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FILE REF: SHA/24539

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DECISION MAKING BODY: NHS COMMISSIONING BOARD (“NHS ENGLAND”)

GDS CONTRACTOR: CHICHESTER DENTAL STUDIO

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

RE: LATE SUBMISSION OF UNITS OF DENTAL ACTIVITY (UDAS)

1 Outcome

- 1.1 I determine this dispute in favour of NHS England.
- 1.2 Where UDAs have not been submitted to NHS England in accordance with paragraph 38 of Schedule 3 of the Regulations, NHS England may recover sums previously paid to the Contractor in consideration of the delivery of the required number of UDAs.
- 1.3 I note the Contractor’s comment that “We also need clarification as to why the contract has not been paid for nearly a year.”
- 1.4 I note NHS England’s comment that “In line with existing regulations, you would have been paid monthly based on 1/12th of your contract value for the 2019/20 financial year...” I determine that NHS England must review that this was the case and that where payments have not been made in respect of the full amount of the contract value, then there shall be no requirement for recovery of overpaid sums. This is to ensure that there shall be no double recovery made by NHS England.
- 1.5 I note that neither party has requested interest in relation to this dispute and I determine that no interest shall be applied to any overpayment recovered by NHS England from the Contractor.

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RE: **LATE SUBMISSION OF UNITS OF DENTAL ACTIVITY (UDAS)**

1 INTRODUCTION

- 1.6 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”).
- 1.7 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By email dated 19 February 2021 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 10 February 2021 together with enclosures;
 - 2.2.2 Email from the Contractor dated 19 February 2021 together with enclosures;
 - 2.2.3 Email from the Contractor dated 4 March 2021 together with enclosures;
 - 2.2.4 Email from the Contractor dated 8 March 2021;
 - 2.2.5 Email from the Contractor dated 12 March 2021 together with enclosure;;
 - 2.2.6 Note of a call from the Contractor dated 31 March 2021;
 - 2.2.7 Email from NHS England dated 6 April 2021 together with enclosures;
 - 2.2.8 Second email from NHS England dated 6 April 2021 together with enclosures; and
 - 2.2.9 Third email from NHS England dated 6 April 2021 together with enclosures.

- 2.3 I have also been provided with a letter confirming that the Contractor's representative may act on its behalf in relation to this dispute. This letter was received in response to an email of 25 February 2021 requesting said authority.
- 2.4 I have been provided with multiple copies of a Personal Dental Services ("PDS") Agreement in relation to this application for NHS dispute resolution. I have also been provided with multiple copies of variation documents related to a General Dental Services Contract. I have queried with the Contractor whether the contract in place between it and NHS England is a PDS Agreement or a GDS Contract. The Contractor confirmed, by email dated 8 March 2021, that "It is a General Dental Services contract to which the GDS contract variation notice applies." I note that NHS England, in enclosures received with their representations, including a year-end reconciliation letter to the Contractor dated 29 July 2021, refer to the GDS Regulations. NHS England does not dispute that there is a GDS Contract in place between the parties and this application for NHS dispute resolution is in relation to that Contract. I am content that this dispute relates to a GDS Contract and shall proceed on this basis.

