

## Lancashire and South Cumbria Integrated Care Board Provider Selection Regime Group

### Terms of Reference

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#### 1. Background

The Provider Selection Regime (PSR) came into force on the 1<sup>st</sup> of January 2024. This is a new procurement regime for selecting providers of healthcare services in England that replaced current procurement legislation specifically when commissioning healthcare services. Therefore, from the 1<sup>st</sup> of January 2024 the ICB must comply with the new regime when commissioning all healthcare services (of any value).

There are five main routes in which healthcare contracts can be awarded via the Provider Selection Regime:

PSR Route	Description
Direct award process A	Where there is an existing provider for the services and that provider is the only capable provider.
Direct award process B	Where people have a choice of providers, and the number of providers is not restricted by the relevant authority.
Direct award process C	Where there is an existing provider for the services and that existing provider is satisfying the original contract, will likely satisfy the proposed new contract and the services are not changing considerably.
Most suitable provider process	Where the relevant authority is able to identify the most suitable provider without running a competitive process.
Competitive process	Where the relevant authority wishes to run a competitive exercise, or if they wish to establish a framework agreement.

A standstill period will be required for all contracts awarded either via the direct award process C, the most suitable provider process or the competitive process.

An intention to award a contract notice must be published which triggers the start of the standstill period.

A provider can then make a representation (challenge) to the ICB if they believe that the ICB has failed to apply the PSR correctly and are able to set out reasonable grounds to support their belief. The ICB then must consider these representations and respond as appropriate. This group has been formed to manage any received representations. The ICB must leave

five working days for the provider to consider their decision before the standstill period can close and the contract can be awarded.

Providers will be able to make representations to the NHS England Independent Patient Choice and Procurement Panel if they are not satisfied with the outcome from the ICB.

If a provider continues to remain unsatisfied, they can take their concerns to a Judicial Review.

## **2. Role and Function**

The ICB PSR Group (hereafter referred to as 'the group') has been established to manage any challenges that the ICB may receive from providers.

The role and function of the group is to manage any representations that are received during a standstill period; a standstill period will remain open until the ICB provides any requested information, considers the representations, and makes a further decision.

This will be achieved by:

### **1. Determine whether a representation that the ICB has received meets the relevant conditions to be considered**

The ICB is only obliged to respond to representations that meet all the following conditions;

- the representation comes from a provider that might otherwise have been a provider of the services to which the contract relates
- the provider is aggrieved by the decision of the relevant authority
- the provider believes that the relevant authority has failed to apply the regime correctly and is able to set out reasonable grounds to support its belief
- the representation is submitted in writing (which includes electronically) to the relevant authority within eight working days of the start of the standstill period.

If they wish, relevant authorities may also respond to representations that do not meet the conditions above.

### **2. To review a representation that is received that meets all the relevant conditions**

The group must;

- Ensure that the provider is afforded an opportunity to explain or clarify its representation(s) if these are not clear.
- Provide an indicative timeframe for when the representation might be considered by, and when the provider might reasonably expect a decision to be made.
- Provide any information requested by the provider that the ICB is required to keep under the regime as soon as possible, except where this:
  - would prejudice the legitimate commercial interests of any person, including the relevant authority
  - might prejudice fair competition between providers
  - would otherwise be contrary to the public interest.
- Review the evidence and information used to make the original decision, taking into account the representations made.

- Consider whether the representation has merit (e.g., it identifies that the process has not been correctly followed or brings to light information that has a bearing on the decision reached).

### **3. Agree the outcome of the representation and communicate with providers**

a) If the group does not find any merit in the representation then the decision will be to continue to enter into a contract or conclude the framework agreement as intended and this decision should be communicated (with reasons) to the provider who submitted the representation and to the provider to whom it intended at the beginning of the standstill period to award the contract to.

