

Reference: FOI.ICB-2324/411

Subject: Report on the procurement process leading to the Consultant Connect High Court Case

I can confirm that the ICB does hold the information requested; please see responses below:

QUESTION	RESPONSE
<p>I wish to request the report following the enquiry into the procurement process which led to the High Court case involving Consultant Connect and the actions which have and will be taken to ensure proper procurement processes in the future.</p>	<p>A wider procurement considerations paper was written for and presented to the BNSSG ICB Board in December 2023 and this paper included the lessons learnt from all recent BNSSG CCG/ICB procurements including the Consultant Connect case. This paper can be found on the ICB website: 6.1-Lessons-Learnt-from-ICB-procurement-activities-ICB-Board-December-2023.pdf</p> <p>In December 2022 a lessons learnt paper specific to the Consultant Connect case was written for and presented to the BNSSG ICB Audit and Risk Committee. This paper was marked as commercially, financially and legally sensitive and although the majority of the paper has been disclosed as part of this FOI request, redactions have been made in line with the FOI Act, specifically under Section 41 (Information provided in confidence), Section 42 (Legal Professional Privilege) and Section 36 (Information which would prejudice the effective conduct of public affairs).</p>

Please note the financial costs associated with BNSSG ICB remain in the response however these reflect a moment in time and may not accurately represent the final costs incurred.

Section 41 (Information provided in confidence) and Section 42 (Legal Professional Privilege)

Some of the information within the report was provided to BNSSG ICB in confidence and/or constitutes legal advice received. The information redacted includes formal advice and information received from DACB and financial information provided from the other ICBs.

The ICB has redacted the financial information related to the other ICBs. This information was provided to BNSSG ICB in confidence and BNSSG ICB does not have the authority to disclose the financial information of other public authorities. This information was provided in the report to indicate the costs attributable to BNSSG ICB. Section 41 is an absolute exemption and therefore the ICB does not have to consider the public interest test. However, the ICB has also considered the impact of these disclosures on the effective conduct of public affairs and the Section 36 considerations are below.

The information received from DACB is subject to legal professional privilege and therefore the ICB has applied Section 42 to this information. Section 42 is a qualified exemption and the public interest test considerations have been set out below.

There is a general argument in favour of promoting transparency of public authorities however there is a strong public interest in maintaining privilege between a public authority and its legal advisors as it is important that free and frank exchange can take place without intrusion. It is generally considered in the public's interest to promote a respect for the law and encourage public authorities to take legal advice. The ICB considers the advice from DACB confidential. The ICB has considered whether the summation of the advice included in the report constitutes loss of privilege. The ICB has considered that ICB Audit and Risk Committee papers are not published publicly and only available to Committee members. In this case, the report contained very specific references to the advice and neither the context nor the full reasoning for the advice was provided and therefore the summary included within the paper did not lead to loss of privilege.

Section 36 - Information which would prejudice the effective conduct of public affairs

The ICB has redacted information which if made public would inhibit the ICB's ability to have discussions and make decisions alongside other ICB partners. The information redacted includes references to discussions between the three ICBs regarding financial decisions and the procurement process. The ICB believes that disclosure of these discussions would inhibit the ability for ICB staff and staff from other ICBs to express themselves openly and honestly as part of legal case

discussions. It is important that during legal proceedings, parties are able to provide a full range of opinions and viewpoints to consider. The ICB believes that the disclosure of those conversations may inhibit free and frank discussion in the future which would have a detrimental effect on the relationship between the ICBs. It is important that staff feel able to discuss legal matters between them honestly and without concern that those discussions will be disclosed. These considerations have also been applied to the costs relating to the other ICBs and BNSSG ICB believes that disclosure of these costs would be unfair to the other ICBs as the costs reflect a moment in time and may not accurately represent the final costs incurred.

The ICB recognises that there is a public interest in how public funding is spent particularly when that funding is used to pay legal costs. NHS annual reporting includes the costs relating to legal and losses to support transparency across public services. The ICB has disclosed the key points of the court case within the report which outline the reasons behind the payments made. The costs as at 30th November 2022 attributable to BNSSG ICB have not been redacted as part of the response to this FOI.

