

May 2023
FOI_5954

The following information was requested on 3 May 2023:

I asked the dhsc for some information about west essex pct relating to when they sought or received information relating to pds child only dental contracts in 2008 (uttlesford pct). I was party to one of these contracts which were terminated but have data showing that information was released saying that these could be changed to gds contracts on a like for like basis. Hence the request to identify when the pct became aware of this information. It would also be feasible that the same pct had other pds child only contract due to expire in 2009 (epping pct). Is it possible that you have the data that would confirm or deny if these contracts were terminated as per the contract or if they were allowed to convert to gds as the revised guidelines suggested. If also available would be any internal questioning of the concerns with the same pct having two different contract for the same services but having different criteria (2year and 3year durations). Was it discussed to alter them?

Our Response

We note your request falls into four parts:

1. Confirmation when West Essex PCT sought or received information relating to PDS 'child only' Agreements;
2. Provision of data which would confirm or deny if these contracts were terminated or allowed to convert to GDS Contracts;
3. Provision of internal questioning of the concerns about the same PCT; and
4. Confirmation if any such concerns were discussed with them.

We have interpreted your request as one, which is best addressed by NHS Resolution's Primary Care Appeals service, which, amongst other things, determines contracting disputes between dentists and the commissioner of primary dental services. The Appeals service's role only commences when a party to the contract applies for NHS dispute resolution. For more information, please refer to the Appeals service's webpage at [Primary Care Appeals - NHS Resolution](#)

With regard to point 1, the Appeals service is independent and does not provide guidance or advice to an individual party on a particular issue or dispute. The only way in which the commissioner would receive some form of clarification on the issue you raise is if the Appeals service has determined a dispute of this type. In this regard, the Appeals service retains decisions for six years so would not be able to furnish you with

any relevant decisions from the period 2008-2009. However, all historic decisions are retained here (it is advisable to access the following link via Internet Explorer): [\[ARCHIVED CONTENT\] UK Government Web Archive - The National Archives](#). In order to assist you, the Appeals service has located a decision regarding the right of a PDS Agreement contract holder (not child only) to return to a GDS Contract. Please, find attached below.

On point 2, the Appeals service do not hold this data. If this data was ever collected by PCTs, it may have been inherited by NHS England. You can find NHS England contact details on their website: [NHS England » Contact us](#).

On point 3, the Appeals service do not hold this data. PCTs no longer exist so any discussions may have been inherited by the relevant NHS England's regional office.

On point 4, the Appeals service do not hold this data. This request is similar to that in point 3, please note our response above.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to [Tinku Mitra](#), Deputy Director of Corporate and Information Governance for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

[Information Commissioner's Office \(ICO\)](#)

20 August 2009

FILE REF: [REDACTED]

PRIMARY CARE TRUST: # #

CONTRACTOR: # #

GDS PROVIDER:

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

RE: DISPUTE RESOLUTION – RIGHT OF RETURN TO GDS

1 Introduction

- 1.1 The contractor has referred the dispute in relation to its GDS contract for dispute resolution under the provisions of Regulation 8(3) and (4) of the National Health Service (General Dental Services Contracts) Regulations 2005 ("the GDS Regulations").
- 1.2 The Secretary of State for Health has directed that the NHS Litigation Authority exercise the functions of dispute resolution on his behalf. I as an authorised officer of the NHSLA have made this determination.

2 Application for Dispute Resolution

- 2.1 By letter dated [REDACTED] the contractor applied to the FHS Appeal Unit of the NHS Litigation Authority 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 Letter from the contractor dated [REDACTED] together with enclosures;
 - 2.2.2 Letter from the contractor dated [REDACTED];
 - 2.2.3 Letter from the PCT dated [REDACTED] together with enclosures;
 - 2.2.4 Letter from the PCT dated [REDACTED];
 - 2.2.5 Letter from the contractor dated [REDACTED] together with enclosure.
- 2.3 The contractor was a pilot PDS scheme provider prior to 1 April 2006. From 1 April 2006 the contractor held a Personal Dental Services ("PDS") agreement with the PCT for the provision of primary dental services. The contractor provided mandatory services under its PDS Agreement with the PCT.
- 2.4 The contractor has sought to exercise its right to a General Dental Services ("GDS") contract.
- 2.5 The contractor disputes the new GDS contract Negotiated Annual Contract Value ("the NACV") offered to it by the PCT which is less than the contractors Negotiated Annual Agreement Value ("NAAV") under the PDS Agreement with the PCT. The contractor does not agree to a change in the level of activity as provided for under the PDS agreement.

