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The London Borough of Tower Hamlets

Procurement report summarising the process for selecting an award process under the Health Care Services (Provider Selection Regime) Regulations 2023

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1 Introduction

1.1 Following a Teams meeting on 6th June 2024 attended by Andy Grant of the London Borough of Tower Hamlets (the **Council**), and Rebecca Rees and Stuart Brown of Trowers & Hamlins LLP, the Council has instructed us to set out a summary of the Direct Award Processes under the Health Care Services (Provider Selection Regime) Regulations 2023 (the **PSR**).

1.2 In particular, the Council has instructed us to advise whether the use of the various Direct Award Processes are mandatory or optional.

1.3 This report summarises the three Direct Award Processes under the PSR (Direct Award Processes A, B and C), and identifies to what extent the Council is required to make a direct award where those processes apply, and where the Council is able to have recourse to a competitive process.

1.4 Following a further discussion on 14th June 2024, the Council has instructed us to also set out a summary of the Most Suitable Provider Process and the Competitive Process under the PSR.

1.5 If helpful, we are able to provide further advise on the application of the PSR more generally.

2 Executive summary: when is the Council required to follow Direct Award Processes, the Most Suitable Provider Process, and the Competitive Process?

2.1 Where the conditions detailed in paragraph 2.5 and 2.6 below are met, the Council is required to use Direct Award Process A (incumbent provider, no realistic alternative) or Direct Award Process B (patient choice). This should be the first consideration for the Council in choosing a provider selection process.

2.2 In contrast, there is no obligation for the Council to use Direct Award Process C (incumbent provider, satisfying existing contract) or the Most Suitable Provider Process. However, where the relevant conditions for their use are met (as set out paragraph 2.7 and 2.8 respectfully), the Council has a choice as to whether or not it makes a direct award under Direct Award Process C the Most Suitable Provider Process, or whether it follows the Competitive Process (such choice being at the Council's sole discretion).

2.3 There is an obligation for the Council to use the Competitive Process if the conditions set out in paragraph 2.9 are met. In summary, if neither the Direct Award Processes (A, B or C) or the Most Suitable Provider Process can be used, then the Competitive Process must be used.

2.4 We have set out further detail on the conditions which relate to each of the Direct Award Processes in section 3 of this Report. We have also set out further details on the Most Suitable Provider Process in section 4, and the Competitive Process in section 5.

2.5 Direct Award Process A **MUST** be used where **ALL** of the following apply:

2.5.1 There is an existing provider of the services to which the proposed contract relates;

- 2.5.2 The Council is satisfied that the services to which the proposed contract relates can be delivered only by that provider due to the nature of the services to be provided (and that there is no realistic alternative provider); and
- 2.5.3 The award is not concluding a framework agreement.
- 2.6 Direct Award Process B **MUST** be used where **ALL** of the following apply:
- 2.6.1 The proposed contract relates to services where a patient is offered a choice of provider; and
- 2.6.2 The number of providers is not restricted by the Council (either because it has chosen not to, or there is a legal right to patient choice); and
- 2.6.3 The Council will offer contracts to all providers who meet the requirements (the requirements are outlined in the National Health Service Commissioning Board and Clinical Commissioning Group (Responsibilities and Standing rules) Regulations 2012); and
- 2.6.4 The Council has arrangements in place for providers to express an interest in providing the required services; and
- 2.6.5 The award is not concluding a framework agreement.
- 2.7 Where the conditions for Direct Award Process A or Direct Award Process B are not met, the Council **MUST** use one of Direct Award Process C, the Most Suitable Provider Process, or the Competitive Process. Subject to the conditions below, the choice as to which of those processes is followed is largely at the Council's discretion.
- 2.8 Direct Award Process C **MAY** be used where **ALL** the following apply:
- 2.8.1 The Council is not required to follow Direct Award Process A or Direct Award Process B (above); and
- 2.8.2 The existing contract term is expiring, and the Council is proposing a new contract to replace it; and
- 2.8.3 The new contractual provisions are not changing considerably from the existing contract (see above); and
- 2.8.4 The Council is of the opinion that the incumbent provider is satisfying the existing contract to a sufficient standard (see above).
- 2.9 The Most Suitable Provider Process **MAY** be used where **ALL** the following apply:
- 2.9.1 The Council is not required to follow Direct Award Process A or B; and
- 2.9.2 The Council is unable, or does not wish to follow Direct Award Process C; and
- 2.9.3 The Council is of the view that it is likely to be able to identify the most suitable provider without running a Competitive Process (see Section 5 for further details).
- 2.10 The Competitive Process **MUST** be used where **ALL** the following apply:

- 2.10.1 The Council is not required to follow Direct Award process A or B; and
- 2.10.2 The Council cannot or does not want to follow Direct Award Process C; and
- 2.10.3 The Council cannot or does not want to follow the Most Suitable Provider Process.

