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6 March 2024

FILE REF: **SHA/26072 & 26079**

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

GDS CONTRACTOR: **DR R PRASHAR**

THE SMILE CLINIC
39 ST BOTOLPH'S STREET
COLCHESTER
CO2 7EA

and

THE SMILE CLINIC
61 MILL ROAD
COLCHESTER
CO4 5LE

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

RE: **FINANCIAL RECOVERY OF MONIES WITH REGARD TO CONTRACTS 5733100001 AND 5733100003**

1 Outcome

1.1 I determine that it is open to the Commissioner to consider the Contractor's individual circumstances and use its discretion to allow a proportion of the UDAs to be carried over as it has suggested.

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

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RE: **FINANCIAL RECOVERY OF MONIES WITH REGARD TO CONTRACTS 5733100001 AND 5733100003**

1 INTRODUCTION

1.3 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") Contracts for dispute resolution under the provisions of Paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations").

1.4 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 email dated 29 August 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 Contractor's email dated 29 August 2023;

2.2.2 Contractor's email dated 31 August 2023;

2.2.3 Contractor's email dated 8 September 2023, with attachments;

2.2.4 Contractor's email dated 19 September 2023;

2.2.5 Commissioner's email dated 25 October 2023;

2.2.6 Contractor's email dated 5 November 2023;

2.2.7 Commissioner's email dated 24 November 2023;

2.2.8 Contractor email dated 7 December 2023, with copies of year end letters dated 31 July 2023 and breach notices dated 12 October 2023;

2.2.9 Commissioner's email dated 11 December 2023, with copy of "NHS dental year-end 2022/23 arrangements" letter; and

2.2.10 Contractor email dated 15 December 2023.

3 PARTIES SUBMISSIONS

The Contractor's application

In an email dated 29 August 2023 the Contractor stated:

3.1 "I would like to appeal against the clawback for the above dental contract. It will cause us financial distress and will lead to a reduction in NHS dental services from our practice."

In a further email dated 31 August 2023 the Contractor stated:

3.2 "Ref: appeal against clawback contract no 5733100001 and 5733100003

I am appealing against the Clawback decision which will be carried out over the next six months from my practice. I am detailing below the reasons why I believe we were not able to achieve our UDA targets for the year 22/23 and a request that this funding not be clawed back but carried forward to the following year 23/24.

This is the first time since this new contract came into effect in 2006 that we have not reached our target UDA figure. We have always in fact over delivered by the 2% tolerance every year and have continued to see NHS patients throughout the pandemic and since then, until now. We are in fact two of the only dental practices in Colchester that are still accepting new NHS patients onto our books, as you can see from the local NHS choices website. We continue to be inundated by new enquiries from New patients demanding NHS dental services and have a waiting list until April Next year 2024! These patients are being refused by all other practices locally. We are still very committed to providing NHS dental services to our patients despite the mounting financial challenges.

The main reason why we could not deliver our contracts over this last year was due to the dire situation regarding recruiting NHS dental associates/ performers. There is a national shortage in the dental profession and especially acute in the east /Suffolk area. We lost a dentist in December 2021 and despite advertising and using recruitment agents we were not able to recruit anybody. The main reason being that nobody wants to continue carrying out NHS dentistry. We had no problem in recruiting performers to carry out private dentistry, but that was not acceptable as we are still fully committed to providing NHS dental services.

We are paid less per UDA than other practices in our immediate areas and any dentist/ performer who applied chose to go to these other practices as they could afford to pay more per UDA to the performer than we could. This disparity in UDA values creates a real

anticompetitive environment where the Higher paid corporate UDA practices are able to recruit much easier. So the fact that we could not provide the NHS dental services contract is really down to the fact that we are not able to compete against other practices who the NHS funds at higher levels. My team work very hard at lower UDA levels and I can categorically say that if we were able to pay higher UDA amounts to prospective performers like other practices in the area then we would have no problem in recruiting either.

As we have continued to accept new NHS patients, a large percentage of them have been refused at other practices and a large number are high needs cases. I'm sure you are aware that this dental contract does not reward us for high needs cases, and indeed this is why other practices in the area refuse to see these patients. However, we have continued to accept these high needs patients which have led to spending multiple appointments and time correcting their dental problems. Consequently we have a long waiting list and are finding it very difficult to squeeze patients in for treatments. It is taking over 6-9 months to complete these larger cases which again is another factor that reduces our UDA efficiency.

