

September 2018

Guidance for members following announcement of PDS contract award

As the second stage for the procurement of the PDS contracts in the South is now well underway with the lot awards now being announced and preferred providers identified. It is expected that the process will be rolled out across the rest of the country soon. This information is intended as guidance for members who may wish to challenge or seek clarification following failure to be awarded preferred provider status.

Following preferred provider announcement bidders will be sent a comprehensive feedback document highlighting their scores and (if appropriate) those of the winning bid with narrative. Members in receipt of this feedback are encouraged to read this very carefully and identify if there any areas of concern, within the minimum standstill period (10 days from notification of award). These should then be raised in writing with the procurement team for clarification and response as soon as possible and in any event within this period. Bidders are also reminded that in any correspondence a request should be made to extend the ten-day standstill time to allow sufficient opportunity for any responses to be considered.

If any response to any such an appeal is not considered satisfactory, recourse to the courts is the next option through which reparation can be sought. Following the issue of any proceeding (within the ten day stand still period), there will be a de facto injunction which restrains NHSE from concluding contracts. NHSE may apply to have this mandatory suspension lifted before the High Court. Without proceedings being issued within 10 days, NHSE will in all likelihood be free to enter into the contract.

Whilst it is possible to challenge the process following the contract award, any challenge raised after the contract has been awarded will be limited to a claim for damages (for loss of profit) – there is a period of 30 days from when you first received information giving rise to your complaint (i.e. usually, the date you received NHSE's award letter with supporting reasons – obviously, such a letter without reasons would not start this separate 30-day clock running, although in practice many bidders will be basing possible complaints on information they only became aware of – and could not have learned earlier - once the notification letter had been issues). Legally, please also bear in mind that the clock will only be stopped once a claimant has actually issued proceedings before the Court.

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For members who may want to avoid the cost risk (or other factors involved in) litigation, an alternative remedy may be sought by making a complaint with NHS Improvement (formerly Monitor). NHS Improvement has the power to investigate matters brought to its attention under the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013, provided these are not also the subject of parallel court action. A matter can be brought to its attention by way of a letter with supporting documentation, preceded and/or followed by a telephone call to seek a suitable case officer. NHS Improvement has limited resources and allocates cases according to its priorities. There is therefore no guarantee of a case being taken up, so if a complainant wishes to maximise their leverage with NHSE they will likely be advised to consider court action. However, if an NHS Improvement complaint is preferred in view of the risk and expense of court action then the following page provides contact details for and guidance on registering a complaint:

<https://improvement.nhs.uk/contact-us/asking-advice-raising-complaints-and-concerns/>

Members who wish to raise concerns or make formal enquiries of the process and outcome should seek independent legal advice on their position.

Members are also advised that there should not be variations made to the standard PDS agreement as included in the bid documentation. Any such variations should not be accepted and if necessary signed in dispute.

Directorate of Clinical Practice
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