul style="list-style-type: none"> ○ The provider shall notify the commissioner in writing in accordance with the agreed complaints procedure of all complaints received in connection with any service it provides and of all steps taken in response to such complaints. ○ A record of any complaints and their outcomes must be maintained for inspection by the commissioner on request. ○ The provider and the commissioner shall take all reasonable steps to ensure that no detriment is suffered, either by the complainant, the provider or by any other person who is not the subject of a substantiated complaint as a consequence of any complaint.
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Variation

Suggested Clauses

<p>The contract should ensure that both parties can agree variations to the contract.</p>	<ul style="list-style-type: none"> ○ Either party may propose a variation to the terms of this agreement. No alteration to this agreement shall be effective unless it is in writing and signed by the [authorised / nominated] representatives of both parties. ○ Acceptance of a proposed variation shall not be unreasonably withheld or delayed. Where agreement cannot be reached as to a proposed variation, the matter may be referred to mediation and, if required, to arbitration, in accordance with the terms of this agreement.
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Default

Suggested Clauses

<p>There must be clear ways to determine when a party has defaulted on the contract and how this can be resolved.</p>	<ul style="list-style-type: none"> ○ If any party is in default of their respective obligations under this contract, the other party shall notify in writing the way in which the party is in default and if appropriate the matter shall be considered at a meeting of the parties. ○ Where, despite any action taken the party is still in default, the aggrieved party may issue a default notice specifying the default and the
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	<p>action to be taken to rectify it. The notice shall state a reasonable period of time within which the required action is to be taken. If the default is not remedied within this period to the reasonable satisfaction of the other party, the aggrieved party shall refer the matter to the dispute resolution procedure in accordance with clause [].</p>
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Exerting Undue Influence

Suggested Clauses

<p>These are fairly standard clauses in most contracts. Attention should be given to the sub-clause dealing with proportionality.</p>	<ul style="list-style-type: none"> ○ The provider shall not offer, give or agree to give to any agent or employee of the commissioner or their families or other connected persons <ul style="list-style-type: none"> ▪ any gift or consideration of any kind ▪ any inducement or reward for any act in relation to the obtaining or performance of this or any other contract with the commissioner, ▪ or show or not show favour or disfavour to any person in relation to this or any other contract with the commissioner. ○ The provider shall not <ul style="list-style-type: none"> ▪ Enter into this or any other contract with the commissioner in connection with which a reward or fee has been paid or has been agreed to be paid unless before this agreement is made particulars of any such arrangement have been disclosed in writing to the commissioner. ○ If the provider, its employees or agents, or anyone acting on its or their behalf, does any of the prohibited acts or commits any offence under the Prevention of Corruption Acts 1889 to 1916, with or without the knowledge of the provider, the commissioner shall be entitled: to <ul style="list-style-type: none"> ▪ terminate this agreement; and ▪ recover from the provider the amount or value of any such gift, property or lease or consideration or commission.
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	<ul style="list-style-type: none"> ○ In exercising its rights or remedies under this clause, the commissioner shall: <ul style="list-style-type: none"> ▪ act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing the prohibited act, the extent to which such an act may have been solicited by any person in the employ of or acting on behalf of the commissioner; and ▪ give all due consideration, where appropriate, to action other than termination of this agreement, including (without limitation) requiring the provider to procure the dismissal of an employee where the prohibited act is that of such employee.
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Dispute resolution

Suggested Clauses

<p>The parties should work together with a view to resolving disputes. At no time should any services provided be disrupted, delayed or suspended during a dispute between the commissioner and provider.</p> <p>The general principle of dispute resolution is that attempts should be made to resolve the problem at the earliest and most informal opportunity, and at the point nearest to service delivery, by those directly involved. Only if this fails should the matter be referred in an escalation process through the management structures and dispute or complaints procedures in an attempt to find a resolution acceptable to all parties.</p> <p>There may be instances when this is not considered the best way of resolving an intractable situation (as perceived by one of the parties). Instead the ability to terminate the contract may be preferable with remedies still being open through any contract law proceedings.</p>	<ul style="list-style-type: none"> ○ “The Parties shall negotiate, in good faith, a settlement of any complaint(s) arising in connection with the agreement. The Parties shall attempt to resolve any complaint(s) by a meeting between the agreed representatives within a reasonable period of time but not exceeding [14 days]. ○ In the event that the Parties are unable to resolve the complaint(s) at this meeting or within 14 days thereafter, the complaint(s) shall be referred by the agreed representatives to more senior representatives of each party, who shall meet together within 28 days of such a referral, with a view to resolving the complaint(s). ○ If the Parties cannot resolve the dispute through the above process, the dispute may be settled by mediation and/or arbitration. This is without prejudice to either Party’s right to terminate the agreement in accordance with clause [] and [] of this agreement, and/or either Party’s right to issue legal proceedings. ○ Either Party may refer any dispute to
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	<p>mediation in accordance with the CEDR Model Mediation Procedure by giving written notice (“the Mediation Notice”) to the other Party. Any agreement reached in Mediation shall be in writing and be final and binding on the Parties.</p> <ul style="list-style-type: none"> ○ If either Party refuses at anytime to participate in the Mediation Procedure and/or the dispute is not resolved within 60 days of service of the Mediation Notice (or such longer agreed period), then either Party may refer the matter to arbitration for final decision. ○ The arbitrator will be independent and be agreed by both Parties. Such agreement will not be unreasonably withheld by either Party. ○ The arbitrator shall be entitled to make such decision or award as he thinks just and equitable having regard to all the circumstances of the dispute. Costs of the arbitration shall be apportioned between the Parties by the arbitrator as he thinks fit. Any award or decision of the arbitrator shall be final and binding on the Parties. ○ Performance of the contract should not be suspended, ceased or delayed whilst a dispute is referred to mediation/arbitration or legal proceedings are commenced and the parties shall fully comply with the requirements of the contract at all times.
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Indemnity

