Introduction

1.1 The Contractor has referred Dispute 1 (below), in relation to its GDS contract for dispute resolution under the provisions Regulation 8(3) and (4) of the National Health Service (General Dental Services Contracts) Regulations 2005 (“the GDS Regulations”).

1.2 Clause 14 of the GDS Contract does not set out clearly whether the Contractor has elected to be regarded as a Health Service Body and so for, the purpose of Disputes 2 – 4 (below), I have treated them as if the dispute has been referred for dispute resolution under the provisions of Paragraph 54 of schedule 3 of the GDS Regulations.

1.3 On behalf of the Secretary of State for Health, the NHS Litigation Authority is directed to exercise the functions of dispute resolution. I as an authorised officer of the NHS Litigation Authority, have made this determination.

Application for Dispute Resolution

2.1 By letter dated 5 January 2010 the Contractor applied to the NHSLA 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:

1.) Letter from the Contractor dated 5 January 2010 together with enclosures;

2.) Letter from the PCT dated 10 February 2010 together with enclosures;

3.) Letter from the Contractor dated 10 March 2010 together with enclosures;

4.) Letter from the Contractor dated 6 April 2010 together with enclosures.
2.3 The Contractor has sought to exercise its right to a General Dental Services ("GDS") Contract under Regulation 21 of the National Health Service (Personal Dental Services Agreements) Regulations 2005.

2.4 I have been provided a copy of the GDS Contract dated 1 April 2009 together with an unsigned signature page at Schedule 2.

2.5 I have also been provided separately a copy of a signature page at Schedule 2 of the GDS Contract. The Contractor has signed and dated this page 27 August 2009 and the PCT has signed and dated this page 13 October 2009.

2.6 The Contractor disputes the following:

1.) The number of Units of Dental Activity ("UDA") under the new GDS contract. This number is less than the number of UDAs under the Contractor's PDS Agreement. The Contractor Claims that this reduced number of UDAs has been imposed by the PCT by way of unilateral variation;

2.) The failure of the PCT to inspect the practice premises in a timely fashion in order to allow the premises to re-open following the PCT's alleged closure on 1 June 2009;

3.) The service of a second Remedial Notice by the PCT on 22 September 2009, which the Contractor claims contained matters that should have been contained in the first Remedial Notice of 11 August 2009;

4.) The failure of the PCT to provide reasonable notice of its inspection of the practice premises on 13 May 2009 contrary to clauses 234 and 235 of the GDS Contract.

3 Consideration

Dispute One: UDA amount

3.1 It is common ground that as at 13 December 2008 the Contractor held a PDS Agreement under which the Contractor was obliged to provide 18355 UDAs per annum.

3.2 The Contractor served notice on the PCT on 4 December 2008 and again on 10 December 2008 under its PDS Agreement to exercise its right to a GDS contract. The Contractor's PDS Agreement was a fixed term contract that expired on 31 March 2009. The Contractor requested that the GDS contract start on 1 April 2009, is without a fixed term, for the same UDA requirements and for the same annual contract value as its PDS Agreement.

3.3 The Contractor has a right to a GDS contract by virtue of Regulation 21 of the National Health Service (Personal Dental Services Agreements) Regulations 2005 ("the PDS Regulations") which provides that:

(1) A Contractor which is providing mandatory services and which wishes a general dental services contract to be entered into pursuant to this regulation shall notify the Relevant Body in writing at least three months before the date on which it wishes the general dental services contract to be entered into.

(2) A notice under paragraph (1) shall—
(a) state that the Contractor wishes to terminate the agreement and the date on which the Contractor wishes the agreement to terminate which must be at least three months after the date of service of the notice;

(b) subject to paragraph (3), give the name or names of the person or persons whom the Contractor wishes the Relevant Body to enter into a general dental services contract with; and

(c) confirm that the person or persons so named meet the conditions set out in section 28M of the Act (persons eligible to enter into GDS contracts and regulations 4 and 5 (where applicable) of the GDS Contracts Regulations or, where the Contractor is not able so to confirm, the reason why it is not able to do so and confirmation that the person or persons immediately prior to entering into the general dental services contract will meet those conditions.

(3) A person's name may only be given in a notice referred to in paragraph (1) if that person is a party to the agreement.

(4) The Relevant Body shall acknowledge receipt of the notice served under paragraph (1) within the period of seven days beginning on the day that it received the notice.

(5) Provided that the conditions set out in section 28M of the Act and regulations 4 and 5 (where applicable) of the GDS Contracts Regulations are met, the Relevant Body shall enter into a general dental services contract with the person or persons named in the notice served under paragraph (1).

