

DBULLETIN

Providing Care Services - Negotiating Service Levels and Incentives to Perform

The contract for the provision of the services will go on for pages. However, it is vital to read to the end! The schedules in the back will set out, in detail, services and the standard to which they are to be provided. These schedules are, typically, negotiated by the provider's operations team. Accordingly, the service levels should be developed by those familiar with the day to day operations. This is crucial when one is "outsourcing" services (whether it is a PFI or a supporting people contract). The lawyer's job is to ensure that the service levels are correctly worded and can be understood by future users of the agreement, long after the original service provider's team has moved on.

Drafting the service description

As a general rule, a customer will want to ensure that all the services, it is expecting, for a given price will be delivered to the standard required. There is no magical solution to this other than careful drafting and review of the service description. One technique is to concentrate on outputs rather than individual tasks. This can be done, for example, by reference to a 'delivery plan' or similar document. This avoids the risk of inadvertently missing out a specific task and allows flexibility if the tasks to perform an output vary during the term of the agreement. Regrettably, difficulties can arise where no list of services (let alone the performance standards) has ever been compiled by the customer.

Service Levels

Service levels are provisions which require the care provider to perform specified outputs to a particular level to bring certainty as to what is to be delivered. The drafting of service levels requires adherence to a number of practical rules:

- as with the service description one should concentrate on specific outputs rather than tasks.
- ensure that the service levels must be capable of objective measurement.
- keep the points system simple – over

complex service level agreements can create monitoring problems.

In addition, when determining service levels one needs to define a baseline for the provision of the service. For example:

- Availability – the proportion of time that the service is available.
- Reliability – the number of interruptions.
- Performance – response times for certain actions.

Ideally, the parties will agree the service and service levels prior to signing the contract. Defining detailed service levels (or for that matter, the precise services), after signing, can leave the customer exposed to additional costs. In law an agreement is already in place. There is little reason for the service provider to agree to a higher level of service; so negotiations may also result in price increases.

In practice, there may be commercial (or political pressures) to sign an agreement before all the service levels can be agreed. In these cases, the parties will undertake as much as possible, prior to signing. The resolution of the outstanding aspects can place during a fixed timetable after signing. Such a mechanism is best undertaken against a known benchmark, for example the determination of existing service levels (if known). If the parties cannot agree,

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then provisions could be included allowing the parties to terminate the agreement without liability. Another, perhaps less satisfactory approach, is for areas of dispute to be referred to an expert for determination. However, this is all very much a “second best” to sorting out the issue beforehand.

Incentives to perform

By way of background, under case law, a local authority (or, for that matter, any purchaser of care services) has the right to reimbursement if the care provider's breach of contract has resulted in the services being worth less than those for which they had contracted. This could be done by a deduction from payment to the care provider. Alternatively, the client would have the right to bring a claim for damages against any losses suffered by them due to the breach of contract by the care provider. For example, the care provider fails to provide certain services. As a result of that failure the client has to employ others to undertake their services. In such circumstances, the client would be entitled to make a deduction against sums due to the care provider under the original care provision agreement, to reflect the reduced value of the services received or, alternatively, claiming the cost of employing an alternative care provider from the original care provider.

What happens where breaches of the contract by the care provider do not lead to any loss or, more frequently, do not lead to a loss that is easily quantifiable? For example, if a care provider agrees to answer all calls to a telecare call centre within a specified time limit, but, in fact, fails to meet that target, will the client suffer any loss? If so, how will that loss be calculated?

Given the potential problems about linking poor performance to payment, many care contracts now contain performance point systems or service credits to allow deductions from sums

due to a care provider where the loss resulted from the breach can either not be quantified or is non-existent. The main objective of the performance points system is to ensure that the client receives the standard of service they pay for under the care contract.