Suggested Clauses

<p>Contracts should recognise that both parties carry responsibilities and liabilities for service provision. Both commissioner and provider need to consider which party should be responsible for which risks. Generally, the commissioner will require protection in the form of an indemnity from the provider if the provider is negligent in providing the service. Similarly, the provider will require indemnification for the negligence of the commissioner. The parties should consider limiting the level of indemnity in accordance with insurable</p>	<ul style="list-style-type: none"> ○ The Provider shall be liable for, and shall indemnify the Commissioner, its employees, servants or agents from and against all liability to the maximum extent permitted by law in the case of : <ul style="list-style-type: none"> ▪ death of, or personal injury, to any person; ▪ breach of a statutory duty or obligation arising under this contract; ▪ loss of, or damage to any property belonging to the Commissioner
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<p>losses. Any system of agreed damages should be proportionate to the breach and relate only to direct financial losses incurred by the aggrieved party.</p> <p>Contracts should never contain penalty clauses (which under contract law are unenforceable). Nor should such clauses be included on the basis that they would never be enforced for minor infringements. Contract clauses should only exist, where there is an intention to enforce them.</p>	<p>and/or its employees' servants or agents;</p> <ul style="list-style-type: none"> ▪ in respect of any claim, action, proceedings, damages costs, demands, expenses and charges (including all legal expenses) and any other liabilities whatsoever arising out of, or in connection with this agreement caused directly or indirectly by the negligence or omission of the Provider except where the Provider is able to demonstrate that such death, personal injury, loss or damage was not caused or contributed to by its negligence or default, or the negligence or default of its staff or sub-contractors, or by any circumstances within its control.” <ul style="list-style-type: none"> ○ Subject to clause [], the provider shall not be liable for, or obliged to indemnify the commissioner, its employees, servants or agents, for any injury, loss, damage, cost or expense caused by <ul style="list-style-type: none"> ▪ any act, omission, or negligence or wilful misconduct of the commissioner or by the breach by the commissioner of its obligations under this contract; ▪ the provider acting on the instruction of the commissioner or on incorrect information provided by the commissioner; ▪ any claim in excess of the level of the provider's required insurance cover as detailed in clause [] of this contract. ○ The provider to effect and maintain with a reputable insurance company policies of insurance providing adequate level of cover in respect of all risks incurred by the provider or likely to be incurred arising out of the contract including but not limited to death/personal injury or loss of or damage to property. Policies shall include cover in respect of financial loss arising from any advice given or
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	<p>omitted to be given by the provider.</p> <ul style="list-style-type: none"> ○ Provider to hold employers liability insurance in respect of staff in accordance with legal requirements for the time being in force. ○ The term of insurance shall not relieve the provider of any liabilities under the contract. It shall be for the contractor to determine the amount of insurance cover to satisfy any liability. ○ Subject to clause [], the commissioner shall indemnify the provider against all liability for death of or personal injury to any person; loss of or damage to any property; and actions, costs, claims, demands, charges and expenses (including legal expenses on an indemnity basis) that may arise out of or in consequence of <ul style="list-style-type: none"> ▪ the commissioner's performance of or failure to perform its obligations under this contract; ▪ Any act or omission, the negligence or wilful misconduct of the commissioner; ▪ Where not otherwise compensated for under this contract, a breach by the commissioner of its obligations under the contract. ○ An indemnity by a party under any provision of this contract shall be without limitation to any indemnity by that party under any other provision save that no party shall be entitled to recover twice in respect of any one loss ○ If either party wishes to make a claim under this clause [] against the other party, the claiming party shall give notice of the claim as soon as reasonably practicable, setting out full particulars of the claim. The parties shall follow the dispute resolution procedures set out in clause [] ○ Neither party shall be liable to the other for any loss of income or any type of special indirect or consequential loss.
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Confidentiality

Suggested Clauses

It will be necessary to exchange personal information about service users to facilitate the provision of appropriate care. The provider will also need to provide potentially commercially sensitive information to commissioners. The contract must allow for this but ensure that both parties pay due regard to the need for confidentiality.

Service users and carers should know that this is happening. They should also know if information is to be shared with third parties, for example in the case of inspections or perhaps where the ownership of a home is about to be transferred.

