



LA procurement practices for High Needs placements

Report

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Executive Summary

This report was commissioned by Natspec to enable the organisation and its members better to understand developments in High Needs procurement systems¹ – specifically, Frameworks and Dynamic Purchasing Systems – with a view to ensuring that these systems remain compliant with the SEND Code of Practice. It thus makes specific recommendations which we hope Natspec will endorse in its dealings with local authorities in future. The report will also, it is hoped, be of interest to Natspec members, particularly those currently participating in the procurement systems concerned and those contracting with LAs that are considering, or in the process of, introducing such systems.

Current practice

A majority of LAs continue to use spot purchasing to commission High Needs placements at specialist post-16 institutions [SPIs]. However a number of LAs and LA-based consortia are progressively moving towards more formal contracting arrangements. Two factors are in our view driving this. The requirements of the PCR 2015 are certainly a consideration, but LAs are also concerned to maximise their use of resources while at the same time ensuring they remain compliant with their Standing Orders relating to procurement.

Recent developments

The main alternatives to spot purchasing currently being used to procure High Needs placements at SPIs are procurement Framework agreements and Dynamic Purchasing Systems [DPSs]².

The fieldwork raised, and this Report covers, a number of issues specifically in relation to the use of Frameworks and DPSs:

1. The information available to SPIs when they bid for individual placements
2. The volume of work for SPIs that is potentially generated by invitations to bid for placement

¹ [#BC] “Procurement” is not a particularly well defined term. The Cambridge Dictionary (dictionary.cambridge.org) simply defines it as “the process of getting supplies”. To be absolutely clear, what we are covering in this report, and what we describe as “procurement”, is the process of local authorities and young people (severally and jointly, as required by the SEND Code of Practice) obtaining placements at SPIs. In doing this they need to choose from among the range of SPIs (and other providers, including general FE colleges) available; identify which providers can meet the young person’s needs; arrange for a programme to be provided; and negotiate a fee. The concluding of contractual arrangements with the chosen provider we would term “commissioning”; this is not in scope of our report.

² At the time we conducted the research for this report (August to December 2016) there were, we believe, just one Framework (NE12+) and one DPS (the south London consortium) being used to procure High Needs placements for post-16 students. There are however a larger number of frameworks/DPSs in place for the procurement of pre-16 placements from independent specialist schools.

3. How a young person's expression of a preference for a particular SPI is handled by the process
4. Various points of detail in the framework/DPS process (e.g. the use made of: pre-agreed fees/prices; quality measures; and lotting)
5. The extent to which the young person, their parent/carer and the SPI are actively engaged in the process.

Points 1. to 4. are 'concerns'; point 5. represents a potential area of conflict between the requirements of PCR 2015 and the SEND Code of Practice.

A way forward?

We are not recommending any move away from spot purchasing where both LA and provider find this approach satisfactory. But where LAs are contemplating a move towards more formal procurement arrangements (such as frameworks and DPSs) it is important to ensure that the requirements of the Code of Practice are not compromised. This report therefore proposes an approach to the use of frameworks and DPSs in procurement by LAs/consortia of High Needs placements in SPIs that addresses the five issues identified above.

In essence, the proposed approach is as follows:

Stage 1 – pre-qualification: key elements

All SPIs are offered the opportunity to join a list of prequalified providers.

As part of the pre-qualification assessment process, a 'floor standard' is set for quality. Each SPI determines the format in which it provides its evidence. All those that "pass" are admitted to the framework/listed on the DPS.

As part of pre-qualification, SPIs are not required to state overall prices for student programmes, however defined.

Placements are un-lotted or, if some sub-categorisation is deemed necessary, SPIs are asked "What placement opportunities would you like to be offered?" (not "What do you do?").

Once approved, the list of prequalified SPIs stands for a defined period before a new pre-qualification exercise is undertaken.

SPIs not on the initial list of pre-qualified providers have the opportunity to join the list at any point during the life of the list.

Stage 2 – individual placement process: key elements

Any advertising of individual placement opportunities ('Requirements') includes a brief outline statement about the student, focussing on their assessed needs and the provision likely to be required to address these, on an anonymised basis.

Placement opportunities are offered to all pre-qualified SPIs (subject to any constraints imposed by SPIs themselves about the kinds of opportunities they do not wish to receive or by any sub-categorisations/lots).

A preferred but not already pre-qualified SPI – in accordance with the Code – is given the opportunity to pre-qualify well in advance of the associated opportunity being listed.

SPIs prepare an initial response to the requirement (including an indicative fee subject to assessment) on the basis of the limited information available to them. On the basis of the initial response a shortlist of potential SPIs will be drawn up by the commissioning authority.

When subsequently the young person takes up their placement at the provider there should be the facility to review provision and if necessary revise the fee as necessary.

Shortlisted SPIs will be asked to prepare a more detailed response and a binding fee. As part of this process SPIs will be able to see and assess the young person if they wish to do so.

Conclusion

We believe that what we are proposing forms the basis of a practical approach to commissioning High Needs placements at SPIs.

Furthermore, although our project has been very much SPI-focused, we believe that a consistent approach should be applied to the purchasing of all post-16 High Needs placements across all types of provider. We believe that what we are proposing also forms the basis of a practical approach that would enable this.

However, our expertise is as education consultants, with a particular focus on post-16 and High Needs provision. We are neither procurement specialists or contract lawyers; authorities will need to review the detail of any arrangements they decide to implement with specialist advisers before finalising their preferred model.

1 The context of our report

Introduction

101 In late summer 2016 acI was commissioned to undertake research into the procurement of High Needs placements in specialist post-16 institutions [SPIs]³. The project follows on from a number of reports we have written for Natspec on aspects of colleges' funding and fee planning and work we have undertaken for various SPIs on these issues. We greatly appreciate our on-going link with you and the sector.

102 On this occasion we were asked to:

- Identify, review and document current Local Authority [LA] practice
- Clarify reasons why LAs are introducing procurement frameworks or dynamic purchasing systems
- Respond to concerns over any potential conflicts between the 2015 Public Contracts Regulations and the SEND Code of Practice⁴
- Provide advice to LAs on how to discharge their procurement responsibilities in accordance with the SEND Code of Practice.

103 This report is based on analysis of LAs' and Government's documentation on the procurement and commissioning of High Needs places and on fieldwork with a number of LAs – including representatives of LA consortia – and SPIs. We have also participated in two Natspec conferences and held detailed discussions with Natspec Board members and staff. We are most grateful to all those who have participated in our work programme for their time and expertise – including those colleagues who kindly sent in written submissions and other information.

The structure of this Report

104 Following this Introduction,

- Section 2 describes past and present arrangements for commissioning High Needs places at SPIs
- Section 3 looks at recent developments – in particular Frameworks and dynamic purchasing systems [DPSs] – and flags up issues and potential concerns with these
- Section 4 addresses the relationship between our work and general FE colleges

³ “Specialist Post-16 Institution” is the current term for independent providers (including independent specialist colleges) that are approved to offer places to post-16 students.

⁴ *Special educational needs and disability code of practice: 0 to 25 years. Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities.* Department for Education/Department of Health. January 2015.

- In Section 5 we develop a new approach to procurement which we believe will address the issues and concerns identified in Section 3
- Section 6 draws some general conclusions.

The purpose of this report

- 105 This report is intended to support Natspec and its members in partnership working with local authorities by helping them to comment upon, help plan and/or subsequently participate in LA arrangements to commission High Needs places at SPIs.
- 106 The commissioning of High Needs places is a complex subject and a short report such as this cannot be comprehensive. Our expertise as education consultants is in the management, particularly the financial management, of SPIs and it is in this context that we have compiled this report. There are therefore two specific tasks which this report does not attempt.
- 107 First, we are not procurement specialists (that is a management discipline in its own right) and this report does not set out to give any assurance to LAs that particular procurement arrangements – even arrangements we may appear to recommend in a general context – are necessarily compatible with LA Standing Orders or any statutory duties imposed on LAs.⁵ It goes without saying that LAs must determine for themselves whether the detail of any arrangements they decide to implement is consistent with local and national statutory and other requirements.
- 108 Secondly, we are not contract lawyers. Whenever an institution enters into a framework agreement or a DPS⁶ with an LA or a consortium of LAs, it is taking first steps towards establishing a contract with the LA(s) concerned.⁷ If the institution is at all concerned, qualified legal advice should be sought before any contracts or other apparently binding documents are signed. Anything we say in this report about particular arrangements being generally satisfactory or good practice should not be taken as removing institutions' responsibility to seek this appropriate legal advice and we do not set out to say that any specific set of arrangements is, or is not, uniformly acceptable.
- 109 Specifically, we are not qualified to, and will not, make any judgement on any forms of contract or contractual documents.

⁵ Including, but not limited to, the requirements of the *Public Contract Regulations 2015* and the *SEND Code of Practice January 2015*

⁶ These terms are more fully defined later in this report.

⁷ It is not clear to us whether a contract is established when an institution signs up to a framework/DPS agreement, or only when a student is submitted to the institution under the framework/DPS. There is no general agreement on this, and it may depend on whether the initial framework/DPS contract is expressed as a deed. Nor, when LA and institution enter into an "agreement", is it necessarily clear whether this has contractually binding force. As we say, institutions should seek legal advice if in the slightest doubt.

- 110 More generally, neither we or (we would suggest) Natspec are in any position to recommend particular frameworks/DPSs as “acceptable”, or to recommend that institutions sign up to any of them without further consideration.
- 111 Notwithstanding these disclaimers, we nevertheless hope this report is of interest and assistance both to LAs in planning future developments in their High Needs commissioning processes and (as we say) to Natspec and SPIs in responding to them.
- 112 As will become clear, this is a fast moving field with many developments in the pipeline and this report cannot be definitive. We would welcome – as would Natspec – any further up-to-date information on LA High Needs commissioning practice and the extent to which experience of it confirms, or contradicts, the conclusions arrived at in this Report.

