



NHS Orthodontic Contract Advice

For Primary Care Trusts

NHS Orthodontic Contract: Advice for PCTs (October 2010)

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Executive summary

The majority of NHS orthodontic services are delivered under time-limited PDS agreements and the majority of these agreements are likely to reach the end of their agreed term on 31 March 2011. PCTs may need to make decisions on how to recommission services beyond this date

There are a number of options available to PCTs when reviewing the expiry of current NHS orthodontic contracts, and a PCT's individual approach will vary depending on a number of factors, including those that are outlined in this paper.

All PCTs are advised that each individual contract should be assessed on its own merits. A decision about how to recommission contracts should be taken on an individual contract basis.

Purpose

1. To provide Primary Care Trusts (PCTs) with advice on how to approach the review of existing NHS orthodontic contracts which are expected to expire at the end of March 2011, in order to maintain continued access to services for patients.
2. A table of options for PCTs reviewing the expiry of current contracts is provided at Annex A.

Background to NHS Orthodontic Contracts

3. Dentists providing orthodontic services were transferred to either a new Personal Dental Services (PDS) agreement or new General Dental Services (GDS) contract in April 2006. Those providing both general dental services and orthodontic services were transferred to GDS contracts. Specialist practitioners whose work was limited to orthodontic services were transferred to new PDS agreements with a recommended minimum contract duration¹ of five years. The majority of these agreements are likely to reach the end of their agreed term on 31 March 2011.
4. Under GDS contracts, dentists are required to provide mandatory services². Practices providing only orthodontic services do not provide the full range of mandatory services and so cannot hold a GDS contract.
5. Orthodontic courses of treatment normally take between 18 months and two years to complete.
6. Approximately 800 orthodontic agreements transferred to the new PDS Agreement in 2006. The total annual value of these agreements (at 2006 prices) was circa. £175m. Contracts were awarded only to existing contract holders in 2006 and the majority of service provision remains in locations where contracts were based at that time.
7. The majority of NHS orthodontic services are delivered under time-limited PDS agreements³.
8. PCTs are required under the NHS Act (2006) to commission services to the extent that they consider it necessary to meet all reasonable requirements within their area. PCTs may need to make a decision on how to re-commission services beyond March 2011, as many contracts are expected to expire imminently.

¹ Gateway 5865, Primary Dental Services: Commissioning Specialist Dental Services (revised version)

² As set out in Regulation 14 of the NHS (General Dental Services Contracts) Regulations 2005

³ A small amount of additional activity has been commissioned by PCTs in subsequent years using PDS agreements and mixed GDS contracts (UDAs and UOAs).

9. There are a number of options available to PCTs when reviewing the expiry of current NHS orthodontic contracts, and a PCT's individual approach will vary depending on a number of factors, including those that are outlined in this paper.
10. The Principles and Rules of Cooperation and Competition⁴ set out the overriding principles that govern commissioning decisions within the NHS. Additionally, when making procurement decisions PCTs must give due consideration to the "Procurement Guide for Commissioners of NHS-Funded Services"⁵.

Workforce

11. The British Orthodontic Society (BOS), which represents orthodontic practitioners across the UK, conducted a survey in 2008 to look at the current status of orthodontic training in the UK. The BOS figures suggest a minimum of 40 new orthodontists are required per year required to maintain current provision levels and 35 to 40 new specialists are being accredited each year but not all of these remain within the UK. Further information from the survey is available at Annex B.

Current Market Activity

12. Between September 2008 and September 2010, 12 procurement advertisements for NHS orthodontic services have been placed on NHS Supply2Health⁶. One of these was a joint advertisement for services in three different PCTs.
13. The North West Dental Observatory are expected to publish a National Epidemiological Survey of 12 year olds before the end of 2010, which will contain data on current orthodontic needs and demand⁷.

View of the Profession

14. The BOS has been receiving large numbers of queries from practitioners in England seeking advice about what is going to happen to contracts that are coming up for expiry in 2011.
15. The BOS holds the view that, provided a PCT is happy with a service, and if it is needed, the best outcome would be for a new agreement to be awarded under a Single Tender Action process with the existing provider. The BOS acknowledges that some services may need to be tendered (eg where current providers were not delivering an adequate level of service). Additionally, the BOS does recognise that it would be

⁴ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118221

⁵ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118218

⁶ <http://www.supply2health.nhs.uk>

⁷ <http://www.nwph.net/dentalhealth>

reasonable for PCTs to work with providers to negotiate terms with a view to improving value for money (measured in both service quality and cost).

