
Memo

10 February 2020

To: PSAAP members

From: Buddle Findlay

CEN21700126 - Updated back-to-back contract template

Background and general information about the back-to-back template contract

1. The PHO Services Agreement provides that a PHO may subcontract all or any of the primary health care services that the PHO provides for a DHB (clause B.11(1)). The Agreement also provides that any subcontract entered into by a PHO must include certain mandatory clauses agreed by the PHO and DHB (clause B.11(2)(d)).
2. The back-to-back contract template is provided as an example of a contract that PHOs can use when they subcontract an organisation or practitioner to provide services under the PHO Services Agreement. (That organisation or practitioner is the "Contracted Provider" referred to in the template.)
3. The template includes:
 - (a) all mandatory clauses that must be included in each PHO's subcontracts (as required by clause B.11(2)(d) of the PHO Services Agreement);
 - (b) other clauses that will help ensure that a PHO meets its obligations under the PHO Services Agreement; and
 - (c) general terms that are often seen in back-to-back contracts (eg, dispute resolution and assignment and transfer clauses).
4. PHOs are not required to use the template. PHOs which wish to use the template can delete or amend the terms as they wish (with the exception of the mandatory clauses). A PHO and Contracted Provider can also agree to add terms to the template.

Updates to the back-to-back contract template in 2020

5. In 2019, Buddle Findlay was asked to work with a group comprising members from both DHBs and primary care to review the template. The purpose of the review was to:
 - (a) identify technical improvements that could be made to the template (eg, updating clause cross-references and legislative references, and clarifying existing wording);

(b) consider whether any new contractual or legislative obligations should be captured in the template.

6. Set out below is a summary of the key changes made to the template as a result of the review. We understand that the new template is intended to be made available on TAS's website from [insert date].

Summary of key changes

7. Paragraph B of the "Background" section has been amended to reflect new wording in Part A of the PHO Services Agreement (relating to the five themes of the New Zealand Health Strategy).

8. Clause 5.3, which lists the information that Contracted Providers must advise the PHO of (on a monthly basis), has been amended to include "Practitioner's health practitioner index number (if they have been assigned such a number)". That reflects that PHOs are required to provide those numbers to DHBs.

9. The template now includes, in clause 6, a reference to the Children's Act 2014 as follows:

6. *Children's Act 2014*

6.1 *The Contracted Provider must comply with its obligations under the Children's Act 2014, including:*

(a) *adopting a child protection policy (in respect of the provision of children's services within the meaning of section 15 of the Act) that complies with section 19 of that Act; and*

(b) *reviewing the policy within three years from the date of its adoption or most recent review, and at least every three years after that.*

6.2 *The Contracted Provider must, if requested to do so by either the PHO or the DHB, make a copy of its child protection policy available to either the PHO or the DHB.*

6.3 *The Contracted Provider must conduct, or cooperate with the PHO in relation to, worker safety checks as required by the Children's Act 2014.*

10. These clauses:

(a) reflect the obligation imposed on DHBs by section 17 of the Children's Act to ensure that certain contracts entered into by DHBs require the subcontracted provider to adopt a child protection policy;

(b) reflect the worker safety check requirements set out in Part 3 of the Children's Act; and

(c) give the DHB and/or PHO the power to require a Contracted Provider to provide their child protection policy to the DHB or PHO.

11. The explanatory note accompanying clause 8.1 has been re-drafted to clarify the purpose of the clause, and to explain more clearly how PHOs can use the clause to apply any geographical limitations that the PHO itself is subject to (eg, Secondary Geographical Area restrictions).

12. A new clause 9.2 has been added, as follows:

9.2 The Contracted Provider must provide written notification to the PHO, within the timeframe and in the format required by the PHO, if the Contracted Provider:

- (a) opts into receiving any of the additional payments which a practice may decide to receive or forego, as described in clause F.3(2) and Schedule F1.1; or*
- (b) decides to cease receiving any such payments.*

13. The purpose of this new clause is to give DHBs (and PHOs) visibility over which Contracted Providers are signing up to the "optional" payment schemes described in clause F.3(2) and Schedule F1.1 of the PHO Services Agreement (such as the Community Services Card scheme). Currently DHBs (and PHOs) receive only limited information about which Contracted Providers are providing such services (and therefore receiving the relevant payments).

14. Clause 15.6 (which is about dispute resolution) has been amended by adding a new subclause (d) as follows:

15.6 Exceptions: This clause does not apply to:

[...]

- (d) any dispute as to whether a service is a General Medical Service, or whether any amount, and if so what amount, is payable by the DHB for a General Medical Service.*

15. The new subclause reflects the equivalent clause in the PHO Services Agreement (see clause B.37(6)).

16. The template has been amended in a number of places to replace references to "21 Business Days" and "30 Business Days" with "20 Business Days". This change reflects equivalent provisions in the PHO Services Agreement, to ensure the template and Agreement are consistent.

17. Clause 17.1 (which is about alternatives to termination) has been amended by re-drafting subclause (b) and deleting subclause (d). This is a drafting simplification, meaning that the effect of the clauses is unchanged.

18. Clause 19 (which is about putting in place alternative arrangements in the event that the Contracted Provider does not deliver the Services) has been amended to improve the drafting and clarify how the clause operates. To summarise, the clause provides that:

- (a) if a Contracted Provider fails to provide the Services, the PHO can require the Contracted Provider to pay for the cost of making alternative arrangements;
- (b) however, if the PHO has already taken steps to withhold payments from the Contracted Provider, the maximum amount that the Contracted Provider can be required to pay (in respect of the cost of making alternative arrangements) is 10% of the amount of money that has been withheld.

19. All other changes to the template have been made to ensure consistency with equivalent provisions in the PHO Services Agreement, or to address minor wording issues.