New NHS patients booked so far in advance unfortunately have a higher failure rate and the fact that we are still taking on new patients and not just relying on our existing patient base (who are more committed) has led to large number of failures of these new patients. In fact we had over 620 hours of failed NHS appointments in our practices which equates to around 88 days' worth of appointment time lost. Virtually 3 months lost, where we could have easily continued to see our existing more committed patient base instead of NEW NHS patients. This would have allowed us to easily fulfil our UDA quota.

I feel we are now being penalised due to this length of time we have spent with these high needs patients and seeing new patients. It has led us to not being able to achieve our targets and if this clawback is taken we will need to look at whether we also like other practices continue to see new NHS patients beyond our capacity.

The total amount of clawback combined from the 2 practices/contracts will be £195,359.63. This is an extremely large amount for us and will seriously undermine our already stretched team. The fact that we were one dentist short last year does not impact the overheads of the business apart from one less dental assistant. We still have to open the whole premises, still have to use the same amount of heating. Lighting ancillary labour etc. By clawing back these funds it will seriously undermine our ability to continue to provide NHS services to the local population going forward as we will need to consider the economics of continuing to do so.

In addition the performers have all indicated to me that they will start looking at other practices where they can provide more private treatments if they have any clawback due to them not fulfilling their annual UDA quotas and this will only reduce our capacity going forward to provide NHS treatments.

As I said earlier the reason why we were short of our UDA target is due to recruitment issues. I have now managed to finally recruit 2 more new dentists/performers and am quite confident that we will easily achieve our normal UDA targets. In addition I believe that we will now have additional capacity and will also be able to carry out the undelivered UDA's in addition to our regular target.

I have put in place systems to encourage additional working patterns and ensure our UDA targets are exceeded this year. If the clawback is taken it will only go back into the local dental system and then have to be tendered out again at possibly higher UDA amounts to other practices. I do not see any economic sense in this as we will be able to use these underdelivered UDA's in my practices to continue providing NHS services anyway.

I would hope that the ICB can use their discretion and allow us to carry forward the undelivered UDA's. I'm sure you can see from our history that we have always achieved our target and this last year was just a one off unusual event due to the dire recruitment issues. As I have said, we are the only practice in Colchester taking on new NHS patients at present (see NHS choices website) and if the clawback is taken it will only lead to a reduction in this valuable service.

I realise that these funds have to be paid back or used and I am merely requesting that the unused funds / undelivered activity be carried forward to the next year (i.e. 23/24). I am sure that the ICB can use their discretion and see locally that we have a real problem as far as access to NHS dental services is concerned as we have a much better situation regarding performer dentists.

I would not expect the ICB to cancel the under-delivery payment, but they can use their discretion to carry forward the under delivery of UDAs to this year.

After all, if we had just achieved another, 12% of UDAs we would have reached the 90% threshold and would have been allowed to carry these forward anyway.

By allowing the under delivery to be clawed back, all it is doing is restricting our ability to provide NHS dental services, going forward.

Maybe we should carry on like other dental practices in the area and refuse to take on any more NHS patients. We have enough of a patient base to complete our UDA targets without taking on any more new NHS patients that are invariably high needs cases, but how will this benefit anyone? It certainly will not improve access to NHS Dentistry if the money is just taken back and absorbed into the general health budget.

I would ask you to reconsider clawing back this amount of funding otherwise we will need to look at our financial position in continuing to provide NHS services to new patients."

In a further email dated 8 September 2023 the Contractor stated:

3.3 "Neither myself nor the ICB actually have any copies of the contracts. They were never returned to us after there was a dispute in 2014 and they were sent to the Local Area Team. ([AT] and [DB]). However, I believe the contract is a standard GDS contract.

The funding of our dental practice by NHS is lower than other practices in the area. As a direct consequence of this, we find it difficult to recruit dentists as we are not funded to the same level. We cannot pay these new dentists to the same level as other practices and so new, dentists and our existing ones are being poached by other practices in the area who can afford to pay them more as they are paid more per Unit Of Dental Activity (UDA).

It is a direct consequence of being unable to recruit that we have been unable to fulfil our target contract of dental activity for the first time in our history. ! [sic]

The Local ICB want to clawback 200K of monies from us as we were unable to fulfil our UDA contract, but this will seriously undermine our ability to provide NHS dental services. We wish to carry forward the undelivered UDAs to this year 23/24 which will improve NHS services in the area and not reduce them.

I have attached the relevant letters for both contracts received form [sic] our local appeals process."

Representations

<u>The Commissioner's representations</u>

3.4 "I do not believe we have anything to add from the initial response, the National Letter has made it clear of NHS England's expectations on Providers and as the ICB's we do not have authority for changes to be made to last years finances which will be returned to NHSE.

