

# **Independent Patient Choice and Procurement Panel**

## **Review of a proposed contract award**

### **Community Aural Microsuction Service for Norfolk and Waveney**

**Case Reference: CR0011-25**

**8 April 2025**

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## 1. Executive Summary

1. On 25 February 2025, Norfolk Deaf Association (NDA) asked the Independent Patient Choice and Procurement Panel (the Panel) to advise on the selection of a provider by NHS Norfolk & Waveney Integrated Care Board (N&W ICB) for its Community Aural Microsuction Service in Norfolk and Waveney. The Panel accepted NDA's request on 27 February 2025 in accordance with its case acceptance criteria.
2. NHS Norfolk and Waveney ICB is one of 42 ICBs in the NHS in England and is part of the Norfolk and Waveney Integrated Care System (ICS). Community Aural Microsuction services within the ICS area are currently delivered by four providers, namely NDA, Chet Valley Medical Practice, Acle Medical Practice and Wymondham Medical Partnership. The contracts with these providers were inherited by N&W ICB from the five Clinical Commissioning Groups (CCGs) that previously held commissioning responsibilities in the area.
3. With the current commissioning arrangements due to end on 2 February 2025, N&W ICB published a Prior Information Notice on Find a Tender Service (FTS) on 24 July 2024, inviting feedback on a draft service specification.
4. On 16 September 2024, N&W ICB published a Contract Notice on FTS setting out its intention to follow the competitive process under the PSR regulations to select a provider for the service. Interested providers were invited to submit their bids by 5pm on 27 September, with the deadline subsequently extended to 14 October. The contract was intended to commence on 3 February 2025, and have a 3-year duration with the option of a 2-year extension, with an estimated total contract value of approximately £3 million (excluding VAT).
5. N&W ICB received bids from four interested providers, including NDA, and these were assessed by an evaluation panel between 16 October and 14 November 2024. The successful bidder was North Norfolk Primary Care (NNPC). NDA's proposal was ranked second. N&W ICB wrote to bidders on 22 November informing them of the outcome and published a notice of its intention to award the contract to NNPC.
6. NDA emailed N&W ICB on 27 November 2024, raising concerns about the conduct of the provider selection process, before making a formal representation on 4 December, prior to the end of the standstill period. Following its review of NDA's representations, N&W ICB wrote to NDA on 19 February 2025, communicating its further decision to proceed with the contract award to NNPC.
7. On 25 February 2025, prior to the end of the extended standstill period, NDA asked the Panel to review N&W ICB's provider selection decision. The Panel accepted this request on 27 February. On being made aware of this, N&W ICB confirmed that it would hold the standstill period open for the duration of the Panel's review, as required by the PSR regulations.
8. NDA's representations to the Panel about N&W ICB's compliance with the PSR regulations are in three parts:
  - first, concerns about the evaluation of bidders' proposals;
  - second, concerns about N&W ICB's response to NDA's request for information following the contract award decision; and

- finally, concerns about N&W ICB's review of NDA's representations.

9. The Panel reviewed NDA's concerns about the evaluation of bidders' proposals (i.e. the first point listed above) but has not found it necessary to reach any conclusions given the Panel's findings on the second and third points.

10. In summary, the Panel's findings are:

- First, the Panel finds that N&W ICB, by failing to provide any of the information requested by NDA as part of its representations, breached its obligation under PSR Regulation 12(4) to "provide promptly any information requested by an aggrieved provider where the relevant authority had a duty to record that information under regulation 24".
- Second, the Panel finds that N&W ICB, by not meeting the requirement for the contract award decision to be reviewed by individuals (or at least one individual) not involved in the original process, breached the PSR regulations and, in particular, the obligation under Regulation 4 to act fairly.

11. Given these findings, three options are open to the Panel. The Panel may advise that:

- the breaches had no material effect on N&W ICB's selection of a provider and it should proceed with awarding the contract as originally intended;
- N&W ICB should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
- N&W ICB should abandon the current provider selection process.

12. The Panel's view is that N&W ICB's breaches of the PSR regulations may have had a material effect on N&W ICB's selection of a provider. This is because a representation review process carried out in accordance with the PSR regulations, including the supply of information to NDA in response to its request, may have resulted in a different contract award decision.

