

21 December 2009

FILE REF: 15396

PRIMARY CARE TRUST: # (the "PCT")

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 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. I as an authorised officer of the NHS Litigation Authority have made this determination.

**2. Application for Dispute Resolution**

- 2.1 By letter dated 11 September 2009 the Contractor applied to 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 Contractor dated 11 September 2009, together with enclosures;
  - 2.2.2 Letter from the PCT dated 19 October 2009 together with enclosures;
  - 2.2.3 Letter from the Contractor dated 10 October 2009, together with enclosures;
  - 2.2.4 Letter from the PCT dated 6 November 2009; and
  - 2.2.5 Letter from the Contractor dated 9 November 2009 together with enclosures.
- 2.3 The GDS Contract which I have been provided with is between # and #, dated 28 February 2006 ("the Contract").
- 2.4 The Contractor disputes that it is not required to pay the PCT the sums due under the contract on the basis that the PCT has acted in breach of the Contract in failing to act reasonably and fairly and in delaying reconciliation statement to the Contractor.

**3. Consideration**

- 3.1 The Contractor states that "the PCT have acted unfairly and unreasonably under the law and indeed have not satisfied the terminating of the contract between us. I believe

that by not engaging in reasonable discussion earlier about the disputed final figure.....the clawback should now be terminated. "

3.2 The Contractor sought to terminate its GDS contract in accordance with Clauses 225 to 226 of the Contract on 1 April 2008. During the course of a meeting between the PCT and the Contractor which took place on 22 April 2008 ("the Meeting") it was decided that:

3.2.1 The Contractor would continue to see NHS Patients until 31 July 2008 (the period between 1 April 2008 and 31 July 2008 shall hereafter be referred to as "the Notice Period") and that the units of dental activity undertaken and (during the Notice Period) would be used to off set the underperformance in the 2007/2008 financial year ("the Claw-back Figure").

3.2.2 The Contractor would not receive any payment for work done during the Notice Period.

3.2.3 The Contractor would pay to the PCT 4 instalments of £3,000 towards discharging the Claw-back Figure.

3.2.4 That the outstanding balance would be agreed in September 2008.

3.3 On 1 August 2008 the PCT sent a letter to the Contractor confirming the Claw-back Figure to be £37,453.92. The letter includes a reconciliation of payments made by the PCT to the Contractor and the value of work undertaken by the Contractor under the Contract. This was served within 3 months following the termination of the Contract and fulfils the requirements of Clause 271 of the Contract.

3.4 As the Contractor has 2 months to notify or a course of treatment as set out at Clause 147 of the Contract the reconciliation could not have been considered final. The penultimate paragraph of this letter states "In our previous conversations you indicated that you expected to finish working on 31 July 2008. I assume that all remaining forms will therefore be processed in August. I will therefore ask my secretary to contact you and arrange a meeting in early October to discuss the final position." I understand that this meeting did not take place.

3.5 An updated reconciliation was sent to the Contractor on 31 March 2009, stating the Claw-back Figure to be £26,930.74. This was acknowledged by the Contractor on 6 April 2009. On 30 April 2009 the Contractor wrote to the PCT raising some queries in respect of the Claw-back Figure set out in the final reconciliation. The PCT did not respond to the queries, prompting the Contractor to seek adjudication of the matter under the Dispute Resolution Procedure.

3.6 It is my opinion that the matters in dispute are two fold:

3.6.1 Does the PCT's delay in issuing the final reconciliation amount to unreasonable behaviour which absolves the Contractor from his obligation to pay the Claw-back Figure; and

3.6.2 If the PCT's behaviour does not absolve the Contractor from paying the Claw-back Figure, the parties require the Claw-back Figure to be determined.

I shall address each of these points in turn.

3.7 It is the Contractor's position that the PCT's delay in issuing the final reconciliation amount to a breach of contract and entitling him to cancel the debt owed. The Contractor has not detailed on what contractual basis he is entitled to have his debt cancelled. I have not been advised of any provisions under the Contract which absolve the Contractor from repaying any sums owed to the PCT.

- 3.8 It is my opinion that the relevant sections within the Contract relating to the parties obligations on termination of the contract are set out at clauses 271 - 273 of the Contract and provide as follows:

*271. "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.*

*272. 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.*

*273. Each party shall pay the other any monies due within three months of the date on which the PCT served the Contractor with written details of the reconciliation, or the conclusion of the NHS dispute resolution procedure.*

- 3.9 As set out above, the PCT sent to the Contractor a reconciliation dated 1 August 2008. Under the provision of Clause 272 of the Contract, the Contractor has 28 days within which to raise a dispute in respect of the reconciliation. The Contractor did not do so, which I accept may have been on the basis that the reconciliation acknowledged that the Contractor was likely to submit details of additional activity undertaken during the Notice Period for processing.

- 3.10 The delay which followed between issuing the reconciliation dated 1 August 2008 and the further reconciliation on 31 March 2009 is regrettable and has been the subject of an apology by the PCT Primary Care Commissioning Lead. I do not accept that this delay, and reduction in the Claw-back Figure from the first reconciliation negates the Contractors requirement to repay the Claw-back Figure set out in the final reconciliation dated 31 March 2009. It is of note that the sums are public monies due to a public body. It is also of note that, the Contractor failed to raise this within 28 days of the further reconciliation.

- 3.11 I determine that the Contractor shall repay the Claw-back Figure as set out below.

#### **The Claw-back Figure**

- 3.12 A number of queries have been raised by the Contractor to the PCT but which were not set out as disputes in the Contractors application for dispute resolution. On review of these queries, provided to me in the course of this application for dispute resolution, the Contractor has raised a dispute regarding the absence of payments of superannuation during the period 1 April to 31 July 2008. I am satisfied with the PCT's response to this query, in its letter dated 19 October 2009, that the Contractor did not receive payment during this period so as to reduce the sums due to the PCT and that the Contractor was not entitled to superannuation payments.

- 3.13 The Contractor states in his letter dated 9 November 2009 that '£8,985.71 was never paid to us.' Clause 207 of the Contract states that "Any party wishing to refer a dispute as mentioned in clause 206 (NHS Dispute Resolution Procedure) must do so within a period of three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute."

- 3.14 The Contractor would have been aware on 1 May 2006 (that being the date on which these monies were due to be paid to the Contractor), that this payment was

outstanding. In the circumstances, the Contractor is now out of time for raising this as a dispute for determination under the NHS Dispute Resolution Procedure.

**4. Determination**

4.1 I determine that the Contractor must pay to the PCT the Claw-back Figure of £26,930.74 within three (3) months of the date of this determination.

**LISA HUGHES**  
**Appeals Manager**