If this was next year, I would come back and say that the ICB would propose to split the difference, with a clawback of 11% and a roll over of 11% as that seems the most logical response to the question and would help the Provider deliver a reasonable amount of additional activity and reduce clawback that would impact the Provider, however this year we just don't have the authority to respond like that!"

Observations

The Contractor's observations

3.5 "Regarding the response received from the Head of Dental Contracts (ICB) [GB]. If he cannot do anything as this is from the previous year and the previous Local Area team are responsible then what is the point of going through this whole appeals process?

The reason why we were not able to achieve our target UDA's is purely down to NHS England and the local area team not providing us with a competitive UDA value leading to an inability to recruit dentists. Even still we only just missed the UDA target by around 10% so why not just roll it over to this year rather than claw back which will just reduce the NHS access further in this area.

The local area team (from last year) had the authority to negotiate UDA values according to local NHS need as do the new ICBs so even though this was from the previous administration the effects of the clawback will affect NHS Dental provision in this year so is the responsibility of the new ICBs.

The new ICB could easily request that the clawback be rolled over rather than absolve all responsibility for it.

Recruitment to find dentists willing to carry out NHS dentistry is still a real issue as they are not willing to do it for low UDA values, so we will end up with same problem again this year.

I would request that you cancel this clawback and let us provide increased access to NHS Dental services rather than reduce it further."

By letter dated 15 November 2023 NHS Resolution requested further information from both parties.

The Commissioner's further comments

3.6 "We note the Provider will be providing other documentation and request that once this is received, the appropriate time scale is applied in order to allow the NHS commissioner to reply in a timely manner, if appropriate.

We would make the following observations on behalf of NHS SNEE ICB:-

Contrary to what the Provider has explained on lack of engagement, we dispute the claim we haven't engaged with the Provider. We have engaged with this Provider and we kindly agreed to extend his clawback repayments over 6 months (October 2023 to March 2024) instead of the nationally agreed repayment term of 3 months (October 2023 to December 2023). So, for the Provider to say we haven't engaged with him is incorrect and inaccurate.

His current UDA rate of £32.50 is significantly above the Suffolk & North East Essex UDA Rate average of £28.27. So, for him to claim he is on a very low rate is also inaccurate. In fact, his rate of £32.50 puts him amongst the top 10% of highest UDA rates in SNEE.

It should be noted that the Provider is unhappy that he hasn't been afforded the opportunity to carry forward his under delivery of activity for 2022/2023 in to 2023/2024. However, like all other Dental Providers in the UK who hold an NHS Contract, any under delivery below 90% (usually 96%), it is National Policy that all monies owed will be clawed back through the contract payments. We see no reason why this Provider should be treated any differently to any other contract in the country.

To be clear, if the Provider was unable to deliver the minimum of 90% of his contracted activity last year, i.e. only 90% deliver for 22/23 then how is he expecting to deliver not only his 2023/2024 contract but also the under delivery for 2022/2023. (In effect 122% -

100% of 2023/24 and 22% carry over from 2022/23). We believe it would be irresponsible of us to sanction his request.

Lastly, as the Provider has a debt of £195,359.63, it has not been explained to us what the Provider has used this money for in order to now leave him with significant financial issues. As he does not have enough Performers on his contract to deliver the contract (his words) then he won't have spent the money on performer wages, therefore knowing he was unable to perform the contract it would have been prudent to make allowance for the under-spent funds. Providers receive a monthly schedule detailing the performance month by month, along with activity report on Compass therefore the provider would and should have been aware of the pending under-performance and approximate debt that would need to be repaid to the public purse. All other Dental Providers we have engaged with so far this year regarding clawback payments, appear to have safeguarded the underperformance money, knowing it will need to be repaid to the NHS. It is unclear why this Provider should be exempt from the agreed National policy for repayment, leaving NHS England open to challenge from other providers."

Contractor's final observations

3.7 "Thank you for forwarding the comments from the Local Area team regarding the clawback. I will address each paragraph of those comments separately.

1. Lack of engagement: Despite warning the local area team during the year 21/22 and 22/23 in various emails that recruitment was becoming very difficult due to the disparity in local UDA values, and the fact that my practices were still the only ones in the area actually STILL accepting new NHS patients, I had absolutely no response to any of those emails. The emails were sent to Dental Contracts lead [JB] and also and [sic] to [DM].

