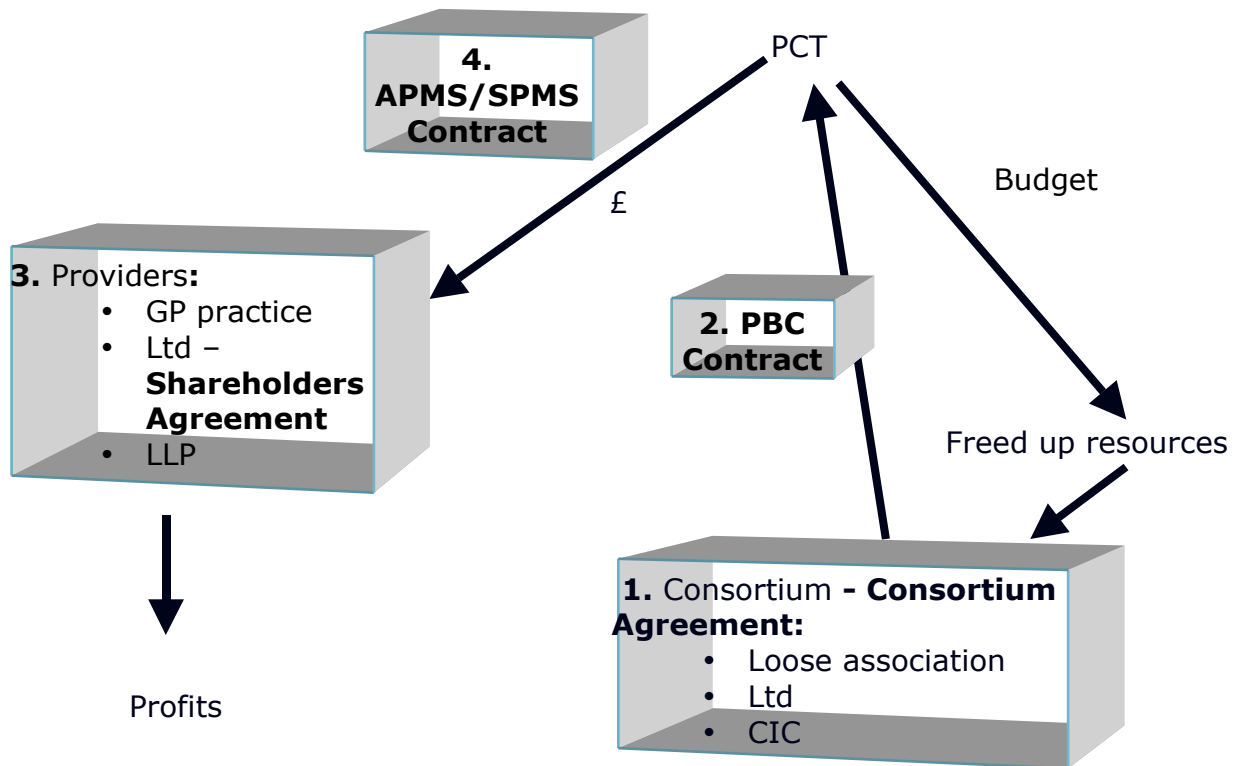


## Practice Based Commissioning

There are an increasing number of enquiries about Practice Based Commissioning and this note sets out the basis of the arrangements Lockharts are able to make to assist PCTs and groups of practices ("Consortia").

We deal with this in four quite separate limbs as shown below in the diagram, albeit that there would be some overlap from time-to-time as matters proceeded.



### 1. The Consortium Agreement – bringing together the commissioning parties

We believe that it is essential that groups of practices working together have a clear agreement, which sets out the way in which they will deal with the various matters that arise. Subject to the arrangements being consistent with the arrangements in their individual Partnership Deeds it is open to the members of the group to agree on what they want. Nevertheless, as to be what might be called a "rule book", there are a number of points, which should be incorporated in every case so as to avoid difficulties at a later stage. The key thing here is to think about the potential problems first and then set out the procedures which

will apply if difficulties arise. Particularly with large groups of 10 or 20 practices it would be extremely difficult to try and negotiate a sensible solution to a problem after it had arisen and after the interests of various practices had become disparate.

