West Lancashire
Clinical Commissioning Group

# PROCUREMENT POLICY

**Document Information**

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**Associated Documents**

**This policy should be read in conjunction with the following documents:**

| Title | Date |
|---|---|
| Standing Orders and Standing Financial Instructions | |
| Managing conflicts of interest where GP practices are potential providers of CCG-commissioned services (NCB) | July 2012 |
| | |
| | |
| | |

This Procurement Policy should be reviewed on a regular basis and at least annually to ensure it remains up to date with all regulations, rules, best practice and guidance. The Department of Health is consulting on proposals for sector-specific regulations – the Procurement, Choice and Competition Regulations which will come into force in April 2013 and The EU Commission has published proposals to revise the existing EU procurement rules. This Procurement Policy will be updated accordingly.

| Authorisation Domains and Equality Delivery System (tick all relevant boxes) | | | |
|---|---|---|---|
| Clinical Focus and Added Value | √ | Leadership Capacity and Capability | √ |
| Commissioning processes | √ | Collaborative Arrangements | √ |
| Clear and Credible Plan | √ | Equality Delivery System | √ |
| Engagement with Patients/Communities | √ | | |

**CONTENTS**

## EXECUTIVE SUMMARY

This document sets out the West Lancashire Clinical Commissioning Group (the **CCG**) Procurement Policy to ensure best practice procurement processes, thus demonstrating value for public money. The aims of the policy are to engender:

**(i)** **Choice:** principles of co-operation and competition and procurement guide (July 2010) states that commissioners should provide choice;

**(ii)** **Competition:** maintain a number of providers to encourage a degree of competition within the health system to continuously improve quality and innovation; and

**(iii)** **Consistency:** clinical safety, equity of access and quality of outcomes need to be ensured

As commissioners we have a clear responsibility to ensure that we make decisions and commission services that deliver both the vision, and the needs of the public. The services we commission have to be affordable within the limits of the available resources, with emphasis on the quality of outcome, rather than the quantity of provision. The challenge for the CCG in the difficult financial period ahead is to deliver value-for-money by obtaining the maximum benefit over time, with the resources available. Throughout 2012-13 and beyond we will continue to work to embed and develop best practice, building on experience and lessons learnt. We will continue to review the services we need to commission. We will identify opportunities to improve efficiency extend choice and access, improve the quality of outcomes, and enhance patient experience.

This procurement policy is part of that approach and sets out the principles, rules and methods we will work to. The policy clearly outlines how and when it is appropriate to seek to introduce competition or to apply other commissioning levers, including working with our partners, to achieve the most beneficial and cost effective models of delivery.

This document:

1. supports the CCG in commissioning high quality value for money services;
2. provides a framework to ensure the CCG is operating in line with procurement legislation and within its Standing Financial Orders;
3. provides a useful tool for staff to use to guide them in making the decisions in relation to commissioning services; and
4. provides all providers with an understanding of the CCGs plans for commissioning and the principles and processes by which this will be done.

**PURPOSE**

The CCG aspires to delivering high quality and value for money in its commissioning of healthcare services. This will put it in the best position to serve its population in delivering its vision, strategic goals and improved health outcomes. The CCG will commission continuous improvement in the quality of services.

An appropriate procurement process can produce considerable cost savings and quality improvements. In the current NHS economic climate, we shall be required to make savings and efficiencies and strategic procurement is a useful tool in achieving this. It will also open up the market to a wider range of providers. This in turn shall help to drive up service quality and innovation.

The July 2010 White Paper "Equity and Excellence: Liberating the NHS" made clear the need for the NHS to deliver efficiency savings, whilst setting out the proposed direction for the NHS:

- Giving patients greater choice and control, equipping them to make decisions through the provision of a greater range of data;
- Focusing on clinical outcomes rather than targets, building on Lord Darzi's review and particularly its focus on quality; and
- Empowering clinicians and other healthcare professionals to use their judgement and innovate.

