

10 November 2009

FILE REF: 15337

PRIMARY CARE TRUST: #

GDS PROVIDER: #

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 its 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 25 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 Contractor dated 25 August 2009 together with enclosures;
 - 2.2.2 Faxed letter from the PCT dated 22 September 2009 together with enclosures;
 - 2.2.3 Letter from the Contractor dated 24 September 2009;
 - 2.2.4 Letter from the Contractor dated 29 September 2009 enclosing a copy of the GDS Contract;
 - 2.2.5 Letter from the Contractor dated 29 September 2009 together with enclosure;
 - 2.2.6 Letter from the Contractor dated 13 October 2009.
- 2.3 The GDS Contract which I have been provided with is between # PCT (now # PCT) and is unsigned. It is not disputed that the Contract was signed 'in dispute'. I have not been asked to determine any pre-contract dispute and shall not comment in this regard.

3 Consideration

- 3.1 The Contractor's dispute is in relation to the PCT suggested financial 'claw back'. The Contractor states that he feels that he has done what he was requested to do by the PCT and the prison authority 'i.e. attend for the number of sessions agreed and treat all patients presented to me.'

- 3.2 Clause 77 of the Contract provided to me by the Contractor states that 'the contractor shall provide # units of dental activity during each financial year.'
- 3.3 Schedule 4 (Payment Schedule) states that the Gross Contract Value per annum is £#. Schedule 4 also states that the units of dental activity to be provided per annum is #. There are provisions for additional payments to be made upon approved application from the Contractor. Schedule 4 states that 'amounts and entitlements are subject to the same requirements as previously calculated under the former GDS arrangements updated to nGDS. All above items are subject to the terms and conditions within the Contract.'
- 3.4 I have not been advised of any provision within the contract which states that the Contractor shall be paid to deliver the services on a 'sessional' basis. I have however been made aware of an offer by the PCT for the Contractor to undertake an additional session at the prison in order for the Contractor to achieve additional units of activity but which was not accepted by the Contractor.
- 3.5 The Contract requires the Contractor to deliver # units of dental activity during each financial year. During the financial year 2007/08 the PCT states that the Contractor provided #% of the contracted units of dental activity. I am advised that 'this takes into account the assumption that [the Contractor] will carry forward your #% tolerance into 2008/09.' The PCT has stated that it is entitled to recover £#, which has been calculated by taking the under performed units of dental activity (less a #% tolerance) at the average price per unit of dental activity across the contract when all other payments have been removed. The PCT has proposed that #% of this sum is recovered by the Contractor in three equal payments.
- 3.6 I understand from PCT correspondence to the Contractor dated 24 February 2009 that the Contractor had provided # units of dental activity at that time and that this showed an underperformance in the financial year 2008/09. The PCT states in this correspondence that it had agreed to provide some dedicated administrative support to the contractor to assist in the submission of FP17 forms.
- 3.7 On the basis of the facts as set out to me, and as set out within Clause 77 and Schedule 4 of the GDS Contract, the Contractor has failed to meet its required obligations. The PCT has the ability to recover the money paid to the Contractor relating to the overpayment as the Contractor did not perform the obligations as required. The PCT has proposed that #% of the sum calculated is recovered by the Contractor in three equal payments. This appears to be a reduced sum "to demonstrate that [the PCT is] aware of the complexities of working in a prison environment."
- 3.8 It is of note that the Contractor has provided information regarding a number of attendances at the prison where the services are to be provided. The Contractor states that it expected to see twelve inmates at the prison and who were included on the list of patients. Of the twelve expected patients, it is noted that only, two, three, two, four and six patients attended on various dates.
- 3.9 Having regard to all of the circumstances and the representations and observations of the parties, the PCT offer seems to be reasonable. The PCT appears to recognise the arguments put forward by the Contractor and states that the offer is made to demonstrate that it is aware of the complexities of working in a prison.
- 3.10 I determine that the overpayment made to the Contractor is recoverable by the PCT and that the PCT offer, which is not expressed as being time limited, is accepted by the Contractor in recognition of the complexities of working in a prison, as it has set out in its application for dispute resolution.

LISA HUGHES
Appeals Manager