

2 December 2009

FILE REF: 15309

PRIMARY CARE TRUST: #

GDS CONTRACTOR: #

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

RE: DISPUTE RESOLUTION

1. INTRODUCTION

- 1.1 The Contractor has referred the dispute in relation to the Standard General Dental Services Individual Including Domiciliary Contract ("the GDS Contract") for dispute resolution under the provisions of paragraph 54 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 ("the GDS Regulations").
- 1.2 The Secretary of State for Health has directed that the NHS Litigation Authority exercise the functions of dispute resolution on his behalf. The Family Health Services Appeal Unit discharges that function for the Authority. I as an authorised officer of the NHS Litigation Authority have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter dated 10 August 2009, the Contractor applied to the FHS Appeal Unit of the NHS Litigation Authority 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 letter from the PCT's solicitors dated 27 August 2009, together with enclosures;
 - 2.2.2 letter from the Contractor's solicitors dated 10 August 2009, together with enclosures;
 - 2.2.3 letter from the Contractor's solicitors dated 17 September 2009, together with enclosures;
 - 2.2.4 e-mail from the Contractor's solicitors dated 22 September 2009;
 - 2.2.5 letter from the PCT's solicitors dated 7 October 2009, together with enclosures;
 - 2.2.6 letter from # MP dated 13 October 2009;
 - 2.2.7 letter from the # dated 26 October 2009;
 - 2.2.8 letter from the Contactor's solicitors dated 10 November 2009;

- 2.2.9 letter from the PCT's solicitors dated 13 November 2009;
- 2.2.10 letter from the Contractor's solicitors dated 23 November 2009; and
- 2.2.26 excerpt from # news programme.

2.3 The Contractor has made of a number of clear representations which I shall determine below but has also referred to there being other issues within the papers provided to me. As set out above, all of the papers provided to me have been considered in this determination.

2.4 The GDS Contract which I have been provided with is between # (the "PCT") and # dated 21 April 2006.

3. **CONSIDERATION**

3.1 The Contractor's dispute is in relation to:

3.1.1 the termination of the GDS Contract by way of a settlement agreement dated 5 November 2008 (the "Settlement Agreement"); and

3.1.2 the circumstances under which the Contractor entered into that Settlement Agreement.

Termination of the GDS Contract

3.2 The essence of the Contractor's dispute and its position is that the PCT elicited the Contractor's agreement to a termination date set out in the Settlement Agreement on the basis of a misrepresentation by the PCT's then Chief Executive that the Contractor would be obliged to retire at the age of seventy.

3.3 The PCT disputes the Contractor's claim and contends that the Settlement Agreement dated 5 November 2008 was valid as an agreement between the parties to terminate the GDS Contract in accordance with the GDS Regulations.

3.4 Paragraph 64 of Schedule 3 of the GDS Regulations states:

"The Primary Care Trust and the contractor may agree in writing to terminate the contract, and if the parties so agree, they shall agree the date upon which the termination should take effect and any further terms upon which the contract should be terminated."

Paragraph 64 of Schedule 3 to the GDS Regulations is reflected at clause 305 of the GDS Contract.

3.5 It is therefore necessary to consider whether the form of the Settlement Agreement complies with paragraph 64 of Schedule 3 of the GDS Regulations as set out above.

3.6 The Settlement Agreement is in writing and clause 1.2 of the Agreement states:

"In accordance with clause 305 of the Contract, the Contract shall terminate by agreement between the Parties with effect from close of business on 31 March 2010."

3.7 The termination of the GDS Contract by way of the Settlement Agreement is therefore in accordance with paragraph 64 of Schedule 3 to the GDS Regulations.

3.8 The Contractor states that the refusal of the PCT to "delete the termination date" is in breach of the GDS Regulations and the PCT is "estopped from relying on this provision in the

Settlement Agreement". No further detail is provided as to the exact provisions of the GDS Regulations which have been breached or in what way the PCT would be so estopped. In its representations dated 27 August 2009 the PCT states that the insertion of a termination date in the GDS Contract is permitted by paragraph 64 of Schedule 3 to the GDS Regulations, and that the assertion that an inclusion of a termination date in the Settlement Agreement is in breach of the GDS Regulations, is wrong as a matter of law. As set out above, the form of the Settlement Agreement complies with paragraph 64 of Schedule 3 to the GDS Regulations with regard to the termination of the GDS Contract.