3 CONSIDERATION

- 3.1 This dispute relates to the late submission of units of dental activity (UDAs) and that the Contractor wishes to query why they have not been given an override code for CoMPASS (Contract Management Payment and Superannuation System) in order that they would be able to submit late claims for UDAs. I note further that the Contractor queries "why the contract has not been paid for nearly a year".
- 3.2 In support of their dispute the Contractor has provided only an undated copy email, which responds to NHS England's email dated 7 January 2021 concerning a decision of its Dental Contract Management Group meeting. From this email, I note the Contractor refers to NHS England having been aware of the problem since October 2019 and, following repeated emails and telephone conversations, the Contractor thought that the problem had been resolved in early 2020. The email also contains the Contractor's response to various points of NHS England's decision which I will deal with later in this consideration.
- 3.3 I note that in response to the application, NHS England has provided me with a wider, more detailed background and explanation of events in this matter. Having regard to 'Document 6 – Timeline' together with the Contractor's view that there has been repeated emails and telephone calls between the parties since becoming aware of the problem, I am satisfied that the parties have engaged in local dispute resolution of some sort and that I am able to proceed to consider the dispute.
- 3.4 I note NHS England state that the Contractor has on several occasions requested that an override code be set up on CoMPASS in order that they would be able to enter late claims dating back to October 2019, with the Contractor stating a deficit of 2572.6 UDAs. NHS England declined the request on the grounds that neither NHS England nor NHS Business Services Authority ("NHS BSA") had caused the delay or error in the processing of claims. I note that the Contractor disagreed with the decision and a paper was subsequently presented to NHS England's Dental Contract Management Group (DCMG) at its meeting on 7 January 2021.
- 3.5 I have had regard to the paper presented to the DCMG on 7 January 2021 ("Document 1"). I note that the nature of the Contractor's request is described as 'Late Submission / Override rule' and that a description of events provided by the Contractor has been included as background as follows:
- 3.5.1 *"In October 2019 Dr. Fariborz Thomas Mottacki joined our surgery. A CAF form was filled in for him along with Dr. Thomas Ziach who started around the same time. They were submitted together as advised by Mrs Safaa Jelassi.*

(1) Up to January 2020 we did have issues trying to put Dr Mottacki on the performer list and Compass due to various reasons. During this time NHS England were aware of the problem so we believed it had been resolved.

- (2) *Unfortunately over the next few months we realised that it hadn't been. After many email's and phone call's we managed to get back to Mrs Jelassi.*
- (3) *In September 2020 through a conversation with Mrs Jelassi we were informed that Dr. Mottacki had been removed from the performer list by Mrs Jelassi as she had believed/assumed Dr Mottacki had left the position of associate dentist for our surgery when in fact, he had only been self-isolating for 2 weeks back in March. So again we had to apply for him to be reregistered."*

3.6 I note that, on 10 September 2020, NHS England had informed the Contractor that it was unable to authorise an override code for the late submissions due to the error being that of the Contractor and not NHS England or NHS BSA. The Contractor subsequently requested that the matter be escalated and so it was being brought before the DCMG for review. NHS England noted in the paper that Dr Mottacki had commenced in October 2019 however was not added to CoMPASS until January 2020, with a meeting being held with the Contractor to assist. I note that there was further communication between the parties with the issue ongoing. I note NHS England's email to the Contractor dated 24 September 2020 as follows:

3.6.1 *"Following our telephone conversation this morning, please ensure you add your performer Mr T Mottacki to your contract again to enable him to submit the UDAs he has completed.*

We further discussed the issue of late claims and that you need to ensure claims are submitted within 2 months of their date of completion. Claims submitted after the two months have passed will not be allowed and will not count towards your yearly UDA delivery. I explained that only in rare circumstances can late claims be allowed.

I looked at the contract history on Compass and have found the below entry. This suggests that you added the performer on with a start date of 15/10/2019 and an end date of 31/03/2020. I authorised this change for you at the time to ensure the performer is added to your contract and able to submit claims without any delay."

3.7 I note that according to Document 1, the year-end information from the NHS BSA (from a weekly report as at 16 September 2020) using option 1 (of the revised methodology for 2019/2020) put the Contractor's delivery of UDAs at 11.75% resulting in a clawback of £205,831.08, with the actual recorded activity on CoMPASS for 2019/2020 being 8.23%.

