

# NHS Herts and West Essex Integrated Care Board (ICB)

## Competition Disputes Policy

### July 2022 V.01

<b>Brief Description (max 50 words)</b>	This policy sets out the process to be followed and reporting arrangements in the event that a provider or potential provider of services disputes the procurement/ contracting / commissioning or related decision-making decisions.
<b>Target Audience</b>	All staff working for or on behalf of NHS Hertfordshire and West Essex Integrated Care Board.

<b>Version Number</b>	Version 1.0
<b>Accountable Officer</b>	Jane Halpin
<b>Responsible Officer</b>	Alan Pond
<b>Date Approved</b>	27.07.2022 (approval noted by HWE ICB Board)
<b>Approval Ratified by</b>	Executive Team (on behalf of HWE ICB Board)
<b>Review Date</b>	June 2023
<b>Stakeholders engaged in development/review</b>	External procurement advisors – initial draft
<b>Equality Impact Assessment</b>	Completed

## Amendment History

Version	Date	Reviewer Name(s)	Comments
1	16 <sup>th</sup> June 2022	Sarah Beaumont (Attain)	Issued for comments

## EQUALITY IMPACT ASSESMENT

This document has been assessed for equality impact on the protected groups, as set out in the Equality Act 2010 and is with the Equality and Diversity Group to review. There are no detrimental effects of this policy on any of the protected groups. This Policy is applicable to every member of staff within the ICB irrespective of their age, disability, sex, gender reassignment, pregnancy, maternity, race (which includes colour, nationality and ethnic or national origins), sexual orientation, religion or belief, marriage or civil partnership.

## SUSTAINABILITY STATEMENT

We declare that NHS Hertfordshire and West Essex Integrated Care Board will demonstrate commitment to promoting environmental and social sustainability through our actions as a corporate body and as a commissioner.

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## 1. INTRODUCTION

This Competition Disputes Resolution Policy is referenced within the Hertfordshire and West Essex Integrated Care Board's (HWE ICB) Procurement Policy.

It sets out the process to be followed if a current provider, or potential provider, of services wishes to dispute the procurement / contracting / commissioning or related decision-making decisions.

It is only applicable in the context of resolving procurement disputes where the complainant is not intending to make a formal challenge of the outcome of any contract award made via a formal procurement process through the Courts and/or the contract award value in question does not fall within the thresholds for formal procurement processes against the Public Contract Regulations 2015 (as amended etc.) (2020).

## 2. CONTEXT

The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations came into effect on 1 April 2013. The regulations require commissioners to adhere to rules to ensure good practice in relation to the procurement of NHS health care services and to protect patients' rights to make choices regarding their NHS treatment. They also prohibit commissioners from engaging in anti-competitive behaviour unless this is in the interests of health care service users. (See Appendix A).

The Regulations adopt a principles-based approach that is intended to give commissioners flexibility.

Providers have the right of appeal in some circumstances against contracting / commissioning decisions. The Procurement, Patient Choice and Competition Regulations apply alongside the existing Public Contracts Regulations 2015 (as amended by the Public Procurement (amendment etc.) (EU Exit) Regulations 2020). The Regulations are a bespoke set of rules for the health care sector and provide a mechanism for NHS Improvement, as sector regulator, to investigate complaints and take enforcement action. The Regulations are designed as an accessible and effective alternative to challenging decisions in the courts.

For the avoidance of doubt this Competition Dispute Resolution Process is a non-contractual process and is intended for use in situations where the prospective parties have decided not to follow other resolution solutions that may be available to them including formal contract dispute resolution or action under statutory or legal provisions governed by English law.

### Procurement Reforms

The UK's departure from the EU following the end of the transition period provides a unique opportunity to radically change public procurement. For healthcare services, NHS England and NHS Improvement have a desire to replace the current procurement rules when procuring healthcare services with a set of more flexible arrangements to support the NHS's ambition for greater integration and collaboration between NHS organisations and their partners, whilst reducing administrative bureaucracy.

The NHS Provider Selection Regime (PSR) will replace the Public Contract Regulations 2015 (EU Exit amendment etc. 2020) and the NHS (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

Simultaneously to this, the government have been consulting on the Green Paper on 'Transforming Public Procurement' which addresses proposals to reform public sector procurement. This new set of Regulations will be applicable for the purchasing of goods or services which are not considered to be 'healthcare' services (likely any services which currently fall under the current non-light touch regime). The ambition is to create a new regulatory framework which delivers the best commercial outcomes with the least burden on providers and commissioners.

The ICB will update this policy when the new legislative reforms are enshrined in law.

### **3. OBJECTIVES OF THE DISPUTE RESOLUTION PROCESS**

The ICB's objectives of this process are as follows:

- To resolve competition disputes transparently, fairly and consistently and to mitigate risks and protect the reputation of the NHS.
- To resolve any disputes by local resolution. A conciliation process will be proposed in all cases.
- To be compliant with the acceptance criteria of NHS Improvement
- To prevent, where possible, legal challenge and external referral processes.
- To provide confidence to parties that the process is transparent, proportionate, that it treats providers equally and in a non-discriminatory way. Encouraging innovative ideas and enhancing a willingness to participate in a market, that it is intended will benefit Hertfordshire and West Essex patients.
- To ensure internal governance processes are being followed and that a clear audit trail is maintained of any assessments undertaken and correspondence considering local and national policy requirements.
- To mitigate risks and protect the reputation of the NHS.

