6 March 2024

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

FILE REF: **SHA/26095**

DECISION MAKING BODY: **NHS ENGLAND & HERTFORDSHIRE AND WEST ESSEX INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **VALLEY DENTAL PRACTICE 83 LOUGHTON WAY, BUCKHURST HILL, ESSEX, IG9 6AS**

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

RE: **APPLICATION FOR DISPUTE RESOLUTION WITH REGARD TO FINANCIAL RECOVERY FOR 2022/2023**

1 Outcome

1.1 Based on the information provided to me, I am satisfied that whilst a new Schedule 4 was not issued for the year 2022/2023, the Contractor continued to deliver the services and the Commissioner did not stop these when it did not receive an expression of interest/sign up from the Contractor, due to the Commissioner's error in using the wrong email address to communicate programme changes to the Contractor. On this basis, I determine that the Commissioner shall review the repayments against the activity provided and ensure that these are revised accordingly. I determine that the Contractor continued to provide the services based on the 2021/2022 arrangements, unless either party can evidence otherwise. For example, I note the Contractor's comments in relation to the "multiple Teams meetings" whereby there may have been a clear understanding of alternative arrangements. Where alternative terms were understood, these must be evidenced to the other party within 21 days and these terms shall be the basis on which the repayments shall be reassessed.

1.2 Where repayments in respect of services delivered during the year 2022/2023 have already been made by the Contractor to the Commissioner, I determine that these are repaid to the Contractor within 30 days of the date of this determination.

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

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RE: APPLICATION FOR DISPUTE RESOLUTION WITH REGARD TO FINANCIAL RECOVERY FOR 2022/2023

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 55 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 email dated 16 October 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 dated 16 October 2023;

2.2.2 Email from the Contractor dated 29 October 2023 with further information;

2.2.3 Email from the Contractor dated 21 November 2023 with enclosures;

2.2.4 Email from the Commissioner dated 21 November 2023 with enclosures; and

2.2.5 Email from the Contractor dated 11 December 2023 with enclosures.

3 PARTIES SUBMISSIONS

<u>The Contractor's application</u>

3.1 “I hope this email finds you in good health.

I am writing to seek your assistance in resolving a matter concerning clawback deductions for the year ending 2023. We have encountered significant difficulties in our attempts to communicate with NHS BSA, and they have suggested that we seek your support in this matter.

We believe that there have been misunderstandings and discrepancies in the clawback calculations, leading to an unfair financial burden for our organization [sic]. Despite our best efforts to engage in open and construction dialogue with NHS BSA, we have not achieved a satisfactory resolution.

Given these challenges, we are turning to NHS Resolution in the hope that your expertise and impartial perspective can help us find a fair and equitable resolution to this issue.

When considering the 2022/23 Year-end reconciliation letter for Contract 1812260001 (Valley Dental Practice, 83 Loughton Way, Buckhurst Hill, Essex, IG0 6AS), we have noticed the following potential errors.

> 1. We enrolled to take part in a flexible commissioning Program 1a with our local Area Team (East of England). We have dedicated 10% of clinical time to provide services for emergency patients and accepting new patients referred from NHS 111. There was some confusion with regarding contract numbers so claims have not been allocated correctly to the 1a program. The time and patients have been seen under this portion of the contract but have not been allocated correctly.

We disputed clawback with the BSA, and they have completed their own investigations which concluded that our contract was not part of the flexible commissioning scheme during the Year End 22/23. The BSA were told by the Commissioning Team that a request for expression of interest to provide 1a urgent care under flexible commissioning was sent to all providers on 31 March 2022 from the East of England Dental email address. We have checked and can confirm, we did not receive an email. We find it difficult to believe a request for expression of interest would be sent a day before the start of the contract year.

BSA asked us to provide proof that we replied to the expression of interest email to the Area Team to continue provision of 1a urgent care. This put us in a precarious position because we were never sent the email in the first place. BSA were also unable to present us with provide proof [sic] of this email request was ever sent to us from the Area Team.