16. The BOS, on behalf of the profession, is concerned that

- the current uncertainty is damaging from a commercial perspective
- PCTs do not understand the implications for providers and patients of switching agreements
- any change in provider could have an adverse impact on continuity of care for patients. Great emphasis has been placed on this as the BOS believes that it is difficult to take over from another practitioner during a course of treatment as there are many different ways of undertaking particular procedures, eg different types of brace may be used.
- if decisions are not made soon about whether or not to tender there will be insufficient time to ensure services are in place from 1 April 2011
- interim solutions - whilst a longer term approach is developed - may prolong the uncertainty, although there is recognition that this may be necessary as there is little time left between now and 31 March 2011.
- providers are unclear about the treatment of their Agreements at the contract expiry date as some providers expected the Agreement to be of a 'rolling nature' and with adequate notice if there was to be no renewal. This makes it difficult for providers to follow the transitional provisions (if included) whereby no new patients are accepted after a certain date.
- The length of the patient care pathway, which can be 2 – 3 years including supervised retentions, may not be receiving due consideration in re-commissioning proposals.

17. There is recognition that quality improvements may need to be sought and that these would be possible to deliver. Also acknowledged is the fact that PCTs' ability to assess for quality was improving, supported by the recently developed vital signs data. In addition the BOS has suggested that the current Peer Assessment Rating system could be strengthened.

Reviewing NHS orthodontic contracts on expiry - considerations to take into account

18. The White Paper, *Equity and excellence: Liberating the NHS*⁸, sets out the Government's proposals for the NHS. Following the recent period of consultation and engagement, the Department will be setting out a consultation response later this year. Many of the proposals require primary legislation, so are subject to Parliamentary approval.

⁸ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

19. The White Paper proposes that a new NHS Commissioning Board, which would be established in shadow form from April 2011 and take on most of its functions from April 2012, will have responsibility for commissioning some services, including primary dental services
20. The Government has also committed to a new dental contract, and plans to make an announcement about pilot arrangements by December 2010. However, this should not affect the decisions that PCTs reach on orthodontic contracts in the interim.
21. PCTs may wish to take into account the following issues in light of these factors:
 - a. **Length of contract:** Whether to extend the contract for limited period or whether to award a longer term contract to improve quality and value for money.
 - b. **Impact on Value for money:** PCTs are under an obligation to ensure services offer value for money. PCTs need to balance the potential benefits of an open and competitive procurement, in terms of quality and value for money, with the potential risks if the proposed contract period is too short (which could increase the market's perceived risk and may lead to higher prices for services). To run a procurement for a short contract duration may not represent the best value for money and may be considered disproportionate (see the Guide paragraph 1.36). (For example, a 6-month procurement process for an 18 month low value contract may be considered disproportionate.)
 - c. **Early Termination:** In the event that an alternative contracting approach is implemented for NHS orthodontics before any contract expires, there may be significant complications for those contracts. PCTs do not currently have a clear option to terminate the procured contract on notice as the Courts have ruled against termination on notice. Consideration should be given as to whether a shorter term or an early specific break clause could be inserted into the new contract. However, the inclusion of such a term or break clause could feed through into the bidders pricing for the contract to reflect the increased risk in the shorter term contract
 - d. **Consulting future commissioners:** PCT commissioners should contract for services knowing that the NHS Commissioning Board may have taken over commissioning the service from April 2012. Bidders for the new contract may attach a risk factor to not being clear who will hold and manage the contract in future, as well as uncertainty over the likely nature of relationship with the new contract holder.

About this guidance

22. This section sets out, in more detail, some of the specific considerations PCTs should make when reviewing NHS orthodontic contracts services prior to making a decision to re-contract or re-tender.
23. PCTs are expected to ensure that any procurement activity complies with the DH Principles and Rules for Cooperation and Competition⁹ and the Procurement Guide for Commissioners of NHS Funded Services (the Guide)¹⁰. The options outlined within this paper, and presented in the table in Annex A, may be used to inform the PCT's procurement decisions within the above mentioned guidance.
24. The Guide establishes that PCTs are responsible for making tendering decisions at a local level:
- 1.11 The onus is therefore on commissioners to demonstrate rationale for their actions and decisions (e.g. Tender / No Tender decisions). It does not obviate the need to take legal advice, or advice from other sources such as SHAs and CSUs, as necessary.*
25. All PCTs are advised that each individual contract should be assessed on its own merits. A decision about how to re-commission contracts should be taken on an individual contract basis.
26. PCTs must consider how communications will be handled in respect of patients and providers, irrespective of the option(s) that they pursue.

