

# **Briefing Paper: Termination of Dental Contracts and Sale of Goodwill**

This document has been prepared to assist PCTs in handling the termination of NHS primary care dental contracts and agreements, both in terms of handling discussions with outgoing and incoming contractors and ensuring continuity of care for NHS patients. For convenience, the relevant references to the GDS/PDS Regulations, GDS/PDS Statement of Financial Entitlements, Transitional Provisions Order etc are included as footnotes.

## **1. Background**

One of the most important changes brought about by the new NHS dental contract was to devolve responsibility for commissioning local NHS dental services to PCTs. For the first time, PCTs now have the financial resources and commissioning tools to shape local dental services directly in line with the needs of their local populations. All practitioners who signed the new GDS contracts or PDS agreements which came into force on April 1<sup>st</sup> 2006 automatically have security of tenure for three years. But what happens when a contractor wishes to sell or transfer his or her business during the course of this period?

Practitioners have highlighted concerns over the following clause in national model GDS contracts and PDS agreements on the grounds that it prevents the contract value from being transferred or sold:

*The contractor shall not give, sell, assign or otherwise dispose of the benefit of any of its rights under this contract, save in accordance in with contract. The contract does not prohibit the contractor from sub-contracting its obligations arising under the contract where such sub-contracting is expressly permitted by the contract.*<sup>1</sup>

This statement has been interpreted by some practitioners as affecting the 'goodwill' of the practice and, therefore, its saleability in the future. This is not strictly true. However it is the case that, because dental contracts are personal contracts between the parties, a successor contractor cannot be assigned by the practice wishing to sell. This has been supported by NHSLA determinations. Instead, a PCT should end one contract and decide whether to issue a new one in order to replace the lost capacity (this may be at a different level and location to the previous contract, depending on local needs and priorities).

Other than when clause 12 applies, a contract or agreement may be terminated only in certain circumstances. It is worth studying Part 9 of Schedule 3 of the relevant Regulations, but in summary these are:

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<sup>1</sup> Model General Dental Services Contract, Part 2, Clause 12: same clause number in PDS model agreement

**By the contractor**

A contractor can terminate their dental contract by giving three months' notice in writing to the PCT at any time. The contract will expire on the last calendar day of the month in which the termination date falls<sup>2</sup>.

**By mutual agreement**

The PCT and contractor may agree (in writing) to terminate the contract at any time.<sup>3</sup>

**Upon death of the contractor**

Where the contract (or agreement) is with a single individual, it may be terminated within 7 days of date of death, subject to certain provisos<sup>4</sup>

**By the PCT**

A PCT can only terminate a contract (agreement) unilaterally if

- o the contractor's financial situation is such that the PCT considers itself at serious risk<sup>5</sup>
- o the contractor has breached the contract and in consequence, there is a serious risk to patient safety<sup>6</sup>
- o if the contractor is no longer eligible to hold a contract
- o if the contractor has provided untrue or inaccurate information in a "material respect"<sup>7</sup>
- o on grounds of suitability<sup>8</sup>
- o if the contractor has committed a serious breach of contract (other than the above)<sup>9</sup>
- o for PDS agreements, by serving notice in writing on the contractor at any time – in which case, the agreement terminates on the date provided for in the agreement<sup>10</sup>
- o (for DBCs, partnerships of two or more individuals and qualifying bodies) if the contractor is carrying on any business which the PCT reasonably considers to be "detrimental to the contractor's performance of its obligations under the contract (agreement)."<sup>11</sup>

In all situations, the PCT is not obliged to pass on the existing contract to the new owner of the business and many choose not to do so.

<sup>2</sup> GDS Regulations, Part 22, Clauses 309, 310, 315

<sup>3</sup> GDS Regulations, Schedule 3 Part 9, Clause 64 (Clause 62 of PDS Regulations)

<sup>4</sup> GDS Regulations, Part 9, Clause 65 (Clause 63 of PDS Regulations)

<sup>5</sup> GDS Regulations, Schedule 3 Part 9, Clause 72 (Clause 70 of PDS Regulations)

<sup>6</sup> GDS Regulations, Schedule 3 Part 9, Clause 72 (Clause 70 of PDS Regulations)

<sup>7</sup> GDS Regulations, Schedule 3 Part 9, Clause 70 (Clause 68 of PDS Regulations)

<sup>8</sup> GDS Regulations, Schedule 3 Part 9, Clause 71 (Clause 69 of PDS Regulations)