To do this the CCG will: -

- Manage the provider 'market' and effectively commission services from a variety of providers without compromising quality outcomes;
- Ensure strong clinical insight and engagement;
- Apply robust contracts to assure the delivery of service;
- Produce good quality information to support transparent decision making processes;
- Make the public aware of their right to make choices in relation to their own health; and
- Implement a robust procurement process that follows both legislative and good practice requirements.

The CCG believes that it will only be able to deliver its vision in collaboration with others. Our success will depend upon close partnership working. We are committed to working in strong partnership with the local community, Local Authority and healthcare providers. The CCG will develop collaborative and integrated service delivery with other health economies where it is proven that this adds value.

This procurement policy sets out the framework within which the CCG will work to ensure that procurement fulfils the requirements of the CCG's commissioning services, directly contributes to the CCG's corporate aims and objectives and meets legal requirements. It sets out the principles, rules and methodologies that the CCG will work to and clearly outlines how and when it is appropriate to seek to introduce contestability and competition as a means of achieving the best clinical outcomes and achieve value for money.

## NATIONAL CONTEXT

The CCG's strategic principles, priorities and plans, including this procurement policy, need to be understood within the national context of the development of health policy in the UK. Fundamental to the Department of Health's strategy to improve the NHS is the wish to provide better care, better patient experience and better value for money.

The CCG is committed to securing the best services for its local population, reducing health inequalities, increasing access to services and improving clinical quality and outcomes. This procurement policy main focus is on providing a meaningful procurement process to enable the greatest benefit in terms of health outcomes and achieving value for money.

This Procurement Policy is intended to meet all relevant national and regional guidelines and strategies including but not limited to:

- Procurement guide for commissioners of NHS funded services, Gateway ref 14611 (July 2010);
- Principles and rules for cooperation and competition, Gateway ref 14611 (July 2010);
- NHS Operating Framework 2012/13;
- The CCG Commissioning Strategy ( 2012);
- The CCG's Standing Orders and Standing Financial Instructions.

The current national guidance does not introduce any general policy requirement that all NHS services should be subject to competitive tendering. The current policy is to create an NHS that is much more responsive to patients and achieves better quality outcomes. A step to achieving this is to increase the current offer of choice, giving patient's choice of any qualified provider where relevant.

The operational guidance on the application of Any Qualified Provider (AQP) was issued in July 2011 and this, together with the establishment of the CCG and the impact of wider organisational changes on the NHS means that procurement strategy needs to be substantially updated. The expectation is that the AQP model will be required to be used more extensively to extend patient choice in a range of community and mental health services and priority areas, beyond those already identified locally. The NHS Supply2Health website has been upgraded to provide information about AQP for patients, commissioners, NHS staff and current providers. The website also provides AQP implementation packs for the eight priority areas originally established by DH.

The CCG, as a Public Body must comply with EU procurement requirements; these require that the procurement processes used for procuring services from a provider are fair and transparent. CCGs need to ensure potential providers are given clear guidance on what services the CCG wish to procure and the selection process that will be used to select the provider.

## LOCAL CONTEXT

### What the CCG will commission

The role of the CCG is to purchase and plan health services for its population as directed by the National Commissioning Board.

**Guiding principles**

The CCG is committed to commissioning services from the providers who are best placed to deliver the needs of our patients and population.

The CCG is required and committed to securing value for money for its patients and taxpayers.

Commissioning and procurement will be transparent and non-discriminatory. The CCG will adhere to good practice in relation to procurement, will not engage in anti-competitive behaviour and will promote the right of patients to make choices about their healthcare.

Potential conflicts of interest will be managed appropriately to protect the integrity of the NHS commissioning system.

**Procurement Support**

It is essential to have the appropriate organisational structure, capacity, training and infra-structure in place to complement the procurement policy. The CCG will work with the Lancashire Commissioning Support Unit (CSU) to ensure the necessary skills and expertise is available to undertake procurement successfully.