We signed a flexible commissioning scheme contract for year end 21/22. Towards the end of financial year 2022 we had several Teams meetings with David Barter (Head of Commissioning – East of England) with other UDC members present. During these meetings UDC members verbally requested a new contract for year 2022/23 as part of the flexible commissioning 1a program. We were told verbally (on several occasions) that there was no need for a new contract, and we should continue providing the emergency cover during 2022/23 and that we would be renumerated [sic] as per terms agreed when we first signed the contracts in September 2021.

We feel we have been wrongly penalised for following the Area Team instructions and some administrative and system errors. We acted as a UDC in our area throughout the pandemic and then continued with the 1a flexible commissioning program, our team has gone above and beyond to provide services to our local population.

Since the introduction of ICBs, our practice has been moved from the Essex Area Team to Hertfordshire and West Essex ICB. The previous Essex commissioning team (including David Barter) have migrated to the Mid and South Essex ICB. Maybe this is the reason why we are in the position we are in. Perhaps there hasn’t been miscommunication between the BSA, our previous commissioners and our new ICB.

We are grateful for any assistance you can provide, and we are committed to working closely with your team to provide all necessary documentation and information for a thorough review.

Thank you for considering our request. We look forward to your guidance and support in finding a resolution that is in the best interest of all parties involved."

Representations

NHS England's representations

3.2 "All documents have been submitted to NHS Resolutions [sic], this document provides detail as to what information is held within each document attached and describes the information shown in items 2 and 3.

We believe that this evidence reflects that NHS England communicated with the provider clearly stating the start and end date of the programme, and issuing expression of interest to continue for a further year.

Item 1: Expression of interest email (attached)

Below is a screenshot of the email sent to all providers of 1a in 2021/22, the date of the email is 31/03/2022, this email was sent to hardik@smileartdental.co.uk which was the email on our contact database at the time. Screenshot provided as well as attached email as email sent bcc for GDPR purposes.

[the screenshot was provided but is not included here]

Item 2: Screenshot of Compass 2021/22

Ref: FC Securing Access for Urgent Care 01/07/2021 to 31/03/2022 value £14943.39 Target 293

[the screenshot was provided but is not included here]

Item 3: Screenshot of Compass 2022/23

The service line clearly shows that the scheme has not been extended in to 2022/23, refer to service line, FC Securing Access for Urgent Care 01/07/2021 to 31/03/2022 Value 0 Target 0

[the screenshot was provided but is not included here]

Item 4: Contract Variation (attached)

The variation excerpt below clearly states that the scheme ends on 31 March 2022 and has been signed by Satin Patel on 18/01/2021.

[the screenshot was provided but is not included here]

Item 5: Prov of Urgent Dental Care Programme 1a Service Specification (attached)

The Service Specification states the following.

12 PERIOD OF SERVICE

The agreement will run from the date that the contract variation is signed to 31 March 2022, with a provision to allow for a six-month break clause by either party."

The Contractor's representations

3.3 “I have just noticed that and [sic] email sent to the Dental cases BSA team on 08.08.23 had some attachments on there which are not in the Claim bundle.

Please find attached the email along with the attachments to be used during your considerations.

Sorry for any inconvenience caused.”

Observations

NHS England’s observations

The Commissioner did not provide any observations.

The Contractor’s observations

3.4 “Item 1: Transformational Commissioning Programmes

Below is a screenshot of the email sent to Dental East (NHS England & NHS improvement) in June 2021. This form (full copy attached) was completed by us and expresses our interest to take part in Programme 1a. This form was provided by NHS England and clearly states that our nhs.net email address should be provided for all future communications relating to 1a. This form was emailed from hardikpatel@nhs.net before the 1a programme had started.