13. As a result, the Panel's advice is for N&W ICB to return to an earlier step in the provider selection process, namely the point at which NDA's representations were received following the initial contract award decision. N&W ICB should provide NDA with the information that it requested (subject to appropriate redactions of any commercially confidential information), allow NDA an opportunity to make any further representations arising from this information, and then reassess its contract award decision in the light of all of NDA's representations (not just those subsequently raised with the Panel).

14. The Panel recommends that N&W ICB constitutes a new review panel, without any participation from previous evaluators or other decision makers, to ensure the fairness of the new review.

## 2. Introduction

15. On 25 February 2025, Norfolk Deaf Association (NDA)<sup>1</sup> asked the Independent Patient Choice and Procurement Panel (the Panel) to advise on the selection of a provider by NHS Norfolk & Waveney Integrated Care Board (N&W ICB) for its Community Aural Microsuction Service in Norfolk and Waveney.
16. The Panel accepted NDA's request on 27 February 2025 in accordance with its case acceptance criteria. These criteria set out both eligibility requirements and the prioritisation criteria the Panel will apply when it is approaching full caseload capacity.<sup>2</sup> NDA's request met the eligibility requirements, and as the Panel was not approaching full capacity there was no need to apply the prioritisation criteria.
17. The Panel's Chair appointed three members to a Case Panel for this review (in line with the Panel's procedures). The Case Panel consisted of:
  - Andrew Taylor, Panel Chair;
  - Albert Sanchez-Graells, Case Panel Member; and
  - Daria Prigioni, Case Panel Member.<sup>3</sup>
18. The Case Panel's review has been carried out in accordance with the Panel's Standard Operating Procedures ("procedures").<sup>4</sup>
19. This report provides the Panel's assessment and advice to N&W ICB and is set out as follows:
  - Section 3 briefly describes the role of the Panel;
  - Section 4 sets out the background to the Panel's review, including the events leading up to, and including, the selection of a provider for the Community Aural Microsuction Service;
  - Section 5 sets out the concerns raised by NDA;
  - Section 6 summarises the provisions of the PSR regulations relevant to this review;
  - Section 7 sets out the issues considered by the Panel and its assessment of these issues; and
  - Section 8 sets out the Panel's advice to N&W ICB.
20. The Panel thanks N&W ICB and NDA for their assistance and cooperation during this review.

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<sup>1</sup> NDA, which uses the working name 'Hear for Norfolk', is a charitable company founded in 1898 that supports people with hearing loss and related conditions. Further information can be found on NDA's website at <https://www.hearforfolk.org.uk/>.

<sup>2</sup> The Panel's case acceptance criteria are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/>.

<sup>3</sup> Biographies of Panel members are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/panel-members/>.

<sup>4</sup> The Panel's Standard Operating Procedures are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/>.

### 3. Role of the Panel

21. The PSR regulations, issued under the Health and Care Act 2022, put into effect the Provider Selection Regime for NHS and local authority commissioning of health care services. The PSR regulations came into force on 1 January 2024.<sup>5</sup>
22. Previously, health care services were purchased under the Public Contracts Regulations 2015 and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. The Provider Selection Regime, however, provides relevant authorities (i.e. commissioners) with greater flexibility in selecting providers of health care services.
23. The Panel's role is to act as an independent review body where a provider has concerns about a commissioner's provider selection decision. Panel reviews only take place once a commissioner has reviewed its original decision.
24. For each review, the Panel's assessment and advice is supplied to the commissioner and the potential provider that has requested the Panel review. It is also published on the Panel's webpages. The commissioner is then responsible for reviewing its decision in light of the Panel's advice.

### 4. Background to this review

25. NHS Norfolk and Waveney ICB is one of 42 ICBs in the NHS in England and is part of the Norfolk and Waveney Integrated Care System (ICS). It is a statutory body responsible for planning health services to meet the health needs of the Norfolk and Waveney population and managing the budget for the provision of NHS services to this population.<sup>6</sup>
26. Community Aural Microsuction services<sup>7</sup> within the ICS area are currently delivered by four providers, namely NDA, Chet Valley Medical Practice, Acle Medical Practice and Wymondham Medical Partnership.<sup>8</sup> The contracts with these providers were inherited by N&W ICB from the five Clinical Commissioning Groups (CCGs) that previously held commissioning responsibilities in the area. N&W ICB told the Panel that service specifications, patient accessibility and tariffs differ across these contracts.<sup>9</sup>
27. With the current commissioning arrangements due to end on 2 February 2025, N&W ICB published a Prior Information Notice on Find a Tender Service (FTS) on 24 July 2024, inviting feedback on a draft service specification.
28. On 16 September 2024, N&W ICB published a Contract Notice on FTS setting out its intention to follow the competitive process under the PSR regulations to select a provider for the service. Interested providers were invited to submit their bids by 5pm