3 Consideration

- 3.1 The contractor states that "having been a member of the PCT's PDS pilot scheme prior to the introduction of the new contracts for dentistry in England and Wales in April 2006, I naturally opted to enter into a replacement PDS agreement under the new system." I

understand that the PDS agreement was for 3 years from 1 April 2006 and required the contractor to provide # units of dental activity during each financial year for a NAAV of #, subject to the DDRB uplift/review. The contractor states that it was aware of its right to a GDS contract on notice to the PCT and did not regard the agreement as a short term agreement or one that could be unilaterally terminated or varied by the PCT, or ■ would not have made the personal financial investments in the practice.

3.2 The contractor served a notice on the PCT dated ■ under its PDS Agreement to exercise its right to a GDS contract. The contractor requested that the GDS contract start on ■, that the contract subsists, that it is for the same services as its PDS agreement and for the same UDA commitment and for the same annual contract value.

3.3 The contractor had a right to a GDS contract by virtue of Regulation 21 of the National Health Services (Personal Dental Services Agreements) Regulations 2005 ("the Regulations") which provide that:

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

(2) A notice under paragraph (1) shall—

(a) state that the contractor wishes to terminate the agreement and the date on which the contractor wishes the agreement to terminate which must be at least three months after the date of service of the notice;

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

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

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

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

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

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

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

- (b) *the same services to be provided under the general dental services contract as were provided under the agreement immediately before it was terminated unless the parties otherwise agree;*
- (c) *the contractor to complete any course of treatment or orthodontic course of treatment that were not complete immediately before the agreement was terminated—*
 - (i) *in accordance with the terms of the general dental services contract in so far as those terms correspond with the terms of the agreement immediately before it was terminated, and*
 - (ii) *subject to such terms of the general dental services contract that permits the termination of a course of treatment or orthodontic course of treatment; and*
- (d) *unless the parties otherwise agree—*
 - (i) *subject to paragraph (ii), the same number of units of dental activity or units of orthodontic activity (as the case may be) specified in the agreement in a term giving effect to regulation 13 or 14 to be provided under the general dental services contract;*
 - (ii) *where the general dental services contract is to begin on a day other than 1st April, the contractor to provide under that contract during the remainder of that financial year any units of dental activity or units of orthodontic activity that the contractor would have been obliged to provide in that financial year under the agreement but had not yet provided immediately before the general dental services contract begins;*
- (e) *unless the parties otherwise agree—*
 - (i) *subject to paragraph (ii), the same number of courses of treatment involving the provision of sedation services or domiciliary services specified in the agreement in a term giving effect to regulation 16 to be provided under the general dental services contract;*
 - (ii) *where the general dental services contract is to begin on a day other than 1st April, the contractor under that contract to provide or contribute to during the remainder of that financial year any courses of treatment involving the provision of sedation services or domiciliary services that the contractor would have been obliged to provide or contribute to in that financial year under the agreement but had not yet provided or contributed to immediately before the general dental services contract begins;*
- (f) *in respect of a course of treatment or orthodontic course of treatment falling within sub-paragraph (c), the contractor to ensure that a patient who is not an exempt person only pays one NHS Charge in respect of that course of treatment or orthodontic course of treatment; and*
- (g) *the contractor to comply with the term of the general dental services contract giving effect to paragraph 12 of Schedule 3 to the GDS Contracts Regulations (repair or replacement of restorations) in respect of any patients to whom it provided treatment under its agreement, in addition to patients to whom it provides treatment under the general dental services contract.*

- (7) *An agreement shall terminate on the date stated in the notice given by the contractor under paragraph (1) unless a different date is agreed by the contractor and the Relevant Body or no general dental services contract is entered into by the Relevant Body pursuant to this regulation.*
- (8) *Where there is a dispute as to whether or not a person satisfies the conditions set out in section 28M of the Act or regulation 4 or 5 of the GDS Contracts Regulations, the contractor may appeal to the FHSAA and the Relevant Body shall be the respondent.*
- (9) *Any other dispute relating to this regulation shall be determined by the Secretary of State in accordance with regulation 8(3) and (4) of the GDS Contracts Regulations (pre-contract disputes).*
- (10) *The parties to a dispute referred to the Secretary of State in accordance with paragraph (9) shall be the contractor and the Relevant Body.'*

3.4 The PCT acknowledged receipt of the contractors notice by way of a letter dated [REDACTED] and stated that it had put into place arrangements for a new GDS contract to commence on [REDACTED]. By letter dated [REDACTED], following correspondence from the contractor, the PCT put forward two options for the new GDS contract; that either the contractor retained the same contract value (the NACV) as the PDS agreement (the NAAV of #) but provided additional activity (total # units of dental activity); or the contractor provided the same activity as the PDS agreement (# units of dental activity) and the NACV under the new GDS contract is # (which represents a reduction of # from the NAAV under the PDS agreement).

