Procurement Policy (including decommissioning and disinvestment policy)

NHS Bedfordshire, Luton and Milton Keynes Integrated Care Board (BLMK ICB)

Document Control	
Document Owner:	Anne Brierley, Executive Director of Operations
Document Author(s):	Kathryn Moody, Director of Contracting / Deputy Chief Operating Officer
Directorate:	Operations
Approved By:	ICB Operational Group
Date of Approval:	08-06-2024
Date of Next Review:	This policy will be reviewed in January 2025 or when revised procurement legislation is issued, whichever is earlier.
Effective Date:	01-04-2024

Version Control			
Version	**Date**	**Reviewer(s)**	**Revision Description**
Draft v0.1	22-06-2022	Operational Group	First Draft
V0.2	01-07-2022		Incorporation of procurement limits
Draft V2		Operational Group	Amendments due to legislative change (PSR 2023) and introduction of TOM1
Draft 2.1	19-06-2024		Updates on Data Security and engagement with VCSE
V2.2	08-07-2024	Operational Group	Approved by Operational Group
Major revisions to a document are reflected by incrementing the whole number by 1. Minor revisions are reflected by making increments to the decimal number.			

Implementation Plan

Development and Consultation:	The following individuals were consulted and involved in the development of this document: ▪ Executive Director of Operations ▪ Director of Contracting / Deputy Chief Operating Officer ▪ Head of Acute and Strategic Contracting ▪ Procurement advisors ▪ Senior Contract Manager- Top Decile and Efficiency ▪
Dissemination:	Staff can access this document via the website and will be notified of new / revised versions via the staff briefing. This document will be included in the organisation's Publication Scheme in compliance with the Freedom of Information Act 2000.
Training:	The following training will be provided to make sure compliance with this document is understood: ▪ Procurement Training for managers
Monitoring:	Monitoring and compliance of this document will be carried out via: ▪ Monitoring of Standing Financial Instructions (SFIs), particularly the number of Single Tender Waivers (STWs) ▪ Quarterly reporting of procurement activities to Finance and Performance Committee ▪ Number of procurement challenges lodged against ICB
Review:	The Document Owner will ensure this document is reviewed in accordance with the review date on page 2.
Equality, Diversity and Privacy:	Appendix 1 - Equality Impact Assessment Appendix 2 - Data Protection Impact Assessment
Associated Documents:	The following documents must be read in conjunction with this document: ▪ Standing Financial Instructions (SFIs)Scheme of Reservations and Delegations (SoRD) ▪ Standing Orders ▪ NHS BLMK ICB Governance Handbook
References:	The following articles were accessed and used to inform the development of this document: • The Health Care Services (Provider Selection Regime) Regulations 2023[1] • The Public Contracts Regulations (2015)[2]; • Procurement, Patient Choice and Competition Regulations (2013) (No. 2) - guidance and interpretations[3]; (under transitional arrangements from 1st January 2024) • EU Procurement Directives (2014)[4]; • NHS Principles and Rules for Cooperation and Competition (2010)[5];

[1] The Health Care Services (Provider Selection Regime) Regulations 2023 (legislation.gov.uk)
[2] The Public Contracts Regulations 2015 (legislation.gov.uk)
[3] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (legislation.gov.uk)
[4] EU procurement directives and the UK regulations - GOV.UK (www.gov.uk)
[5] Principles and rules for cooperation and competition - GOV.UK (www.gov.uk)

	• Managing Conflicts of Interest in the NHS: Guidance for staff and organisations (2017)[6]; • Health and Social Care Act (2012)[7]; • NHS Long Term Plan; (2019)[8]; • Equality Act (2010)[9]; • Bribery Act (2010)[10]; • Modern Slavery Act (2015)[11]; • Public Services (Social Value) Act (2012)[12]; • Freedom of Information Act (2000) (UK)[13]; • Data Protection Act (2018)[14]

[6] NHS England » Managing Conflicts of Interest in the NHS: Guidance for staff and organisations
[7] Health and Social Care Act 2012 (legislation.gov.uk)
[8] NHS Long Term Plan
[9] Equality Act 2010 (legislation.gov.uk)
[10] Bribery Act 2010 (legislation.gov.uk)
[11] Modern Slavery Act 2015 (legislation.gov.uk)
[12] Public Services (Social Value) Act 2012 (legislation.gov.uk)
[13] Freedom of Information Act 2000 (legislation.gov.uk)
[14] Data Protection Act 2018 (legislation.gov.uk)

Table of Contents

1.0 Introduction 7
2.0 Scope 7
3.0 Definitions 7
4.0 Policy Statement 7
5.0 Roles and Responsibilities 8
6.0 Processes and Procedures 9
6.1 When to Procure 9
6.2 What Procurement Route Is Best? 10
6.2.1 What and Why 10
6.2.2 Status of Service 10
6.2.3 Value of Contract (applicable for non-clinical goods and/or services only) 11
6.2.4 Length of Contract 12
6.2.5 Complexity of Service 12
6.2.6 Approach to Risk 13
6.2.7 Engagement with Key Stakeholders 13
6.2.8 Timelines 13
6.2.9 Conflicts of Interest (CoI) 13
6.2.10 Decommissioning 14
6.3 Methods of Procurement 14
6.3.1 The Health Care Services (Provider Selection Regime) Regulations 2023 15
6.3.1.1 Modification of Contracts 18
6.3.1.2 Transparency Requirements 18
6.3.1.3 Mixed Procurements 19
6.3.1.4 Transitionary Arrangements 19
6.3.2.1 Open Procedure (Regulation 27) 19
6.3.2.2 Restricted Procedure (Regulation 28) 19
6.3.2.3 Competitive Procedure with Negotiation (Regulation 29) 20
6.3.2.4 Competitive Dialogue (Regulation 30) 20
6.3.2.5 Framework Agreements (Regulation 33) 20
6.3.2.6 Dynamic Purchasing System (Regulation 34) 21
6.3.3 Other Approaches 21
6.3.3.1 Any Qualified Provider (AQP) – PSR 2023 (Direct Award Process B) 21
6.3.3.2 Pilot Projects 22
6.3.3.3 Grants 22

6.4.1 Planning Stage 23
6.4.2 Advertisement Stage 23
6.4.3 Specification stage 24
6.4.4 Bidder Events 24
6.4.4 Selection Questionnaires 25
6.4.5 Invitation to Tender 25
6.4.6 Bidder Selection stage 25
6.4.7 Offer stage 26
6.4.8 Tender Evaluation Panel 26
6.4.9 Award stage 26
6.4.10 Post Award Stage 27
6.4.11 Post Contract Award Period 27
6.4.12 Contract Monitoring 27
6.5 Transfer of Undertakings and Protection of Employment Regulations (TUPE) 28
6.6 Sustainable Procurement & Social Value 28
6.7 Information Governance Management and Data Security 29
6.8 Training Needs 30
6.9 Documentation and Record Keeping 30
6.9.1 PCR 2015 (Regulation 84) 30
6.9.2 PSR 2023 (Regulation 25) 31
6.9.2.1 Transparency Notices under PSR 2023 32
6.9.2.2 Receiving Representations under PSR 2023 32
Appendix 1 - Equality Impact Assessment Initial Screening 35
Appendix 2 - Data Protection Impact Assessment Initial Screening 37

1.0 Introduction

1.1 NHS Bedfordshire, Luton and Milton Keynes Integrated Care Board (ICB) aims to ensure robust governance through its formal written procedural documents, such as this document, which communicate standard organisational ways of working. These documents help clarify operational requirements and consistency within day-to-day practice. They can improve the quality of work, increase the successful achievement of objectives and support patient safety, quality and experience. The ICB aims to ensure its procedural documents are user friendly, up-to-date and easily accessible.

1.2 The ICB must design and implement procedural documents that meet the diverse needs of our service and workforce, ensuring that none is placed at a disadvantage over others, in accordance with the Equality Act 2010. The Equality Impact Assessment initial screening, which was used to determine the potential impact this policy might have with respect to the individual protected characteristics is incorporated at Appendix 1.

1.3 A Data Protection Impact Assessment (DPIA) is a process which helps assess privacy risks to individuals in the collection, use and disclosure of personal information. The Data Protection Impact Assessment initial screening, which was used to determine the potential impact this policy might have with respect to an individual's privacy is incorporated at Appendix 2.

2.0 Scope

2.1 This policy applies to all ICB staff members, including Ordinary Members of the Board of the ICB, involved in policy-making processes, whether permanent, temporary or contracted-in under a contract for service (either as an individual or through a third-party supplier).

3.0 Definitions

3.1 Due to the technical nature of procurement, definitions are explained throughout the document as required.

4.0 Policy Statement

4.1 The NHS in England is bound by a range of procurement directives and legislations. Chief amongst these are the Health Care Services (Provider Selection Regime) Regulations 2023 which came into effect on 1st January 2024 and replaced the Public Contract Regulations (2015) (PCR) (2015), and the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations (2013) (NHS PPCCR 2013) for Clinical (in-scope) services and some mixed-use services.

The PSR does not have any retrospective effect on contracts or frameworks agreements that were entered into prior to 1st January 2024. However, from 1 January 2024 onwards any changes to these contracts or framework agreements (those awarded or established before 1st January 2024) where the services are in scope of the regime, must be carried out in accordance with the contract modifications section of the PSR. There may be instances where procurements underway following the PCR processes did not conclude fully by the time the PSR came into force. Any contract award procedure started before 1st January 2024 will not be affected by the PSR. This

means that contract awards, including when awarding a contract based on a framework agreement, initiated before 1st January 2024 can conclude under PCR rules. Similarly, if the establishment of a framework agreement started before 1st January 2024, then this can be concluded under PCR rules. These directives and legislations require ICBs to obtain best value for their patients, be transparent and fair in their procurement activities and pricing, and ensure goods and services (clinical and non-clinical, hereafter referred to as 'services') are appropriately sourced and managed.