The appellant may withdraw the appeal at any time during the process. If for any reason an appeal is withdrawn, the CCG will not accept a future appeal on the same grounds.

### **4. UNDERPINNING PRINCIPLES**

In line with national guidance the ICB's Competition & Dispute Resolution Process will be based on, and will seek to uphold, the following principles in line with procurement law:

- Transparency;
- Proportionality;
- Non-discrimination; and
- Equality of Treatment.

It will do this by:

- **Transparency**

Communicate the process and decision-making criteria widely and in advance. Engage all relevant stakeholders in the development of this process. Enforce declarations of interest. Publish findings within and across the ICB and NHS England to enable consistency.

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- **Equality of treatment**

Ensuring that all providers and sectors have equal opportunity to compete where appropriate; that financial and due diligence checks apply equally and are proportionate; and that pricing and payment regimes are transparent and fair.

- **Proportionality**

Only begin the formal dispute process on matters of material importance. Resources used must be proportionate to the significance of the dispute.

- **Non discriminatory**

The ICB will not favour one part of the system over another.

#### Process

The ICB will ensure that it upholds the following processes in investigating the complaint:

- **Objectivity**

Base the analysis and the decision on objective information and criteria. Maintain an audit trail.

- **Accountability**

The ICB will provide information relating to the number of disputes considered and outcomes. The ICB will act on any decision of the NHS England panel and be held to account by its own Board.

- **Subsidiarity**

Wherever possible the dispute will be managed by the ICB drawing on NHS England support as required. If this fails then NHS England will manage the dispute using its own Competition and Dispute Resolution Process.

- **Consistency**

Internal coherence and consistency will be of paramount importance across the ICB and NHS England.

- **No double jeopardy**

Providers will not be held to account differently by different institutions. Where cases involve multiple commissioners, the commissioners will follow the Competition and Dispute Resolution process for the ICB who is named as the Lead for the contract in question.

## **5. ACCEPTANCE CRITERIA**

The ICB will only accept appeals that meet the following criteria:

- The content of the dispute is covered by NHS Improvement's complaints procedure and no legal proceedings have commenced.

- There is complete disclosure of all relevant and applicable information. Any individuals connected to the complaint are available to provide further evidence or testimony and the ICB is not precluded from requesting more detailed information to make an informed decision.
- To provide confidence to parties that the process is fair and transparent, enhancing willingness to participate in delivery of services within the ICB area.
- That the ICB is either an associate commissioner or lead commissioner for the service in question.
- The dispute is not trivial or vexatious having appropriate grounds for complaint.
- The dispute is raised within 3 months of the disputed event occurring.

## **6. ESTABLISHING A COMPETITION DISPUTES RESOLUTION PANEL**

The ICB will establish a Competition Disputes Resolution Panel with the terms of reference as Appendix C.

## **7. THE PROCESS**

### **Stage 1 - The Complaint:**

The Chief Financial Officer will acknowledge the appeal within two business days starting from the day following receipt.

The first stage is to gather information (see attached form – Appendix B) and complete an initial assessment. A nominated officer independent of the process that has been followed for the procurement / contracting / commissioning will be appointed to carry out the assessment.

Following the initial assessment, the ICB may instigate an informal investigation to add further detail. This stage is to be completed within 14 days. Following this assessment there will be an opportunity for conciliation between the parties. A timescale will be set and notified to each party.

If the criteria for dispute are met and conciliation has not resolved the issue, the nominated officer will complete a report for the ICB Panel.

If the matter has been addressed through conciliation, this shall be documented to the appellant and reported to the relevant committee who will report to the Board in Part 2 of the meeting.

### **Stage 2 - ICB Panel:**

Membership – the Panel has four core members:

- Lay Member (Chair)
- Accountable Officer
- Chief Financial officer
- GP Member

In attendance:

- Commissioning lead
- Procurement lead (where the dispute relates to a procurement process)
- Panel secretary

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The nominated officer will attend to present their investigation.

The appellant may request or be invited to attend.

The Panel will formally meet and review the case. This stage is to be completed within 20 working days from the referral to the panel. Both parties will have had the opportunity to submit written material in advance of the hearing. Both parties may be offered the opportunity to attend the Panel.

### **Stage 3: The Decision:**

The ICB Panel has 3 potential outcomes:

- Complaint upheld
- Further investigation needed – to be completed within a maximum 20 working days
- Complaint rejected

The ICB will write to the complainant(s) notifying them of its decision, explaining the rationale and any course of action required.

If the complainant does not believe the case has been satisfactorily resolved, the complainant has the option to refer the complaint to NHS Improvement or contact a solicitor to instigate a judicial review.

All results of the process will be presented to the ICB's Board on a quarterly basis for information. Reports will include summaries of complaints and outcomes, as well as performance against target timescales.

