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Anne Hughes-Jones, Commissioning and Contracts Manager
Denbighshire County Council
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3rd February 2009

Dear Ms Hughes-Jones,

Standard contract for domiciliary care in North Wales

Thank you for the opportunity to take an active part in the creation of a standard domiciliary care contract for use by local authorities in North Wales. The purchase of high-quality homecare from the independent and voluntary sectors is greatly enhanced by clear contract terms where the

In principle, the United Kingdom Homecare Association (UKHCA) supports initiatives which aim to modernise existing contractual arrangements, and bring about regional consistency. Such contracts have the advantage of giving local providers a consistent framework to do business, particularly where one organisation supplies to more than one local authority area. However, such a project also carries risks for the local homecare sector. It is therefore imperative that contracts include reasonable, fair and workable conditions to avoid serious problems throughout an entire region.

We therefore offer a number of principles which we believe should underpin

Wales would fully support the following:

- Drafting of contracts, tendering processes, and the operation of contracts, should be underpinned by mutual trust between purchaser and provider;
- Contracts should create mutual and appropriate obligations and rewards for both parties;
- The commercial risks inherent in any contract should be shared equitably between purchaser and provider;



- Both parties must acknowledge that purchasers receive safe and cost-effective services while providers need to make a return on investment;
- Illegal, unenforceable, punitive, ambiguous or nugatory clauses must be avoided.

We would like to share with you a number of considerations intended to ensure that contract terms can establish a fair and equitable basis for both parties to operate. I attach a paper to this letter highlighting

process. We would hope to see the six councils in North Wales adopting our recommendations and implementing them when drafting the contract terms.

Comments on version 3 of the Councils' draft

We have several concerns over the initial phase of this project. The draft issued as version 3 is in the very early stages of development and we consultative, drafting.

whether more timely delivery could be achieved with reference to some of the work already undertaken on fair contracting terms in the United Kingdom. In particular, we would like to commend the document "*A Guide To Fairer Contracting: Part 1*", which was produced with extensive consultation, including representation from UKHCA, by the Care Services Improvement Partnership (CSIP) at the Department of Health. A copy of this document is included with this letter.¹ We believe that the document could be of considerable assistance to the project team, as it supplies specimen clauses that were the result of a consensus view between purchasers, providers and commissioning experts. In our view, these outlined on page 1 of this letter.

¹ Electronic copies can be downloaded from: http://networks.csip.org.uk/_library/Resources/BetterCommissioning/BetterCommissioning_advice/Fairer_contracting_guide.pdf.

Our observations on version 3 of the councils' draft include the following:

- We commend councils for the thinking that has been given to
- There is a lack of mutuality in a number of clauses which generally impose obligations on providers, but do not impose similar obligations on purchasers (examples include clauses on waiver, indemnity insurance and fraud);
- We notice a number of headings relating to the recruitment, selection, employment and retention of staff. We urge the councils to give serious consideration to the wisdom of deviating from the standard regulatory requirements.²
- We presume that the contract will require providers to act as though they were local authorities for the purposes of the Human Rights Act 1998 and the Freedom of Information Act 2000. The council will be aware that this legislation only imposes obligations on public bodies.³ We would suggest that the council gives careful consideration to the potential increase in costs that providers would need to re-coop from the contract price if this were implemented.
- Although it seems like a minor point, references to "Service Purchaser" and "Service Provider" may affect comprehension, particularly for those who do not read legal contracts regularly. We recommend that the simpler expressions "Purchaser" (or even "The Council") and "Provider" are adopted.

² We note the councils' position that regulation by the Care and Social Services Inspectorate Wales (CSSIW) does not necessarily guarantee that providers will meet the local authorities' requirements. However, we strongly caution against clauses in the *The Domiciliary Care Agencies (Wales) Regulations 2004* and *National Minimum Standards for Domiciliary Care Agencies in Wales* to the extent that providers would need to operate different standards of recruitment according to the contract under which any prospective care worker would be expected to work. Our opposition is based on extensive understanding of operational delivery, and the additional cost providers would need to recoup in their contract price.

³ And in certain circumstances independent and voluntary sector-run residential homes, but not domiciliary care services;

Concluding remarks

Wales produce a fair, reasonable, and workable contract for use with the independent and voluntary sectors. My colleague Gill Charlick will continue to represent UKHCA on your project team, and will be supported by me from our central function. It would greatly assist our participation if I could be included in the circulation list in correspondence on this contract.

We would welcome your response to this letter and my accompanying councils may require. My business e-mail address and direct dial telephone number are given below.

Gill and I look forward to working with you on this project.

Yours sincerely,



Colin Angel

Head of Policy and Communication

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Copies to:

- Yvonne Apsitis, Vice-President, United Kingdom Homecare Association
- Gill Charlick, Board Member, United Kingdom Homecare Association
- UKHCA member organisations in North Wales
- Mike Rose, Chairman, Domiciliary Care Association Wales
- Members (c/o the Coordinator) of the Expert Reference Group Domiciliary Care Wales

Alternative formats: If you would prefer to receive this letter in another accessible format, including e-text, 'clear print', large print or audio cassette, please contact us on 020 8288 5297 or colin.angel@ukhca.co.uk.