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<sup>5</sup> The PSR Regulations are available at <https://www.legislation.gov.uk/uksi/2023/1348/contents/made> and the accompanying statutory guidance is available at NHS England, *The Provider Selection Regime: statutory guidance*, <https://www.england.nhs.uk/long-read/the-provider-selection-regime-statutory-guidance/>.

<sup>6</sup> Further information on N&W ICB can be found on the ICS website at <https://improvinglivesnw.org.uk/about-us/our-nhs-integrated-care-board-icb/>.

<sup>7</sup> Aural microsuction services most commonly involve the removal of ear wax.

<sup>8</sup> Norfolk & Waveney ICB, *Project Initiation Document – Procurement of the Provision of Community Aural Microsuction*, 25 July 2023.

<sup>9</sup> Existing contracts expired at various times between 2020 and 2024. Arrangements were put in place by N&W ICB to ensure that providers would continue to deliver services initially until 30 September 2024, and subsequently until 2 February 2025.

on 27 September, with the deadline subsequently extended to 14 October. The contract was intended to commence on 3 February 2025,<sup>10</sup> and have a 3-year duration with the option of a 2-year extension, with an estimated total contract value of approximately £3 million (excluding VAT).<sup>11</sup>

29. N&W ICB received bids from four interested providers, including NDA, and these were assessed by an evaluation panel between 16 October and 14 November 2024. The successful bidder was North Norfolk Primary Care (NNPC).<sup>12</sup> NDA's proposal was ranked second. N&W ICB wrote to bidders on 22 November informing them of the outcome and published a notice of its intention to award the contract to NNPC.
30. NDA emailed N&W ICB on 27 November 2024, raising concerns about the conduct of the provider selection process, before making a formal representation on 4 December, prior to the end of the standstill period. Following its review of NDA's representations, N&W ICB wrote to NDA on 19 February 2025, communicating its further decision to proceed with the contract award to NNPC.
31. On 25 February 2025, prior to the end of the extended standstill period, NDA asked the Panel to review N&W ICB's provider selection decision. The Panel accepted this request on 27 February. On being made aware of this, N&W ICB confirmed that it would hold the standstill period open for the duration of the Panel's review, as required by the PSR regulations.

## 5. Representations to the Panel by NDA

32. NDA's concerns about the provider selection process for the Community Aural Microsuction service, as summarised in its submission to the Panel, are as follows:

“We have two overarching concerns, and three specific concerns, we want the Independent Panel to address. They are:

“The procurement has been re-examined by the same evaluators that carried out the original bid. We are concerned that this further decision has been made unfairly, as there is a risk that having ‘marked their own homework’ they would inevitably come to the same conclusions as they had made in their original assessment. This is a breach of Regulation 4(1)(b) to act ‘transparently, fairly and proportionately’.

“The relevant authority has failed to provide us with the documents we requested in our original request to review the decision and has failed to provide the information required by the Regulations, a failure to act transparently. Our request was for documents pursuant to Regulation 12(4)(b). These are documents which the relevant authority is obliged to keep pursuant to Regulation 24. Failure to provide us with the documents prevents us from understanding the basis of the decision and the further decision, which is a breach of Regulation 4(1)(b).

“With regards to question 1.03, our full response has not been taken into account because of a technical error made by the relevant authority. Since preparing these

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<sup>10</sup> The Panel understands that the revised start date for the new contract is in early May and that incumbent providers' contracts have been extended accordingly.

<sup>11</sup> Norfolk & Waveney ICB, *Contract Award Notice on Find a Tender Service*, 16 September 2024.

<sup>12</sup> NNPC has since changed its name to Norfolk Primary Care (NPC). NPC is a Community Interest Company (CIC) supporting local primary care. Further information on NPC can be found on its website at <https://norfolkprimarycare.com/>.

representations, we noticed that our submission, which was within the word count limit of 750 words (742 words) was cut off by the relevant authority's online portal. The key information on how the SEND data would help us provide the service was omitted, through no fault of our own. Our submission has been marked down as a result, so this question has not been properly scored. It is manifestly wrong to mark the tenders this way, and a breach of Regulation 11(5) by not marking them in accordance with the contract criteria. Given the relevant authority's comments we are concerned that there may be further scoring criteria which are not set out in the contract criteria, and which have been applied to the assessment of our submission. This would be a breach of the requirements to act transparently and fairly, and of Regulation 4(1)(b).