3 Direct Award Processes

We have set out below more detail on the various conditions that relate to each of the Direct Award Processes below.

3.1 Direct Award Process A

3.1.1 The process for a direct award under Direct Award Process A is set out in regulations 6(3) and 7 of the PSR. In summary, this process is used where the type of service required means that there is no realistic alternative to the incumbent provider. This direct award process does not apply to (and should not be used to award contracts for) new services.

3.1.2 Even if there are alternative providers, unless these alternative providers are realistic alternatives to the current provider, this direct award process must be used. The Statutory Guidance which underpins the PSR sets out an indicative list of services which might fall within scope of Direct Award Process A, including (but not limited to):

- (a) Type 1 and 2 urgent and emergency services;
- (b) 999 ambulance services;
- (c) Urgent NHS mental health crisis services;
- (d) A service that is interdependent with, and cannot realistically be provided separately from, another service which can realistically only be provided by the supplier.

3.1.3 In light of the above, where there is an incumbent supplier it will be necessary (on a case by case basis) to determine whether or not the services are of a type that realistically can only be provided by the current provider in order to determine whether the Direct Award Process A applies.

3.1.4 Where there is a realistic alternative supplier, then Direct Award Process A cannot be used.

3.1.5 Where there is no realistic alternative supplier, Direct Award Process A must be used.

3.2 Direct Award Process B

3.2.1 The process for a direct award under Direct Award Process B is set out in regulations 6(4) and 8 of the PSR. In summary, this direct award process is used where patients have a choice of providers, and the number of providers is not

restricted by the Council or by law (i.e. where a patient has unrestricted choice over a provider).

3.2.2 The Statutory Guidance also sets out an indicative list of services which can fall within scope of Direct Award Process B, including (but not limited to):

- (a) Elective services led by a consultant or mental health care professional where patients have the legal right to choose.
- (b) Other elective services where patients do not have a legal right to choose, but where the Council voluntarily offer patients a choice of providers and where the number of providers is not restricted by the Council through provider selection.

3.2.3 The important element, as outlined above, is that the number of providers either cannot be restricted due to legal choice requirements, or has not been restricted by the Council.

3.2.4 Notwithstanding the above, there are certain qualification criteria that providers must meet before they can be offered a contract (these criteria fall outside the remit of the PSR and are set out in the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012).

3.2.5 In addition to ensuring providers meet those qualification criteria, the Council must ensure that:

- (a) Arrangements are in place to ensure providers can express an interest in providing the services required.
- (b) All providers who meet the requirements in relation to the provision of the health care service in question are offered contracts.
- (c) It has considered the exclusion provisions in regulation 20 of the PSR (i.e. if the Council would be obliged to exclude that provider under the Public Contract Regulations 2015 then it must not award them a contract under a Direct Award Process).
- (d) The procurement is not to conclude a framework or to award a contract based on a framework.

3.2.6 As indicated above, if the Council intends to establish a limited pool of providers from which patients can choose (even where there is no legal right to patient choice) then Direct Award Process B cannot be used, as the number of providers will have been restricted.

3.2.7 Where the conditions detailed above are met, and there is an unrestricted freedom of choice by patients, Direct Award Process B must be followed.