The end of the standstill period must be at least five working days after the ICB has communicated its decision to the providers. The minimum five working days' notice allows for providers that remain unsatisfied about the response given by the ICB, to seek further clarifications and to seek the involvement of the Independent Patient Choice and Procurement Panel.

b) Where the group finds that a representation has merit (e.g., it identifies that the process has not been followed correctly or brings to light information that has a bearing on the decision reached), it must further consider whether this impacts on the intention to award a contract to the selected provider. It must then decide whether to:

- enter into a contract or conclude the framework agreement as intended
- go back to an earlier step in the selection process, either to the start of the process or to where a flaw was identified, rectify this, and repeat that step and subsequent steps
- abandon the provider selection process

The ICB must communicate the decision described above promptly and in writing, to:

- the provider that made the representation
- the provider to which the ICB intended at the beginning of the standstill period to award the contract, or all providers with which the relevant authority intended at the beginning of the standstill period to conclude the framework agreement.

The standstill period can only end once the ICB has reviewed its decision, shared its conclusion (in writing) with the relevant providers, and concluded that it is ready to award the contract, or that it's going to return to an earlier step in the process, or abandon the process.

The ICB must allow at least five working days following the day on which they sent their response to the provider, before the standstill period comes to an end. This time allows the provider to consider the response given by the ICB, seek further clarifications, and to consider whether to request a further review by the Independent Patient Choice and Procurement Panel.

If a panel review is requested and accepted, then the standstill period would usually continue until after the Independent Patient Choice and Procurement Panel has given its advice and the ICB has made its further decision in light of that advice.

### **3. Membership and Quoracy**

The group has senior representation from ICB finance, commissioning, governance and procurement:

- Jayne Mellor, Director of urgent, emergency & planned care
- Paul Kingan, Senior Place and Programme Finance Lead
- Sarah Mattocks, Head of Governance
- Joanne Sherborne, ICB Head of Procurement and Contracting (facilitator)

All members can nominate a deputy if required.

At least one individual on the group must be independent from the original decision-making process (when a PSR route has been chosen and followed to award a contract). This will be determined at the first meeting to discuss the representation (challenge) and any changes in member representation made accordingly.

The group will achieve quoracy if all members (inclusive of deputies) are in attendance.

### **4. Meeting Frequency and Management**

- The ICB Head of Procurement and Contracting will co-ordinate all representations the ICB receives and convene a panel meeting when required to review the representation(s).
- The panel do not need to meet on a regular basis and would only be called upon if any representations are received by the ICB.
- The ICB Head of Procurement and Contracting will facilitate the meetings and will record any decisions made and co-ordinate a response to the provider.

### **5. Governance**

- Representations from providers will be received via the ICB Procurement email address; [lscicb.procurement@nhs.net](mailto:lscicb.procurement@nhs.net) and all correspondence with providers will be managed via this email address.
- If providers attempt to make direct contact with panel members, these should be redirected to the ICB Procurement email address.
- Any declarations of interest will need to be recorded for all members and appropriately managed and mitigated.
- Providers will be able to make representations to the NHS England PSR Review Panel if they are not satisfied with the outcome from the ICB.

### **6. Review**

These terms of reference will be reviewed on an annual basis or earlier if required.

## **Extract from the PSR Statutory Guidance in relation to the Standstill Period and Representations**

### **Reviewing decisions during the standstill period**

The standstill period requirements, including for the reviewing of decisions, are detailed in Regulations 12 and 14(3). Provision for independent expert advice is set out in Regulation 23 (see the section on the Independent Patient Choice and Procurement Panel) – this includes how the Independent Patient Choice and Procurement Panel may provide advice during the standstill period.

This section explains how certain decisions made under the regime can be reviewed during the standstill period before they are finalised, and how a contract is awarded under certain procedures.

### **What is the standstill period?**

The standstill period must be observed once a notice of intention to make an award to a provider under direct award process C, the most suitable provider process, or the competitive process has been published. This includes concluding a framework agreement or awarding a contract based on a framework agreement following a mini-competition.

The standstill period follows a decision to select a provider and must end before the contract can be awarded. It gives time for any provider who might otherwise have been a provider of the services to which the contract relates to make representations; and for relevant authorities to consider those representations and respond as appropriate. See the section below on receiving representations for further details.

The standstill period must last for a minimum period of eight working days. The standstill period begins on the day after the notice of intention to award or conclude is published and, unless a written representation is made, ends at midnight of the eighth working day after the day the standstill period begins (see worked examples below). If any representations are received during this period, then the standstill period will remain open until the relevant authority provides any requested information, considers the representations, and makes a further decision.