- o Each party shall:-
 - Comply with the requirements of the Data Protection Act 1998 and the Freedom of Information Act 2000
 - treat as confidential and secret all information relating to individual service users, carers or any employees of either party and safeguard it accordingly
 - Treat as confidential any information obtained from the other party under or in connection with this agreement and clearly identified as confidential by that party
 - Not use any confidential information otherwise than for the purposes of this contract
 - Not disclose any confidential information to any third party without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of this agreement.
- o The provisions of clause [] above shall not apply to any information: which was in the possession of the party concerned without restriction as to its disclosure, before receiving it from the disclosing party or which is or becomes public knowledge (otherwise than by breach of this clause []).
- o The obligations imposed by this clause [] shall continue to apply after the expiry or termination of this agreement. Unless otherwise specified in writing in relation to a particular item of Confidential Information, the obligations imposed by this clause [] shall apply in respect of each item of Confidential Information for a period of [to be agreed] years from the date on which that item was created, or indefinitely.
- o Neither party shall advertise or publicly

	announce this contracting agreement without the prior written consent of the other party, including its partners. Such consent should not be unreasonably withheld or delayed.
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Assignment and Sub-Contracting

Suggested Clauses

<p>It is not uncommon for service providers to either sell or change partnership arrangements with regard to their business. Equally contracts should cover the use of agency staff.</p>	<ul style="list-style-type: none"> ○ Neither party shall assign their obligations under this contract without the prior written consent of the other party. Such consent should not be unreasonably withheld or delayed. ○ Where a contract is assigned it does not release either party from the requirements of the confidentiality clauses [] or any obligation or duty attributable to the party under the contract or these conditions. ○ Neither party shall sub-contract their obligations under this contract, without prior consent in writing of the other party. Such consent should not be unreasonably withheld or delayed. ○ Where consent is given to placing of sub-contracts, copies of each new sub-contract should be sent immediately to the client upon issue. ○ A Party to this Agreement shall be responsible for the acts and omissions of its sub-contractors as though they are one of its own ○ Clause [] does not exclude the use of agency staff in cases of emergency or other planned absence. It would be expected that agency staff do not constitute more than [%] of staff on duty during any given week.
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Going into Hospital or other temporary suspension of a service

Suggested Clauses

<p>Where someone is admitted to hospital and is not receiving care for a period; either in their care home or in their own home; there needs to be agreement between the commissioner and provider on the holding of</p>	<ul style="list-style-type: none"> ○ If the service user becomes absent from their home where they receive domiciliary care services or from their care home and the absence is unplanned, then the provider shall
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<p>that service for the service user’s return, the number of days for which this is reasonable, and the continuation of fee payment.</p> <p>These arrangements are likely to vary in response to planned, unplanned, brief or longer absences.</p> <p>Whichever party first becomes aware of a planned or unplanned absence must let the other party know as soon as possible. Such variations would normally be notified, or confirmed, in writing unless this is impracticable.</p> <p>It would be reasonable for the commissioner to at least pay for wasted time that may arise from a carers visit to a service user’s home when neither party have been made aware of an absence.</p> <p>It would be reasonable to have different arrangements for holding a residential care room pending the service user’s return compared to holding a domiciliary care service, as the former is a person’s own home.</p> <p>In a care home a person’s room should never be used by another service user without consent being given by the user and both parties.</p>	<p>formally notify the commissioner’s nominated representative within one working day or less of the period of absence commencing.</p> <ul style="list-style-type: none"> ○ Where an absence is unplanned, then upon the giving of this notification the parties shall review the individual’s continued requirement for the service. ○ Where the absence is pre-planned and the period of absence is expected to exceed eight continuous days, the party first made aware that the absence will occur shall inform the other party in writing. ○ If the individual is absent from their care home, the provider shall ensure that their room is kept available for them during their temporary absence. The commissioner will continue to pay fees in full during that period of absence. Where the absence exceeds a period of [] days the commissioner and provider may agree in writing a reduction in the price or a suspension of the contract. ○ If the individual is absent from their own home and is therefore not requiring domiciliary care services, the provider shall ensure that they are able to restart the service when the person returns home after their temporary absence. The commissioner will continue to pay fees in full during that period of absence for up to [X] days. Where the absence exceeds this period the commissioner and provider may agree in writing a reduction in the price or a suspension of the contract.
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Termination

