

Independent Patient Choice and Procurement Panel

Review of a proposed contract award

Intermediate Minor Oral Surgery Services for Yorkshire and the Humber

Case Reference: CR0013-25 and CR0014-25

27 May 2025

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1. Executive Summary

1. On 7 March 2025, the Panel was asked by Barkhill Dental Practice Limited (Barkhill) to advise on the selection of providers by NHS Humber and North Yorkshire Integrated Care Board (HNY ICB) for the Intermediate Minor Oral Surgery (IMOS) service in Yorkshire and Humber. On 10 March 2025, the Panel was asked by Clarendon Dental Spa (Leeds) Limited (Clarendon) to advise on the same provider selection process. The Panel accepted both requests on 12 March 2025.
2. HNY ICB hosts the Yorkshire and Humber dental commissioning team, which commissions IMOS services across three ICB areas, namely Humber and North Yorkshire, South Yorkshire and West Yorkshire. IMOS services go beyond the scope of primary care dentistry, and commonly involve minor soft tissue procedures and removing unhealthy teeth. There are currently 14 IMOS service providers in Yorkshire and Humber, including Barkhill and Clarendon.
3. On 26 July 2024, HNY ICB published a Prior Information Notice on Find a Tender Service to gain a better understanding of the market's capacity and appetite to deliver IMOS services in Yorkshire and Humber. This was followed by a Contract Notice on 20 September 2024 setting out HNY ICB's plan to use the competitive process to select providers for new IMOS contracts. The procurement was divided into 16 lots based on geographical areas with contracts to be let for an initial 5 year period, commencing on 1 April 2025, with the option of a 2 year extension. The estimated total value of the 16 contracts was approximately £38.1m (excluding VAT).
4. Bids were received from 26 interested providers, including Barkhill and Clarendon, and were assessed between 26 October and 4 December 2024. HNY ICB informed bidders of the tender's outcome on 10 December 2024 and, on the same day, published a notice of intention to make an award to the successful bidders (notice of intention).
5. On 17 and 19 December 2024, Barkhill wrote to HNY ICB raising concerns about the conduct of the provider selection process for Lots 11 and 12. This was followed by a formal representation on 23 December. On 20 December, Clarendon made representations to HNY ICB about the provider selection process in relation to 14 of the 16 lots.
6. While considering Barkhill's and Clarendon's representations, HNY ICB published a contract award notice on 13 January 2025 indicating that it would be proceeding with a contract award for Lot 2, where no representations had been made. The contract award notice included a corrigendum to the 10 December 2024 notice of intention, providing an additional CPV code for that notice.
7. On 4 March 2025, HNY ICB wrote to Barkhill and Clarendon setting out its further decision on the provider selection process, namely to proceed with the contract award as originally intended. On 7 March 2025, HNY ICB published a second corrigendum to its 10 December 2024 notice of intention with additional information on the key criteria used in the provider selection process and how conflicts of interest were managed.
8. Barkhill asked the Panel to advise on HNY ICB's provider selection decisions on 7 March 2025 and Clarendon requested the same on 10 March. The Panel accepted both requests on 12 March 2025.

Barkhill's representations

9. Barkhill's representations to the Panel raised concerns about whether HNY ICB complied with the PSR regulations in relation to:
 - the evaluation of Barkhill's proposals;
 - the notice of intention published on 10 December 2024 and the corrigenda published on 13 January and 7 March 2025; and
 - the response to Barkhill's request for information during its representations to the ICB.
10. The Panel finds that HNY ICB breached the PSR regulations in relation to: (a) the notice of intention; and (b) its response to Barkhill's request for information.
11. Regarding the notice of intention, the Panel finds that HNY ICB breached the PSR regulations:
 - by not including the full addresses of the successful bidders (contrary to the requirements of Regulation 11(10) and Schedule 10);
 - by not including a statement explaining the ICB's reasons for selecting the chosen providers (contrary to the requirements of Regulation 11(10) and Schedule 10); and
 - by returning to an earlier step in the provider selection process, through publishing the corrigendum of 7 March 2025, without repeating the subsequent steps in the provider selection process (contrary to the requirements of Regulation 12(4)).
12. The Panel does not, however, consider that HNY ICB's breaches of the PSR regulations in relation to its notice of intention had a material effect on its provider selection process.
13. Regarding Barkhill's request for information during its representations to the ICB, the Panel finds that HNY ICB breached Regulation 12(4) by failing to provide Barkhill with its records on:
 - its decision making process, including the way in which key criteria were taken into account;
 - how the basic selection criteria were assessed and contract award criteria were evaluated;
 - the reasons for the decision to award the contract for Lots 11 and 12 to Haricover; and
 - evaluators' identities.
14. The Panel considers that HNY ICB's breach of the PSR regulations in relation to Barkhill's information request may have had a material effect on HNY ICB's provider selection process. This is because a representation review process carried out in accordance with the PSR regulations, including the supply of information in response to Barkhill's request, may have resulted in a different outcome for the provider selection process.
15. The Panel's advice, given its conclusion that HNY ICB's breach of the PSR regulations in relation to Barkhill's information request may have had a material effect on HNY ICB's provider selection process, is that HNY ICB return to an earlier step in the

provider selection process for Lots 11 and 12, namely Step 8(a) of the competitive process. This is the point at which Barkhill's representations were received following the initial contract award decision.

16. HNY ICB should, in line with Regulation 12(4): (i) provide Barkhill with the information that it requested (subject to the proper application of any measures in accordance with Regulation 12(5)); (ii) allow Barkhill an opportunity to "explain or clarify the representations made" (i.e. make any further representations arising from this information); and (iii) follow the representations review process as laid out in the Regulations and Statutory Guidance in light of any further representations by Barkhill.

Clarendon's representations

17. Clarendon's representations to the Panel raised concerns about whether HNY ICB complied with the PSR regulations in relation to:
 - the evaluation of Clarendon's proposals;
 - the notice inviting offers published on 20 September 2024;
 - the notice of intention published on 10 December 2024 and the corrigenda to this notice published on 13 January and 4 March 2025; and
 - the review of Clarendon's representations.
18. The Panel finds that HNY ICB breached the PSR regulations in relation to the notice of intention by not including a statement explaining the ICB's reasons for selecting the chosen providers with reference to the key criteria (contrary to the requirements of Regulation 11(10) and Schedule 10). The Panel does not, however, consider that HNY ICB's breach of the PSR regulations had a material effect on HNY ICB's provider selection process.
19. As a result, the Panel's advice is that HNY ICB should proceed with awarding the contracts as originally intended with respect to Lots 1, 3-10, and 13-16.

2. Introduction

20. On 7 March 2025, the Panel was asked by Barkhill Dental Practice Limited (Barkhill)¹ to advise on the selection of providers by NHS Humber and North Yorkshire Integrated Care Board (HNY ICB) for the Intermediate Minor Oral Surgery (IMOS) service in Yorkshire and Humber. On 10 March 2025, the Panel was asked by Clarendon Dental Spa (Leeds) Limited (Clarendon)² to advise on the same provider selection process.
21. The Panel accepted both requests on 12 March 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.³ Both providers' requests met the eligibility requirements, and as the Panel had sufficient capacity and no immediate prospect of reaching full capacity, there was no need to apply the prioritisation criteria.

¹ Further information on Barkhill can be found on its website at <https://www.barkhildental.com/>.

² Further information on Clarendon can be found on its website at <https://www.clarendondentalspa.co.uk/>.

³ 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/>.

22. The Panel's Chair decided to combine the review of these two cases and appointed three members to a joint Case Panel (in line with the Panel's procedures). The Case Panel consisted of:

- Andrew Taylor, Panel Chair;
- Daria Prigioni, Case Panel Member; and
- Sally Collier, Case Panel Member.⁴

23. The Case Panel's review has been carried out in accordance with the Panel's Standard Operating Procedures (procedures).⁵ It has, however, taken longer than the Panel's target of 25 working days to produce the Panel's assessment and advice. This reflects the complexities of the issues considered by the Panel and the effect of carrying out a combined review of two sets of representations.

24. This report, which provides the Panel's assessment and advice to HNY ICB, 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 provider selection process;
- Section 5 sets out the concerns raised by Barkhill;
- Section 6 identifies the provisions of the PSR regulations relevant to Barkhill's representations;
- Section 7 sets out the Panel's assessment of the issues raised by Barkhill;
- Section 8 sets out the concerns raised by Clarendon;
- Section 9 identifies the provisions of the PSR regulations relevant to Clarendon's representations;
- Section 10 sets out the Panel's assessment of the issues raised by Clarendon; and
- Section 11 sets out the Panel's advice to HNY ICB.⁶

25. The Panel would like to record its thanks to HNY ICB, Barkhill and Clarendon for their assistance and cooperation during this review.

3. Role of the Panel

26. 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 2024.⁷

27. 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, gives

⁴ 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/>.

⁵ 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/>.

⁶ The Panel's advice is provided under para 23 of the PSR Regulations and takes account of the representations made to the Panel prior to forming its opinion.

⁷ 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/>.

relevant authorities (i.e. commissioners) greater flexibility in selecting providers of health care services.

28. 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 following a commissioner's review of its original decision.
29. For each review, the Panel's assessment and advice is supplied to the commissioner and the 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

30. HNY ICB is one of 42 ICBs in the NHS in England and is part of Humber and North Yorkshire Health and Care Partnership. HNY ICB is a statutory body responsible for planning health services to meet the health needs of the Humber and North Yorkshire population and managing the budget for the provision of NHS services to this population.⁸
31. HNY ICB hosts the Yorkshire and Humber dental commissioning team, which commissions IMOS services across three ICB areas, namely Humber and North Yorkshire, South Yorkshire and West Yorkshire. Until April 2023, the team was part of NHS England, but transferred to HNY ICB when responsibility for dental commissioning passed to ICBs.
32. IMOS services go beyond the scope of primary care dentistry, and commonly involve minor soft tissue procedures and removing unhealthy teeth. There are currently 14 providers of IMOS services in Yorkshire and Humber, including Barkhill and Clarendon. Barkhill currently serves Bradford North, while Clarendon currently serves Leeds South, North Kirklees and Greater Huddersfield.⁹
33. HNY ICB told the Panel that a review of IMOS contracts in Yorkshire and Humber found significant variation in the services offered to local populations, tariffs paid to providers, and providers' compliance with oral surgery clinical standards and best practice.¹⁰ As a result, a joint working group was established across HNY ICB, South Yorkshire ICB and West Yorkshire ICB to put in place a revised tariff and service specification.
34. On 26 July 2024, HNY ICB, as the host ICB for Yorkshire and Humber dental commissioning team, published a Prior Information Notice on Find a Tender Service (FTS) to gain a better understanding of the market's capacity and appetite to deliver IMOS services in Yorkshire and Humber.
35. This was followed by a Contract Notice on 20 September 2024 setting out HNY ICB's plan to use the competitive process to select providers for new IMOS contracts. The procurement was divided into 16 lots based on geographical areas, with contracts to be let for an initial 5 year period, commencing on 1 April 2025, with the option of a

⁸ Further information on HNY ICB can be found on its website at <https://humberandnorthyorkshire.icb.nhs.uk/>

⁹ JFH Law, *Report prepared on behalf of Clarendon for the purposes of the meeting with the Panel*, 9 April 2025.

¹⁰ HNY ICB, *Opening statement to the Independent Patient Choice and Procurement Panel*, 11 April 2025.