4.2 These requirements have been incorporated within the BLMK ICB Procurement Policy. However, this document cannot operate in a vacuum, and there are other issues which need to be considered in determining any procurement approach. This policy outlines what these are and presents how the BLMK ICB should take these into account when considering its procurement route.

5.0 Roles and Responsibilities

5.1 The following have specific responsibilities in relation to this policy:

- The Board
- The Audit, Risk and Assurance Committee
- The Finance and Investment Committee

5.2 The Board

The Board will have accountability for the operation of this policy, it's application in decision-making, and decisions made under it.

5.3 Audit, Risk and Assurance Committee

The Audit, Risk and Assurance Committee will ensure that the application of this policy is in line with Standing Orders, Standing Financial Instructions and the Scheme of Delegation.

5.4 Finance and Investment Committee (FIC)

The Finance and Investment Committee (FIC) will be responsible for ensuring the procurement activity of the organisation is reviewed and appropriate action is being taken in relation to expiring contracts. It will provider assurance to the Board that the duties are being carried out effectively.

5.5 Chief Operations Officer (COO)

The Chief Operations Officer (COO) will be responsible for ensuring there are controls and resource in place to deliver the procurement pipeline under the terms of this policy.

5.6 Director of Contracting / Deputy Chief Operations Officer

The Director of Contracting / Deputy Chief Operations Officer will have operational responsibility for the management and delivery of the procurement service and function, ensuring that it is fit for purpose.

5.7 All Staff

All staff are required to adhere to this policy as it pertains to their area of work and decision-making.

5.8 Procurement Team

The procurement team will offer their knowledge and experience to support the ICB's compliance with existing and upcoming/future changes to legislation and regulations for clinical services i.e., the Health Care Services (Provider Selection Regime) Regulations 2023 which came into effect on 1st January 2024 and non-clinical Services i.e., and the Procurement Act 2023 which is due to come into effect on 1st October 2024. Services provided by the procurement function are to advice, support, ongoing development and management of procurement processes.

6.0 Processes and Procedures

6.1 When to Procure

All commissioners utilising NHS resources (including local authorities under pooled budget/joint commissioning arrangements) need to adhere to all legislative and regulatory requirements as set out above. However, in an environment where systems are looking to develop integrated provision and encourage alliances to support whole pathway commissioning, it cannot be the case that traditional market testing can always be relied on to shape the market accordingly.

From a BLMK ICB perspective, the aims must always be:

- To ensure high quality, safe and efficient services are provided, in line with patient need;
- To ensure a sustainable and consistent local market is available, even for services where provision is limited;
- To have transparent and consistent decision-making processes, which are understood and adhered to by key decision makers;
- To adhere to legislative frameworks, noting the need for competition and co-operation set down under PSR 2023 as well as the requirements under PCR (2015); and
- To manage the risks of procurement challenge, but to note that these need to be considered in conjunction with other service and financial risks when deciding on procurement approach.

When deciding what procurement activities to undertake, the BLMK ICB should therefore be clear on how the above will be satisfied, whilst ensuring procurement is focussed on the needs of the patients within BLMK.

Procurement options should be considered as part of the planning of any potential procurement process, including consideration as to whether a competitive procurement process is required or whether the adoption of a collaborative approach is more appropriate given the service requirements and the BLMK ICB's wider strategic aims. This will depend on a number of things, some of which are discussed in more detail below. However, the overarching aim must be the quality and continuity of care for patients, and the achievement of best value in sourcing and contracting with providers. This should be in line with the following principles:

- The BLMK ICB will consult with procurement professionals to scope the options fully in line with the prevailing legislation(s).
- Procurement activity will be proportionate to the size and complexity of the service(s) in question.
- All providers, including NHS bodies, Small, Medium Enterprises (SMEs), Voluntary, Community and Social Enterprise (VCSE's) and Third Sector Organisations will be given a fair and equal opportunity (not solely based on the

organisations classification) to bid for contracts where this is in the best interest of the patient.

- Each procurement process will be scoped to determine the appropriate amount of resource to be allocated proportionate to the size and complexity of the service(s) in question, and this cost should be taken into consideration when considering the procurement route.
- Where pooled budget arrangements are in place, the Contracting Authorities will jointly consider opportunities to align procurement requirements to maximise outcomes and benefits.

6.2 What Procurement Route Is Best?

The procurement routes laid down later in this paper are governed by the Provider Selection Regime (PSR) 2023 for clinical and some mixed use services and PCR's (2015) applicable to the procurement of goods and services not covered under Section 7 Social and Other Specific Services.

However, before considering the route to be taken, an options appraisal should be completed to determine the most appropriate procurement route for a given service. In completing the options appraisal, the following questions will be asked and answered.

6.2.1 What and Why

At the onset, considering what should be procured may seem a straightforward question, but not considering this question fully may lead to issues related to compliance with procurement requirements and/or resultant provision of the service(s). As the BLMK ICB transitions towards the role of a strategic commissioner, the focus on outcomes may lead to a more straightforward service specification, but a much more complex procurement, evaluation and delivery environment.

If the BLMK ICB cannot identify what they want and need, then open market procurement may likely result in a sub-optimal response. In these cases therefore, it may be more prudent to adopt an Early Supplier Involvement (ESI) approach to work with one or more partner organisation(s) to co-design and test via a pilot scheme or through a dialogue approach using the Plan, Do, Study, Act (PDSA) discipline.

Likewise, the question of 'why?' is also critical. It may be that there are clear performance and quality issues, or that the financial arrangements are unsatisfactory, but it may be less clear cut. It may simply be that a contract is coming to a natural end and procurement activity is expected. But if the question is not asked and answered appropriately, well informed and well considered decisions could result in short term solutions, but create issues in the longer term.

6.2.2 Status of Service

The question of whether the service is new or simply a change to an existing service is critical to deciding on options to procurement approach. Depending upon the circumstances at the point of consideration, a new service may be tested on the open market to encourage early supplier involvement identify the best provider/model of provision to meet the needs of the BLMK ICB.

However, if the service is an existing one and changes are required/desired, then the opportunity to work with the existing provider to shape this should be considered in discussions with the Procurement team to ensure the most appropriate route is

followed, keeping in view the risk of any potential and/or perceived advantage such involvement may arise in the event of a subsequent procurement process being undertaken and mitigation measures must be put in place e.g. where independent providers (including those in the VCSE and SME sector) hold contracts for services, it would be appropriate and reasonable for the relevant authority to involve them in discussions, such as about pathway design and service delivery, particularly at place level. The VCSE and SME sector could be utilised for obtaining insights into local community requirements and support service design, with community engagement in service development; through the engagement with VCSE and SME sector as stakeholders, representatives of the local population and as providers within the market to shape future needs and inform commissioning decisions. However, this would be clearly distinct from any considerations around contracting and commissioning from which they would be excluded. Ensuring that quality standards and Value for Money (VfM) are maintained is critical and must be demonstrated. It should not be automatically assumed that a market exercise would ensure this, not least since the procurement exercise and the transfer of services are not cost and/or risk-free options, and impact and mitigation options should be considered carefully when deciding the strategy. The critical decision points would therefore need to be reached by a clear options appraisal taking all options and other key parameters into consideration.

6.2.3 Value of Contract (applicable for non-clinical goods and/or services only)

The procurement method will change depending on the lifetime value of the contract. Each year, the UK Government publishes financial limits beyond which all procurement should be advertised and a compliant procurement process followed. From 2024 onwards, these limits are as follows:

Type of authority	Type of Contract			
	Works	**Supplies & services**	**Light Touch Regime (LTR) Services**	**Concessions** Works and service
Central government bodies	**£5,372,609**	**£139,688**	**£663,540**	**£5,372,609**
Sub-central authorities	**£5,372,609**	**£214,904**	**£663,540**	**£5,372,609**
Small Lots	£884,720	**£70,788**	NA	NA

NHS commissioning agencies are classified as sub-central authorities, and values are lifetime costs including VAT where applicable.

Where a contract is likely to exceed these values then procurement must be undertaken; if there are exceptional reasons why this cannot be done under the terms of the PCR or for other reasons, a Single Tender Waiver (STW) form must be completed prior to contract award.

Whilst these limits are legally binding, from an organisational perspective, it is desirable to ensure that procurement is undertaken to ensure best value. Even where contracts are likely to be below these limits, the following should be undertaken. Again, where this is not possible, a STW needs to be completed.

6.2.3.1 Non-Healthcare Services and Supplies

- Formal tendering procedures need not apply where estimated expenditure does not or is not reasonably expected to exceed £50,000 over the whole life of the contract.
- Expenditure exceeding £10,000 and up to £20,000 must be supported by a minimum of 2 quotations. Expenditure exceeding £20,000 and up to £50,000 must be supported by a minimum of 3 quotations. A STW form is not required but managers are required to hold evidence of quotations for audit.
- If expenditure is likely to exceed £50,000 a formal tendering process must be followed in accordance with the ICB's Procurement Policy. If there is a **valid reason for not following the formal process** (see list of exemptions attached) this STW request form must be completed.

6.2.3.2 Healthcare (Clinical) Services

Under the Provider Selection Regime (PSR) 2023 all healthcare and some mixed procurement activity must be compliant with PSR. Under PSR there is no de-minimis value below which a proportionate procurement is not required. Further details on PSR are outlined in Section 6.3 within this document.

6.2.4 Length of Contract

When considering which procurement route to use, thought should be given to the length of the contract required. For short term contracts, the market is likely to provide a costly response, as set up costs are usually amortised by providers over the length of a contract, and the shorter the contract term, the higher the annual contract sum.

In these cases, working with an existing supplier may be more cost effective. However, artificially shortening the contract term to enable direct award is likely to be challenged if there is a market which feels it has artificially been excluded. Contract length needs to be honestly and carefully considered when looking at the right approach to enable the appropriate decisions to be made. In addition, any extension periods (+1 clauses) should be set out clearly contract documentation and procurement paperwork, to ensure that extensions are appropriate and transparent, and to reduce risk of future challenge.