Suggested Clauses

<p>Only when dispute procedures have been exhausted should formal contract enforcement termination occur. There may of course, be instances where termination is not associated with dispute or breach, eg, if</p>	<ul style="list-style-type: none"> ○ Either party may terminate the whole of this agreement by giving [] months' notice in writing or such other period as may be mutually agreed. During the period of notice both parties shall co-
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<p>a business is closing down.</p> <p>The contract should allow both provider and commissioner the ability to terminate, and possibly by way of a break clause, on reasonable grounds and in accordance with procedures which have been agreed by both parties. Both parties should minimise any damaging effects on the users of the service caused by termination.</p> <p>The notice period for withdrawing from the agreement should be the same for all parties and clearly stated. Both parties should have the right to terminate the agreement by giving written notice.</p> <p>The contract should be clear as to when termination is intended to apply to the whole agreement and when only to individual service order within a contract, or individual contracts within a service level agreement.</p> <p>The Office of Fair Trading guidance (reference) explicitly refers to the termination of contracts, both on the part of the provider and the person receiving the services. It is critical that all parties have protection, although the service user is not a party to the contract between commissioner and provider..</p> <p>Contracts should be proportionate in assigning rights of termination. For example; a breach of a critical contract term should not attract the same response as a minor procedural infringement. In most circumstances dispute resolution would be tried first.</p> <p>In terms of material breach it may be that the commissioner would wish to include either specific legislation or a more global clause dealing with compliance. Clauses may be included with regard to national minimum standards, although the majority of this material will be dealt with in the service specification document planned by DH to be issued as a companion to this Fairer</p>	<p>operate to ensure that the interests of service users are met under whatever new arrangements may be proposed.</p> <ul style="list-style-type: none"> ○ The commissioner may terminate the agreement immediately by written notice in the event that the provider: <ul style="list-style-type: none"> ▪ being a body corporate summons a meeting of its creditors, makes a proposal for or becomes subject to a voluntary arrangement, is unable to pay its debts within the meaning of section 123 Insolvency Act 1986, ▪ has a receiver, manager, administrator or administrative receiver appointed over its assets, undertakings or income, passes a resolution for its winding up (other than for the purposes of voluntary reconstruction or amalgamation), is the subject of a petition for its winding up or otherwise ceases to trade; ▪ being a partnership or individual enters into any composition or arrangement with its creditors, has a bankruptcy order made against it, is the subject of an interim order under section 253 Insolvency act 1986, has an interim receiver appointed under section 286 Insolvency Act 1986, is unable to pay its debts within the meaning of sections 267 and 268 Insolvency Act 1986 or otherwise ceases to trade; ○ Where the Provider has undergone a change of control within the meaning of section 416 of the Income and Corporate Taxes Act 1988 which impacts adversely and materially on any part of the contract the Commissioner may only exercise rights under this clause within 6 months of a change of control occurring and shall not be permitted to do so where it has been agreed in advance to any change of control that occurs provided to notify the Commissioner immediately when a change of control occurs
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Contracting Guidance.

- Both commissioner and provider reserve the right to terminate the contract with immediate effect if a material breach occurs which restricts or prevents the whole or any material part of the agreed service from being delivered or where the breach is capable of remedy, the provider fails to do so within [28] days of written notification by the commissioner. The written notice, which should be served within [3] months of the breach occurring or the commissioner becoming aware of the breach whichever is the later, should specify the nature of the breach and the required action for it to be remedied.
- For the purpose of this Agreement, the following issues are considered to be a material breach:
 - minor repeated and/or serious non-compliance with the provisions of the Health and Safety at Work etc. Act 1974, and any subsequent health and safety regulations by the Provider;
 - operation of the Home without insurance cover as required under clause [];
 - non-compliance with the requirements of race relations, equal opportunities legislation and disability discrimination legislation by the Provider
 - evidence of the deliberate misuse of drugs and/or medicines by the Provider when delivering services to individuals under this Agreement or negligence by the provider in permitting such abuse by any of the provider's staff.
 - evidence of the deliberate abuse and/or mistreatment of individuals by the Provider or negligence by the provider in permitting such abuse by any of the provider's

	<p>staff;</p> <ul style="list-style-type: none"> ▪ The Provider offers improper inducements or exerts unreasonable pressure upon potential Individuals or their relatives, or others with an interest, to attempt to encourage the potential Service user to go into the Home; ▪ The provider has been convicted of an offence under the provisions of the Care Standards Act 2000 and regulations thereto and any subsequent amendments; ▪ The provider has committed an offence under the Prevention of Corruption Acts 1889 - 1916; ▪ Persistent use of unqualified or untrained staff or agency staff over the amount specified in clause [] . <p>○ The Provider may terminate this Agreement by written notice in the event that:</p> <ul style="list-style-type: none"> ▪ the Commissioner fails to make payment, or is persistently late in making payment in which case the Provider shall be entitled to terminate upon 28 days notice; ▪ the Commissioner has committed a material breach of the Commissioner's obligations under this Agreement and, where the breach is capable of remedy, the Commissioner fails to remedy such breach within 28 days' of service of a written notice by the Provider specifying the breach and requiring it to be remedied, provided that any such notice is served within 3 months of the breach occurring or the Provider becoming aware of the breach whichever is the later; ▪ the Provider proposes to discontinue
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	<p>the operation of the Home/domiciliary care service and no arrangements acceptable to the commissioner have been made for the transfer of it as a going concern in which case the Provider shall be entitled to terminate upon 3 months written notice;</p> <ul style="list-style-type: none"> ▪ the Home/domiciliary care service ceases to be registered under the Care Standards Act 2000 in which case the Provider shall be entitled to terminate upon 28 days written notice.
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Termination of Individual contracts