There are probably three main arrangements that can be used:-

1. A loose association of practices,
2. A company limited by shares, and
3. A community interest company

If the loose association arrangement is desired, the 'rule book' would be contained in an agreement between the members of the various practices and at the very least, the same points would have to be covered.

Where consortia take the form of limited companies, similar arrangements must be set out in its Articles of Association but a number of changes will be needed where a Consortium takes the form of a community interest company, which is a new type of company designed for social enterprises but which wants to use its profits for the public good. We would be very happy to advise on both types of formation and, indeed, already have draft documentation to deal with this.

Community interest companies are a new development but again large parts of the 'rule book' would need to be incorporated into the company structure, although the overriding provisions would be ones which would limit the use to which any savings could be put. We do not at present expect that there will be many consortia who will wish to go down this route but we would similarly be happy to advise should the need arise.

The main issues which must be dealt with within the Consortium arrangements – whatever form it takes – are:

- Establishing the executive management board – which should in most circumstances be made up of no more than 12 members elected from a group consisting of one representative from each practice and all the members of the Consortium should agree to be bound by their decision. If there are more than say 12 participating practices it will probably be necessary to develop either a two tier structure or a system of rotational board membership.
- A set of rules about how long each representative should hold office, issues about retirement, election of a Chairman and Vice Chairman and the establishment of a Quorum.
- A system of enabling the management board, after due notice, to require a practice to retire from the Consortium if a practice either fails to abide by the agreed rules or jeopardises the viability of the whole commissioning arrangement.
- How and when savings are to be allocated – possibly on a capitation basis or on a weighted capitation basis.

- Perhaps including some sort of “fair shares” arrangement, which would permit the management board to re-allocate part of the savings to practices which believe that the allocation was not calculated fairly, or if circumstances arose which had not been anticipated.
- A set of rules governing the day-to-day running of the Consortium.
- Rules relating to the possible winding up of the Consortium, e.g. because the three year HM Treasury cycle ends, and dealing with late entries in the Consortium.

We have developed a wide bank of clauses for Consortium Agreements. These can be appropriately tailored to the individual needs of groups based on the responses to a detailed questionnaire.

Experience has allowed us to substantially reduce our original pricing structure and we are delighted to be able to offer a first draft of a tailored Consortium Agreement for a fixed fee of £1,750 (of which £250 is payable as a commencement fee on the receipt of our questionnaire and the remaining £1,500 on receipt of the first draft). What is difficult is to know how much fine tuning work is needed after the first draft but we would expect 2 to 3 hours work at £200 per hour to finalise the Agreement. Whilst we hope that this would not be exceeded, what we can certainly say is that it would not be exceeded without giving the group good notice that we were getting into difficulties and that the work was proving very much more complicated, as a result of the instructions that we were receiving, than had previously been expected.

Whilst it is anticipated that much of this can be done electronically or over the phone, we recognise that a face to face meeting is often an efficient way of assisting a group in the preliminary stages of forming a Consortium Agreement. Meetings for this could either take place in the office here or alternatively either I, or one of my colleagues, could visit the group at their office or one of the surgeries. Obviously however we would expect to be reimbursed proper travel expenses in addition to the above hourly charge.

It is not so much the case that the drafting proves difficult but if along the way there are disagreements between the members of the group as to what is needed it inevitably impacts very considerably on the question of costs. The estimate that we have given is based on the understanding that there will be a single and clear line of instruction and that we do not have to spend additional time resolving inter-group problems. We have developed a Q & A approach to some of the setup work and this could well help groups in the formative stage of their discussions.

An appropriate outline of the stages of constructing a Consortium agreement after instructing Lockharts is as follows:

- Receive the Consortium Questionnaire and pay the commencement fee of £250.
- Return the completed Questionnaire and Lockharts will prepare the first draft of the Consortium Agreement.

- The Group will receive the first draft and pay the sum of £1,500.
- Final development of the Agreement will be at the hourly rate of £200 (expected to be 2-3 hours for a standard Agreement).
- Any visiting work at any stage will be at the hourly rate of £200 plus travel costs plus proper disbursements.

In summary, with the Consortium Agreement we believe that on the basis of clear instructions a Consortium should budget for a total of £2,350.