3.8 I note that in the Contractor's statement attached to Document 1 they stated:

3.8.1 *"Because of these issues it looks as if we have underperformed so have now been penalised by NHS England and are having to pay back what we received last year. Our UDAs for 2019/2020 is 3447.4*

The amount recorded is 874.8

This is a deficit of 2572.6"

3.9 I note that NHS England states that information taken from CoMPASS totals a deficit of 2,183 UDAs.

3.10 I note that having considered Document 1 the DCMG decided not to allow the Contractor's request for an override rule in order to allow the submission of late claims, and it notified the Contractor of its decision by email dated 7 January 2021. Although I have not been provided with a copy of the email, I note that it has been reproduced, at least in part, in the Contractor's application as follows:

3.10.1 *"The group agreed that your request for an override rule, to allow the late claims, could not be approved. This decision was based on the following:*

NHS England and NHS Improvement are governed by contracting rules and they state that claims are required to be submitted within 2 months. Evidence submitted showed that Dr Mottacki commenced October 2019 however was not added to CoMPASS until 2020.

As the delay / error in processing was not made by NHS England and NHS Improvement or NHS Business Services Authority these claims can't be accepted.

It was felt that the contract needs to implement a procedure to ensure reconciling of activity, this could be a weekly/monthly basis.

This would have allowed you to realise these claims had not been submitted, therefore you would then be in a position to have reviewed and remedied the situation, all within the cut off period of 2 months.

As advised the only time that claims may be allowed is when there has been an error made by the NHS which has impacted on the submission of the claim(s) and this has not been the case."

- 3.11 I note that the Contractor appealed the decision and the matter was escalated to the Dental Contract Oversight Group (DCOG) on 20 January 2021. Background information was provided in a paper to the DCOG (Document 2) and the paper included the Contractor's local appeal against the decision of the DCMG by email dated 11 January 2021, which I note is the undated email repeated in the Contractor's application to NHS Resolution.
- 3.12 I note that the DCOG upheld the decision of the DCMG and that this was communicated to the Contractor by email dated 28 January 2021 according to the timeline provided, although I have not been provided with a copy of the email itself. I note NHS England state that the Contractor was advised that local resolution had now been exhausted and they should contact NHS Resolution if they wished to take the matter further.
- 3.13 NHS England has set out in its representations the process for the submission of late claims. I note that when a request for consideration is received it is forwarded to NHS BSA (Dental Services) to follow up and investigate, and then details are forwarded to NHS England to consider the request and confirm whether the late claims can be accepted. I note NHS England have highlighted section 3.6 'Late submission of FP17/FP17(O)' from the 'National Dental Contract Management Service (NDCMS) – Single Operating Model 19/20', a full version of which has been provided as Document 3. I note that this section contains a table indicating the actions to be followed depending on the reason for the delay, as stated by the Contractor. In this case I note that the process has followed that of the 'NHSE LT delay / error in processing' column in line with the reasons stated by the Contractor.
- 3.14 NHS England has provided a copy of the Policy Book for Primary Dental Service and has highlighted an extract from section 9.5 'Year-End Review – GDS, PDS and PDS Plus' as follows:
- 3.14.1 *"The contractor is required to provide notification of a course of treatment, orthodontic treatment, etc within 2 months in accordance with paragraph 38 of Schedule 3 of the GDS Regulations and paragraph 39 of Schedule 3 of the PDS Regulations. Where the contractor fails to provide a notification within the 2 month time limit, the Commissioner does not have to pay for this activity nor take into account its delivery and therefore does not have to have it included within the activity report."*
- 3.15 I note the Contractor's view that "it was the NHS fault that the performer was not put on Compass", however I consider that there is limited information from which I can conclude that this was the case, or that this was entirely an NHS England responsibility. I note that little information and evidence has been provided to me by the Contractor.
- 3.16 I note that the Contractor, in its application for NHS dispute resolution and in local dispute resolution stated that "The problems were repeatedly reported via email and telephone

conversations to many of your colleagues, and through their advice and guidance, we thought the problem was solved in early 2020.” Despite the assertion, the Contractor has not provided me with copies of the emails or notes of telephone calls regarding these issues.