Suggested Clauses

<p>See definition of terms, for the distinction between an Individual Placement Agreement and an Individual Purchase Agreement.</p>	<ul style="list-style-type: none"> ○ The commissioner or the provider may require the removal of a service user and terminate an Individual [Placement / Purchase] Agreement upon 28 days written notice; if: any of the following apply: <ul style="list-style-type: none"> ▪ The service users health or well-being would be seriously prejudiced by their continued presence in a care home. ▪ The mental and/or physical condition of the service user deteriorates, or the needs of the service user change, to the extent that the provider can no longer provide the care within the Home to meet that persons needs. ▪ The service user is in breach of the Individual Placement Agreement to an extent that the Individual Placement Agreement is terminated. ▪ The [care home/domiciliary care provider] is unable to provide the care required under the Care Standards Act 2000 and associated regulations and standards. ○ If a termination notice is served the commissioner will pay the fee to the provider for the duration of the notice period. ○ Should the agreement be terminated in accordance with clause [], by the provider the commissioner will be responsible for the costs of transferring the service user to an alternative provider.
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	<ul style="list-style-type: none"> ○ In the event of any termination of the agreement or placement for whatever reason, the provider will with utmost good faith collaborate with the commissioner to ensure there is a smooth transition and transfer of any service user from the provider's accommodation or domiciliary care service to the alternative accommodation or service.
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Death of the person using services

Suggested Clauses

<p>If a person is receiving domiciliary care then the payment should cease at the end of an agreed period from the date on which the death is notified to the provider, as the worker(s) concerned will have been scheduled and will need to be paid. Where the provider's staff discover the death, they may be required to take appropriate action or remain in attendance for longer than was originally scheduled. The contract should make allowance for this extended requirement, although for domiciliary care the level of provision is unlikely to be as high.</p> <p>If the person was in a care home, there should be a period during which fees may still be liable to allow the family to have time to clear their relative's effects from the room. The agreement should state the period.</p> <p>Such terms should be clear and prominent so that all parties to the contract are fully aware of their obligations. The key point is the reasonableness of the parties in each situation.</p>	<ul style="list-style-type: none"> ○ The individual contract shall terminate automatically after [x] days from the date on which the provider becomes aware of the individual's death. However, the contract may be extended for a short period of up to [x] days to allow providers to deal with any outstanding matters.
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Force Majeure

Suggested Clauses

<p>The contract should include 'force majeure' provisions. These clarify that neither party should be liable for any failure to meet the terms and conditions of the agreement which are as a result of an event beyond their control. In other words, where there is no practical means available to the parties</p>	<p>For the purposes of this clause</p> <ul style="list-style-type: none"> ○ "Force Majeure" means any event or occurrence which is outside the control of the Party concerned and which is not attributable to any act or failure to take preventive action
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<p>concerned to avoid such failure or delay.</p>	<p>by the Party concerned including, but not limited to, any Act of God, fire, flood, lightning, war, preparation for war, hostilities, insurrection, revolution, act of terrorism, riot or civil commotion, epidemic or other nature disaster, failure of supplies or power, fuel, transport, explosion, impact of aircraft or articles dropped from aircraft, equipment, raw materials or other goods or services and shall only be treated as events of force majeure to the extent that these events were beyond their control; force majeure does not include any industrial action occurring within the providers organisation or its sub-contractors organisation</p> <ul style="list-style-type: none"> ○ Any failure or delay by the provider in performing its obligations under this Agreement which results from any failure or delay by an agent, sub-contractor or supplier shall be regarded as due to force majeure only if that agent sub-contractor or supplier is itself impeded in complying with an obligation to the provider by force majeure. ○ Neither party shall be liable to the other party by reason of any failure or delay in performing its obligations under this agreement which is due to force majeure where there is no practicable means available to the party concerned to avoid such failure or delay. ○ If either party becomes aware of any circumstances of force majeure which give rise to any such failure or delay or which appear likely to do so that party shall promptly give notice of those circumstances as soon as practicable after becoming aware of them and shall inform the other party of the period for which it estimates that the failure or delay will continue. ○ Notwithstanding the foregoing, each Party shall use its reasonable endeavours to perform its obligations for the duration of the Force Majeure event. However if such event prevents either party from performing all of its obligations under the contract for a period in excess of [X months] either party may terminate the contract by notice in writing
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	with immediate effect.”
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Jurisdiction

Suggested Clauses

<p>It is normal to state in a contract the jurisdiction to which the contract is subject. Commissioners that have placements across the Scottish border may need to determine which jurisdiction applies.</p>	<ul style="list-style-type: none"> ○ The contract shall be considered as a contract made in England and subject to English law. ○ Subject to clause [] (dispute resolution), the courts of England and Wales shall have exclusive jurisdiction to determine any disputes that may arise out of or in connection with this contract. ○ If any provision of this contract becomes or is declared invalid this shall not impair or affect any other provision.
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Definition of Terms

Change of Law – unanticipated changes in the law which have a material adverse effect on the agreement (generally financial) following the commencement of the agreement where the change is effected by community law, domestic legislation or case law, and affecting services of a similar nature to those set out in this agreement.

Commissioner - for the purpose of these guidelines the term commissioner is used to mean the Local Authority, or any combination of statutory agencies entering into contracts with independent providers for the provision of community care services as defined by the NHS and Community Care Act 1991. It also includes all employees or agents of such commissioner(s). It used to mean the purchasing authority in this document throughout.

