

6<sup>th</sup> November 2007

**FILE REF: 14003**

**PRIMARY CARE TRUST: #**

**PMS CONTRACTOR: #**

**DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (PRIMARY  
MEDICAL SERVICES AGREEMENT)  
REGULATIONS 2004)**

**RE: LIST SIZE CALCUATION**

## 1 INTRODUCTION

- 1.1 As PMS Providers, the above contractor has referred the matter of contract variation for dispute resolution under the provision of Paragraph 95, Schedule 5 of the NHS (Personal Medical Services Agreement) Regulations 2004.
- 1.2 On behalf of the Secretary of State for Health, the NHS Litigation Authority is directed to exercise the functions of dispute resolution, which is undertaken within the Authority's Family Health Services Appeal Unit. I as Chief Officer of the FHS Appeal Unit and authorised officer of the NHS Litigation Authority have made this determination.

## 2 APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter dated 20 August 2007 the contractor applied to the FHS Appeal Unit of the NHS Litigation Authority, for dispute resolution of the above issue.
- 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 Letter of application dated 20 August 2007, including a bundle of documents labelled A thru Z.
  - 2.2.2 Letter from the PCT dated 20 September 2007 which enclosed the representations of the PCT together with a bundle of documents labelled 1 thru 13.
  - 2.2.3 Letter dated 1 October 2007 from the contractor enclosing final observations and a bundle of documents labelled AA, CC, D, F, G and HI.

## 3 CONSIDERATION

- 3.1 I note that the Contractor states he entered into a PMS Pilot Agreement with the PCT's predecessor on 27 March 2003 and that this became permanent on 1 April 2004. I note that the PCT does not dispute this.
- 3.2 I note that the PCT refers to the provisions of the "Personal Medical Services Agreements (Financial Provisions) Direction 2006 which directs PCTs no later than 1 May 2006 to review the terms of all PMS Agreements and identify those financial provision and other terms of the PMS Agreement which if amended, could constrain any increases in payment under the PMS Agreement. Whilst this may have been the impetus for the PCT to review, I do not consider that without it the PCT were prevented from doing so.
- 3.3 I am mindful that the original pilot PMS Agreement [Schedule 13, part 3] states 'the maximum total number of persons who may be included in the Doctor's Lists of the Pilot Doctors at the Commencement Date shall be #.' I have not been provided with

any variation to this limit however it is clear that both parties agreed a higher [#] indicative list size for the initial calculation of the contract value. This is not unusual in establishing either new practices or PMS Agreements for such. Notwithstanding this, the actual list size did not attain this indicative figure and the list in 2006 was less than the # maximum and not within the #% tolerance of # referred to by the contractor. I am content that the PCT were entitled to reconsider the mechanism attributable to clause 4.1 of the PMS Agreement where no specific mechanism is contained within the contract as is the case here.

- 3.4 I note that the PCT wrote to the contractor on 31 July 2006 advising the contractor that from 1 September 2006 the PCT would review all Practice list sizes against their original forecasted list size. It further advised that "As with the contract Agreement the PCT will allow a #% tolerance level". I note further that following advice from another contractor the PCT took the view that in fact a #% tolerance did not form part of the PMS Agreement, and therefore the PCT wrote to the contractor again on 22 December 2006 advising the contractor that as from 1 January 2007 list sizes will be calculated quarterly and payment adjusted monthly in order to bring PMS into line with GMS. I further note in a letter dated 12 January 2006 [sic] (which refers to letters dated 28 December 2006 and 2 January 2007 and as such I am of the view should read 12 January 2007) the PCT wrote to the contractor advising the contractor of the "changes" which are as follows:
- 3.4.1 1 September – December 2006 list size adjustment based on #% tolerance up or down.
  - 3.4.2 1 January 2007 an onward list size adjustment based on the actual list size.
  - 3.4.3 Payment is adjusted monthly based on list size which is notified quarterly.
- 3.5 I am mindful of the provisions of clause 4.1.3 of the PMS Agreement which states when referring to the "non-cash limited element" of the contract value (list size forming part of this) that "will be revised for agreed changes in list size" and further states that "The first years calculated payments will be the starting point for the second years base line payment and this process will be repeated each year. The Commissioner and the Pilot shall then agree on the adjustments that will be required in order to establish the calculated payment for the following year. In the event of no agreement being reached the same level of payments will be made as were paid in the immediately proceeding period insofar as these payments have been allocated to the Commissioner until there is agreement". I note that neither the PCT nor the contractor have provided me with any agreed and signed variation to this aspect of the PMS Agreement. I do note however that the "Variation to PMS pilot Contracts" signed by the contractor on 31 March 2004 and the PCT on 16 April 2004 states under the heading Funding Principles that "In accordance with the PMS guidance, funding decision between GMS, PMS and other Primary care contractual arrangement will be fair equitable and transparent." It is this lack of agreement that is the essence of the instant dispute.
- 3.6 I note that the contractor is claiming that in view of the letter to him dated 31 July 2006 he is entitled to a #% tolerance in list size and that this is further supported by an invoice dated 7 December 2006 from the PCT to the contractor and minutes of a PCT meeting dated 13 December 2006. I note the PCT contention however that this #% tolerance does not form part of the PMS Agreement and as such the contractor is not entitled to it. I further note that neither party has directed me to a provision of the PMS Agreement or any signed variation to the Agreement that provides for such a tolerance when calculating list size payments. I am of the view therefore that the contractor is not entitled to a #% tolerance when calculating aspects of the contract value based on list size. In the absence of an agreement on the 'tolerance' methodology, which I do not consider is equitable between GMS and PMS, therefore for the period September to December 2006 I determine that the contractor shall not have the mechanism varied to that in force at the commencement of the 2006/07 contracting year and shall have the contract value calculated accordingly.
- 3.7 With regard to the period from 1<sup>st</sup> January 2007 onwards, I am mindful that the PCT has sought to apply a mechanism that is the same as and therefore fair and equitable

with GMS, which accords with the "Variation to PMS pilot Contracts" referred to in 3.5 above. I am mindful that clause 4.1.3 states that the non-cash limited element of the contract, which applies here, 'will be revised for agreed changes in lists size.' *[my emphasis]* I note that there is no dispute as to the actual list size at these times and determine that this clause requires such a revision to the non-cash limited element. In effect, this clause ensures fair distribution of public monies and I determine that the mechanism the PCT seeks to apply from 1<sup>st</sup> January 2007 does not of itself vary the contract but applies a fair and equitable mechanism for the apportionment of public monies inline with GMS Contracts. In this respect, I determine that the position of the PCT should prevail in the absence of any contrary written agreement between the parties for 2007 onwards.

**PAUL BURNS  
CHIEF OFFICER  
FHS Appeal Unit**