

19 January 2010

FILE REF: 15465

PRIMARY CARE TRUST: #

GDS PROVIDER: # ("the Contractor")

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

RE: DISPUTE RESOLUTION

1. Introduction

- 1.1 The Contractor has provided its consent and the PCT 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 ("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. I as an authorised officer of the Authority have made this determination.

2. Application for Dispute Resolution

- 2.1 By letter dated 20 October 2009 the PCT applied to the FHS Appeal Unit of the NHS Litigation Authority for dispute resolution.
- 2.2 The following documents have been made available to me in order that I may consider the dispute matter to ensure the just, expeditious, economical and final determination of this dispute: -
 - 2.2.1 Letter from the PCT dated 20 October 2009, together with enclosures;
 - 2.2.2 Letter from the Contractor dated 16 November 2009;
 - 2.2.3 Letter from the PCT dated 20 October 2009 but received by e-mail on 27 November 2009 and received by post on 30 November 2009.
- 2.3 I have been provided with copies of the Schedules to the Contract, which include a signature page. I have not been provided with a copy of the main body of the Contract. I have been provided with a copy of an 'Explanatory Notes' document which states that the PCT used the model GDS Contract and indicates that the Contractor should scrutinise the Contract and associated schedules. The Contractor has signed and dated this document 21 February 2006.
- 2.4 The Contractor disputes the sum which the PCT has calculated that the Contractor is required to repay to the PCT following termination of the Contract.

3. Consideration

- 3.1 The Contractor states that it does not hold a signed copy of the Contract with the PCT. I have been provided with a copy of the Schedules to the Contract which include Schedule 1 which sets out the names of the parties and Schedule 2 which sets out the signatures of the parties. The Contractor states that the PCT can not invoke any of their proposed actions as he is not legally bound by a written Contract.
- 3.2 I am satisfied that the Contractor was provided with a copy of the model GDS Contract. The PCT in its Explanatory Notes document states that "we endeavoured and would have preferred, to produce a Contractor and PCT specific Contract document, but unfortunately because of its generic nature and format, it allows for no amendments or adjustments to its main body text". I am satisfied that the model GDS Contract was provided to the Contractor and that the Contractor signed and dated the explanatory notes document 21 February 2006.
- 3.3 The PCT and the Contractor dispute whether the sum of £10,023.84 is repayable by the Contractor. No dispute has been raised by the Contractor regarding the PCT calculation of the £10,023.84. The PCT and the Contractor were parties to a GDS Contract until "this Contract was resigned by the Contractor on 30 June 2008." The PCT states that it performed one finance and activity reconciliation which covered 2007/08 and the first two months of 2008/09. I am advised by the PCT that "due to an unfortunate error, a small Contract payment continued to be paid to the Contractor between July and October 2008 which was after the resignation date."
- 3.4 The PCT has stated that payment and activity reconciliations after contract termination are covered by Clause 359 of the Contract and paragraph 11.19 of the GDS SFE dated 1 April 2009. The GDS SFE dated 1 April 2009 was not in force during the Term of the Contract or at the termination of the Contract.
- 3.5 Clause 359 of the standard GDS Contract current during the Term of the Contract provides that "on termination of the Contract or termination of any obligations under the Contract for any reason, the PCT shall perform a reconciliation of the payments made by the PCT to the Contractor and the value of the work undertaken by the Contractor under the Contract. The PCT shall serve the Contractor with written details of the reconciliation as soon as reasonably practicable, and in any event no later than three months after the termination of the Contract."
- 3.6 I have been provided with a copy of the Reconciliation provided by the PCT to the Contractor under cover of a letter dated 24 March 2009. The letter states that the report is based upon the information reported by the Contractor to NHS Dental Services and relates to the period 1 April 2007 to 31 October 2008.
- 3.7 The PCT has failed to provide any evidence that it provided the Contractor with written details of the reconciliation as soon as reasonably practicable, and in any event no later than three months after the termination of the Contract.
- 3.8 Clause 360 of the standard GDS Contract current during the Term of the Contract provides that "if the Contractor disputes the accuracy of the reconciliation, the Contractor may refer the dispute to the NHS dispute resolution procedure in accordance with the terms of the Contract within 28 days beginning on the date on which the PCT served the Contractor with written details of the reconciliation. The parties shall be bound by the determination of the dispute." The Contractor did not raise a dispute within 28 days of the date on which the PCT served the Contractor with details of the reconciliation.
- 3.9 Part 3, paragraphs 12.7 and 12.8 of the GDS SFE in force during the Term of the Contract provides in relation to 'overpayments and withheld amounts.' Paragraph 12.7 states that:

