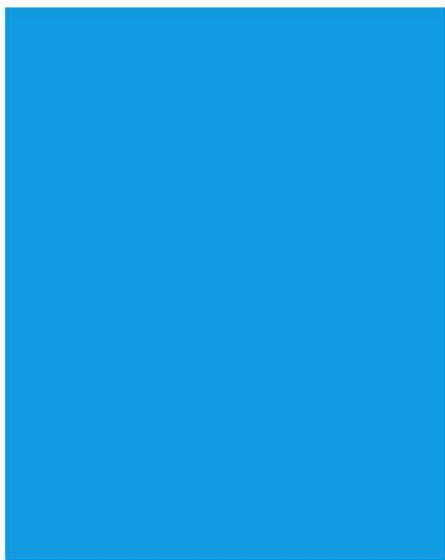


NHS Standard Contract

Guidance on National Variations to existing 2010/11, 2011/12 and 2012/13 form contracts



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Executive summary

This document contains guidance on the completion of the National Variations to existing contracts on the 2010/11, 2011/12 and 2012/13 forms to reflect *Everyone Counts: Planning for Patients 2013/14* and other policy and legislative developments.

Introduction

This guidance is relevant to all commissioners who are assuming, and providers who are parties to, existing commissioning contracts the terms of which extend beyond 31 March 2013.

As in previous years, all commissioners and providers are required to vary their existing and ongoing contracts in order to incorporate policy requirements for the coming commissioning year. For the year 2013/14 these policy requirements are those set out in the NHS Commissioning Board's publication *Everyone Counts: Planning for Patients 2013/14* and supporting guidance. In addition, contracts need to be varied to reflect the new and developing organisational structure and regulatory framework put in place by the Health and Social Care Act 2012 and supporting secondary legislation.

Each variation will be a National Variation as defined in the applicable NHS Standard Contract.

Process

The 2013/14 NHS Standard Contract is substantially different in structure and substance to Standard Contracts issued for previous years. Also, for the first time, the contract is published and available for use in eContract form. Commissioners and providers are strongly encouraged to review the 2013/14 contract and supporting guidance (available via the eContract portal <https://commissioning.supply2health.nhs.uk/eContracts/Pages/default.aspx>) before taking any further action in response to this guidance.

Commissioners and providers may effect the required National Variations in respect of their contracts in either of two ways.

Option 1: Transfer to eContract

The parties to any existing contract (the commissioner(s) receiving the contract under the relevant statutory transfer scheme(s) and the provider) may opt to vary it by means of transferring that contract into an eContract. Using the eContract platform they can:

- create an eContract for the remainder of the term of their existing contract
- reflect in that eContract all locally agreed matters (Service Specifications, Indicative Activity Plans etc), whether carried over from their existing paper contract (as previously varied) or newly agreed for the coming year
- by this means adopt not only the new policy and legislative changes, but also the updated, simplified and improved contract management processes and procedures contained in the 2013/14 Standard Contract
- achieve consistency of language, processes and procedures between their existing (varied) contracts and their new contracts – as both will be on the 2013/14 form. This will make management of a portfolio of contracts simpler and more consistent.

Option 2: enter into a Deed of Variation

The parties to an existing contract may, notwithstanding the benefits of transferring to an eContract, prefer to retain their existing form of contract, and vary it only so far as is necessary to reflect new policy and legislative positions.

To cater for this we have prepared template deeds of variation to effect that variation in respect of contracts on the following forms:

| | |
|---------|---|
| 2012/13 | Acute/Ambulance/Community/Mental Health and Learning Disabilities Services (Multilateral) |
| 2012/13 | Acute/Ambulance/Community/Mental Health and Learning Disabilities Services (Bilateral) |
| 2011/12 | Acute Services (Multilateral) |
| 2011/12 | Community Services (Multilateral) |
| 2011/12 | Community Services (Bilateral) |
| 2011/12 | Mental Health and Learning Disabilities Services (Multilateral) |
| 2011/12 | Mental Health and Learning Disabilities Services (Bilateral) |
| 2011/12 | Care Home Services (Multilateral) |
| 2011/12 | Care Home Services (Bilateral) |
| 2011/12 | Integrated Acute and Community Services (Multilateral) |
| 2011/12 | Integrated MHL D and Community Services (Multilateral) |
| 2011/12 | Integrated MHL D and Community Services (Bilateral) |
| 2010/11 | Acute Services (Multilateral) |
| 2010/11 | Ambulance Services (Multilateral) |
| 2010/11 | Ambulance Services (Bilateral) |
| 2010/11 | Community Services (Multilateral) |
| 2010/11 | Community Services (Bilateral) |
| 2010/11 | Mental Health and Learning Disabilities Services (Multilateral) |
| 2010/11 | Mental Health and Learning Disabilities Services (Bilateral) |
| 2010/11 | High Secure Services (Multilateral) |

These template deeds are available via the eContract portal and the NHS Commissioning Board website <http://www.commissioningboard.nhs.uk/nhs-standard-contract/>.

Each template deed of variation is drafted on the basis that the commissioners and providers have signed all previous applicable national deeds of variation issued by the Department of Health.

Each template deed of variation is drafted so as to effect only the new policy, legislative and regulatory positions required by the NHS Commissioning Board to be incorporated in all NHS contracts. Contracts varied by means of one of the template deeds of variation will otherwise continue on their existing terms (as may have been varied previously).

Where commissioners and providers wish to agree further variations to their contract (for example, to update Service Specifications or payment regimes), they must follow the variation procedure set out in their contract and enter into a separate deed of variation to effect those further changes.