## **2. The PBC Contract between a Consortium and the PCT**

The second limb is obtaining a contract with the PCT which will deal with how the indicative budget is set up for the commissioning of services, management costs, distribution of freed up resources, overspending, etc. The key issue is whether we are providing our own core document and then working on it to achieve what is needed or alternatively receiving a draft contract (probably in this case called a Service Level Agreement) from the PCT and having to amend it to achieve what we want.

If we go down the first route we already have available a model Contract, which is available for inspection to Consortium groups or PCTs for a fee of £100 on the basis of a licence agreement. If the matter proceeds past inspection, the fee will be deducted from the full licence fee set out below.

### If the Contract is provided to a Consortium

We can supply the model Contract for a non-exclusive licence fee of £1,750. We can then adapt, if required, each standard contract to the specific needs of the group at a price of £200 per hour. Part of this cost will arise at any preliminary meeting and the balance when the Contract is developed. We have developed a detailed development questionnaire to assist in the completion of the Contract. For this route we think that an estimate for the Contract would also be no more than 10 hours additional work, again giving the figure of £2,000, although considerably less time may be needed depending on the responses to the questionnaire.

### If the Contract is not provided to a Consortium

#### (i) If we supply the model Contract to the PCT

We can supply the model Contract for use in that one PCT area for a non-exclusive licence fee of £1,250 with an additional £500 payable per Consortium for the use of the Models. The PCT may wish to seek independent legal advice on tailoring the Contract, but we would be happy to do so on the same terms as for a Consortium (above).

#### (ii) If the PCT supplies its own Agreement

By definition, it will be more difficult to work from a PCT document. This is not that the PCT documentation will necessarily be unfit for the purpose but it will be in a different format. As you may know, we did an enormous amount of work

with the various PMS Pilot Scheme waves and indeed some 1/3 of the country are at present using the Lockharts' Model PMS Agreement, now PMS is in permanent form. The difficulty, however, is that also around the country are a number of other PMS Agreements which are quite variable in content and quality (in a number of cases having been drafted without legal input) and when we have been asked to review some of these the review process alone has taken up to 15 hours. In some cases this has even been followed by a recommendation that the terms of the Agreement are really quite unacceptable for practices.

It is probably fair to say that some PCTs are better draftsmen than others but if a PCT wants to use its own Agreement, or SLA, the costs involved may very probably exceed the above estimate of £1,750 plus £2,000 for the work-up costs. If the drafting is poor the cost could well be more than twice the work up costs.

Another difficulty which may arise with PCT produced documentation is that there may be a lack of clarity as to whether or not the arrangement between the Consortium and the PCT should actually take the form of a contract or should simply be some form of what could be an imprecise SLA, which sets aspirations rather than concrete provisions. This is all well and good at the outset but there have to be concerns about what is to happen should a difficulty arise.

### **3. Provider arrangements within the providing group – Company Limited by Shares and Shareholders Agreement**

The third limb is bringing together the providers in a Provider Group. The important thing here is to ensure that everyone involved distinguishes very carefully between commissioning and providing. In many cases, the providers will be the same, or more or less the same, as the commissioners, but a clear distinction must be maintained for a number of reasons.

When moving towards the arrangements that are needed for providing, it is probably best, in the first place, to take the simple example of the PCT commissioning from a local hospital and then see how this needs to be adapted when the commissioning is from providers who are GPs. Where the commissioning takes place from a hospital the PCT will, in effect, be acting in exactly the same way as they work at present where secondary care services are provided and both the PCT and the hospital are subject to appropriate arrangements which take account of governance and probity requirements.

The same position will apply where PCTs are requested to commission from a group of GP providers but there will be additional governance or probity arrangements that the PCT will have to bear in mind because the commissioners wearing one hat will, in effect, be the same people as the providers wearing a different hat. Additional difficulties may arise because of the European procurement arrangements which may apply to PCT commissioning from a group of GP providers and this is something that will have to be borne in mind.

When, however, the governance and probity issues have been dealt with, the question arises as to how a group of providers should form themselves into a unit. If the providing unit was a single GP practice, I doubt whether it would want to change its own format as the provision of services to the PCT on a

commissioning basis would really be no different to the provision of the services provided already, albeit that the services might come under an APMS or an SPMS type of agreement (please see below).