It is expected that the existing procurement guidance and support will remain available to retain corporate memory and that the service will be provided flexibly in accordance with CCG commissioning requirements.

**Premises and equipment**

In line with national policy it is expected that most of the remaining PCT assets will transfer to the new national NHS Property Company on 1st April 2013. The CCG will work with this new organization to ensure the future use of assets is in line with the needs of the local population and supports the effective commissioning of healthcare services.

**HEALTHCARE MARKET ANALYSIS**

The CCG plans to undertake a preliminary analysis of its local healthcare market on the basis of its strengths, weaknesses, opportunities and challenges. This analysis is will be defined within the Clinical Commissioning Strategy. The markets shall be assessed on the basis of five criteria:

i. **Choice**: defined by the number of providers currently available in the market;
ii. **Quality**: defined by business intelligence (benchmarking, outcomes, performance) etc;
iii. **Provider concentration**: defined as current provider market share by locality, ward, etc;
iv. **Switching**: defined as the potential for patients to choose an alternative provider; and
v. **Levers**: clinical rules and regulations, contractual requirements, training standards, provision of information to patients.

## COMPETITION OR CO-OPERATION

In accordance with the Procurement guide for commissioners of NHS funded services (July 2010) (the Procurement Guide), the CCG will use contract management where an existing contract is in place in order to secure incremental improvements/changes to existing services, or to address underperformance as an alternative to procurement (e.g. to reduce cost).

However where any planned change will extend the scope of the contract considerably to encompass services not initially covered in the existing agreement or increases the value say by more than 10%, then this may be considered to have created a new contract and therefore procurement options should be considered.

**Pilots** – may be used with incumbent or new providers, but these are subject to the procurement principles below and other strict limitations.
Any Qualified Provider should be used where commissioners are seeking to extend the current offer of choice and access. This cannot be used to address quality issues or price issues alone.

The CCG will consider procurement options for securing services outside the scope of existing contracts (including material changes), including, new service models, significant increases in capacity and where existing contracts are due to expire or be terminated (e.g. where contract management is unable to address underperformance). Commissioners must be able to demonstrate consistency with the overarching principles of public procurement, these being:

- Transparency;
- Proportionality;
- Non-discrimination; and
- Equality of Treatment.

## PROCUREMENT PROCESS

Procurement is the process of commissioning services covering both existing providers and new providers. The procurement process starts from identification of need, to the decision whether to tender or not through to the conclusion of a services contract and its ongoing management. The development and management of provider markets to ensure capacity and capability is essential.

This Procurement Policy has been developed to support consistent and transparent decision making within the CCG, when commissioning healthcare services. It will identify the systems and procedures required for the CCG to meet patient needs, demonstrate quality, governance and probity, good procurement practice and achieve value for money by delivering cost effective high quality services.

The CCG's aim is to improve the quality and accessibility of services to patients through a process of service review, robust contracting, key performance indicators (KPIs) and provider development activity. The CCG will work to develop provider markets as well as working with existing providers to improve service quality.

This Policy will assist the CCG in delivering its strategic objectives and improving quality, value for money and choice for patients. The interests of patients are fundamental in decision making regarding

the commissioning of health services. Equally the CCG has an obligation to ensure value for money and to be transparent, equitable and non- discriminatory when commissioning services.

**When to procure**

The CCG as a public healthcare body is governed under the EU Procurement Directive and the following thresholds apply since 1st January 2012 (they are subject to ongoing review):

Public Contract Regulations 2006 – Procurement Thresholds

| SUPPLIES<br><br>Part A | SERVICES<br><br>Part B | WORKS |
|---|---|---|
| £113,057 | £173,934 | £4,348,350 |

Part A Services includes all goods and supplies for example, maintenance of healthcare equipment, office supplies and training and education. For products and services that fall under part A and where procurements exceed the thresholds then either the 'Open', 'Restricted', 'Negotiated', or 'Competitive Dialogue' procedures must be adhered to. The following flowchart identifies the procurement route to be taken depending on the value of the contract.

