The legal fallout

Alex Hall discusses the implications of converting from PDS Plus to GDS contract.

When a provider is looking at starting the process of converting a PDS Plus agreement to a GDS contract (under Regulation 21 of the 2005 PDS Regulations) there is normally a degree of trepidation – quite understandably, as it is not uncommon for area teams to insist that the value of the GDS contract should be significantly lower than the value of the PDS agreement. Over the years various approaches have been taken by NHS England in determining the negotiated annual contract value (NACV) of a new GDS contract in these circumstances. There have been a few developments recently to consider which prompted me to write this article:

- The decision in Hilsea Dental Limited and others (File Ref: 18215, 18216 and 18217).
- The issue, in January 2016, of NHS England's new *Policy Book for Primary Dental Services*.
- Area teams notifying PDS Plus agreement holders, on mass in some areas, that their PDS Plus agreements may be converted to GDS contracts within a fixed time frame (on their imminent expiry) and that the GDS contract value will be the "service activity" element only of the PDS agreement.

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Hilsea Dental Limited and others

It wouldn't be unfair to say that some area teams have been very rigid in applying the principle that when a PDS Plus agreement is converted into a GDS contract, it is only the "service activity" element for payment of UDAs that should be taken into account

when determining the new NACV. This approach is based upon the provision contained in the majority of PDS Plus Agreements, at paragraph 2.5 of Schedule 3, which identifies that the service payment acts as the "base" of a NACV.

This was the approach taken by the Wessex Area Team in Hilsea Dental Limited and others (File Ref: 18215, 18216 and 18217). The area team maintained that they were unable to negotiate a NACV and that the service activity acted as a maximum NACV for the new GDS contract.

Although the National Health Services Litigation Authority (NHSLA) which heard the case acknowledged the above mentioned provision at Schedule 3 of the PDS Plus agreement, it found that the service activity was merely a starting point for negotiating the NACV, a minimum, and that NHS England must consider whether the services would be "safe and viable" at such values.

The parties were instructed to undertake this exercise, returning only to make submissions on the point of safety and viability if the parties could not reach an agreement as to the new NACV. The case is ongoing at the time of writing.

The approach taken by the NHSLA is in accordance with:

- The previous guidance (in the NHS England Policy issued in April 2014 – 'Transfer from a personal dental services agreement to a general dental services contract') which indicated that the service element was a minimum and that: "On request to transfer the area team will need to undertake a review of the oral health needs assessment and service provision available and where appropriate can negotiate an appropriate GDS Contract Value."
- The GDS Statement of Financial Entitlements 2013. This provides, at clause 2.2, that the NACV should be "agreed" by the board and the contractor based on the units of dental activity; this specifically includes these circumstances where a contractor transfers from providing services under a PDS Plus agreement to providing services under a GDS contract.

The case emphasises the importance of the GDS contract value being negotiated, and enabling the continuation of safe and viable provision of services. It is an important insight into how the NHSLA believes area teams should frame their approach to these matters.

Policy Book for Primary Dental Services

This policy book, issued in January of this year, is described as "replacing individual policies that have been available on the NHS England website" which would include the above mentioned conversion policy.

Unfortunately, there is little useful additional guidance in relation to the conversion of PDS Plus agreements in the policy book, other than confirming:

- That there is a right of PDS Plus agreement holders to convert to a GDS contract (in accordance with Regulation 21 of the National Health Service (PDS agreements) Regulations 2005).
- That clauses 3.1-3.17 (setting out a notice and negotiation procedure for PDS agreements) also apply to PDS Plus agreements.
- In section 4 of the guidance (the only specific provisions in relation to PDS Plus agreements) paragraph 2.5 of Schedule 3 applies and the service payment applies as a "base" for the GDS contract value; in essence repeating what is stated in the PDS Plus agreement itself.

This guidance isn't clear and is somewhat contradictory. Whilst indicating that the NACV should be based on the service element payment of the PDS Plus agreement, it also suggests that a negotiation process is expected following the service of the conversion notice.

Mass forced conversion

Some PDS Plus agreement holders have been advised that they may only continue to provide the services they have been providing under their PDS Plus agreements beyond their expiry (after March 2017) if they agree to a new GDS contract to follow on with a contract value equal to the service element of their current PDS Plus agreement. The letters which have been received give the impression that there is no scope for any negotiation.

PDS Plus agreement holders are understandably concerned about such proposals. However, given the decision in Hilsea, and the new policy book guidance, it is clear that there is supposed to be some degree of discussion or negotiation with NHS England and that the provision of services must remain "safe and viable".

It may be that area teams will argue that contractors, by signing the PDS Plus agreement containing paragraph 2.5 of Schedule 3 (as referred to above), agreed the minimum service element GDS contract value in advance from the outset. However, there is scope to argue that such agreement is in contradiction of law made since (the GDS Statement of Financial Entitlements), meaning that the provision is void.