"With regards to question 3.03, we note that we have not been given credit for providing an ENT consultant as part of our service. The evaluators have stated that they "did not determine this would provide additional value to the contract, and did not feel your response demonstrated how/why this element of your offer would provide additional value" but have not given any reasons why. Given how important providing up to date correct medical treatment is, by providing timely access to an ENT Consultant (over and above the contract criteria) for staff members to seek advice, ensuring that all our staff are working with the latest clinical best practice, we fail to see how providing this feature has not been marked accordingly. To score us in this manner, is disproportionate and unfair. In addition, when compared to how the Preferred Provider received extra credit for offering to provide a Neurodiversity Lead in response to question 3.07, the scoring is also inconsistent. This is a failure to act fairly, and score in accordance with their published criteria, which is a breach of Regulation 11(5) and Regulation 4(1)(b).

"Finally, with regards to question 3.07, we are concerned that we have not been marked appropriately, particularly for the examples set out at subparagraphs (a) and (b) of our tender response. These provide clear evidence of how we have identified issues relating to EDI when providing the service and set out how we have addressed them to improve the service. It is manifestly wrong that we have not been given appropriate scores. This is a failure to act consistently, and to act fairly. This is a breach of Regulations 11(5), to mark in accordance with the contract criteria, and 4(1)(b), to act transparently, fairly and proportionately. We are not asking the Independent Panel to review our submissions made for questions 1.01, 3.01, 3.02 or regarding pricing."

## **6. PSR regulations relevant to this review**

33. In its representations to the Panel, NDA suggested that N&W ICB had breached the PSR regulations in relation to the general obligations on commissioners (as set out in Regulation 4) and the obligations of the relevant authority to provide information to unsuccessful bidders (as set out in Regulations 11, 12 and 24).
34. Much of the Panel's assessment in this case relates to Regulations 4, 12 and 24. The parts of these regulations most relevant to this review are set out below.
  - Regulation 4 sets out the general obligations that apply to relevant authorities (i.e. commissioners) when selecting a provider of health care services. It states that relevant authorities must act "(b) transparently, fairly and proportionately".
  - Regulation 12 sets out the obligations that apply to commissioners in relation to the standstill period after a contract award decision. It states that "(4) Where the relevant

authority receives representations [during the standstill period], it must ... (b) provide promptly any information requested by an aggrieved provider where the relevant authority has a duty to record that information under regulation 24 (information requirements) ...".

- Regulation 24 sets out the information that commissioners must record. This includes: "... (d) the decision-making process followed, including the identity of individuals making decisions ... [and] (g) the reasons for decisions made under these Regulations ...".

35. The Provider Selection Regime Statutory Guidance "sits alongside the Regulations to support organisations to understand and interpret the PSR regulations".<sup>13</sup> Reference is made to relevant provisions of the Statutory Guidance in the Panel's assessment of the issues in Section 7.

## 7. Panel Assessment

36. NDA's representations to the Panel about N&W ICB's compliance with the PSR regulations are in three parts:

- first, concerns about the evaluation of bidders' proposals;
- second, concerns about N&W ICB's response to NDA's request for information following the contract award decision; and
- finally, concerns about N&W ICB's review of NDA's representations.

37. The Panel reviewed NDA's concerns about the evaluation of bidders' proposals (i.e. the first point listed above) but has not found it necessary to reach any conclusions given the Panel's findings on the second and third points.

38. Section 7.1 sets out the Panel's assessment and findings in relation to N&W ICB's response to NDA's request for information, while Section 7.2 sets out the Panel's assessment and findings in relation to N&W ICB's review of NDA's representations.

### 7.1 N&W ICB's response to NDA's request for information

39. On 4 December 2024, NDA requested the following information from N&W ICB as part of its representations to the ICB concerning its contract award decision:

- "All documents relating to how we were scored during the assessment process;
- "The identity of who was involved in assessing our submissions, including but not limited to their experience relating to this specific service area, namely the provision of community aural microsuction services to enable them to properly and fairly assess the bids received;
- "All notes of any moderation meetings held and the effect of that moderation exercise on the scores;
- "Any and all notes and documents created after the decision had been made which relate to the decision; and

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<sup>13</sup> NHS England, *The Provider Selection Regime: statutory guidance*, 21 February 2024, p.2.