2 year extension. The estimated total value of the 16 contracts was approximately £38.1m (excluding VAT).¹¹

36. Bidders, when submitting their proposals, were asked to respond to twelve quality questions, grouped into six categories, namely Clinical & service delivery, Workforce, Governance, Mobilisation, Information management & technology, and Social value. These twelve questions were divided into nine 'generic' questions and three 'local' questions.
37. Responses to the 'generic' questions were evaluated by a single group of evaluators. Bidders' responses to each of these questions were evaluated and scored once, with a final moderated score and feedback comment for each of these questions applied to every lot where the provider had submitted a bid. For the 'local' questions, bidders were advised that these "require a response for each Lot that a provider selects to compete upon and should consider the geographical and demographic aspects of the Lot when answering these questions".¹²
38. Responses to the 'local' questions were evaluated separately for the three ICBs by three different groups of evaluators. A final moderated score and feedback comment was arrived at for each response, with the potential for scores to vary between lots (as well as between ICBs).¹³
39. Bids were received from 26 interested providers, including Barkhill and Clarendon, and were assessed between 26 October and 4 December 2024. The scores achieved by Barkhill and Clarendon for each lot on which they bid, and their rank amongst bidders, are set out in Tables 1 and 2. HNY ICB informed bidders of the tender's outcome on 10 December 2024 and, on the same day, published a notice of intention to make an award to the successful bidders (notice of intention).
40. On 17 and 19 December 2024, Barkhill wrote to HNY ICB raising concerns about the conduct of the provider selection process for Lots 11 and 12. This was followed by a formal representation on 23 December. On 20 December, Clarendon made representations to HNY ICB about the provider selection process in relation to 14 of the 16 lots. Both providers submitted their representations prior to the end of the standstill period, and HNY ICB began the process of considering these representations.
41. While considering Barkhill's and Clarendon's representations, HNY ICB published a contract award notice on 13 January 2025 indicating that it would be proceeding with a contract award for Lot 2, where no representations had been made. The contract award notice included a corrigendum to the 10 December 2024 notice of intention, providing an additional CPV code for that notice.
42. On 4 March 2025, HNY ICB wrote to Barkhill and Clarendon setting out its further decision on the provider selection process, namely to proceed with the contract award as originally intended. This letter was followed by further exchanges of correspondence with Barkhill and Clarendon regarding the ICB's review of representations. On 7 March 2025, HNY ICB published a second corrigendum to its

¹¹ HNY ICB, *Contract Notice on Find a Tender Service*, 20 September 2024.

¹² HNY ICB, *Provider Response Document*, July 2024, p.59.

¹³ HNY ICB, *Opening statement to the Independent Patient Choice and Procurement Panel*, 11 April 2025.

10 December 2024 notice of intention with additional information on the key criteria used in the provider selection process and how conflicts of interest were managed.¹⁴

Table 1: Lots contested by Barkhill

Lot	Area	Incumbent provider	Successful bidder		Barkhill's bid	
			Name	Score	Rank	Score
Lot 11	Bradford North	Barkhill	Haricovert	90.75	5	63.50
Lot 12	Bradford	Ravat & Ray Dental Care	Haricovert	85.75	6	63.50

Note: Haricovert operates under the trading name of Trinity House Orthodontics.

Source: HNY ICB, Evaluation Scoring Spreadsheet.

Table 2: Lots contested by Clarendon

Lot	Area	Incumbent provider	Successful bidder		Clarendon's bid	
			Name	Score	Rank	Score
Lot 1	North Yorkshire	No provider	Whitecross Dental Care	82.50	2	81.25
Lot 3	East Riding	Clifton Gardens Dental Practice	Haricovert	85.75	3	81.25
Lot 4	Hull	City Healthcare Partnership	Haricovert	85.75	4	78.75
Lot 5	North & NE Lincolnshire	Smile Lincs The Forum	The Forum Dental Studio / Practice	90.25	3	78.75
Lot 6	Rotherham	Kimberworth Park Practice	JDSP Dental	79.25	3	74.25
Lot 7	Sheffield	Whitecross Dental Care	Whitecross Dental Care	82.50	3	78.75
Lot 8	Doncaster West	Denaby Dental Practice Mr AP Rose	Haricovert	88.75	3	76.75
Lot 9	Doncaster East	The Forum Practice	Haricovert	88.75	3	76.75
Lot 10	Barnsley	Whitecross Dental Care	Haricovert	88.75	4	78.75
Lot 12	Bradford	Ravat & Ray Dental Care	Haricovert	85.75	4	78.25
Lot 13	Wakefield	Mulli	Haricovert	93.25	6	80.75
Lot 14	Leeds South	Clarendon	Haricovert	93.25	5	75.75
Lot 15	North Kirklees	Clarendon	Haricovert	85.75	3	80.75
Lot 16	Greater Huddersfield	Clarendon	Haricovert	90.75	4	80.75

Note: Haricovert operates under the trading name of Trinity House Orthodontics.

Source: HNY ICB, Evaluation Scoring Spreadsheet.

43. On 7 March 2025, Barkhill asked the Panel to advise on HNY ICB's provider selection decisions, and on 10 March, Clarendon requested the same. Both requests were

¹⁴ HNY ICB, *Corrigendum notice for changes or additional information on Find a Tender Service*, 7 March 2025.

received by the Panel prior to the end of the standstill period. The Panel accepted both requests on 12 March 2025. On being made aware of this, HNY ICB confirmed that it would hold the standstill period open for the duration of the Panel's review, as required under the PSR regulations.

5. Barkhill's representations to the Panel

44. Barkhill's concerns about the provider selection process for IMOS services for Yorkshire and Humber, as summarised in its submission to the Panel, are as follows:

"The authority's decision of 4 March 2025 fails to address any of Barkhill's detailed points. The decision does nothing more than baldly assert that 'all bids were evaluated equally, using the published evaluation criteria' and all relevant information 'has already been provided'. This constitutes a wholesale failure to acknowledge and respond to our contentions and has not resolved any of the issues we have raised.

"The evaluation criteria adopted for the Procurement (described in the table headed 'Provider Response Questions Evaluation Criteria' included on pages 82 and 83 of the Provider Response Document) took the form of a 'scoring matrix' which set out metrics which must be met in order for each grade (or score) to be awarded for quality questions. Those metrics were presented as cumulative requirements in order for a grade to be awarded.

"The information provided in Appendix A to the decision letter which Barkhill received on 10 December 2024 suggests that, in numerous instances, grades were awarded on the basis of a consideration of some of the metrics corresponding to the relevant grade, but not all of the metrics corresponding to that grade. Appendix 1 to our letter of 23 December 2024 identifies each instance of an apparent omission to consider one or more relevant metrics when grades were awarded in response to both Barkhill's and the winning bidder's bids for Lots 11 and 12.

"These failures to apply the evaluation criteria in the manner in which they were described in the Provider Response Document each constitute a breach of the requirement in regulation 4(1)(b) that the authority act transparently – since the obligation of transparency entails that a procuring authority must apply its published criteria (see e.g. *Lion Apparel Systems v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [30] (Morgan J); *Lancashire Care v Lancashire CC* [2018] EWHC 1589 (TCC) at [10] (Stuart-Smith J)). This has undermined the award decisions in relation to Lots 11 and 12, because it cannot be known what grades would have been awarded (to both Barkhill and the winning bidder) in relation to the questions included in Appendix 1 to our letter of 23 December 2024 if all relevant metrics had been considered.

"Alternatively, if it is the case that each metric for the relevant grade was in fact considered by the evaluators in each instance, the authority has failed to provide the reasons for which the evaluators considered each metric to be met. This constitutes a failure to comply with the authority's duties pursuant to regulation 11(8)(b) PSR23 together with paragraphs 3 and 4 of Schedule 9, as well as with the general duty to provide reasons at common law. Furthermore this failure has prevented proper scrutiny of the award decision in relation to Lots 11 and 12, which entails that it should be set aside (see for example *Lancashire Care v Lancashire CC* (above) at paragraphs [59] and [82]).

“Furthermore, for the detailed reasons given in our letter dated 19 December 2024 (Acuity Law to NECSU), the notice published on the Find a Tender service on 10 December 2024 with reference 2024/S 000-039787 was not valid to start the standstill process under regulation 12(2). This is because it was not a notice of intention to award within the meaning of regulation 11(9), in turn because it did not “include the information set out in Schedule 10” (contrary to the requirement in regulation 11(10)).

“In fact the notice published on 10 December 2024 took the form of a notice of the award of a contract, as required by regulation 11(16), and indicated that contracts had been concluded. This was a material error because it was apt to cause entities which may wish to challenge the award decision wrongly to conclude that they have no prospects of overturning the award, and thus to refrain from submitting representations in relation to the decision.

“None of these issues has yet been resolved.”

6. PSR regulations relevant to Barkhill’s representations

45. In its representations to the Panel, Barkhill suggested that HNY ICB breached the PSR regulations in relation to the general obligations on commissioners (as set out in Regulation 4), the steps that commissioners must follow when using the competitive process (as set out in Regulation 11), and the commissioner’s obligations to provide information to unsuccessful bidders (as set out in Regulations 12 and 24).
46. The parts of the PSR regulations most relevant to the Panel’s assessment of Barkhill’s representations are set out below:

Regulation 4 sets out the general obligations that apply to commissioners when selecting a provider of health care services. It states that commissioners must act “(b) transparently, fairly and proportionately”.

Regulation 11 sets out the obligations that apply to commissioners when following the competitive process. It states that:

- “(1) Where the relevant authority follows the Competitive Process, the process is that the relevant authority follows the steps set out in this regulation ...
- “(3) Step 2 is that the relevant authority submits a notice for publication on the UK e-notification service inviting offers to provide the relevant health care services in relation to which the contract is to be awarded ...
- “(4) The notice referred to in paragraph (3) must include the information set out in Schedule 8;
- “(5) Step 3 is that the relevant authority assesses any offers received in accordance with the contract or framework award criteria ...
- “(8) Step 5 is that the relevant authority promptly informs, in writing –
 - “(a) the successful provider that their offer has been successful and the relevant authority intends to make an award or conclude the framework agreement;
 - “(b) each unsuccessful provider that their offer has been unsuccessful, such communications to include the information set out in Schedule 9.
- “(9) Step 6 is that the relevant authority submits for publication on the UK e-notification service a notice of intention to make an award to the chosen provider ...
- “(10) The notice referred to in paragraph (9) must include the information set out in Schedule 10.”

Regulation 12 sets out the obligations that apply to commissioners in relation to the standstill period after a contract award decision. Regulation 12(4) states that:

“(4) Where the relevant authority receives representations … it must

- (a) ensure each provider who made representations is afforded such further opportunity to explain or clarify the representations as the relevant authority considers appropriate,
- (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:

- “(a) the name of any provider to whom it awards a contract;
- (b) the name of any provider who is a party to a framework agreement;
- (c) the address of the registered office or principal place of business of each provider referred to in paragraph (a) or (b);
- (d) the decision-making process followed, including the identity of individuals making decisions …
- (f) 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;
- (g) the reasons for decisions made under these Regulations;
- (h) declared conflicts or potential conflicts of interest;
- (i) how any conflicts or potential conflicts of interest were managed for each decision …”

Schedule 9 sets out the information that must be included in the communication to an unsuccessful provider. This includes:

- “(1) The contract or framework agreement title and reference.
- (2) The contract or framework award criteria.
- (3) The reasons why the successful provider was successful.
- (4) The reasons why the unsuccessful provider was unsuccessful.
- (5) The dates of the beginning and end of the period in which written representations may be made.”

Schedule 10 sets out the information that must be included in a notice of intention to make an award. This includes:

- “(1) A statement that the relevant authority is intending to award a contract to a provider or conclude a framework agreement under the Competitive Process.
- (2) The contract or framework agreement title and reference.
- (3) The name and address of the registered office or principal place of business of the provider to whom a contract is to be awarded or with whom a framework agreement is to be concluded.
- (4) A description of the relevant health care services to which the contract or framework agreement relates, including the most relevant CPV code.
- (5) Where the notice relates to the conclusion of a framework agreement, the duration of the agreement and the relevant authorities which will be able to use the framework agreement.
- (6) The approximate lifetime value of the contract or framework agreement.
- (7) Details of the decision-makers.
- (8) A statement explaining the decision-makers’ reasons for selecting the chosen provider, with reference to the key criteria

- (9) Any declared conflicts or potential conflicts of interest.
- (10) Information as to how any conflicts or potential conflicts of interest were managed.
- (11) Where appropriate, an indication whether a framework agreement was used.”

47. The Provider Selection Regime Statutory Guidance “sits alongside the Regulations to support organisations to understand and interpret the PSR regulations”.¹⁵ Reference is made to relevant provisions of the Statutory Guidance in the Panel’s assessment of the issues in Section 7.¹⁶

7. Assessment of Barkhill’s representations

48. This section sets out the Panel’s assessment of Barkhill’s representations and its findings on whether HNY ICB complied with the PSR regulations in relation to:

- first, the evaluation of Barkhill’s proposals (Section 7.1);
- second, the notice of intention published on 10 December 2024 and the corrigenda published on 13 January and 7 March 2025 (Section 7.2); and
- finally, the response to Barkhill’s request for information during its representations to the ICB (Section 7.3).