In cases where contracts are likely to be short because the commissioner requires a test and learn/pilot project prior to formal procurement, this can be an appropriate route, subject to the caveats outlined later in this paper.

6.2.5 Complexity of Service

Often, contracts procured on the open market fail because of poor specification or a lack of appreciation of the complexity of the service prior to commissioning.

When considering the procurement route, commissioners need to be certain they understand the services they are looking to procure, are clear about the outcomes they require (and the measurement of these will allow the collection of KPIs and data required under the Provider Selection Regime), and have thoroughly researched the market to identify appropriate providers. If there remains uncertainty around any of these, the procurement route should be developed to enable co-production with providers, or to enable negotiation to be undertaken after market testing to confirm the requirements. In these cases, competitive dialogue (only under PCR 2015) may

be used as an alternative to market testing, to enable providers and commissioners to work together to support outcomes.

The indirect consequences of service change should also be considered when assessing complexity, so that other providers are not adversely affected by changes or stoppages of service, and patients do not get 'stuck' in the system should one element of that system need to change. Alternatively, commissioners could work with incumbent providers to develop new services where these are likely to require testing and change before final procurement to enable these intricacies to be considered and resolved.

6.2.6 Approach to Risk

Procurement is by its very nature a highly regulated and legislated area. Any deviation from full market testing carries a risk of challenge and sub-optimal procurement routes can lead to significant issues for commissioners and patients alike. Most seriously, this can lead to the selection of a provider who is unable to satisfy the requirements of the specification and contract once this is 'real worlded', meaning services are lower quality than required, or that performance and financial targets cannot be hit. Alternatively, it could lead to fragmentation if providers do not work collaboratively but are instead in competition with one another.

6.2.7 Engagement with Key Stakeholders

In deciding what procurement route to take under PSR 2023 or PCR 2015, the ICB should engage with stakeholders around their current experiences of services, to ensure that these are taken into account when looking to make decisions around whether new market entrants should be pursued, or whether existing services can be redefined/redesigned. It is particularly key that when designing services which have interfaces/consequences for other providers/the wider ICS, that the views of patients and organisations directly impacted by these are sought and taken into consideration, to ensure seamless patient journeys, system efficiency and avoid the creation of clumsy hand-offs. Any potential conflict of interest issues that arise during the engagement process need to be managed in accordance with the ICB's Conflict of Interest policy.

6.2.8 Timelines

When deciding the best route, the timelines of each type of procurement procedure should be considered and any project timelines must build these in. Since lack of time is not an appropriate defence against procurement challenge, there needs to be clarity around the time required to develop a service for procurement, particularly given the previous comments around service complexity.

Typically, a two-stage market testing exercise will take 6-9 months (due consideration must be given to the mobilisation period required) to conclude if bidders come forward, and so full market testing is a major exercise with no guarantee of a successful outcome. Consideration needs to be given on how best commissioning time should be used and focus given to market testing those services where the ICS cannot respond appropriately.

6.2.9 Conflicts of Interest (CoI)

Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement processes so as to avoid any distortion of competition and to ensure equal treatment of all

economic operators. When adopting procurement approaches and in particular those which may not result in open market tendering, there is a clear need to ensure conflicts of interest are appropriately declared and managed. All participants in discussions regarding procurement activity will be required to adhere to the ICB Conflicts of Interest Policy. Likewise, external stakeholders will be required to declare and note interests to ensure these are appropriately managed.

A conflict of interest arises where an individual's ability to exercise judgement or act in one role is or could be impaired or otherwise influenced by that individual's involvement in another role. For the purposes of the procurement regulations, a conflict will arise where an individual's ability to exercise judgement or act in their role in the commissioning of services is impaired or otherwise influenced by their interests (or potential interests) in the provision of those services.

Where any person has an interest in a procurement decision, that person/those persons will be excluded from the decision-making process (but not necessarily from the discussion about the proposed decision).

Where it is not practicable to manage a conflict by simply excluding the individual concerned from participating in relevant decisions or activities, the ICB will need to consider alternative ways of managing the conflict such as, for example, involving third parties on the Board of the ICB who are not conflicted or inviting third parties to review decisions to provide additional scrutiny.

The ICB will, through its Conflicts of Interests Register, maintain a record of how they manage any conflict that arises between the interests in commissioning the services and the interests involved in providing them. This Register will need to include:

- Details of the individual who was conflicted and their role/position within the ICB.
- The nature of their interest in the provision of services.
- When the individual's interest in the provision of the services being commissioned was declared and how.
- Details of the steps taken to manage the conflict.
- The individual's involvement in the procurement process.

Conflicts of Interest will also need to be included on the agenda and recorded for all Contract Monitoring meetings. This may be used for audit and demonstrating the ICB has met the transparency requirements.

6.2.10 Decommissioning

As part of our procurement activities, thought should always be given to whether we should be procuring or commissioning a service at all, or whether services should be decommissioned or transferred to another system partner. Whilst this may not seem something that is ordinarily discussed as part of a procurement policy, ascertaining whether something is needed at all, and whether a service can provide value is a critical part of the decision making.

6.3 Methods of Procurement

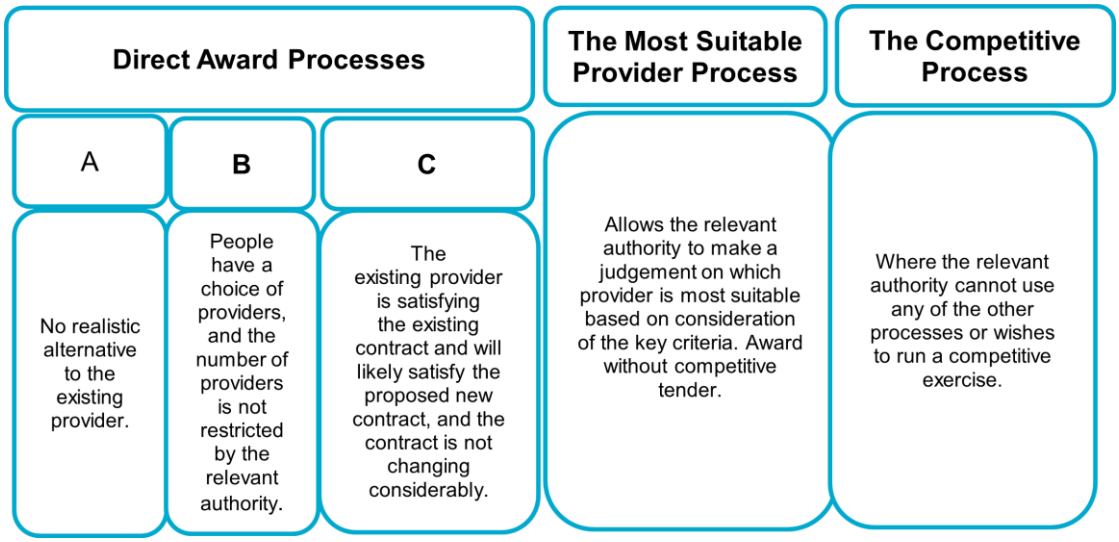
The term "procurement" means the acquisition of works, supplies or services by one or more contracting authorities from economic operator(s) chosen by those

contracting authorities. In many cases this may mean market testing, but this is by no means a foregone conclusion. The two main applicable regulations/legislations are:

- The Health Care Services (Provider Selection Regime) Regulations 2023 which came into effect on 1st January 2024 for clinical services (replacing PCR 2015) and in some instances for Mixed-Use procurements.
- The Public Contract Regulations (PCR) 2015 for non-clinical Services (please note the Procurement Act 2023 which is due to come into effect on 1st October 2024 replacing PCR 2015). This strategy will we updated to reflect the changes.

6.3.1 The Health Care Services (Provider Selection Regime) Regulations 2023

This section outlines the range (commonly used) of procurement routes (procedures) under The Health Care Services (Provider Selection Regime) Regulations 2023 which could be used by commissioners to ensure the most appropriate decision is made. These are:



1. Direct Award Processes:
    a. Direct Award Process A (DAP A)- This process must only be utilised where there is an existing provider of the services concerned and that provider is the only provider capable of offering those services.
    b. Direct Award Process B (DAP B) – This process must only be followed where patients are to be offered a choice of provider and the number of providers is not restricted by the ICB. The ICB is obliged to have processes in place for providers to express an interest and be accredited to provide such services where this is the case.

    Where Direct Award Process A or B cannot be utilised, either Direct Award Process C, the Most Suitable Provider Process or the Competitive Process must be utilised.

    c. Direct Award Process C (DAP C) – This process may be used where neither DAP A or DAP B are applicable. This process allows the direct award of a contract to an existing provider of the services who is doing a good job and the considerable change threshold is not met.
2. Most Suitable Provider (MSP) process – This process (MSP) may be utilised where the ICB, in their opinion, has a sufficient knowledge of the market to ascertain which provider would be best placed to perform the contract and

can do so without the need to carry out a competitive process, bearing in mind that a significant evidence base will be needed to do this and that the evidence base may be subject to challenge by other providers, who may bring representations when details of the award are publicised.

3. Competitive Process – This process may be utilised where the ICB needs to consult with the market, via a competitive process, to ascertain which provider is best placed to provide the service. The competitive process must be used if the relevant authority wishes to conclude a framework agreement. Framework Agreements: Under PSR these are agreements between one or more ICB's and one or more providers. Framework agreements set out the terms and conditions based on which the provider will enter into one or more contracts with the ICB(s), during the period the framework agreement is in place.

   The ICB(s) that may award contracts based on the framework agreement must be identified in the framework agreement (either by name or by describing the type of authority), and contracts awarded based on a framework agreement must only be between the authority (or relevant authorities) identified in the framework agreement and a provider that is party to the framework agreement.

   The length of a framework agreement must not exceed four years, other than in exceptional cases where the ICB is satisfied that the subject-matter of the framework agreement justifies a longer term.