[the screenshot was provided but is not included here]

Item 2: Transformational Commissioning Programmes

After receiving our expression of interest, we were invited to a Teams (Early Adopters Programme 1a) meeting. This invite was sent to our nhs.net account on the 21st July 2021. This indicates that the email address they had as our contact email was hardikpatel@nhs.net

[the screenshot was provided but is not included here]

Item 3: Submission of Standard GDS Contract Variation Notice for year 2021-22

The screenshot below shows the signed contract variation was sent to Dental East (NHS England & NHS improvement) nhs.net at 11:06 on the 20th Sep 2021. We were informed during the Teams (Early Adopters Programme 1a) meetings that the contract variation was delayed and will be provided in due course to all 1a providers. We were advised to start implementing 1a from April 2021 (which we did in good faith).

[the screenshot was provided but is not included here]

Items 4, 5, 6, 7, 8, 9: Screenshots of email exchanged between commissioners and ourselves since starting 1a.

Please note here, all correspondences have been from nhs.net to nhs.net accounts.

[the screenshots were provided but are not included here]

Item 10: use of hardik@smileartdental.co.uk email account.

This email address was not provided by us to the commissioners, we are not sure why this was on their database at any time. It is not checked regularly and is only used by a nurse at the practice to order stock. The Expression of Interest for Programme 1a to continue into year 22-23 should never have been sent to this email account. Item 1 demonstrates that both parties were in agreement that nhs.net email accounts should be used when dealing with NHS contractual documents.

[the screenshot was provided but is not included here]

Item 11: Service Specification for Provision of Urgent Dental Care Transformational Programme document.

Generally speaking, for any NHS contractual documents, we have always followed NHS guidelines and used our nhs.net email account. In this particular programme, page 14 Section 10 of the Service Specification for Provision of Urgent Dental Care Transformational Programme states that the provider must have connectivity to NHS.net mail account. In contractual agreements where the use of an NHS.net email is stipulated as a requirement; it is imperative that both parties strictly adhere to this provision. This specific requirement serves to maintain a standard protocol for communication, emphasising the significance of utilising NHS.net email addresses as a means of safeguarding confidential data, maintaining accountability, and aligning with established security measures within the NHS framework.

[the screenshot was provided but is not included here]

Throughout the 2022-23 year, our team diligently continued the delivery of the 1a programme. We engaged in multiple Teams meetings and, crucially, were never verbally or in writing informed to cease providing the service. Instead, we received encouragement to persist in delivering emergency cover and doing the right thing by the patient, with the assurance of renumeration [sic] based on the terms established in the contract variation dated September 2021.

Considering the delays experienced in finalising contracts during the previous year (2021-22), we perceived the situation as not uncommon due to the pressures faced by the Area Team at that time. Our understanding was reinforced by the continued encouragement to provide emergency cover under the terms agreed upon.

However, it's important to highlight a critical oversight from the commissioner's team: the failure to inform us officially about a new contract requiring our attention. The contract variation for 2022-23 was inadvertently sent to an email address that historically had not been used for such sensitive communication. We acknowledge this as a simple human error, not seeking to assign blame but to shed light on the situation.

The refusal by NHS commissioners to honour the terms of the contract due to not returning the signed contract variation, despite our unwavering implementation of the 1a programme, places an unjust burden on our practice. The financial penalties imposed as a result of this oversight have had severe implications for our operations.

Our commitment to the programme has been demonstrated through increased clinical hours, dedicated resources for emergency patients, expanded staff, and additional operational expenses. These efforts were undertaken in good faith, and the substantial clawback we now face puts our business in an untenable position from which recovery seems impossible.

We appeal to the NHS Resolution Team's understanding and urge a reconsideration of this situation. We remain devoted to providing quality healthcare services but seek fairness in this matter. Your support in rectifying this oversight would be immensely appreciated.

Thank you for your attention to this urgent issue."

4 CONSIDERATION

4.1 As part of the 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. I note that I was not provided with a full copy of the signed Contract in place between the parties. I have not therefore seen the notice provisions within the Contract and note that neither party has made any comment in relation to this. I have however received a copy of a variation notice dated 12 August 2022 and signed by both parties. I have therefore assumed

that the Contract between the parties reflects the provisions of the relevant Regulations in force at the relevant time and proceed to determine the dispute on that basis.

