

# Contracts

## Why we need them and what to look out for

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A contract sets out the terms and conditions of the relationship you are entering into with a commissioner, service provider or other organisation. In very basic terms, the contract covers:

- Who is doing what; the obligations upon both parties to the contract and how these should be met
- How much you and/or the other party is being paid, how and when
- Each party's rights and obligations to bring the contract to an end, including in the event of the relationship breaking down

Having a written agreement provides certainty to both parties and protects your interests in the event that there is any confusion or difference in interpretation, including as to the scope of the arrangement and/or each party's responsibilities. However, there is a danger of accepting, or tendering on the basis that you will accept, the other party's standard contract without either reading or fully understanding the terms and their implications.

For consumers there are legal protections against unfair terms being imposed on them by businesses. Between organisations and businesses, however there is much more freedom to contract, and less protection in the event that the terms are unbalanced. There are, as there often are in law, exceptions to this general rule, but the "basic" position is one of "buyer beware".

Historically the courts (and to date Parliament) have considered that largely it is for businesses to sort out their contracts without much need for protection and have left business to business arrangements largely unregulated. This may well make sense between two large well-resourced businesses, but the relevant legislation does not differentiate between a multinational business with offices worldwide, and a team of lawyers at HQ, and a smaller entity such as a care home. As such, every organisation needs to know what it is signing up to when it agrees a contract, and it may find itself stuck with the terms proposed, however unfair these are felt to be.

The essential guidance is therefore to read the contracts you are agreeing to be bound by. The law assumes that if you have signed a contract, that you have in fact read it. Except for a very small number of contract types, the law does not require contracts to be signed at all.

### Terms to look out for

When reviewing any contract you should, as a minimum, understand the provisions covering:

<b>Parties</b>	Who are the people/organisations signing up to the contract? Is it with the commissioner or supplier you expected or a third party? Are you signing up as an individual or on behalf of your organisation?
<b>Is it clear what you are being paid for/you are getting what you are paying for?</b>	Is the contract clear on what will be supplied by who, and when, and what the consequences are for delay? Are there any key performance indicators for the parties to work to?
<b>Risks</b>	Is it clear under the contract where all risks sit at each stage of the contract? For example, if you are buying expensive equipment, who bears the risk (and obtains insurance) for the cost of delivery?
<b>Term of contract</b>	How long does the contract last? Can it be extended automatically? Do you understand how the contract is to be brought to an end, and are any notice provisions clear?
<b>Price and payment</b>	What gets paid and when? Is party entitled to withhold payment for non-performance of the contract?
<b>Variation</b>	Is either party entitled to vary or renegotiate certain terms of the contract? Is this a mutual or a unilateral right?
<b>Employment issues and TUPE</b>	Will the contract result in a TUPE transfer of employees? Is this clearly provided for in the contract? What rights and liabilities do you have regarding transferred employees?
<b>What happens if it all goes wrong?</b>	What are the rights of termination? For example, does the contract have a no-fault termination clause to allow earlier than expected termination? Is there any liability for a termination payment?
<b>Liability</b>	To what extent are the parties liable for any defaults? Are there any exclusions/caps on liability? Is party required to take out a specific insurance policy?
<b>What happens at the end?</b>	Is there any ongoing responsibility regarding confidentiality, provision of information, collection and delivery of patient records? Are there likely to be any large charges for moving stored paper from one supplier to the other?
<b>GDPR</b>	What terms are in a contract covering GDPR? What information will be passing between the parties?

With basic supply contracts, if you have read and understood the agreement you may rarely need specific legal advice on the terms. Of course, if you do not understand certain provisions then you should consider seeking such advice if the contract is of sufficient value or complexity.

Organisations tendering for contracts (especially those which are being procured by public sector bodies such as local authorities and in most cases will be caught by the Public Contracts Regulations 2015) should strongly consider asking clarification questions during the tendering process in order to challenge and/or seek to better understand any unclear or unfair terms. Raising these during the procurement process and before the tender is submitted provides the opportunity to determine whether the contractual risk is commercially acceptable and often results in the commissioner amending the terms in question.

Our specialist commercial team can help you with any of the points raised in this article, or any other contractual issues that may arise.

**JOLENA BULLIVANT-CLARK,**  
**TRAINEE SOLICITOR**  
[J.Bullivant-Clark@hempsons.co.uk](mailto:J.Bullivant-Clark@hempsons.co.uk)

Jolena joined as a paralegal in 2019 having previously worked for two national claimant personal injury firms. Prior to commencing her training contract, she ran a caseload of limited instruction clinical negligence files, while assisting other fee earners where required. Jolena currently sits in the corporate and commercial team where she assists with a range of matters.