   During the term of a framework agreement, providers may be added to a framework agreement. The ICB(s) are advised to set out how and when this might be done in the terms and conditions of that framework agreement. ICB(s) must use the approach for the competitive process to add providers to the framework agreement, and authorities are advised to use the same award criteria as when setting up the original framework agreement.

   If awarding a contract based on a framework agreement, the ICB(s) may do so in one of the following ways:
   - if the framework agreement includes more than one provider, choose whether to award the contract:
     - without a further competition (via 'direct award'), or
     - by following the competitive process (via a 'mini-competition').
   - without competition if the framework agreement only includes one provider (via a 'direct award')

When using Direct Award Process C or the Most Suitable Provider Option the ICB is required to undertake a due diligence process (including basic selection criteria and exclusions) proportionate to the nature and value of the contract. and will require assurance about potential providers and may seek inputs from the procurement team. The ICB should develop and maintain sufficiently detailed knowledge of relevant providers to ensure compliance with PSR. In addition, the ICB must consider five key criteria as below.

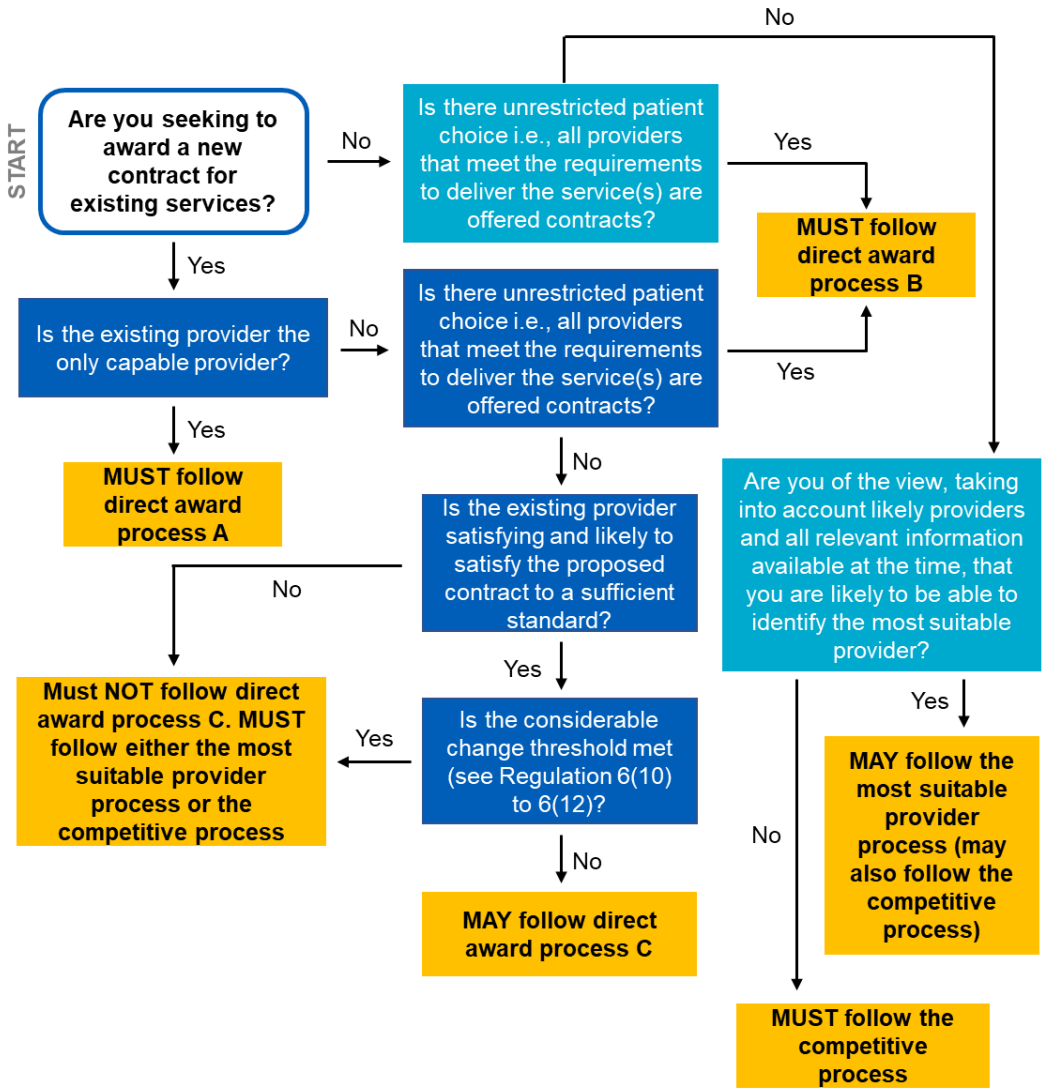
Five key criteria must be considered when making decisions about provider selection under Direct Award Process C, The Most Suitable Provider Process and The Competitive Process. The five criteria are:

- Quality and Innovation

- Value
- Integration, collaboration and service sustainability
- Improving access, reducing health inequalities and facilitating choice
- Social value

The relative importance of the key criteria is not predetermined by the Regulations and there is no prescribed hierarchy of weighting for each criterion, The ICB must apply all criteria to provide selection decisions and base the relative importance based on what the ICB is seeking to achieve from the service and contracting arrangements.

The following flow chart should be followed to identify the correct provider selection option:



A contract award can be made in urgent circumstances without the need to consider all decision-making options. Urgent circumstances include:

- a new service needs to be arranged rapidly in an unforeseen emergency or local, regional or national crisis, e.g., to deal with a pandemic
- urgent quality/safety concerns pose risks to patients or the public and necessitate rapid changes

- an existing provider is suddenly unable to provide services under an existing contract (for example, a provider becomes insolvent or experiences a sudden lack of critical workforce) and a new provider needs to be found.

An urgent award or modification must only be made by the ICB when all the below apply:

- the award or modification must be made urgently
- the reason for the urgency was not foreseeable by and is not attributable to the relevant authority
- delaying the award of the contract to conduct a full application of the regime would be likely to pose a risk to patient or public safety.

The ICB must not use the urgent award or contract modification provisions if the urgency is attributable to the relevant authority not leaving sufficient time to make procurement decisions and run a provider selection process – poor planning is not an acceptable reason to use these provisions.

Where decisions are made under urgent circumstances the ICB must complete a full PSR process once the urgent circumstance has passed. Any contract entered into under an urgent circumstance should be limited to twelve months duration.

6.3.1.1 Modification of Contracts

Modifications to contracts are permitted in certain circumstances are permitted without the need to consider any of the decision-making circumstances. Modifications are permitted if provided for in the original contract, relate to the change in identity of the provider or are as a result of external factors beyond the control of the ICB. Modifications are not permitted without consideration of the decision-making circumstances if the changes make the contract materially different in character or the changes are over £500,000 and represent over 25% of the original contract value.

6.3.1.2 Transparency Requirements

The ICB is required to evidence that it has properly exercised the responsibilities and flexibilities permitted by PSR, to ensure that there is proper scrutiny and accountability of decision made in relation to health care services. Relevant Transparency Notices must be published depending on which provider selection option is selected. All transparency notices must be published using the UK e-notification services – the Find a Tender Service. The ICB must keep clear records detailing the decision-making process and rationale. The ICB must follow the PSR standstill period for published transparency notices prior to any contract award.

PSR allows the opportunity for providers to make a representation on provider selection decisions made by the ICB. It also provides opportunity for a provider participating in a competitive procurement process to make a representation relating to the procurement process. Representations are only considered from an impacted provider if the representation meets all conditions of the PSR. The ICB must have place a process to receive and respond to representations. ICB officers involved in responding to representation must not have had any involvement in the original provider selection decision. Representations that are not resolved at ICB level can be escalated to the NHS England National PSR Panel. The ICB process for managing representations must support the process for providing information to the national

panel. Details of all representations received an outcome must be published in a ICB annual statement.

6.3.1.3 Mixed Procurements

Where a contract comprises a mixture of health care services and non-health care and goods the main subject matter should be determined by value of the health care element and whether the non-healthcare services or goods could be reasonably supplied under another contract. PSR shall only apply when both these requirements are satisfied.

6.3.1.4 Transitionary Arrangements

The PSR described above does not have any retrospective effect on contracts or frameworks agreements that were entered into prior to 1st January 2024. However, from 1st January 2024 onwards any changes to these contracts or framework agreements (those awarded or established before 1st January 2024) where the services are in scope of the regime, must be carried out in accordance with the contract modifications section of the PSR.

However, there may be instances where procurements underway following the PCR processes (see section below) did not conclude fully by the time the PSR came into force. Any contract award procedure started before 1st January 2024 will not be affected by the PSR. This means that contract awards, including when awarding a contract based on a framework agreement, initiated before 1st January 2024 can conclude under PCR rules. Similarly, if the establishment of a framework agreement started before 1st January 2024, then this can be concluded under PCR rules.

6.3.2 The Public Contract Regulations (PCR) 2015

This section outlines the range (commonly used) of procurement routes (procedures) under The Public Contract Regulations (PCR) 2015 which could be used by commissioners to ensure the most appropriate decision is made. There are other procedures under PCR 2015 which are not listed here.

6.3.2.1 Open Procedure (Regulation 27)

This procedure allows an unlimited number of interested providers to tender against defined parameters. This procedure is open and transparent and is the recommended procedure if low numbers of interested providers are known.

6.3.2.2 Restricted Procedure (Regulation 28)

This is a two-stage procedure. The first stage allows an unlimited number of interested providers to tender but allows the contracting authority to set the minimum criteria relating to technical, economic and financial capabilities that the suppliers have to satisfy.

Following evaluation and short-listing, a minimum of five suppliers (unless fewer qualify) are invited to tender in the second stage.

6.3.2.3 Competitive Procedure with Negotiation (Regulation 29)

This procedure is appropriate for complex contracts where contracting authorities are able to define some of the technical means capable of satisfying their needs or objectives but which could be negotiated following receipt of tenders. The contracting authority may enter into negotiation with bidders (a minimum of three suppliers, unless fewer qualify) following assessment of their initial tender to identify and define the means best suited to satisfying their needs but must ensure that the minimum requirements for service delivery are not amended and that all bidders are treated equally.