Where, however, a number of practices group together to form a provider unit they might well feel that it would be preferable to do so through the medium of a company limited by shares (but of course a different company from the Consortium company) and such a company would probably need to have a Shareholders' Agreement which would set out how company profits were to be divided between the shareholders. You have to bear in mind here that the shareholders of this company are making profits, which they would retain for themselves, rather than dealing with savings which might accrue to the Consortium that deals with the commissioning. Therefore providers are making a straight commercial profit in exactly the same way that a hospital or an independent sector provider might make a profit out of commissioning.

An alternative format for the providing group might be to use a limited liability partnership but all the accountancy advice that we have received so far suggests that the limited company is probably a more suitable route than an LLP. This is probably something which is best discussed in outline at the first meeting with the group so that they can start considering both the types of arrangements that could be made and how any profits that are made should be distributed.

We have prepared a bank of clauses for a Shareholders' Agreement to cover providing arrangements, and we would be happy to advise on this. The cost involved in forming an appropriate company is unlikely to exceed £500, as most companies will be obtained "off the shelf". What will be needed, however, will be changes to the company documentation so that it interfaces correctly with the APMS Contract or SPMS Agreement and the agreed method of profit distribution as set out in the Shareholders' Agreement.

We will be able to provide a Shareholders' Agreement on the same basis as the Consortium Agreement with an Agreement tailored to the individual needs of groups and based on the responses to a detailed questionnaire. We will be able to provide a first draft of a tailored Shareholders' Agreement for a fixed fee of £1,750 (of which £250 is payable as a commencement fee on the receipt of our questionnaire and the remaining £1,500 on receipt of the first draft). The fine-tuning will be carried out at the rate of £200 per hour and we will advise after the receipt of instructions on an expected time cost for this work since Shareholders' Agreements can vary substantially in content. We will of course keep the group informed of any problems and of any unexpected change regarding time cost scales.

An appropriate outline of the stages of constructing a Shareholders Agreement after instructing Lockharts is as follows:

- Receive the Shareholders' Agreement Questionnaire and pay the commencement fee of £250.
- Return the completed Questionnaire and Lockharts will prepare the first draft of the Shareholders' Agreement.
- The Group will receive the first draft and pay the sum of £1,500.

- Final development tweaking of the Agreement will be at the hourly rate of £200 (with an expected timescale advised at the outset).
- Any visiting work at any stage will be at the hourly rate of £200 plus travel costs plus proper disbursements.

#### **4. Arrangements between the provider group and the PCT-APMS Contract/SPMS Agreement**

The fourth limb is a contractual arrangement between the group of providers and the PCT, which sets out the provisions under which the providers will deliver the agreed services. This can be done through an APMS Contract or an SPMS Agreement. There are differences between these two forms, and this is again something which is best discussed in outline at the first meeting with the provider group so that they can consider both types of arrangements.

There will be additional costs involved in dealing with the APMS Contract or the SPMS Agreement and again, as with a PBC Contract, there are likely to be differences depending on whether the providers are able to use one of the model APMS Contract/SPMS Agreement produced by this firm or will be required to work with PCT documentation.

The Lockharts' model APMS Contracts and SPMS Agreements are available per provider group, again on the terms of a non-exclusive licence fee of £1,500 and fine tuning will again be carried out at the rate of £200 per hour. The model is however in straightforward form and the additional work should not take more than 4 hours.

#### **Generally**

All the prices set out in this note are exclusive of VAT at the prevailing rate. The hourly work would be billed on a monthly basis.

Finally as to costs please note that the estimates given above may need to be revised in the light of the and further guidance but we hope this will not be the case.

**-oOo-**

Either I or my colleagues Emese Duncan or Mark Jarvis would be very pleased to discuss these matters further with you on the telephone if we can be of assistance.