<sup>9</sup> GDS Regulations, Schedule 3 Part 9, Clause 73 (Clause 71 of PDS Regulations)

<sup>10</sup> PCTs should note:

(a) that Regulation 12 of the PDS Regulations provides that an agreement must specify the duration of the agreement. That does not mean the Agreement cannot be terminated in accordance with the terms of the Agreement. The "/" between the two phrases in paragraph 16 of the Model Agreement should be read as an "or"

(b) for transitional cases, clause 21(1) and (2) of the Transitional Provisions Order 2005 are relevant. Paragraph (1) of clause 21 provides that in the case of entitlement to a PDS agreement under clause 14 (pilot scheme providers), the duration of the agreement must be for a period not less than the unexpired period as at 31st March 2006 of the pilot scheme agreement. Paragraph (2) of clause 21 provides that in the case of entitlement to a PDS agreement under clauses 16(individual dentists who provide only orthodontic care and treatment) or 17(partnership that provides only orthodontic care and treatment), the duration of the agreement must not be for a period of less than 5 years.

c) the variation and termination provisions as provided for in the PDS Regulations are required terms in the agreement as is the requirement to specify the duration of the agreement. The effect is that the termination provisions can "kick-in" during the period of the duration of the agreement.

In the light of this advice, PCTs may wish to consider amending their PDS agreements (Schedule 3, Part 9 clause 60 enables PCTs to vary the agreement unilaterally in such circumstances).

<sup>11</sup> GDS Regulations, Schedule 3 Part 9, Clause 74 (Clause 72 of PDS Regulations)

### **3. Incorporation<sup>12</sup>**

If a practice becomes a Dental Body Corporate (DBC) – either as a Private Company Limited by Shares or a Limited Liability Partnership – then a new GDS contract or a new PDS agreement is required that includes the specific provisions relating to DBCs, as well as the new signatories. It follows therefore that the previous contract or agreement held by the practice will terminate by virtue of incorporation. In most cases, this will be a straightforward like-for-like contract transfer.

### **4. Transitional issues**

Transitional issues may need to be taken into account, including assurances about the completion of current courses of treatment, recovery of capital grants where relevant and other issues such as outstanding payments.

[See annex A]

### **5. Replacement of terminated contracts**

Where the PCT recommissions services from a new provider, the value of the contract is a matter for agreement between the PCT and the new contractor. For this reason, should a contractor wish to sell on his/her practice, or incorporate, it is advisable for him/her to involve the PCT in discussions as early as possible so that the PCT can ascertain whether there is a requirement to continue to commission services in that location. If this is the case, the PCT needs to assess the following:

- the level and type of NHS dental services required (this may be different to that currently being provided)
- the new contractor is an appropriate fit in terms of the local health needs assessment and PCT priorities
- the new contractor is an appropriate resource in terms of the categories of provider with whom the PCT can enter into a contract/agreement.

It is particularly important for the PCT to ensure that the replacement practitioner is committed to delivering the required amount of NHS dental services. If the new provider is not in a position to provide the full level of capacity required, the PCT will need to commission additional services from other nearby contractors and therefore will need to plan for this.

[These points are expanded into a detailed checklist in Annex A.]

### **3. Partnership changes**

Minor changes to contracts with an individual contractor or two or more individuals practising in partnership are dealt with in GDS/PDS Regulations, Schedule 3, part 9. Such changes do not necessarily mean the contract has to be terminated – there is provision for:

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<sup>12</sup> See also Dental Bodies Corporate briefing paper on PCC website: <http://www.pcc.nhs.uk/136.php#Contracting>

- partnership changes (partners leaving or joining an existing partnership)
  - sole practitioners becoming a partnership
  - dissolution of a partnership (including death of a partner)
- to be dealt with as contract variations, subject to satisfactory information being provided to the PCT.

PCTs should note that incorporation is not a “minor change” in this context.

#### 4. *When associates leave*

- Practice-based contracts

Because performers are essentially subcontractors with practice-based contracts, internal changes in the practice (such as an associate leaving) are a matter for the practice to deal with, not the PCT - as long as the required UDA levels are still being maintained.

- Individual contracts

In this case, if an associate leaves, his/her contract will automatically terminate. PCTs are free to pursue the option of a ‘like for like’ replacement in the same practice, but this is not an obligation - the practice owner/contractor cannot expect automatically to retain the funding.