6.3.2.4 Competitive Dialogue (Regulation 30)

This procedure is appropriate for complex contracts where contracting authorities are not objectively able to define the technical means capable of satisfying their needs or objectives, and/or are not objectively able to specify the legal and/or financial make-up of a project. The contracting authority enters into a dialogue with bidders (a minimum of three suppliers, unless fewer qualify) following assessment of their initial tender to identify and define the means best suited to satisfying their needs. The dialogue may be conducted in successive stages with the option of reducing the number of bidders at each stage with the remaining bidders being invited to tender. Bidders must be eliminated on the basis of applying the stated award criteria.

6.3.2.5 Framework Agreements (Regulation 33)

A framework agreement is an umbrella agreement which sets out the terms on which the purchasing organisation and the provider(s) will enter into. The term of a framework agreement shall not exceed 4 years, save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement.

The agreements are established by organisations (both local and national) and are created by having a number of pre-approved providers who supply similar goods and/or services which can be purchased relatively quickly and easily. Each provider successfully accepted on the Framework Agreement have been assessed for financial and economic stability assessed and compliant with procurement legislation.

The terms and conditions set out in the Agreement cannot be re-negotiated for individual purchasing purposes. The risks and benefits of using the terms and conditions of a Framework Agreement should be assessed with procurement consultation.

There are 2 options;

- **Mini Competition**
  A smaller scale competitive process is undertaken with the approved suppliers to establish the Most Economic Advantageous Tender (MEAT) to ensure, Quality, affordability, accountability and Value for Money e.g. Price or Quality only where prices are already known. Under a mini-competition process framework providers have the option to reduce their prices or offer discounts.

- **Direct Award (Call Off)**
  Apply the terms and conditions of the Framework Agreement and Direct Award the contract.

Framework Agreements will stipulate in their terms and conditions if Mini Competition and Direct Award apply, some Agreements will also stipulate the weightings that must apply in each Mini Competition. In both options the Contract Award will be in

line with the terms and conditions of the framework agreement. Contracts awarded under the framework agreement may outlive the term of the framework agreement.

Useful Framework Agreements can be found at:

- Crown Commercial Services (CCS) http://ccs.cabinetoffice.gov.uk
- NHS Shared Business Services (SBS) http://www.sbs.nhs.uk/procurement/immediate-contact-access
- NHS Supply Chain http://www.supplychain.nhs.uk

6.3.2.6 Dynamic Purchasing System (Regulation 34)

A Dynamic Purchasing Systems (DPS) is similar to the Framework Agreement in that they are an umbrella agreement for a service / goods where providers apply through a Compliance and Financial and Economic Viability assessment. The difference being that there are no limits on how many providers can join the DPS or when i.e. joining is open to the market for the entire length of the DPS. The Contracting authorities can call off the DPS using the second stage of the restricted procedure.
It is possible to use the rules for 'Social and Specific Services' in the PCR's (2015) with flexibility within LTR and thus creating a Pseudo Dynamic Purchasing System (PDPS) whereby the rules for procuring Clinical Healthcare Services apply.
The BLMK ICB should seek professional procurement advice and consultation when considering this route.

The BLMK ICB will consider the risks and benefits of options available to them, taking advice from procurement professionals where required.

6.3.3 Other Approaches

In appropriate circumstances where providers are willing and able to work collaboratively under collaborative contracting models a fair and transparent negotiation procedure that is compliant with advertising rules and mirrors the competition principles of awarding contracts in Section 7, Regulation 76, of the PCR (2015) and PPCCR (2013) regulations should be considered. Please note the changes to the PCR 2015 and PPCCR 2013 regulations with the introduction of PSR 2023 for clinical services and the upcoming Procurement Act 2023 for non-clinical services which may affect the approach being adopted by the ICB.

This procedure should be accompanied with best value testing against benchmarking or formal financial model testing to ensure that the BLMK ICB can be held accountable for public money and evidence VfM.

The BLMK ICB will consider the risks and benefits of using this approach; seeking advice from procurement professionals and ensuring a full record of considerations and decision making is kept.

6.3.3.1 Any Qualified Provider (AQP) – PSR 2023 (Direct Award Process B)

The use of an AQP should be considered by the BLMK ICB where increasing the role of competition and patient choice can be proven to improve quality and patient care. Providers must be Care Quality Commission (CQC) registered (or where not required, the appropriate registration) or licensed by NHS England to take part in the process and all providers will be required to operate within the same pricing structure.

- Providers qualify and register to provide services via an assured process that tests providers' fitness to offer NHS funded Services.

- ICB sets pathways and referral protocols which providers' must accept.
- Referring Clinicians offer patients a choice of qualified providers for the service being referred to.

The BLMK ICB's procurement advice and support will advise on the suitability and applicability of the Any Qualified Provider (AQP) procurement route. It should be noted that the ability to control demand is a key consideration in the letting of AQP contracts, as the creation of additional supply can of itself generate additional demand for service. For contracts where AQP is being considered, thought must be given to the way in which demand for services can be effectively regulated.

6.3.3.2 Pilot Projects

The PSR 2023 regulations do not make any provision for Pilot Projects to be undertaken. Therefore, the ICB must approach Pilot Projects with caution. Unless there are no other options and if it is important for the BLMK ICB to use pilot projects (up to 18 months) e.g. in circumstances where the clinical outputs are not known or cannot be accurately predicted and understand that if a pilot project is a success, with provider capacity and capability in the market, the next step would be a competitive process under PSR 2023.

The use of a pilot project must not be used as a way to avoid a competitive procurements process or as a stop gap measure where the BLMK ICB have no intention of entering into a future competitive process and a Tender Waiver must be approved at the relevant committee / delegated committee dependant on the value of the project.

The BLMK ICB procurement advisors will provide guidance on the suitability of the use of pilot projects to ensure compliance with current procurement and competition law.

Pilot projects have been undertaken previously under PCR 2015 when the following definitions have been met and that the clinical service was a new service that had been redesigned;

- There was a specific goal;
- The timetable was set with defined periods for;
  - Start Date;
  - End Date; and
  - Period for lessons learnt.
- Clear and signed contract with the pilot provider;
- Robust Plan /process for evaluation; and /or
- Right to terminate a pilot must be included if it is found to be unsafe or the outcomes cannot be met.
-

6.3.3.3 Grants

Grant funding can be given by the ICB to a voluntary organisation where the ICB wishes to support the activities of that organisation because they complement the services that the ICB commissions (for example, grant funding to contribute to a hospice). By giving grant fund's, the ICB is not commissioning services from the organisation, but rather they are supporting the activities of that organisation: the grant agreement is not a contract for services, and so grant funding does not oblige the recipient to provide services to the ICB and the ICB cannot, through grant

funding, compel a body to provide services. However, grant funding should not be unconditional since it is important that the ICB is assured, proportionate to its value, that any funding will be used strictly for the purposes for which it was given, and that the services provided by the recipient to those who benefit from its activities are appropriate (for example, regarding safeguarding) to receive public funds.

Although grants are not subject to the Provider Selection Regime or the Public Contracts Regulations and therefore do not require a decision record, it is good practice to maintain a record of all decisions undertaken including approvals process for audit purposes.

6.4 The Procurement Process

As explained above, the procurement process can be designed on a bespoke basis but should reflect the market, value and complexity of the service being commissioned so that a proportionate procurement approach is applied.

All the ICB Procurements will need to be reviewed through the Contract Continuity and Procurement Governance Group (CCPG). The Chair of CCPG will then escalate key issues/risks to the appropriate Committee (usually Finance and Investment Committee).

The process will consist of some or all of the following stages:

Bidder Selection includes Evaluation/Moderation/Clarification Interview/Post Moderation

6.4.1 Planning Stage

A review of the service need, specification and options available to procure the service will take place. A project team when necessary should be set up and a project plan drawn up.

As part of the planning stage, each project member is required to complete a Potential Conflict of Interest form and Non-Disclosure Declaration regarding the specific procurement process.

This is then assessed by the commissioning lead/procurement lead for the project and the project member is deemed to be either eligible to proceed in the evaluation process or is excluded from the process. If any issues are identified, these are flagged up to the Associate Director Corporate Governance and reviewed/ signed off as having had the appropriate action taken.

Furthermore, once expressions of interest have been received on specific tenders, the names of the bidders are circulated to the project team and all project members are asked to reaffirm their ability to participate in the evaluation process. Market Analysis may also take place at this stage.

6.4.2 Advertisement Stage

When required an appropriate tender advertisement will be placed commensurate with the value and complexity and extent of the services being procured.

Opportunities that are selected for a competitive process must be sufficiently advertised to ensure fair competition. Publication of opportunities must be in line with transparency requirements applicable in compliance the regulations.

Advertisements will be clear and will succinctly promote the procurement opportunity, encouraging suitably qualified providers to respond. The advert will be published in an appropriate means including Contracts Finder UK; the ICB website and the UK Find-a-Tender Service (FTS) which replaced the Official Journal of the European Union (OJEU) website.

Advertisements are key to alerting the market in increasing market stimulation and ensuring adequate competition.

For non-clinical services under PCR 2015, if the contract value is below the relevant threshold value at which an advert is mandatory, an advert can still be placed 'on a voluntary basis'. The UK Guidance suggests that contacts over £12,000 must be published on Contracts Finder UK and contacts over £138,760 including VAT must be published on UK Find-a-Tender Service (FTS). This also includes the award notice. Under the Provider Selection Regime 2023, there is no de- minimis value for publishing procurement decisions on Contracts Finder. Under the Provider Selection Regime (2023) there is also a requirement to publish details of modifications where they are allowed under the Provider Selection Regime 2023.

6.4.3 Specification stage

Generic terms should be used when specifying the services required avoiding brand names and other references which would have the effect of distorting competition. Specifications should be performance-based specifications linked to achieving Key Performance Indicators (KPIs) to trigger payment of a proportion of the contract price.