7.1 HNY ICB’s evaluation of Barkhill’s proposals

49. This section sets out the Panel’s assessment of Barkhill’s concerns about HNY ICB’s evaluation of its bid.

50. Barkhill, in its representations to the Panel, said that:

“The evaluation criteria adopted for the Procurement … took the form of a ‘scoring matrix’ which set out metrics which must be met in order for each grade (or score) to be awarded for quality questions. Those metrics were presented as cumulative requirements in order for a grade to be awarded. The information provided in Appendix A to the decision letter which [Barkhill] received on 10 December 2024 suggests that, in numerous instances, grades were awarded on the basis of a consideration of some of the metrics corresponding to the relevant grade, but not all of the metrics corresponding to that grade …

“These failures to apply the evaluation criteria in the manner in which they were described in the Provider Response Document each constitute a breach of the requirement in regulation 4(1)(b) that the authority act transparently …

“Alternatively, if it is the case that each metric for the relevant grade was in fact considered by the evaluators in each instance, the authority has failed to provide the reasons for which the evaluators considered each metric to be met. This constitutes a failure to comply with the authority’s duties pursuant to regulation 11(8)(b) PSR23 together with paragraphs 3 and 4 of Schedule 9 …” (see paragraph 44)

51. The Panel’s assessment of whether HNY ICB breached the PSR regulations when evaluating Barkhill’s proposals is in two parts:

¹⁵ NHS England, *The Provider Selection Regime: statutory guidance*, April 2025, p.2.

¹⁶ The PSR Statutory Guidance was updated in April 2025. However, references to the Statutory Guidance in this report are to the February 2024 version of the guidance as this was the version in force during this provider selection process. Where relevant, differences between the two versions of the Statutory Guidance are noted in this report.

- first, whether HNY ICB failed to apply the grade definitions set out in the tender documentation (Section 7.1.1); and
- second, whether HNY ICB's feedback to Barkhill, as an unsuccessful bidder, was deficient (Section 7.1.2).

7.1.1 Whether HNY ICB failed to apply the grade definitions set out in the tender documentation

52. In assessing whether HNY ICB failed to apply the grade definitions set out in the tender documentation, the Panel, first, considers Barkhill's arguments about how the grade definitions should be interpreted, and second, HNY ICB's application of the grade definitions in its evaluation.
53. By way of background, the grade definitions set out in the tender documentation's 'scoring matrix' are replicated in Table 3 below.

Table 3: Grade definitions in the tender documentation

Grade label	Value	Definition of Grade
Excellent	4 = 100%	Excellent, addresses all issues raised and/or a thorough understanding of the requirements. The response is very detailed and well evidenced and is of a quality and level of understanding that provides certainty of delivery and permits full contractual reliance (where applicable). Fully identifies any system/stakeholder benefits with strong evidence /rationale
High Degree of Confidence	3 = 75%	High degree of confidence in the provider's ability to do what is stated through a thorough and detailed understanding of what is being requested. Responses demonstrate that the provider can do what they say they will; translates well into contractual terms (where applicable). Responses are detailed and supported by evidence as appropriate. Potential system/stakeholder benefits described with evidence/rationale
Meets Requirements	2 = 50%	The provider understands the issues and requirements and addresses them appropriately with sufficient information but lacking reliable substance so as to suggest more of a "model answer" than a true commitment, and so only some confidence that the provider will be able to deliver in line with expectations. Potential system/stakeholder benefits may be described but with limited evidence or rationale
Low Degree of Confidence	1 = 25%	Some misunderstandings by the provider and limited on relevant information, detail, and evidence. Does not provide sufficient confidence that provider can fulfil or meet the requirements in line with expectations.
No Relevant Information	0 = 0%	No or minimal relevant information and/or refusal to deliver requirements

Source: HNY ICB, *Provider Response Document NHSE1023*, 20 September 2024, pp.82-83.

Interpretation of the grade definitions

54. Barkhill told the Panel that the "definition of grade" set out in the scoring matrix (and reproduced in Table 3) "tells you what you have to do in order to get that grade". It

continued, “when you read it [the definitions] as a normal objective reader it’s very clear that where there’s more than one sentence, the separate sentences express separate metrics, all of which have to be met … they’re clearly not meant to be alternatives because if they were alternatives you could satisfy just one of the sentences [to be awarded the grade] and that’s clearly not what’s intended”.¹⁷ As a result, Barkhill concluded that the separate sentences in the grade definition were cumulative requirements all of which had to be met to be awarded a particular grade.

55. HNY ICB told the Panel that “the score [awarded to bidders] was based on the overall level of confidence that we had in the provider’s ability to deliver the specified service as expressed through their response to the question”. It described the grades as “moving from a low level of confidence where the bidder doesn’t give much information about how they’re going to comply with the specified requirement responses up to the highest level of confidence where they’ve really clearly demonstrated not only what they’re going to do, but how they’re going to do it”.¹⁸
56. The Panel notes that the tender documentation does not provide any guidance on interpreting the grade definitions.
 - A statement that accompanies the scoring matrix in the Provider Response Document says “Each question will be evaluated and given a score as per the evaluation criteria”. (The words “evaluation criteria” are taken by the Panel to refer to the grade definitions in the scoring matrix).¹⁹ That is, bidders are referred back to the grade definitions when told how answers will be scored.
 - Another statement that accompanies the quality questions in the Provider Response Document says answers will be scored 0-4 “in accordance with Provider Response Questions Evaluation Criteria as per the PRD Schedule 6 Provider Response Evaluation Criteria Handbook”.²⁰ This is a reference back to the scoring matrix and grade definitions in the Provider Response Document. That is, bidders are again referred back to the grade definitions when told how answers will be scored without being given any additional guidance on their interpretation.
57. The Panel, having reviewed the grade definitions, considers that the first sentence, or clause, in each grade definition sets out the primary, or umbrella, description for that grade. The remaining content of the grade definitions then, for the most part, provides supporting explanation of how the primary, or umbrella, description should be interpreted.²¹ As a result, the Panel does not interpret the grade definitions as comprising a list of separate and independent metrics as suggested by Barkhill. That said, the Panel also considers that each grade definition contains elements that are additional to the grade’s primary description (e.g. the references to system/stakeholder benefits that are contained in three of the five grade definitions). The Panel’s view is

¹⁷ Panel meeting with Barkhill, 9 April 2025.

¹⁸ Panel meeting with HNY ICB, 11 April 2025.

¹⁹ HNY ICB, *Provider Response Document NHSE1023*, 20 September 2024, pp.82-83.

²⁰ HNY ICB, *Provider Response Document NHSE1023*, 20 September 2024, pp.60-67.

²¹ For example, the grade definition for a score of 4 (Excellent) says in its first sentence that the answer will be “Excellent, addresses all issues raised and/or a thorough understanding of the requirements”. The subsequent sentences provide a further description of what an excellent response looks like, saying “The response is very detailed and well evidenced and is of a quality and level of understanding that provides certainty of delivery and permits full contractual reliance (where applicable). Fully identifies any system/stakeholder benefits with strong evidence/rationale”.

that to the extent that the definition of a grade contains elements that are additional to the grade's primary description, all of these additional elements should also be satisfied by a bidder's answer in order to be awarded that grade.

HNY ICB's application of the grade definitions

58. The Panel, in assessing how HNY ICB applied the grade definitions, considered: (i) the training provided to evaluators; (ii) evidence from evaluators' comments, records of moderation meetings and final agreed feedback; (iii) Barkhill's analysis of the evaluators' scoring; and (iv) the explanations provided to the Panel by HNY ICB.
59. In relation to evaluator training, the Panel notes that evaluators were taken through the scoring matrix and told to "only evaluate using the published scoring criteria and methodology", and to provide a rationale for each score that is "aligned to the question criteria and scoring methodology". Evaluators were told that good feedback should, amongst other things, describe: "what relevant detail they [the bidders] did provide and what parts of the response met requirements"; "which parts of the response were only covered sufficiently"; "which parts of the response were limited in evidence and rationale"; and "state what would have improved / strengthened their [the bidder's] response".²²
60. In relation to evidence from evaluators' comments, records of moderation meetings and final agreed feedback, the Panel notes that these were in line with the evaluator training. Evaluators' comments and final agreed feedback described specific aspects of each response that were viewed as positive or negative, notable or compliant, often supplemented with an explanation of why they were as such. The feedback also included comments on where specific inclusions or amendment might have improved a response, often with an explanation of why this would be the case. The Panel did not identify any comments in the final feedback that caused concern about potential conflict with the grade definitions.²³
61. Barkhill, in its analysis of the evaluators' scoring, suggested that "evaluators adopted a different scoring methodology to that set out in the Scoring Matrix, whereby simply: a. a grade of 4 was awarded if no faults or flaws were identified by the evaluators in an answer; b. a grade of 3 was awarded if evaluators identified only one or two faults or flaws in an answer; and/or c. a grade of 2 was awarded if evaluators identified two or more faults or flaws in an answer".²⁴ HNY ICB said that it did not use this alternative scoring methodology, noting that scores were "based on the full details of the answer provided".²⁵
62. The Panel explored with HNY ICB the approach taken to evaluating submissions. HNY ICB told the Panel that, in line with their training, evaluators ensured that all elements of the grade definition were met when deciding on the score for a bidder's answer. The

²² HNY ICB, *Tender Evaluation Training, Intermediate Minor Oral Surgery Services for Yorkshire and the Humber*, October 2024.

²³ The Panel notes that for the generic question IM&T02 Haricover were awarded a score of 2, and the final feedback includes "The response meets requirements but lacks sufficient information". The Panel's view is that this is a drafting error born of a contraction of the element of the grade definition which states "The provider understands the issues and requirements and addresses them appropriately with sufficient information but lacking reliable substance ..." rather than a misapplication of the scoring matrix.

²⁴ Barkhill, *Representations to HNY ICB*, 23 December 2024.

²⁵ HNY ICB, *Representations response letter*, 4 March 2025.

ICB also noted that the issue of system / stakeholder benefits, which is referenced in the grade definitions, was more important for some questions than for others.

Panel conclusions on whether HNY ICB applied the grade definitions set out in the tender documentation

63. In summary, the Panel's view is that each grade definition has a primary description supplemented with further explanation for how this primary description should be interpreted. Within this further explanation, however, there are additional elements to each definition, and the Panel's view is that all elements of the grade's primary description need to be met for a grade to be awarded.
64. The Panel's review of the evidence from evaluator training, evaluator comments and feedback, and the explanations provided by the ICB supports a conclusion that evaluators applied all elements of the grade definition when awarding scores to bidders' answers. The Panel did not see any conflict between the final feedback comments and the requirements of the grade definitions (which might have indicated that evaluators were not applying all of the elements of a grade definition when awarding scores). Moreover, the Panel did not see further evidence in the evaluator training or evaluation process to suggest that scoring proceeded, as Barkhill has suggested, by way of "counting faults", and the Panel accepts HNY ICB's explanation that this was not the case.
65. Given this, the Panel finds that HNY ICB, in evaluating proposals did not fail to apply the grade definitions set out in the tender documentation, and as a result, did not breach the PSR regulations including, in particular, the obligation under Regulation 4 to act transparently, fairly and proportionately.

7.1.2 HNY ICB's tender outcome letter to Barkhill

66. Barkhill told the Panel that "if it is the case that each metric for the relevant grade was in fact considered by the evaluators in each instance, the authority has failed to provide the reasons [in the tender outcome letter] for which the evaluators considered each metric to be met ... this failure has prevented proper scrutiny of the award decision" (see paragraph 44).
67. The Panel reviewed the tender outcome letter sent to Barkhill and notes that the reasons contained in the letter are consistent with the feedback comments agreed by evaluators in the evaluation process. These comments, as set out in paragraph 60, described specific aspects of each response that were viewed as positive or negative, notable or compliant, often supplemented with an explanation. The feedback also included comments on how a response might have been improved.
68. The PSR regulations require that commissioners inform unsuccessful bidders that their offer has been unsuccessful giving the reasons why the successful provider was successful and the unsuccessful provider was unsuccessful (Regulation 11(8)(b) and Schedule 9, paras 3 and 4).
69. The Panel does not consider that the PSR regulations require commissioners to give explicit feedback on how each and every element of the grade definition was met, and how elements of the grade definitions for higher scores were not met. The Panel

considers that such a requirement would be both disproportionate for commissioners, and unhelpful for unsuccessful bidders who would be likely to benefit more from the style of feedback described in the previous paragraph.