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Fax: 020 7383 7117

# **LICENCE & SUPPLY OF SERVICES** **AGREEMENT FOR** **PRACTICE BASED COMMISSIONING** **CONTRACTS**

THIS LICENCE & SUPPLY OF SERVICES AGREEMENT is made the  
\_\_\_\_\_ 2006  
between LOCKHARTS Solicitors of Tavistock House South, Tavistock Square,  
London WC1H 9LS, (referred to below as "the Licensor") and  
\_\_\_\_\_ on behalf of  
the \_\_\_\_\_  
\_\_\_\_\_ CONSORTIUM ("the Consortium")  
of (address) \_\_\_\_\_  
(referred to below as "the Licensee")

## **RECITALS**

- (a) In return for payment of an inspection license fee ("Inspection Licence Fee") as provided for under this Agreement, the Licensor has agreed to the inspection of a Lockharts' Practice Based Commissioning Contract (the "Contract") by the Licensee.
- (b) In return for payment of an use licence fee ("Use Licence Fee") as provided for under this Contract, the Licensor has agreed to use one copy of the Contract with their PCT for the purpose of entering into a Practice Based Commissioning arrangement.
- (c) If applicable and agreed between the parties, in return for payment of a supply licence fee ("Supply Licence Fee") as provided for under this Contract, the Licensee has agreed, on entering into this

Agreement, to appoint and engage the professional services of the Licensor, and the Licensor shall in return supply its professional expertise amending the Contract to tailor it to the individual requirements of the Licensee for the purpose of Practice Based Commissioning in return for payment of the fees as provided for under this Agreement.

- (d) The Contract has been drafted by the Licensor and all copyright and other intellectual property rights in the Contract and any amended version thereof are owned by the Licensor.

**NOW IT IS AGREED as follows:**

**OPERATIVE PARTS**

1. The said \_\_\_\_\_ warrants to the Licensor that he is duly authorised to enter into this Agreement on behalf of the Consortium and its members.
  
2. In consideration of the fees to be paid in accordance with clauses 5(i) and 5(ii) and if applicable with clause 5(iii) the Licensor hereby grants to the Licensee a non-exclusive licence to carry out the acts set out in the List of Permitted Acts below:-

**List of Permitted Acts where the Inspection Licence Fee is paid**

- (i) making and retaining such hard and electronic copies of the Contract for inspection purposes only so as to permit the Consortium to consider whether it wishes to use the same where it proposes to contract for the provision of Practice Based Commissioning but not otherwise;

**List of Permitted Acts where the Use Licence Fee and if applicable the Supply Licence Fee is paid**

- (ii) amending copies of the Contract to tailor them to the individual requirements of the Licensee wishing to enter into new or amended

contracts for the purpose of Practice Based Commissioning with their PCT but not otherwise save as provided in clause 3 below;

(iii) making and retaining such hard and electronic copies of the Contract or of copies of the Contract amended in accordance with clause 2(ii) above as are reasonably necessary for the purposes of recording any new or amended contracts for the purpose of Practice Based Commissioning

3. The rights and permissions granted to the Licensee under clause 2 of this Agreement shall extend to their legal and to their accountancy professional advisers of the Consortium to advise in respect of any legal and accounting issues and to the Primary Care Trust ("the PCT") with whom the Consortium is to contract for Practice Based Commissioning for purposes only of entering into a Practice Based Commissioning Contract with the Consortium.

4. For the avoidance of doubt:

(i) this Agreement shall not grant either the Licensee, or their accountancy professional advisers, or the PCT any right to carry out acts not expressly permitted by clause 2 above or to authorise others to carry out such acts (except as required under clause 3);

(ii) the Licensee hereby warrants to the Licensor that it will not in any circumstances, save with the specific written agreement of the Licensor, have the right to make or retain hard or electronic copies of the Contract or any part of it or amended versions of it or any part of them or to supply any such copies to any person, organisation, company or firm including any Primary Care Trust or to any NHS body or to any Local Medical Committee or to any individual or to any company or to any partnership or to any industrial or provident society or to any friendly society or to any voluntary organisation or to any other body or any doctors save for the purposes of the permitted acts specified in clauses 2(i) and 2(ii) above;

- (iii) neither the Primary Care Trust nor any person to whom copies of the Contract have been extended in accordance with clause 3 shall have the right to supply copies of the Contract or amended version of it to any Primary Care Trusts of NHS body or to any Local Medical Committee or to any individual or to any company or to an partnership or to any industrial or provident society or to any friendly society or to any voluntary organisation or to any other body or any doctors,
- (iv) the Licensee shall not to cause or permit anything which may damage or endanger the Licensor's intellectual property or the Licensor's title to the Licensor's intellectual property rights or assist or allow others to do so; and
- (v) all references to "copies of the Contract" or "amended versions of it" in this Agreement shall be taken to include copies embodying of a part, as opposed to all, of the Contract or amended versions of it.