Part B Services are defined as "the procurement of clinical services falling with the category of "health and social care services" which need not be advertised or competitively tendered under the Regulations".

Whilst the full EU procurement rules do not apply to healthcare services, which are included in Part B (Residual Services), a number of requirements do apply to Part B Services procurements under the rules and principles of the EC Treaty. Essentially these are concerned with ensuring a fair, equitable and transparent process, advertising widely enough to reach all potential providers, having a clear specification for what is being procured and a transparent means of evaluation. There is also an obligation to publish a contract award notice in the Official Journal of the European Union (OJEU) within 48 days of contracts being signed.

Part B service procurement can follow any procedure that meets the overarching EC principals of transparency, proportionality, equality of opportunity and non-discrimination. The first stage is to decide whether a Part B service needs to be procured competitively.

In deciding whether a Part B service should be procured, the decision making process at Annex 1 shall be used (published at http://www.commissioningboard.nhs.uk/files/2012/09/procure-brief-5.pdf)

Note 1: Under the *Procurement Guide*, procurement options should be considered for securing services outside the scope of existing contracts, including additional choices for patients, new service models, significant increases in capacity and where existing contracts are due to expire or be terminated (e.g. where contract management is unable to address underperformance).

**Procurement options**

Once a decision has been made to procure the main procurement routes available to the CCG are detailed below. Advice should be sought from CSU on the most appropriate route for each service tender and this should be approved by the CCG.

The following Procurement options should be considered and should reflect the market, value and complexity of the service being commissioned so that a proportionate procurement approach is applied:

**Any Qualified Provider** – the Government is committed to increased choice and personalisation in NHS-funded services through the Any Qualified Provider (AQP) route. AQP will provide patients with an extended choice of qualified providers who meet NHS service quality requirements, prices and normal contractual obligations.

**Competitive Tendering** – an increasing number of services will be subject to competitive tendering in order to comply with the requirements of transparency, openness, equitability and obtaining (and proving) value for money.

Competition may be waived - in circumstances such as (genuine) urgency, monopolistic rights or where only one provider can provide the service for technical reasons or special exclusive rights. In these circumstances the Single Tender Waiver procedures set out in the CCG's Standing Orders and Standing Financial Instructions must be followed.

Where it is decided not to competitively tender for new services or where services are significantly changed, CCG approval MUST be obtained and a rationale recorded as required by the Procurement Guide.

**Framework Agreements** - the CCG is able to use other public sector organisations framework agreements if a provision has been made in the framework agreement to allow this (that is by the holder of the framework agreement, such as the Department of Health). The EU rules for tendering state that framework agreements should be for no longer than four years in duration. Details of framework agreements can be found on:

http://gps.cabinetoffice.gov.uk/

Where it is allowed for in the framework agreements there may be an option for running mini competitions. Here all providers on the framework who can meet requirements are invited to submit a bid, these are then evaluated and business awarded following the same processes used for "conventional tenders". Any contract awarded can run beyond the framework agreement period but the length of the contract extension must be reasonable.

**Grants** - Public bodies must follow public procurement policy at all times. In certain circumstances grants are payable to third sector organisations. However, there should be no preferential treatment for third sector organisations. Use of grants can be considered where:

- Funding is provided for development or strategic purposes.

- The provider market is not well developed.
- Innovative or experimental services.
- Where funding is non- contestable (i.e. only one provider).

Grants should NOT be used to avoid competition where it is appropriate for a formal procurement to be undertaken.

**PROCUREMENT PRINCIPLES AND OBJECTIVES**

In carrying out its commissioning role, the CCG will adopt the following procurement objectives and principles.