- “Any and all documents relating to our submissions, including documents which may be partially redacted where permitted to be withheld under Regulation 12(5) of the PSR Regulations”.<sup>14</sup>

40. N&W ICB first responded to NDA’s request on 17 December 2024, saying that NDA’s “request for disclosure is also acknowledged and N&W ICB is considering the scope of that request”.<sup>15</sup> N&W ICB substantively responded to NDA’s information request on 19 February 2025, saying that it was “unable to disclose information which relates to another bidder in the Procurement and which is commercially sensitive in nature”.<sup>16</sup>

41. The Panel, for the purposes of its assessment, has considered NDA’s information request in two parts: first, the request for the identity of those involved in assessing the NDA submission (i.e. the second bullet point in paragraph 39); and second, the request for notes and documents concerning N&W ICB’s evaluation of bidders’ proposals (i.e. the remaining bullet points in paragraph 39). These two issues are addressed in Sections 7.1.1 and 7.1.2.

### **7.1.1 Identity of those involved in assessing NDA’s submission**

42. Under Regulation 12(4)(b), a commissioner receiving qualifying representations must “provide promptly any information requested by an aggrieved provider where the relevant authority has a duty to record that information under regulation 24”. The records that must be kept under Regulation 24 include “the identity of individuals making decisions”.

43. The Panel’s view is that “individuals making decisions”, as per Regulation 24, includes all individuals whose role makes a material contribution to determining the outcome of a provider selection process, and that this covers both individual evaluators and the officials responsible for formally deciding whether to adopt the outcome of a provider selection process.

44. The Panel is aware that some commissioners may, for the purposes of Regulation 24, distinguish between evaluators and the official(s) responsible for accepting or rejecting the results of a provider selection process. The Panel is not, however, persuaded that such a distinction has merit. Evaluators are responsible for deciding the scores to be awarded to bidders’ responses and, as such, have a decision making role. That is, evaluators fall within the definition of “individuals making decisions” for the purposes of Regulation 24.

45. Moreover, the underlying purpose of requiring commissioners to keep a record of decision makers’ identity is to facilitate the transparency necessary to demonstrate that the provider selection process has been free of conflicts of interest and that those involved have sufficient expertise to make fair decisions. Excluding evaluators from the Regulation 24 record keeping requirement would defeat the underlying purpose of recording this information.

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<sup>14</sup> NDA, *Representations letter*, 4 December 2024.

<sup>15</sup> Norfolk & Waveney ICB, *Initial response letter*, 17 December 2024.

<sup>16</sup> N&W ICB’s response to NDA’s information request was included in the letter that communicated the outcome of its review of NDA’s representations (Norfolk & Waveney ICB, *Representations response letter*, 19 February 2025).

46. Regarding NDA's request for details of evaluators' "experience relating to this specific service area, namely the provision of community aural microsuction services to enable them to properly and fairly assess the bids received", the Panel considers that N&W ICB was obliged to keep a record this information under Regulation 24(g).
47. Regulation 24(g) requires commissioners to keep a record of "the reasons for decisions made under these Regulations". Decisions made under the PSR regulations include not only contract award decisions, but also the intermediate decisions that lead up to contract award decisions. This includes, for the purposes of this review, decisions on the selection of evaluators, which the Panel would expect to take account of evaluators' expertise, and the assignment of specific questions to different evaluators.
48. That is, the Panel considers that N&W ICB was obliged under Regulation 24 to keep a record of the information that NDA requested concerning evaluators' experience and to supply this information to N&W ICB when it was requested under Regulation 12(4)(b).
49. The Panel notes that commissioners' obligation to supply information requested by aggrieved bidders under Regulation 12(4)(b) is qualified by Regulation 12(5). This says, under part (a), that commissioners do not have to supply information that has been requested where it "would prejudice the legitimate commercial interests of any person, including those of the relevant authority". The Panel further notes that N&W ICB's refusal of NDA's information request used reasoning consistent with this qualification (see paragraph 40).
50. N&W ICB gave the Panel four further reasons for not disclosing to NDA the information it had requested.<sup>17</sup> It said that the ICB:
  - (a) believed that NDA would be satisfied with N&W ICB's review of its tender award decision, and as a result, it was not necessary to provide the information NDA had requested;
  - (b) faced resource constraints at the time that impeded its ability to respond to NDA's request;
  - (c) did not wish to give NDA information in a piecemeal fashion and as a result did not supply information that was readily to hand with a view to supplying all relevant information at the same time; and
  - (d) did not wish to prejudice any future procurement process in the event that the Panel advised it to repeat one or more steps in that process.<sup>18</sup>
51. The Panel's view is that none of these explanations are sufficient reason not to have provided NDA with information about the identity and relevant professional experience of those involved in assessing NDA's submission. In particular:
  - (i) this information did not relate to another bidder nor were there any commercial sensitivities associated with this information;