4.2 This application for NHS dispute resolution relates to financial recovery from the Contractor for the year 2022/23. The Contractor seeks to dispute the Commissioner's decision to recover monies paid to the Contractor and claims that this money was paid in response to providing services as part of the Urgent Dental Care Transformational Programme 2022/23. I have not been provided with a copy of the decision letter regarding the repayments from the Commissioner to the Contractor, however, I note that there is no dispute between the parties that this was issued. I note that an email was sent by the Commissioner on 3 October 2023 referring the Contractor to NHS Resolution as the local dispute resolution process had been exhausted. I therefore conclude that there has been some form of dispute resolution at local level.

4.3 The Commissioner is of the view that the Contractor did not enter into the Urgent Dental Care Transformational Programme 2022/2023 to which these payments relate. The Contractor does not dispute that they did not submit an expression of interest/sign-up form as required by the programme either within the timeframe set out by the Commissioner or at all.

4.4 There is no dispute between the parties that the Contractor provided services during the year 2022/23. The Contractor has provided two example screenshots which are headed "NHS 111 referral notification[s]" and dated 4 April 2022 and 27 March 2023 which I understand to be evidence of the programme service delivery taking place. No observations were provided by the Commissioner to rebut these. I have not been provided with detailed evidence of the level of services that the Contractor provided throughout the year 2022/2023 by either party.

4.5 I have been provided with a copy of the signed Contract variation notice dated 13 September 2021 between the Contractor and the Commissioner wherein the Contractor was enrolled to be part of the Provision of Urgent Dental Transformational Programme 2021/22. This notice states:

"As this flexible commissioning agreement is on a non-recurrent basis this variation to the GDS contract will cease on 31 March 2022, whereby a new Schedule 4 will be issued."

And

"We acknowledge that this notice will take effect from the 01 July 2021 until 31 March 2022."

4.6 I also note that "The Dental Transformation Strategy Provision of Urgent Care Transformation Programme Service Specification" provided to me by the Commissioner states:

"Period of Service

The agreement will run from the date that the contact variation is signed to 31 March 2022, with a provision to allow for a six-month break clauses by either party."

And

"Termination of Service

The delivery of this service will terminate on a date three months after the date on which the notice is served, by either mutual agreement or by either party."

4.7 Whilst, on balance I believe that the Contract variation notice would take precedence over the Service Specification, I do consider that the provisions of the Service Specification are confusing and introduce ambiguity when read in line with the Contract variation notice. I am of the view that, the Contractor should have been aware that the programme, that is the subject of this dispute, was not a rolling arrangement and that a new arrangement would need to be agreed for the period after 31 March 2022 ("*whereby a new Schedule 4 will be issued").*

4.8 I note the Contractor's comments as regards the transition to the ICB and give these some weight. I also note the comment in the Contract variation notice "*whereby a new Schedule 4 will be issued"*. It does not appear from this drafting that a new Schedule 4 was intended to be subject to any competition and it appears that this would be a matter of a new document being issued.

4.9 The Contractor states that they had not received any written communication in relation to the 2022/2023 programme and therefore was unable to provide confirmation to NHSBSA during the local dispute resolution of replying to the expression of interest email. I note that I have been provided with a copy of an email sent by the Commissioner on 31 March 2022 at 1.31pm to hardik@smileartdental.co.uk which is asserted to be the email address that was held on file for the Contractor's practice at the time. The Contractor states that this was not the practice email address and therefore should not have been on the database nor where important communication should be sent to as it was only accessed by one individual at the practice. The Contractor states that the account is only used for stock orders. The Contractor states that "*We have checked and can confirm, we did not receive an email*." It is unclear whether this is a reference to an email not being received at the nhs.net email address or at the "stock orders" email address.

4.10 The Contractor claims that the Commissioner should not have recorded hardik@smileartdental.co.uk in its database as they had not previously communicated via that address.

