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7 November 2023

FILE REF: **SHA/26056**

DECISION MAKING BODY: **NHS ENGLAND & SUFFOLK & NORTH EAST ESSEX INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **NEWMARKET DENTAL SURGERY**
105 HIGH STREET
NEWMARKET
SUFFOLK
CB8 8JH

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

RE: **FINANCIAL RECOVERY DUE TO UNDERPERFORMED ACTIVITY FOR 2021/22 FINANCIAL YEAR**

1 Outcome

1.1 I determine that, having regard to all the information provided by both parties, the Commissioner can refuse to allow the Contractor to carry forward the underperformance activity from 2021/22. The Commissioner is entitled to recover any overpayment for the 2021/22 financial year as part of the Year-End contractual balancing process for 2022/23.

1.2 I note that neither party has submitted a claim for interest. I make no determination in this regard.

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RE: **FINANCIAL RECOVERY DUE TO UNDERPERFORMED ACTIVITY FOR 2021/22 FINANCIAL YEAR**

1 INTRODUCTION

1.1 The Contractor has referred the dispute in relation to its General Dental Services ("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 "Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

2.1 By letter dated 11 July 2023 the Contractor applied to NHS Resolution 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 Email from the Contractor of 11 July 2023 with enclosures;

2.2.2 Email from the Contractor of 25 July 2023 with enclosures;

2.2.3 Email correspondence with Mid and South Essex ICB of 28 July 2023;

2.2.4 Letter from the Contractor of 10 August 2023 with enclosures;

2.2.5 Email correspondence with NHS Suffolk and North East Essex ICB of 17 August 2023; and

2.2.6 Email from NHS England of 5 September 2023 with enclosures.

3 PARTIES SUBMISSIONS

The Contractor's application

3.1 In a letter dated 11 July 2023 the Contractor applied to NHS Resolution for dispute resolution and stated:

"We would like to appeal against the decision to clawback the money from 21/22.

We underperformed because of losing our Specialist Orthodontist in March 2021 due to a family bereavement.

We couldn't get another orthodontist because as I'm sure you are aware there is a national shortage.

We managed to get a dentist with a special interest, but unfortunately there were so many patients under treatment that hadn't been seen due to Covid that the importance was put on finishing these patients first to prevent root resorption & decalcification.

This made us behind with the UOA's & we approached NHS England to ask if we could carry them over.

We first contacted NHS England back in May 2022 unfortunately we were told they would pass it on to the relevant person, but we didn't have any reply, so the matter was brought up quite early in the contract year.

The first meeting was the end of September 2022 with [JG] & [DB] not 1st of November as quoted in the letter. The contract team did attempt to set up a meeting but because the orthodontist we had was away in the USA we had to postpone for 1 or 2 weeks; this is not a reason to delay a response for so many months.

The clinical commissioning meeting with [SC] & [JB] was in December, they seemed quite happy for us to do the extra but they re-iterated that they couldn't approve it & it had to come from above.

We did put in extra days & employed another dentist with a special interest in orthodontics to do Saturday afternoons, but as we hadn't yet had approval to do the UOA's we stopped when we hit our target because otherwise, we would be in a position of over-performing & not getting paid for this. We can't afford to do this either.

Ultimately, we received the approval by email on 31/3/2023, by which time it was too late. We are very unhappy with the lack of timely responses from that team & this is why we didn't complete the UOA's on time.

As there are so many dentists & orthodontists leaving the NHS, we must now pay more than we were paying the specialist we had just to get the contract done, we are in no position to have money clawed back from us as we will go bankrupt & there will be thousands more patients without an NHS dentist."

Representations

The Contractor's representations

3.2 In a letter of 3 August 2023 the Contractor has provided representations on this matter which states:

"We would like to justify our appeal by giving you all the information so you can make a fair decision.

Back in April 2021 our specialist orthodontist went to Bangladesh as her father died suddenly, we allowed her some time to deal with her bereavement we had no idea at that point she wouldn't return as she gave us no hint of that in her emails & no resignation. We asked when she thought she may be returning, her response was she didn't know how long it would take to sort business out in another country. So, we gave her some more time. By May 2021 with no return date from [Dr R], we had so many patients needing to be seen we had to get a Locum in to deal with the routine adjustments needed for orthodontic treatment. The cost for this Locum was £1200-£1500 per day.

We sent an email to NHS England in August 2021 when it became apparent, she wasn't returning, to see if it was possible to get some special dispensation due to unforeseen circumstances. The Annex 84 Contractors Preliminary Notice of Force Majeure Event was sent on 24th August 2021.