- 3.17 NHS England has provided detailed representations although I do not have copies of email correspondence which correlates to the names and dates referenced by the Contractor. I have been provided with a timeline document, which does include issues regarding changes to compass and a “CAF” form. The Contractor has been provided with a copy of the NHS England representations and invited to make observations on these. The Contractor did not provide any observations.
- 3.18 It is clear from the information provided to me that each of the parties consider that the issue which led to the delay relating to the submission of required information as regards the UDAs was not made by them.
- 3.19 Paragraph 38 of Schedule 3 of the Regulations provides that:

“Notification of a course of treatment, orthodontic course of treatment etc.

- (1) *The contractor shall, within two months of the date upon which—*
- (a) *it completes a course of treatment in respect of mandatory or additional services;*
 - (b) *it completes a case assessment in respect of an orthodontic course of treatment that does not lead to a course of treatment;*
 - (c) *it provides an orthodontic appliance following a case assessment in respect of orthodontic treatment;*
 - (d) *it completes a course of treatment in respect of orthodontic treatment;*
 - (e) *a course of treatment in respect of mandatory services or additional services or orthodontic course of treatment is terminated;* or
 - (f) *in respect of courses not falling within sub-paragraph (d) or (e), no more services can be provided by virtue of paragraph 5(4)(b) of Schedule 1 (orthodontic course of treatment) or paragraph 6(4)(b) of this Schedule, subject to sub-paragraph (4), send to the Board by means of electronic submission, the information specified in sub-paragraph (2).*
- (2) *The information referred to in sub-paragraph (1) comprise of—*
- (a) *details of the patient to whom it provides services;*
 - (b) *details of the services provided (including any appliances provided) to that patient;*
 - (c) *details of any NHS Charge payable (and paid) by that patient; and*
 - (d) *in the case of a patient who is exempt from NHS Charges, the information required under sub-paragraph (3).*
- (3) *In the case of a patient who is exempt from NHS Charges, the contractor must provide the Board (or a person authorised on the Board's behalf) with—*
- (a) *such details of that exemption as the Board may reasonably request;*
 - and
 - (b) *the written declaration.*
- (4) *The Board may accept submission of the information mentioned in sub-paragraph (2) in paper form in such exceptional circumstances as the Board may reasonably determine.*
- (5) *In this paragraph, ‘electronic submission’ means the submission of information electronically via a computer system approved by the Board.”*

- 3.20 As set out at paragraph 38(1) of Schedule 3 of the Regulations, the Contractor is required to submit details of the completed activity within two months. I am satisfied that each of the parties must be aware of this provision and will have contracted with each other on this basis.

- 3.21 I am not satisfied, from the very limited information provided to me by the Contractor, that the delays in the submissions of information in accordance with the Regulations are as a result of a fault by NHS England or that there was a failure to provide an “override code”. Whilst NHS England has provided detailed representations, these do not support the Contractor’s position and I note that the Contractor has not provided any observations on these.
- 3.22 I note that this issue relates to CoMPASS, which is an electronic system. I am unaware of the Contractor making a request to submit or actually making submission of the information in paper form although I note that this may be accepted by NHS England in exceptional circumstances, as set out at paragraph 38(4) of Schedule 3 of the Regulations.
- 3.23 I determine this dispute in favour of NHS England.
- 3.24 Where UDAs have not been submitted to NHS England in accordance with paragraph 38 of Schedule 3 of the Regulations, NHS England may recover sums previously paid to the Contractor in consideration of the delivery of the required number of UDAs.
- 3.25 I note the Contractor’s comment that “We also need clarification as to why the contract has not been paid for nearly a year.”
- 3.26 I note NHS England’s comment that “In line with existing regulations, you would have been paid monthly based on 1/12th of your contract value for the 2019/20 financial year...” I determine that NHS England must review that this was the case and that where payments have not been made in respect of the full amount of the contract value, then there shall be no requirement for recovery of overpaid sums. This is to ensure that there shall be no double recovery made by NHS England.
- 3.27 I note that neither party has requested interest in relation to this dispute and I determine that no interest shall be applied to any overpayment recovered by NHS England from the Contractor.

**Head of Operations, Primary Care Appeals
NHS Resolution**