Contract specifications for Healthcare Services must utilise the NHS standard specification template as in the NHS Standard Contract. The Invitation to Tender (ITT) be in line with those mandated through the Provider Selection Regime although the panel is at liberty to decide the weightings of each of the 5 key criteria. For procurement under the PCR 2015, the ITT must include agreed evaluation criteria and weightings. Where services are tendered the Evaluation Criteria used must be published in the Invitation to Tender (ITT) and once published cannot be altered.

All appropriate interested parties should be involved in writing the specification and the results of consultation must be also considered. The time required to prepare the service specification should not be underestimated.

6.4.4 Bidder Events

Bidder events allow providers to obtain a more in depth understanding of the procurement requirements and provide an opportunity to: stimulate market interest, raise clarifications and questions, request additional information and obtain market information which may help shape the ICB requirements. Market engagement events may be held to bring potential providers including those from VCSE and SME sector together so they can make linkages and support a larger procurement through sub-contracting/ lead provider arrangements, thus encouraging partnership building between VCSE/SME sector and support smaller service providers to link with primary contractors to access supply chain opportunities/ However due to the cost

implications of holding bidder events, the overarching principle of proportionality will remain.

6.4.4 Selection Questionnaires

A Selection Questionnaire (SQ) is used to enable the ICB to evaluate providers on their suitability, capacity, capability and eligibility to be short listed for the invitation to Tender stage.

Potential providers will complete a standard format SQ with questions tailored to reflect the service and procurement requirements.

The SQ document is issued to all parties who submit a formal expression of interest. The SQ will then be evaluated against predetermined SQ criteria and enable the ICB to move from a long list of suppliers to a shortlist. It is recommended that SQ is only used on tenders above the procurement threshold applicable at the time of publication.

6.4.5 Invitation to Tender

The Invitation to Tender (ITT) documents are issued to short listed bidders who were selected following the SQ process in the case of a Restricted Process. In an Open Process the documents are made electronically available to those potential bidders who register and download the documents.

The ITT documents consist of guidance and instructions to the bidders on the process and a response guide based on the approved detailed Service Specification. Elements of the ITT may include terms and conditions, contract specification, insurance, quality plans, method statements, pricing and fining schedules, bonds and guarantees, key performance indicators, etc.

Bidders are required to submit their responses to address requirements within the ITT documents. The responses are evaluated against pre-determined and pre-documented criteria.

For healthcare services under PSR (DAP C, MSP and Competitive Process), Basic Criteria and the following Key criteria must be evaluated:

1. Social Value
2. Improving access, reducing health inequalities, and facilitating choice
3. Value
4. Integration, collaboration and service sustainability
5. Quality and innovation

The ITT Evaluation, if not carried out correctly can lead to a potential challenge to the Commissioner's decision-making process (under PCR 2015) or a representation (under PSR 2023).

6.4.6 Bidder Selection stage

When selecting potential bidders, the process used must be open, transparent and fair. No sector of the market should be given an unfair advantage including the current provider if applicable. If a high number of responses to the opportunity are predicted, bidder events can be used to evaluate potential provider's capabilities, capacity and financial standing prior to a full technical evaluation.

All bidders must declare any Potential Conflicts of Interest so that these can be dealt with to ensure a fair and impartial approach to any selection.

6.4.7 Offer stage

This is where the potential Provider's offer is made to provide the service including the price for providing those services. Where competition is waived or is not applicable this will be by direct negotiation with the Provider and once agreed a contract will be signed.

6.4.8 Tender Evaluation Panel

The tender evaluation panel is a legal requirement of any tender process and its function is to ensure the safety, quality, performance, financial viability and merit of potential providers to serve patients on behalf of the ICB. An evaluation methodology is formally agreed before the ITT is issued as the ITT must include the relevant scoring criteria and weightings for each section.

The evaluation panel will be multi-disciplinary including representation from relevant specialists e.g. Clinicians, Contracting, HR, Finance, IM&T, Governance, Communications & Patient Engagement, Equality and Diversity will be established for all procurements to ensure fair and transparent scoring of each submission.

The evaluation process should seek to identify the most economically advantageous bid(s), both in terms of qualitative and quantitative criteria.

In conducting the evaluation, the evaluators must act in accordance with the key principles of the Public Contract Regulations and Provider Selection Regime:

1. Non-discrimination
2. Equal Treatment
3. Transparency
4. Proportionality

All recorded comments and notes would be made available under a Freedom of Information (FOI) Act request. Confidentiality must be respected and maintained throughout the evaluation process. Any potential or actual conflict of interest must be advised in advance of the tender evaluation.

Managing potential conflicts of interest appropriately is needed to protect the integrity of the procurement process and commissioners from any perceptions of wrongdoing. Any potential or actual conflict of interest must be advised to Project lead in advance of any tender evaluation. A conflict of interest may include but not be restricted to any direct or indirect links to any of the Bidders and significant shareholdings associated with any of the Bidders.

6.4.9 Award stage

Under PSR 2023, the award of a contract is based on the evaluation of the five key criteria. To do this, the commissioner's must decide the relative importance of the key criteria for the service in question, before assessing the existing provider in relation to each of the key criteria.

Under PCR 2015, the award of contract is based on "the Most Economically Advantageous Tender (MEAT)" to the preferred bidder. This focuses on the best combination ratio of Price/Quality. For example, it may be that the evaluation of the

procurement is undertaken based on 60% weighting of final scoring being given to quality/technical capabilities, and 40% given to the finance/price element of the bid.

Under both regulations, the final scores are a combination of all the allocated weightings leading to the organisation with the highest combined score being given the award.

6.4.10 Post Award Stage

Under PSR 2023, the standstill period will begin on the working day following the publication of the intention to award a contract notice. The standstill period of eight working days would then be counted from that point. Under PSR 2023, the process for publishing contract award decision on Find a Tender Service (FTS) is laid out and varies between Direct Award process A, B, C, Most Suitable Provider and Competitive dialogue. These requirements must be followed (please see chart on Transparency Notices under PSR). However, under PCR 2015, where the ICB has placed an FTS advert a 10-day Standstill (Alcatel) period will apply. Whilst not mandatory for those services contained within the Light Touch regime, its use will help the ICBs further demonstrate openness and transparency of processes and help mitigate any risk of any potential future legal challenge and must be adopted as good practice.

- A **signed contract** will be entered into with the successful provider(s) using the relevant NHS standard contract and the schedules populated with details from the winning bidder(s) Tender response. A contract award notice will then be placed via the e-Tendering system to close the process.
- A **record of the contract award** must be maintained in order to comply with PSR 2023, PCR 2015 and Regulation 3(5) of the Procurement, Patient Choice and Competition Regulations. Alongside this record, a register of procurement decisions is held by the CSU. All prospective bidders are asked to complete a conflict of interest form prior to submitting any responses to the ICBs through the electronic sourcing portal. A register is held detailing any such conflicts of interests and the details of the connecting project.

6.4.11 Post Contract Award Period

All awards are published following contract signature. A contract award notice will be created and will either be published immediately after contract signature. These notices are then available to the public on the Contracts Finder/ FTS website. Contracts awarded via a Framework Agreement may not require the publication of an award notice, however the Framework Authority must be informed of the award and any other relevant information requested.

Prior to the contract award notice being published, the ICB will not be able to answer specific Freedom of Information requests relating to the award of the contract.

6.4.12 Contract Monitoring

Contract monitoring process is to ensure providers are meeting their contractual requirements in order to guarantee high levels of patient safety and satisfaction and the ICB is receiving Value for Money (VfM) for its patients.

The contract monitoring process is used to measure (e.g., KPI's), monitor (regular meetings and reporting) and intervene (discussion and issuing Contract Performance Notices as appropriate) if the quality of services does not meet the needs of the users/carers. The frequency of contract monitoring meetings should be based on the ICBs risk assessment of the contract and this should be reviewed regularly.

Conflicts of Interest will also need to be included on the agenda and recorded for all Contract Monitoring meetings. This may be used for audit and demonstrating the ICB has met the transparency requirements.

6.5 Transfer of Undertakings and Protection of Employment Regulations (TUPE)

These regulations arose because of the 1977 EU Acquired Rights Directive and were updated in 2006. They apply when there are transfers of staff from one legal entity to another because of a change in employer. This is a complex area of law which is continually evolving.

Commissioners need to be aware of these regulations and the need to engage HR support and possibly legal advice if there is likely to be a TUPE issue. Additionally, NHS Bodies must follow Government guidance contained within the "Cabinet Office Statement of Practice 2000/72 (revised 2013) and associated Code of Practice 2004 when transferring staff to the Private Sector" also known as "COSOP".

It is the role of the ICB to advise potential bidders that whilst not categorically stating TUPE will apply it is recommended that they assume that TUPE will apply when preparing their bids and ensure that adequate time is built into procurement timelines where it is anticipated that TUPE may apply.

Any logistical arrangements regarding staff transfer under TUPE, when there is a change of provider, as a result of a procurement, is a provider-to-provider issue, it is not an area for Commissioners to involve themselves with.

6.6 Sustainable Procurement & Social Value

The NHS is a major employer and economic force across the ICB's region. The ICB recognises the impact of its purchasing and procurement decisions on the regional economy and the positive contribution it can make to economic and social regeneration. The ICB is committed to the development of innovative local and regional solutions and will deliver a range of activities as part of its market development plans to support this commitment.

Wherever it is possible and does not contradict or contravene the ICB's legal obligations, the ICB will work with VCSE's and SMes to develop and support a sustainable local health economy eg:

- Longer term sustainable investment in providers to enable innovation and transformation and prioritises evidence of local added value, local networks and knowledge and local impact on addressing health inequalities across the 5 key criteria
- Simplified, inclusive and proportionate processes that enables a range of providers to be part of it and fully demonstrate their impact (such as grassroots or small VCSE organisations)
- Shifting investment closer to communities including to communities themselves
- Mitigation against potential sustainability risks and exploring solutions with providers particularly where funding sources comes from multiple statutory health and care partners (such as in the VCSE sector).