Relevant authorities are expected to be aware of the process and timeline for the review of decisions under this regime and are expected to plan the arrangement of services accordingly. They are expected to ensure that the review of the decision-making process can be completed, and a new contract awarded, before the existing contract ends.

### **When does the standstill period end?**

Care must be taken when calculating the end of the standstill period. The standstill period starts the day after the publication of an intention to award a contract. Representations must be received before midnight on the eighth working day after that day.

The standstill period will end at midnight on the eighth working day, if:

- no representations are received by midnight on the eighth working day, or

- representations do not meet the required conditions (set out below).

Where representations meeting the required conditions are received, the standstill period continues until the relevant authority:

- completes its review
- communicates its further decision (with reasons) to the provider who submitted the representations and to the provider to whom it intended at the beginning of the standstill period to award the contract to
- concludes it is ready to award the contract, or that it wishes to return to an earlier step in the process or abandon the process.

The end of the standstill period must be at least five working days after the relevant authority has communicated its decision to the provider. The minimum five working days' notice allows for providers that remain unsatisfied about the response given by a relevant authority to their representations to seek the involvement of the Independent Patient Choice and Procurement Panel (see Independent Patient Choice and Procurement Panel below).

Where the relevant authority's decision is to award the contract (rather than return to an earlier step in the process or abandon the process), the standstill period should end when the relevant authority concludes it is ready to award the contract and there has been at least five working days since the relevant authority communicated its further decision. Where within five working days of receiving the relevant authority's further decision, the provider requests an independent review from the Independent Patient Choice and Procurement Panel, the standstill period should continue, other than in exceptional circumstances. See the Independent Patient Choice and Procurement Panel section for further details on its process and how to request a review.

In this situation, if the Independent Patient Choice and Procurement Panel accepts the request, the standstill period should not end until the relevant authority makes a further decision having considered the advice provided by the Independent Patient Choice and Procurement Panel. The relevant authority must again give at least five working days' notice of its further decision before the standstill period can come to an end and the relevant authority proceeds to take forward its further decision.

The standstill period must end before a contract is awarded and a confirmation of the decision is published (or before returning to an earlier step in the process or abandoning a process). The transition of services must only take place after the standstill period has ended and the contract has been awarded.

### **Receiving representations**

Providers may make a representation to the relevant authority within the first eight working days following the start of the standstill period (ie eight working days starting with the first working day following the day after the intention to award notice has been published). Providers cannot submit a representation after that period, even if the standstill period has been extended in response to a representation from another provider.

The purpose of making a representation is to seek a review of the decision made, to determine whether a relevant authority has applied the regime correctly and made an appropriate provider selection decision.

Relevant authorities are only obliged to respond to representations that meet all the following conditions:

- the representation comes from a provider that might otherwise have been a provider of the services to which the contract relates
- the provider is aggrieved by the decision of the relevant authority
- the provider believes that the relevant authority has failed to apply the regime correctly and is able to set out reasonable grounds to support its belief
- the representation is submitted in writing (which includes electronically) to the relevant authority within eight working days of the start of the standstill period.

When awarding a contract based on a framework agreement, eg following a mini-competition, only providers that were party to the framework agreement and i) took part in the mini-competition but were unsuccessful, or ii) were excluded from the mini-competition, may make a representation to the relevant authority.

If they wish, relevant authorities may also respond to representations that do not meet the conditions above.

Relevant authorities must follow the relevant transparency requirements for the approach they take and must keep internal records of their decision-making (see [transparency](#)).

### **Example of calculating the minimum length of the standstill period during which representations can be made**

#### **Example A**

The intention to award a contract notice is published on Thursday 11 January 2024. The standstill period begins the following day. Representations can be made for up to eight working days after the day the standstill period begins. Therefore, the standstill period would end at midnight on Wednesday 24 January 2024.

#### **Example B**

The intention to award a contract notice is published on Friday 12 January 2024. The standstill period begins the following day. Representations can be made for up to eight working days after the day the standstill period begins. Therefore, the standstill period would end at midnight on Wednesday 24 January 2024.

#### **Example C**

The intention to award a contract notice is published on Tuesday 16 January 2024. The standstill period begins the following day. Representations can be made for up to eight working days after the day the standstill period begins. Therefore, the standstill period would end at midnight on Monday 29 January 2024.