We were firstly asking if a dentist with a special interest could continue the patient's treatment but were concerned, they were not able to treatment plan which meant new patients couldn't be seen & no appliances were fitted. (These are the only means of obtaining UOA's).

We had in the interim put an advert on Indeed & Linked In to find a replacement Specialist Orthodontist, but we had no luck not even 1 applicant. (Evidence provided).

Due to the distinct lack of response from NHS England when we were clearly struggling to find a replacement orthodontist because of a national shortage the situation was extended far longer than it should have been.

Our email to NHS England had an auto-response then no other communication.

We sent another email on 1st September 2021, which we did have 6 responses but no answer to our queries.

A third email attempt was made 22nd December 2021, but we had no response.

We resent the same email on 28th March 2022, to which we did have a response but no answer to our problem, we then sent another email on 10th May 2022 & another email on 26th May 2022.

We have dealt with so many different people at NHS England & no one has given us a definitive answer.

The last few communications & Zoom meetings have been with [JG] & [DB].

We made a proposal to complete the outstanding UOA's by the end of the contract year March 2023 to which we never received confirmation until 31st March 2023 that we could do it as they always said they had to get permission from a more senior dept. This was obviously too late for us to even contemplate to complete.

Directly after this everything changed, people were reorganised, & it was then made into The Integrated Care Board (ICB) to whom we contacted to complain about the service we'd received from NHS England. We again had no response apart from that they were looking into it until 4 months later when the decision letter came on 4th July 2023 from [JG] that everything still stood & clawback would continue unless we wanted to appeal.

We would also like to point out that we never received any breakdown or statement of what was taken as they have already taken £47,000 without our agreement.

The conclusion to this appeal is our Specialist Orthodontist left without giving the 3 months' notice required contractually, the time spent finding another Orthodontist to replace her has taken so long, but we now have one in place that we were quite prepared to catch up the UOA's shortfall, but NHS England didn't give us a confirmation until the last day of the contract year which was too late."

The Commissioner's representations

3.3 In an email of 5 September 2023 the Commissioner has provided representations on this matter which states:

"The information that I can share with you includes:

1. A letter that I send [sic] to the contractor in July 2023 that set out our position. The commissioning team are of the strong view that ample time was allowed for the provider to deliver additional capacity to make up for under delivery but there has been no confidence that the additional capacity can or has been delivered. The 2022/23 performance should support this assessment of the provider's ability to deliver. (See Newmarket Orthodontics Letter…)

2. Summary of the meeting that our clinical advisor [SC] had with the provider to seek clinical assurance that the activity could be delivered safely. While the focus of this meeting was on clinical / safety assurance – there is a clear spirit here to support additional delivery. (See 'FW: 133582/0001 Horan &…')

3. Letter from the provider regarding 21/22 performance with assurances that they can delivered the required levels of activity. (See 'Scan nhs letter 1 and 2)

4. BSA letters to the provider setting out the contract position."

3.4 The documents referred to above were included with the Commissioners representations.

Observations

3.5 Neither party provided any observations in response to the representations received.

4 CONSIDERATION

4.1 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the contract in dispute containing all variations agreed since the contract was signed. This was provided and has not been disputed by the Commissioner.

4.2 The Contractor holds a contract to provide both UDA and UOA. The application for dispute resolution is in relation to the underperformance of UOAs for the period 2021/22 and the associated recovery of monies from the Contractor by the Commissioner. The Contractor seeks to dispute the decision of the Commissioner to not allow any further carry forward of the underperformance.

4.3 I note that the end of year reconciliation statement for 2021/22 was sent to the Contractor on 28 July 2022. A revised end of year reconciliation statement for 2021/22 was sent to the Contractor on 28 September 2022.

4.4 During the 2021/22 financial year, the Contractor was in communication with the Commissioner and a final letter was sent by the Commissioner to the Contractor on 4 July 2023. The 4 July 2023 letter stated "*Considering the chronology of events and contractual performance for 2022/23, I am unable to agree any further exceptions for your practice. Therefore, the approval of the NHS England governance group stands, if the under-performance activity from 21/22 has not been delivered by 23 March 2023, this will be clawed back as part of the Year-End Contractual Balancing process for 2022/23. Should you wish the matter to be reviewed by Primary Care Appeals – the email address is: nhsr.appeals@nhs.net"*

4.5 From the information before me, I am of the view that local dispute resolution has been exhausted following which the Contractor has referred the matter in dispute to NHS Resolution. There is no dispute that local dispute resolution has not been entered into and therefore I will proceed to consider the matters before me.