The NHS has committed to a carbon reduction plan and to reach net zero by 2040. The ICB will support this plan in accordance with NHS England guidance when

selecting providers and completing due diligence assessments. The ICB should make procurement and provider selection decisions in accordance with the ICS Green Plan to reduce carbon footprints, reduce consumption and switch to sustainable alternatives.

The NHS has committed to a carbon reduction plan and to reach net zero by 2040. The ICB will support this plan in accordance with NHS England guidance when selecting providers and completing due diligence assessments. The ICB should make procurement and provider selection decisions in accordance with the ICS Green Plan to reduce carbon footprints, reduce consumption and switch to sustainable alternatives.

6.7 Information Governance Management and Data Security

The NHS standard contract contains all of the necessary clauses needed to comply with UK GDPR and should be used where possible. If the NHS standard contract is not being used, please refer to the checklist within the NHS England Big Picture Guides - Data Security Standard 10 News (dsptoolkit.nhs.uk) which provides a guide to the necessary clauses for any legally binding agreement. Depending on the agreement involved, these clauses may be captured within the body of the main contract, as a separate schedule, or as a standalone data processing agreement. Additional information relating the contracts can be found within the Information Commissioners Office (ICO) website via Contracts | ICO.

Prior to awarding a contract a proportional due diligence process must be undertaken which may involve researching the supplier/service provider so that the ICB can be assured of their compliance with data protection laws and the National Data Guardian (NDG) Data Security Standards. This includes checking their Data Security and Protection Toolkit (DSPT) status for the latest year's submission, and if the ICB contracting suppliers/service providers to provide digital health and care technology, the ICB is encouraged to request and review their Digital Technology Assessment Criteria (DTAC) submission.

It is important to note that the level of due diligence needed will depend on the level of risk of the service the supplier is providing, as well as the ICB's appetite for risk. However, if an organisation is commissioned via the NHS Standard Contract, the supplier/service provider must complete and publish an annual data security assessment in accordance with, and comply with the mandatory requirements of, the NHS Data Security and Protection Toolkit, as applicable to the Services and the supplier/service provider's organisation type. (21.2 General Responsibilities).

The ICB should ensure that any supplier/service provider of critical IT systems that could impact on the delivery of care, or that processes personal identifiable data, has the appropriate certification (suppliers may include other health and care organisations). Depending on the nature and criticality of the service provided, certification might include:

- ISO/IEC 27001:2013 certification: supplier/service provider holds a current ISO/IEC27001:2013 certificate issued by a United Kingdom Accreditation Service (UKAS) - accredited certifying body and scoped to include all core activities required to support delivery of services to the organisation.

- Cyber Essentials (CE) certification: supplier/service provider holds a current CE certificate from an accredited CE certification body.
- Cyber Essentials Plus (CE+) certification: supplier/service provider holds a current CE+ certificate from an accredited CE+ Certification Body.
- Digital Marketplace: supplier/service provider services are available through the UK Government Digital Marketplace under a current framework agreement.
- Please note, other types of certification(s) may also be relevant and required.

Overall, it is important that the ICB organisation assures itself of any necessary certification for suppliers/service provider it uses, even if the procurement has been done through a framework. In addition to this, the ICB may also require the supplier to complete a Data Protection Impact Assessment (DPIA) which is a process to help the ICB identify and minimise the data protection risks of a project / new supplier. Suppliers and ICB contract / project leads must complete a DPIA where the processing of data that is likely to result in a high risk to individuals. This includes some specified types of processing. DPIA templates and support can be found within the ICB Information Governance team and the suppliers Data Security/ Information Governance team.

6.8 Training Needs

All the ICB staff, and others working with the ICB, will need to be aware of this policy and its implications. It is not intended that staff generally will develop procurement expertise, but they will need to know when and how to seek further support. The most urgent requirement is that all System Transformation Team and Place staff throughout the ICBs should know enough about procurement to know to seek help when they encounter related issues; they must also be able to give clear and consistent messages to providers and potential providers about the ICB procurement intentions in relation to individual service developments.

Awareness of procurement issues will be raised through organisational development and training sessions for clinical and non-clinical members of the ICB.

6.9 Documentation and Record Keeping

The ICB will comply with its statutory obligations to keep and maintain appropriate records.

Accurate record keeping and documentation is also fundamental to any procurement process and is also consistent with the ICB obligation of transparency. A robust audit trail should be maintained which records all steps and decisions taken and the reasons for those decisions. This assures the ICB accountability, that its decisions can be scrutinised, and that it can accurately respond to formal complaints or challenges. Formal document version control should also be implemented, and all document versions retained in case of future need.

6.9.1 PCR 2015 (Regulation 84)

This regulation required contracting authorities to draw up a report in relation to each contract of framework that is awarded, and ensure it includes all the information set out at Regulation 84 (1).

This does not apply to contract called off from a framework agreement (see Regulation 84 (2)).

There is an ability to cross-refer to the Contract Award Notice, where this already constrains all the information required. NB: A template report compliant with this regulation is provided by the AGEM CSU procurement team.

6.9.2 PSR 2023 (Regulation 25)

The ICB is required to adhere to the information requirements laid out in regulation 24 of the PSR 2023, namely keeping a record of:

- The name of any provider to whom it awards a contract;
- The name of any provider who is a party to a framework agreement;
- The address of the registered office of principal place of business of each provider referred to above;
- The decision-making process followed, including the identity of individuals making decisions;
- Where DAP C or the Most Suitable Provider Process was followed, a description of the way in which the key criteria were taken into account and the basic selection criteria were assessed when making a decision;
- Where the Competitive Process was followed, a description of the way in which the key criteria were taken into account, the basic selection criteria were assessed and contract or framework award criteria were evaluated when making a decision;
- The reasons for any decisions made under PSR 2023;
- Any declared conflicts or potential conflicts of interest;
- How any conflicts or potential conflicts of interest were managed for each decision;
- Where a procurement is abandoned, the date on which it was abandoned.

In addition to the record keeping requirements on an individual procurement basis, the ICB is obliged to publish an annual summary of its contracting activity for the provision of relevant health services. This must be made available on the ICB's website and must include:

- The number of contracts awarded in the year to which the summary relates where DAP A, DAP B or DAP C was followed;
- The number of contracts awarded in the year to which the summary relates where the Most Suitable Provider Process was followed;
- The number of contracts awarded in the year to which the summary relates where the Competitive Process was followed;
- The number of framework agreements concluded in the year to which the summary relates;
- The number of contracts awarded and modifications made in reliance on regulation 14 (urgent award and modification) in the year to which the summary relates;
- The number of new providers to whom a contract was awarded in the year to which the summary relates;
- The number of providers who held a contract in the previous year but no longer hold any contracts in the year to which the summary relates;
- The number of written representations made in accordance with regulation 12(3) and received during standstill periods which end in the year to which the summary relates and a summary of the nature of those representations.

In addition to the record keeping requirements outlined above, the ICB is also obliged to monitor its compliance with the PSR 2023 and along with publishing the detail

outlined above must also publish details of the results of the monitoring and provide detail as to how any non-compliance will be addressed.

6.9.2.1 Transparency Notices under PSR 2023

process	decision-making processes					framework agreements		
	direct award processes			the most suitable provider process	the competitive process	establishing a framework agreement	contracts based on a framework agreement without competition	contracts based on a framework agreement following competition
	A	B	C					
Making intentions clear in advance								
Publishing the intended approach in advance				✓				
Publishing a notice for a competitive tender					✓	✓		
Communication of the decision								
Publishing the intention to award notice			✓	✓	✓	✓		✓
Confirmation of the decision								
Publishing a confirmation of award notice	✓	✓	✓	✓	✓	✓	✓	✓
Contract modification								
Publishing a notice for contract modifications	✓	✓	✓	✓	✓	✓	✓	✓

6.9.2.2 Receiving Representations under PSR 2023

When following Direct Award Process C, the Most Suitable Provider Process, and the Competitive Process – following the publication of the intention to award a contract – the relevant authority must observe the standstill period. Standstill period will begin on the working day following the publication of the intention to award a contract notice. The standstill period of eight working days would then be counted from that point.