Compliance with laws – contract terms and conditions should comply with applicable legislation and the general common law.

Confidential – designated or intended to be kept secret: the contract should allow for such information to be produced if it is relevant to the contract.

Contract – the agreement between the provider and the commissioner consisting of these conditions and any attached schedules, the invitation to tender and any other documents or parts thereof specified by the commissioner.

Council – see **Purchasing Authority**

Default - any breach of the obligations of either party (including but not limited to fundamental breach or breach of fundamental term) or any default, act, omission, negligence, or statement of either party, its employees agents or sub-contractors in connection with or in relation to the subject matter of the contract and in respect of which such a party is liable to the other.

Default Notice – notice served by one party claiming that the other has defaulted on the contract detailing the default, the steps needed to be taken to rectify the default and the applicable timescales for rectification

Dispute resolution – attempts to address any disagreement between the parties to the contract in a way that avoids escalation and termination of the contract.

Extension - increasing the period of the contract beyond the termination date initially agreed between the parties

Force Majeure - any event or occurrence which is outside the control of the Party concerned and which is not attributable to any act or failure on their part to take preventive action.

Hardship – difficulty by either party to a contract in carrying out the terms of that contract

Individual Placement Agreement - an agreement between a commissioner and a provider over the placement of one individual outside any general agreement about terms and conditions.

Individual Purchase Agreement – see also Pre-Placement Agreement below – An Individual Purchase Agreement is an agreement between the commissioners and a service provider to provide a service for an individual service user normally within the terms of a pre-placement agreement

Key managers or workers - individuals of the respective parties who will be responsible for the operational aspects of the contract.

Law - any statute, by law, regulation, order, regulatory policy, guidance or industry code, rule of code, or directives, or request of any regulatory body, delegated or subordinate legislation or notice of any regulatory body and case law.

Local Authority – see Purchasing Authority

Material Change in Circumstance - a change in circumstances which has a significant effect or is likely to have a significant effect on the services provided, the manner in which they are provided or the costs of providing the service to the service user

Partnership Statement - any contract between the parties should underline that the parties' intentions are to work together in partnership and detail what the underpinning principles of that partnership are. Contracts should avoid the use of the word 'partnership' which is a legally defined status under the Partnership Act 1890, which neither party intends.

Primary Care Trust – NHS health body responsible for the provision of primary and community services, and the commissioning of acute services for patients living within their local area. There will be a number of PCTs within each wider Strategic Health Authority area.

Pre-Placement/Pre-Purchase Agreement (PPA) – see also Individual Purchase Agreement (IPA) above – a PPA is a general agreement on contract terms and conditions between the commissioners and a service provider prior to the placement of any individual with that provider under an IPA

Providers –any body or agency providing a service under the terms and conditions of the contract described. Provider also means any staff employed or agencies acting on behalf of that body.

Purchasing Authority/commissioner – The legal body which is issuing the contract. In the case of a single authority this will be the named local authority, if it is on behalf of a consortium of purchasers the lead commissioning organisation.

Reviews – a reassessment of the individual service user's needs and whether the service they are receiving is achieving the outcomes intended for that individual when it was first set up

Service User – The individual; receiving the care service and named in the care plan and/or assessment. The term service user unless otherwise specified shall also include reference to any person acting under a power of attorney, as next of kin or as an advocate or friend to the person.

Service Specification – the description of the services to be provided under the contract and attached as the specification schedule.

System Partners – all of the associated organisations who are or should be involved in the system of providing non-acute care services to older people. These may include local authority social services and housing, health and the independent sector.

Termination – The ending of a contractual agreement between commissioner and provider, whether of a whole service, or just of the provision to one individual service user

Third Party Contribution -

In certain circumstances, councils can make placements in more expensive accommodation than they would usually expect to pay for, provided a resident [in very limited circumstances] or a third party is able and willing to make up the difference (to top up)...A third party in this case might be a relative, a friend, or any other source. (LAC (2000)20 para 3.2

Variation – an alteration to the terms of the contract agreement

Appendix 1. Best Value

The aim of the Best Value process is to secure continuous improvements in performance, and to deliver services which bear comparison to the best. The Best Value (Exclusion of Non-Commercial Considerations) Order 2001 SI No 1909 was inserted into section 17 of the Local Government Act 1988 and came into force on 1 April 2000. It applies to all local government services, including social services (see Appendix 2).

The regulations permit commissioners to consider certain criteria such as the Terms and Conditions enjoyed by providers' care workers when selecting a contractor. Effectively, they can require contractors to apply minimum pay and conditions which needs to be reflected in the fees paid. This will be desirable, since recruitment and retention of good quality staff has a significant effect on the capacity and quality of service delivered.