70. In summary, the Panel finds that HNY ICB's tender outcome letter did not breach its obligations under Regulation 11(8)(b) and Schedule 9 to provide Barkhill with "the reasons why the successful provider was successful" and "the reasons why the unsuccessful provider was unsuccessful".

7.2 HNY ICB's notice of intention to make a contract award

71. HNY ICB published a notice of intention to make a contract award (notice of intention) on 10 December 2024 followed by corrigenda to this notice on 13 January and 7 March 2025.²⁶
72. Barkhill's concerns about the notice of intention published on 10 December 2024 are set out in its letter to HNY ICB on 19 December (and referenced in its formal representation on 23 December). These concerns are that:
 - the notice of intention does not state the address of the registered office or principal place of business of the successful providers;
 - the notice of intention does not state the most relevant CPV code;
 - the notice of intention fails to provide a statement explaining the decision makers' reasons for selecting the chosen provider with reference to the key criteria; and
 - the notice of intention fails to identify any declared conflicts of interest and to provide any information as to how any conflicts or potential conflicts of interest were managed.²⁷
73. Barkhill told the Panel that the deficiencies with the 10 December 2024 notice meant that it was not valid to start the standstill period under Regulation 12(2). Moreover, it said that the 10 December notice took the form of a contract award notice, rather than a notice of an intention, thus potentially misleading parties that might have wished to make representations about the provider selection process (see paragraph 44).
74. The Panel's assessment of Barkhill's concerns regarding the notice of intention is set out as follows:
 - first, events subsequent to the publication of the notice of intention on 10 December 2024 are set out (see Section 7.2.1);
 - second, Barkhill's concerns about a lack of addresses for the successful bidders are discussed (see Section 7.2.2);
 - third, Barkhill's concerns about the use of inappropriate CPV codes in the notice are discussed (see Section 7.2.3);
 - fourth, Barkhill's concerns about the notice inadequately providing reasons for selecting the successful providers are discussed (see Section 7.2.4);
 - fifth, Barkhill's concerns about conflicts of interest information in the notice are discussed (see Section 7.2.5);

²⁶ HNY ICB, *Contract Award Notice on Find a Tender Service*, 10 December 2024.

²⁷ Barkhill, *Letter to HNY ICB*, 19 December 2024.

- sixth, Barkhill's concerns about the notice of intention taking the form of a contract award notice are discussed (see Section 7.2.6); and
- finally, the Panel's conclusions are set out (see Section 7.2.7).

7.2.1 Events subsequent to publication of the notice of intention on 10 December 2024

75. The publication of the notice of intention on 10 December 2024 was followed by correspondence between Barkhill and HNY ICB concerning the content of the notice as part of Barkhill's representations to the ICB.
76. On 13 January 2025, following Barkhill's representations about the CPV code in the notice of intention, HNY ICB published a notice confirming the award of the contract with respect to Lot 2, where no representations had been received. This notice included a corrigendum for the notice of intention, adding an additional CPV code to the notice of intention.
77. On 4 March 2025, HNY ICB wrote to Barkhill setting out its further decision on the provider selection process. In this letter, HNY ICB responded to Barkhill's representations about the notice of intention saying that "the published notice [on 10 December 2024] was sufficient to meet the requirements of the regulations, and included:
 - The contract title and reference.
 - The name and address of the registered office or principal place of business of the provider to whom the contract has been awarded.
 - A description of the relevant health care services to which the contract relates, including the correct CPV code category. While we accept that other CPV codes might also have been relevant, the [ICB review] panel determined that this had no material impact on the validity of the procurement.
 - The lifetime value of the contract.
 - The dates between which the contract provides for the services.
 - A statement that conflicts or potential conflicts of interest were managed."
78. HNY ICB's letter of 4 March 2025 also provided new information about how HNY ICB managed conflicts of interest, saying "We can confirm that 2 potential conflicts of interest were identified prior to evaluation and that these 2 potential conflicts were discussed, and it was agreed that they would be removed and would take no further part in the competition process. The [ICB review] panel determined that conflicts of interest had no material impact on the competition or procurement outcome".²⁸
79. On 7 March 2025, HNY ICB published a second corrigendum to the 10 December 2024 notice providing additional information on: (i) the key criteria used by HNY ICB; and (ii) how HNY ICB managed conflicts of interest.

7.2.2 Addresses of the successful bidders

80. Barkhill raised concerns that the notice of intention did not state the address of the registered office or principal place of business of the successful providers (see paragraph 72).

²⁸ HNY ICB, *Representations response letter*, 4 March 2025.

81. Regulation 11(9) states that, under the competitive process, having selected the successful provider(s), the commissioner must publish “a notice of intention to make an award to the chosen provider”. Regulation 11(10) states that this notice must include the information set out in Schedule 10. One of the items listed in Schedule 10 is “The name and address of the registered office or principal place of business of the provider to whom a contract is to be awarded”.
82. The Panel notes that the notice of intention includes the name of the successful bidders and the city or town where the successful bidders have their registered office or principal place of business (e.g. Manchester or Ackfield), but not a full address. The Panel further notes that no further address information was provided in the corrigenda published on 13 January or 7 March 2025.
83. The Panel finds that HNY ICB, by not including full address information in the notice of intention, breached the PSR regulations with respect to its obligations under Regulation 11(10) and Schedule 10.

7.2.3 CPV codes

84. Barkhill raised concerns that the notice of intention does not contain the most relevant CPV code (see paragraph 72). One of the items of information listed in Schedule 10 for inclusion in a notice of intention is “A description of the relevant health and care services to which the contract or framework agreement will relate, including the most relevant CPV code”.
85. The CPV code used in the 10 December 2024 notice was ‘85000000 - Health and social work services’. This CPV code is a parent code for all health and social work services rather than a specific code for dental services. Moreover, it is not one of the CPV codes to which the PSR regulations apply. (By contrast, the 20 September 2024 notice inviting offers used the CPV code ‘85130000 – Dental practice and related services’.)
86. As set out in paragraph 76, HNY ICB published a corrigendum to the notice of intention on 13 January 2025 that included an additional CPV code, namely ‘85130000 – Dental practice and related services’. The Panel notes the importance of CPV codes as a means of interested parties tracking procurement activities, and considers that the addition of this CPV code by way of corrigendum addressed the deficiency identified by Barkhill.
87. The Panel finds that HNY ICB, as a result of publishing the corrigendum with the additional CPV code, did not breach the PSR regulations with respect to its obligation under Regulation 11(10) and Schedule 10 to include the most relevant CPV code in its notice of intention.

7.2.4 Reasons for selecting the successful providers

88. Barkhill raised concerns that the notice of intention failed to provide a statement explaining the decision makers’ reasons for selecting the successful providers with reference to the key criteria (see paragraph 72). One of the items of information listed in Schedule 10 for inclusion in a notice of intention is “A statement explaining the

decision-makers' reasons for selecting the chosen provider, with reference to the key criteria".

89. The Panel reviewed the notice of intention and identified the following text, included in 'Section VI Complementary information', as coming closest to a statement explaining HNY ICB's reasons for selecting the successful providers with reference to the key criteria:

"The PRD includes the contract award criteria, including the agreed relative importance of key criteria (for example weightings apportioned to questions within the key criteria) against which responses were evaluated. The providers have been assessed and passed against the relevant 5 key criteria and mandatory requirements".

90. The Panel considers that the meaning of this statement is unclear. It might be read as saying that all bidders, including both successful and unsuccessful bidders, were assessed and passed against the five key criteria and mandatory requirements. (However, this would not explain why the chosen providers had been selected.)

91. On the other hand, it might be read as saying that only the successful bidders passed the key criteria and mandatory requirements, which would potentially explain why the successful bidders had been selected. However, if this is the intended reading, the statement is incorrect given that unsuccessful bidders also passed the key criteria and mandatory requirements but simply scored fewer points than the successful bidders.

92. As a result, the Panel's view is that this statement does not explain the "decision makers' reasons for selecting the chosen providers" (as per the requirements set out in Schedule 10).

93. The corrigendum published on 7 March 2025 replaces the text set out in paragraph 89 with the following:

"The PRD includes the contract award criteria, including the agreed relative importance of key criteria (for example weightings apportioned to questions within the key criteria) against which responses were evaluated. The providers have been assessed and passed against the relevant 5 key criteria and mandatory requirements.

Assessment/Scoring of the Successful Provider(s) Response:

In line with the PSR Regulations, the successful provider(s) were scored against the following PSR 5 Key Criteria as weighted:

- Quality and Innovation - Macro Weighting of 24%
To ensure good quality services and the need to support the potential for the development of new or significantly improved services or processes that will improve the delivery of health care or health outcomes.
- Value - Macro Weighting of 15%
To achieve good value in terms of the balance of costs, overall benefits, and the financial implications of a proposed contracting arrangement.
- Integration, Collaboration and Service Sustainability - Macro Weighting of 41%
Providing services in:
 - (i) an integrated way (including with other health care services, health-related services, or social care services),

- (ii) a collaborative way (including with providers and with persons providing health related services or social care services),
- (iii) a sustainable way (which includes the stability of good quality health care services or service continuity of health care services),
in a way that improves health outcomes.
- Improving Access, Reducing Health Inequalities and Facilitating Choice - Macro Weighting of 10%
Ensuring accessibility to services and treatments for all eligible patients, improving health inequalities and the ensuring that patients have choice in respect of their health care.
- Social Value - Macro Weighting of 10%
To improve economic, social, and environmental well-being in the geographical area relevant to a proposed contracting arrangement.²⁹

94. The Panel notes that while the corrigendum includes additional information on the key criteria it retains the same text as the original notice of intention where it says “The providers have been assessed and passed against the relevant 5 key criteria and mandatory requirements”. This means that the notice of intention, as revised by the corrigendum, retains the same deficiencies as those set out in paragraph 90.
95. As a result, the Panel finds that HNY ICB, by not including a statement explaining the decision-makers’ reasons for selecting the chosen provider in the notice of intention, breached the PSR regulations with respect to its obligations under Regulation 11(10) and Schedule 10.

7.2.5 Management of conflicts of interest

96. Barkhill raised concerns that the notice of intention failed to identify any declared conflicts of interest and failed to provide any information as to how any conflicts or potential conflicts of interest were managed (see paragraph 72). Two of the items of information listed in Schedule 10 for inclusion in a notice of intention are “Any declared conflicts or potential conflicts of interest” and “Information as to how any conflicts or potential conflicts of interest were managed”.
97. The Panel notes that the notice of intention says, with respect to conflicts of interest, “Any Conflicts of interest were monitored and managed with mitigations in place throughout the project if/ when required”.
98. In response to Barkhill’s representations on this issue, HNY ICB told Barkhill on 4 March 2025 that the 10 December 2024 notice was “sufficient to meet the requirements of the regulations” (see paragraph 77). However, it went on to say in relation to conflicts of interest:

“We can confirm that 2 potential conflicts of interest were identified prior to evaluation and that these 2 potential conflicts were discussed, and it was agreed that they would be removed and would take no further part in the competition process. The panel determined that conflicts of interest had no material impact on the competition or procurement outcome” (see paragraph 78).

²⁹ HNY ICB, *Corrigendum Notice for changes or additional information on Find a Tender Service*, 7 March 2025.

99. This additional information about conflicts of interest was included in the 7 March 2025 corrigendum notice, which says:

“Any Conflicts of interest were monitored and managed with mitigations in place throughout the project if/ when required.

“A clarification on the management of Conflict of Interests during the NHSE1023 Competitive Process. Once provider submissions were received, only the names of the submitting providers (organisations) were noted and shared with the evaluation team to re-confirm no conflicts of interest. This was prior to any opening of the evaluation process or submission details being shared. Two evaluators each noted an association with a submitting provider and therefore a potential conflict. Both were immediately removed from the project and replaced by appropriate evaluators who did not have a potential conflict. Only then was the evaluation process allowed to begin and provider submissions accessed by all non-conflicted evaluators”.³⁰

100. The Panel considers that the original notice of intention, published on 10 December 2024, was not sufficient to meet the requirements of the PSR regulations as set out in Regulation 11(10) and Schedule 10, with respect to information on conflicts of interest. This is because the original statement did not include any information on how conflicts of interest were managed. The Panel, however, considers that this deficiency was remedied by the corrigendum published on 7 March 2025.