Fair contracting terms between the statutory sector and independent and voluntary sector providers

By: Colin Angel, Head of Policy and Communication
United Kingdom Homecare Association
29th January 2009

Introduction

This paper addresses matters usually dealt with in the general terms and not attempt to be an exhaustive list, but without addressing these issues a homecare contract is unlikely to offer a fair contracting relationship between councils and their providers. UKHCA therefore urges parties revising or drafting homecare contracts to give this paper their fullest consideration.

Contract type, duration and renewal

1. The contract should clearly describe the basis on which purchases will be made (eg. 'spot', 'block', 'cost & volume' purchase) and must provide a
2. The start date and duration of the contract must be clearly stated.
3. Mechanisms to extend the life of the contract beyond its original term must require the mutual agreement of both parties and must include a review of the contract price (see paragraph 12.b.iii). The point in time

an opportunity to extend.

Default

4. Contract terms should specify which clauses might constitute a fundamental or material breach of contract if either party were to be in default.

Termination of contract and individual packages of care

5. Termination clauses must be equitable and must include the ability of either party to terminate the entire contract:
 - a. In writing, with immediate effect:
 - i. following a fundamental breach of the contract by the other party;
 - ii. following a force majeure event lasting longer than [X days, weeks or months] (See paragraph 24).

- b. With prior notice of [X working days, weeks or months]:
 - i. where there is a material breach of the contract by the other party, is incapable of remedy;
 - ii. for any other reason (ie. a "no-fault termination").
- 6. There should be a provision for the termination of individual packages of care (rather than the whole agreement), with notice, on the grounds of:
 - a. actual or potential hazards to the health and safety of the workforce;
 - b. behaviour by a service user, their family or representative, that could reasonably be perceived as being motivated by prejudice or hatred.

Dispute resolution

- 7. Disputes between the parties to be resolved at the lowest level
 - a. Resolution between the authorised representatives of both parties;
 - b. Resolution between more senior representatives of both parties;
 - c. Mediation by a third party acceptable to both organisations;
 - d. Independent arbitration by a third party acceptable to both organisations.
- 8. Any costs associated with arbitration should be apportioned by the arbitrator, having regard to all the circumstances of the dispute.
- 9. The use of dispute resolution procedures must not be prejudicial to either party's right to terminate the contract or to issue legal proceedings;

sole decision of the purchaser;

Contract price

- 11. Prices in the contract (and form of tender) should be exclusive of VAT. The contract should require the purchaser to pay VAT at the prevailing rate when payment is due.
- 12. The contract must contain a reasonable price review mechanism, which allows price increases:

- b. at the request of either party, as a result of:
 - i. legislative changes, newly arising case law, or other change in the costs of providing the service;
 - ii. a request to vary the contract terms, according to the principles of paragraph 20;
 - iii. any extension to the duration of the original term of the contract (see paragraph 3).

13. Disputes over price reviews referred to in paragraph 12 should follow

14. Clauses which give the purchaser the unilateral ability to determine or change the price, or to set the increase at zero, are not acceptable.

Payment terms

15. Payment cycles must be regular, prompt and should avoid the provider being exposed to lengthy periods of credit. The recommended period between work being carried out and receipt of payment should be no more than 28 days.

16. The format of invoices (whether written or electronic) should be

17. The procedure for the purchaser to place invoices in dispute should be

18. All items on an invoice not in dispute should be paid according to the normal payment procedure.

unpaid invoices not in dispute under the Late Payment of Commercial Debts (Interest) Act 1998.

Variation to contract terms and specification

20. Procedures to vary the terms and conditions of the contract, or the

- a. mutual agreement;
- b. a review of the contract price, according to the principles in paragraph 12.
- c. dispute resolution, according to the principles outlined in paragraphs 7-10.

21. The ability of the purchaser to unilaterally vary the contract, or to have

Force majeure

22. The contract should specify that neither party becomes liable for any failure to meet the terms and conditions of the contract which are the result of events beyond their control, and for which there is no practicable means to avoid failure or delay in the performance of their obligations.

23. The contract should require both parties to use their reasonable endeavours to perform their respective obligations during a force majeure event.

24. Clauses should enable either party to terminate the contract with immediate effect by giving notice in writing if a force majeure event

paragraph 5.a.ii).

Provisions for end of contract, including TUPE

25. The contract must not attempt to constrain the provider's ability to recruit or vary the terms and conditions of its workforce during the life of the contract.

Penalties and non-enforceable clauses

26. Contracts should not impose excessive penalties, which are disproportionate to the losses incurred by the purchaser.

27. Contracts should not contain clauses which are unenforceable, invalid or ineffective because they bring uncertainty to the terms agreed by the parties and are at risk of being struck out by the courts.

Self-directed support

28. The contract terms must not attempt to apply the terms, conditions, and service user using direct payment, a personal budget or their own