

10 November 2009

FILE REF: 14756

PRIMARY CARE TRUST: #

GMS CONTRACTOR: DR #

PREMISES: #

**NHS (GMS) REGULATIONS 2004
RE: NOTIONAL RENT**

1 Introduction

- 1.1 As a GMS Provider, the above named doctor has referred the matter of current market rent assessment as at 1 June 2007 for dispute resolution under the provision of Schedule 6, Part 7 of the NHS (General Medical Services Contract) Regulations 2004.
- 1.2 The Secretary of State for Health had directed the NHS Litigation Authority to exercise the functions of dispute resolution on his behalf. I, as an authorised officer of the Authority, have determined this application.
- 1.3 The dispute resolution procedure also allows for advice to be sought.

2 The Following Points are relevant to this Application for Dispute Resolution

- 2.1 In a letter received by the NHS Litigation Authority on 21 August 2008, the contractor through their representative, applied to the NHSLA for Dispute Resolution. The letter argued that notional rent in respect of the contractor's surgery premises should have been assessed at a higher figure with effect from 1 June 2007.
- 2.2 I have had regard to the following documents made available to me in consideration of this matter:
 - 2.2.1 Letter from the contractor's representative dated 21 August 2009.
 - 2.2.2 Letter from the contractor's representative dated 17 September 2009 with enclosures
 - 2.2.3 Letter from the PCT, with enclosures dated 13 November 2008.
 - 2.2.4 Letter from the contractor's representative, with enclosures, dated 2 December 2008.
 - 2.2.5 Report by an Independent Expert Advisor dated 15 October 2009.

3 Statutory Framework

- 3.1 I note the GMS Contracts Regulations 2004 apply in this case. Schedule 6, Part 7, paragraph 101 of the Regulations, indicates with some exclusions, that the NHS

dispute resolution procedure applies in the case of “any dispute arising out of or in connection with the contract which is referred to the Secretary of State –

- (a) in accordance with section 4(3) of the 1990 Act (where the agreement is an NHS contract); or
- (b) in accordance with paragraph 100(1) (where the agreement is not an NHS contract).

3.2 I note Part 5 of the GMS Statement of Financial Entitlements indicates recurring premises costs such as notional rent payments are dealt with in the NHS (General Medical Services – Premises Costs (England) Directions 2004. Part 5, paragraph 42 of the Premises Costs Directions allows the PCT to make payments to the contractor, and allows for a three yearly review. In the absence of argument to the contrary, I will proceed on the basis that these form part of the contract and apply in this case.

4 Preliminary Matters

4.1 In order to be able to determine the dispute properly, I decided to consult and seek advice from an Independent Expert Advisor (IEA) appointed by the President of the Royal Institution of Chartered Surveyors (RICS). This IEA uses their expert knowledge on these matters to weigh the merits of the arguments presented but, importantly, has no pecuniary or budgetary interest in the outcome. It is open to the IEA to ensure that it has available to it as full an understanding as possible of the parties' view on the appropriate valuation. This usually includes providing the parties the opportunity to fully disclose matters, which have not previously been made available, expand on that already provided and also inspect the subject premises and any comparables.

4.2 The IEA provided a report that dealt with any factual matters in dispute e.g. the floor area of the premises, and addressed the issues raised by the parties. The report is in the form of a reasoned assessment and recommendation. The Authority received the report, and the parties were provided with an opportunity to make observations upon it.

5 Consideration

5.1 I note that the District Valuer, in advice to the PCT, contended that the revised CMR as at the date fixed for review was £85,500. I further note that the total figure upon which the contractor seeks to rely is £94,000.

5.2 I note that a copy of the IEA's report was forwarded to parties for comment; I further note that the PCT has not provided any comments upon it.

5.3 I note in a letter dated 22 October 2009 the contractor's representative provides comment on a number of procedural issues which I intend to deal with below.

5.3.1 I note the contractor's concerns with regards to a five day extension of time given to the PCT for them to provide observations on the representations received from the contractor (I note that the PCT did not provide representations on the Application for Dispute resolution). I further note that a response has already been provided with regards to this in a letter to the contractor's representative dated 16 January 2009. I note the provisions of Regulation 101(13) which allows for the granting of an extension “if he [by Direction this Authority] considers that there is good reason for doing so.” I further note that there is provision within the Regulations for this extension of time to be granted retrospectively. I am content that the application for an extension of time was granted for good reason in order that the responding party was given the opportunity to provide observations on the substantial representations received from the contractor's representative, in order to

ensure the just, expeditious, economical and final determination of the dispute.

- 5.3.2 Regulation 101(7)(8) and (9) confers an obligation upon this Authority to ensure that the Application for Dispute Resolution, the Representations and any observations are copied to all parties of the dispute. I am aware of the fax sent to the PCT dated 13 November 2008 but consider there is no regulatory requirement to copy this to parties given it appears to be an explanation of our procedures. I do not consider this to be advice.
- 5.3.3 I note comments made with regards to 12 and 13 of the dispute resolution procedure. I am of the view that as an extension of time was given for good reason then the observations by the PCT could be taken into account when making a determination on this application.
- 5.3.4 I note the reference to 10(a) of the dispute resolution procedure. However this refers to where an adjudicator invites representatives to appear before him, which is not the case here.
- 5.3.5 I further note the contractor's representative's objection to the provision of a further statement to the IEA by the PCT dated 7 August 2009. It is open to the IEA to ensure that it has available to it as full an understanding as possible of the parties' view on the appropriate valuation. This usually includes providing the parties the opportunity to fully disclose matters, which have not previously been made available, expand on that already provided and also inspect the subject premises and any comparables.
- 5.4 In my view, the rationale in the advice to me is robust and the observations offered do not advance the initial dispute rather seek to add to it. I note that comments provided by the contractor's representative were of a procedural nature, which I have responded to above. On this basis I am not persuaded to depart from the advice to me.
- 5.5 For the reasons given in the report from the IEA, I accept the recommendation on the current market rent of the subject premises with effect from 15 November 2007 which is £86,900.

Lisa Hughes
Appeals Manager