(6) In addition to the terms required by the Act and the GDS Contracts Regulations, a general dental services contract entered into pursuant to this regulation shall provide for—

(a) the general dental services contract to commence immediately after the termination of the agreement;

(b) the same services to be provided under the general dental services contract as were provided under the agreement immediately before it was terminated unless the parties otherwise agree;

(c) the Contractor to complete any course of treatment or orthodontic course of treatment that were not complete immediately before the agreement was terminated—

(i) in accordance with the terms of the general dental services contract in so far as those terms correspond with the terms of the agreement immediately before it was terminated, and

(ii) subject to such terms of the general dental services contract that permits the termination of a course of treatment or orthodontic course of treatment; and

(d) unless the parties otherwise agree—
(i) subject to paragraph (ii), the same number of units of dental activity or units of orthodontic activity (as the case may be) specified in the agreement in a term giving effect to regulation 13 or 14 to be provided under the general dental services contract;

(ii) where the general dental services contract is to begin on a day other than 1st April, the Contractor to provide under that contract during the remainder of that financial year any units of dental activity or units of orthodontic activity that the Contractor would have been obliged to provide in that financial year under the agreement but had not yet provided immediately before the general dental services contract begins;

(e) unless the parties otherwise agree—

(i) subject to paragraph (ii), the same number of courses of treatment involving the provision of sedation services or domiciliary services specified in the agreement in a term giving effect to regulation 16 to be provided under the general dental services contract;

(ii) where the general dental services contract is to begin on a day other than 1st April, the Contractor to provide or contribute to during the remainder of that financial year any courses of treatment involving the provision of sedation services or domiciliary services that the Contractor would have been obliged to provide or contribute to in that financial year under the agreement but had not yet provided or contributed to immediately before the general dental services contract begins;

(f) in respect of a course of treatment or orthodontic course of treatment falling within sub-paragraph (c), the Contractor to ensure that a patient who is not an exempt person only pays one NHS Charge in respect of that course of treatment or orthodontic course of treatment; and

(g) the Contractor to comply with the term of the general dental services contract giving effect to paragraph 12 of Schedule 3 to the GDS Contracts Regulations (repair or replacement of restorations) in respect of any patients to whom it provided treatment under its agreement, in addition to patients to whom it provides treatment under the general dental services contract.

(7) An agreement shall terminate on the date stated in the notice given by the Contractor under paragraph (1) unless a different date is agreed by the Contractor and the Relevant Body or no general dental services contract is entered into by the Relevant Body pursuant to this regulation.

(8) Where there is a dispute as to whether or not a person satisfies the conditions set out in section 28M of the Act or regulation 4 or 5 of the GDS Contracts Regulations, the Contractor may appeal to the First-tier Tribunal and the Relevant Body shall be the respondent.
Any other dispute relating to this regulation shall be determined by the Secretary of State in accordance with regulation 8(3) and (4) of the GDS Contracts Regulations (pre-contract disputes).

The parties to a dispute referred to the Secretary of State in accordance with paragraph (9) shall be the Contractor and the Relevant Body.

The PCT acknowledged receipt of the Contractor's notice by way of letter dated 9 February 2009. It is noted that this acknowledgement fell far outside of the seven day requirement under Regulation 21(4). In its letter the PCT states that “it will comply with the provisions of Regulation 21 of the PDS Regulations. The GDS Contract will be without a fixed term and with the same UDA requirement as your existing PDS Agreement.”

The PCT stated that it was waiting for the publication of the 2009 Statement of Financial Entitlements in order to clarify the right to retain the PDS Agreement Value and that therefore it was unable to confirm whether the “Negotiated Annual Contract Value under the new GDS Contract will remain the same as the current PDS Agreement Value.”

The parties met on 31 March 2009 to discuss the Negotiated Annual Contract Value of the new GDS contract. It is unclear why there was a delay in arranging the meeting but there is no evidence to suggest that this delay affected the following negotiations between the parties.

At the meeting the Parties sought to agree the UDA figure of the new GDS contract. Under Regulation 21(6)(d) the new GDS contract is to be provided on the same UDA figure as the PDS Agreement unless the parties otherwise agree (my emphasis).

The PCT wrote to the Contractor on 1 April 2009 following the meeting to confirm the following in relation to the new GDS contract: “8000 UDAs x £29.17 (your current UDA value) = £233,360.00 annual contract value. The contract will be varied in year to reflect when you have successfully recruited further dentists at the practice. Using the above UDA figure this would equate to the appointment of an extra 1.29 WTE practitioners (i.e your original allocation of 18355 / 8000 = 2.29 WTE).”