The mails were sent on the following dates: 20/10/21. (no reply received). 30/11/21. (no reply received), 15/07 2022 (no reply received) 12/12/22 (no reply received)

This is a lack of engagement where as a provider of NHS services I was requesting help but none was given nor acknowledged. Although I appreciate the gesture of extension of clawback over 6 months rather than 3, this was a general clause nationally negotiated by the BDA which was offered to all practices facing clawback and not just me.

2. UDA RATE. I can only see the national data for year 22/23 as this year's data of 23/24 has not been released nationally. The UDA rate referred to (in the ICB response) of £32.50 is actually for this year of 23/24 and it has increased due to a National pay rise to **all** practices of around 6%. I can only refer to the data from the year 22/23 but it still demonstrates the anticompetitive and unfairly funded environment I encounter every day.

For the year 22/23 for contract 5733100001 I was paid £30.66 per UDA. (£686,409.59 for 22381 Uda's activity)

For the year 22/23 for contract 5733100003 I was paid £30.11 per UDA (£210,800.03 FOR 7000 Uda's activity. [sic]

If you look at other contract values per UDA in the local vicinity I would like to know why I am being remunerated at such a low rate. After all I presume I am expected to adhere to the same regulatory standards and a dental examination or any other treatment I do, is expected to be carried out with the same skill and standard as any other dental treatment that another practice locally provides.

Yet I have a practice 10 yards away (opposite me) being paid at a rate of £36.50 per Uda . (£438410 for 12000 Uda activity). I have another practice 500 yards away (on the same street as mine) being paid at a rate of £34.22/ UDA. (£473640.00 for 13838 Uda's activity).

And then we have a local BUPA practice around 1 mile away from mine who is being paid £37.40 per Uda! (£1089389.00 for 29084 Uda's activity). This is the equivalent of around

£150638.81 extra being given every year to this practice alone compared to mine for carrying out the same NHS UDA activity!

So as you can see, if these practices are being funded more per UDA then they can obviously recruit dentists and ancillary staff easily as they can actually pay them more per UDA than I can. With the recruitment crisis in dentistry being so severe in this rural area, any new applicants want a much higher UDA value to be paid to them nowadays. If my practice is not funded to the same levels as those around me then it is those practices which will attract staff as they can actually pay them more. It is not viable to recruit dentists on the lower UDA values such as mine and expect them to carry out NHS treatments. We had absolutely no problem recruiting dentists to carry out private treatments, but no dentist will carry out NHS treatments if the remuneration is so low nowadays. Therefore I would like to know why my NHS funding cannot be increased to the same level as those practices around me so I can recruit and pay my NHS dentists and staff as well. It is just plain anticompetitive to expect us to provide the same NHS UDA activity for around 30% less remuneration. Alternatively reduce the UDA values of those higher funded practices to a lower level so that at least we are all on an equal UDA value.

The reason why we could not carry out the Uda's target last year is because of this low funding that our practice receives from the LAT which is directly responsible for our inability to recruit any new NHS dentists, and this is now the responsibility of the ICB.

3. Carry forward of activity. This is the first year in the history of our practice that we have not achieved our UDA target and had to request carry forward of activity. This fact alone, I would hope shows that we are very committed to carrying out NHS dentistry. I would have hoped that the ICB could use their discretion to allow us to carry forward but maybe I was expecting too much.

The comment from the ICB “we see no reason why this provider should be treated any differently to any other contract in the country” is wholly inaccurate. The fact that my practice is not paid the same UDA value than others in my immediate vicinity means that **I am** being treated differently to other NHS providers in the local vicinity.

4. The ICB is concerned that I will be unable to deliver the underperformance from last year and also the required target this year. As I have said my previous record shows over the last 17 years that we have always consistently delivered our target every year (even during covid) and I have already set out the reasons why we were not able to achieve it last year.

We have now managed to recruit 3 new (trainee) dentists by having no choice but to increase the remuneration to them (despite being paid lower UDA values). These dentists and the ancillary staff are willing to work additional hours during the year if needed to deliver our target as well as carry out the underperformance of the previous year so I am quite confident that this will be achieved. I would have hoped that the ICB use their discretion here but they obviously find it difficult to believe that this would be possible. In the end by sanctioning this it would have reduced the access problems for NHS patients and reduced the long waiting lists, instead of this NHS funding now being clawed back and absorbed into the general healthcare budget.

5. Yes we have a debt of £195359.63, due to the underdelivery. Yet as described above the ICB is giving out much more than this every year to those practices that are being paid a much higher UDA value for actually carrying out the same amount or less NHS treatments than us.