3.5 The PCT states that it has a higher than 'average value for the number of units of dental activity compared to the rest of [REDACTED] and within [the PCT area] there is a wide range of UDA values.' I understand that the PCT undertook a value for money review of all dental contracts in August 2008 and 'the intention was to redistribute either activity or resource, so that contracts at the lower end could reinvest in their infrastructure and to improve the standard of care for patients.'

3.6 The contractor correctly set out to the PCT, as provided for at Regulation 21 of the Regulations that it is entitled to a GDS contract with the same services and number of units of dental activity as set out within the PDS agreement which is to terminate. Unless the parties agree otherwise, the GDS contract should be for the same activity and services provided under the PDS agreement which is to be terminated.

3.7 With effect from 1 April 2009, Part 1, paragraph 2 of the current General Dental Services Statement of Financial Entitlements ("the SFE") provides in relation to new or first NACVs. Part 1, paragraph 2.3 and 2.4 states that:

'Payments under a GDS contract in respect of the agreed number of units of dental activity and orthodontic activity specified in the contract are to be based on a NACV.

The PCT and the contractor must agree, in respect of the first financial year during which a GDS contract has effect, a NACV for the GDS contract, based on the number of units of dental activity and, where applicable, orthodontic activity that the contractor is required to provide under its GDS contract, including where a contractor transfers from providing services under a PDS agreement to providing services under a GDS contract pursuant to regulation 21 of the PDS Agreements Regulations.'

3.8 The contractor acknowledges in its letter [REDACTED] that 'whilst the PDS Regulations are silent on the issue of the contract value for the replacement GDS contract, it is necessary to consider PCC guidance which states that it is probably implicit that the contract value should remain the same.' The contractor is accurate in its statement that the Regulations are silent on the new NACV for a GDS contract.

- 3.9 The contractor has provided a copy of a Primary Care Contracting ("PCC") document 'NHS Primary Care Dentistry: PCT powers in relation to contractual changes' which states 'a contractor providing mandatory services under a PDS agreement has a right to convert to a GDS contract at any time, subject to giving due notice to the PCT in accordance with the Regulations (Part 6, Reg 21). Unless agreed otherwise, the new GDS contract must be for the same activity and services. The Regulations do not specifically state the new contract must be for the same contract value; however this is probably implicit. Likewise, it is implicit that the new GDS contract should be without term.'
- 3.10 PCC guidance is not binding on the PCT and there is no requirement for this to be followed by PCTs.
- 3.11 I do not agree that it is implicit that the NACV for the new GDS contract should be the same as the NAAV under the PDS agreement for the reasons I shall set out in more detail below. Had the intention been for the NACV under the new GDS contract to be the same as the NAAV under the PDS agreement, this would have been set out within the Regulations. The Regulations expressly state that the same services and activity are to be provided unless agreement is reached between the parties and that the **Negotiated** (my emphasis) Annual Contract Value is to be agreed between the PCT and the contractor.

Unilateral Variation by the PCT

- 3.12 The contractor does not accept that the PCT has a unilateral right to vary the PDS agreement or the GDS contract. The contractor is correct insofar as the value of the arrangements and the number of units of dental and orthodontic activity that the contractor is required to provide during each financial year cannot be varied without the consent of the contractor.
- 3.13 Under the provisions of Regulation 21 of the Regulations, the PDS agreement must be terminated and a new GDS contract entered into. There is therefore no variation of the arrangements but a new contractual arrangement between the parties. It is open to the PCT to negotiate the NACV with the contractor and no requirement that this must be equivalent to the NAAV under the PDS agreement which is to be terminated.