BNSSG ICB works closely with ICB colleagues nationally but particularly locally to improve services for the local populations. It is vitally important that the positive relationships between ICBs remain so that staff between organisations feel confident to provide advice



**Bristol, North Somerset
and South Gloucestershire**

Integrated Care Board

	<p>and opinions openly to support robust and quality decision making. In this case, the ICBs discussed matters relating to the court case and the ICB believes that should these discussions be shared then these organisations may be less inclined to discuss similar matters with the ICB in the future.</p>
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The information provided in this response is accurate as of 5 March 2024 and has been approved for release by Sarah Truelove, Deputy Chief Executive and Chief Finance Officer for NHS Bristol, North Somerset and South Gloucestershire ICB.

Meeting of Audit Committee

Date: 9 December 2022

Time: 15.10

Location: MS Teams

Agenda Number :	7.2		
Title:	Update on Consultant Connect		
Confidential Papers	Commercially Sensitive	Yes	
	Legally Sensitive	Yes	
	Contains Patient Identifiable data	No	
	Financially Sensitive	Yes	
	Time Sensitive – not for public release at this time		
	Other (Please state)		
Purpose: For Information			
Key Points for Discussion:			
<p>During 2020 BNSSG agreed to collaborate with BSW and Gloucester CCGs to contest the provision of digital advice and guidance services.</p> <p>The contract was awarded jointly for three years with BNSSG being specific that the award for our system was for a one-year contract with the option to extend via a 1 + 1 arrangement. Gloucester holds the contract and BSW led the procurement.</p> <p>After the award, Consultant Connect challenged the award stating concerns regarding the lawfulness of the use of the Clinical Communications Procurement Framework High level reasons stated for challenging the award were:-</p> <ul style="list-style-type: none"> • Breach of duties of transparency and equal treatment • Unlawful use of the Clinical Communications Procurement Framework and • Failure to comply with BSW CCG’s constitution and related policies <p>Following BSW receiving the challenge from the claimant, BSW engaged with DACB to secure legal advice. DACB has been advising the three CCGs/ICBs throughout the process.</p> <p>The outcome following the court case was that the defendants lost the case on the basis that: -</p> <ul style="list-style-type: none"> • The CCGs did not apply the pricing provisions in the framework and the terms and conditions in respect of price • The CCGs departed materially from the terms and conditions of the framework, adding an entirely new technical specification, and new commercial conditions including “KPIs” 			



- The CCGs followed neither the call-off procedure in regulation 33, nor the mini-competition procedure in that regulation.
- The operation of the framework was not conducted transparently and did not respect the principle of equal treatment because the specification was deliberately drafted in a manner intended to ensure that Cinapsis alone could satisfy it.
- No proper evaluation was carried out; the scoring exercise in which evaluators purported to score Cinapsis's tender was not objective; Cinapsis's performance was not measured against anyone else's.
- Consultant Connect was excluded from bidding following an undisclosed evaluation process at the product demonstration day. The demonstration day was "a material part of the process".
- There were no published award criteria, and the scoring system was undisclosed.

As the defendants lost the case each CCG was ordered by the judge to:

- Fine the defendants' civil penalties
- Pay the claimants legal fees and damages
- Foreshortened the Cinapsis Contract to 31/1/23 (contract ran until 31/3/24)

Financial risk and exposure for BNSSG currently equates to £405,698.79 – as of 30 November 2022

Final element of the case, the settlement agreement has been finalised and the settlement agrees that the claimant and defendants accepts the release and forever discharges each other from the released claims.

The case is now closed

The paper outlines the learnings from this case, for example:

- Comprehensive risk assessment of routes that can be taken to market
- Content of emails sent – consideration – all emails are FOI'able
- Procurement and Commercial awareness training, which includes evaluation, moderation, note taking. Competent and comprehensive procurement advice
- To have clear governance process for decision making
- Management of conflict of interest
- Follow our procurement policy and adhere to the four key pieces of legislation

Recommendations:	To note
Previously Considered By and feedback :	Paper hasn't been considered by any other committee, however FED has been made aware of the legal action
Management of Declared Interest:	N/A