The Contractor states that he was being “held to ransom” by the PCT and felt under pressure to sign a unilaterally changed contract. The Contractor states that it entered into the GDS contract “following the PCT putting the Contractor in a position where he had no alternative but to sign the new GDS Contract.” I see no evidence to suggest that the PCT put pressure on the Contractor to sign the contract quickly nor that the PCT imposed a unilaterally varied contract on the Contractor. Following the letter of 1 April 2009 there appears to have been a period of negotiation between the parties culminating in the signature of Schedule 2 of the contract on 27 August 2009.

From the evidence provided to me it is sufficiently clear that the parties have agreed that the GDS contract will be for 8000 UDAs and that the contract provides for this figure being uplifted (pro rata) in the event that the Contractor successfully recruits additional performers. No evidence has been provided regarding the level of payments made to the Contractor under the GDS contract apart from a letter from the PCT dated 13 October 2009 confirming that “the payments made during the contractors period of suspension are to be treated as suspension payments” and therefore, I assume that since 1 April 2009 the Contractor has been remunerated at the 8000 UDA rate.
3.11 The Contractor further states that the PCT “forced through a contract of 16000 UDAs even after it sent a covering letter with the signature pro-forma stating that it required the original 18355 UDAs to stand”.

Determination

3.12 There is evidence to suggest that the Contractor has not recruited any additional performers and therefore I find that the condition stipulated in Schedule 4 of the GDS contract has not been met. On the evidence before me it would appear that the parties agreed on 31 March 2009 that the maximum figure to which the GDS Contract UDA number could rise was 18355. It is not clear on the evidence whether or not that was subsequently varied by agreement to 16,000. Since it appears that no additional performers have been recruited I will not determine this point given the unsatisfactory nature of the evidence provided.

3.13 I find that in accordance with Regulation 21(6)(d) the parties have agreed that the number of UDAs under clause 77 of the GDS contract is 8000 to be uplifted to such a figure as the parties agree following the recruitment of an additional performer.

3.14 Furthermore, I find that in accordance with Regulation 21(6)(d) clause 77 of the contract reads: *The Contractor shall provide 8000 units of dental activity during each financial year.*

3.15 In addition, I note that the way in which the negotiations proceeded, with amended pages being created to be substituted in the draft GDS contract, has created evidential difficulties compounded by the fact that there does not appear to be a final, complete GDS contract signed by both parties nor a conformed, original and counterpart copy GDS Contract.

Dispute Two: Inspection of the practice premises

3.16 The PCT inspected the practice premises on 13 May 2009. This practice inspection identified a range of remedial actions which were required to be undertaken to the Contractor.

3.17 The evidence obtained at the 13 May 2009 practice inspection appears to have culminated in the suspension of the Contractor from the PCT’s Dental Performers List under Regulation 13(1)(a) of the National Health Service (Performers List) Regulations 2004 (“the 2004 Regulations”) following a hearing of the PCT panel on 18 May 2009. The Contractor was also suspended by the General Dental Council’s (“GDC”) Interim Orders Committee from the Dentists Register on 12 June 2009.

3.18 It appears to be accepted by the Parties that neither suspension from the PCT’s Dental Performers List or from the GDC’s Dentists Register operated to suspend the contractual arrangements between the Contractor and the PCT.

3.19 The Contractor states that it was “told by the PCT on the 1 June 2009 that it was a condition that he should not reopen the practice until it had been inspected by the PCT.” The PCT accepts that it wrote to the Contractor on 1 June 2009 and that the letter “indicated that another practice inspection would be needed prior to any NHS services being delivered and that the visit might be carried out by the Dental Reference Service.”

3.20 The evidence that has been submitted to me demonstrates that the Contractor wrote to the PCT on several occasions requesting further guidance as to the scope and nature of the refurbishments required; but this
correspondence did not appear to amount to a request for inspection. The Contractor states that he wrote to the PCT on “19 August 2009 and again on the 9 September 2009” requesting that the PCT carry out an inspection. The PCT deny receipt of these requests, however the Contractor has produced copies of these emails following a Data Protection Request made to the PCT dated 26 March 2010 and I find that the Contractor did contact the PCT on 19 August 2009 and 9 September 2009 to indicate that his practice was ready for inspection.

3.21 The PCT did not respond to these requests but it does appear to have visited the practice on 8 September 2009 to carry out an inspection in relation to a contractual Remedial Notice (see paragraph 3.26 below).

3.22 By the letter of 1 June 2009 the PCT does appear to have given the Contractor the impression that he could not provide services under his GDS contract until his premises were inspected by the PCT. However, as the letter of 1 June 2009 has not been produced by either party I am unable to comment on it.

