

## **NHS (GMS-Premises Costs) DIRECTIONS 2013**

### **Initial Comments on Changes Made**

#### **GENERAL**

In the main, the changes relate to those necessary so that the Directions can apply to the Commissioning Board (NHS England) and the CCGs rather than referring to PCTs. The 2013 Directions now in general relate to “the Board” referring to the NHS Commissioning Board. In addition, there are a number of minor grammatical alterations. It then adds a new section “Part 7” to attend to transition revocation and savings provisions relating to the move from the 2004 Directions to the 2007 Directions.

However, in addition to the above, the writers of the 2013 Directions have taken the opportunity to make some more fundamental changes as noted hereunder.

#### **PART 2 – PREMISES DEVELOPMENT AND IMPROVEMENT**

Within the description of premises development proposals, the Directions now include other areas in addition to the original building of new premises, purchase of new premises and premises redevelopment. The additional elements are:-

- The sale and leaseback of premises
- The increase of existing floor area of premises

It makes it clear that the Board will not agree to fund any of these operations where a contract has already been entered into or work commenced. Prior agreement with the Board must be obtained.

The main effect of the above is that GPs will not be able to enter into a sale and leaseback agreement without getting specific permission.

#### **Improvement Grants**

The Directions have been expanded to exclude certain additional elements relating to improvement grants. Whilst car parking can be provided using an improvement grant, it now specifically notes that tandem spaces cannot. In addition, it excludes improvements designed solely to reduce the environmental impact of premises such as the installation of solar energy systems, air conditioning or replacement windows, doors or facades. The purpose of this exclusion is unknown and appears rather random.

On the other hand, additional areas are included where improvement grants can be used including such things as the provision of electronic storage facilities in a remote location and the installation of specialist floor coverings for infection control purposes.

Where grants were given a contractor would have to guarantee that the premises will be used for the delivery of NHS services for up to five years (where the cost was up to £100,000 or up to ten years where it was over £100,000). A new level has been added where such guarantee must be given for fifteen years where projects cost over £250,000.

#### **PART 3 – PROFESSIONAL FEES AND RELATED COSTS**

##### **New Projects**

Originally reimbursement was allowed for reasonable architects' and surveyors' fees plus reasonable legal fees. In relation to the reasonable surveyors' and architects' fees, a maximum has been added at 12% of the contract sum. In addition, a further 1% of the contract sum has been included for the engaging of a project manager. I think there is an element of confusion here as, within a traditional tender situation, the project manager would usually be the architect and, if one is looking at a design

and build project, the project manager or employer's agent would normally be charging closer to 2 ½ %. But then of course part of the architect's fees would move over to the contractor. This section could certainly be improved so as to have regard to real situations.

#### **PART 4 – GRANTS RELATING TO RELOCATION OR REMORTGAGING**

##### Remortgages

A new section has been added covering a situation whereby a contractor is in receipt of borrowing costs (the new form of Cost Rent) and remortgages at a lower rate of interest. The contractor must make a reapplication to the Board who will then reappraise the level of reimbursement.

It also makes it clear that no such grant will be available where a mortgage deficit has arisen through a contractor negotiating a payment holiday.

##### Guaranteed Minimum Sales Price

Previously, professional advice had to be obtained by the PCT in relation to a minimum sale price whereas now the Board must go to the District Valuer.

##### Grants relating to the Cost of Surrendering Leases

Grants towards the surrendering of a lease now only apply to those leases with no more than five years left to run. The linked ability to pay a grant to cover a contractor's own loan liability in a vacant property is now limited to twelve months and only applies where the contractor continues to undertake all reasonable steps to a surrender or assign the lease.

#### **PART 5 – RECURRING PREMISES COSTS**

##### Leasehold Premises Rent

The old Directions related to rental costs arising under a lease agreed or varied on or after the 1<sup>st</sup> April 2004 and later in the original Directions there was paragraph 54 which guaranteed the continuation of reimbursement of any forms of rent previously agreed. Clause 54 has now been removed totally and the 2013 Directions now relate to all leasehold premises. In relation to historic agreements, see PART 7. The section clarifies that reimbursement must be the lower of the CMR plus any VAT or the actual lease rent plus any VAT.

##### Borrowing Costs

The prescribed percentages for fixed interest rate loans at 1.5% above the 20 year gilt rate or for variable rate loans base rate plus 1% still remain despite such margins being totally out of line with the market. It is a shame that the opportunity was missed not to revise these. In relation to the appropriate costs, professional surveyors' and architects' fees have been limited to 12% plus 1% towards the project manager. As noted previously, such rates do not take on board the reality of either a traditional building contract or design and build contract.

##### Notional Rent

This section now makes it clear that, whereas one of the triggers of a review of Notional Rent was further capital investment in the premises, this now only applies where the Board has approved such investment.

##### Abatement of Notional Rent

Where an improvement grant or similar had been used by a contractor to improve premises, under the 2004 Directions the level of rent reimbursement was abated for a period of ten years. The

abatement period has now been changed so that it will only be abated for five years where the cost is up to £100,000, the ten years remain where the cost is between £100,000 and £250,000 and extended to fifteen years where the cost is over £250,000.