A dental practice obviously has fixed costs of around 50% and these are there regardless of how many performers staff etc there are in the building. As we could not recruit new dentists to carry out the NHS treatments we have had to work additional hours (evenings and weekends) to at least try and achieve our UDA target. These additional hours require additional remuneration to staff and dentists of around 40% on top of their normal pay scales. Also the opening of the whole practice buildings for longer hours brings additional costs such as utilities which have increased exponentially last year. So yes we had to pay the existing performers higher UDA rates and the ancillary staff double time pay scales to work

these additional hours and try and carry out as many NHS treatments as possible. This would not be sustainable in the long run but at that time we were the only practice still accepting NHS new patients and had to work these additional hours to cope with the demand.

I notice that even as of today we are the only practice in Colchester that are accepting new NHS patients despite other practices being paid at higher UDA levels than we are. If we also received the same higher funding then maybe I would also have the funds to pay back the ICB easily rather than having to use it to pay my staff overtime to carry out the NHS treatments so desperately required.

I hope I have now explained above why I feel we did not achieve our NHS targets and why I would be quite happy to roll over the underperformance to this year.

However this is all a moot point now as the ICB have already recovered over half the funds back in the monthly clawback."

4 CONSIDERATION

4.1 This application for dispute resolution relates to the underperformance of Units of Dental Activity ("UDAs") for the financial year 2022/2023. The Contractor seeks to dispute the Commissioner's decision not to carry forward its undelivered activity and the recovery of monies resulting from the underperformance during the financial year 2022/2023.

4.2 I note that the end of year reconciliation statements for each practice were sent to the Contractor by letters dated 31 July 2023. It appears that the Contractor contacted the NHS BSA to request that they be permitted to carry forward activity below the 90% performance tolerance, although I have not been provided with a copy of the request. The NHS BSA informed the Contractor by letters dated 23 August 2023 that the case had been referred to the NHS England commissioning team for Stage 1 local resolution and that the request to carry forward activity for each Contract had been declined. The letters indicated that all avenues of local dispute resolution had now been exhausted. The Contractor was advised that it may wish to refer the matter to NHS Resolution. On this basis I am satisfied that there has been some attempt at local resolution as set out in the GDS Contracts, however the parties have been unable to resolve the dispute and therefore the Contractor has referred the matter to NHS Resolution. There is no dispute from either party that local dispute resolution has not been entered into, therefore I will proceed to consider the matter before me.

4.3 As part of this consideration of the application for NHS dispute resolution, I required up-to-date versions of the Contracts in dispute containing all variations agreed since the Contracts were signed. This was not provided nor was there agreement between the parties on the version of the contract that is in place. I have therefore assumed that the Contracts between the parties reflect the provisions of the relevant Regulations in force at the relevant time and have proceeded to determine the disputes on that basis.

4.3 I note that there is no dispute that the Contractor has under delivered its contracted activity for both Contracts for the financial year 2022/2023.

4.4 The year end reconciliation letters dated 31 July 2023 state that:

"*The 2022/23 year-end reconciliation will be completed in line with the principles set out in the supporting year-end guidance. Acknowledging that the letter on 5 April 2022 recognised continued income protection arrangements and a revised performance threshold during quarter one for contractors delivering mandatory services (measured using UDAs) the end of year report will identify practice delivery against:*

- *1 April 2022 to 30 June 2022, described as Quarter 1 (including dental foundation trainee activity)*
- *A full year delivery total against the revised contract performance threshold, inclusive of any carry forward activity as per the letter from NHS England on 19 June 2023.*

We have finalised your year-end delivery position based on FP17/FP17(O) submissions in respect of the 2022/23 financial year, any activity awarded due to force majeure applications and meeting the contractual stipulations for this financial year.

Your outcome summary is set out in the table below:

Your contract has not met contractual requirements in Q1 and over the year. Your contract will therefore be subject to full financial recovery for undelivered activity.

The value of your undelivered activity will be recovered in the instalments detailed below. This will commence with your Compass payment on 1 October 2023 (September schedule).

Under-delivery of your contracted activity is a breach of your contract. Your breach notice will be published in Compass. When this is ready to view, we will email you via your business owner email address."

4.5 The letter regarding Contract no. 5733100001 contained the following information:

"*Total Adjustment for undelivered activity* *£0.00*
Total Financial Recovery *£132,583.38*
Total *£132,583.38*

Initial instalment *£44,195.38*
Subsequent instalment *£44,194.00*
Number of subsequent instalments *2*

Given your contract has not delivered within tolerance in 2022/23, your commissioner will be in touch to arrange an annual review.