<sup>17</sup> N&W ICB told the Panel at the start of the Panel's review that it was still considering NDA's information request. The Panel notes that the appropriate time for N&W ICB to respond to NDA's information request was before N&W ICB had reached its further decision on NDA's representations. The information requested by NDA was intended to allow it to further develop its representations to N&W ICB, and any provision of this information to NDA after N&W ICB had finalised its review of NDA's representations would have been of limited value to NDA, except as part of making further representations to the Panel. The Panel has now addressed the provision of this information as part of the recommendations from this review.

<sup>18</sup> Norfolk & Waveney ICB, *Panel meeting*, 24 March 2025.

- (ii) there was no reasonable basis for N&W ICB concluding with any certainty that NDA would be satisfied with its review of the tender award decision (and thus would not require the information that it had requested);
- (iii) the resource required to respond to NDA's request was minimal;
- (iv) there was no reasonable basis for N&W ICB being concerned about the piecemeal provision of information to NDA, particularly when there was no reason to believe that NDA shared this concern; and
- (v) providing information to NDA on evaluators' identity would not have any effect on any repetition of the procurement process that could be recommended by the Panel.

### **7.1.2 Notes and documents related to the evaluation of NDA's submission**

52. As set out in paragraph 39, NDA asked N&W ICB for a range of notes and documents concerning the evaluation of bidders' proposals. These included:

- "All documents relating to how we were scored during the assessment process;
- "All notes of any moderation meetings held and the effect of that moderation exercise on the scores;
- "Any and all notes and documents created after the decision had been made which relate to the decision; and
- "Any and all documents relating to our submissions, including documents which may be partially redacted where permitted to be withheld under Regulation 12(5) of the PSR Regulations".<sup>19</sup>

53. As set out in paragraph 42, a commissioner receiving qualifying representations must, under Regulation 12(4)(b), "provide promptly any information requested by an aggrieved provider where the relevant authority has a duty to record that information under regulation 24". Regulation 24 obliges commissioners to keep a record of, amongst other matters, "the reasons for decisions made under these Regulations" and "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".

54. The Panel considered whether the notes and documents requested by NDA (see paragraph 52) fall within the scope of the record keeping requirements set out in Regulation 24, and in particular those provisions set out in paragraph 53.

55. Taking note of the scope of NDA's request, the content of the tender outcome letter, and the Panel's understanding of the records kept by N&W ICB, the Panel considers that N&W ICB should have, in responding to NDA's request, provided it with – at a minimum – individual evaluator comments and scores for both NDA and NNPC as well as the recorded reasoning for the consensus decision on moderated comments and scores.

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<sup>19</sup> NDA, *Representations letter*, 4 December 2024.

56. The Panel's view is that this request fell within the Regulation 24 record keeping requirement, and in particular the obligation to keep a record of "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" under the competitive process.
57. In relation to the N&W ICB's explanations for not providing the information requested by NDA (see paragraphs 49 and 50), the Panel's view is that none of these explanations – for the reasons set out at paragraph 51 – were sufficient reason not to "provide promptly" (as per Regulation 12(4)) the information requested by NDA, with the possible exception of potential issues of commercial confidentiality.
58. To the extent that the information requested by NDA potentially included commercially confidential information (as per Regulation 12(5)), then N&W ICB should have undertaken a detailed assessment to identify this information and redact it from the material supplied to NDA. N&W ICB was not correct to use the presence of commercially confidential information as a blanket justification for withholding all of the information requested by NDA.