4.6 From the information provided, I note that there is no dispute that the Contractor was required to provide 4,054.00 UOAs in the financial year 2021/22 and further that the Contractor did not manage to achieve this, which resulted in a shortfall of UOAs for the year 2021/22.

4.7 The Contractor sought approval from the Commissioner to carry forward this shortfall to the 2022/23 financial year. This approval was provided by the Commissioner, however the Contractor claims that this was too late as it was given on 31 March 2023.

4.8 The Commissioner is now seeking to recover the overpayment in respect of the underperformance whilst the Contractor wishes to make up the UOA shortfall.

4.9 The Contractor, states that the reason for the underperformance was as a result of losing their Specialist Orthodontist. I note that there is a discrepancy as to whether the Specialist Orthodontist, due to a family bereavement overseas, left in March 2021 or April 2021, however there is no dispute that the Specialist Orthodontist was overseas for the beginning of the 2021/22 financial year. There is no dispute that the Specialist Orthodontist left the practice without giving the requisite 3 months' notice and further did not give an indication of when they were likely to return which left the Contractor in some difficulty at the beginning of 2021/22 financial year.

4.10 The Contractor states that they had not realised until August 2021 when it became apparent that the Specialist Orthodontist would not be returning and that they would not be able to fulfill their UOA's for the year 2021/22. The Contractor sought special dispensation from the Commissioner and submitted a Force Majeure notice on 24 August 2021. I have not been provided with a copy of this. Further, I have also not been provided with a copy of the Commissioner's decision in relation to this application and therefore do not know the outcome. Given that there is now an application for dispute resolution before me, I can only assume that this application was unsuccessful, however I note that the Force Majeure application and subsequent decision is not the subject of this application for dispute resolution. I therefore take no view on the Force Majeure application by the Contractor or the subsequent decision of the Commissioner.

4.11 From the information before me, I can see that the Contractor and Commissioner were in communication for some time during the 2021/22 financial year with regard to the potential underperformance of UOAs. Whilst I have not been provided with all the communications between the parties, I have been provided with some correspondence in the form of two Year-End reconciliation statements for 2021/22 (dated 28 July 2022 and 28 September 2022) as well as a summary of a meeting held in December 2022 between the Contractor and the Commissioner and a copy of an undated letter from the Contractor to the Commissioner.

4.12 I do not have any emails from the Contractor to the Commissioner or their responses to correspondence from the Commissioner. Further I do not have any information as to why two Year-End reconciliations statements for 2021/22 were issued to the Contractor or which is the correct Year-End reconciliation statement. It would have assisted me if this information had been provided by parties when representations were sought so that I had before me all the information on which the Contractor and the Commissioner are seeking to rely.

4.13 Without this information it is difficult to consider how the initial reconciliation for 2021/22, sent under cover of a letter from NHS BSA of 28 July 2022, was carried out and why a second reconciliation statement from NHS BSA of 28 September 2022 was sent to the Contractor. I am mindful that it might not form the basis of the dispute, however the information contained in this correspondence and especially with regard to the Year-End reconciliation would have been useful as background to the dispute.

4.14 The Commissioner, in its letter of 4 July 2023 to the Contractor has made reference to the guidance from the Office of the Chief Dental Officer (OCDO) and whilst I have not been provided with a copy of this guidance, the letters from NHS BSA with the Year-End reconciliation statements include a link to the relevant guidance online. There is no dispute from the Contractor that they had not received or were not able to access this guidance.

4.15 The Year-End reconciliation letters from NHS BSA of 28 July 2022 and 28 September 2022 also make reference to the "NHS England and NHS Improvement Preparedness letters for primary dental care" and a link to these letters was provided. I note again that there is no dispute from the Contractor with regard to the application of the "Preparedness letters for primary dental care" for the 2021/22 year-end reconciliation.

4.16 The Commissioner, in its letter of 4 July 2023 to the Contractor states:

"*In August 2022, the contracts team correspondence to explain that there was no carry forward allowed as part of the guidance from the Office of the Chief Dental Officer (OCDO). The practice responded and requested local discretion to allow for carry forward and again it was explained that national policy will be adhered to."*

4.17 The letter from the Commissioner goes on to state:

"Following further correspondence in September 2022, the contract team referred this for review to the Head of Commissioning. Initially [JG] and [DB] met with your team 1st November 2022. At this meeting a discussion took place on the practice's ability to deliver both the 2022/23 contracted activity and the underperformed activity from 2021/22 in the remaining part of the contractual year

NHS England staff raised that they had clinical concerns with deliverability of such proposals.

