

8 December 2009

FILE REF: 15308

PRIMARY CARE TRUST: #

GDS PROVIDER: #

DISPUTE RESOLUTION: PCT refusal to novate contract to #

RE: NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005

1 Introduction

- 1.1 The contractor has referred the dispute in relation to its GDS contract for dispute resolution under the provisions of paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005.
- 1.2 On behalf of the secretary of State for Health, the NHS Litigation Authority (NHSLA) is directed to exercise the functions of dispute resolution and I as an authorised officer of the NHS Litigation Authority, have made this determination.

2 Application for Dispute Resolution

- 2.1 By letter dated 6 August 2009 the contractor applied to the NHSLA for dispute resolution.
- 2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute:
 - 2.2.1 Application from the Contractor dated 2 August 2009, enclosing correspondence between the Contractor and the PCT and his GDS Contract dated 31 March 2006
 - 2.2.2 Correspondence from the PCT dated 10 September 2009 enclosing advice from it's lawyers, Guidance Notes on European Procurement Directives from the national association of primary care dated September 2006, an extract from # PCT's Standing Orders (undated) and correspondence between the Contractor and PCT
 - 2.2.3 Correspondence from the Contractor dated 1 September 2009
 - 2.2.4 Correspondence from the PCT dated 28 September 2009
 - 2.2.5 Correspondence from the Contractor dated 28 September 2009

3 Consideration

- 3.1 The Contractor applied to the PCT by way of letter dated 23 December 2007 for his contract with him as an individual dentist, to be transferred to him, operating by way of a dental body corporate, as a limited company.

- 3.2 The PCT replied by way of letter dated 2 January 2008, that they would be prepared to transfer the contract to the limited company, that this would, however, mean a new contract would need to be signed, and new provisions would need to be inserted into this contract. Other issues in relation to patient charges needed addressing and a meeting was suggested.
- 3.3 The Contractor interpreted this as an agreement on the part of the PCT to transfer the contract. In fact, the letter states that a new contract would be required, but the impression is certainly given, that the PCT were not objecting to the proposal.
- 3.4 The Contractor wrote to the PCT three times in January and February 2008 regarding the revised contract. The PCT provided a draft contract for a corporate body by way of correspondence dated 27 February 2008 and suggested a meeting to discuss completion of the contract.
- 3.5 Further correspondence from the Contractor in March 2008 suggested firstly that the incorporation could not be completed prior to April 2008 and would be completed for April 2009 then latterly that it could be achieved by April 2008 after all, and the contract was returned signed.
- 3.6 By way of correspondence dated 15 April 2008, the PCT indicated that it was no longer able to agree to the new contract with the dental body corporate, following advice received from its legal advisors. The PCT position was that if the Contractor wished the transfer to go ahead, then this would need to be the subject of a competitive tendering exercise.
- 3.7 The Contractor agreed by letter dated 16 April 2008 to continue with his current contractual arrangements but expressed concern and dissatisfaction that the PCT having previously indicated it would transfer the contract to the dental body corporate, was now stating that it would not, and relied on advice which did not appear within the Contractor's GDS Contract.
- 3.8 There followed a number of exchanges of correspondence, emails and telephone conversations between the Contractor, his British Dental Association (BDA) advisor, and different individuals within the PCT regarding whether or not the PCT was bound to follow a procurement process and re-tender a contract when a contractor was seeking to incorporate his practice and continue to operate to the same terms and on the same basis as when he was an individual.
- 3.9 The GDS contract which forms the subject of this dispute is with the Contractor as an individual named dental provider. The contract expressly provides at clause 12:
- The Contractor shall not give, sell, assign or otherwise dispose of the benefit of any of its rights under this Contract. The Contract does not prohibit the Contractor from sub-contracting its obligations arising under the Contract where such sub-contracting is expressly permitted by the Contract*
- 3.10 There is no provision within the Contract requiring the PCT to consent to the sale, transfer, assignment or novation of the contract to a third party. Whilst the Contractor states that there would be no material variation to the contract as he would still be operating the contract, a limited company is a separate legal entity to the Contractor. It was, therefore, within a range of options available to the PCT, to require a new contract to be entered into by the dental body corporate, and that is the offer that was made to the contractor.
- 3.11 The circumstances surrounding that offer, the terms of that contract and the later withdrawal of that offer are not matters upon which this authority was the

jurisdiction to determine any dispute as they are outwith the current contracting arrangements.

- 3.12 It is a commissioning decision of the PCT as to whether they choose to tender contracts for the provision of dental services, and if so, to whom they choose to award a contract.

LISA HUGHES
Appeals Manager