2 Commissioning practice – past and present

Traditional commissioning of High Needs places at SPIs

- 201 There are over a hundred and fifty LAs in England with responsibilities for High Needs commissioning, and each authority (or group of authorities) will commission High Needs places in a different way. To set the context for our work, therefore, we need to generalise.
- 202 For the purpose of our discussion, the “traditional” way that High Needs post-16 placements⁸ are procured in SPIs is generally referred to as “spot purchasing”. It is important to note that, at the time of writing, most LAs currently secure High Needs placements in this way.
- 203 The procurement process is broadly as follows
- A young person’s aspirations for post-16 learning (beyond school) are identified – mediated by parents/carers as necessary and as appropriate to the young person’s difficulties or disabilities
 - The young person’s LA identifies a potentially suitable placement for them, taking into account any preference that the young person may have expressed. (The way in which the preference must be taken into account is identified in the SEND Code of Practice)⁹
 - The LA sends the provider relevant information¹⁰, and asks the provider to indicate a fee (“price”) to deliver a suitable package of learning, life and independent living skills
 - The young person has the opportunity to visit the SPI and to have their needs assessed by the SPI
 - If the SPI believes they are able to accept the young person and can meet his or her needs then it confirms this – and the associated fee it would wish to charge (annually/for the first year) – to the LA and a place is offered

⁸ We immediately hit a difficulty. Many Natspec member colleges traditionally admit young people at age 19, once they have completed Years 12, 13 and sometimes 14 in their school setting (often a special school). Occasionally older students are also admitted. Technically, however, this is the “post-16 sector” and we shall so refer to it.

⁹ Broadly, the LA has a conditional duty to accept the young person’s choice of placement, providing it is suitable for the young person’s age, aptitude and special needs, and the placement is compatible with the efficient education of others and efficient use of resources. The requirements are fully described in the Code of Practice. The duty only applies if the provider is included in the list of approved independent schools and special post-16 institutions published by the Secretary of State for Education under Section 41 of the Children and Families Act 2014 (“the Section 41 List”). We will have more to say about the Section 41 list later.

¹⁰ E.g. the EHC plan, though many interviewees told us that these were generally of little value in determining a young person’s specific needs and had to be supplemented with a face-to-face assessment process.

- The commissioning LA negotiates the fee – part funded¹¹ by the Education Funding Agency [EFA] (“Elements 1 and 2”, amounting to around £11,000) with the LA responsible for the balance of the fee (“Element 3” – subject to any contributions from health authorities for Health-related inputs) – and/or agrees the fee with the SPI
- The placement is confirmed by the LA¹².

204 Subsequently the placement is formally commissioned by the signing of a contract.

205 As we say, this is a highly generalised (and simplified) description of current arrangements:

- In practice the LA may only get involved at a later stage – once there has been some dialogue, visits etc. between the young person, their parents/carers and the SPI
- The ways in which Elements 1 and 2 are calculated and allocated to SPIs (and GFEs) is a little more complex than this¹³
- The detail of arranging placements, deciding on outcomes, and holding providers to account in delivering these outcomes is vitally important (and again described in the SEND Code of Practice).

206 But the outline description set out above is sufficient for our purposes here.

207 The key point to make is that, in procurement language, the “commissioning” LA is making a “spot purchase”.

208 Sometimes, if there is doubt in the LA commissioner’s mind about the best placement for the young person, requests may be made to two or more SPIs and their proposals (and prices) compared. However, what the LA commissioner, under this traditional approach, does *not* usually do is “advertise” the proposed placement to the general community of SPIs (or indeed SPIs and GFEs, conceivably) and invite “bids” or “expressions of interest” from them. Effectively, the LA commissioner is choosing the preferred supplier(s) and inviting bids only from it/them.

209 This procedure complies entirely with the SEND Code of Practice. Indeed, to the extent that the Code discusses the way in which placements should be

¹¹ In most cases. A few Natspec member colleges are not EFA funded and in these instances the LA has to pay the entire fee.

¹² The SEND Code of Practice lays down specific timescales within which various elements of this procedure must be completed. These are not strictly relevant to the discussion in this Report – except in the general sense that LAs and consortia that choose to develop procurement frameworks and DPSs must ensure that their procedures are nimble and streamlined enough to allow these timescales to be met.

¹³ And due to change from 2018/19, where the distinction between Elements 1 and 2 is set to be abandoned. In the meantime, current arrangements are fully described in the 2017-18 High Needs Funding Arrangements document at <https://www.gov.uk/government/publications/high-needs-funding-arrangements-2017-to-2018> (see particularly Section 6)

commissioned (which it does not do in any detail)¹⁴ it could be said to be good practice. However, moving towards more openly competitive procurement systems may provide additional benefits.

- 210 The first benefit of more openly competitive systems is that a wider range of SPIs is given the opportunity to “bid” for placements. Under spot purchasing, SPIs will in general not even know that a particular “placement event” is happening. SPIs that might well be able to meet the needs of a particular young person – indeed, may be able to meet the needs better (at least in their view) than the institution(s) the LA commissioner has in mind – are not given an opportunity to make their case.
- 211 This is particularly relevant where an SPI is seeking to develop its range of services. For example, an SPI with a tradition of providing support for young people with a moderate level of learning difficulty may decide to extend its services to include young people with a range of autistic spectrum disorder. Unless it finds a way to convince its target LA/LAs that it is competent to do this, it may not get any young people with ASD referred its way.
- 212 This argument applies with even more force to new SPIs, or organisations seeking to develop SPI provision for the first time.
- 213 The second benefit of a more open procurement system is that it avoids placing the full responsibility on LA commissioners to decide which provider benefits from a particular placement contract. These are potentially very high value contracts¹⁵ and under spot purchasing may be being allocated, it could appear, on an individual LA officer’s say-so.¹⁶ At the least, this may put the LA officer concerned in a vulnerable position.
- 214 A “spot purchase” approach, without any opportunity for open competition from a wide range of potential providers, is also counter to LAs’ existing practice in procuring other supplies and services of equivalent (or even lesser) value. Although LAs do usually have *de minimis* limits below which spot purchase contracts for general supplies and services can be awarded without competition, these financial limits are usually significantly exceeded by even a single High Needs placement.¹⁷

¹⁴ Paragraphs 9.78 onwards.

¹⁵ A placement for a child referred to a specialist school at age 3 might conceivably have an annual value of more than £100,000, and in effect run for 16 years to age 19 for a cumulative value of £1.6m (neglecting inflation and the potential for changing needs). SPI contracts are of course of much shorter duration.

¹⁶ Student preference notwithstanding, of course. In practice a significant proportion of young people do not necessarily express a preference, or are guided by their LA in their choice – as one would expect.

¹⁷ There is an arcane debate over the way in which High Needs contracts should be amalgamated to establish their “value”. It is generally forbidden to try to subvert *de minimis* limits by splitting a contract artificially into smaller mini-contracts (e.g. 20 minibuses at £40,000 each is one contract not twenty) and it is far from clear whether an LA that has commissioned ten places at a particular institution in the same year should aggregate the ten (different) fees together to establish the contract value, even if the ten sets of negotiations were entirely separate (which they almost certainly will be) and carried

- 215 We have had it stated to us by an officer from one LA that this “traditional” approach is in clear contravention of that LA’s Standing Orders. Assuming this is true (we have no reason to doubt it), then at the point which the breach of Standing Orders is discovered the LA needs to take urgent steps to revise the procedures concerned.
- 216 Whether or not Standing Orders are being breached, it is clear that LAs are under increased financial pressure and that ensuring that full value for money is secured from all budgets is increasingly important to them. Spot purchasing of High Needs places is being scrutinised as part of this general drive for greater efficiency.
- 217 A third factor at play here may be the promulgation by Government of the Public Contracts Regulations 2015¹⁸ [PCR 2015], which in turn implemented (as Government is required by EU law to do) the *EU Procurement Directive 2014*¹⁹ [EUPD 2014]. It was believed by some commentators that concerns about PCR 2015, and in particular, the abolition of the distinction between “Part A and Part B”²⁰ services, have triggered LAs’ initiatives to re-examine their procurement of High Needs placements and have thus led to the development of new procurement arrangements now being seen in various LAs/consortia. Equally we have read technical commentary²¹ that appears to suggest that EUPD 2014 actually *relaxes* some of the requirements of the Directive it repeals²² and its alternative to “Part A and Part B” services is actually more *flexible*.
- 218 We also note that the Department is keen to encourage collaborative solutions – for example:
- “We will promote collaborative working between local authorities in regional or sub-regional groups so that they can achieve more effective and efficient commissioning of provision, working in partnership to share administrative functions as well as services and provision.”²³

out by different people (which is possible). It is also far from clear whether the fee for just one year’s placement, or the full fees involved in a young person’s multi-year career in the provider, should be taken into account, even if only one year has been formally contracted for. It has even been suggested that an authority’s *total spend* in any one year on all High Needs placements, 0 to 25, with all specialist institutions, is the “contract value” that should be compared with any *de minimis* limits set in Standing Orders – though one would have thought this could be argued against.

¹⁸ <http://www.legislation.gov.uk/ukxi/2015/102/contents/made>

¹⁹ The official title is “*Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance*”. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>.

²⁰ We hope that we can be forgiven for not going into the detail of this.

²¹ See, for example, <https://blog.tendersdirect.co.uk/2015/03/30/part-b-services-verses-light-touch-regime/>.

²² Directive 2004/18/EC. See <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0018>

²³ See paragraph 3.39c, *High needs funding formula and other reforms. Government consultation – stage one*. Department for Education. March 2016.

- 219 Whilst we cannot comment on what has caused LAs (whether individually or in consortia) to move away from the spot purchase arrangements that have (apparently) served them so well since the 1981 Special Education Act, what is clear is that “moving they are”; we believe that the movement away from spot purchasing will continue. (We are, to be clear, making an observation here; we have *not* been asked to form an opinion that such a move is either desirable or necessary.)
- 220 We also believe that there is sufficient in the internal concerns raised already in this section (i.e. *re* council Standing Orders and the efficient use of budgets) to explain why LAs are reviewing what they currently do anyway; it may not be absolutely necessary to add PCR 2015 to the list. Should a future UK Government repeal or withdraw PCR 2015 following the UK’s withdrawal from the EU our view is that concerns over non-competitive spot purchasing will remain: it seems highly unlikely to us that the current trends in developing alternative approaches to procurement will reverse.

Conclusion

- 221 Currently a majority of LAs continue to use spot purchasing to commission High Needs places at SPIs. These arrangements are fully in line with the SEND Code of Practice.
- 222 However, there is a range of factors that, we believe, make it improbable that this situation can continue. PCR 2015 is certainly a consideration. However, we believe that other factors (council Standing Orders and the drive for more efficient use of budgets in particular) are equally – possibly more – important in explaining why an increasing number of LAs are introducing alternative approaches to procurement.