Year end 22/23	***Total***
Annual contracted activity	*22,381.00*
Q1 indicative contracted activity	*5,595.25*
Q2-Q4 Indicative contracted activity	*16,785.75*
Annual scheduled UDA	*18,058.00*
UDA carry forward from previous year(s)	*00*
Adjusted scheduled UDA	*18,058.00*
Annual UDA % delivered	*80.68%*
Q1 scheduled UDA	*4,600.80*
Q1 UDA % delivered	*82.23%*
Year end reconciliation	
Indicative UDA Value	*£30.67*
Q1 Adjustment for undelivered UDAs (£)	*£00.00*
Financial recovery for undelivered UDAs	*£132,583.38*
Total year end 22/23 financial recovery (£)	*£132,583.38*
Carry forward to 2023/24	*00*
Over delivery carry forward (max 2%)	*00*
Over delivery payment (£) (max 10%)	*£00.00*

These details are available in your year-end statement in Compass."

4.6 The letter regarding Contract no. 5733100003 contained the following information:

"*Total Adjustment for undelivered activity* *£0.00*
Total Financial Recovery *£62,776.25*
Total *£62,776.25*

Initial instalment	*£20,926.25*
Subsequent instalment	*£20,925.00*
Number of subsequent instalments	*2*

Given your contract has not delivered within tolerance in 2022/23, your commissioner will be in touch to arrange an annual review.

Year end 22/23	***Total***
Annual contracted activity	*7,000.00*
Q1 indicative contracted activity	*1,750.00*
Q2-Q4 Indicative contracted activity	*5,250.00*
Annual scheduled UDA	*4,915.40*
UDA carry forward from previous year(s)	*00*
Adjusted scheduled UDA	*4,915.40*
Annual UDA % delivered	*70.22%*
Q1 scheduled UDA	*1,116.20*
Q1 UDA % delivered	*63.78%*
Year end reconciliation	
Indicative UDA Value	*£30.11*
Q1 Adjustment for undelivered UDAs (£)	*£00.00*
Financial recovery for undelivered UDAs	*£62,776.25*
Total year end 22/23 financial recovery (£)	*£62,776.25*
Carry forward to 2023/24	*00*
Over delivery carry forward (max 2%)	*00*
Over delivery payment (£) (max 10%)	*£00.00*

These details are available in your year-end statement in Compass."

4.7 The Commissioner refers in its representations to the "National Letter" and has provided a copy of a letter dated 19 June 2023 sent to all NHS dental contractors with regard to the year-end processes and guidance for the 2022/2023 financial year. The Contractor does not dispute that it was sent a copy of this letter.

4.8 The letter states:

"*NHS England has today published year end guidance for reconciliation of GDS/PDS contracts for 2022/23. Within this we are confirming that to support practices during the ongoing recovery of dental services and maximise access for patients we are waiving our rights to financial recovery at the usual contract tolerance level of 96% and have set a revised lower performance tolerance of 90% for contractors delivering mandatory services. This will be for 2022/23 only and seeks to support contractors by recognising that pandemic measures continued to affect capacity for many practices in the early part of 2022/23. Orthodontic services have been working to usual contracting arrangements since 1 April 2022 and the performance tolerance remains unchanged.*

This means that any un-delivered activity between 90 to 100% of that contracted will be carried forward into 2023/24 contract year. Where 90% of the total annual contract activity has not been delivered, financial recovery will apply as normal."

4.9 The Contractor has not disputed the calculations of its year end reconciliation for each practice, rather that it should be allowed to carry over the activity to the 2023/2024 year due to the circumstances it has faced.

4.10 The Contractor states that "*This is the first time since this new contract came into effect in 2006 that we have not reached our target UDA figure. We have always in fact over delivered by the 2% tolerance every year and have continued to see NHS patients throughout the pandemic and since then, until now.*" The Contractor comments that it is committed to providing NHS dental services despite financial challenges and states that the main reason it could not deliver its contracted activity was due to "*the dire situation regarding recruiting NHS*

dental associates/performers". The Contractor refers to a "*national shortage in the dental profession*" which it believes is "*especially acute in the east/Suffolk area*". I note that a dentist left the Contractor's practice in December 2021 and that although it advertised and used recruitment agents, it was unable to recruit another dentist. I appreciate that this would have affected the Contractor's ability to reach its target UDA figure. I have not been provided with any information to detail the Contractor's efforts in recruiting a replacement performer. The Contractor believes that its difficulties in recruiting are due to dentists being unwilling to carry out NHS dentistry and comments that although it had no problem in recruiting performers to carry out private dentistry, it is committed to providing NHS dental services. I note that by the date of this application for dispute resolution, the Contractor had managed to recruit 2 new performers and is committed to encouraging "*additional working patterns*" in order to exceed its UDA target this year. I further note that by the date of the Contractor's final observations, they state that *"We have now managed to recruit 3 new (trainee) dentists.."*