101. The Panel further notes that Regulation 12(4) states that “Where the relevant authority receives representations … it must … (c) review the decision to award the contract … taking into account the representations made, and (d) make a further decision to – (i) enter into the contract … as intended after the standstill period has ended, (ii) go back to an earlier step in the selection process and repeat that step and subsequent steps in accordance with the relevant procedure, or (iii) abandon the procurement”.

102. The Panel considers that HNY ICB, by publishing this corrigendum with substantive new information³¹ following Barkhill’s representations, returned to an earlier step in the provider selection process.³² Having decided to return to an earlier step in the selection process, HNY ICB was obliged, under the terms of Regulation 12(4), to repeat the subsequent steps in the provider selection process. In this case, the subsequent steps should have involved re-starting the standstill period after the corrigendum was published for a period of eight working days to allow all unsuccessful bidders the opportunity to make further representations based on the revised notice of intention.

103. Instead, HNY ICB’s letter to Barkhill of 4 March 2025, where it set out the ICB’s further decision on the provider selection process, did not mention that a corrigendum to the notice of intention would be published on 7 March. HNY ICB’s letter said “the issues you [Barkhill] have raised have not materially affected the ICB’s ability to reach a fair

³⁰ HNY ICB, *Corrigendum notice for changes or additional information on Find a Tender Service*, 7 March 2025.

³¹ The Panel distinguishes here between a corrigendum that contains substantive new information and a corrigendum that only contains a minor correction of an earlier notice.

³² The Panel notes that the template notices available to commissioners for publication on FTS are aligned with the former Public Contracts Regulations (PCR) and the Procurement Act. Guidance for commissioners of health care services says that PCR template notices should be used for the purposes of publishing notices under the PSR. In particular, confirmation of contract award notices under PSR should be published using the template for the PCR’s corrigendum to a contract award notice. The Panel notes that where it refers to corrigendum notices in this report, it is referring to a corrigendum notice for the purposes of making changes to a PSR intention to award notice, and is not referring to the template corrigendum notice under PCR which has been re-purposed for use in PSR.

decision. As such, we intend to enter into contracts for this service as stated in our intention to award notice. As required by the Provider Selection Regime regulations, we will allow a further five working days of standstill from the date of this letter, at which point the standstill period will come to an end".³³

104. After further correspondence from Barkhill, HNY ICB wrote to Barkhill again on 5 March 2025, again not mentioning that a corrigendum to the notice of intention would be published on 7 March, and said "To confirm, the 5 day standstill period concludes midnight, Tuesday 11 March 2025".³⁴
105. In conclusion, the Panel finds that HNY ICB, by making a substantive correction to the notice of intention returned to an earlier step in the provider selection process and by not repeating the subsequent steps in the selection process, breached the PSR regulations with respect to its obligations under Regulation 12(4).

7.2.6 Contract award notice vs Intention to award notice

106. Barkhill raised concerns that the notice of intention was erroneously published on FTS as a contract award notice rather than a notice of an intention to make a contract award. Barkhill's view is that the deficiencies it identified with the notice of intention meant that it was not valid to start the standstill period under Regulation 12(2) (see paragraph 72).
107. The Panel notes that the template notices available for commissioners on FTS are aligned with the requirements of the former Public Contracts Regulations and the new Procurement Act. This means that, currently, FTS does not have template notices matched to the requirements of the PSR regulations. To address this shortcoming, guidance has been issued to commissioners of health care services advising which of the FTS template notices should be used for notices that need to be published under the PSR regulations. The guidance states that for notices of intention, the contract award notice template on FTS should be used. It further states that the date on the contract award notice is a mandatory field, and says "Please enter the date when the relevant decision on the provider in question was made (even though the contract has not yet been awarded)".³⁵
108. The Panel notes that HNY ICB's notice of intention, consistent with the FTS guidance, states "Date of conclusion of the contract: 9 December 2024". The Panel also notes that the 10 December notice includes four statements to the effect that the notice is an Intention to Award notification. This includes at least one statement, in caps, stating "THIS IS AN INTENTION TO AWARD NOTIFICATION".
109. The Panel considers that it is sub-optimal that notices specific to the requirements of the PSR regulations are not available on FTS. However, it also considers that the current workaround arrangements are adequate for the purposes of ensuring that commissioners are able to meet their obligations under the PSR regulations. As a result, the Panel finds that HNY ICB, when publishing its notice of intention on FTS

³³ HNY ICB, *Representations response letter*, 4 March 2025.

³⁴ HNY ICB, *Letter to Barkhill*, 5 March 2025.

³⁵ NHS England, *Find a Tender Service (FTS) supplementary guide*, 'Competitive Process' tab, 10 July 2024.

using the FTS contract award notice template, did not breach the PSR regulations and the notice was valid to start the standstill period under Regulation 12(2).

7.2.7 Panel conclusions on HNY ICB's notice of intention

110. The Panel finds that HNY ICB breached the PSR regulations in relation to the notice of intention published on 10 December 2024 in three ways:
 - first, by not including full addresses of the successful bidders (contrary to the requirements of Regulation 11(10) and Schedule 10);
 - second, by not including a statement that adequately explained the ICB's reasons for selecting the successful bidders (contrary to the requirements of Regulation 11(10) and Schedule 10); and
 - finally, by returning to an earlier step in the provider selection process, through making a substantive correction to the notice of intention via the corrigendum of 7 March 2025, and not repeating the subsequent steps in the provider selection process (contrary to the requirements of Regulation 12(4)).
111. The Panel also finds that HNY ICB did not breach the PSR regulations in two other respects:
 - by publishing a corrigendum to the notice of intention with an additional CPV code, HNY ICB did not breach the PSR regulations with respect to its obligation under Regulation 11(10) and Schedule 10 to include the most relevant CPV code in its notice of intention; and
 - when publishing its notice of intention on FTS using the contract award notice template, HNY ICB did not breach the PSR regulations and the notice was valid to start the standstill period under Regulation 12(2).

7.3 HNY ICB's response to Barkhill's information request

112. Barkhill, in making its representations to HNY ICB on 23 December 2024, said:

"we note that you are required to keep records in relation to the Procurement pursuant to regulation 24 PSR23, including:

 - a. a record of the decision-making process followed, pursuant to regulation 24(d);
 - b. records of the identity of the evaluators, pursuant to regulation 24(d);
 - c. 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, pursuant to regulation 24(f);
 - d. 'the reasons for' the decision to award the contract for Lots 11 and 12 to Haricovert, pursuant to regulation 24(g); and
 - e. information in relation to conflicts of interest, as referred to in regulation 24(h) and (i)".³⁶

113. Barkhill continued:

"we note that you are also now required to provide that information to Barkhill promptly on request, pursuant to regulation 12(4)(b) PSR23. We therefore ask that: (a) you provide all the information described ... above at this stage; ... and (c) as part of the records of the decision-making process followed, and/or as part of the reasons for the award decision, you provide any notes taken by individual evaluators, and any notes

³⁶ Barkhill, *Representations to HNY ICB*, 23 December 2024.

taken of any discussion between evaluators, which were made for the purposes or in the context of deciding on the grades to be awarded in respect of Barkhill's and Haricovert's answers".³⁷

114. HNY ICB responded to Barkhill's information request on 4 March 2025 in its letter setting out its further decision on the provider selection process. HNY ICB told Barkhill that:

"we consider that the information you request ... has already been provided in the Intention to Award notice, the standstill letter, and the published provider response document, except for the records of the identity of the evaluators. We consider that regulation 24 and regulation 12 require us to record and disclose the 'identity of individuals making decisions', and that individual evaluators are not the decision makers in this process. The decision makers for the lots you have raised representations about were the Director for Strategy and Partnerships, West Yorkshire ICB, and the Assistant Director of Contracting, West Yorkshire ICB".³⁸

115. Barkhill, in its representations to the Panel, said that the ICB's response did not satisfy Barkhill that it had been provided with the information that it had requested (see paragraph 44).

116. The Panel's assessment of HNY ICB's response to Barkhill's information request is set out as follows:

- Section 7.3.1 considers HNY ICB's supply of its records on: (i) the decision-making process; (ii) the way in which the key criteria were taken into account, the basic selection criteria were assessed and contract award criteria were evaluated; and (iii) the reasons for the decision to award the contract for Lots 11 and 12 to Haricovert;
- Section 7.3.2 considers HNY ICB's supply of its records of the identity of the evaluators; and
- Section 7.3.3 considers HNY ICB's supply of its records in relation to conflicts of interest.

7.3.1 HNY ICB's response to Barkhill's request for its records on the decision making process and reasons for its decisions

117. This section sets out the Panel's assessment of whether HNY ICB complied with the PSR regulations when responding to Barkhill's request for records relating to: (i) the decision making process; (ii) the way in which key criteria were taken into account, the basic selection criteria were assessed and contract award criteria were evaluated; and (iii) the reasons for the decision to award the contract for Lots 11 and 12 to Haricovert.

118. HNY ICB told Barkhill that "we consider that the information you request ... has already been provided in the Intention to Award notice, the standstill letter, and the published provider response document" (see paragraph 114). During this review, the Panel asked HNY ICB to specifically identify where each of the items of information requested by Barkhill had been supplied. HNY ICB's response is set out in Table 4.

³⁷ Barkhill, *Representations to HNY ICB*, 23 December 2024.

³⁸ HNY ICB, *Representations response letter*, 4 March 2025.

119. The Panel notes that HNY ICB's position is that the records requested by Barkhill were published in their entirety in the documents referenced by HNY ICB. The Panel's view, however, is that a commissioner's records in relation to these matters will go beyond these published documents. For example, notes taken by individual evaluators and notes of discussions between evaluators will form part of the records that a commissioner is obliged to keep under either or both of Regulation 24(d) and Regulation 24(f). The Panel notes that HNY ICB did not respond to Barkhill's request for "any notes taken by individual evaluators, and any notes taken of any discussion between evaluators, which were made for the purposes or in the context of deciding on the grades to be awarded in respect of Barkhill's and Haricovert's answers" (see paragraph 113).

Table 4: Barkill's information request and HNY ICB's explanation of its response

Information requested by Barkhill	HNY ICB's explanation of where this information was supplied to Barkhill
Record of the decision-making process followed, pursuant to regulation 24(d)	This information was detailed in the Intention to Award notice, Section VI, sub section VI.3
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, pursuant to regulation 24(f)	These were included in the published Provider Response Document, page 59-67, Schedule 6 Evaluation Handbook and in Appendix A of the standstill letter
The reasons for the decision to award the contract for Lots 11 and 12 to Haricovert, pursuant to regulation 24(g)	This information was included in the standstill letter, page 1 and Appendix A.

Source: HNY ICB, Response to Panel information request Q14-RA.

120. As a result, the Panel finds that HNY ICB breached the PSR regulations with respect to its obligations under Regulation 12(4) by failing to provide all of the relevant records in response to Barkhill's request for: (i) the decision making process; (ii) the way in which key criteria were taken into account, the basic selection criteria were assessed and contract award criteria were evaluated; and (iii) the reasons for the decision to award the contract for Lots 11 and 12 to Haricovert.

7.3.2 HNY ICB's response to Barkhill's request for its records on evaluators' identity

121. Barkhill requested that HNY ICB provide its records on the identity of evaluators pursuant to Regulation 24(d) (see paragraph 112). Under Regulation 24(d), commissioners must keep a record of "the decision-making process followed, including the identity of individuals making decisions".
122. HNY ICB, in its response on 4 March 2025, refused to supply this information, saying that "Regulation 24(d) states we must keep a record of the identity of individuals making decisions. The evaluators were not the decision makers, the approvals bodies are the decision makers and these were included in the Intention to Award notice" (see paragraph 114).
123. The Panel recently addressed, in Case CR0011-25, the issue of whether evaluators are decision makers for the purposes of Regulation 24. The Panel in that case said:

“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.

“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.