Risk and Assurance:	N/A																			
Financial / Resource Implications:	<table border="1"> <thead> <tr> <th>As at 30 November 2022</th> <th>BSW</th> <th>Gloucestershire</th> <th>BNSSG</th> <th>Total</th> </tr> </thead> <tbody> <tr> <td>Spilt</td> <td>████████</td> <td>████████</td> <td>████████</td> <td>100%</td> </tr> <tr> <td>Total</td> <td>████████</td> <td>████████</td> <td>£405,698.79</td> <td>████████</td> </tr> </tbody> </table>					As at 30 November 2022	BSW	Gloucestershire	BNSSG	Total	Spilt	████████	████████	████████	100%	Total	████████	████████	£405,698.79	████████
As at 30 November 2022	BSW	Gloucestershire	BNSSG	Total																
Spilt	████████	████████	████████	100%																
Total	████████	████████	£405,698.79	████████																
Legal, Policy and Regulatory Requirements:	<p>Four key pieces of legislation which govern procurement in NHS organisations</p> <ul style="list-style-type: none"> • National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (which relate to the procurement of healthcare services) • Public Contracts Regulations 2015 (which covers the procurement of all goods and services above certain financial thresholds) • Health and Social Care Act 2012 (in relation to patient and public involvement) • Equality Act 2010. Throughout the production of this policy, due regard has been given to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who share a relevant protected characteristic and those who do not share it. 																			
How does this reduce Health Inequalities:	N/A																			
How does this impact on Equality & diversity	N/A																			
Patient and Public Involvement:	N/A																			
Communications and Engagement:	N/A																			
Author(s):	Helena Fuller, Deputy Director of Commissioning, Contracts and Procurement																			
Sponsoring Director / Clinical Lead / Lay Member:	Sarah Truelove, Chief Finance Officer and Deputy Chief Executive																			

Agenda item: 7.2

Report title: Update on Consultant Connect

1. Purpose

The purpose of this paper is to briefly outline the position / outcome of the judgement that was handed down by Mr Justice Kerr in relation to the claimant Consultant Connect and three ICBs (formally CCGs) – BSW, Gloucester and BNSSG.

2. Background

Introduction

During 2020 BNSSG agreed to collaborate with BSW and Gloucester CCGs to contest the provision of digital advice and guidance services.

The contract was awarded jointly for three years with BNSSG specifically detailing that our contribution will be a pilot and therefore BNSSG's element under this award was for a one-year contract with the option to extend via a 1 + 1 arrangement.

BNSSG piloted the service within Dermatology during 2021 and confirmed on 10 December 2021 that we will not be enacting the extension available to us. The contract with Cinapsis and BNSSG ended on 31 March 2022. (To note Gloucester is the contract holder, so formal communication was to them requesting that they formally confirm our position – this was actioned on 13 December 2021. BNSSG no longer receives services from Cinapsis (1 April 2022))

Although Gloucester holds the contract it was BSW that led the procurement using the procurement services from Salisbury NHS Trust. To secure these services it was decided to use the Clinical Communications Procurement Framework (“Clinical Communications Framework”) which was established by NHSX in 2020. BNSSG CCG decision to award was based upon the Contract Recommendation Report and final approval of the decision to enter into the contract was confirmed via email on 25 March 2021 by the Director of Transformation.

Consultant Connect challenged the award on 12 April 2021 stating concerns regarding the lawfulness of the use of the Clinical Communications Procurement Framework (the “**Clinical Communications Framework**”) to award that contract to Cinapsis. Consultant Connect was concerned that a decision had been taken not to conduct an open and transparent competition for a replacement Advice and Guidance Contract but rather to award the Expanded Advice and Guidance Contract directly to Cinapsis using a framework which was not established for the provision of advice and guidance platform services. High level reasons stated for challenging the award were:-

- Breach of duties of transparency and equal treatment
- Unlawful use of the Clinical Communications Procurement Framework and
- Failure to comply with BSW CCG's constitution and related policies

Process of defence and legal engagement

Following BSW receiving the challenge from the claimant, BSW engaged with DACB to secure legal advice. DACB has been advising the three CCGs/ICBs throughout the process.