Determination

3.23 I find that the PCT has no contractual or statutory power to either directly or indirectly suspend services under a GDS contract by ordering the closure of a practice or preventing a practice from opening. I accept the that PCT’s actions were motivated by laudable aims of protecting patients and the public, but find that the PCT misdirected itself as to their powers in this regard.

3.24 The Contractor seeks a direction that the PCT compensate it for the PCT’s delays in carrying out the practice inspection. The Contractor has provided no evidence of loss, I am therefore unable to make any determination in relation to compensation.

3.25 Had the Contractor sought to continue providing services without having carried out the remedial works the PCT would have had options as to the proper and lawful steps to take which may have led to termination of the GDS contract. This would also be relevant to any evaluations of loss.

Dispute Three: Remedial Notices

3.26 The PCT served a Remedial Notice on the Contractor on 11 August 2009 (“the first Remedial Notice”) this was followed up by an inspection of the practice premises on 8 September 2009. Another Remedial Notice was served on the Contractor on 22 September 2009 (“the Second Remedial Notice”) which was followed up by a practice visit on 27 October 2009.

3.27 The Contractor states that the Second Remedial Notice “related to the same provisions of the Contract as the First Remedial Notice” and that therefore the “PCT were seeking to put the Contractor into “double jeopardy” and it was a breach of the rules of natural justice to treat him in this way."

3.28 The PCT states that the First Remedial Notice “was concerned with Health and Safety matters, for example, used dental needles had been found in a bin outside the dental practice and that bin was unsecured.” The PCT further states that the Second Remedial Notice “was concerned with basic infection control awareness and practices.”

3.29 Neither party has submitted copies of either the First Remedial Notice, the Second Remedial Notice nor any correspondence confirming the results of
the inspections carried out by the PCT on 8 September 2009 and 27 October 2009. I am therefore unable to comment on the content of these.

3.30 The Contractor suggests that both Remedial Notices related to breaches of clauses 247 and 250 of the GDS contract.

3.31 Clauses 247 to 250 of the contract state:

247 The Contractor shall establish, and operate in accordance with clauses 248 and 249, a practice based quality assurance system which is applicable to all the persons specified in clause 248.

248 The specified persons are:

248.1 any dental practitioner who performs services under the Contract; and
248.2 any other person employed or engaged by the Contractor to perform or assist in the performance of services under the Contract.

249 The Contractor shall ensure that in respect of its practice based quality assurance system, he has nominated a person (who need not be connected with the Contractor’s practice) to be responsible for operating that system.

250 In clauses 247 to 249 “practice based quality assurance system” means one which comprises a system to ensure that:

250.1 effective measures of infection control are used;
250.2 all legal requirements relating to health and safety in the workplace are satisfied;
250.3 all legal requirements relating to radiological protection are satisfied;
250.4 any requirements of the General Dental Council in respect of the continuing professional development of dental practitioners are satisfied; and
250.5 the requirement to display in a prominent position the written statement relating to the quality assurance system (see clause 208.1) is satisfied.

3.32 Clause 250 offers five ‘limbs’ under which the Contractor might fail to have in place a practice based quality assurance system and could therefore be in breach of clause 247. As is apparent, the factual basis on which a breach of clauses 247 and 250 might arise could vary. Where different factual breaches arise it is open to the PCT to serve separate remedial notices. Therefore on the face of it, the service of two remedial notices in relation to clauses 247 and 250 of the GDS contract does not appear unreasonable. In any event under clauses 329 to 336 of the GDS Contract (see paragraph 3.33) there is no contractual requirement for the PCT to only serve single remedial notices in relation to a single contractual clause.

3.33 Clauses 329 to 336 of the GDS Contract state as follows:
Where the Contractor has breached the Contract other than as specified in clauses 322 to 328 and the breach is capable of remedy, the PCT shall, before taking any action it is otherwise entitled to take by virtue of the Contract, serve a notice on the Contractor requiring it to remedy the breach ("remedial notice").

A remedial notice shall specify—

3.1 details of the breach;

3.2 the steps the Contractor must take to the satisfaction of the PCT in order to remedy the breach; and

3.3 the period during which the steps must be taken ("the notice period").

The notice period shall, unless the PCT is satisfied that a shorter period is necessary to—

3.1 protect the safety of the Contractor’s patients; or

3.2 protect itself from material financial loss,

be no less than 28 days from the date that notice is given.

Where the PCT is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the notice period, the PCT may terminate the Contract with effect from such date as the PCT may specify in a further notice to the Contractor.