3 Commissioning practice – recent developments

Introduction

- 301 As discussed in Section 2, for whatever reason/combination of reasons, a growing number of LAs and LA consortia are now seeking to devise alternatives to traditional non-competitive “spot purchase” arrangements for High Needs placements at SPIs. [Annex 1, which is not a complete picture, lists those LA/consortia arrangements known to us.]²⁴
- 302 We have not the space here to evaluate each system identified to us in detail: this would be a considerable undertaking.²⁵ What we can do is:
- Outline the alternatives to the non-competitive “spot purchase” (this section)
 - Compare the various identified possibilities with what seem to us to be the requirements of the SEND Code of Practice and propose an alternative to spot purchasing that reconciles the need to procure High Needs places in a different way with the requirements of the Code (Section 5).

Alternatives to spot purchasing – Framework agreements and Dynamic Purchasing Systems

- 303 The LAs which we are aware of that are moving away from spot purchase, as described in Section 2, are generally introducing or planning either a purchasing *Framework* agreement or a DPS. Both of these procurement approaches have long and respectable histories in public sector procurement.
- 304 Frameworks and DPSs usually cover a number of LAs, not least because they require a certain amount of up-front investment in new technologies to set them up and there are additional costs incurred in running them – it is more efficient if these are shared between a number of LAs.
- 305 Both approaches identify potentially suitable providers in advance of specific opportunities being procured. Prequalifying eligible providers in this way makes the actual letting of individual contracts (in our present context, placing individual students at SPIs) quicker since as many as possible of the necessary checks on a provider’s capabilities are carried out once and in advance: this leaves only the

²⁴ It is important to note that these alternatives to traditional non-competitive “spot purchase” arrangements do not currently apply to the procurement of High Needs placements at other post-16 providers, in particular general further education colleges. Various justifications for their non-inclusion have been advanced. Our view is that a ‘one placement; two systems’ approach is unfair to students and to SPIs: we explore this issue further in sections 4 and 5.

²⁵ DfE commissioned a review of the regional dynamic purchasing system developed by the LA consortium South East Together – see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560766/Developing_a_regional_dynamic_purchasing_system.pdf. This report gives an idea of the potential complexity involved in developing alternatives to spot purchasing.

details specific to each individual purchase (placement) to be carried out in each case.

- 306 In practice both approaches are essentially ways of managing some elements of the procurement process (or “tools for procurement”). There is no sense in which the job is handed over to a consortium to do in its entirety; there remains much for the individual LA to do. At its simplest, in a High Needs context a framework or a DPS is a way of: advertising a placement opportunity to a range of providers; communicating with interested suppliers about the opportunity; and providing a means through which suppliers can make a bid. In some cases a standardised form of documentation and/or a standardised approach for LAs to use when evaluating any bids received also exist alongside the DPS or framework but, strictly speaking, they are not part of it. In any event the task of reviewing and assessing any expressions of interest received from SPIs remains with the commissioning LA and not the consortium in all cases.

Frameworks – a general description

- 307 A framework is an agreement that sets out terms and conditions under which an organisation (in our context an LA) will make specific purchases (call-offs) of specified services (education and care programmes) from certain suppliers (those SPIs “on the framework”) during the life of the agreement. There is no absolute obligation or requirement for the LA to buy these services from those SPIs on the framework – though, having gone to the trouble of setting it up, it is hard to see why they would not.
- 308 The process of setting up a framework is broadly as follows:
- The intention to establish a framework is advertised
 - Interested organisations submit the necessary documentation. There are generally two dimensions to this: a pass/fail element covering financial standing, criminal record, safeguarding etc.; and a scored element covering the skills, technical competence, quality etc. required to deliver the service(s) being tendered. There may be two stages: expression of interest/pre-qualification; and full bid
 - Bids received are evaluated using a standard scoring system to determine the “most economically advantageous” tenders [the perhaps rather unfortunate acronym is MEAT] and a place on the framework is awarded to successful bidders on the basis specified in the tender documentation
 - Bidders are notified of the outcome of the process and framework agreements are signed. The framework will generally be in place for a stated period of time with the opportunity to extend at the end – and possibly to re-open it to new bidders at particular points during its life.
- 309 Once the framework is in place, when a service need covered by the framework arises (in our context a need to place a High Needs learner at an SPI) – all potential service suppliers on the framework are alerted. It is up to each supplier to determine whether or not they respond to the alert (put in a bid to provide the placement).

- 310 Any bids received are evaluated by the commissioning LA and the contract (placement) awarded to the supplier offering best value for money – the MEAT. There will be procedures to cover a “no-bids received” situation etc. – these need not detain us here.
- 311 We believe that NE12+ is currently the only example of a framework agreement being used to commission High Needs placements at SPIs in England.²⁶ The development process for this framework started in May 2014; the framework went live on February 1st 2016 (i.e. the first placements awarded under the framework were for September 2016 starts). Another framework – the White Rose consortium – has been tendered; at the time of writing bids were being evaluated.

DPSs – a general description²⁷

- 312 A DPS is an alternative system to framework contracts through which contracting authorities can source goods and services.
- 313 Until February 2015 the public procurement rules on setting up and operating a DPS “created an unwieldy and un-dynamic tool for procurement”²⁸; DPSs were therefore not often used. PCR 2015 made DPSs a more dynamic tool for procurement – we note in passing that that this may explain why they now appear to be more popular for those contemplating a move away from spot purchasing of High Needs placements than was previously the case.
- 314 The process of setting up a DPS not dissimilar to that for a framework and is broadly as follows:
- The intention to establish a framework is advertised
 - Interested organisations submit the necessary documentation (make a “Request to Participate” [RTP])
 - RTPs are evaluated by the contracting authority
 - Those organisations whose RTP passes the evaluation are admitted to the DPS.

²⁶ ‘NE12+’ refers to the (12) local authorities in the region – Sunderland, Newcastle, Durham, Northumberland, Gateshead, North Tyneside, South Tyneside, Hartlepool, Redcar & Cleveland, Middlesbrough, Stockton, Darlington. The ‘+’ refers to the region’s Clinical Commissioning Groups [CCGs].

²⁷ For a series of articles on DPSs and the technicalities of how they are established and operate, see <https://www.bevanbrittan.com/insights/articles/2016/procurement-by-dynamic-purchasing-systems-dps-1-planning-for-a-dps/> . We have drawn on these articles in the following paragraphs.

²⁸ Not (just) our view: see http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=27168%3Adynamic-purchasing-systems-planning&catid=53&Itemid=21

- 315 It is at this point that the major difference between a DPS and a framework will become most apparent: namely that organisations are entitled to submit (or resubmit) an RTP at any time during the life of the DPS. This means that the procurement documents must continue to be available electronically at all times and that any new applications to join the DPS must be assessed in the same way as the RTPs of those first admitted to the DPS.²⁹
- 316 Once the DPS is in place, when a service need covered by the framework arises (in our context a need to place a High Needs learner at an SPI³⁰) an invitation to tender is published (emailed) to all service suppliers on the DPS. It is up to each supplier to determine whether or not they respond to the alert (put in a bid to provide the placement). Any bids received are evaluated by the commissioning LA and the placement awarded to the supplier offering best value for money (the MEAT).
- 317 Contracting authorities are not able to limit the number of organisations on a DPS: all suitably qualified applicants to the DPS must be admitted to it.
- 318 The general rule is that a contracting authority must invite all organisations admitted to the DPS to tender for all contract opportunities put out through the DPS, though sub-categorisation of the DPS (and therefore the opportunities) is permitted.
- 319 Though there is no statutory limit on the length of time that a DPS can be in operation, in practice the duration of the DPS is generally fixed when the intention to establish a DPS is first advertised.
- 320 Providers appointed to the DPS will usually be asked to confirm (e.g. annually) that there have been no changes in circumstances that would disqualify them from membership of the DPS were they now applying to join.
- 321 We believe that the consortium of ten south east London LAs operating as the South London Special Educational Needs Commissioning Programme [SL SENCP]³¹ is currently the only DPS actually being used to commission High Needs placements; as noted in Annex 1, we are aware of others currently under consideration or development.
- 322 For a detailed comparison of Frameworks and DPSs, see Annex 3.

²⁹ Whilst a DPS is never closed, applications to join may reasonably be assessed on a periodic (e.g. once a quarter) rather than on a continuous basis as they are received.

³⁰ It is possibly worth pointing out that although our commission from Natspec (and therefore our discussion) is set in the context of post-16 provision many points in our discussion are likely to apply to LAs/consortia's procurement of special *schools* placements too. However our fieldwork did not cover the schools sector so we cannot be definitive on this.

³¹ The LAs concerned are Merton, Bromley, Bexley, Wandsworth, Sutton, Lewisham, Richmond Upon Thames, Kingston Upon Thames, and Greenwich.

Particular issues in a High Needs context

- 323 The above has been, as we say, a general description of frameworks and DPSs. However our fieldwork for this project has pointed up some potential issues with both of these new procurement processes in the context of arranging High Needs placements.
- 324 Our first concern is whether SPIs are expected to bid on the basis of documentation supplied, rather than (for instance) on a detailed assessment of the young person involved. Self-evidently it is not reasonable to expect an individual young person to attend multiple SPIs for assessment simply to drive a procurement process; equally it is asking a great deal of SPIs to make a “binding offer” simply on the basis of (sometimes quite exiguous) documentation. LAs/consortia have therefore had to consider whether, and how, to build in to their frameworks/DPSs the possibility that bids by SPIs may in some sense be “provisional” until a formal face-to-face assessment of the young person’s needs has taken place.
- 325 Secondly and relatedly, SPIs may receive and wish to express an interest in a large number of potential placement opportunities in any one year. They can perhaps not be expected to work up “full” offers of a placement and programme for each of these opportunities.
- 326 Thirdly, where a young person has expressed a preference for a particular SPI in their EHC Plan it is important that this is handled in a way that is consistent with both PCR 2015 and the SEND Code of Practice (including observing the timescales mandated by the Code). There is a risk that “consulting” with a preferred provider, as required by the Code, is interpreted as simply “giving it an opportunity to bid”. We return to this topic below.
- 327 Fourthly, particular issues may arise where the preferred SPI is not already listed on the framework or the DPS. Running a separate, parallel procurement exercise to ensure that the preferred SPI can participate would be one way to handle this scenario. However, our view is that ideally one procurement model should be capable of coping in a consistent manner with all SPIs (or indeed all providers of placements for High Needs students– listed or not.
- 328 Fifthly, there are some issues about the way the framework/DPS operates – for example:
1. Does the consortium split its requirement for High Needs places into lots based on the primary need of the young people and ask SPIs to specify the lots they are applying for? Or are SPIs admitted to a general list, sent all placement opportunities that arise and left to decide which they wish to pursue? Trying to impose too rigid a “lot” system may hamper SPIs from making the most flexible provision, especially where a young person’s special needs extend across more than one spectrum of disability.
 2. For frameworks, are prices/fees (and associated inputs) set at the prequalification stage or is each placement opportunity individually designed and priced? Setting prices at the prequalification stage may be implicitly contrary to the Code of Practice.