4.11 I have been provided with a screenshot of a document entitled "Transformational Commissioning Programmes" with the scheme name: Programme 1a Urgent Dental Care and the Provider's name and address which clearly states the "Contact Details (nhs.net email and phone)" as "hardikpatel@nhs.net." I have not been provided with any evidence to suggest that the parties requested or provided alternative email addresses for use for this programme. It is therefore clear to me that the nhs.net email address requested on the Programme 1a Urgent Dental Care scheme form and provided back to the ICB with the hardikpatel@nhs.net email address inserted should have been used for formal communications as regards this programme.

4.12 I note the Contractor's statement that it had signed a "Flexible commissioning scheme contract" for the year 2021/2022 and confirmed that it had not signed anything for the financial year 2022/2023. I further note the Contractor's statement that it had conducted verbal communication with the Commissioner in relation to the 2022/2023 programme.

4.13 I note that the Contractor states *"Throughout the 2022-23 year, our team diligently continued the delivery of the 1a programme. We engaged in multiple Teams meetings and, crucially, were never verbally or in writing informed to cease providing the service. Instead, we received encouragement to persist in delivering emergency cover and doing the right thing by the patient, with the assurance of renumeration [sic] based on the terms established in the contract variation dated September 2021*." I have not been provided with any further information about these meetings, in particular who they were with. However, the Contractor further contends that:

"We were told on several occasions by David Barter (Head of commissioning East of England) during Teams meetings to continue providing emergency cover during 2022-23 as part of the flexible commissioning 1a program and that we would be renumerated as agreed when we first signed the contracts in September 2021. These meetings were held on several occasions with the whole UDC group. We carried on providing this service even though we were unable to take on any new patients due to capacity constraints."

"We were informed by David Barter that an extension to the contract was not necessary for the following year. This message was reiterated on several occasions at meetings, we were told to continue as per 2021/22 and allocate 10% of our time for emergency cover to see patient sent via the NHS 111 Directory of service and all other emergencies contacting the practice directly."

4.13 I have not been provided with any evidence to support the Contractor's claim that these communications took place. I also note that the Commissioner has not made any comment on these communications or sought to suggest that they did not occur. I have no reason to believe that these communications did not take place and that the Contractor delivered the services it thought that it was contracted to provide throughout the year. Again, the Commissioner does not make any comment that the Contractor did not provide the services, or that when it did not receive an expression of interest/sign up that the Contractor was removed from the service provision. I have been provided with NHS 111 referral notifications which appear to be relevant to the provision of the services during the year 2022/2023.

4.14 Having regard to the evidence provided that the Contractor submitted an nhs.net email address for the programme; that the evidence provided by the Commissioner sending the expression of interest documents was not sent to the notified nhs.net email address; and as there is no dispute between the parties that the Contractor provided the services during the year 2022/2023, I conclude that the Commissioner should review the repayments it seeks to recover from the Contractor and must ensure that these are revised to reflect that the Contractor provided the services.

4.15 The absence of a formal contract regarding the delivery of the services is due to an error of the Commissioner in using the wrong email address to seek an expression of interest/sign up from the Contractor. The Commissioner has not provided any evidence to support that it acted on the absence of an expression of interest/sign up or contract to prevent the Contractor from providing the services.

5 DECISION

5.1 Based on the information provided to me, I am satisfied that whilst a new Schedule 4 was not issued for the year 2022/2023, the Contractor continued to deliver the services and the Commissioner did not stop these when it did not receive an expression of interest/sign up from the Contractor, due to the Commissioner's error in using the wrong email address to communicate programme changes to the Contractor. On this basis, I determine that the Commissioner shall review the repayments against the activity provided and ensure that these are revised accordingly. I determine that the Contractor continued to provide the services based on the 2021/2022 arrangements, unless either party can evidence otherwise. For example, I note the Contractor's comments in relation to the "multiple Teams meetings" whereby there may have been a clear understanding of alternative arrangements. Where alternative terms were understood, these must be evidenced to the other party within 21 days and these terms shall be the basis on which the repayments shall be reassessed.

5.2 Where repayments in respect of services delivered during the year 2022/2023 have already been made by the Contractor to the Commissioner, I determine that these are repaid to the Contractor within 30 days of the date of this determination.

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

Head of Appeals
NHS Resolution