Commissioners must ensure that their services are responsive to the needs of citizens, are efficient and of high quality and provided within a clear policy framework. They must prepare annual Best Value Performance Plans, setting out their strategic objectives and corporate priorities. Over a five-year period commissioners should review all their services to consider new approaches to service delivery and set demanding performance targets that will deliver continuous improvement. Therefore, Commissioners should work closely with providers to plan strategically for service provision in their area. Councils will want to ensure that the services they commission and purchase meet Best Value Requirements and providers will want to ensure that they have developed and can support those services. Commissioners may consider offering a higher price for a higher quality of care in order to encourage care providers to develop and improve their services.

The Local Government Act 1999 promotes best value through placing local authorities under a statutory duty to show continuous improvement in the areas of economy, efficiency and effectiveness. This offers local authorities a new opportunity to achieve their statutory duties by working in partnership with providers. The objectives of best value will be best achieved by:

- Developing better contracts through establishing a contracting framework enabling partnership working, which makes use of a broader range of contract types.
- Improving contract processes thereby ensuring that tendering for services takes place where necessary and appropriate.

Some commissioners have used their market powers to drive prices down and squeeze as much as possible from providers in the short term. Some providers have used market position to exploit prices and have not always delivered good quality services, sometimes because of commissioner pressure for them to keep doing more and more. In the long term this approach will prevent the development of the high quality services commissioners want, and will remain expensive in terms of high transaction and monitoring costs.

In order to move forward and to allow providers to provide a quality cost effective service for which they make an acceptable return, commissioners and providers need to better understand the pressures each face. They need to base their relationship on a partnership approach rather than the traditional adversarial arrangements.

Appendix 2 Potential measures to be used in price reviews

Average Earnings Index: means the Average Earnings Index for Health and Social Work which is the JVVR AEI: mth and ex bonus: Health and Social Work NSA (July 1999-100) as published by the Office for National Statistics (or by a government department or other body upon which duties in connection with such index devolve)

Increase in Average Earnings Index: means the percentage increase (if any) in the Average Earnings Index between the Commencement Date and [month before Price Review Date] in the first Contract Year and thereafter the annual increase in the Average Earnings Index between [month before Price Review Date] in the previous Contract Year and [month before Price Review Date] in the current Contract Year for the duration of the Contract.

Increase in RPI: means the percentage increase (if any) in RPI between the Commencement Date and [month before the Price Review Date] in the first Contract Year and thereafter the annual increase in RPI between [month before Price Review Date] in the previous Contract Year and [month before Price Review Date] in the current Contract Year for the duration of the Contract.

Appendix 3 Relevant Publications

<p><i>Building Capacity and Partnership in Care.</i>¹¹ BCPC was published in October 2001 by the Department of Health. It is an agreement between the statutory and independent sectors. It aims to encourage a more strategic, inclusive and consistent approach to capacity planning at a local level</p>
<p><i>Implementing Building Capacity and Partnership in Care</i>¹² was published in December 2003 by the Association of Directors of Social Services and representatives of the independent sector. It restates the principles of BCPC but also gives examples of the initiatives in specific localities, which demonstrate that aspects of commissioning practice have improved in some places</p>
<p><i>The Commissioning of Social Care and the requirement for joint commissioning</i>¹³ was published by CIPFA in 2003. The report seeks to identify the knowledge needed to commission effectively, describing and assessing the different approaches to joint commissioning.</p>
<p><i>Guidance on unfair terms in care home contracts</i>¹⁴ was published in October 2003 by the Office of Fair Trading. The report is described as a guide for advisers and is based on a review of a sample of agreements between providers and service users and outlines the OFT's experience of enforcing the <i>Unfair Terms in Consumer Contracts Regulations 1999</i> Care homes for older people in the UK Office of Fair Trading 2005 Recommendations from a 10 month study include a one-stop-shop for information on care home provision to help older people choose the right home; better access to complaints procedures, greater price transparency and fairer contract terms for care home residents</p>
<p><i>Take your Choice – a commissioning framework for community care</i>¹⁵ was published in December 1997 by the Audit Commission. This handbook is intended provide social services departments with a more detailed analysis of the issues raised in The Coming of Age relating to their commissioning role.</p>
<p><i>Making Ends Meet</i>¹⁶ is a Joint Review website for managing money in social services in respect of social care commissioning.</p>
<p><i>A Catalyst for Change</i>¹⁷ is a diagnostic tool and was published by Department of Health Change Agent Team in 2003. It provides a systematic approach to people in health and social care organisations and their system partners to help them identify what stage they are at in their commissioning roles. It</p>

¹¹

http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4006241&chk=BPcEi1

¹²

<http://www.ceretas.org.uk/publications/BUILDINGCAPACITYMONO.pdf#search='implementing%20building%20capacity%20and%20partnership%20in%20care'>

¹³ <http://secure.cipfa.org.uk/cgi-bin/CIPFA.storefront/EN/product/BV015>

¹⁴ www.offt.gov.uk

¹⁵ <http://www.joint-reviews.gov.uk/money/Commissioning/files/TakeYourChoice.pdf>