3. What account is taken of external measures of quality – both in the listing process and in deciding which SPI is awarded a particular placement? Taking too much account of external measures of quality can lead to an LA/consortium assuming the role of regulator, perhaps acting in a more draconian fashion as a result.

The Public Contracts Regulations 2015 and the SEND Code of Practice

- 329 It has been suggested that some of the provisions of PCR 2015 are directly contrary to the SEND Code of Practice – indeed we were asked to identify any such potential conflicts as part of our work.
- 330 Both PCR 2015 and the Code are legal documents – strictly the Code is “statutory guidance” relating to the Children and Families Act 2014 – and any contradictions between them are therefore a matter for the Courts rather than us to judge.
- 331 However, the recent publication *Building partnerships between local authorities and providers over post-16 high needs provision: Some lessons learned*³², co-authored by the Department for Education amongst other organisations (including AoC, Natspec and the LGA) states categorically that:
- “... [the good practice that *Building Partnerships* identifies] should apply and sit alongside any procurement frameworks devised by LAs. There should not be any irreconcilable conflicts between the statutory requirements of the Special Educational Needs (SEN) Code of Practice and those of the Public Contracts Regulations 2015...”
- 332 It is reassuring that the Department is prepared to endorse this statement. Nonetheless, and as will be apparent from this section, our review of frameworks and DPSs has identified a number of potential concerns (rather than conflicts) in relation to these approaches to procurement, and one potential area of conflict with the Code relating to SPIs for which the young person has stated a preference.
- 333 We also have a more general concern vis á vis the extent to which the young person, their parent/carer and the SPI are able to interact such that placement is a process that they participate in rather than an outcome produced by the system that they “take”. Paragraph 3.39 of the consultation document on High Needs funding reforms is instructive here:
- “In reviewing the way they fund and commission high needs provision for all ages, it is essential that local authorities work closely with parents and young people. A fundamental principle of the SEN and disability reforms is that services should be co-produced with the parents and young people who use them. The statutory framework gives parents and young people a central role in making decisions about their provision – including a right to request placements at particular institutions.

³² The document is available at <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Working%20together%20to%20commission%20and%20fund%20high%20needs%20FINAL2.pdf>

Local authorities need to take account of the resulting demand when developing the local offer of services ...

... decisions [need] to be made on an individual basis, taking account of the child or young person's needs and the preferences they or their parents have expressed.”

- 334 We have very much had this in mind when developing our thoughts on an alternative approach to the procurement by LAs/consortia of High Needs placements in SPIs in Section 5.

Conclusion

- 335 This Section has reviewed the main alternatives to spot purchasing currently being used to procure High Needs placements at SPIs and highlighted a number of potential concerns that these raise in our minds.
- 336 The main function of the rest of this report is to explore how these concerns might be addressed in revisions to current (or any new) procurement arrangements. Before doing this, however, the next Section will discuss the position of general FE colleges and the way in which they should (in our view) interact with the approaches to procurement being discussed here.

4 General FE Colleges and procurement: an unresolved issue

- 401 So far, this report has talked exclusively about the procurement processes used by LAs in commissioning High Needs places at SPIs. The process used to commission places at general FE colleges [GFECs] is entirely different.
- 402 Some of these differences are structural, and are described in the Education Funding Agency's Operational Guide for 2016-17 (see section 7). For our purposes, however, the point to make is that in no instances we have observed are GFECs required to participate in frameworks or DPSs even when they are making provision very similar to that made by local SPIs.
- 403 Paradoxically this means that procurement processes introduced to bring greater fairness, transparency and equality of opportunity are not being used to procure the vast majority of High Needs placements. Of c. 25,000 High Needs placements, 22,000 are in the GFE system and are therefore not currently in scope of the arrangements described in the preceding section of this report.
- 404 This seems to us unfair. In our view, all High Needs providers contracting with any given LA should be subject to the same processes and systems – if they are using spot purchasing then all High Needs provision should be spot-purchased; if they have a DPS for High Needs placements then all High Needs placements should be commissioned through it. The way in which students and providers are treated and the use of the High Needs budget should be the same in every case.
- 405 Specifically, it is clear to us that many young people with high needs might well want to consider a place at their local GFEC alongside one or more placements in SPIs before making their final choice. It is not unreasonable for a young person to expect personalised programmes and support to be available at their local GFEC, as well as at an SPI, and to want to review what the GFEC could offer before making a final choice. Moreover LAs may well wish to review whether for a particular young person a placement at a GFEC might represent the most “efficient use of resources”.
- 406 It does not sit particularly well with these aims if the system for placing young people at GFE colleges is entirely different from that which applies to SPIs. Moreover if there are objections to “spot purchase” in an SPI context it is hard for the lay person to see why these objections do not also apply to “spot purchase” at GFECs.
- 407 There are of course differences between the legal status of GFECs and SPIs. Further Education Colleges are incorporated through the Further and Higher Education Act 1992³³ while SPIs are usually run by charities and/or are companies limited by guarantee (though some are “for profit”). It may be that this difference in status is sufficient to provide a legal justification for GFECs being omitted from the

³³ See Department of Business, Innovation and Skills: *College Governance: a Guide* (2014), page 5. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344615/BIS-14-1012-college-governance-a-guide.pdf.

frameworks and DPSs now being developed by LAs and consortia. But from the point of view of the young person and his or her parents/carers (not to mention the fair and transparent use of funding) there is clearly much to be said for one system in which GFECs are considered alongside, and under the same terms as, SPIs: this is what we will propose in Section 5.

- 408 We would recommend that Natspec discuss this further with the Department for Education, not necessarily as a step towards a legal challenge to the current arrangements being put in place by LAs/consortia but rather in the interests of making young people's choices of post-16/post-19 provision easier and more straightforward.
- 409 DfE, together with EFA, has an opportunity to consider implementing this through the current High Needs funding consultation.
- 410 We are aware that this will potentially bring a very large number of low-cost High Needs places in scope of an LA's procurement system. A "*de minimis* exemption" under which all High Needs placements with an Element 3 value of less than (say) £1000 were exempt from procurement systems and could be spot purchased, would help reduce the volume of placements going through dynamic procurement. Of course this arrangement would need to extend to SPIs too.

5 Towards an approach to procuring High Needs places

Introduction

- 501 Our view, based on the arguments in Section 2, is that the traditional, non-competitive “spot purchase” arrangements described there are unlikely to continue indefinitely. We are not suggesting that SPIs should seek to reject or criticise spot purchase arrangements where they persist, nor are we ourselves criticising them. However, where LAs have come to the conclusion that they need to move towards the adoption of some form of competitive procurement system they are unlikely, we believe, to be persuaded to reverse this.
- 502 In this Section, we therefore venture to put forward what an alternative approach to the procurement by LAs/consortia of High Needs placements might look like – thereby addressing the final objective for this project listed in Section 1.
- 503 We have not modelled our suggestions on a specific existing procurement arrangement, but rather on a logical discussion based on our fieldwork (including our research into the procurement of places in independent special schools). We believe the approach would work under either a framework-based or a DPS model and should address the concerns identified in Section 3.
- 504 As discussed in the previous Section, we believe the approach outlined here should apply to all providers and potential providers, including GFECs. In the remaining paragraphs of this section we therefore refer to ‘providers’ rather than SPIs or GFECs.
- 505 It is worth pointing out that this is a hypothetical model which can be drawn upon when discussing the implementation or modification of a framework/DPS. We are – as already noted – neither legal nor procurement professionals and LAs in particular will want to make sure they take advice from appropriately qualified professionals.
- 506 There are two stages to the implementation of some form of competitive procurement system which we will use to provide a framework with which to present our approach:
1. The means through which a list of approved providers is created (we refer to this as prequalification)
 2. The means through which opportunities are advertised and filled (we refer to this as the placement process).
- 507 A model for our process is provided in the table immediately below.

<i>Element of process</i>	<i>Key activities/actions/elements</i>
Stage 1: prequalification	
<ul style="list-style-type: none"> Quality 	<p>Floor standard – all who meet it qualify.</p> <p>No inspection-linked requirement (e.g. for an Ofsted grade)</p> <p>No registration-linked requirement (e.g. for S41 registration)</p>
<ul style="list-style-type: none"> Evidence 	<p>Provider's own format</p>
<ul style="list-style-type: none"> Offer 	<p>Provider to define what placements they would like to be offered</p>
<ul style="list-style-type: none"> Timings 	<p>Time-limited in terms of duration</p> <p>Permanently open to providers</p> <p>Annual re-confirmation of eligibility</p>
<ul style="list-style-type: none"> Prices 	<p>Approach to pricing only – no 'example fees' or 'pre-set fees for X'</p>
Stage 2: placements	
<ul style="list-style-type: none"> Requirement content 	<p>Anonymised. No reference to any preferred provider</p> <p>Standard (LA-determined) format</p> <p>Brief outline of requirement</p> <p>Additional information/documentation available on request/by click</p>
<ul style="list-style-type: none"> Requirement invitees 	<p>All listed providers subject to any self-imposed limitations and/or sub-categorisations of the list (student need; residential/day etc.)</p> <p>Appropriate treatment of any preferred provider (as required by the Code of Practice)</p> <p>Any unlisted provider that is preferred by the learner to apply to join the list (see "timings" above)</p>
<ul style="list-style-type: none"> Response 	<p>Description of a suitable learning programme and outcomes</p> <p>Indicative (non-binding) fee – disaggregated into main components</p>
<ul style="list-style-type: none"> Shortlisting 	<p>Joint commissioner-young person/responsible adult decision</p> <p>Preferred provider taken forward if they have responded</p> <p>A small number (1 or 2) other suitable providers taken forward if possible</p>
<ul style="list-style-type: none"> Full assessment 	<p>Providers taken forward have opportunity to fully (re-)assess the young person</p> <p>Full learning programme and binding fee submitted to LA</p>
<ul style="list-style-type: none"> Decision 	<p>Joint commissioner-young person/responsible adult selection of provider to be offered placement</p> <p>Appeals process if commissioner and young person/responsible adult are unable to agree</p>
<ul style="list-style-type: none"> Confirmation 	<p>Providers notified of outcome</p>