#### Payment in Respect of Running Costs and Service Charges

Changes have been made to try and make this previously difficult to understand section slightly more clear.

#### Abatements in Respect of Income from Private Patients and Commercial Contracts

This is the section whereby under the 2004 Directions if a contractor received up to 10% of their income from private sources, they could still enjoy full rent reimbursement. The section contained a scale whereby, if they received between 10% and 20% of private income, reimbursement would drop by 10%. This whole section has now been removed.

#### Effect of Minimum Standards

The 2004 Directions already noted that, where a PCT reimbursed rental or paid Notional Rent, they were under a duty to ensure that the premises meet the minimum standards set out in Schedule One. When serving a Remedial Notice, the PCT would have had to give six months' notice but, under the 2013 Directions, this has been reduced to "no more than three months" unless the Board deem a longer period is required.

### **PART 6**

This section has virtually been deleted in its entirety and related to paragraphs 54 and 55 which guaranteed reimbursement levels in respect of leases and other agreements entered into prior to 2004. As noted earlier, it is clear that the intention is that the 2013 Directions will now apply across the Board.

### **PART 7**

#### Transitional Provisions

This is a new section added to allow for the transition from the 2004 Directions to the 2013 Directions. Paragraph 56 notes that agreements for reimbursement under the old 2004 Directions must continue as if the 2004 Directions continued (thus replacing the old paragraphs 54 and 55).

### **SCHEDULE 1 – MINIMUM STANDARDS**

The Schedule has been updated and expanded and now includes two sections, Part 1 – Statutory Standards (including the Quality Act 2010, Fire Precaution Provisions and LOLER and COSHH Regulations). Part 2 – Contractual Standards (additions include adequate procedures for ensuring the continuing safety of Practice premises to include the carrying out of risk assessments, decontamination and infection control provisions etc).

### **SCHEDULE 2 – CMR AND NOTIONAL RENT CALCULATIONS**

#### Part 1 (General Provisions)

It now makes it clear that the assessment of CMR or Notional Rent must be undertaken by the District Valuer and not any valuer appointed by the Board.

Additions are made to the instructions to the valuer, specifically instructing the valuer to exclude any value applicable to tandem (double parked) car parking spaces. Previously, this had always been the PCT decision to include or exclude, and then a valuation exercise to decide whether they had or did

not have any value. For example, such spaces would be unlikely to be essential or have any real value in a rural area whereas, in a built-up urban environment such as Central London, tandem spaces may previously have been considered both essential and valuable. The clause goes on to note that the valuer must exclude any improvements that have been made to the Practice accommodation solely to reduce the environmental impact of the premises such as the installation of solar panels, air conditioning or replacement windows or doors. The logic to this is not understood and appears to be a direct disincentive positively discouraging doctors from improving premises to reduce environmental impact.

## Part 2 – CMR Reimbursement for Leasehold Premises

This section makes some changes so that the level of rent reimbursement can now be reviewed whenever there is any change in the terms and condition of a lease regardless of whether or not the level of rent changes.

Possibly the most controversial change is that, prior to reviewing the level of CMR for reimbursement purposes, the Board must require a rent review memorandum signed by the landlord and contractor recording the change and level of lease rent charged. In simple terms, the contractor must commit to the review prior to the CMR being assessed. This is going to conflict directly with many modern rent review clauses where rent for review purposes is linked to rent reimbursement. In some instances, it will make them difficult to operate, in others it will completely frustrate the process. Where frustrated, it will remove the protection that tenants previously enjoyed.

There is a further clause that gives concern in that it notes where existing leasehold premises a rental value for car parking has been included in the rent charged by the landlord, this will continue to be included in the assessment of the CMR for reimbursement purposes but only until the term of the lease expires or the lease is varied to exclude that rental value from the rent charged. It appears to indicate that reimbursement on rent for car parking spaces is to be revisited.

## Part 3 – Notional Rents

A technical change in that under the 2004 Directions when valuing a Notional Rent, the valuer would assume a new term of 15 years with future upward only rent reviews. The instruction is now to consider a new term of 15 years with rent reviews every 3 years allowing for an up or down review, but never below the initial rent. The most relevant element here is that, under the old Red Book and the 2004 Directions, the valuer could assume that the use of the premises were for Practice purposes or for such other purpose for which planning permission has been granted or may be reasonably expected. This alternate has now been removed so that, in assessing Notional Rent, you can only value having regard to the use of the premises as a surgery. This is potentially going to cause substantial problems for Practices in older style converted residential premises in sought after and valuable locations where such alternate residential use would create a far higher rent than the surgery value. No doubt part of the move to get doctors out of such premises and into new purpose-built units.

## **SCHEDULE 3 – NOTIONAL RENT ABATEMENTS AND SUPPLEMENTS**

Originally, the formulas for abatements in Notional Rent and periods that those abatements lasted only applied to situations where NHS grants were provided. Thus, where a Deanery Grant was offered to a Practice, PCTs would often make up their own conditions and, in some instances, reimburse no rent for an indefinite period. One good point is that Schedule 3 now relates to all grants, where NHS funded or not.