“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.”³⁹

124. The Panel does not see any reason to conclude any differently in this case. That is, the Panel considers that the evaluators in HNY ICB’s provider selection process for the IMOS service in Humber and Yorkshire are decision makers for the purposes of Regulation 24. As a result, the Panel considers that HNY ICB’s explanation for not providing Barkhill with the identity of evaluators, in its response to Barkhill’s information request on 4 March 2025 (i.e. that “the evaluators were not decision makers”) is not valid as it is not consistent with the definition of “decision makers” for the purposes of Regulation 24(d).
125. The Panel further notes that even if evaluators were not decision makers for the purposes of Regulation 24(d), commissioners would still be obliged to keep a record of evaluators’ identities as part of their wider decision making record (e.g. as part of the decision-making process). As a result, information on evaluators’ identities is disclosable under Regulation 12(4) even if evaluators are not considered to be decision makers.
126. HNY ICB told the Panel, having refused to supply the information on evaluators’ identities, that it would like to rely on Regulation 12(5) as the basis for not providing Barkhill with information on evaluators’ identities.⁴⁰ Regulation 12(5) says that commissioners do not have to supply requested information where it “would prejudice the legitimate commercial interests of any person, including those of the relevant authority”.
127. HNY ICB explained to the Panel that providing this information would prejudice its legitimate commercial interests as a result of it discouraging staff from participating as evaluators (due to the risk of potential unfounded challenge to their qualifications, personal animus from providers and unfounded accusations of bias). HNY ICB also

³⁹ Independent Patient Choice and Procurement Panel, *Review of a proposed contract award: Community Aural Microsuction Service for Norfolk and Waveney*, CR0011-25, 8 April 2025, paras 43-45.

⁴⁰ Panel meeting with HNY ICB, 11 April 2025.

said that it was not in the public interest to provide information on evaluators' identities because of the privacy interests of the evaluators. HNY ICB further said that providing this information was not something that it would normally do in the context of, for example, freedom of information requests.⁴¹

128. The Panel notes that none of the reasons set out in paragraphs 126 and 127 were advanced by HNY ICB at the time that it refused Barkhill's request for its record of evaluators' identities. That said, the following paragraphs set out the Panel's views on these points so as to assist commissioners in responding to similar requests in the future.
129. By way of an overview, the Panel has observed that some commissioners are willing to disclose evaluators' names, relevant professional experience and their role in the evaluation process while others, similar to HNY ICB, are more reticent. The fact that some commissioners are willing to disclose this information suggests that HNY ICB's concerns about the potential adverse effects of disclosing evaluators' identities do not necessarily apply all of the time.
130. Regarding the specific concerns raised by HNY ICB:
 - *Providing information on evaluators' identities would discourage staff from participating as evaluators*: the Panel notes, as per the previous paragraph, that while disclosing information on evaluators' identities might discourage staff from participating as evaluators (assuming that such a choice is open to staff), this will not necessarily always be the case.
 - *Risk of potential unfounded challenge to their qualifications, personal animus from providers and unfounded accusations of bias*: the Panel acknowledges that unfounded challenge or accusations can be hurtful and distressing for staff. The Panel also notes that challenges to the integrity of procurement processes may be more likely in an environment where transparency is limited and commissioners can be accused of hiding information. The Panel considers that there is a balance to be struck between protecting staff from the risk of unfounded challenge, and ensuring transparency and confidence in the provider selection process. The Panel further considers that the appropriate balance between these two potentially competing aims may vary from case to case.
 - *Not in the public interest to provide information on evaluators' identities because of the privacy interests of the evaluators, and that providing this information was not something that the ICB would normally do in the context of, for example, freedom of information requests*: as per the previous point, the Panel does not consider that evaluators' potential desire for privacy can always outweigh all other considerations, including public interest requirements for transparent procurement processes. Case specific factors will impact on the privacy expectations of individual evaluators, such as their seniority and the nature of their role. The Panel further notes that commissioners may be required to disclose evaluators' identities in legal cases arising under the former Public Contracts Regulations (PCR) or the new Procurement Act. These legal

⁴¹ Panel meeting with HNY ICB, 11 April 2025.

cases, rather than freedom of information requests, are likely to be a better comparator for considering the appropriate level of disclosure under the PSR.

131. The Panel also notes that disclosure of evaluators' identities to an unsuccessful bidder who makes a request for a commissioner's records under Regulation 12(4) has different privacy implications to disclosing identities to the public at large (e.g. pursuant to the publication of a notice of intention to award a contract under Regulation 11(9) and Schedule 10).⁴² This may mean that different approaches to disclosing evaluators' identities may be appropriate in a notice of intention as compared to a response to a request by an unsuccessful bidder.
132. Given this, the Panel's view is that the number of instances where it is appropriate for a commissioner to refuse to share any information about evaluators' identities is likely to be limited. The Panel expects commissioners refusing to share any such information to be able to show robust grounds for doing so.
133. The Panel notes that, in this case, HNY ICB's initial refusal to provide information on the identity of individuals making decisions was based on an erroneous understanding of its obligations under the PSR regulations. The Panel therefore finds that HNY ICB's decision not to provide information on evaluators' identities, based on evaluators not being decision makers, breached the PSR regulations with respect to its obligations under Regulation 12(4).

7.3.3 Provision of records on conflicts of interest

134. Barkhill requested that HNY ICB provide its records on conflicts of interest pursuant to Regulation 24(h) and (i). Under Regulation 24(h) and (i), the commissioner must keep a record of "declared conflicts or potential conflicts of interest" and "how any conflicts or potential conflicts of interest were managed for each decision".
135. The Panel notes that, as discussed in paragraph 98, Barkhill was supplied with further information on conflicts of interest on 4 March 2025. Given the Panel's findings set out in Section 7.2.5, the Panel does not consider it necessary to reach any further findings on this issue.

8. Clarendon's representations to the Panel

136. Clarendon's concerns about the provider selection process for IMOS services in Yorkshire and Humber, as summarised in its submission to the Panel, are as follows:

"Written representations [by Clarendon] under regulation 12(3) of the Health Care Services (Provider Selection Regime) Regulations 2023 (the regulations) were submitted [to HNY ICB] on 20 December 2024. The representations raised concerns under regulation 12(3)(a) and (b). The 12(3)(a) representations were supported by an appendix to the letter, setting out the Applicant's [Clarendon] detailed analysis of the way in which the assessment criteria had been applied and the numerous inconsistencies and anomalies in the apparent decision-making process. On 4 March 2025 the ICB emailed an undated letter to the Applicant's representatives. The letter

⁴² The Panel notes that the PSR statutory guidance specifically allows for the publication of the name of a committee or job titles of individuals for the purposes of this notice (PSR Statutory Guidance, February 2024, p.41).

purported to address the concerns set out in the Applicant's appendix A. Regulation 12(4)(c) requires the relevant authority to review the decision to award the contract, not to justify the reasons for not awarding the contract to the Applicant.

"There is no evidence within the letter that those assessing the application have reviewed the information submitted by the successful contractor, or made any meaningful comparison against the information submitted by the Applicant. The letter fails to properly consider the complaints of the Applicant, contained within the 9-page Appendix A, lacks clarity and discloses no evidence of any significant analysis. The letter of 4 March makes no reference to the procedural errors outlined in the letter of 20 December 2024, leading those representing the Applicant to assume that those concerns had not been considered at all ... There is no evidence that the panel were instructed to or did consider the procedural concerns raised.

"The representations under regulation 12(3)(b) were contained within a letter from JFH Law LLP, and detailed failures by the ICB to properly apply the stages of the Competitive Process as required under regulation 11. It was asserted that the failures were so substantial that the ICB had failed in their duty to implement a fair and transparent competitive tendering process. The ICB were invited to return to Step 2 of the process to ensure an appropriate and fair competitive process was followed at all times.

"The representations were made on the following grounds:

"1. The Applicant was aggrieved by the result on the grounds that the decision was irrational and lacked transparency. The scoring was applied inconsistently across different 'Lots' which suggests a lack of objectivity in the application of the assessment process. The feedback referenced rules or data protection issues that have no basis in law or regulation (such as the use of the secure messaging app, WhatsApp, for clinicians to discuss clinical matters). These failings resulted in the Applicant narrowly missing out on all tendered opportunities, despite having been a successful provider for over a decade.

"2. The ICB failed to comply with the procedural requirements of the Regulations, in particular Reg 11 and the corresponding schedules 8 and 10. Regulation 11 sets out the stages of the Competitive Process that must be followed by the ICB.

"a. The contract notice published on 20 September 2024 (Notice reference: 2024/S 000-030168), failed to properly specify the contract award criteria. Stating only: 'Price is not the only award criterion and all criteria are stated only in the procurement documents'. This is clearly insufficient to satisfy the requirements of Schedule 8. Further, there is no statement as to how offers will be assessed, or whether there are any stages involved in this assessment.

"b. The contract award notification published on 10 December 2024, failed to provide any reason for selecting the chosen provider, and merely stated that the "providers have been assessed and passed against the relevant 5 key criteria and mandatory requirements". This is not sufficient to meet the requirements of schedule 10. Further, if this is intended to represent the reason for selecting the chosen provider, the implication is that no other offeror passed against the relevant 5 key criteria, which is clearly not the case.

"c. The contract award notification failed to declare any conflict or potential conflicts of interest. The notice stated only; "Any Conflicts of interest were monitored and

managed with mitigations in place throughout the project if/ when required.” Schedule 10 requires this notice to set out information as to how any conflicts of interest were managed. This requirement is clearly not met. Failure to properly address conflicts of interests in this way is a serious and fundamental failure by the ICB in their duty to implement a fair and transparent competitive tendering process.

“The ICB have attempted to rectify these serious procedural failings with the issuing of two corrigendum notices on 7 March 2025. However, they cannot retrospectively correct the failings under schedule 8.”

9. PSR regulations relevant to Clarendon’s representations

137. Clarendon’s representations to the Panel, for the most part, relate to those parts of the PSR regulations that are also relevant to Barkhill’s representations, namely Regulations 4, 11, 12 and 24 and Schedule 10 of the PSR regulations. The relevant parts of these regulations are set out in Section 6.
138. Clarendon’s representations additionally relate to Schedule 8 of the PSR regulations. Schedule 8 sets out the content to be included in notices inviting offers, namely:
 1. The contract or framework agreement title and reference.
 2. A description of the relevant health care services to which the contract or framework agreement relates, including the most relevant CPV code.
 3. The intended or estimated dates –
 - a. between which the services must be provided and the duration of the contract including potential extensions beyond the initial term; or
 - b. of the term of the framework agreement.
 4. The approximate lifetime value of the contract or framework agreement.
 5. The contract or framework criteria.
 6. Where the notice relates to a proposed framework agreement, the relevant authorities which will be able to use the framework agreement.
 7. A statement as to how offers must be made, which must be by electronic means.
 8. A statement as to how offers will be assessed, including whether the assessment will be in stages.

10. Assessment of Clarendon’s representations

139. This section sets out the Panel’s assessment of Clarendon’s representations and its findings on whether HNY ICB complied with the PSR regulations in relation to:
 - first, the evaluation of Clarendon’s proposals (Section 10.1);
 - second, the notice inviting offers published on 20 September 2024 (Section 10.2);
 - third, the notice of intention published on 10 December 2024 and the corrigenda to this notice published on 13 January and 4 March 2025 (Section 10.3); and
 - finally, the review of Clarendon’s representations (Section 10.4).

10.1 HNY ICB’s evaluation of Clarendon’s proposals

140. Clarendon, in its representations to the Panel about HNY ICB’s evaluation of its proposals, said that it “was aggrieved by the result on the grounds that the decision was irrational and lacked transparency. The scoring was applied inconsistently across

different ‘Lots’ which suggests a lack of objectivity in the application of the assessment process. The feedback referenced rules or data protection issues that have no basis in law or regulation (such as the use of the secure messaging app, WhatsApp, for clinicians to discuss clinical matters)” (see paragraph 136).⁴³

141. Clarendon further summarised its concerns in a paper for the Panel that was submitted before its meeting with the Panel on 9 April 2025.⁴⁴
142. The Panel’s assessment of Clarendon’s concerns about the evaluation of its proposals is set out as follows:
 - Clarendon’s concerns about inconsistent evaluation and scoring across the local questions is discussed in Section 10.1.1;
 - Clarendon’s concerns about inconsistencies in the evaluation concerning its proposed use of the WhatsApp messaging system is discussed in Section 10.1.2; and
 - Clarendon’s other concerns about the evaluation of its proposals are discussed in Section 10.1.3.