Stage 1: prequalification

- 508 LAs/consortia will need to adopt some form of prequalification procedure in order to compile a record of providers interested in and capable of offering placements to their post-16 High Needs learners³⁴. Prequalification has the following potential advantages:
- It enables the necessary checks to be carried out on providers in good time. Clearly a commissioning LA needs to satisfy itself that a provider is “fit and proper” to provide a placement for a young person (i.e. of good financial standing; with the necessary policies and procedures etc.). Putting together the evidence to support this is not the work of five minutes and if it can be carried out well in advance of the actual placement process, and “once only”, then time can be saved by both parties
 - It at least begins to satisfy the requirements of good procurement practice, and (where relevant) council Standing Orders, by being entirely open and public and giving any potential provider the opportunity to apply for qualification, particularly if it is widely advertised (almost inevitable as contract consolidation websites etc. will pick up most notices)
 - If LAs are concerned about the impact of PCR 2015, the advertisement of a prequalification opportunity will do much to allay these concerns
 - It gives LAs some idea about the interest they are likely to receive from providers when it actually comes to making placements – and where potential gaps in provision may lie. Remedial steps can be taken before any actual placements are delayed or become difficult.
- 509 Most of these advantages are mirrored from the provider’s point of view also. The more paperwork that can be got out of the way well in advance, the better³⁵. But the major advantage from the provider’s point of view is that the procedure is open: any provider can apply to any LA/consortium’s prequalification procedure and has an equal chance to state its case as a potential provider on its own terms. What is more, the provider has the opportunity to describe its own specialisms, rather than relying on the LA/consortium’s institutional memory of “what the provider is good at”:

³⁴ Self-evidently it would be highly desirable if *all* LAs/consortia going down this road could agree on common prequalification requirements and procedures. This would greatly simplify the task facing those providers that seek to prequalify with more than one LA/consortium. This might be an initiative that DfE could promote. In the meantime, we recognise the reality that, at present, all the prequalification requirements we have seen (either in place or being drafted/porting from schools procurement) are entirely different both in form and content.

³⁵ Sometimes LAs’ prequalification procedures are accused of asking for reams of paperwork, including policies and procedures that are obliged to be at the LA’s request draconian or even simply intrusive. There may be truth in this accusation. But this is not a fault of prequalification itself: presumably such paperwork would otherwise have been requested at the time of placing a young person. The most that can be said is that LAs should not give in to the temptation of adding spurious requests to the prequalification “shopping list”.

this can be a real advantage where providers are developing new specialisms, as already mentioned above.

Quality

- 510 We suggest that prequalification sets a “floor” standard, and simply checks that everything is in place that needs to be: an LA would not commission any service from a potential provider that was bankrupt, that paid no attention to Health and Safety, etc. It is difficult to argue against this.
- 511 Whilst it may be tempting to set a higher (i.e. above “floor”) standard – in particular to look for evidence of good outcomes from statutory inspections by Ofsted and other agencies³⁶ – LAs must be very careful at this point not to usurp or challenge the role of statutory inspectors, or to introduce gross unfairness into the system.
- 512 For example, if a statutory inspection of a provider concludes that it (or elements of its provision) are anything other than good or outstanding it would, in our view, not be appropriate for that provider to lose its prequalification or to have a bar on new placements put in place. If this happened then effectively the LAs would be acting to put the provider out of business – thereby imposing a harsher penalty than the statutory inspectors, who may well be working with the provider to improve its provision.
- 513 There is an interesting parallel in the way that the Education Funding Agency manages the “Section 41 list”. A poor inspection judgement does not automatically disqualify a provider from inclusion in the Section 41 list.
- 514 Unfortunately even such an apparently bland requirement as to ask for evidence of potential providers’ “Section 41 registration” can run into trouble. Reading through the Section 41 guidance notes³⁷, it is not immediately clear whether a “brand new” institution, that has never previously opened its doors, can register under Section 41 in advance of admitting a single student.
- 515 However, there should be some scope for LAs/consortia to rely on the S 41 process in prequalification. At the least, LAs/consortia that decided to ask for S 41 registration as part of prequalification would not need to ask for evidence in order to check the items that the S 41 registration process itself checks, simplifying procedures both for the LA/consortium and for the provider responding to prequalification requirements. Those that were not S 41-registered would still need to provide the evidence.

³⁶ At the time of writing we have had reported to us some ambiguity about just which agency/agencies are to take responsibility for the inspection of residential care in SPIs in the future. This explains the vagueness in this sentence – this vagueness is not material to our argument.

³⁷ <https://www.gov.uk/government/publications/applying-to-be-on-the-approved-list-of-independent-special-institutions/a-guide-for-independent-special-institutions-on-applying-for-inclusion-on-the-secretary-of-state-approved-list>

- 516 In similar vein, our view is that if Ofsted gradings are used as part of prequalification then this unfairly disadvantages any provider that has yet to be inspected³⁸. Moreover there can be long intervals between inspections and an inspection that took place many years ago may be no guide to current quality of provision: alternatively a provider with a “poor” inspection some years ago may have significantly improved in the interim. We are therefore against the explicit use of Ofsted gradings in prequalification decisions.
- 517 Of course, if the policies, procedures, etc. sent in by providers applying for prequalification are clearly inadequate by any normal standard then LAs are quite within their rights to refuse the application – though there should be an opportunity for the provider to put things right (see below).

The form of documentary evidence

- 518 If prequalification is about setting “floor criteria” below which the provider is unacceptable as a potential supplier, and not “quality criteria” in order to choose the best, then LAs are not *comparing* providers’ submissions but considering each independently. All those that “pass” should be admitted to the framework or listed on the DPS.
- 519 It follow from this that, provided it meets the LA’s requirements for information, providers should be allowed to submit evidence in any format they believe appropriate. The LA will doubtless check (using its own internal checklist) that particular points are covered in the document pack it receives. But our view is that allowing the provider to determine the format in which it provides evidence is more reliable than sending providers forms to complete, which have an understandable tendency to “lead the witness”.
- 520 This approach has the added benefit that a provider submitting prequalification applications to multiple LAs/consortia should not have to redraft documents for each to meet the same requirement for information.
- 521 LA readers may argue that this gives them and their colleagues more work to do. But reading is quicker than writing, and as a general principle saving LA staff a smaller amount of work by giving the provider community a larger amount is not cost-effective.³⁹

³⁸ Again, EFA’s Section 41 procedure allows a “new entrant” to the list eighteen months after opening before requiring an Ofsted inspection.

³⁹ Note that if (as previously suggested) LAs/consortia can agree between themselves on the form of prequalification evidence they require, and all agree to require it in the same format, this issue goes away.

Evidence as to the types of provision offered by the provider

Disability or learning difficulty

- 522 As part of LAs' prequalification processes, they may ask providers "what they do". There is self-evidently a wide range of disabilities and learning difficulties among the post-16 community, and it would be unusual for a single provider to set out to meet needs across all of them.
- 523 In some instances this information may be used to restrict the opportunities providers see – for example if "lots"⁴⁰ are used in prequalification.
- 524 However, a great deal of energy can be wasted in trying to "classify" the difficulties or disabilities experienced by young people to little result, especially when the boundaries are not necessarily clear. If an element of pre-selection must be made, and all opportunities not simply sent to all qualified providers, then a question along the lines of "Which of the following kinds of placement opportunity do you wish to be offered" is a more reasonable one to ask.

Vocational area

- 525 What is definitely important – much more so than in the school sector, which is a risk to those LAs seeking to "port" a school-based arrangement to providers – is the *vocational areas* that a provider can support. Here we would strongly suggest that some form of question is included in the LA's prequalification pack, at least to cover the (majority of) post-16 learners for whom some form of vocational learning is appropriate. If a young person is set on developing an interest in agriculture, for instance, there is no use their looking at a provider that does not offer it.
- 526 Again, however the question form should be "What placement opportunities would you like to be offered", not "What do you do", to reduce unreasonable barriers to entry to, or development of, new vocational areas at provider level. There are many checklists that would facilitate this and the boundaries between vocational areas are relatively easy to understand.

Mode of attendance

- 527 Providers can also reasonably be asked whether they offer day or residential provision and, if the latter, what basis (working week, seven-day, termly etc.) and for how many weeks a year.

⁴⁰ Dividing up an overall tendering opportunity into "lots", that is to say individual mini-exercises within an overall procurement exercise, is more common in a framework contract than in a DPS (indeed arguably it cannot be used in a DPS in the same way). In the present contract a "lot" may represent a type of disability or difficulty. A division into "lots" is also sometimes associated with seeking prices for each individual "lot", for which see the further discussion below.

Timings

528 There are effectively two parts to prequalification:

- An initial, time-limited, “mass” opportunity to prequalify before the procurement vehicle is first launched and placement opportunities start to be commissioned through it
- Subsequent opportunities to join the procurement vehicle on a more individual/*ad hoc* basis after it has been launched and placement opportunities are already being commissioned through it.

Pre-launch prequalification

529 The details of running a prequalification process are considerable, technical and complex and probably not for this report. However, in essence there are three stages: inviting applications by a certain deadline; assessing applications after the deadline; and notifying providers as to whether they have been successful or not. There are various well-understood and readily accessible ways in which these stages can be completed.

530 Frameworks have to be ‘time-limited on launch’; DPSs do not but can be and there may be value in “refreshing” a DPS after a number of years.

531 Approved providers should be required to notify the LA/consortium promptly should any aspect of their prequalification information subsequently “fail” (or be asked to confirm that there has been no change to the information provided at prequalification on a regular basis – e.g. annually), so that commissioners can take a view about their continued prequalification status. Otherwise, once approved, providers are prequalified and should remain on the list until it ceases to operate.

Subsequent opportunities to join the list

532 For DPSs the position is clear: it is a requirement that they are left permanently open – and that the documentation for applications to join the list remains readily available electronically for anyone interested in prequalifying for the DPS – as long as the DPS remains operative.

533 As far as frameworks are concerned, for reasons that will become apparent in a subsequent sub-section⁴¹ it would be advantageous if applications from “new” providers to join the framework could be made ideally at any time; failing that on a reasonably regular basis – e.g. quarterly. Similarly reapplications from providers who had not previously satisfied prequalification conditions should be permitted, giving the providers the opportunity to demonstrate that they now meet the prequalification requirements.

⁴¹ In essence to avoid the need to go “off-framework” to commission places – most obviously in cases where a preference has been expressed in the EHC Plan for a non-listed SPI.