3.3 **Direct Award Process C**

3.3.1 The process for a direct award under Direct Award Process C is set out in regulations 6(5) and 9 of the PSR. In summary, this direct award process may be

used where the existing provider is satisfying the existing contract and would be likely to satisfy the proposed contract. It should be noted that the proposed contractual arrangements must not change considerably from the existing contract if this direct award process is used. The following criteria must be met in order for the Council to be able to make a direct award under Direct Award Process C:

- (a) There must not be a requirement to follow either direct award process A or B above.
- (b) The existing contract term must be expiring, and the Council must be proposing a new contract to replace it.
- (c) The proposed contractual provisions must not change considerably from the existing contract. The PSR set out that the following threshold for considerable changes:
- (d) Where the changes render the proposed contractual arrangement materially different in character to the existing contract; or
- (e) Where all of the following apply:
 - i Changes to the proposed services are attributable to a decision of the Council;
 - ii The lifetime value of the proposed contract is at least £500,000 higher than the lifetime value of the existing contract (when that contract was entered into); and
 - iii The lifetime value of the proposed contract is at least 25% higher than the lifetime value of the existing contract (when that contract was entered into).
- (f) The Council must consider that the incumbent provider is satisfying the existing contract to a sufficient standard.
- (g) The Council must also believe the provider will continue to satisfy the requirements of the proposed contract to a sufficient standard.
- (h) The procurement must not be to conclude a framework or to award a contract based on a framework.

3.3.2 The Statutory Guidance provides greater detail as to what the Council may take into account when considering whether a contract is being delivered (or is likely to be delivered) to a sufficient standard (including by reference to details outlined in the contract, key criteria, and basic selection criteria).

3.3.3 Where the conditions set out above are met, the Council has a discretion as to whether it follows Direct Award Process C. Where it opts not to make a direct award, it is required to follow either the Most Suitable Provider Process or the Competitive Process.

4 The Most Suitable Provider Process

- 4.1 The process for making a direct award using the Most Suitable Provider Process is set out in regulations 6(6) and 10 of the PSR. In summary, this process can be used by the Council where it can make an assessment on which provider is most suitable to deliver the proposed contract based upon consideration of the key criteria and the basic selection criteria, and that the Council can then award this contract without following the Competitive Procedure.
- 4.2 The Most Suitable Provider Process can be used by the Council where it is of the view (considering the likely providers and all information available to it at the time of the decision) that it can identify the most suitable provider to deliver the services to the relevant population. We would suggest that the Council only follows this process where it is confident that it can clearly identify all of the providers capable of providing the services required (acting reasonably) who are capable of passing any pass/fail key criteria or sub-criteria.
- 4.3 Below are some examples of when the Council may wish to use this process (as indicated by the statutory guidance):
- 4.3.1 A new service is being arranged.
 - 4.3.2 The Council is changing an existing contractual arrangement in a significant manner (such that Direct Award Process C cannot be used).
 - 4.3.3 The existing provider of the services no longer wishes to continue providing the services to the Council.
 - 4.3.4 The Council wishes to consider potential providers, as it is in the best interest of the people who use the services, but there is no benefit to running a competitive process or it would be disproportionate to do so.
- 4.4 When using this process, the Council must consider and adhere to the following steps:
- 4.4.1 The Council should take account of any termination or exit provisions in existing contractual arrangements if using this process where there is an existing contract with a provider in place, or the existing provider is no longer able to provide the services.
 - 4.4.2 The Council should engage in some form of pre-market engagement to identify all of the suitable providers, and develop and refine the service specification.
 - 4.4.3 The Council must also consider the relative importance and weighting given to each of the key criteria for the service in question.
 - 4.4.4 The Council must be of the view that in considering the providers and the information it has at the time of making the decision is sufficient to allow it to identify the most suitable provider.
 - 4.4.5 The Council must identify providers who will be the most suitable, considering their ability to deliver services to the relevant population and by reference to the key criteria and basic selection criteria.
 - 4.4.6 The Council must then assess the providers against the key criteria and basic selection criteria in a fair way, on an equal basis, in order to identify a provider to award the contract to.

- 4.4.7 The Council will need to be mindful of the specific transparency obligations that are required when pursuing the Most Suitable Provider Process (including, for example, the requirement to publish certain notices and the requirement to observe a standstill period).
- 4.5 The Council will have to demonstrate that it has understood the alternative providers not chosen, and that it has selected a provider via reasonable decision making (although this does not need to be via a formal competitive exercise). Robust records must be kept by the Council and the transparency requirements (outlined further in section 6) must be followed.
- 4.6 If, at any stage, it appears to the Council that it has insufficient information to make an assessment of the most suitable provider, or after following this process the Council is unable to identify the most suitable provider, then it is recommended that the Council instead uses the Competitive Process (outlined at section 5 below). If the Council has already issued a notice setting out intention to use the Most Suitable Provider Process and subsequently decides to change the process used to select the provider, then it must abandon the process and start again.