Recommended options

27. PCTs, having confirmed the need for an NHS orthodontic service, are recommended to:
- a. Review provisions for termination or extension of current contracts – any further contract review decisions should be made within the context of these provisions; and
 - b. Make a market assessment to determine the level of interest in provision of services from current and new providers. PCTs may wish to make use of the NHS Supply2Health 'notice' function. The outcome of such an exercise can inform the PCT's decision on commissioning contracts on an individual basis. PCTs should also give due consideration to their own internal governance procedures and requirements.

⁹ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118221

¹⁰ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118218

28. Readers of this paper should note that there is no risk free option for PCTs to pursue. All of the options will comprise a certain level of risk, which will vary between and within options.
29. In summary, the options for re-commissioning services are outlined in the table in Annex A. The PCT needs assessment may determine the need for more than one option to be pursued eg an extension of a current contract for a defined transition period plus a signal to procure services.

Annex A - Potential PCT Options for Re-commissioning NHS Orthodontic Services, Post-contract Expiry

PCT Option	Benefits	Risks	Commercial / Clinical Considerations	Legal summary of option
<p>1. Existing Agreement expires and services not re-commissioned.</p>	<ul style="list-style-type: none"> ▪ Would be appropriate under the following circumstances: ▪ - PCT is confident from its needs assessment that the service being delivered is no longer required for local patients or the service is no longer required in the current location. ▪ - There are objective concerns regarding service performance or quality. 	<ul style="list-style-type: none"> ▪ Some patients with a continuing need to access services may need to travel further. ▪ Impact on surrounding providers requires PCT to ensure adequate capacity to meet patient needs. ▪ Current provider may challenge PCT's decision. The PCT's needs assessment must therefore be robust and appropriately evidenced. 	<ul style="list-style-type: none"> ▪ PCT will need to secure the ongoing treatment for patients who are part way through a treatment cycle, which may be up to 2 years and needs to include supervised retentions ▪ PCT should approach providers as soon as possible to make clear that the contract will not be extended and to discuss treatment of "new starts" in the pre-expiry phase. ▪ Where there is a material transfer of activity to other providers, there may be TUPE considerations for provider salaried employees– in which case the PCT will need to take legal advice where this is likely. ▪ PCT will need to identify whether there has been any form of capital grant made to the provider for the contract and whether there are any conditions that are relevant to the contract expiring. 	<ul style="list-style-type: none"> ▪ If, following a local needs assessment, the PCT is satisfied that the service is no longer required, the contract may be allowed to end on its expiry date. ▪ However, the PCT must ensure that appropriate arrangements are put in place to manage the exit period of the contract and that consideration is given to continuity of care for those patients who are part way through an orthodontic treatment cycle (which may or may not continue with the existing provider under a separate arrangement). This could potentially be facilitated by requesting that providers enter into separate "Exit Agreements" to deal with the remainder of any treatment cycle for these patients. ▪ Both the provider and the PCT must fulfil their regulatory obligations concerning termination of the Agreement. Both the PCT and the provider will need to be clear whose responsibility patients are in the treatment cycle. The BOS has published guidance on their website for providers on obligations at close of contract.