4.11 The Contractor contends that it is paid less per UDA than other practices in the immediate area and that as a direct consequence it finds recruitment difficult because performers will choose to go to other practices which can afford to pay them more. It comments that both new and existing dentists are being "poached" by other practices in the area with higher UDA rates. I note the Contractor's comments that "*…the fact that we could not provide the NHS dental services contract is really down to the fact that we are not able to compete against other practices who the NHS funds at higher levels. My team work very hard at lower UDA levels and I can categorically say that if we were able to pay higher UDA amounts to prospective performers like other practices in the area then we would have no problem in recruiting either.*"

4.12 In response the Commissioner states that the Contractor's "*current UDA rate of £32.50 is significantly above the Suffolk & North East Essex UDA Rate average of £28.27. So, for him to claim he is on a very low rate is also inaccurate. In fact, his rate of £32.50 puts him amongst the top 10% of highest UDA rates in SNEE.*"

4.13 I note that the Contractor only has access to the national UDA data for 2022/23 and comments that the UDA rate of £32.50 referred to by the Commissioner is for 2023/24, rather than 2022/23, this having been increased due to a national rise for all practices of around 6%. I note the Contractor's average UDA rates of £30.66 and £30.11 for the two Contracts. The Contractor highlights a practice opposite theirs being paid a rate of £36.50 per UDA, with another practice further away on the same street being paid £34.22. The Contractor also notes that there is a BUPA practice around 1 mile away that is paid £37.40 per UDA. I have assumed that the rates referred to are for 2022/23. The Contractor questions why their UDA rate cannot be increased to the same level as nearby practices as it is "*anticompetitive*" to expect it to provide the same UDA activity for around 30% less remuneration.

4.14 Although I have not been provided with any supporting information with regard to the average UDA rates in the area, I am mindful that differing UDA rates will clearly have an effect on where performers choose to accept employment thereby exacerbating any recruitment difficulties.

4.15 The Contractor states that a large number of the new NHS patients that it accepts have been refused at other practices and that they are "high needs" cases which require multiple appointments booked in advance, and that these have a high failure rate with over 620 hours of appointment time lost due to patients not turning up. The Contractor comments that this equates to around 88 days of lost appointment time, when it could have fulfilled its UDA quota by just continuing to see its existing patient base and comments that it feels penalised for the time it has spent with the "high needs" patients and accepting new NHS patients. The Contractor further comments that it is the only dental practice in Colchester that is accepting new NHS patients despite other practices receiving higher UDA rates. I note that I have not been provided with any supporting information regarding the cancelled appointments in order to consider the impact this has had on the Contractor's ability to meet its UDA targets. The Commissioner has not commented on this matter.

4.16 I am mindful that the Contractor references the Contracts coming into effect in 2006. It is unclear whether a previous primary dental services contract was in place and whether the

UDAs and the original contract value was created through the transitional provisions in place at that time. Whilst I note the Contractor's comments on the high needs and makeup of the activity required I also note that the Contractor has "always achieved our target." The banding of treatments and activity is set and there will be parity across all primary dental providers (and I note there is no provision for patients lists, being either open or closed). It is unclear how or whether the Commissioner has had regard to the high needs points addressed in this regard by the Contractor. I consider that average UDA rates should be considered between the parties as part of contractual arrangements and whilst these comments are supportive context to this application for NHS dispute resolution, this is not a matter to be resolved as part of this application for NHS dispute resolution. The Contractor seeks an outcome that "I would hope that the ICB can use their discretion and allow us to carry forward the undelivered UDA's."

4.17 It would appear that the Contractor considers that it has experienced exceptional circumstances. The letter dated 19 June 2023 to all NHS dental contractors included a link to the published "Guidance to support dental contract management arrangements for the 2022/23 year-end reconciliation", which has not been disputed by the Contractor. Section 4 of the guidance titled "Exceptional circumstances" states:

"*26. There may be instances in which a contractor is unable to fulfil its requirements to deliver the annual contractual activity due to an adverse event.*

27. The established process outlined in chapter 17 (titled 'Adverse Events') of NHS England Policy Book for Primary Dental Services should be followed in these circumstances.

28. The commissioner will have regard to the circumstances listed in Annex 49 of the Policy Book for Primary Dental Services: Appendices.

29. Contractors are contractually required to inform commissioners at the earliest opportunity if they feel that any contractual conditions cannot be met due to exceptional circumstances.