5 **The Competitive Process**

- 5.1 The process for following a Competitive Process in awarding a contract is set out in regulations 6(7) and 11 of the PSR. In summary, this process must be followed where the Council is not required to follow Direct Award Process A or B and the Council either cannot, or does not wish to, use Direct Award Process C or the Most Suitable Provider Process.
- 5.2 The Council must adhere to, and consider, the following steps when using this process:
- 5.2.1 The Council will need to develop a service specification setting out the requirements for the service, which may require some form of pre-market engagement to be carried out.
- 5.2.2 The Council must determine the contract award criteria for the service in question, considering key criteria and applying the basic criteria also.
- 5.2.3 The Council must formally advertise the opportunity and ensure all providers are given a reasonable timeframe in which to respond.
- 5.2.4 The advertisement of the opportunity must contain information regarding how the bids will be assessed including whether different award criteria will be assessed in different stages of the process (if the Council decides to use stages).
- 5.2.5 The Council must then assess all bids received against the award criteria and the exclusion criteria (contained in regulation 20 PSR) in a fair way, and on an equal basis. If the assessment is to be done in stages, this must be outlined in the formal advertisement.
- 5.2.6 The Council must identify the successful provider, or group of providers, and must inform them in writing of their intention to award them the contract.
- 5.2.7 Unsuccessful providers must also be informed by the Council, in writing, that their Bid has been unsuccessful.

5.2.8 As with the Most Suitable Provider Process, the Council will need to be mindful of the specific transparency obligations that are required for the Competitive Process (including, for example, the requirement to publish certain notices and the requirement to observe a standstill period).

5.3 The Council can engage in dialogue or negotiation with providers or with shortlisted providers (if such stages are used) provided that it does so in a fair and proportionate way, whilst treating all bidders equally.

5.4 This process can also be used to conclude framework agreements.

6 Transparency and publication requirements

6.1 It is also worth noting that the PSR sets out various transparency obligations and publication requirements in Part 5 of the PSR in respect of contracts awarded pursuant to the Direct Award Processes, as well as contracts awarded under the PSR more generally. We have set out below for completeness a summary of the key annual reporting obligations that the Council must follow, but the Council should familiarise itself with its transparency / record keeping obligations.

6.2 Regulation 25, Annual Summary

The Council is required to publish online, on a publicly available website accessible free of charge, an annual summary of its contracting activity for the provision of relevant health care services. That summary must include:

- (a) The number of contracts awarded in the relevant year where any of the Direct Award Processes A, B or C have been used.
- (b) The number of contracts awarded in the relevant year where the Most Suitable Provider Process was followed.
- (c) The number of contracts awarded in the relevant year where the Competitive Process was followed.
- (d) The number of frameworks concluded in the relevant year.
- (e) The number of contracts awarded based on frameworks in the relevant year.
- (f) The number of urgent contract awards or contract modifications made in the relevant year pursuant to regulation 14.
- (g) The number of new suppliers to whom a contract was awarded in the relevant year.
- (h) The number of providers who held a contract in the previous year but no longer hold any contracts in the relevant year.
- (i) The number of written representations received pursuant to regulation 12(3) during standstill periods which ended in the relevant year, and a summary of the nature and impact of those representations.

6.3 **Regulation 26, Monitoring Requirements**

The Council must also monitor its compliance with the PSR and publish online, on a publicly available website accessible free of charge, an annual report of the results of that monitoring, including information as to how any non-compliance will be addressed.

7 **Additional information**

This report is written for the sole purpose of advising the London Borough of Tower Hamlets on the requirements for direct award under the Health Care Services (Provider Selection Regime) Regulations 2023. No liability is accepted for any other person or for any other purpose. Please contact Rebecca Rees (rrees@towers.com) or Stuart Brown (spbrown@towers.com) for further information.

Towers & Hamlin LLP

17 June 2024

DISCUSSION DRAFT

Appendix 1 – PSR Processes Flowchart