**Objectives**

- Support the CCG's transformation through the delivery of high quality, responsive, innovative (where appropriate) affordable and sustainable clinical services which are patient focused and deliver better healthcare outcomes for local residents;
- Stimulate the provider market to provide competition to meet demand and secure required clinical, health and wellbeing outcomes;
- Apply procurement skills, expertise, processes and methodologies that ensure robust, viable and value for money contracts;
- Ensure procurement processes are effective, are transparent and equitable and are defensible to scrutiny;
- Ensure that sustainable and ethical procurement is undertaken to achieve best value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment;
- It will be fair, transparent, equitable and non–discriminatory. The CCG will use procurement amongst other tools as a means of ensuring quality, delivery of health outcomes and value for money;
- Value for Money is a pre-requisite of service commissioning. The CCG will regularly review all healthcare service provision and the broader provider market, enabling the CCG to focus resources where clinical outcomes can be best (positively) influenced by procurement;
- Each procurement will include a cost comparison of the new service (where applicable) with the cost of delivering the equivalent service with existing providers whilst ensuring quality of delivery. Service specifications will be clear, concise and non-discriminatory using or based upon Department of Health templates; and
- The PCT will be open and transparent in the way it conducts commercial relationships with potential providers and existing providers.

**Principles**

**Transparency** the requirement of transparency is fundamental to the accountability of the CCG, the following areas show how we will be transparent in our commissioning process:

- **Stating commissioning strategies and intentions:** We will publish our short to medium term commissioning intentions on

our website providing a link to them via NHS Supply2Health. This will indicate those services which are expected to go through a competitive procurement process and which will likely to be delivered via Single Tender Actions;

- **We will publish** any strategies that indicate our commissioning intentions;

- **Stating the outcome of service reviews and whether a competitive tender is to be used:** We will state the outcome of service reviews and how we intend to secure the service going forward and whether a competitive tender is to be used and by which method (i.e. Any Qualified Provider, Single Tender Action or competitive tendering). Where appropriate we will publish upcoming tenders, and other such information, such as Prior Information Notices (PIN) prior to any formal process;

- **Advertisement of Procurement and notification of Contract Award:** We will notify all awards of new competitively tendered contracts with a lifetime value of over £100,000 on NHS Supply2Health and to OJEU for all contracts over €200,000.We will comply with Cabinet Office policy and guidance by publishing all tender opportunities and contract awards over £10,000 on Contracts Finder at:

  http://www.contractsfinder.businesslink.gov.uk/

- Once procurement has resulted in the award of new contract(s) we will provide **feedback to any unsuccessful bidders** and allow a standstill period between notifying the contract award decision and executing the contract; and

- **Transparency of documentation and process/decisions:** We will ensure an auditable documentation trail, that is itself transparent, regarding key decisions (e.g. tender/no tender), which provides clear accountability.

**Proportionality**

The actions we take will be proportionate to the value, complexity, risks and benefits to patients and the services provided. The contractual framework will be appropriate and proportionate to the services being commissioned, (e.g. the contract duration will be proportionate to the scale of investment required of the provider and the degree of risk transfer involved.

We will also ensure that criteria should not be disproportionately demanding (i.e. to the value of the contract or level of clinical risk associated with the services). In addition we will seek to avoid providers incurring wasted costs due to significant delays or material

scope changes.

**Non-discrimination** We will ensure that the commissioning and procurement process is non- discriminatory and transparent at all times, neither including nor favouring nor excluding any particular provider. This includes all documentation and particularly the identification of criteria and weightings that will be used as part of any evaluation process.

We will make available all appropriate information in good time to enable potential providers to properly assess whether they wish to express an interest in providing the relevant services.

**Equality of treatment** We will clearly identify those services which will be put out for competition. We will ensure that the procurement process does not give an advantage to any market sector; we will treat all providers (NHS and non NHS) equally. The basic financial and quality assurance checks will be applied to all types of providers but will be proportionate to the service being procured. All providers will operate under the same principles when being asked to respond to any tender specification and pricing payment regimes.