534 Our overall view, therefore, is that there should be no barrier to providers applying to join the list, or indeed listed providers modifying their offerings (type of disability/difficulty; mode of attendance etc.)⁴², after it has been launched. New applicants should be added to the approved list as soon as their prequalification has been successfully completed.

Evidence of prices

535 We do not believe that LAs should, as part of prequalification, ask providers to state *overall* prices for student programmes, however defined. (It is however legitimate to ask providers to describe, ideally in a “free text” box, how they *do* set fees/prices for individual students since providers differ significantly in this respect. This will not influence whether a particular provider is admitted to the framework/DPS but will be useful information for later.)

536 We believe strongly that good practice is for providers to design individual programmes for each young person, based on this explicit logical planning sequence:

- “These, based on our experience, are the outcomes that we can help this young person achieve
- “To help the young person achieve these, we believe we need to offer him or her the following support ...
- “To deliver this support we will need the following fee ...
- “You can then hold us accountable for the outcomes we proposed and the provision necessary to achieve them which you have agreed to fund.”

537 This approach is entirely consistent with the Code of Practice, which is explicit about the need to plan a young person’s education, health and care provision in this way. (see paragraph 9.22 of the Code). In fairness paragraph 9.22 is written in the context of preparing an EHCP, but we would argue that the outcome-based focus should not stop there. In particular, the view that the EHCP can be expected to set out fully both the outcomes that a young person can be expected to achieve and the provision necessary to achieve these outcomes, *before* the young person concerned is referred to a provider for assessment, was rejected as impractical by our SPI interviewees. In practice, they argue, the assessment expertise of the provider plays a vital part both in drawing up realistic outcomes for the young person and in designing programmes to meet these. They would claim that the mixed quality of EHCPs currently confirms this judgement.

538 We also believe that the sequence in the previous paragraph is not one-sided. On receipt of a submission along these lines from a provider, an LA commissioner is entitled to ask “If we paid a lower fee of ..., to what extent would the achievement of these outcomes be compromised?” – and for that matter the reverse question “If we paid more, are additional outcomes within reach?”.

⁴² Assuming details of offerings are recorded as part of the prequalification.

- 539 In this way, the best possible outcomes can be achieved for the young person while value for money is also taken into account.
- 540 *None* of this can happen, in our view, if any kind of binding fee (implicitly or explicitly for a series of pre-defined inputs) is proposed by the provider for one or more hypothetical students as part of the prequalification process. Instead, what is likely to happen is that a student subsequently arrives with a “pot of money” already decided; the challenge to the provider is then to “do the best they can” with what they have. Logically, the pot will either be “too little” to enable that *particular* student to achieve the best outcomes for him or her in the most cost-effective fashion, or “too much” (the provider is contractually required to do things that, in its view, are not necessary for this particular young person) – either way resource is wasted.
- 541 It is also worth noting that fees are likely to be different for otherwise “equivalent” students following different vocational paths. Catering, agriculture and office work (for example) all have their own cost base, whether simulated or supported as placements in a sheltered workplace. How many fixed fees would a provider have to propose in its prequalification documentation to cover all of these?
- 542 To summarise, our point is that it should be for the provider to state how it proposes to calculate fees, not for the LA to impose some form of “pricing for the hypothetical student” at prequalification time.
- 543 To anticipate an objection, we are aware that some DPSs currently in place and working successfully in the schools sector do ask for fixed fees at prequalification stage (perhaps with provision for annual updates), and independent special schools are apparently happy to quote them. There are we think some differences between the two sectors – not least the vocational point just made – that might explain why we are not comfortable using something in a post-16 context that is apparently acceptable to schools. Short of carrying out a parallel project with schools, we cannot comment further.

Sample (?) contracts

- 544 It is clearly appropriate for LAs, as part of the prequalification process, to send providers samples of the contract(s) and schedule(s) they propose to use in commissioning places, to ask providers to review these and raise any queries, and to take a very dim view of any queries subsequently raised about the form of these documents at the time of placement. Whether there is any value in providers being asked to “sign” these effectively blank contracts, or indeed whether any contract can exist in advance of any particular student(s) being placed in the provider concerned and a consideration in the form of a fee offered, is a legal point on which we are not qualified to comment.

Stage 2: placement process

- 545 Once the purchasing system is up and running, student placements can be arranged through it.

Requirements

Content

- 546 Any advertising of placement opportunities (for want of a standard term, we shall refer to these as “Requirements”) will need to be accompanied by a brief outline statement about the student, his or her aspirations, vocational interests, previous education, specific or general difficulties or disabilities, day or residential place preferred, etc.
- 547 Whether or not these should be anonymous depends on the views taken to issues raised below. Certainly at some point in the process (possibly after shortlisting – see below) anonymity will need to be waived; on the other hand when outline statements are being widely distributed there is something to be said for keeping the student’s identity confidential to avoid any data protection issues.
- 548 There is every reason to share these outline statements with students or their parents/carers, and even to ask if students want to make an input into them.
- 549 Providers may receive reasonably high volumes of these outline statements, particularly at certain times of year, so it will need to be made quick and easy for a provider to identify whether or not it wishes to respond to a particular placement opportunity. Standardising the way in which outline statements are set out so that providers can quickly find their way around them will help. (Different LAs/consortia may have their own designs, but providers must live with that⁴³.)
- 550 The outline statement need not necessarily include a copy of the young person’s most recent EHC Plan – and certainly “just sending the EHC Plan” should not be an alternative to drafting the outline statement – but providers who wish to see the EHC Plan before responding to the opportunity should be able to do so (for example by clicking on a link). If the outline statement is anonymous, the EHC Plan (and any other relevant reports, assessments etc. made available to providers at this point) will need to be anonymised too, of course.

Invitees

- 551 Placement opportunities should be offered to a wide range of providers – indeed all providers in membership of the system, subject to any constraints imposed by providers themselves about the kinds of opportunities they do not wish to receive (see paragraphs 522 ff. above).⁴⁴

⁴³ Though again anything that can be done to encourage standardisation between LAs/consortia can only be useful.

⁴⁴ There is an issue about travelling distance here: is it easier to set up the framework/DPS so as not to offer day placements to those providers who have said they only wish to be considered for residential placements or simply to rely on the provider to delete any requirements that are not of interest to them on receipt?

- 552 However if the requirements of the SEND Code of Practice – specifically the requirements to take into account student preference – are to be met, then it seems to us certain additional steps may need to be taken.
- 553 If a preference for a particular provider is stated then the Code requires this preference to be “taken into account” in a precise way⁴⁵. This means that (at the very least) the provider named by the young person must be contacted as the Requirement is published and advised that they are the “preference choice” for a specific, named young person – even if it is the usual policy that the LA/consortium circulates opportunities anonymously⁴⁶.
- 554 Furthermore: “Where a nursery, school or college identified at 9.78 above is named on an EHC plan they **must** [subject to certain specified exceptions] admit the child or young person.”⁴⁷ Our view is that the Code thus *requires* preferred providers to be accorded a more elevated position in the placement commissioning process than may currently be the case. This is a position that will need careful handling in the context of PCR 2015.
- 555 On the basis that the Code has been followed – i.e. that the transition has been planned well in advance; that the preferred provider has been identified by the young person in advance of the LA seeking to commission the placement; that a dialogue has taken place between the provider, the LA and hopefully the young person/their parents etc.; and that the provider has determined that it is a suitable provider given the age, ability, aptitude and SEND of the young person – the most likely ground for the LA going to market is to determine whether a placement at the preferred provider would represent an efficient use of resources. It seems to us to be not unreasonable for the LA to use its framework or DPS to test this even though there is a preferred provider in place.
- 556 It is conceivable that the LA would want to ensure that a different provider could not better meet the young person’s needs or help the young person achieve higher outcomes: the framework/DPS will test this too.
- 557 A Requirement should therefore still go out as a “general call” to *all* (all appropriate) prequalified providers even if a preference for a particular provider has been expressed. If challenged further on this we would argue that the alternative – an effective return to spot purchasing in cases where a preference is expressed – cannot be viewed as acceptable:

⁴⁵ See paragraph 9.79 of the Code.

⁴⁶ See paragraph 9.80 of the Code: “The local authority **must** consult the governing body, principal or proprietor of the school or college concerned and consider their comments very carefully before deciding whether to name it in the child or young person’s EHC plan, sending the school or college a copy of the draft plan.”

⁴⁷ The specified exceptions are “that it would be unsuitable for the age, ability, aptitude or SEN of the child or young person, or ...the attendance of the child or young person there would be incompatible with the efficient education of others, or the efficient use of resources.” This assumes the provider concerned is on the S41 list. See paragraph 9.79 of the Code.

- If a general call was not issued where a preference had been expressed, then the LA is effectively running two systems: one where a preference has not been expressed and one where it has. This has the effect of marginalising the idea of a “preference” – almost to the point of “hoping it doesn’t happen” – which is unacceptable under the Code of Practice.
- A good procurement system should be able to cope with preferences (given their centrality to the SEND Code of Practice) without abandoning standard procedures
- An LA is allowed (even required) to consider the efficiency of the preferred placement. Arguably it can only do this if it has one or more comparators upon which to base its judgement; In the presence of a framework or DPS, the most straightforward way to obtain these comparators is to issue a general call to its prequalified providers
- An LA/consortium that carefully establishes a framework/DPS to handle post-16 student High Needs placements, presumably on the grounds that it believes “spot purchasing” to be unsatisfactory, and then abandons its framework/DPS in favour of spot purchasing as soon as the student expresses a preference, might find itself open to legal challenge and arguably is in a worse position *vis* PCR 2015 than it was before.

- 558 A preferred provider should be encouraged (required) to respond to the related Requirement – or to let the LA have a formal statement to the effect that, on reflection, it has decided it cannot meet need in this instance: this is in order that the LA can demonstrate that it is following the Code.
- 559 Should the general call note that a preference has been expressed for a particular provider? Our view is that it *should not*. If non-preferred bidders know there is a preference stated they may not put as much effort into their response – indeed, may not bother to bid at all. Under these circumstances the LA’s ability to make the “efficient use of resources” judgement would be constrained.
- 560 Finally, a further complication potentially arises if the preferred provider is not currently prequalified for the framework/DPS: we are clear that the provider must be given the opportunity to prequalify promptly. Our recommendation (above) that there should be no barrier to providers applying to join the prequalification list post-launch should cover this point and ensure that any “preferred but non-prequalified” provider prequalifies in good time. Ideally the process should start as soon as it is known that the young person is likely to express a preference for the provider concerned. Of course, if the preferred provider “fails” to meet the prequalification requirements this should provide sufficient grounds not to consider it further for this placement.⁴⁸
- 561 The timescales laid down by the Code of Practice are tight at this point, and it has been argued to us that it may be easier to go “off framework” in order to cope with the preference expressed rather than rushing the provider through prequalification.