5. The Licensee hereby agrees to:

- (i) pay the signing hereof by the Licensee to the Licensor an Inspection Licence Fee of £100 plus VAT in respect of receiving an inspection copy of the Contract in accordance with but limited to the Permitted Acts in clause 2(i),
- (ii) pay to Licensor the Use Licence Fee in the agreed sum of £1,750 plus VAT less the sum paid under clause 5(i) above such fee being payable within 7 days of the use of the Contract for the Consortium in accordance with the Permitted Acts in clauses 2(ii) and 2(iii);
- (iii) if it is agreed between the Licensor and the Licensee pay to the Licensor the Supply Licence Fee for the supply of services of £200 plus VAT for every hour of work the Licensor is engaged amending, whether before or after the sending out of the Development

Questionnaire which designed to begin the process of tailoring the Contract for the individual requirements of the Licensee who wishes to enter into new or amended agreements for the purpose of Practice Based Commissioning, where such work shall occupy no more than 10 hours of work unless it is otherwise agreed between the Licensor and the Licensee, and where such fees shall be payable within one month of receiving invoices from the Licensor in line with the Licensor's attached Terms of Business which shall regulate the supply of professional services to the Licensee save where the terms are superseded by this Agreement; and

- (iv) to indemnify and keep indemnified the Licensor from and against any and all loss and/or damage and/or liability (whether criminal or civil) suffered and legal fees and costs incurred by the Licensor resulting from any breach of this Agreement including, but not limited to, any act and/or neglect and/or default of the Licensee or the Consortium.

6. If the Licensee fails to make payments due under this Agreement within one month of those payments falling due, the Licensor shall be entitled to terminate the license granted under this Agreement either in full or, at the Licensor's sole unfettered discretion and in such a case the Licensor shall be under no obligation to carry out any further work for the Licensee.

## 7. Severance

If any term of this Agreement, is held to be invalid, illegal or unenforceable by any Court, tribunal or other competent authority, such term shall, to the extent required, be deemed to be deleted from this Agreement and shall not affect the validity, lawfulness or enforceability of any other terms of this Agreement.

If, in the reasonable opinion of the Licensor or the Licensee, the effect of such a deletion is to undermine the purpose of this Agreement or

materially prejudice the position of either party, the parties shall negotiate in good faith in order to agree a suitable alternative term to replace the deleted term or a suitable amendment to this Agreement.

#### 8. Entire agreement.

The Licensor and the Licensee acknowledge that this Agreement constitutes the entire agreement between the parties with respect to its subject matter.

This Agreement supersedes any prior agreements, negotiations, promises, conditions or representations, whether written or oral, and the Licensor and the Licensee confirm that they did not enter into this Agreement on the basis of any representations that are not expressly incorporated into this Agreement. However, nothing in this Agreement purports to exclude liability on the part of either party for fraudulent misrepresentation.

#### 9. Arbitration

Any dispute, difference or question which may arise at any time hereafter between the Licensor and the Licensee as to the, meaning of the terms of this Agreement or the rights and liabilities of the Licensor or the Licensee shall be referred to the decision of a single arbitrator in London to be agreed upon between the parties or in default of agreement within 14 days to be appointed at the request of either party by the Law Society of England and Wales in accordance with and subject to the provisions of the Arbitration Act 1996.

#### 10. Jurisdiction

This Agreement shall be deemed to be made in England and the construction, validity and performance of this Agreement shall be governed in all respects by the law of England and Wales, and subject to the preceding clause the Licensor and the Licensee submit to the exclusive jurisdiction of the Courts of England and Wales.

SIGNED on

on behalf of the Licensor by  
Andrew Richard Lockhart- Mirams

Partner

SIGNED on

on behalf of the Licensee by