"Without prejudice to the specific provisions elsewhere in this SFE relating to

overpayments of particular payments, if a PCT makes a payment to a contractor under its GDS contract pursuant to this SFE and—

(a) the contractor was not entitled to receive all or part thereof, whether because—

(i) it or a person employed or engaged by it did not meet the eligibility criteria for the payment, or

(ii) the payment was calculated incorrectly (including where a payment on account overestimates the amount that is to fall due);

(b) the PCT was entitled to withhold all or part of the payment because of a breach of a condition attached to the payment, but is unable to do so because the money has already been paid; or

(c) the PCT is entitled to repayment of all or part of the money paid, the PCT may recover the money paid by deducting an equivalent amount from any payment payable pursuant to this SFE (in instalments, where that is appropriate), and where no such deduction can be made, it is a condition of the payments made pursuant to this SFE that the contractor must pay to the PCT that equivalent amount.

- 3.10 I am satisfied that the GDS SFE sets out the entitlement to the recovery of overpayments and that Clause 356 to 362 the Contract sets out the process which should be followed.
- 3.11 Payments have been made to the Contractor in consideration of the Contractor performing the units of activity set out at clause 77 of the Contract. Where the Contractor has failed to perform the activity required under the Contract, the PCT was entitled to withhold part of the payment because of a breach of a condition attached to the payment. The PCT is unable to withhold payment as payment has already been made. The PCT is entitled to repayment of part of the money paid. The PCT may recover the equivalent amount as no deduction can be made as the Contract has terminated.
- 3.12 The Contractor disputes that an element of the overpayment relates to the Contract Year 2007/08 to which the PCT made no attempt to reclaim the amount due as per the terms of the 'standard NHS Dental Contract.' The Contractor has not referenced any particular clause of the 'standard NHS Dental Contract' and I have assumed that he is referring to the GDS Contract.
- 3.13 As set out above, payments have been made to the Contractor in consideration of the Contractor performing the units of activity set out at clause 77 of the Contract. Where the Contractor has failed to perform the activity required under the Contract, the PCT was entitled to withhold part of the payment because of a breach of a condition attached to the payment. The PCT is unable to withhold payment as payment has already been made. The PCT is entitled to repayment of part of the money paid. The PCT may recover the equivalent amount as no deduction can be made as the Contract has terminated.
- 3.14 The PCT has the ability under the provisions of paragraph 12 of the GDS SFE in force at the date of the Contract, to recover an equivalent amount money to that which has been overpaid to the Contractor.
- 3.15 The Contractor disputes that there appears to be an inconsistent approach with the recovery of under achievements across the Country and has requested clarification under the Freedom of Information Act that all Dental Contractors holding a Contract with the PCT, who have underperformed since the start of a new Dental Contract, have repaid the PCT in full. The Contractor also asks what mitigating circumstances, if any, have been agreed for any non payments. The PCT has responded to the

Contractor in this regard. Contracts are personal between the parties and this determination is in relation to the Contract between the Contractor and the PCT.

- 3.16 The Contractor disputes that an element of the overpayment relates to payments being made to the Contractor in error by the PCT after the Contract ceased. There is no dispute that the Contractor was not entitled to receive these payments.
- 3.17 The Contractor states that the PCT "did not meet its contractual obligations and due processes with regard to review and performance monitoring during 2006/7 or 2007/8" and that he has "never had a formal performance review with the PCT during the time that I provided dental services to them." The PCT states that a mid year review was scheduled for 29 August 2006 but the PCT can not confirm whether this took place or not as no meeting notes are available.
- 3.18 Clause 91 of the standard GDS Contract states that "the PCT may notify the Contractor that it is concerned about the level of activity provided under the Contract in the first half of the financial year" and require that the Contractor participates in a mid year review. This is a discretion available to the PCT not an obligation that the PCT must undertake a mid year review with the Contractor.

4. Determination

- 4.1 I determine that the Contractor must pay to the PCT the sum of £10,023.84 within three (3) months of the date of this determination.

LISA HUGHES
Appeals Manager