30. Contractors are also encouraged to work with the commissioner to improve compliance to improve access and reduce the likelihood of financial recovery being implemented."

4.18 I note that the Contractor has not submitted a Force Majeure notice to the Commissioner and has not provided any evidence to suggest that it wishes its request to carry over activity to be considered as such.

4.19 "Force majeure" is a defined term as set out in the Policy Book for Primary Dental Services ("the Policy Book"). The Policy Book, under the section "Adverse Events", states:

"Adverse incidents are dealt with in the force majeure provisions of the standard GDS contract and PDS agreement. …

The Contractor is responsible for informing the Commissioner of any force majeure event promptly and no later than five working days of the occurrence of such circumstances or events and for lodging a claim for relief within the timescales specified within this document.

…

Contract Wording

Clause 372 to 375 of the GDS Contract … provide that:

'Neither party shall be responsible to the other for any failure or delay in performance of its obligations and duties under this Contract which is caused by circumstances or events beyond the reasonable control of a party. However, the affected party must in the occurrence of such circumstances or events:

• inform the other party in writing of such circumstances or events and of what obligation or duty they have delayed or prevented being performed; and

• take all action within its power to comply with the terms of this Contract as fully and promptly as possible.

…

A force majeure event is one which is caused by circumstances beyond the reasonable control of either the Commissioner or the Contractor that could not have been avoided or mitigated with reasonable care and where the event has had a material effect on the fulfilment of the contract.

Examples of events that may invoke the force majeure provisions are as follows:

• fire;
• flood;
• severe weather conditions and for which precautions are not usually taken to avoid or mitigate the impact (for example a severe hurricane);
• industrial action …;
• death of a significant performer or close relative …;
• pandemic disease or circumstances that might otherwise be considered "an act of God";
• war;
• civil war…;
• riot or armed conflict;
• radioactive, chemical or biological contamination;
• pressure waves caused by aircraft or other aerial devises travelling at sonic or supersonic speed;
• acts of terrorism; and/or
• explosion."

4.20 I am not satisfied that the circumstances described by the Contractor, either with regard to the recruitment issues it has experienced or the number of cancelled appointments, are listed in the Policy Book as examples of an event or intended to be included as an event which may invoke the Force Majeure provisions.

4.21 I note the Commissioner's view that the national policy was made clear to dental providers in the letter issued that in the case of any under delivery below 90% financial recovery would apply, and that it sees no reason why the Contractor should be treated differently to any other provider. The Commissioner comments that it has engaged with the Contractor and agreed to extend the recovery of monies to a period of 6 months rather than the nationally agreed 3 months. I note that whilst the Contractor appreciates this, they comment that this was a general clause negotiated by the BDA which was offered to all practices facing financial recovery, not just the Contractor. I would expect engagement to be not simply limited to payment terms but to include consideration of the Contractor's individual circumstances and the particular events surrounding the Contractor and reasonableness that payments should be made in the first instance.

4.22 Finally, I consider the Commissioner's comments that "*If this was next year, I would come back and say that the ICB would propose to split the difference, with a clawback of 11% and a roll over of 11% as that seems the most logical response to the question and would help the Provider deliver a reasonable amount of additional activity and reduce clawback that would impact the Provider, however this year we just don't have the authority to respond like that!*".

4.23 I note that since 1 April 2023 ICBs have taken on delegated responsibility for the commissioning of primary dental services and have had regard to the NHS England Delegation Agreement which sets out the way in which NHS England has delegated its functions in relation to primary dental services to ICBs. The Delegation Agreement is clear that ICBs have taken on dental service contract management and they must comply with

mandated guidance. I note that there are no express provisions regarding how ICBs should manage historic disputes.

4.24 The ICB has responded to invitations to provide representations and further information albeit this was limited. If the ICB is of a certain view, it is open to the ICB to liaise with NHS England where it considers it necessary to do so in order to ensure a full response can be provided. I note that there are staffing provisions in the Delegation Agreement and that ICBs have staff available to deliver the commissioning services. On this basis, I do not consider it unreasonable to expect the ICB to liaise with NHS England in order to understand any relevant historic positions and to have conversations as required to make any necessary changes to the arrangements. I do not consider that an internal NHS point on finances should interfere with the management of the Contracts or the resolution of this dispute. I therefore consider that the ICB has the authority to use its discretion in these circumstances, and it has indicated that it would be willing to do so.

5 DECISION

5.1 I determine that it is open to the Commissioner to consider the Contractor's individual circumstances and use its discretion to allow a proportion of the UDAs to be carried over as it has suggested.

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