Differential between PDS agreement values and GDS contract values

- 3.14 Had the contractor entered into a GDS contract from 1 April 2006 instead of electing to enter into the time limited PDS agreement with the PCT on 1 April 2006, the following provisions would have applied in relation to the NACV from 1 April 2006.
- 3.15 Part 1, paragraph 3.5 of the SFE in force at 1 April 2006 provided for NACVs for GDS contracts that replaced pilot scheme agreements.
- 3.16 The Department of Health 'Implementing Local Commissioning for Primary Care Dentistry: Factsheet 2 – Making New Arrangements with PDS Dentists' ("Factsheet 2") states that 'the agreement value should be the same as the existing PDS, providing the level of NHS commitment is equivalent to the level agreed for the pilot arrangements and subject to agreeing an appropriate level of Units of Dental Activity.'
- 3.17 Under the provisions of Article 6 of the General Dental Services and Personal Dental Services Transitional Provisions Order 2005 ("the Transitional Provisions Order") the number of units of dental activity would have been determined in accordance with Article 10 of the Transitional Provisions Order.
- 3.18 Article 10 of the Transitional Provisions Order provides for the number of units of dental activity to be provided by the contractor under a GDS contract. Article 10(5) to (7) applies in the case of entitlement to a GDS contract under Article 6.
- 3.19 Article 10(5) to 10(7) provide:

'(5) Where—

- (a) data does not exist for the period specified in paragraph (2)(a); or
- (b) data does exist, but it is appropriate to adjust the data,

the contractor and the Primary Care Trust shall agree the number of units of dental activity to be provided.

(6) *Where the contractor and the Primary Care Trust cannot agree the number of units of dental activity as provided for in paragraph (5), the general dental services contract shall state this to be the case, and shall specify a number of units of dental activity which is determined by the Primary Care Trust.*

(7) *In determining the number of units of dental activity to be specified under paragraph (6), the Primary Care Trust shall have regard to any data it holds regarding the amount of care and treatment provided under section 35 arrangements or, as the case may be, the pilot scheme agreement, by the person or persons with whom the general dental services contract is to be entered into in the period since 1st October 2004.'*

3.20 Factsheet 2 provides guidance in relation to the to units of dental activity which states as follows:

'Units of Dental Activity: the activity levels for new PDS agreements are a matter for agreement between the PCT and the dentist or practice. PCTs will wish to ensure that there is sufficient activity agreed as part of the PDS agreement to deliver an appropriate level of activity for local patients and to ensure that an appropriate level of patient charges is collected.

In setting PCTs' net budgets (which need to take into account anticipated income from patient charges), the Department has recognised that contracted activity levels for PDS agreements (measured in terms of Units of Dental Activity) are likely to be lower on average than for new GDS contracts of comparable value. We have assumed an average differential of 15% (see Factsheet 4 on 'PCT Dentistry Budgets and Patient Charge Income'. This reflects:

- *the fact that many PDS pilots have included agreements with practices to deliver other activities that cannot be measured in terms of 'Units of Dental Activity' and which do not attract patient charges, e.g. specific health promotion activities*
- *the wish to ensure that agreed activity levels are sensitive to the expectations that PDS practitioners will have had when they entered into pilot agreements.'*

3.21 Factsheet 2 also provides guidance in relation to dentists transferring from PDS to GDS as follows:

'If a practice wishes to move from a PDS pilot to a new GDS contract, then care will need to be taken when agreeing appropriate levels of Units of Dental Activity. For PDS pilots, the Department's assumptions about Units of Dental Activity allow for the need to reflect the expectations that PDS practitioners will have had when they entered into pilot agreements. Where PDS practitioners choose to move to open-ended GDS contracts, the PCT will wish to take into account the typical relationship between contract values and Units of Dental Activity for other GDS providers in their area.'

3.22 Both a GDS contract or a PDS agreement from 1 April 2006 should have had an agreement value the same as the existing pilot PDS scheme arrangements prior to 1 April 2006. Had the contractor elected to enter into a GDS contract instead of the PDS agreement, the PCT would have had regard to the # average differentials and will have wished to take into account the typical relationship between contract values and units of dental activity for other GDS provider in their area.