All documentation provided in advance of the panel meeting, during the panel meeting and on the outcome of the panel meeting shall be retained in an agreed designated folder for further reference or for reference in relation to a Freedom of Information requests.

Any learning from the outcome of dealing with any dispute will be extracted and shared with the contracting, procurement and commissioning team leads, the relevant committee and with the Board as part of the regular reports. Any further development requirements that are required by Board, committee or the teams will be identified and provided within planned development sessions.

## **8. FURTHER INFORMATION**

If you have any questions or queries about this process, please contact the Chief Financial officer

Email: [alan.pond@nhs.net](mailto:alan.pond@nhs.net) or telephone: Phone: 01707 685415

## APPENDIX A

**The Procurement, Patient Choice & Competition Regulations (Sections 75, 76, 77 and 304(9) and (10) of the Health and Social Care Act 2012)** introduced on 1 April 2013, set out the requirements on NHS England and CCGs in relation to commissioning, including rules for ensuring transparency and non-discrimination in commissioning activities

Thus ICBs:

- should secure services that meet patients' healthcare needs, improve quality & efficiency;
- should ensure rationale for decision to award a contract;
- must act transparently & fairly when qualifying providers;
- where third parties, assist or support a commissioner in their procurement activity, the commissioner must ensure that they follow the requirements of the Regulations in the same way the commissioner must do itself;
- should ensure there is record of contract awarded;
- should promote patient choice: primary medical services & choice of alternative provider;
- must not prevent, restrict or distort competition;
- should manage conflicts of interest;
- thorough justification if competition not required where services are only capable of being provided by a particular provider;
- should facilitate advertisements & expressions of interest; and
- should ensure transparency, proportionately & non-discrimination.

## **APPENDIX B - Dispute Resolution Form – Acceptance Criteria**

### **1. Complainant Contact Details:**

Name:

Address:

Telephone Number:

Email Address:

Date:

Name and title of the person(s) authorised to represent the complainant:

### **2. Acceptance Criteria: Evidence that each of the acceptance criteria has been met:**

#### ***Acceptance Criteria 1:***

*The content of the dispute is covered by NHS Improvement and that no legal proceedings have commenced.*

*Evidence 1:*

#### ***Acceptance Criteria 2:***

*There is complete disclosure of all relevant and applicable information. Any individuals connected to the complaint are available to provide further evidence or testimony and the ICB is not precluded from requesting more detailed information to make an informed decision.*

*Evidence 2:*

#### ***Acceptance Criteria 3:***

*To provide confidence to parties that the process is fair and transparent, enhancing willingness to participate in the market.*

*Evidence 3:*

#### ***Acceptance Criteria 4:***

*The ICB is the commissioner or lead commissioner for the service in question.*

*Evidence 4:*

#### ***Acceptance Criteria 5:***

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*The dispute is not trivial or vexatious*

*Evidence 5:*

**Acceptance Criteria 6:**

*The dispute is raised within 3 months of the disputed event occurring.*

*Evidence 6:*

**Basis of Complaint:**

*Details of the basis of the dispute and which principles are breached:*

*Evidence:*

**Any supporting evidence available:**

**Summary Statement:**

*A statement as to the desired outcome or resolution:*

This form should be sent to:-

Alan Pond

Chief Finance Officer

NHS Hertfordshire and West Essex ICB

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## **APPENDIX C- Competition Disputes Resolution Panel Terms of Reference**

Membership – the Panel has four core members:-

- Lay Member (Chair)
- Accountable Officer
- Chief Financial Officer
- GP Member

The quorum for transaction of business shall be Chair plus 2 Members.

In attendance:-

- Commissioning lead
- Procurement lead (where the dispute relates to a procurement process)
- Panel secretary

The nominated officer will attend to present their investigation.  
The appellant may request or be invited to attend.

The panel will:-

- a. Meet on a quarterly basis if required or as necessary.
- b. Additional meetings of the Competition and Disputes Resolution Panel, other than those regularly scheduled, shall be summoned by the Secretary to the Complaints and Disputes Resolution Panel at the request of the Chair.
- c. The agenda for each meeting will be circulated at least three working days in advance together with supporting assessment papers, and will be distributed by the Secretary to the Competition and Disputes Resolution Panel.
- d. Any items to be placed on the agenda are to be sent to the Secretary of the Competition and Disputes Resolution Panel no later than three working days ahead of the meeting, accompanied by all relevant background papers. Tabled papers will only be accepted with the approval of the Chair.
- e. The Secretary to the Competition and Disputes Resolution Panel will record the decisions for each assessment.
- f. Minutes of the meeting to be submitted to the Chair for approval prior to formal communication to the submission owners (within three working days) followed by submission to the Board for noting and a summary report to go to the public ICB Boards and in Part 2 where relevant.

## **REPORTING AND ACCOUNTABILITY**

The Competition and Disputes Resolution Panel will be accountable to the Board and report directly to the Board where there are issues that need to be publicly recorded or which pose significant risk to the ICB through formal competition dispute processes

## **REVIEW ARRANGEMENTS**

These terms of reference will be reviewed annually. Any amendments will be brought to the Board for approval.