



Contracting for Quality Outcomes

In the first of a two-part series, our legal expert Mark Johnson examines the features of a good contract and how to set one up to achieve results.

As we enter the brave new world of contestability and plurality of providers there will be inevitably more of a focus on the efficacy of contracts. What should a good contract contain and how do you avoid costly and damaging disputes? The best contracts are those which are concise, readily understood by all parties and easy to manage. They should also be proportionate and fit for purpose. There is no point in using four reams of impenetrable legalese for a contract worth only a few thousand pounds per annum. Commissioning teams may wish to give some thought to developing in-house templates which they can use for different contracting scenarios. Here we examine some of the key issues to address in a contract.

Structure of the contract

Depending on the nature of the service being contracted, it will often be practical to keep the main body of the contract concise and then to use a series of schedules to contain the fine detail, such as specifications, pricing and change control procedures. But make sure all the bits fit together and do not contradict.

Parties to the contract

Make sure you properly describe the legal entity or persons with whom you are contracting. Many disputes arise from parties thinking that they are contracting with one person or organisation, when it turns out that they have contracted with someone entirely different, such as a shell company in poor financial position. If in doubt, spell it out, check and insert the company number and registered office details.

Service Levels and Quality

If you are contracting to receive a defined level of service then make sure this is properly spelt out in black and white. If the contract follows a tendering exercise during which all sorts of grand claims have been made about the service and quality you will receive, make sure these are captured and referred to in the specification. If certain personnel are key to delivering the service, make it an express term that they are assigned to the task and not changed without your permission.

Ensure Proper Monitoring

Contracting exercises often come in for criticism for not delivering the desired outcomes. In my experience, most of the time this is because the service is not properly monitored and managed. From a commissioner's perspective it is not enough to toss the contract in a drawer and assume the provider will just deliver. Any contracting exercise will be a shared

journey, which requires effort and good communication from both sides to make it work. All too often there is no continuity between the procurement team which lets the contract and then moves on to the next big project, and the ongoing role of contract management, which requires a particular set of skills and resources.

Service levels should be monitored regularly and a mechanism used to review quality and provide feedback – perhaps through a monthly or quarterly review meeting. Often early informal mechanisms to solve problems constructively can avoid entrenched positions and costly disputes developing later. Many contracts will contain regimes to incentivise performance. Often regimes which reward good performance work better than those which impose draconian financial penalties for bad service. For example, we recently produced an estates management contract where the provider could earn up to double his profit margin for exceptional performance. If he did not perform, he stood to lose all the profit margin – but he always covered his costs. This is working brilliantly on the ground. Experience has shown that provider management time is far more likely to be concentrated on maintaining a profitable contract than on rescuing an unprofitable one!

Payment Terms

In the new contestable market place, cashflow will be king to sustaining the business models of many new providers. Social enterprises in particular will need to achieve full cost recovery. Large corporates with deep pockets may weather the storm in the short term, but in the long-run the benefits of competition and choice may be lost if commissioners do not appreciate the impact of their payment policies. Think carefully about how payments are made. It can often be simpler and more efficient to set up automated payments by BACS transfer and then to reconcile any adjustments in the following month. Your partners will not thank you if their invoice sits in the in-tray unprocessed for a month while the key person is on holiday. You might even consider paying partly in advance for some services, if that would enable your provider to offer a keener price because he can reduce his borrowing costs.

How will contract prices will keep pace with inflation? An annual round of negotiations on contract pricing could place undue strain on the relationship – for a long-term deal, consider pegging the pricing to a suitable index which reflects price inflation for that particular service. For example, a labour intensive service might be pegged to increases in the Index of Average Earnings for Health and Social Care or a hybrid which includes a blend of indices.

Risk allocation

In a high-risk regulated service environment, commissioners will need to pay particular attention to risk management issues. Often a contracting exercise is seen, quite wrongly, as an opportunity to transfer all the risks to the provider. The reality is that many risks will still sit with the commissioner: not least reputational risk and the need to discharge a statutory duty to deliver a service. Are there standard operating procedures your providers should be signing up to? Do you encourage a no-blame culture of reporting 'near misses' so that lessons can be learned for the future? You may even need to reserve a right in the contract to step-in and provide services directly in a disaster scenario. Also think about insurance. Providers will need to demonstrate that they have adequate insurance in place to meet any third party claims. You may require an indemnity clause which requires the negligent provider to reimburse your costs and expenses in sorting out any claims.

Next Issue: Dealing with change, managing disputes and exit routes.

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