## Considering representations

Relevant authorities should ensure that appropriate internal governance mechanisms are in place to deal with representations made against provider selection decisions. To this end, relevant authorities should, where possible, ensure that decisions are reviewed by individuals not involved in the original decision. Where this is not possible, relevant authorities should ensure that at least one individual not involved in the original decision is included in the review process.

If the relevant authority is considering representations on the same issue from multiple providers, it may consider these together if appropriate.

Where a representation is received within the eight working days, the relevant authority:

1. Must ensure that the provider is afforded an opportunity to explain or clarify its representation(s) if these are not clear.
2. Is expected to provide an indicative timeframe for when the representation might be considered by, and when the provider might reasonably expect a decision to be made.
3. Must provide any information requested by the provider that the relevant authority is required to keep under the regime (see record keeping) as soon as possible, except where this:
  - would prejudice the legitimate commercial interests of any person, including the relevant authority
  - might prejudice fair competition between providers
  - would otherwise be contrary to the public interest.
4. Must review the evidence and information used to make the original decision, taking into account the representations made.
5. Must consider whether the representation has merit (e.g., it identifies that the process has not been correctly followed or brings to light information that has a bearing on the decision reached).

The provider that made the representations is expected to respond promptly and concisely to questions from the relevant authority about the points it has made, and if it cannot respond within a reasonable timeframe then it is expected to provide a justification.

We expect the relevant authority to allow sufficient time and opportunity for the provider that made the representations to respond to questions from the relevant authority. In the event that the provider fails to respond/communicate, then it is for the relevant authority to decide whether to complete its assessment of the representations and communicate their decision to the provider.



## **Outcome of representations**

Where the relevant authority finds that a representation has merit (e.g., it identifies that the process has not been followed correctly or brings to light information that has a bearing on the decision reached), it must further consider whether this impacts on the intention to award a contract to the selected provider. It must then decide whether to:

- enter into a contract or conclude the framework agreement as intended
- go back to an earlier step in the selection process, either to the start of the process or to where a flaw was identified, rectify this, and repeat that step and subsequent steps (see [repeating a step](#))
- abandon the provider selection process (see [abandoning a process](#)).

The relevant authority must communicate the decision described above promptly and in writing, to:

- the provider that made the representation
- the provider to which the relevant authority intended at the beginning of the standstill period to award the contract, or all providers with which the relevant authority intended at the beginning of the standstill period to conclude the framework agreement.

The standstill period can only end once the relevant authority has reviewed its decision, shared its conclusion (in writing) with the relevant providers, and concluded that it is ready to award the contract, or that it's going to return to an earlier step in the process, or abandon the process.

The relevant authority must allow at least five working days following the day on which they sent their response to the provider, before the standstill period comes to an end. This time allows the provider to consider the response of the relevant authority, seek further clarifications, and to consider whether to request a further review by the Independent Patient Choice and Procurement Panel. This time also allows the relevant authority to reconsider their decision and make any subsequent decisions if necessary. The relevant authority must communicate any such further decision in writing to the provider (as outlined above).

If a panel review is requested and accepted, then the standstill period would usually continue until after the Independent Patient Choice and Procurement Panel has given its advice and relevant authority has made its further decision in light of that advice.

## **Independent Patient Choice and Procurement Panel**

NHS England has established the Independent Patient Choice and Procurement Panel to provide independent expert advice to relevant authorities with respect to the review of PSR decisions during the standstill period, and separately to support reviewing decisions with respect to the application of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (as amended).

If a provider remains unsatisfied about the response given by a relevant authority to their representations, then that provider may seek the involvement of the panel. The panel may consider whether the relevant authority complied with the Regulations and may provide advice to the relevant authority. The relevant authority should then make a further decision about how to proceed.

### **The Chair and the Panellists**

The panel Chair presides over the Independent Patient Choice and Procurement Panel. While there is a single Chair for the panel, the panel members reviewing representations in relation to the PSR are different to those reviewing patient choice complaints.

Panel members for the PSR element of the panel are independent experts who are made available by, or endorsed by, NHS England or the Secretary of State for Health and Social Care to provide advice relating to the relevant authority's compliance with these Regulations. Panel members are selected on the basis of having the relevant expertise, qualifications, or experience relating to the commissioning or procurement of health care services that enables them to carry out a review efficiently and effectively.