**Consistency** We will apply national and local principles and rules in relation to procurement consistently across the CCG and over time.

**Timescales** Sufficient time will be allowed to enable bidders to submit their tender in line with best practice. This will depend on the value and complexity of the contract. Thought must also be given to the bidder population. In all instances where a competitive procurement process is to be undertaken the CCG will seek procurement advice from CSU at an early stage. It is not unusual for complex procurements to take many months to complete. An appropriate contract implementation period needs to be included in the procurement plan, to allow sufficient time for the contractor to mobilize.

**De-brief** It is good procurement practice to offer unsuccessful bidders a de-brief to explain where their bid failed. The de-brief should enable the unsuccessful bidder to be in a better position to bid for future contracts.

**Standstill Procedure** The CCG will follow the EU Remedies Directive (2009) and allow a 10 day standstill period between notification of a contract award and the actual contract award.

**Contract** A signed contract MUST be in place before services commence. The contract must contain contract monitoring and performance management processes to ensure that contractual obligations are

met and quality standards are met and improved. All contracts must follow DH model contracts where available.

**Conflicts of Interest** Whatever method is used to commission services the CCG will ensure that there are no Conflicts of Interest. All Conflicts of Interest will be declared and managed appropriately in accordance with the NHS Commissioning Board Authority's Code of Conduct.

Where it has been deemed appropriate to procure services from GP practices, either direct or via an AQP route, the CCGs conflict of interest policy will ensure that this is done in a transparent and fair way. Where services are being procured from GPs then the Code of Conduct: Managing conflicts of interest where GP practices are potential providers of CCG commissioned services, NHS Commissioning Board July 2012, should be adhered to, and the template provided on the National Commissioning Board's website will be completed.

In summary, in order to deliver high quality and value for money services the CCG will carry out fair and open procurement and contracting processes to ensure we commission services that give greatest benefit and value for money to patients and the wider community and meet the priorities set out in the CCGs Clinical Commissioning Strategy and associated plans.

## PROCUREMENT AND COMPETITION RULES AND PRINCIPLES

There is no general policy requirement for NHS Services to be subject to a formal procurement process. However, the CCG will follow the guidance set out in the:

- DH Procurement Guide for Commissioners of NHS-funded services 2010 (Gateway reference 14611**);**
- DH Principles and Rules for Cooperation and Competition 2010 (Gateway reference 14611); and the
- CCG Standing Orders and Financial Instructions.

The Principles and Rules of Cooperation and Competition (July 2010) (the PRCC) form part of the national Operating Framework in establishing the system of rules governing cooperation and competition in the commissioning and provision of NHS services in England. The PRCC sets out the following 10 principles and rules:

a) Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and population.

b) Commissioning and procurement must be transparent and non-discriminatory and follow the *Procurement Guide* issued in July 2010.

c) Payment regimes and financial intervention in the system must be transparent and fair.

d) Commissioners and Providers must cooperate to improve services and deliver seamless and sustainable care to patients.

e) Commissioners and providers should promote patient choice, including, where appropriate, the choice of Any Qualified Provider and ensure that patients have accurate and accessible information to exercise more choice and control over their healthcare.

f) Commissioners and providers should not reach agreements which restrict commissioners or patient choice against patients' and taxpayers' interests.

g) Providers must not refuse to accept services or to supply essential services to commissioners where this restricts commissioner or patient choice against patients' and taxpayers' interests.

h) Commissioners and providers must not discriminate unduly between patients and must promote equality.

i) Appropriate promotional activity is encouraged as long as it remains consistent with patients' best interests and the brand and reputation of the NHS.

j) Mergers, including vertical integration, between providers are permissible when there remains sufficient choice and competition or where they are otherwise in patients' and
taxpayers' interests, for example because they will deliver significant improvement in the quality of care.