Numerous actions were taken between April 21 and July 22 for example,

- Reviewing the current situation and the strength of our position
- Responding / rebutting the claim
- Without Prejudice negotiations between claimant, defendants and Cinapsis to reach an agreed position / settlement
- FOI requests received and responses issued
- Responded to communications and FOIs
- Discussion / awareness raised with NHSX in regard to the use of the framework and the current challenge. Result the framework was frozen
- Received Particulars of Claim linked to the established confidentiality ring
- Securing Queens Counsel
- Agreed cost split between defendants
- Witness statements drafted and issued – nine factual witness statements taken
- Submitted to HMT (Treasury) – Losses and Claims for to enable approval to secure a settlement agreement – no response received
- Numerous requests for disclosure including minutes, papers, emails from named individuals across all three defendants.
- CCG to ICB transfer scheme included the ongoing litigation and confirmed that BNSSG ICB consented to being added as a defendant in substitution for BNSSG CCG
- Court hearing set, court heard, and results of judgement issued

Please note correspondence in this matter was between

- CCGs/ICBs and legal representation (DACB)
- Cinapsis and legal representation (Osbourne Clarke)
- Consultant Connect and legal representation (Eversheds)
- NHSX
- NHSE
- Treasury

Key elements and outputs from the Judgement

- The defendants, asked Consultant Connect and two other companies to make a presentation in November 2020. NHS Bath scored the claimant's presentation against that of the two other companies. Consultant Connect was unaware that its offering was being marked, or what the criteria and scoring system were. Consultant Connect scored second highest; the highest score went to the interested party (**Cinapsis**). NHS Gloucestershire consulted three other framework suppliers and decided that only Cinapsis was suitable. The defendants decided to hold a "mini-competition" under the framework, but with Cinapsis as the only competitor. The invitation to tender was sent to Cinapsis only. The claimant, as a non-framework supplier, was not invited to compete. The defendants then negotiated directly with Cinapsis, agreed terms and awarded the contract to Cinapsis.
- Consultant Connect then brought the present challenge, arguing that the process was non-transparent, skewed in favour of Cinapsis and in unlawful breach of various provisions in the Public Contracts Regulations 2015 (**the PCR 2015** or **the PCR** or **the Regulations**). Consultant Connect asserts that this was an unlawful direct contract award without competition.
- The main broad questions are whether the CCGs:
 - owed the claimant any duties under the PCR;
 - whether the claimant has "standing" to bring the challenge;
 - whether the defendants' use of the framework was unlawful;
 - whether the defendants breached the duties of transparency and equal treatment;
 - whether they provided adequate reasons for their decision;
 - whether there were conflicts of interest and bias in favour of Cinapsis and
 - what remedies, if any, the court should grant; and in particular whether the claimant can establish a right to damages.
- Framework contract value was set at a total value of £3million. The framework ceased to be used after the Cinapsis contract at issue in this case was concluded. The prior information notice for the successor version, which has not yet been tendered, has a more realistic estimated value of £125 million.
- COI management:- for example it was clear that individuals within one ICB favoured the incumbent and therefore Consultant Connect withdrew from presenting as they feared this individual could take the opportunity to leak Consultant Connect's confidential information. Information was shared leading to a complete breach of confidence.
- Lack of transparency with potential bidders at the presentation workshop. It was clear that presentations were being marked, but this was never announced / shared with the bidders. There were about 28 "MUST Requirements", not disclosed to the presenting suppliers.
- Poorly managed procurement process and poor rigorous scoring process – the evaluators didn't recall much about how the scoring was done or recalled the detail of the scoring exercise
- The negotiations with Cinapsis departed from the framework terms – its should have been based on an enterprise license for a set number of specialities, but instead prices were quoted on the basis of bands of numbers of users