Service Credits

Service credits or service level credits are terms used for financial penalties to service providers for poor performance. They are generally considered important for the following reasons:

- as an incentive to the service provide the services to a good standard.
- supporting people and particularly PFI or similar outsourcing relationships are normally fairly long term arrangements - terminating the agreement is not an easy, or attractive, option for the local authority.
- claims for damages are unattractive where the parties have a continuing relationship.
- service level credits avoid the need to quantify loss which can often be difficult (see discussion under “The law of liquidated damages and penalties” below).
- service level credits may be particularly important if the parties have agreed that the care provider will not be liable for certain types of losses that the customer may incur, for example, loss of profits. If so, service credits may be the only mechanism for obtaining financial redress for this area of loss.

Under a performance points system, a care provider will accrue points or service credits should their provision of the services fail to meet the agree service levels or key performance indicators (KPIs). For example, whilst a failure to answer the telephone at a telecare centre within ten rings may cause the accrual of a simple

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performance point, failure to answer a critical callout, within the agreed time, may cause the accrual of many more points.

The actual amounts can be expressed as specific amounts; percentages of the service charge or a form of points system adopted where different service levels and failures have different weightings. When drafting service level credits as specific amounts, the recipient of the service will want to ensure that the amounts increase over time if the service charges increase. The aggregate points accrued, for example, in a one month period, would then be included in a formula which will determine the amount, if any, to be deducted from the sums due to the care provider for that period.

As well as providing a “stick” to the service provider, mechanisms can be included to reward service providers for good service in the form of service level debits or bonuses paid to the service provider for good performance. They can have some advantage – if a service level, say availability is set at a percentage below 100%, then strictly there is no incentive for the service provider to achieve 100% availability the reward would provide an incentive to hit the 100% target. Local authorities are, however, generally reluctant to pay additional amounts for a service which they believe they should be getting in the first place.

The key issue to remember when negotiating the performance points system, as indicated above, is to ensure that it is simple to understand and operate, is jointly agreed by the parties and is based on an assessment of the care provider’s performance against specified service levels or KPIs.

What should be the level of service level credits?

The level of service level credits needs to be considered in relation to a number of factors.

First, as an incentive to the service provider to perform well, it needs to be at a sufficient level that it is a factor taken into account by a service provider, but not so high as to be crippling. Second, one needs to consider the consequences of service failure to, for example, the local authority.

The law of liquidated damages and penalties

In discussing service level credit mechanisms it is worth bearing in mind the law relating to “penalties”. This is the principle that where parties to a contract agree that in the event of a breach, the contract breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a “penalty” (which is irrecoverable) or as “liquidated damages” (which are recoverable). In summary, a claim for a fixed sum is enforceable if it does not exceed a genuine attempt to estimate in advance the loss, which the claimant would be likely to suffer from the breach of the obligation in question.

Negotiating service level credits

When negotiating service level credit mechanisms with performance points, consideration needs to be given as to how this will tie in with any limitation on liability contained within the care contract.

Many care providers will seek to limit their liability of breaches of contract to the deductions from the fee that the client would be entitled to make under the performance points system. If the performance points system only allows deductions to be made from amounts due, as opposed to requiring the care provider to make payments to the client, then this may result in the care provider effectively capping their liability at the level of the amounts to be paid to them under the contract. Many buying care services may find that such a cap is unacceptably low as they may want the ability,

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not only to make deductions from payments due to the care provider under the performance system, but also to bring claims, if necessary, for breach of contract. What is acceptable will depend, in part, on the care provider's insurance arrangements.

The secret of success

To be effective the performance arrangement should be balanced and should incorporate elements of both risk and reward for the care provider. The system should not be seen as a method of penalising the care provider but rather a mechanism to incentivise them to deliver a better service by also providing better incentives.

For successful outsourcing arrangements it is important for the parties to concentrate on defining the services and service levels. Of course, this is not the only requirement for a good working arrangement. Other ingredients are also required – such as mechanisms for flexibility. After all, a relationship which is to last for 5 to 10 years must have the built-in flexibility to accommodate the inevitable changes to the business.

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