#### **7.1.3 Panel findings on N&W ICB's response to NDA's request for information**

59. The Panel finds that N&W ICB, by failing to provide any of the information requested by NDA as part of its representations, breached its obligation under PSR Regulation 12(4) to "provide promptly any information requested by an aggrieved provider where the relevant authority had a duty to record that information".

#### **7.2 N&W ICB's review of NDA's representations**

60. NDA raised with the Panel its concern that N&W ICB, in reviewing NDA's representations, used the same evaluators who carried out the original evaluation, and this raised issues of fairness given the risk that, having "marked their own homework", the evaluators would come to the same conclusions as in their original assessment (see paragraph 32).
61. In response, N&W ICB told the Panel that the "N&W ICB review process included the original evaluation panel and procurement support team. N&W ICB considered that a review of the scores (which were queried by NDA) by the evaluators would enable N&W ICB to make an informed further decision (in accordance with the Provider Selection Regime and related statutory guidance)".<sup>20</sup>
62. N&W ICB further told the Panel that "two independent observers were also included in the review process to ensure that the [evaluation] panel (i) were assured that they had correctly applied the scoring methodology during the initial evaluation process; (ii) discussed their reasoning for the scores awarded in an open forum; (iii) had reached sound consensus scores based on the evaluation criteria, the evaluators' expertise and their understanding of each tender submission; and (iv) had followed the procurement process as advertised to the market."<sup>21</sup>

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<sup>20</sup> Norfolk & Waveney ICB, *Response to Panel questions*, 17 March 2025.

<sup>21</sup> Norfolk & Waveney ICB, *Response to Panel questions*, 17 March 2025.

63. The Panel notes that, under the PSR statutory guidance, where commissioners receive representations, the decision to award the contract should be “reviewed by individuals not involved in the original decision”, taking into account the representations, and “where this is not possible relevant authorities should ensure that at least one individual not involved in the original decision is included in the review process”.<sup>22</sup>
64. The Panel’s view is that reliance on independent observers, as used by N&W ICB, is not sufficient to meet the obligations set out in the statutory guidance. The statutory guidance requires that the decision be *reviewed* by individuals (or at least one individual) not involved in the original process. Independent observers, who observe the original evaluators reviewing their own decision, are not involved in the review in a manner that is sufficient to meet this requirement.
65. Given this, the Panel finds that N&W ICB, by not meeting the requirement for the contract award decision to be reviewed by individuals (or at least one individual) not involved in the original process, breached the PSR regulations and, in particular, the obligation under Regulation 4 to act fairly.

## **8. Panel Advice**

66. In summary, the Panel’s findings on the provider selection process carried out by N&W ICB for the Community Aural Microsuction Service for Norfolk & Waveney are as follows:
  - First, the Panel finds that N&W ICB, by failing to provide any of the information requested by NDA as part of its representations, breached its obligation under PSR Regulation 12(4) to “provide promptly any information requested by an aggrieved provider where the relevant authority had a duty to record that information”.
  - Second, the Panel finds that N&W ICB, by not meeting the requirement for the contract award decision to be reviewed by individuals (or at least one individual) not involved in the original process, breached the PSR regulations and, in particular, the obligation under Regulation 4 to act fairly.
67. Given these findings, three options are open to the Panel. The Panel may advise that:
  - the breaches had no material effect on N&W ICB’s selection of a provider and it should proceed with awarding the contract as originally intended;
  - N&W ICB should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
  - N&W ICB should abandon the current provider selection process.
68. The Panel’s view is that N&W ICB’s breaches of the PSR regulations may have had a material effect on N&W ICB’s selection of a provider. This is because a representation review process carried out in accordance with the PSR regulations, including the

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<sup>22</sup> NHS England, *The Provider Selection Regime: statutory guidance*, p.27.

supply of information to NDA in response to its request, may have resulted in a different contract award decision.

69. As a result, the Panel's advice is for N&W ICB to return to an earlier step in the provider selection process, namely the point at which NDA's representations were received following the initial contract award decision. N&W ICB should provide NDA with the information that it requested (subject to appropriate redactions of any commercially confidential information), allow NDA an opportunity to make any further representations arising from this information, and then reassess its contract award decision in the light of all of NDA's representations (not just those subsequently raised with the Panel).
70. The Panel recommends that N&W ICB constitutes a new review panel, without any participation from previous evaluators or independent observers, to ensure the fairness of the new review.