- Mini competition was to be run under the framework – details were only sent to one provider
- Lack of technical expertise on the evaluation panel and not one evaluator was tasked to evaluate the whole bid. Scores had nothing to be compared with and there was no moderation panel
- [REDACTED]
- The breaches alleged can be broadly characterised as manipulating the process to ensure the appointment of Cinapsis. They include, first, the conduct of the scoring exercise on 20 November 2020; second, inviting only one framework member to bid; third, departing from the pricing mechanism in the framework; and fourth, using the framework beyond its limits and in excess of its maximum value.
- The “grounds of effectiveness” are threefold. Ineffectiveness was granted on the basis that the value exceeded the threshold of the framework and that competition was not based on the same terms as applied for the award of the framework agreement
 - the contract has been awarded without prior publication of a contract notice where “Part 2 required the prior publication of a contract notice”
 - the estimated value is equal to or greater than the relevant threshold of the framework
 - competition must be based on the same terms as applied for the award of the framework and where necessary, more precisely formulated terms and where appropriate other terms referred to in the procurement documents for the framework agreement – this was not followed

The defendants lost the case.

Summary

In summary, the CCGs did not apply the pricing provisions in the framework and the terms and conditions in respect of price. Instead, they engaged in direct financial negotiations with the sole bidder. The pricing bore no resemblance to the mechanism set out in the framework tender documents.

The CCGs departed materially from the terms and conditions of the framework, adding an entirely new technical specification, and new commercial conditions including “KPIs” (key performance indicators). The shape of the A&G services to be provided was nothing like that envisaged in the framework tender documents.

The CCGs followed neither the call-off procedure in regulation 33, nor the mini-competition procedure in that regulation. In regard to the statement about running a mini competition the judgement states that where you run a mini competition (links to regulation 33(8)(c) you cannot have a lawful mini-competition with only one “competitor”. At least two framework members must be invited to compete and sent a formal invitation to tender

The operation of the framework was not conducted transparently and did not respect the principle of equal treatment because the specification was deliberately drafted in a manner intended to ensure that Cinapsis alone could satisfy it. No proper evaluation was carried out; the scoring exercise in which evaluators purported to score Cinapsis's tender was not objective; Cinapsis's performance was not measured against anyone else's.

Consultant Connect was excluded from bidding following a secret, undisclosed evaluation process at the product demonstration day. The demonstration day was "a material part of the process". It was conducted without any attempt to observe the most basic requirements of equal treatment and transparency. There were no published award criteria, and the scoring system was undisclosed.

3. Financial implication

As the defendants lost the case each CCG was ordered by the judge to:

- Fine the defendants' civil penalties – BSW £8k, Gloucestershire £10K, **Bristol £4K**;
- Pay the claimants legal fees and damages
- Foreshortened the Cinapsis Contract to 31/1/23 (contract ran until 31/3/24)

Financial risk and exposure for BNSSG currently equates to £405,698.79 – as of 30 November 2022.

- Exposure is made up of:-
 - Our own legal DABC fees
 - Defence disbursements – counsel fees etc
 - The civil penalties
 - The claimants' legal fees and costs as ordered / agreed before the settlement agreement
 - Damages amounting to lost opportunity to earn profit – the settlement

Subject to 3 exceptions, BSW, Gloucester and BNSSG ICB agreed to share the costs of the case based on the proportion of contribution to the total value of the contract awarded. Each ICB bear responsibility for DACB's charges and for any liability which they might have to pay damages and/or costs to the Claimant in the following shares:

- BSW [REDACTED];
- Gloucester [REDACTED] and
- BNSSG [REDACTED]

The 3 exceptions are as follows:-

1. Each ICB's liability for civil financial penalties is outside the scope of the agreement referred to above – and the amount which each ICB was required to pay as a civil financial penalty was established within Kerr J's Order dated 29.7.22.
2. The invoices (three) dated before 30.4.21 were raised before the above shares agreement was made. Therefore, the three invoices before the 30.4.21 were shared in thirds.
3. [REDACTED]

As at 30 November 2022	BSW	Gloucestershire	BNSSG	Total
Spilt	[REDACTED]	[REDACTED]	[REDACTED]	100%
DACB Defence legal costs - including disbursements and counsel fees invoiced as at 30.11.22, excluding VAT	[REDACTED]	[REDACTED]	£185,697.91	[REDACTED]
Civil financial penalties - fixed ordered by Kerr J's Order dated 29.7.22 (consequent upon Kerr J's judgment dated 29.7.22)	£8,000.00	£10,000.00	£4,000.00	£22,000.00
Amount paid in respect of the Claimant's legal costs as ordered or agreed before the costs inclusive Settlement Agreement dated 29.11.22	[REDACTED]	[REDACTED]	£115,185.38	[REDACTED]
Damages amounting to lost profit earning opportunity	[REDACTED]	[REDACTED]	£100,815.50	[REDACTED]
Total	[REDACTED]	[REDACTED]	£405,698.79	[REDACTED]