10.1.1 Inconsistent scoring across lots

143. Clarendon told the Panel that “the scoring was applied inconsistently across different ‘Lots’ which suggests a lack of objectivity in the application of the assessment process” (see paragraph 140). Clarendon’s concern is that it submitted the same answer (subject to the names of the areas and lots being amended accordingly) for some of the ‘local’ questions across the lots for which it was bidding, but was awarded different scores in different lots.
144. The Panel notes that bidders were advised that ‘local’ questions “require a response for each Lot that a provider selects to compete upon and should consider the geographical and demographic aspects of the Lot when answering these questions” (see paragraph 37). The Panel notes that Clarendon chose to submit answers to local questions that were, for all intents and purposes, uniform rather than varying its answer by lot.
145. The Panel considers that, as a matter of principle, it might be expected that a uniform answer to one of the ‘local’ questions would better suit the circumstances of some areas than others, thus resulting in the answer being awarded higher scores in some lots and lower scores in other lots. The Panel also considers that it is possible for different evaluators to reach different conclusions reasonably, even when faced with effectively the same response and applying the same criteria. Given this, the fact that what is effectively the same answer has been scored differently in different lots is not, on its own, demonstrative of the bidder having been treated unfairly.
146. Clarendon in Appendix A to its representations letter to HNY ICB raises some specific points of concern about inconsistent treatment in the evaluation of the ‘local’ questions that go beyond the points of principle discussed above. These include concerns about the evaluation of its responses with respect to translation services, parking and opening hours. The Panel considers that the inconsistencies perceived by Clarendon

⁴³ HNY ICB, *Representations to the Panel pro forma*, 12 March 2025.

⁴⁴ JFH Law, *Report prepared on behalf of Clarendon for the purposes of the meeting with the Panel*, 8 April 2025.

arise from different groups of evaluators being used to evaluate answers to the local questions across the three ICBs. This in itself, however, is not a cause for concern about fairness so long as each group of evaluators applied a consistent approach to evaluating all of the bidders' answers for each lot for which they were responsible. The Panel, in reviewing the evaluation of answers to the local questions, did not see evidence that HNY ICB did not act fairly in its evaluation.

147. The Panel finds that HNY ICB, in evaluating Clarendon's answers to the 'local' questions did not breach its obligations under the PSR regulations including, in particular, the obligation under Regulation 4 to act fairly.

10.1.2 Evaluation of Clarendon's proposed use of WhatsApp

148. Clarendon's proposal described how it would use WhatsApp in two ways to help deliver its services:

- first, in response to Question CSD02, which asked bidders to describe the patient pathway, Clarendon referenced the use of WhatsApp by clinicians to discuss patient cases; and
- second, in response to Question CSD05, which asked bidders to describe the processes that they will implement to ensure that the experience of service users, including both patients and referring dentists, contributes to future service development, Clarendon said that it provided secure WhatsApp group chats with referring clinicians.

149. HNY ICB, in its evaluation of Clarendon's response to Question CSD02, gave a score of 2 (i.e. Meets Requirements) and made five points in the feedback. One of these points concerned the use of WhatsApp, saying "Evaluators would suggest that the provider checks the rules on the use of WhatsApp as a means of discussing patient cases". In its evaluation of Clarendon's response to Question CSD05, HNY ICB awarded a score of 4 (i.e. Excellent) and made six points in the feedback. One of these points concerned the use of WhatsApp, saying "Provider states engagement with GDPs [general dental practitioners] with 'lunch and learn' sessions and WhatsApp group chats".

150. Clarendon, in its representations to HNY ICB, raised concerns about the consistency of the evaluation in relation to its proposed use of WhatsApp, saying the "feedback criticises WhatsApp usage in CSD02 while applauding it in CSD05", and "The evaluation included contradictory feedback on the use of technology (WhatsApp), which was penalised in some sections while praised in others. This inconsistency further undermines the credibility of the evaluation process".⁴⁵ In response, HNY ICB said:

"You state that there was contradictory feedback about the proposed use of WhatsApp as a method of communication. The panel reviewed the responses and consider the feedback not to be contradictory. The response proposed the use of WhatsApp in two different contexts, one as a method of professional networking, and the other as a means of carrying out discussions of specific patient cases. The second proposed use, raises information governance concerns which were not

⁴⁵ Clarendon, *Detailed Analysis of Tender Scoring and Feedback*, 20 December 2024.

acknowledged or addressed in your response and was therefore flagged as a source of concern".⁴⁶

151. In its representations to the Panel, Clarendon said that HNY ICB's decision was irrational, in part because "The feedback referenced rules or data protection issues that have no basis in law or regulation (such as the use of the secure messaging app, WhatsApp, for clinicians to discuss clinical matters)" (see paragraph 136). Ahead of its meeting with the Panel, Clarendon further elaborated:

"NHS England have no guidance regarding the use of WhatsApp. The current guidance in respect of the use of mobile messaging, published in December 2022, says as follows: 'In some circumstances, it is appropriate to use mobile messaging to communicate with colleagues and patients/service users. Where there is no practical alternative and the benefits outweigh the risk, it may be appropriate to use commercial, off-the-shelf applications. You should check with your IG team what your organisational policy is, such as whether it has approved a specific app for use, and in which circumstances'.

"There is no suggestion within the submission that Clarendon are sharing confidential, identifiable patient data on a WhatsApp group. Instead, the clinicians are using the messaging service as an efficient and effective way to assess if L3 cases can be treated in primary care practice (this would involve the disclosure of a radiograph for example, not identifiable patient data). This is a function commonly used by dentists across the UK and should not have resulted in a reduction in score due to the assessor's misunderstanding of data protection laws.

"For the avoidance of doubt, there is nothing within the Data Protection Act 2018 that prohibits the use of data in this way when properly anonymised, as is the case here. If the assessors had questions regarding the use of WhatsApp, they could have been asked. Instead, Clarendon were improperly marked down."⁴⁷

152. HNY ICB's feedback to Clarendon regarding its answer to Question CSD02 is set out below.

"The provider understands the issues and requirements and addresses them appropriately with sufficient information but lacking reliable substance.

"The response mentioned the management of complications briefly but does not provide detail on how they would be managed practically or what learning is in place from complications and how the specialist/consultant will interface with this.

"The response could have provided more information as to how the provider would work with the eRMS around incomplete referrals discharge.

"Evaluators would suggest that the provider checks the rules on the use of WhatsApp as a means of discussing patient cases.

"Evaluators appreciated the robust triage service and the patient pathways."

153. The Panel notes that the feedback on WhatsApp was neutral in tone. Moreover, while Clarendon has subsequently confirmed that the WhatsApp communications referred to in its answer to Question CDS02 did not include patient identifiable data, this is not necessarily clear from their response to the question itself. The Panel considers that

⁴⁶ HNY ICB, *Representations response letter*, 4 March 2025.

⁴⁷ JFH Law, *Report prepared on behalf of Clarendon for the purposes of the meeting with the Panel*, 9 April 2025.

HNY ICB's feedback in relation to Clarendon's proposed use of WhatsApp was not irrational, particularly in the context of NHS England's guidance on mobile messaging (see paragraph 151) which refers to "benefits" and "risk" and the need to check with IG [information governance] teams about organisational policies. The Panel also notes that it was open to Clarendon to provide reassurance on information governance issues regarding the use of WhatsApp in its answer.

154. The Panel finds that HNY ICB in evaluating Clarendon's proposed use of WhatsApp did not breach its obligations under the PSR regulations including, in particular, the obligation under Regulation 4 to act fairly.

10.1.3 Clarendon's other concerns about the evaluation of its proposals

155. Clarendon raised a number of other concerns about the evaluation of its proposals in Appendix A of its representations letter to HNY ICB of 23 December 2024. These concerns relate to a variety of issues across eight of the twelve quality questions that were asked of bidders.
156. The Panel considered Clarendon's concerns as part of this review, and notes that the matters raised by Clarendon are, in many places, disagreements with evaluators' conclusions about the merits of Clarendon's answers. These disagreements do not, in themselves, raise issues of concern about HNY ICB's compliance with the PSR regulations.⁴⁸
157. The Panel in its review of these concerns has not seen any evidence to support a conclusion that HNY ICB did not act fairly or otherwise failed to meet its obligations under the PSR regulations.

10.2 HNY ICB's notice inviting offers

158. Clarendon raised concerns about the notice inviting offers published by HNY ICB on 20 September 2024. Clarendon considers that the notice failed to properly specify the contract award criteria or how the contract award criteria would be assessed (see paragraph 136). Clarendon considers that, as a result, the notice did not satisfy the requirements set out in Regulation 11 and Schedule 8 of the PSR regulations.
159. Regulation 11 sets out the steps in the competitive process, and Regulation 11(3) states that the commissioner must submit "a notice for publication on the e-notification service inviting offers to provide the relevant health care services in relation to which the contract is to be awarded" (i.e. the notice inviting offers). Regulation 11(4) says that this notice "must include the information set out in Schedule 8". The information set out in Schedule 8 includes "the contract or framework award criteria" and "a statement as to how offers will be assessed, including whether the assessment will be in stages" (see paragraph 138).

⁴⁸ The Panel further notes that Clarendon in Appendix A to its representations letter to the ICB of 23 December 2024 said, under the heading "Transparency Issues" that "There is a pressing need for transparency regarding how scores were determined and how they align with the stated evaluation criteria. Access to the full scoring scheme and responses from the highest scoring bidder is essential for ensuring fairness in this process". It is not entirely clear to the Panel whether Clarendon's intention was for this statement to be a request to HNY ICB for information or records. The Panel considers that Clarendon would have had access to much of this information through the tender outcome letter, while access to the highest scoring bidders' responses is unlikely to have been possible given commercial confidentiality considerations.

160. The PSR statutory guidance says “The contract notice, *or the documents provided in the content of the notice* (e.g. tendering documents) must include: ... contract or framework award criteria ... explanation of how offers (bids) will be assessed, including whether the assessment will be in stages” [emphasis added].⁴⁹ That is, the statutory guidance makes it clear that a Schedule 8 notice will be compliant with the requirements of the PSR regulations if information about the contract award criteria and assessment of bids is included either directly in the notice itself or in documents to which readers of the notice are signposted and are accessible.
161. HNY ICB’s notice inviting offers, published on 20 September 2024, says “Price is not the only award criterion and all criteria are stated only in the procurement documents”. It also says “The procurement documents are available for unrestricted and full direct access, free of charge” and provides a link to the website where the documents may be accessed.⁵⁰
162. The Panel’s view is that, given the PSR statutory guidance, HNY ICB’s notice inviting offers was sufficient to comply with the PSR regulations. As a result, the Panel finds that, in publishing its notice inviting offers on 20 September 2024, HNY ICB did not breach the PSR regulations, and in particular the requirements set out in Regulation 11(4) and Schedule 8.

10.3 HNY ICB’s notice of intention to make a contract award

163. Clarendon has raised concerns about the notice of intention to make a contract award (notice of intention) published by HNY ICB on 10 December 2024. In particular, Clarendon is concerned that: first, the notice of intention failed to provide any reason for the selection of the chosen providers; and second, the notice of intention failed to declare any conflicts or potential conflicts of interest.
164. HNY ICB, after receiving further correspondence from Clarendon following its further decision letter of 7 March 2025, told Clarendon that, in relation to the reasons for selecting the chosen providers “we consider that this [the 10 December 2024 notice] is sufficient to meet the requirements of the regulations however we intend to publish a corrigendum notice giving further information on the key criteria assessment of this procurement exercise”.⁵¹
165. Consistent with the Panel’s conclusions and findings set out in Sections 7.2.4 and 7.2.7, the Panel considers that the additional statement published by HNY ICB in relation to decision makers’ reasons for selecting the chosen provider was not sufficient to meet the requirements of the PSR regulations, and in particular Regulations 11(10) and Schedule 10. As a result, the Panel finds that HNY ICB breached the PSR regulations by not including a statement explaining the ICB’s reasons for selecting the chosen providers contrary to the requirements of Regulation 11(10) and Schedule 10.
166. HNY ICB also told Clarendon in further correspondence, following the further decision letter, that in relation to conflicts of interest, “You raise further issues about the level of detail given around management of conflicts of interest in the notice, and on further

⁴⁹ PSR Statutory Guidance, February 2024, p.40.

⁵⁰ HNY ICB, *Contract Notice on Find a Tender Service*, 20 September 2024.