Each template deed of variation is drafted on the basis that it will be entered into by the new commissioner(s) (ie those “receiving” the contract under the relevant statutory transfer scheme(s): in other words, after the statutory transfer has taken place.

In circumstances where, by virtue of the relevant statutory transfer schemes, the commissioning relationship to which the contract in question applies changes from a bilateral relationship (ie one in which there is a single commissioner) to a multilateral relationship (ie one in which there are multiple commissioners) or vice versa, IT IS STRONGLY RECOMMENDED that the relevant contract is varied by means of OPTION 1. The template deeds of variation do not cater for changes from bilateral to multilateral or vice versa and would need very significant adaptation in order to do so effectively. The parties should however take their own legal advice before deciding whether to pursue Option 1 or Option 2.

As in previous years, we are publishing template deeds of variation in respect of the forms of contract published for the last three years. Where contracts based on standard forms for earlier than 2010/11 are to continue beyond 31 March 2013, commissioners and providers should either:

- (a) pursue Option 1 outlined above, or
- (b) take their own legal advice in order to produce a deed of variation based on the templates we have provided but adapted to suit the contract being varied.

Order of Events

Whichever of the options outlined above is taken, the order of events in respect of each contract must be as follows:

| | |
|--------------------------------|---|
| Period to 31 March 2013 | (a) commissioner(s) and provider to consider 2013/14 Standard Contract/eContract and associated guidance alongside this guidance and relevant template deed of variation; |
|--------------------------------|---|

| | |
|---------------------|--|
| | <p>(b) commissioner(s) and provider to agree which of Option 1 and Option 2 they are to pursue in relation to that contract;</p> <p>(c) commissioner(s) and provider to agree the form of eContract or deed of variation accordingly.</p> |
| 1 April 2013 | <p>(a) contract to be transferred from PCT(s) to CCG(s) pursuant to transfer scheme;</p> <p>(b) new commissioner(s) and provider to enter into new eContract or deed of variation to effect variation of transferred contract. (The eContract or deed of variation may be signed before 1 April 2013, but cannot take effect before then).</p> |

Varying a contract: legal considerations

In order to vary an existing Contract, the parties to that contract must follow the variation procedure set out in that contract. In the case of contracts on the 2012/13 NHS Standard Contract form those provisions are set out in clause 52 in Section E. In earlier contracts they appear at clause 38.

The parties should seek their own procurement advice before deciding whether to pursue Option 1 or Option 2 and in considering any further variations.

The parties may wish to meet to discuss the National Variations required by the NHS CB and whether they are to be effected via Option 1 or Option 2. The parties should try to reach agreement. If agreement on the National Variations cannot be reached, the parties may refer the issue to the Dispute Resolution Procedure in accordance with their contract. If agreement still cannot be reached, either the Co-ordinating Commissioner or the Provider may terminate the contract.

If agreed, the National Variations become legally binding on the date on which the new eContract is signed by all parties and dated, or the Deed of Variation is signed by all parties and dated, as appropriate. However, whichever option is pursued to effect the variations, they will not take effect until 1 April 2013. So the rights, obligations and liabilities of the parties to the contract up to and including 31 March 2013 will be as set out in that contract before it was varied for 2013/14. For example if a breach of the 18 Weeks Referral to Treatment Standard occurs in March 2013, the consequence of that breach will be as set out in the original contract and/or 2012/13 National Deeds of Variation and not the consequence set out in the 2013/14 NHS Standard Contract and the 2013/14 Deed of Variation.

Practical Guidance

Option 1:

If the parties agree to pursue Option 1, and transfer their existing Contract into an eContract, the Co-ordinating Commissioner must create a new eContract, following the guidance available on the eContract portal. Functionality to enable the National Variations via an eContract will be added to the eContract site (along with additional explanatory guidance) very shortly.

Option 2:

The table below summarises the actions necessary to complete a deed of variation.

| Clause | Guidance |
|--|--|
| Cover Page | Insert the full name of all receiving Commissioners under the appropriate transfer scheme, the full name of the Provider, and the date of the original contract. |
| First page | After “THIS NATIONAL VARIATION DEED is dated” insert the date on which the Deed of Variation is completed – ie when it has been signed by all the parties. Note that if the parties sign on different dates, the date to be inserted here is a date on or after that on which the last party signs. This is the date on which the deed of variation becomes legally binding. |
| First page | In the space between the brackets next to “(1)” at the top of the first page insert the names Commissioners. |
| First page | In the space between the brackets next to “(2)” insert the name of the Provider and the address of its principal office. |
| First page | After “WHEREAS”, in paragraph A insert the date of the original contract. |
| First page | At paragraph D, insert in the table the details of each transfer scheme applicable to the contract. |
| Appendix 1 Appendix 2 Appendix 3 Appendix 4 Appendix 5 | Please refer to the 2013/14 NHS Standard Contract and associated guidance for instructions as to how to complete the open fields in these Appendices. |
| Execution page | Signatures and Sealing The Provider and each Commissioner must execute the deed of variation where indicated. Additional attestation clauses have been included for Clinical Commissioning Groups, Local Authorities and |

the NHS CB in accordance with the relevant statutory requirements. Alternative attestation clauses have been included for Providers, for use depending on their structure.

If any Commissioner or Provider is in doubt as to how it executes deeds, it should take its own legal advice and may amend the execution page if necessary in accordance with that advice.

The parties are not required to date the execution page, as the date on which the deed of variation is executed is inserted on the first page of the deed of variation (see above).

The deed of variation may be executed in counterpart (by each party signing separate but identical copies), or alternatively all parties can execute the same copy of the deed of variation.

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