The damages amounting to lost profit earning opportunity has now been finalised as of 29 November 2022. Within the settlement agreement it states that the defendants shall pay to the claimant the total sum of [REDACTED], such sum will be paid without any set-off or other deduction and will be in addition to the monies already paid in respect of costs that are referred to below.

- All monies already paid by the defendants to the claimant under any costs orders in the proceedings or on account of costs pursuant to the order of Kerr J dated 29 July 2022 in the proceedings may be retained by the claimant.
- All monies paid by the claimant to the defendants under any costs orders in the proceedings may be retained by the defendants.

The settlement agrees that the claimant and defendants accepts the release and forever discharges each other from the released claims. Upon payment of the settlement sum all parties shall seek a consent order that states:

- All further proceeding in this claim will be stayed
- The trail herein listed for 13 and 16 March 2023 be vacated
- There be no order for costs

The case is now closed

4. Learnings and points to consider for Future procurements

There are several learnings from this situation namely:

- Content of emails sent – consideration – all emails are FOI'able
- Procurement and Commercial awareness training, which includes evaluation, moderation, note taking
- Comprehensive risk assessment of routes that can be taken to market
- Reviewing and ensure any framework used is fit for purpose including how you secure the service via that framework that be it a direct award or a mini-competition and seek advice to ensure that the appropriate route is selected in each circumstance, in compliance with all relevant legal and regulatory requirements. The potential options are:
 - Contract Variation Process
 - Single Tender Action award to a Single Capable Provider
 - Any Qualified Provider
 - Framework Agreement
 - Competitive Tender
- To have clear governance process for decision making
- Competent and comprehensive procurement advice
- Management of conflict of interest as there was a perception that the CCGs were compromised in their impartiality and independence in the context of the procurement procedure. Consider conflict of interest management and ethical walls
- No matter how small the services we secure, we must treat all active market engagement / contestability the same i.e. fair, equitable and transparent
- We follow our procurement policy in that each of the ethical framework principles are considered equally and given fair consideration
 - **Principle 1** – Rational: Decision-making is rational and based upon a process of reasoning
 - **Principle 2** – Inclusive: Decisions should be arrived at through a fair and non-discriminatory process

- **Principle 3** – Take account of the value we will get: Decisions will take account of the outcomes we will achieve (for example population health, quality of health, survival rate, extent of recovery, people’s experience, safety) for the resources that we use (for example the amount we pay for a service, salaries, investment in equipment and buildings). This is what we call “value”.
- **Principle 4** – Transparent and open to scrutiny: Decisions and the way they are made should be transparent and easily understood. The information provided to decision makers should be fully documented together with the process followed and the degree of consensus reached.
- **Principle 5** - Promote health for both individuals and the community: Decisions about things that promote health and avoid people becoming ill will be considered alongside things that will cure illness and other interventions. There may be times when it is appropriate to target specific demographic groups or health issues in order to reduce inequalities in health outcomes
- In addition, when procuring NHS healthcare services, in all cases the ICB must
 - act in a transparent and proportionate way; and
 - treat providers equally and in a non-discriminatory way (showing no favouritism, particularly on the basis of ownership)
 - conduct all procurement activity openly and in a manner which enables behaviour to be scrutinised.
 - procure services from providers that:
 - are most capable of delivering the needs, quality and efficiency required; and
 - provide the best value for money in doing so
 - follow the four key pieces of legislation which govern procurement in NHS organisations
 - National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (which relate to the procurement of healthcare services)
 - Public Contracts Regulations 2015 (which covers the procurement of all goods and services above certain financial thresholds)
 - Health and Social Care Act 2012 (in relation to patient and public involvement)
 - Equality Act 2010. Throughout the production of this policy, due regard has been given to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who share a relevant protected characteristic and those who do not share it.