⁵¹ HNY ICB, *Representations response, further letter*, 7 March 2025.

consideration we intend to publish a corrigendum notice giving further information on the management of conflicts of interest relating to this procurement exercise. For the avoidance of doubt, there were no conflicts of interest which in any way affected the outcome of the procurement exercise".⁵²

167. HNY ICB concluded its 7 March 2025 letter to Clarendon's legal representatives by saying "To allow time for your client to review the information provided, we confirm that we are extending the Standstill Period until 5.00pm Tuesday, 18 March 2025".⁵³
168. The Panel notes that HNY ICB by publishing this corrigendum with substantive new information⁵⁴ following Clarendon's representations, returned to an earlier step in the provider selection process. Having decided to return to an earlier step in the provider selection process, HNY ICB was obliged, under the terms of Regulation 12(4), to repeat the subsequent steps in the provider selection process. In this case, the subsequent steps should have involved re-starting the standstill period after the corrigendum was published for a period of eight working days to allow all unsuccessful bidders, not just Clarendon, the opportunity to make further representations based on the revised notice of intention.
169. As set out in Section 7.2.7, the Panel finds that HNY ICB breached the PSR regulations by returning to an earlier step in the provider selection process, through making a substantive correction to the notice of intention via the corrigendum of 7 March 2025, and not repeating the subsequent steps in the provider selection process (contrary to the requirements of Regulation 12(4)).

10.4 HNY ICB's review of Clarendon's representations

170. Clarendon has raised concerns about HNY ICB's review of its representations to the ICB. Clarendon told the Panel that HNY ICB's review of its contract award decision had assessed the information Clarendon had provided in its representations, but had only focused on setting out the reasons for not awarding the contract to Clarendon. Clarendon is concerned that this is in breach of Regulation 12(4)(c), which requires HNY ICB to "review the decision to award the contract ... taking into account the representations made".
171. The Panel notes that HNY ICB, when responding to Clarendon's representations, set out its response under the same six headings into which Clarendon had summarised its concerns in Appendix A to its representations.⁵⁵ Clarendon replied to HNY ICB saying that the ICB's response did not address Clarendon's full representations but only those set out in Appendix A, and asking the ICB to confirm that the ICB review panel had reviewed and considered Clarendon's representations, and that the ICB's letter of 4 March provided their full response.⁵⁶ HNY ICB, in turn, replied saying that it had considered all of the points in Clarendon's representations.⁵⁷

⁵² HNY ICB, *Representations response, further letter*, 7 March 2025.

⁵³ HNY ICB, *Representations response, further letter*, 7 March 2025.

⁵⁴ The Panel distinguishes here between a corrigendum that contains substantive new information and a corrigendum that only contains a minor correction of an earlier notice.

⁵⁵ HNY ICB, *Representations response letter*, 4 March 2025.

⁵⁶ Clarendon, *Letter to HNY ICB*, 5 March 2025.

⁵⁷ HNY ICB, *Letter to Clarendon*, 7 March 2025.

172. HNY ICB told the Panel during this review that it had convened an internal panel to consider “the overall process and contract award decision, specifically reviewing relevant evidence from both the representations and wider procurement to analyse and compare/contrast perceived errors in scoring or other discrepancies”. This internal panel consisted of clinical specialists and senior procurement staff from the three ICBs, with “decision-making panel members who had not been involved in the original procurement evaluation”.⁵⁸ HNY ICB also told the Panel that “the ICBs can offer assurance that these have been thoroughly considered in accordance with the PSR Regulations”.⁵⁹

173. The Panel, in assessing the issues raised by Clarendon, reviewed the representations log maintained by HNY ICB, and HNY ICB’s correspondence with Clarendon regarding its representations review process. The Panel notes that the representations log sets out the detail of Clarendon’s representations, including the detail of the concerns raised by Clarendon in Appendix A of its representations letter of 23 December 2024. The representation log also includes details of the documentation that was reviewed in relation to each concern. The Panel’s view is that the representations log, combined with the correspondence from HNY ICB in relation to Clarendon’s representations, shows that HNY ICB took into account all of the representations made by Clarendon when reviewing its provider selection decision.⁶⁰

174. As a result, the Panel finds that HNY ICB, in reviewing Clarendon’s representations regarding the provider selection process, did not breach the PSR regulations, and in particular Regulation 12(4), which requires HNY ICB to review the decision to award the contract taking into account the representations made.

11. Panel advice and recommendations

175. This section sets out the Panel’s advice to HNY ICB in relation to the representations made by Barkhill and Clarendon. For each, the Panel’s findings are summarised, the materiality of any breaches of the PSR regulations are then assessed, and then the Panel’s advice is set out.

11.1 Barkhill’s representations

11.1.1 Summary of Panel findings

176. Following consideration of Barkhill’s representations, the Panel finds that HNY ICB breached the PSR regulations in relation to: (a) the notice of intention; and (b) its response to Barkhill’s request for information during its representations to the ICB.

177. Regarding the notice of intention, the Panel finds that HNY ICB breached the PSR regulations:

- by not including the full addresses of the successful bidders (contrary to the requirements of Regulation 11(10) and Schedule 10);

⁵⁸ HNY ICB, *IMOS Presentation to the Panel*, 11 April 2025.

⁵⁹ HNY ICB, *IMOS Presentation to the Panel*, 11 April 2025.

⁶⁰ HNY ICB, *Representations Log- NHSE1023 – Clarendon*, March 2025.

- by not including a statement that adequately explained the ICB's reasons for selecting the successful bidders (contrary to the requirements of Regulation 11(10) and Schedule 10); and
- by returning to an earlier step in the provider selection process, through making a substantive correction to the notice of intention via the corrigendum of 7 March 2025, and not repeating the subsequent steps in the provider selection process (contrary to the requirements of Regulation 12(4)).

178. Regarding Barkhill's request for information during its representations to the ICB, the Panel finds that HNY ICB breached Regulation 12(4) by failing to provide Barkhill with its records on:

- its decision making process, including the way in which key criteria were taken into account;
- how the basic selection criteria were assessed and contract award criteria were evaluated;
- the reasons for the decision to award the contract for Lots 11 and 12 to Haricover; and
- evaluators' identities.

179. The Panel also finds that HNY ICB did not breach the PSR regulations both in relation to its evaluation of Barkhill's proposals and in relation to other aspects of its notice of intention where concerns were raised by Barkhill.

180. Regarding the evaluation of Barkhill's proposals the Panel finds that:

- HNY ICB did not fail to apply the evaluation criteria in the manner in which they were described in the tender documentation and as a result did not breach the PSR regulations, and in particular its obligation under Regulation 4 to act fairly and transparently; and
- HNY ICB's tender outcome letter did not breach the PSR regulations, and in particular its obligations under Regulation 11(8)(b) and Schedule 9, to provide Barkhill with "the reasons why the successful provider was successful" and "the reasons why the unsuccessful provider was unsuccessful".

181. Regarding the notice of intention, the Panel finds that:

- by publishing a corrigendum to the notice of intention with an additional CPV code, HNY ICB did not breach the PSR regulations with respect to its obligation under Regulation 11(10) and Schedule 10 to include the most relevant CPV code in its notice of intention; and
- when publishing its notice of intention on FTS using the contract award notice template, HNY ICB did not breach the PSR regulations and the notice was valid to start the standstill period under Regulation 12(2).

11.1.2 Materiality of HNY ICB's breaches of the PSR regulations with respect to Barkhill

182. The Panel has assessed the materiality of HNY ICB's breaches of the PSR regulations with respect to its notice of intention and its response to Barkhill's information requests.

183. The Panel does not consider that HNY ICB's breaches of the PSR regulations in relation to its notice of intention had a material effect on HNY ICB's provider selection process.

- Regarding the notice of intention's lack of a full address for the successful bidders, the Panel considers that the limited address information in the notice of intention was sufficient for any interested party to find the successful bidders' addresses using online search tools, including Companies House information.
- Regarding the notice of intention's lack of a statement adequately explaining the decision-makers' reasons for selecting the chosen providers with reference to the key criteria, the Panel notes that all of the unsuccessful bidders separately received information in their tender outcome letter on the reasons why they were unsuccessful and why the successful bidder was successful. As a result, the only parties who may have been disadvantaged by this shortcoming in the notice of intention were those who did not bid for the contract. The Panel does not believe that the inclusion of this information in the notice of intention would have been likely to result in representations that could have led to a different outcome to the provider selection process.
- Regarding HNY ICB's return to an earlier step in the provider selection process, through publishing the corrigendum of 7 March 2025 without repeating the subsequent steps in the provider selection process, the Panel considers that the revised conflict of interest information published by HNY ICB did not reveal any information that raised concerns about the conduct of the provider selection process.

184. The Panel, however, considers that HNY ICB's breach of the PSR regulations in relation to Barkhill's information request may have had a material effect on HNY ICB's provider selection process. This is because a representation review process carried out in accordance with the PSR regulations, including the supply of information in response to Barkhill's request, may have resulted in a different outcome for the provider selection process.

11.1.3 Panel recommendations with respect to Barkhill's representations

185. Where the Panel has found breaches of the PSR regulations, three options are open to it. The Panel may advise that:

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

186. The Panel's advice, given that its conclusion that HNY ICB's breach of the PSR regulations in relation to Barkhill's information request may have had a material effect on HNY ICB's provider selection process, is that HNY ICB return to an earlier step in the provider selection process for Lots 11 and 12, namely Step 8(a) of the Competitive Process (Regulation 11(13)), which requires that the relevant authority "carries out the requirements specified in regulation 12(4) where written representations are made in

accordance with regulation 12(3)". This is the point at which Barkhill's representations were received following the initial contract award decision.

187. In line with Regulation 12(4), HNY ICB should provide Barkhill with the information that it requested (subject to the proper application of any measures in accordance with Regulation 12(5)), allow Barkhill an opportunity to "explain or clarify the representations made" (i.e. make any further representations arising from this information), and then continue to follow the representations review process as laid out in the Regulations and Statutory Guidance, in light of any further representations by Barkhill.

11.2 Clarendon's representations

11.2.1 Summary of Panel findings

188. Following consideration of Clarendon's representations, the Panel finds that HNY ICB breached the PSR regulations in relation to the notice of intention:
 - by not including a statement that adequately explained the ICB's reasons for selecting the chosen providers contrary to the requirements of Regulations 11(10) and Schedule 10; and
 - by returning to an earlier step in the provider selection process, through making a substantive correction to the notice of intention via the corrigendum of 7 March 2025, and not repeating the subsequent steps in the provider selection process (contrary to the requirements of Regulation 12(4)).
189. The Panel also finds that HNY ICB did not breach the PSR regulations in the following respects:
 - in evaluating Clarendon's proposals, HNY ICB did not breach the PSR regulations and, in particular, the obligation under Regulation 4 to act fairly;
 - in publishing its notice inviting offers on 20 September 2024, HNY ICB did not breach the PSR regulations, and in particular its obligations under Regulation 11(4) and Schedule 8; and
 - in reviewing Clarendon's representations regarding the provider selection process, HNY ICB did not breach the PSR regulations, and in particular its obligation under Regulation 12(4) to review the decision to award the contract taking into account the representations made.

11.2.2 Materiality of HNY ICB's breaches of the PSR regulations with respect to Clarendon

190. The Panel does not consider that HNY ICB's breach of the PSR regulations, by not including in the notice of intention a statement explaining the ICB's reasons for selecting the chosen providers had a material effect on HNY ICB's provider selection process. This is because all of the unsuccessful bidders received information on the reasons why the successful provider was successful and the unsuccessful provider was unsuccessful in their tender outcome letter.
191. As a result, the only parties who may have been disadvantaged by this shortcoming in the notice of intention were those who did not bid for the contract. The Panel does not believe that the inclusion of this information in the notice of intention would have been

likely to result in representations that could have led to a different outcome to the provider selection process.

192. Regarding HNY ICB's return to an earlier step in the provider selection process, through publishing the corrigendum of 7 March 2025 without repeating the subsequent steps in the provider selection process, the Panel considers that the revised conflict of interest information published by HNY ICB did not reveal any information that raised concerns that could have had a material effect on the provider selection process.

11.2.3 Panel recommendations with respect to Clarendon's representations

193. Where the Panel has found breaches of the PSR regulations, three options are open to it. The Panel may advise that:
 - the breaches had no material effect on HNY ICB's provider selection process and it should proceed with awarding the contract as originally intended;
 - HNY ICB should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
 - HNY ICB should abandon the current provider selection process.
194. Having concluded that the breach of the PSR regulations had no material effect on HNY ICB's provider selection process, the Panel's advice is that HNY ICB should proceed with awarding the contracts as originally intended with respect to Lots 1, 3-10, and 13-16.