Where the Contractor has breached the Contract other than as specified in clauses 322 to 328 and the breach is not capable of remedy, the PCT may serve notice on the Contractor requiring the Contractor not to repeat the breach ("breach notice").

If, following a breach notice or a remedial notice, the Contractor—

3.1 repeats the breach that was the subject of the breach notice or the remedial notice; or

3.2 otherwise breaches the Contract resulting in either a remedial notice or a further breach notice,

the PCT may serve notice on the Contractor terminating the Contract with effect from such date as may be specified in that notice.

The PCT shall not exercise its right to terminate the Contract under clause 0 unless it is satisfied that the cumulative effect of the breaches is such that the PCT considers that to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract.

If the Contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the Contractor, the PCT may withhold or deduct monies which would otherwise be payable under the Contract in respect of that obligation which is the subject of the default.
3.34 I find that the PCT did not act unreasonably by serving two remedial notices on the Contractor and that whilst I have not had sight of the remedial notices themselves, the PCT do appear to have given the Contractor the required minimum 28 days notice under the First Remedial Notice and the Second Remedial Notice in order to remedy the relevant contractual breaches. I make no finding as to whether the Contractor has satisfied the requirements of either remedial notice.

3.35 I find no reason why the Second Remedial Notice cannot stand and do not determine that it should be withdrawn.

Dispute Four: Practice inspection

3.36 On 13 May 2009 the PCT carried out an inspection of the Contractor’s premises. The Contractor states that the “PCT carried out a surprise investigation at the Contractors practice. The PCT attended the surgery and required entry, without prior notice”.

3.37 It is accepted that the power of the PCT to enter and inspect the practice premises is contained in clause 234 and 235 of the GDS contract which states:

234 subject to -  

234.1 the conditions in clause 235, and  

234.2 clause 236, the Contractor shall allow persons authorised in writing by the PCT to enter and inspect the practice premises at any reasonable time.

235 The conditions referred to in clause 234.1 are that –  

235.1 reasonable notice of the intended entry has been given;  

235.2 written evidence of the authority of the person seeking entry is produced to the Contractor on request; and  

235.3 entry is not made to any premises or part of the premises used as residential accommodation without the consent of the resident.

3.38 There is a factual dispute as to when the inspection took place. The Contractor states that the inspection took place “in the middle of practice at approximately 11am” whilst the PCT contends that the inspection took place “towards the end of surgery when there would be no patients present”. There is insufficient evidence to determine exactly when the inspection took place.

3.39 I note the reasons given by the PCT for not giving advance notice of the inspection. However, it is not clear from the evidence whether any notice was given and it is therefore not possible to determine the extent to which the PCT may be in breach of clauses 234 and 235 of the GDS contract. I do, however, note that the PCT attended the premises with a Health and Safety Executive Inspector who under section 20 of the Health and Safety at Work etc Act 1974 has the power to enter premises without notice.

Determination
3.40 The findings of the inspection had a direct impact upon the action taken by the PCT under the 2004 Regulations. Any findings as to the admission of evidence obtained by the inspection for the purpose of taking action under the 2004 Regulations is outside of the jurisdiction of the NHSLA and should be pursued with the Health, Education and Social Care Chamber of the First-tier Tribunal.

3.41 The fact that the Contractor allowed entry to the premises would indicate that the collection of evidence is not unlawful so as to render inadmissible in relation to the state of the premises. It is undisputed that the premises were in an inadequate condition

3.42 I find that although there is inadequate evidence to find with certainty that the PCT provided no notice (and whilst this is a dispute of fact) a small period of notice (for example half an hour) would have been reasonable in the circumstances. I have not been provided with any evidence of any loss which flowed through the lack of notice. Had the PCT provided a small period of notice, for example 30 minutes, as would have been adequate in the circumstances; this would not have altered the findings of the inspection and therefore I determine that the inspection was lawful and its findings should not be quashed.

Conclusions

3.43 Determining this matter has not been assisted by the parties referring to documents which have not been submitted. If relevant documents are referred to it would greatly assist the work of the NHSLA if these could be supplied.

3.44 In conclusion therefore I determine that:

1.) The agreed UDA number for the GDS contract with effect from 1 April was 8000. I make no determination as to the provisions in the GDS contract as to the level to which the UDAs will rise.

2.) The PCT had no power to close the practice premises, or to require it to remain closed. However, it is clear they had substantial concerns over the state of the premises. There is no evidence of undue delay in arranging inspections.

3.) The PCT were entitled to serve two remedial notices.

4.) The PCT were obliged to give reasonable notice of its inspection of the practice premises on 13 May 2009. However, in the circumstances very short notice would have been reasonable.

LISA HUGHES
Appeals Manager