#### 5. *Ensuring continuity of NHS care for patients*

Clause 357.3 of the GDS contract (clause 333 of the model PDS agreement) requires contractors *‘to cooperate with the PCT to enable the contractors’ patients<sup>13</sup> to be transferred to one or more other contractors or providers of mandatory services which include providing reasonable information about individual patients to such other appropriate person(s) as the PCT specifies’.*

The purpose of this clause is to ensure continuity of NHS care, so that patients whose course of treatment has not yet been completed when the termination takes effect can have their treatment completed under the NHS, if they so wish. It **does not** require the outgoing contractor to hand over details of all the patients on the practice’s books to the PCT.

This clause has sometimes been misinterpreted to mean loss of the practice’s goodwill, and that all patients will automatically be transferred to another provider. This is not the case. Further advice, including suggested working for inclusion in a local policy to ensure continuity of care, can be found on the PCC website at: [http://www.pcc.nhs.uk/uploads/Dentistry/june\\_2006/dental?contract\\_dispute\\_resolution\\_workshop.pdf](http://www.pcc.nhs.uk/uploads/Dentistry/june_2006/dental?contract_dispute_resolution_workshop.pdf)

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<sup>13</sup> Under the new Regulations a patient is defined as ‘a person to whom the contractor is providing services under the contract/agreement’. In other words, someone who is currently undergoing active treatment.

## ***7. Contract termination as a catalyst for review***

It is recommended that PCTs encourage practice owners/contractors to discuss with them early on any potential changes in the NHS dental services they are providing, particularly those which lead to termination of the contract eg

- Proposed sales or transfers
- Incorporation

The termination of a contract provides a good opportunity for PCTs to review the current services provided against their local needs assessment and dentistry priorities. (If a needs assessment/action plan has not already been undertaken, it is advisable to carry one out soon as possible so the PCT is able more easily to explain and justify any investment or disinvestment decisions that it makes.)

## ANNEX A

### *Factors to take into account on issuing a new contract*

The checklist below lists the various points that PCTs may wish to consider or check prior to commissioning services from a new practice owner. Some of these issues do not necessarily mean the PCT would have a problem with issuing a new contract but they may inform discussions with the new owner and contract provisions.

- a) **that the new owner/contractor/Dental Body Corporate falls within the categories of person that the PCT is able to enter into a GDS contract or PDS agreement with**
  - performers list
  - GDC list of Dental Bodies Corporate<sup>14</sup>
  - no significant adverse issues relating to the prospective owner's previous or current contracts
  
- b) **that entering into a contract with that person is justified in terms of the local health needs assessment and PCT priorities**
  - what activity level is required
  - whether any activity "steps" are to be included
  - type of services (mandatory, additional, specialist)
  - categories of patients for whom treatment is to be provided
  
- c) **that the new contract offers value for money**
  - depending on the likely contract value, the PCT's SFIs may dictate that the service is put out to tender. Dental services are classified as "medical services" which are on the B list for OJEU tenders. This means that they are exempt from the OJEU full tender process but the PCT should:
    - ensure fair competition is undertaken and that no potential supplier is disadvantaged by the process or requirements of the tender
    - make sure the decision to award is based upon evaluation criteria that are linked (and this can be demonstrated) to the requirements of the specification.
    - specification must include all technical and professional requirements
    - an award notice is placed through OJEU

Though the full EU tender process does not have to be applied the principles of fairness and open competition must be - any unsuccessful suppliers may challenge the PCT legally if they believe this was not the case.<sup>15</sup>
  - PCT may wish to consider local benchmarking
  
- d) **that the practice is in the "right" location**
  - in the event of a contractor wanting to sell in an area where there already sufficient dental services available, the PCT could elect to assist the move of the purchaser to an area of high need. A capital grant <sup>16</sup>could help incentivise this.

<sup>14</sup> Prior to the new list being implemented, PCTs should satisfy themselves that a majority of the DBC's Directors are dentists or Dental Care Professionals (or any combination of the two)

<sup>15</sup> See also advice re tendering & procurement on PCC website:

[http://www.pcc.nhs.uk/136.php#Tendering\\_Procurement](http://www.pcc.nhs.uk/136.php#Tendering_Procurement)

<sup>16</sup> See guidance issued 12 July – Capital funds for NHS Primary Care Dentistry

- e) practice environment & equipment**
  - any issues that need to be addressed eg DDA compliance. A capital grant <sup>17</sup> might be appropriate
- f) are there any quality and clinical governance issues?**
- g) are there any local PCT policies which define contract delivery expectations that need to be explained/discussed?**

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<sup>17</sup> See guidance issued 12 July – Capital funds for NHS Primary Care Dentistry