- 3.23 The PCT states that 'our value for money review indicates that the PDS differential for this practice is #'.
- 3.24 The PCT states that 'we believe that a # or # shift in activity or price respectively, is not an unreasonable adjustment to make and there would be greater benefits at the lower end.' Having regard to the NACV only as it is accepted that the PCT is required to offer the same activity and services under the new GDS contract, this does not appear to be unreasonable and is a significantly different adjustment to the average differentials set out with the Factsheet 2.
- 3.25 The contractor states in relation to the # differential between PDS agreement values and GDS contract values that 'this is not relevant as the quality component of our PDS agreement has always been delivered in full.' The contractor states that it is proposing to continue to provide the same range of high quality services under the new GDS contract as it was providing under its PDS agreement with the PCT. It states that it will continue to treat the same patient base and maintain its high level of commitment to NHS dentistry.
- 3.26 In exercising its right to a GDS contract, the contractor will be required to comply with the quality provisions of the GDS contract, as it would have done had it entered into a GDS contract on 1 April 2009 when the differential would have been considered by the PCT.
- 3.27 The PCT cannot require that the contractor provides additional activity under the new GDS contract. It is however entirely reasonable that the PCT, now that the contractor is exercising its right to an open-ended GDS contract, takes into account the typical relationship between contract values and units of dental activity for other GDS providers in their area. The PCT has the flexibility within the SFE to negotiate the NACV with the contractor to ensure that these considerations can be exercised when agreeing the new NACV.

Change in Risk Profile

- 3.28 The contractor states that 'at no stage in the initial PDS negotiations was there any suggested threat to practice goodwill or contract security. Had there been so, PDS contracting would have been impossible as no dentist would have signed a contract without any future stability. We can demonstrate that our contract was negotiated fairly and reflected historic turnover and security.'
- 3.29 The contractor entered into a PDS agreement with a three year term. Although the contractor may have been aware of its right to a GDS contract, the PDS agreement and its terms and obligations were for a three year term during which the contractor may terminate the PDS agreement and enter into a different contracting arrangement with the PCT, the GDS contract.
- 3.30 The risk profile of the two arrangements should be considered when assessing whether it is reasonable for the PCT to seek to reduce the NACV as it has suggested or whether it is reasonable for the contractor to require a NACV equivalent to the NAAV under its PDS agreement.
- 3.31 The PDS agreement was for a fixed term of three years which was within the final 6 months of the Term when the contractor exercised its right to a new GDS contract. The GDS contract is open-ended and subsists indefinitely. The risk profile for the contractor in the duration and contract security of its arrangement has reduced and the risk profile for the PCT in this respect has increased.
- 3.32 The activity and the services under the GDS contract will be the same as were delivered under the PDS agreement. The risk profiles of the parties in this respect is therefore unlikely to change.

- 3.33 I have assumed that the services under the GDS contract will continue to be provided from the same premises, with the same staff and equipment as provided the services under the PDS agreement. There is therefore unlikely to be a change to the risk profile of either party in this respect.
- 3.34 It would not appear to be unreasonable that where the overall risk profile for the contractor has been reduced for the PCT to propose that the contract value to be decreased as part of the negotiations.
- 3.35 The contractor states that its decision to 'convert' to a GDS contract was taken on direct advice from the PCT's Local Dental Advisor at a contractors meeting and that a reduction in contract value would destabilise the contract security and set a dangerous national precedent.
- 3.36 The PCT has sought to negotiate a NACV which is not significantly reduced from the value of the NAAV under the contractor's PDS agreement. The contractor's PDS agreement would have expired on 31 March 2009, had it not been terminated early by the contractor in accordance with Regulation 21 of the Regulations. It would not appear to be easy to accept that the NACV offered by the PCT, which the PCT states was based on best value which is consistent with the strategic priorities to improve health and to reduce health inequalities would destabilise the contract security.

Conclusion

- 3.37 The contractor states that the PCT has continued to insist that a GDS contract can only be offered to the contractor if it is prepared to accept what the contractor considers is a reduction in its annual contract value. The NACV offered by the PCT would not seem to be unreasonable having regard to all of the information provided to me and is in line with the Regulations and the SFE.
- 3.38 The contractor states that the notice, under Regulation 21 of the Regulations expired on 1 February 2009 and that the PCT has failed to produce a contract for signature which it states is in accordance with Regulation 21 of the Regulations and the Primary Care Contracting Guidance.
- 3.39 The notice dated 27 October 2008 states that 'the transfer is conditional on the new contract being without term, for the same services provided, the same UDA commitment and the same contract value per annum.' As the PCT has not accepted that the contract value per annum (the NACV) is the same as the NAAV under the PDS agreement, the contractor's conditions for the transfer have not been met.
- 3.40 The contractor's PDS agreement would have expired at the end of its term unless the contractor served a notice on the PCT in accordance with the provisions of Regulation 21 of the Regulations which did not contain conditions which were not required by the Regulations or which were agreed at the discretion of the PCT. The PCT has however stated that 'a continuation of his contract was sent to the contractor by e-mail on 25th March 2009.'

Tom Fothergill
Director of Finance