¹⁶ <http://www.joint-reviews.gov.uk/money/Performance/6-21.html>

<p>identifies the critical activities that will take them forward in the successful development of the non- acute services their communities need. The Change Agent Team has also produced Commissioning and the Independent Sector which is a good practice checklist and the Four Tests of Fairness.</p>
<p>Commissioning Home Care: Changing practice, delivering quality¹⁸ The Change Agent Team published a report in the summer of 2004 on the survey undertaken by the UKHCA and NHC into the range and extent of commissioning of domiciliary care services from both in-house and independent providers.</p>
<p>That's the Way the Money Goes¹⁹ was published in 1999 by the Social Services Inspectorate. It is concerned with the how effectively councils' commission services and contains the findings of inspections of commissioning arrangements in eight local authority social services departments in 1998.</p>
<p>Out in the Open – breaking down the barriers for older people²⁰ was published in 2000 and considers how local councils commission support services for older people. It is based on a project involving four diverse local social services authorities that focused on how and what to commission. The aim of the project was to test the benefits of direct expert intervention over written guidance or other traditional means of promoting good practice.</p>
<p>Surer Funding²¹ published report on a commissioning of inquiry undertaken on behalf of the voluntary sector by the Association of Chief Executives of Voluntary Organisations and published by New Philanthropy Capital, Nov. 2005</p>
<p>With respect to old age – report of the royal commission on long term care²² Published report of the inquiry by Sir Stewart Sutherland. March 1999, the Stationery Office. Sought to recommend a way of paying for long-term care which brings improvements in the short term and which is affordable and sustainable.</p>
<p>Charging for Residential Accommodations Guide (CRAG) in support of the National Assistance (assessment of Resources) Regulations 1992 (SI 1992/2977) updated April 2005.²³</p>
<p>LAC (2004)20 Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992²⁴</p>

¹⁷ http://changeagentteam.org.uk/_library/docs/GoodPracticeGuides/Catalystforchange2.pdf

¹⁸ <http://www.ukhca.co.uk/Commissioning%20Summary.pdf#search='commissioning%20home%20care%20changing%20practice,%20delivering%20quality'>

¹⁹ http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsInspectionReports/PublicationsInspectionReportsArticle/fs/en?CONTENT_ID=4008661&chk=1S6bEd

²⁰ http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4008023&chk=hr3kWH

²¹ www.philanthropycapital.org/html/surer_funding_risk_and_demands.php

²² www.hmsso.gov.uk

²³ www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/

²⁴ www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/LocalAuthorityCirculars

<p>Calculating a Fair Price for Care: a toolkit for residential and nursing care costs²⁵ by William Laing, published for the Joseph Rowntree Foundation by The Policy Press (ISBN 1 86134 426 0, price £11.95).</p>
<p>Calculating the real cost of home care A costing model provided by the United Kingdom Home Care Association 2003²⁶</p>
<p>Data Protection Act and Freedom of Information Act²⁷</p>
<p>Person centered approach for commissioners²⁸</p>
<p>The National Procurement Strategy 2004²⁹ sets out how councils can improve the delivery and cost effectiveness of high quality services through more effective, prudent and innovative procurement practices. The Strategy illustrates the scope for potential cost savings through more efficient procurement practices and partnership working, to release resources to the frontline.</p>
<p>Think Smart, Think Voluntary sector. Good Practice guidance on procurement of services from the voluntary and community sector³⁰ this is principally for central government departments and agencies but those involved in local authority procurement and partnership commissioning at a local level may also find the principles of some relevance to their work</p>
<p>Getting Started–Open Book Accounting Change Agent Team Jan 2005³¹ A briefing paper on open book accounting from the change agent team Better Commissioning Learning and Improvement Network</p>
<p>Best Value³² A brief article outlining the duty of Best Value and what it means for social care, with useful links.</p>
<p>Building Bridges A workbook to assist initiation of a project for developing relationships between commissioners and independent providers of care services³³</p>
<p>No Secrets³⁴ Department of health, 20.03.2000 Guidance on developing and implementing multi-agency procedures to protect vulnerable adults from abuse</p>

²⁵ www.jrf.org.uk/knowledge/findings/socialcare/612.asp

²⁶ www.ukhca.co.uk/index_files/p1052

²⁷ www.informationcommissioner.gov.uk

²⁸ www.valuingpeople.gov.uk/documents/PCAcommissioners

²⁹ www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/divisionhomepage/029685.hcsp

³⁰ www.homeoffice.gov.uk/docs3/thinksmart_040608

³¹ www.changeagentteam.org.uk/_library/docs/BetterCommissioning/BriefingPapers/

[Getting_started_open_book_accounting.doc](#)

³² www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/SocialServicesPerformance

[Assessment/TheWiderContext/TheWiderContextArticle](#)

³³ www.changeagentteam.org.uk/_library/docs/BetterCommissioning/Publications/BuildingBridges

³⁴ www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidance/Article

Appendix 4 Members of the Reference Group

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Mike MacIntosh	Four Seasons Health Care
Bill Mumford	Vice Chair, Voluntary Organisations Disability Group
Pauline Thompson	Age Concern
Bill McClimont,	Independent Consultant
Claire Smart	Gloucestershire SSD
Linda Hardware	Kent SSD
Annie Stevenson	Help the Aged
John Wilcox	Anchor Housing
Lynn Parker	Office of Fair Trading