- 3.9 The Contractor states that the decision of the PCT to refuse to delete the termination date from the amended GDS Contract is inconsistent with the NHS Primary Care Contracting Guidance Note entitled "PCT powers in relation to contractual changes". This guidance, which is currently under review, sets out the position as to termination by agreement between a primary care trust and a dental contractor and reflects the relevant provisions of the GDS Regulations, as set out in paragraph 3.4 above. The Contractor does not provide further details as to the basis for this argument. The decision of the PCT to refuse to delete the termination date from the amended GDS Contract is not inconsistent with this guidance.
- 3.10 In its letter dated 17 September 2009, the Contractor states that the PCT has acted in breach of clause 10 of the GDS Contract in refusing to agree to remove the termination date from the GDS Contract. There are no further submissions from the Contractor on this point. There are no provisions in the GDS Regulations which would prevent the PCT from not agreeing with the Contractor to remove the termination date set out in the Settlement Agreement and on the basis of the documentation before me I do not consider that the PCT has acted in breach of clause 10 of the GDS Contract in refusing to agree to remove the termination date in the Settlement Agreement.

Retirement of the Contractor

- 3.11 The Contractor states that the PCT told the Contractor on several occasions that he would have to retire at the age of 70. Further, the Contractor states that the PCT acted wrongly in eliciting the Contractor's agreement to a termination date on a false premise. I have found no conclusive evidence that the PCT, and in particular, # (the PCT's former Chief Executive) made this statement to the Contractor. The evidence from # himself and included in the PCT's representations is that he has no recollection that he told the Contractor that he would be required to retire at 70 as a matter of law.
- 3.12 The PCT has put forward the argument that the Contractor had expressed a wish to retire and that the purpose of the Settlement Agreement was to formulate an "exit strategy" for the Contractor and the practice. The PCT's Executive Team considered the proposal for the terms of the Settlement Agreement on 7 October 2008 and agreed to the proposal. The PCT then wrote to the Contractor on 7 October 2008 setting out the terms of the PCT's offer. I note in particular the letter from the Contractor to the PCT (#) of 14 October 2008 which confirms that the Contractor wished to accept the offer set out by the PCT's Board and in #'s letter of 7 October 2008.
- 3.13 The Contractor states in its further representations dated 17 September 2009 that the Contractor would never have agreed to the terms of a settlement agreement had the "70th birthday misrepresentation" not been made. The PCT states that there is no evidence presented by the Contractor's solicitors to support the claim and the Contractor would never have agreed to the terms of the Settlement Agreement had the alleged representation regarding retirement not been made. The PCT also states that the evidence of # sets out that the Contractor wanted to reduce his onerous work commitments and the Settlement Agreement gave him an exit strategy as he wound down to requirement.

The PCT's procurement process

- 3.14 The Contractor states that the PCT says that it is putting the GDS Contract out to tender because it is the Contractor's clearly expressed wish that he retire at age 70. The Contractor has also submitted a letter from # MP in relation to the procurement process undertaken by the PCT. I am unable to comment on the procurement process undertaken by the PCT in relation to a new primary dental services contract.

Practice Performance

- 3.15 The Contractor states that the new contract will offer poorer value for money than the GDS Contract with the Contractor and that the practice performs well and there is no logical reason why the PCT should terminate the Contract. I do not consider these arguments relevant to this dispute where a valid termination has been agreed between the parties.

UDA Value

- 3.16 The Contractor has raised various matters in relation to the Contractor's UDA value in its GDS Contract. Whilst I have considered the issues raised, I determine no amendment to the GDS Contract in these regards.

4. DETERMINATION

- 4.1 The Settlement Agreement under which the PCT and the Contractor agreed that the GDS Contract would be terminated on 31 March 2010 complies with paragraph 64 of Schedule 3 to the GDS Regulations and clause 305 of the GDS Contract. The Settlement Agreement is therefore valid as an agreement between the PCT and the Contractor that the GDS Contract will terminate on 31 March 2010 in accordance with clause 305 of the GDS Contract and paragraph 64 of Schedule 3 of the GDS Regulations.
- 4.2 I have not found any conclusive evidence to support the Contractor's submission that the PCT's former Chief Executive told him that he would have to retire at the age of seventy and it was only on that basis that the Contractor entered into the Settlement Agreement.
- 4.3 The Settlement Agreement is valid as an agreement between the PCT and the Contractor that the GDS Contract will terminate on 31 March 2010.

Tom Fothergill
Director of Finance