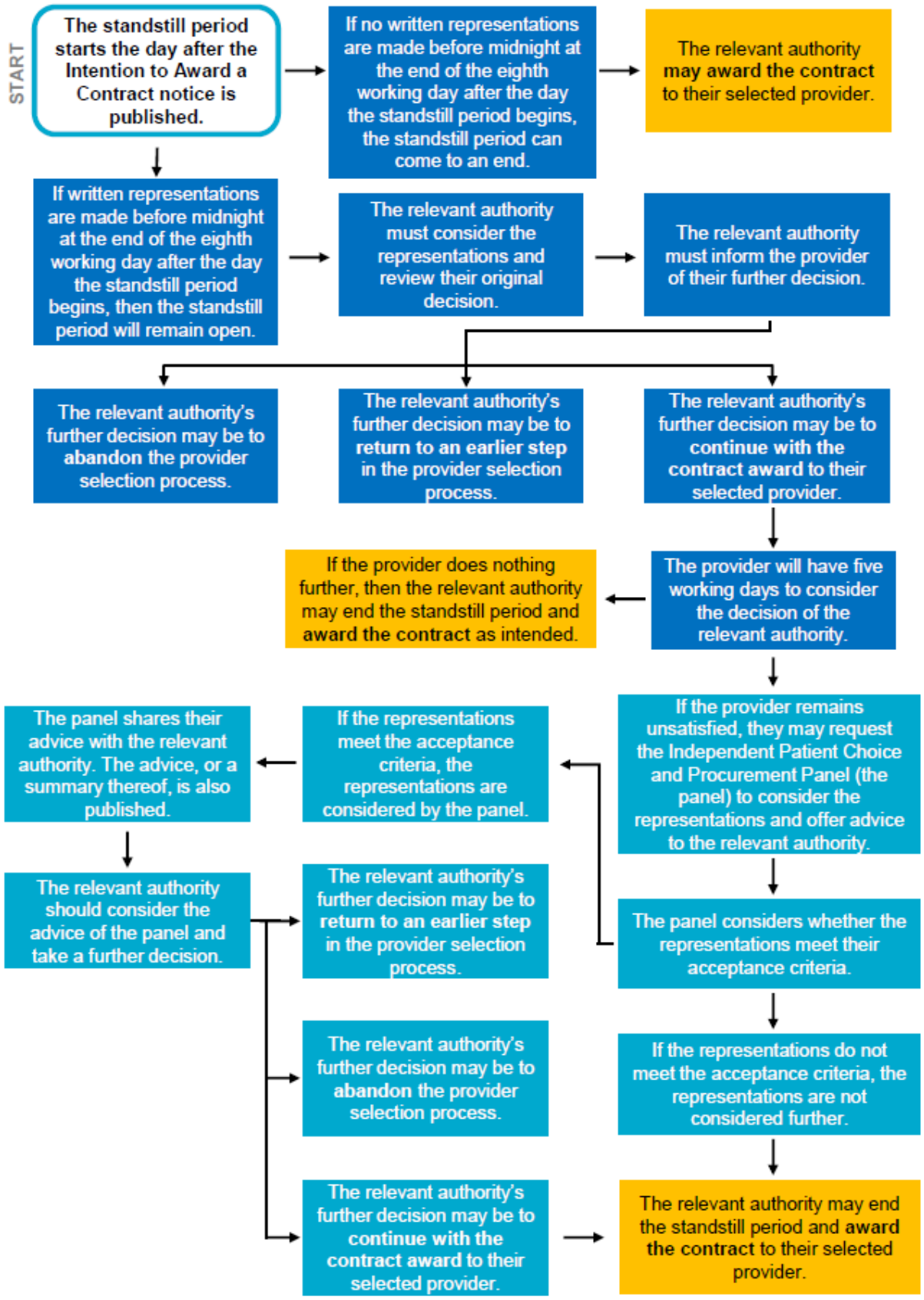
- As part of any documentation/notices issued pertaining to the process followed, providers will be notified that representations must be issued in writing via Atamis or to the ICB contracting address. The route for issuing representations specified will depend on the form taken by the process.
- The standstill period must be for a period of eight working days starting on the working day after the publication of an intention to award notice. Providers must issue their representation formally in writing as detailed in paragraph 1 above within this time. Representations received after the close of the eight working-day standstill period will not be considered.
- The ICB is obliged to acknowledge receipt and advise of an indicative timescale for the standstill period. Timescales for response will be considered by the panel and advised back to the party making the representation on a case-by-case basis. More complex representations, for example, are likely to attract a longer response timescale.
- A review panel (the ICB Procurement Representation Panel) will be established made up of the following representatives (who must be independent from having any involvement in any part of the evaluation or recommendation of the original contract award decision).
    - ICB Representative(s)
    - Senior Procurement Officer of the CSU

    - Other specialist representatives as deemed necessary, i.e. quality, clinical leads, finance, based on representation made or whether further clarity needed from core panel members as part of the review process.
- The panel will be provided with the following documentation as a minimum, to independently review:
    - Details of the provider representation
    - Contract award report.
    - Summary report of provider submission.
- Any other documentation deemed helpful/useful to the deliberations of the panel by the relevant procurement lead based on the substance of the representation received.

  Panel members can request further information where deemed necessary from the provider or ICB evaluation panel through the ICB representative, who will facilitate the process.
- The panel will then collectively agree that adequate assurance has/has not been provided in respect that:
    - the PSR Regulations have been appropriately applied.
    - any area of the evaluation process / scoring which was deemed as requiring further clarity or scrutiny, has now been fully satisfied.
    - due governance processes have been followed in the decision of the contract award.

  On conclusion, a recommendation of whether the representation is upheld or not will be made to the member(s) nominated for the project who will agree appropriate action, using the attached flowchart “reviewing decision during standstill period” for guidance.
- The nominated member(s) will then notify the provider of the outcome of the independent review of the representation. Such notification shall include the proposed action to be taken (e.g., no action to be taken, roll back of procurement to an earlier stage, abandonment etc.) along with the reasoning for the decision.
- The provider will have 5 working days to consider the decision. If there is no further action by the provider, standstill ends.
- If the provider remains dissatisfied, they can make a further representation to the NHS England Independent Patient Choice and Procurement Panel. In this situation, the ICB would not be able to proceed with the award of the contract until concluded. Consideration would need to be given to continuity of service in any interim period.
- Where recommendations are made by the Independent Patient Choice and Procurement Panel, the review panel shall reconvene to consider the recommendations made and decide whether the recommendations should be adopted. They shall then communicate that decision to the provider making representations as appropriate and ensure appropriate action is taken by the ICB.

Reviewing Decisions during the Standstill Period (Flowchart)



Appendix 1 - Equality Impact Assessment Initial Screening

Please answer the questions against each of the protected characteristic and inclusion health groups. If there are significant impacts and issues identified a full Equality / Quality Impact Assessment (EQIA) must be undertaken. It is against the law to discriminate against someone because of these protected characteristics. For support and advice on undertaking EQIAs please contact: agcsu.equalities@nhs.net

Name of Policy:	Procurement Policy
Date of assessment:	01.04.2024
Screening undertaken by:	Kathryn Moody, Director of Contracting / Deputy Chief Operating Officer

Protected characteristic and inclusion health groups. Find out more about the Equality Act 2010, which provides the legal framework to tackle disadvantage and discrimination: https://www.equalityhumanrights.com/en/equality-act/protected-characteristics	Could the policy create a disadvantage for some groups in application or access? (Give brief summary)	If Yes - are there any mechanisms already in place to mitigate the potential adverse impacts identified? If not, please detail additional actions that could help. If this is not possible, please explain why
Age A person belonging to a particular age (for example 32 year olds) or range of ages (for example 18 to 30 year olds).	No	
Disability A person has a disability if she or he has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.	No	
Gender reassignment The process of transitioning from one gender to another.	No	
Marriage and civil partnership Marriage is a union between a man and a woman or between a same-sex couple. Same-sex couples can also have their relationships legally recognised as 'civil partnerships'.	No	
Pregnancy and maternity Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth and is linked to maternity leave in the employment context. In the non-work context, protection against maternity discrimination is for 26 weeks after giving birth, and this includes treating a woman unfavourably because she is breastfeeding.	No	
Race Refers to the protected characteristic of race. It refers to	No	

a group of people defined by their race, colour and nationality (including citizenship) ethnic or national origins.		
Religion or belief Religion refers to any religion, including a lack of religion. Belief refers to any religious or philosophical belief and includes a lack of belief. Generally, a belief should affect your life choices or the way you live for it to be included in the definition.	No	
Sex A man or a woman.	No	
Sexual orientation Whether a person's sexual attraction is towards their own sex, the opposite sex, to both sexes or none.	No	
Carers Individuals within the ICB which may have carer responsibilities.	No	
Please summarise the improvements which this policy offers compared to the previous version or position.		
This policy has not changed in terms of EQIA from that previously in place.		
Has potential disadvantage for some groups been identified which require mitigation?		
No		

Appendix 2 - Data Protection Impact Assessment Initial Screening

Data protection is the fair and proper use of information about people. Before completing this form, please refer to the Data Protection Impact Assessment (DPIA) Guidance in the Information Governance (IG) section on the staff Intranet or contact the Data Protection Officer for support via blmkICB.ig@nhs.net

A DPIA is a process to help you identify and minimise the data protection risks. You must do a DPIA for processing that is likely to result in a high risk to individuals. You can use our screening checklist below to help you decide when to do one. If you have answered 'Yes' to any of the 10 screening questions, you must then carry out a full DPIA using the Stage 2 form, which is also available on the Intranet in the IG section.

Name of Policy:	Procurement Policy
Date of assessment:	01.04.2024
Screening undertaken by:	Kathryn Moody, Director of Contracting / Deputy Chief Operating Officer

Stage 1 – DPIA form **please answer 'Yes' or 'No'**

1.	**Will the policy result in the processing of personal identifiable information / data?** This includes information about living or deceased individuals, including their name, address postcode, email address, telephone number, payroll number etc.	No
2.	**Will the policy result in the processing of sensitive information / data?** This includes for living or deceased individuals, including their physical health, mental health, sexuality, sexual orientation, religious belief, National Insurance No., political interest etc.	Yes
3.	**Will the policy involve the sharing of identifiers which are unique to an individual or household?** e.g., Hospital Number, NHS Number, National Insurance Number, Payroll Number etc.	Yes
4.	**Will the policy result in the processing of pseudonymised information by organisations who have the key / ability to reidentify the information? Pseudonymised data -** where all identifiers have been removed and replaced with alternative identifiers that do not identify any individual. Re-identification can only be achieved with knowledge of the re-identification key. **Anonymised data -** data where all identifiers have been removed and data left does not identify any patients. Re-identification is remotely possible, but very unlikely.	Yes
5.	**Will the policy result in organisations or people having access to information they do not currently have access to?**	Yes
6.	**Will the policy result in an organisation using information it already holds or has access to, but for a different purpose?**	No
7.	**Does the policy result in the use of technology which might be perceived as being privacy intruding?** e.g., biometrics, facial recognition, CCTV, audio recording etc.	No
8.	**Will the policy result in decisions being made or action being taken against individuals in ways which could have a significant impact on them?** Including profiling and automated decision making. (This is automated processing of personal data to evaluate certain things about an individual i.e., diagnosis and then making a decision solely by automated means - without any human involvement)	No
9.	**Will the policy result in the collection of additional information about individuals in addition to what is already collected / held?**	Yes
10.	**Will the policy require individuals to be contacted in ways which they may not be aware of and may find intrusive?** e.g., personal email, text message etc.	No

Appendix 3- Decommissioning and Disinvestment Policy

Decommissioning and Disinvestment F