Following this meeting, you submitted your proposal which included the statement '[o]ur proposition is to allow us to complete the extra UOAs shortfall (1338 UOAs) in addition to our current contractual requirements (4054 UOAs) i.e., 5392 UOAs for the year end 31/3/2023. Any shortfall on this target should be taken as clawback in the appropriate manner at the end of the fiscal year.'

Following receipt of the proposal this was reviewed and the contractual and clinical data was requested from the BSA and then shared with Clinical Advisor [SC]. The Contract Team attempted to set up meetings following receipt of your proposal; however, it is understood that due to other commitments you requested that this was moved on by several weeks.

In December [SC] and [JB], Senior Contracts Manager met with the provider's Orthodontists to seek assurance that the activity could be safely delivered (including the under-performance as well as the 2022/23 contractual obligation) in such a short timeframe. Clinical assurance was received in this meeting.

It was stated within this meeting that additional sessions and weekend slots were being created to enable the delivery of this activity and patients were being booked in at that time and in advance to show that you were actively working to deliver these UOA's. In the meeting it was considered that the practice had commenced arrangements to deliver the prior year's underperformance and that additional bookings were in progress. While it is accepted that formal approval of your proposal was delayed, there is no evidence to support the provisions you set out in the meeting in December were put into practice."

4.18 From the information before me, I have not been provided with any additional information from the Contractor to demonstrate that they had put in place any of the proposals which they had set out to the Commissioner which would demonstrate that they were able to complete the additional UOAs carried forward from the 2021/22 financial year.

4.19 I note the reference above by the Commissioner to the directions from the OCDO, which I have taken to be the "Managing the 2021/22 year-end reconciliation" 'Guidance to support dental contract management arrangements for the 2021/22 year-end reconciliation' version 1, dated 5 April 2022. The Commissioner states "*national policy will be adhered to*". The guidance states:

Carry-forward of over or under-delivery into 2022/23

19. There will be no provision for under or over-delivered activity to be carried forward into contract year 2022/2023.

4.20 In an undated letter sent by the Contractor to the Commissioner it is stated:

"Therefore, our proposition is to allow us, without any clawback, to achieve these UOAs in a timely manner. Of course, if there is any shortfall, we agree to the clawback of these UOAs."

4.21 The Contractor goes on to state:

"*Our proposition is to allow us to complete the extra UOAs shortfall (1338 UOAs) in addition to our current contractual requirement (4054 UOAs) ie 5392 UOAs for the year end 31/2/3023. Any shortfall on this target should be taken as clawback in the appropriate manner at the end of this fiscal year."*

4.22 I note that there is no dispute with regard to the guidance or why this should not be applied in this instance. I further note the assurances from the Contractor that if there was any shortfall they agreed to the recovery of money in respect of the UOAs.

4.23 Whilst I am sympathetic to the Contractor's situation and note the efforts that the Contractor went to in order to find a replacement Specialist Orthodontist, I have not been provided with any information regarding the Force Majeure or, apart from advertising the posts, any steps that the Contractor has taken to fulfil their UOAs once a replacement Specialist Orthodontist had been appointed. I note the Contractor's comments regarding the lack of response from the Commissioner to several enquiries and/or delays in receiving responses, and appreciate the Contractor's concerns about waiting for approval, but it is clear that the consequence of not implementing any of the proposed actions to meet its UOAs would inevitably lead to underperformance.

4.24 I am of the view that the Commissioner, having taken all of the information before it into consideration, did provide its discretion but the Contractor was unable to deliver the carried forward UOAs within the requisite time period. I am of the view that the Commissioner has considered the circumstances in which the Contractor found themselves. Further the Contractor was given the opportunity to provide the underperformed UOAs however this proved not to be possible.

5 DECISION

5.1 I determine that, having regard to all the information provided by both parties, the Commissioner can refuse to allow the Contractor to carry forward the underperformance activity from 2021/22. The Commissioner is entitled to recover any overpayment for the 2021/22 financial year as part of the Year-End contractual balancing process for 2022/23.

5.2 I note that neither party has submitted a claim for interest with regard to this dispute, so I make no determination in this regard.

Head of Appeals
NHS Resolution