⁴⁸ It is not an “efficient use of resources” for the LA to place a young person in a provider that fails basic checks. However to apply this the LA must be sure that its prequalification procedures really do set a “floor” standard and are not about “selecting the best”.

However, we have already stated our view (in paragraph 557 above) that running two systems in this way is unsatisfactory, might tend to marginalise the issue of student preferences rather than reinforce it, and might leave the LA/consortium vulnerable. In any event, should an LA seek to contract “off framework” with a provider that it has not prequalified it will presumably need to undertake due diligence checks on the provider which are likely to require as much effort as any accelerated prequalification.

Personal budgets

- 562 The issue of personal budgets was not specifically mentioned during the course of our work. However, we suggest that where a personal budget has been requested under paragraphs 9.95 *et seq.* of the Code then this should be noted in the Requirement.

Content of the response

- 563 Providers – if they choose to – will respond to the Requirement. Most recipient providers will not have met the student at this point, but based on the information in the outline statement should be able to describe in fairly specific terms what they would seek to do to support the student concerned. In their response providers should focus as far as possible on outcomes rather than inputs and back their description up with examples, if they have them, of apparently similar students and what they have achieved.
- 564 Every effort should be made by the LA/commissioner to ensure that the input required of a provider to respond to a Requirement is proportionate – and that providers have sufficient time to draft their expression of interest⁴⁹. LAs should bear in mind that providers may be receiving not only their Requirements but also to those sent out by other LAs/consortia.
- 565 Setting a word limit is one way to ensure providers do not over-invest in preparing expressions of interest, except that often it takes longer to draft a short document than a long one: saying “no more than two sides of A4 is expected” may be a better idea.
- 566 The format of the expression of interest should be based on an LA proforma: this will make it easier for the LA to compare responses.

Fees

- 567 What fee information should accompany an expression of interest? We start from the assumptions that:

⁴⁹ Named institutions, according to the Code, have fifteen days to respond; but it has been pointed out to us that some extant frameworks/DPSs (for SPIs or schools) give providers much less time than this.

- Providers should not be *required* to quote a binding fee before they have had the opportunity to assess the young person for themselves according to their standardised practice in this respect⁵⁰
- The number of providers who are allowed to assess the young person face-to-face must be limited, to manage resources at provider level but more importantly to protect the young person from excessive demands: the expression of interest must be based on paper and not on a face-to-face meeting
- If expressions of interest do not include any price data at all the task of comparing them objectively is virtually impossible – and how is the LA’s check on “efficient use of resources” criterion to be met?

568 We therefore suggest that providers should be asked to state an “indicative fee” for the programme it is proposing to deliver as part of its expression of interest. The fee should be disaggregated into its component parts so the LA concerned can see how it has been arrived at: we would prefer the precise form of disaggregation to be at the discretion of the provider concerned.

569 The indicative fee should not be binding on the provider, and any shortlisted provider (see below) should have the opportunity to assess a student face to face before proposing a “binding” fee. But in order to avoid game playing providers should know that if they subsequently propose a fee that is considerably different to the indicative fee mentioned on their expression of interest (e.g. by more than 10%, say) the LA commissioner concerned can ask the provider to justify the revised fee and, if necessary, “re-shortlist” and/or ask one or more previously excluded providers if they would also like to work up a firm bid.

Shortlisting

570 At this point, the consortium’s IT system will pass to the relevant LA’s commissioner a range of (say) two-page submissions from providers, with indicative prices, from which to make a “shortlist” choice. From this point the LA, rather than the consortium, runs the process.

571 We suggest that good practice would be for the commissioner to meet with the young person (supported by parents/carers and other professionals as appropriate) to discuss next steps – though we recognise that this might not always be practical. Certainly the relatively tight timescales laid down in the Code of Practice will have a bearing on this. Some providers – a preferred provider in particular – may already have done so.

572 If there are a large number of submissions, the commissioner may want to make an initial selection from these. Advice will need to be taken from a procurement professional on the detail but we suggest that selection is carried out “formally” (i.e. using scoring against objective criteria), that records are kept of the decision-making

⁵⁰ Providers may of course *choose* to quote a fee that they subsequently regard as to a greater or lesser extent binding upon them.

process and that feedback is given on request to disappointed providers. All this is well-known territory to procurement professionals.

- 573 If there is an expression of interest from a “preferred” provider (in SEND Code of Practice terms) then we would argue this provider will need to be included in the selection of providers taken to the next stage regardless of how their submission scored relative to the others received.
- 574 Fee information should not be discussed with the young person and/or his parents/carers: fees are a matter for the LA. Any expressions of interest quoting (in the view of the commissioner) outrageously high (or low) fees should not be long-listed for the young person’s consideration.
- 575 When the number from which to choose is, in the commissioner’s view, manageable, the proposal from each provider should be discussed with the young person and a choice of those to be asked to quote a firm fee for a fully defined programme made. Bearing in mind that many eighteen year olds considering higher education visit up to ten (or more) universities before narrowing their choice down to five, it is perfectly acceptable for the young person to want to visit a number of providers before making his or her choice; equally for some young people visiting more than two may be a burden. A consensus must be established on this, and on the college(s) to visit, during the meeting, bearing in mind the needs (and aspirations) of the young person and the time available.
- 576 If the young person has stated a preference, it is still acceptable to suggest that another provider could be visited.⁵¹ This is not to gainsay the young person’s preference, which must be respected, but merely to confirm that the young person has made an informed choice.
- 577 If on the other hand the LA is minded not to accept the young person’s preference of provider placement, on one or more of the limited grounds set out in the SEND Code of Practice, then it is far better to air the matter at this point and suggest some alternative places to visit.

The placement decision

- 578 As the young person visits the shortlisted provider(s), these will take the opportunity to carry out such initial assessments as they see fit, and also (of course) discuss with the young person and their parents/carers precisely what they can offer. As a result of the visit, the provider(s) should prepare definite proposals, with firm fee calculations, for submission to the LA commissioner (or claim that, on one or more grounds from the SEND Code of Practice, that they are not able to do so).
- 579 Again a reasonable timescale should be set for receipt of these. On receipt of these bids, it is (in our view, and pending any disagreements from procurement

⁵¹ It is possible that the young person may have been there already. In this case, the preferred SPI may have a fully worked up proposal and fee already to hand and need not be visited again.

professionals) in order for the commissioner to review the programmes with the provider(s) along the lines of paragraph 537 above.

- 580 It may be necessary for the commissioner and young person (plus third parties as before) to meet again: the choice of provider is a major decision for the young person, with potential ramifications for his or her entire adult life, and, time permitting, two meetings does not seem extreme. At this point:
- If the commissioner and young person agree on the choice of placement (and this is the preferred provider), then the matter is settled and the paperwork can be issued
 - If the commissioner and young person agree on the choice of placement, but it is not the one for which the young person originally expressed a preference, the commissioner and any third parties present at the meeting should reassure themselves that the young person has genuinely changed their mind. The EHC Plan will need to be amended to reflect the change of preference and the paperwork can be issued
 - If the commissioner and young person cannot agree, then in our view the young person is now stating a preference (even if one was not recorded on the EHC Plan) and the commissioner's grounds for not following this preference must be in accordance with the SEND Code of Practice. The young person must be advised of his or her right of appeal and of the procedure to be followed.⁵²

Contracting

- 581 Finally, after placement has been decided the necessary paperwork should be issued to the provider for signature. Further discussion of the form of this (essentially contractual) paperwork is as we have noted outside the formal scope of this project (it is about "commissioning" rather than "procurement"). However, there are a number of examples (referred to as "individual placement agreements" – or similar) extant.

Conclusion

- 582 In this long section, we have explored what we believe to be a practical approach to establishing and operating alternatives to spot-purchasing for LAs' use in commissioning High Needs placements with post-16 providers. We have been reasonably detailed only where we believe the detail is necessary/helpful. The approach is not based on, or a copy of, any system actually running in England at present, but features of it are drawn from frameworks and DPSs operating – perhaps in schools, perhaps more widely – that we have had described to us during our fieldwork.

⁵² Note that the Code of Practice is clear that the final decision on placement sits with the LA concerned. But involving the young person in the way we have outlined, though not statutorily required by the Code, would nevertheless in our view be good practice.

583 Some of our fieldwork participants may feel that we have taken some elements of their current procedures and disagreed with others: for this we apologise.

6 Conclusion

- 601 This is a very early stage in the development of purchasing systems for SPIs. Nevertheless we have set out to identify practice, including parallels elsewhere, that we can put together to build an overall description of how a High Needs procurement system for all post-16 providers, not just SPIs, might work. We are conscious that (as far as we are aware) the system we have described, largely in Section 4 above, is not in existence anywhere in the country (though almost all the elements included are) and one cannot therefore go to look at it, or see how well it works in practice.
- 602 We have proceeded by determining at each stage in the outline of an approach through a series of (usually) binary choices – “Is a shortlisting meeting necessary? Is it not?” – and then argued from first principles, as much as from our fieldwork, which choice better reflects the demands of the SEND Code of Practice on the one hand, and acceptable practice in procurement (as we as lay people understand it) on the other.
- 603 We take comfort, as already noted, from the assurance, endorsed by DfE, that “... there should not be any irreconcilable conflicts between the statutory requirements of the *Special Educational Needs (SEN) Code of Practice* and those of the *Public Contracts Regulations 2015...*” and hope we may also believe that there should also not be any irreconcilable conflicts between the Code on the one hand and good procurement practice generally on the other.
- 604 We also take comfort from our personal experience of the commitment of colleagues in both LAs and SPIs to do the very best they can for young people under their care and responsibility. It should not need saying – but we will say it anyway – that the commitment of those LA staff we have met, and their determination to find the best possible placements for their young people within the resources available, is strong, as is the commitment of SPIs to deliver the best possible opportunities to those young people once a placement has been made.
- 605 If readers with an eye to the SEND Code of Practice believe any aspect of what we are suggesting weakens the force of it – particularly in the area of student choice of institution, which it appears to us is the main area of potential contention – then they should ask themselves whether their proposed solution would cause difficulties in turn for their procurement colleagues. Similarly if procurement colleagues feel that (for example) our treatment of the student voice in choosing provision is incompatible with best purchasing practice, and in particular with establishing best value for money, they might ask themselves whether *their* proposed solution gives sufficient weight to students’ preferences to meet Code requirements.
- 606 Henry Clay, Speaker of the US House of Representatives in the early nineteenth century (amongst other offices), is the usually quoted source of the remark that “a good compromise is when both parties are dissatisfied”. This may be the inevitable case here. But dissatisfaction is less than full disagreement, and it is our intention that – while we do not expect our proposals to be adopted necessarily in full and in the precise way we have written them – this report helps LAs and specialist post-16

institutions to go forward with at the worst no stronger an emotion than “dissatisfied with each other” and at best a greater understanding of each other’s position.

