NHS Contracts – all change?

As the three-year, protected-income period for NHS contracts/agreements ends in March, Tim Lee offers some advice for NHS practitioners

In March 2008 the health minister, Ann Keen, announced that NHS funding for dentistry would be ‘ring fenced’ from 2009 for a further two years. Some think this means dentists’ protected income levels will also be extended to 2011; unfortunately, one does not necessarily follow the other, unless the Government makes fundamental changes to the two current Statements of Financial Entitlements (SFE).

New SFEs are due later this year/early 2009, and we’ll have to wait and see, but don’t be too surprised if there’s nothing in them to change the current timetabling for protected income – I’m assuming there will be no changes.

We’ll remain as we are at the moment then, for GDS contracts, Calculated Annual Contract Values (CACVs, based upon the baseline year) remain only in force until March 31 2009. After this time, CACVs will be replaced by Negotiated Annual Contract Values NACVs. For PDS Agreements, ‘Calculated Annual Agreement Values’ will be replaced by ‘Negotiated Annual Agreement Values’.

However, the PDS SFE is not very clear on the methodology by which CAAVs are to be replaced by NAAVs; it appears to suggest that NAAVs are to be calculated/agreed very much on the same basis as in 2006. Perhaps the new SFE will clarify the position.

Don’t hold back

The practical tip is to act NOW, (not at the end of March). Find out whether your PCT/LHB intends any significant changes to your contract/agreement. Speak to your LDC with a view to uniformity of approach in the process. Time is short – you need to move quickly.

If the PCT/LHB proposes unacceptable changes, remember that the Regulations require both sides to make ‘every reasonable effort’ to seek to resolve the dispute. If not, the matter can be referred for determination by the NHSLA.

By the time you read this, I expect that South Birmingham PCT’s appeal judgement in the judicial review case brought by Dr Eddie Crouch will have been heard. The High Court upheld Dr Crouch’s application for a review of the decision of the NHSLA to uphold a notice clause in his Agreement which allowed the PCT to terminate that Agreement without grounds, and on a date set out in the notice (as opposed to the agreement either continuing for its duration or only being terminable on the specified grounds of the agreement).

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If the PCT’s appeal, against Dr Crouch’s successful application, is dismissed, then PDS contractors may be in a stronger negotiating position with their PCTs/LHBs.

Pre-contract disputes

On the subject of appeals to the NHSLA, there are still some pre-contract disputes rumbling on, virtually three years down the line.

**Tip** – there is a ‘time limitation’ on appealing pre-contract disputes to the NHSLA—the referral to the NHSLA must be made within three years from the beginning of the dispute. If you are involved in an ongoing pre-contract dispute, not yet referred to the NHSLA, then your time is rapidly running out!

**Tip** – now is the time (if you’ve not done it yet—and some have not) to check that your contract/agreement paperwork is in order. I recently came across a case where the practitioner was unable to produce his PDS Agreement, and maintained that no such written agreement had ever existed. If he was right, both he and the PCT were in breach of the Regulations and the ‘contractual’ relationship might have been null and void. This is an extreme case, but does make the point that paperwork is not always in the state we imagine.

**Tip** – check your GDS Agreement. Ensure that Clause 16 (in the ‘standard’ form agreement) is correctly completed. The GDS Regulations state that a contract must provide for it to subsist until it is terminated in accordance with the terms of the contract or the general law. There are contracts out there, which are, nonetheless, expressed to expire on the March 31 2009—this could clearly lead to problems, so it’s worth getting it corrected now. Recent guidance from the Department of Health (DH) to PCTs suggests that it is possible for there to be ‘fixed term’ GDS contracts. I’m not convinced that’s right, except where the Regulations allow for temporary fixed term contracts in certain limited circumstances.

**Tip** – if your GDS Contract is incorrectly worded, get it corrected by agreement with the PCT/LHB—if the PCT/LHB won’t co-operate, then be prepared to refer to the NHSLA—bear in mind the time limits. You don’t want, at the end of March 2009, for the PCT/LHB, to claim that your GDS Contract has terminated!

**Tip** – PDS contractors should ensure that their PDS Agreement is correct as to term. PDS Agreements carrying on the old pilot scheme arrangements, should terminate no earlier than the end of the term for the original pilot scheme agreement. Orthodontists’ PDS Agreements entered into as from the April 1 2006 are required to have a duration of ‘not less than five years’ (Transitional Provisions Order Article 21).

**Tip** – PDS Contractors providing mandatory services should review their right, under Part 6 of the PDS Regulations, to ‘convert’ their PDS Agreement to a GDS Contract. Your decision will depend upon your circumstances.

**Tip** – the formalities include the contractor notifying the PCT/LHB ‘in writing’ at least three months before the date on which it wishes the GDS Contract to be entered into. That notice also requires the contractor to give the date on which they wish the agreement to terminate ‘which must be at least three months after the date of serving the notice’. Might a PCT/LHB try to argue the invalidity of a notice if given less than three months before the expiry of PDS Agreement? Please make sure of your dates.

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