Panel members must be able to offer an impartial and unbiased opinion, and they must not have any conflicts of interest in the provider selection process in question (see [conflicts of interest section](#)). This means that panel members must not have, directly or indirectly, a financial, economic, or other personal interest that might be perceived to compromise their impartiality and independence in the context of the provider selection process in question. Panel members must recuse themselves from providing advice on any provider selection processes where they have a conflict of interest or a perceived conflict of interest.

Further detail on how the Independent Patient Choice and Procurement Panel operates is set out on the [Independent Patient Choice and Procurement Panel website](#).

### **The PSR Review Panel Process of the Independent Patient Choice and Procurement Panel**

If a provider wishes to request the panel to consider their representation further, then they must submit their request through the [panel's website](#) within five working days of receiving the relevant authority's decision following the relevant authority's review of their representation.

If the provider submits a request for advice from the panel, the relevant authority will be notified, and the relevant authority should:

- keep the standstill period open for the duration of the panel's review
- make a further decision once it has considered the independent expert advice.

In exceptional circumstances, the relevant authority may conclude that it is necessary to enter into a new contract before the panel can complete its review and share its advice. In those circumstances, the relevant authority is expected to note the advice of the panel for the next time they use the PSR to arrange health care services.

Where multiple providers seek the involvement of the panel, in relation to the same provider selection process, the panel may choose to address the points raised by each provider individually or consider all of the points together. The standstill period should continue until the last advice is provided (unless in exceptional circumstances).

If the provider does not submit their request to the panel within the five working day period, or the panel does not accept the request for advice, then at any point after the end of that period, the relevant authority can bring the standstill period to an end and proceed to award the contract to their chosen provider.

The panel will set out acceptance criteria to assess whether a request should be reviewed, and prioritisation criteria to determine the priority/urgency of a particular case. The acceptance and prioritisation criteria will be published.

Information requested by the panel from the relevant authority for the purposes of offering advice, and provided by the relevant authority, does not breach any obligation of confidence owed by the relevant authority. However, it may be subject to restrictions on disclosure imposed by other pieces of legislation.

Where the panel accepts a representation for review, it will endeavour to consider it and share advice, or a summary of its advice, with the provider and the relevant authority within 25 working days. However, this timeframe is indicative and contingent on the engagement and timely responses of the provider and the relevant authority throughout the review process.

The panel will also publish its advice, or a summary of its advice.

### **Urgent contract modifications during the standstill period**

Where the relevant authority is awaiting the advice of the panel during the standstill period, the relevant authority may urgently modify the existing contract in accordance with Regulation 14(3), subject to all the below applying:

- there is an existing contract for the health care services to which the proposed contracting arrangement relates, and the relevant authority considers that the term of the existing contract is likely to expire before the end of the standstill period
- the relevant authority considers it necessary or expedient to modify the existing contract prior to the new contract taking effect in order to ensure continuity between the existing contract and proposed award of a new contract
- the relevant authority considers that it is not possible to satisfy the requirements of Regulations 6 to 13 before the term of the existing contract expires

The relevant authority may only extend the length of the existing contract and must not otherwise modify the contract. The relevant authority is expected to only extend the contract for as long as necessary to ensure continuity between the existing and the new contract.

### **Outcome of panel review**

Once the relevant authority has considered the advice of the panel, it may make a further decision, to be its final decision, replacing the previous one, to either:

- enter into a contract or conclude the framework agreement as intended
- go back to the start of the selection process or to the step where a flaw was identified, and repeat that step and subsequent steps (see [repeating a step](#) in a provider selection process), or
- abandon the procurement (see [abandoning a provider selection process](#)).

The relevant authority must share this further decision promptly, in writing, and with reasons, with the provider who made a representation and the provider to which the relevant authority intended, at the beginning of the standstill period, to award the contract. The relevant authority must set out the outcome and a full and transparent justification for their decision, and it is expected that this will include whether they changed their original decision as a result of the advice of the panel. The relevant authority must wait at least five working days before concluding it is ready to award the contract and bring the standstill period to an end, or before it returns to an earlier step in the process, or before it abandons a process.