PCT Option	Benefits	Risks	Commercial / Clinical Considerations	Legal summary of option
<p>2. Award Agreement under Single Tender Action to current provider for defined transition period</p>	<ul style="list-style-type: none"> ▪ Allows time for a more clearly planned transition to a longer term solution in-line with the future policy for dental services. ▪ Offers practical ability to clarify exit / transition arrangements. ▪ The orthodontic care pathway is unique in elective care due to the length of patient treatment (i.e. up to two years plus supervised retention). An extension will allow the PCT to build this into their procurement strategy to maintain continuity of care for patients. ▪ Would be appropriate under the following circumstances: ▪ - Quality and activity of services already provided is adequate / good. 	<ul style="list-style-type: none"> ▪ Delays the opportunity to market test current value for money achieved by the Agreement. ▪ Risk of challenge from alternate providers wishing to enter the market. ▪ May signal to non-contract holders that it will be difficult to enter NHS Orthodontic market in short-term. ▪ May not address any performance issues if contract awarded to current provider without an appropriate variation. 	<ul style="list-style-type: none"> ▪ Allow explicit incorporation of Vital Signs indicators (including Peer Assessment Ratings – PAR) into performance management regime ▪ Opportunity to ensure peer evaluations are performed on an adequately random and statistically significant sample ▪ Ensure ratio of assessments, treatment starts and completion of patient pathway is appropriate to time remaining length of contract. ▪ Communications: The PCT should make clear to the market its longer term intention for NHS orthodontic services. 	<ul style="list-style-type: none"> ▪ The PCT could use a Single Tender Action process to extend the term of existing contracts by way of a "Deed of Variation" until a longer term solution is put in place. ▪ The PCT must be able to provide robust reasoning and evidence for not following an open procurement process. ▪ The PCT should consider testing the market for interest from other potential providers, including new entrants, as this could help establish the market for these services as well as the likely risk of challenge through delaying an open tendering process (PCTs may wish to make use of the NHS Supply2Health 'notice' function). ▪ Extending the term of such a contract may constitute the award of a new contract and there is then a risk that the decision to do so without competition could be challenged by other providers for failing to put the service out to tender. Advice should be taken by the PCT as to whether the EU treaty principles (and the requirement to advertise) would apply in their circumstances (as this would be a potential tender for "Part B" services). ▪ PCTs should look to ensure that any new contract (or extension period) is justifiable and not of an excessive duration. The length of the proposed new contract and the value of the contract can determine the risk of challenge from alternate providers. ▪ For example a short term interim arrangement prior to a procurement for the services may present less risk of a challenge if structured to use this period to complete market testing and service reviews prior to providing an opportunity for other prospective providers to bid for these services.

PCT Option	Benefits	Risks	Commercial / Clinical Considerations	Legal summary of option
<p>3. Single Tender Action with enhanced provisions – for defined transition period</p>	<ul style="list-style-type: none"> ▪ Allows the PCT the opportunity to explicitly implement performance management and quality standards. ▪ PCT may also introduce clearly defined exit provisions to ensure continuity of patient care on termination. ▪ Would be appropriate under the following circumstances: ▪ - There is room for improvement in service quality / performance. 	<ul style="list-style-type: none"> ▪ Potential for risk of challenge by other providers as it may constitute the award of a "new contract" by the PCT without competition. ▪ Obtaining provider agreement to terms which may require them to take on increased risk and achieve a higher standard of service delivery may prove difficult or come with a cost premium without the opportunity to directly test the value for money of those costs. 	<ul style="list-style-type: none"> ▪ Incorporating further indicators for quality. Allow explicit incorporation of Vital Signs indicators (including Peer Assessment Ratings – PAR) into performance management regime ▪ Opportunity to ensure peer evaluations are performed on an adequately random and statistically significant sample ▪ Ensure ratio of assessments, treatment starts and completion of patient pathway is appropriate to time remaining length of contract. ▪ The PCT may use the extension process to clearly define the provider's responsibilities in relation to treatment of patients where the patient pathway extends beyond contract expiry and "new-starts" in the pre-expiry phase. ▪ Communications: The PCT should make clear to the market it's longer term intention for NHS orthodontic services. 	<ul style="list-style-type: none"> ▪ This variation could be facilitated by the use of a deed of variation to extend both the term of the contract and to implement enhanced quality/performance provisions and exit provisions. ▪ However, see Option 2 in respect of the risk of challenge to such an award from alternate providers.
<p>4. Use open procurement for services.</p>	<ul style="list-style-type: none"> ▪ Allows the PCT to test the market for value for money solutions. ▪ Appropriate where a PCT wishes to materially change the current service offering and/or open up services to a wider 	<ul style="list-style-type: none"> ▪ Potentially risks compromising continuity of care in the short term where there is a change in provider and no Exit management provisions are put in place with existing 	<ul style="list-style-type: none"> ▪ There are likely to be TUPE implications for provider salaried staff where PCTs are re-procuring existing services. May allow: <ul style="list-style-type: none"> ▪ Incorporating Peer Assessment Ratings, Vital Signs and new indicators. ▪ Opportunity to ensure peer 	<ul style="list-style-type: none"> ▪ PCTs should test the market to determine the strength of interest in the services and the number of prospective new entrants into the market when considering the procurement route. ▪ Guidance and case law from Europe suggests that PCTs should consider undertaking a form of competitive tender exercise in relation to the