- 607 And perhaps it is not too much to ask that a more open approach to the placement of young people with High Needs providers, and more opportunity for providers themselves to develop opportunities based on a full understanding of the potential range of young people that might take advantage of them, might contribute towards the development of a more effective system in which providers are better able to meet young people’s needs and aspirations.

Annex 1

Purchasing systems currently operating or planned

This Annex sets out a brief summary of the purchasing systems (fairly broadly defined) currently operating, or known to be in the development stages, within England at the time of compiling our report. The entries in the table do not set out to be a full description of the arrangements concerned, but do indicate the LAs involved in each system and whether the system is (self-) described as a framework or a DPS.

In some instances, the arrangements shown are still substantially provisional. This annex should only be taken as an outline guide, and while we have taken every care in compiling it we do not guarantee that it is correct.

In total up to 68 LAs – almost half of all LAs in England – could be covered by these arrangements.

Consortium (LAs covered)	Proposed new procurement model	Notes
South East (5): <ul style="list-style-type: none"> • West Sussex • East Sussex • Kent • Surrey • Brighton & Hove 	DPS to be introduced in early 2017.	West Sussex currently has an active DPS for High Needs placements in the independent schools sector.
South London (10): <ul style="list-style-type: none"> • Bexley • Bromley • Croydon • Greenwich • Kingston-upon-Thames • Lewisham • Merton • Richmond • Sutton • Wandsworth 	DPS operational from May 2016 until (at least) 2020.	<i>Adam</i> ⁵³ are operating this DPS on behalf of the LAs.
NE12+ (12): <ul style="list-style-type: none"> • Sunderland • Newcastle • Durham • Northumberland • Gateshead • North Tyneside • Darlington • South Tyneside • Hartlepool • Redcar & Cleveland • Middlesbrough • Stockton (plus the region's CCGs)	The framework is divided into 8 lots. Operational since February 2016 until (at least) September 2017.	First consortium-based approach to procuring High Needs places at SPIs. Newcastle is the lead LA for this framework.
South west (4): <ul style="list-style-type: none"> • Bath 	N/A	This is not a framework for procurement in the NE12+

⁵³ See <http://www.useadam.co.uk/>.

Consortium (LAs covered)	Proposed new procurement model	Notes
<ul style="list-style-type: none"> • North Somerset • Bristol • South Gloucestershire 		sense – “only” a statement that “...local possibilities of provision [in the 4 LAs] must be explored before out-of-county provision is considered”
<p>White Rose (11):</p> <ul style="list-style-type: none"> <li style="width: 50%;">• Bradford <li style="width: 50%;">• Barnsley <li style="width: 50%;">• Kirklees <li style="width: 50%;">• East Riding <li style="width: 50%;">• Wakefield <li style="width: 50%;">• Leeds <li style="width: 50%;">• Doncaster <li style="width: 50%;">• NE Lincolnshire <li style="width: 50%;">• Sheffield <li style="width: 50%;">• York <li style="width: 50%;">• Rotherham 	<p>The framework has recently been tendered.</p> <p>The framework will be live from January 2017.</p>	<p>At the moment the framework is focused on West and South Yorkshire in the main. Other authorities in the region (11 in total) may join in future.</p> <p>Leeds is the lead LA.</p>
<p>Liverpool City(+?) (5)</p> <ul style="list-style-type: none"> <li style="width: 50%;">• Liverpool <li style="width: 50%;">• St Helens <li style="width: 50%;">• Knowsley <li style="width: 50%;">• Southport <li style="width: 50%;">• Sefton <p>(Potentially other neighbouring LAs could join – i.e. Halton, Warrington and West Lancashire)</p>	N/A	Discussions are at an early stage and it is unlikely that any new model will be operational before 2019.
<p>West London (7)</p> <ul style="list-style-type: none"> <li style="width: 50%;">• Ealing <li style="width: 50%;">• Hounslow <li style="width: 50%;">• Richmond <li style="width: 50%;">• Hillingdon <li style="width: 50%;">• Harrow <li style="width: 50%;">• Hammersmith & Fulham <li style="width: 50%;">• Brent 	DPS	Ealing are committed to launching a DPS, initially for independent school placements but possibly – either immediately or by subsequent extension – for SPIs

A self-test

In this annex we suggest some questions that LAs should ask themselves about their/their consortium's approach to SPI procurement. The "you" in the questions is therefore the reader's LA.

SPIs may also find it instructive to ask the questions about any new approach to High Needs placement procurement with which they are engaged, or on which their opinion is sought.

The questions are in no particular order.

Are you happy that ...

- Your Local Offer adequately explains what is available to young people with high needs – both in the local area and more widely – once they transition at 16 or at 19?
- Young people and their parents understand how they can express an interest in post-16/19 provision, and do not have to wait for a professional to suggest that they might do so?
- You facilitate students and their parents to state a preference for their post-16/19 placement, as they are entitled to do under the *SEND Code of Practice*? Students/parents know how to do this and do not need to do their own research (or call on their own social capital) in order to do so?
- The way you handle student preferences is consistent with the *Code* as well as with your own council Standing Orders?
- If appropriate, a GFE alternative has been considered as an option?
- You run one procurement system and not two (one for students/parents that express a preference, and one for those who do not)?
- Your system supports effective transition planning, which should start (it is usually argued) in year 9 for transition at 16 and year 12 for transition at 19?

If you run a dynamic purchasing system or framework, are you happy that ...⁵⁴

- New SPIs can join at any time and, once they have joined, revise the content of their listing as their business changes?
- Your requirements for joining represent a "floor" standard and not a selection of the "best"?
- If lots/sub-categorising of opportunities is proposed, that these are reasonable and do not unreasonably restrict SPIs' ability to demonstrate the full range of what they can do and to develop their business?

⁵⁴ If you currently run a DPS or framework for *schools* then it is worth asking whether these requirements are likely to be met if/when the DPS is extended to SPIs.

- The joining process and information requirements do not disadvantage certain providers when compared to others – for example in relation to inspections? Do they permit newly established SPIs to join where appropriate?
- The documents you send to SPIs (including EHC Plans, anonymised as may need be) are sufficiently detailed to allow interested SPIs to form a view on whether they could meet need ...
- ... and what it would cost to do so?
- The timescales you provide to SPIs to respond to placement opportunities are adequate, particularly when a large number of placement opportunities are released at once?
- The requirements for expressing an interest are proportionate, given that an SPI may have to complete a number of Eols at the same time?
- You allow SPIs to express their interest in their own format as far as possible, rather than dictating exactly the format that an Eol should follow?
- You adequately recognise that SPIs need to take account of a student's preferred vocational area(s) in their responses to you?
- SPIs are given a reasonable basis – including time to assess the young person if they wish – before they commit to a final programme and associated fee?
- Have the potential wider benefits from the DPS/framework (standardisation of documentation, information requirements etc.; consolidated monitoring visits; sharing of market information etc.) been realised?
- You have built-in mechanisms through which feedback can be given (by LAs; by SPIs; by young people; by parents/carers) and changes to the model discussed?

Annex 3

A comparison of Frameworks and Dynamic Purchasing Systems

Although from the SPI point of view Frameworks and Dynamic Purchasing Systems are similar, there are some technical differences between them. Some of these are contractual and some based on “custom and practice”.

The table below illustrates how – in our experience, and based on our fieldwork for this project – frameworks and DPSs tend to differ. As noted in the main report, there is currently only one active framework and one active DPS for the SPI sector.

Inevitably there is a degree of generalisation about a table such as this.

	Frameworks	DPSs
<i>Format</i>	<p>An agreement between one or more contracting authorities and one or more suppliers/providers that sets out terms and conditions under which agreements for specific purchases (“call-off contracts”) can be made throughout the term of the agreement.</p> <p>Agreements awarded by competitive tender.</p>	<p>A tool for procurement available for contracts for works, services and goods commonly available on the market. Not dissimilar to an <i>electronic framework agreement</i> – but the openness of the list and flexibility in duration of the DPS mean there are still differences.</p> <p>Places on the DPS awarded by application – all who meet the selection criteria are admitted.</p>
	<p>In most cases a framework agreement will not itself commit either party to purchase or supply but will commit the parties to the terms that will apply should a purchase/supply relationship ensue.</p> <p>Any purchaser wishing to use the framework must be “clearly identified” in the OJEU call for competition.</p> <p>A standstill period prior to issuing framework agreements is generally mandatory</p> <p>A single supplier framework is possible.</p> <p>Direct award – i.e. call-off without running a mini-tender possible</p>	<p>No commit to purchase or supply <i>and</i> no commit to any terms or conditions – so, for example, fees are not set in advance for the duration of the DPS (if a duration is set).</p> <p>A DPS can be used by others, not party to it when it was launched.</p> <p>No standstill period is required.</p> <p>By definition, a single supplier DPS is not possible.</p> <p>All opportunities are advertised to all DPS members (subject to any sub-divisions – see below).</p>
<i>Open or closed list</i>	<p>Closed list. (NB NE12+ is looking into whether they can periodically open up their framework whilst it is operational).</p>	<p>Open list. New suppliers – i.e. those not on the DPS initially – must be able to apply to join at any time; all who meet the criteria must be admitted.</p>
<i>Operations</i>	<p>Need not be run electronically – but often is.</p>	<p>Must be run entirely electronically.</p>

	Frameworks	DPSs
	Generally perceived to be a more onerous process to secure an agreement.	Generally perceived to be a less onerous process to join a DPS.
<i>Sub-division</i>	Sub-division into categories (lots) often used.	Sub-division into categories possible.
<i>Duration</i>	Generally no more than four years.	No prescribed maximum time period.
<i>Relevant regulation</i>	Regulation 33 of the Public Contracts Regulations 2015	Regulation 34 of the Public Contracts Regulations 2015