

# Returning to GDS

Alexander Hall looks at issues arising out of the PDS contractor's entitlement to convert.

Many contractors across the country are currently looking to swap their PDS agreements for GDS contracts. Why?

The end of many fixed term PDS agreements is coming closer and uncertainty surrounds what will happen in March 2011 when many

terms are due to expire. GDS contracts offer greater flexibility and opportunities for business and succession planning with the ability to take on a qualifying partner without primary care trust consent.

Contractors planning to sell their practices also require the partnership clauses only available in GDS contracts.

PDS agreement holders have an opportunity and entitlement under Regulation 21 of the National Health Service (Personal Dental Service Agreements) Regulations

2005 to convert from being a PDS agreement holder to a GDS contract holder. This tends to be known colloquially as 'returning to GDS'. The PCT is entitled to three months' notice. However, one

issue that often arises is that Regulation 21 does not explicitly oblige the PCT to replace the PDS agreement with a GDS contract

at the expiry of the three months. PCTs have even been known to demand that termination of the PDS agreement is simultaneous with the commencement of a new GDS

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contract on the first day of the next financial year. This can mean waiting for a period much longer than the three months.

In such circumstances it is worth noting (and possibly reminding the PCT of) the words of the NHSPCC guidance from January 2009 entitled *Transfer from PDS to GDS* which states: 'The PCT must acknowledge receipt of the notice requesting the transfer within seven days. It must also agree the transfer'.

Regulation 21 states that the contractor is entitled to a GDS contract for the delivery of the same services and the same number of UDAs as were delivered in the PDS agreement. Unfortunately, there is no mention of UDA or contract value.

Since an NHSLA decision in August 2009 many PCTS in these circumstances have been refusing to grant GDS contracts with the same contract value and same UDA value as the outgoing PDS agreement. PCTs have been taking the opportunity to pay less for the delivery of the same services and UDAs.

**The PCT may start off with its best case scenario offer but negotiation may, and can, lead to a better compromise.**

The NHSPCC document *PCT powers in relation to contractual changes* states 'The Regulations do not specifically state the new contract must be for the same financial value; however this is probably implicit'. However, the NHSLA did not agree. Its decision was based on two main principles:

1. There is a shift in the balance of risk borne by the respective parties, the contractor and the PCT. In PDS the PCT has an opportunity to renegotiate the contract value after a number of years at the point when the PDS agreement is to expire. The PCT does not have this opportunity with an open-ended GDS contract. At the same time the contractor obtains greater long-term security when obtaining an open-ended GDS contract.
2. The rules on values may be found in the General Dental Service Contracts Statement of Financial Entitlements (SFE). The NHSLA decision cited paragraph 2.3 of the SFE as supporting the PCT's right to renegotiate the values. Paragraph 2.3 states: 'The PCT and the contractor must **agree**, in respect of the first financial year during which the GDS contract has effect a NACV [Negotiated Annual Contract Value] for the 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'.

The NHSLA and PCTs have taken this to mean that, even when a GDS contract is being granted as a result of a PDS agreement holder exercising his right to convert ➔



- A reduction in contract value in the new GDS contract of 10-15 per cent cuts deep into the profit margins of the contractor.

Under Regulation 21, the first contract value - the NACV - must be 'agreed' and therefore PCTs are not obliged to offer the same contract value.

Unfortunately, a reduction in contract value in the new GDS contract of 10-15 per cent has not been uncommon. This cuts deep into the profit margins of the contractor. What can contractors do about it?

The wording of paragraph 2.3 of the SFE can be helpful to the contractor. PCTs who have a 'take it or leave it' attitude to the offer of the new GDS contract value should take note that the new contract value must be 'negotiated' (the 'N' in 'NACV') and 'agreed'. Whilst the PCT may start off with its best case scenario offer, negotiation may and can, lead to a better compromise. Contractors should discuss with the PCT what else the PCT would like and often the first offer can be renegotiated upwards on the basis that the contractor agrees to other

changes, for example, increased opening hours or the delivery of access or emergency sessions.

Furthermore, it is noteworthy that the decision was made by the NHSLA in circumstances where the NACV was 'not significantly reduced from the value of the NAAV under the contractor's PDS agreement' (paragraph 3.36 of the NHSLA decision). Whether a proposed reduction is 'significant' or not can be argued both ways in many circumstances by the contractor and the PCT. A PCT may argue a reduction of ten per cent is not significant but such a reduction looks very different when put into context. For example, such a reduction, when the same services and the same number of UDAs shall continue to be delivered, can amount to a 50 per cent reduction in the profits of the practice attributable to the contract. Whether the value in the PDS Agreement was relatively high or low in the first place is also relevant.

The negotiation that can follow

the PCT's first offer can lead to a withdrawal of the three month notice by the contractor. Whilst under the Regulation 21 procedure a contractor is entitled to a contract for the same number of UDAs - not more or less - some contractors and PCTs have by agreement departed from the Regulation 21 process and have agreed to maintain the contract value in the GDS contract whilst agreeing to increase the number of UDAs that must be delivered year on year. This dilutes the UDA value but many contractors have preferred this approach rather than agree to a reduction in contract value.

Contractors faced with this situation should be aware that their position can be improved by a close consideration and use of the wording of the SFE and the NHSLA decision and by negotiating with the PCT. ■

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