PCT Option	Benefits	Risks	Commercial / Clinical Considerations	Legal summary of option
	<ul style="list-style-type: none"> pool of providers ▪ May be helpful in areas where a PCT is concerned about quality, performance or Value for Money offered by current provider(s). ▪ PCTs may want to consider offering an "Orthodontics Only" PDS Plus Agreement to deliver greater flexibility and implement KPIs and other more robust performance management measures on the provider. ▪ May allow the PCT to secure provision in areas where there has been no previous service provision. 	<p>providers.</p> <ul style="list-style-type: none"> ▪ Contractual uncertainty will increase the providers perception of risk and is likely to impair value for money. ▪ Normal procurement timescales are unlikely to allow a process to be delivered in time for the expiry of the current arrangements. ▪ Procurement resources within the PCT may be scarce / under pressure due to changes in the NHS commissioning architecture. 	<p>evaluations are performed on an adequately random and statistically significant sample.</p> <ul style="list-style-type: none"> ▪ Ensure ratio of assessments, treatment starts and completion of patient pathway is appropriate to time remaining length of contract. ▪ More clearly define the provider's responsibilities in relation to treatment of patients where the patient pathway extends beyond contract expiry and "new-starts" in the pre-expiry phase. ▪ More clearly defining the provider's responsibility in relation to treatment of patients where the patient pathway extends beyond contract expiry. 	<p>award of contracts for services.</p> <ul style="list-style-type: none"> ▪ If the PCT considers that there is potential cross border interest in the contract or that it wishes to run a tender process, it should advertise the opportunity to the market and if more than one expression of interest is received it would be required to run a fair and transparent tender process, treating all bidders equally. ▪ PCTs may look to run an accelerated form of procurement process under Part B of the Regulations given the timing issues. ▪ PCTs should also consider the internal governance requirements of their Standing Orders and Standing Financial Instructions (though they can be waived if appropriate to do so). ▪ PCTs may also wish to consider including a break clause in any new contract for March 2012 to account for the possibility of the NHS Commissioning Board taking over as contracting authority, however the earlier risks in relation to the cost and attractiveness of short term contracts should be considered. ▪ Alternatively, it may be acknowledged in the ITT documents that the contract will need to be transferred during the contract term to a commissioner and that all warranties, indemnities and liabilities of the PCT under the contract will be transferred to the new commissioner. ▪ PCTs should build appropriate exit arrangements into any new contract to allow for the provision of transitional services if required after the expiry date. ▪ PCTs must be aware of the obligation to consider their duty to consult on changes to service provision ▪ See Annex C

Annex B – British Orthodontic Society workforce survey summary findings

The BOS is data analysis suggests that there will be a shortfall in the number of orthodontists in the next five years. The key findings were:

- 250 orthodontic trainees in post Spring 2008
 - 129 NTN Specialist Registrars in post
 - 48 FTTA Registrars (consultant level) in post
 - 73 Non-NTN (over-seas) trainees in post
- 16 orthodontic training programs in UK
 - High concentration in South East
 - Associated with well established training programs
 - High retention of trainees in proximity of training programs
 - Salary scale £28K to £45K
 - Research costs incurred by trainees range from £3K to £24K over three years (not subject to tax relief)
- Between 2004 and 2015 around 440 orthodontists will retire
 - a minimum of 40 per year required to keep current provision
 - 35 to 40 new specialists accrediting per year
 - 86% remaining in UK
 - potential shortfall of between 60 and 110 by 2015
- Currently contracting compounds issues of local discrepancy
 - Favours area of historic high provision
 - Needs assessments have been inconsistent and have lacked transparency

Annex C: Legal notes for new procurements of services

1. Bodies often enter into long term contracts even though their future existence is debatable. However, in these circumstances, subject to parliamentary approval, it does appear more likely than not that the PCT will cease to exist in April 2013. Given that the proposed future position of PCTs has been made publicly available, this is now also an issue that is likely to be raised by bidders during any procurement process.
2. In order to address this risk, the issue of potential future transfers can be dealt with by clarifying the right in the procurement documentation for the contract to transfer to another body which would take forward the statutory functions of the PCT following its dissolution.
3. PCTs carrying out new procurements in the current circumstances would be recommended to include wording in their procurement documentation which covers this issue, for example:
 - a. The PCT anticipates that during the term of the Agreement it may be required to transfer some or all of its statutory functions in respect of the services to which this ITT relates to a statutory successor (the "New Commissioner").
 - b. For the avoidance of doubt, following any such transfer the rights, obligations and liabilities of the PCT under the Agreement will continue and will be capable of being undertaken by the New Commissioner.
4. It is expected that the new Health Bill will set out how the NHS Commissioning Board (or whichever host body is chosen) will also deal with any outstanding liabilities and/or obligations of PCTs and the statutory transfer of these to any successor statutory bodies. Therefore, the transfer set out above may well happen automatically as a matter of law in any event.