The CCG Standing Orders & Financial Instructions (which encompass the EU Directives) must be adhered to. The Standing Orders and Financial Instructions set out the processes and requirements for all the CCGs financial transactions including the procurement of services. These must be adhered to in all the transactions of the CCG and therefore should be considered alongside this Procurement Policy when undertaking procurement.

Other current and future legislation and guidance affecting procurement includes:

**Section 242 of the National Health Service Act, 2006** provides that commissioners of healthcare services have, in relation to health services for which they are responsible, a legal duty to involve and consult patients and the public – directly or through representatives – on service planning, the development and consideration of service changes and decisions that affect service operation.

**Section 75 of the Health and Social Care Act**, 2012 which will place requirements on commissioners to ensure that they adhere to good practice in relation to procurement, do not engage in anti-competitive behaviour, and promote the right of patients to make choices about their healthcare.

**NHS SUPPLY2HEALTH**

NHS Supply2Health is a mandatory online website resource introduced by the Department of Health in October, 2008 for the advertising of all Part B clinical services tenders commissioned by the NHS in England over £100,000 in (cumulative) value.

It is a central source of information for potential providers of Part B clinical services and will advise them what contracting opportunities exist for them from the NHS.

Supply2Health satisfies EU regulations in regard to fairness and transparency with regard to Part B clinical services. An advertisement must be placed in Supply2Health even if an OJEU advert is placed.

**USE OF INFORMATION TECHNOLOGY**

Wherever possible the use of technology and e-procurement methods should be used. These will assist in streamlining our procurement processes whilst at the same time providing a robust audit trail.

E–Tendering solutions provide a secure and efficient means for managing tendering activity particularly for large complex procurements. They offer efficiencies to both buyers and sellers by reducing time and costs in completing tenders. An added advantage is the use of electronic documents enables easy transfer of information and helps contribute to the environment by reducing paper. CSU plans to continue the use of an E-tendering system.

**DECOMMISSIONING SERVICES**

The need to decommission contracts can arise through:

- Contract Termination due to performance against the contract not delivering the expected outcomes. This can be mitigated by appropriate contract monitoring and management and by involving the provider in this. The contract terms will allow for remedial action to be taken to resolve any problems. Should this not resolve the issues, then the contract will contain appropriate termination provisions;
- The contract expires; and/or
- Services are no longer required.

Where services are decommissioned, the CCG will ensure where necessary that contingency plans are developed to maintain patient care. Where decommissioning involves Human Resource issues, such as TUPE issues, then providers will be expected to co-operate and be involved in discussions to deal with such issues.

**TRANSFER OF UNDERTAKINGS & PROTECTION OF EMPLOYMENT REGULATIONS (TUPE)**

These regulations arose as a consequence of the 1977 European Union's Acquired Rights Directive and were updated in 2006. They apply when there are transfers of staff from one legal entity to another as a consequence of a change in employer, for example they may apply if an 'in house' service is contracted out to another organisation. This is a complex area of law which is continually evolving. Commissioners need to be aware of these and the need to engage HR support and possibly legal support if there is a possibility TUPE may apply.

Additionally, NHS Bodies must follow Government guidance contained within the "Cabinet Office Statement of Practice 2000/72 and associated Code of Practice 2004 when transferring staff to the Private Sector".

Adequate time must therefore be allowed in tender timetables for staff consultation where transfer of staff is a possibility.

**ETHICAL AND SUSTAINABLE PROCUREMENT**

The way we spend this money will have a significant impact on the area we serve. The CCG can have a significant impact on the local health economy by helping reduce health inequalities and improving the wellbeing of the community we serve. This will be achieved by commissioning services that are appropriate and from providers best placed to provide those services.

When making purchasing decisions we need to consider the opportunities for any additional social, economic or environmental benefit that we can bring to the community whilst working within the procurement rules and principles.

It is the intention of the CCG to develop and encourage local providers wherever possible taking due notice of procurement rules and regulations. The location of services will be considered, for example, a very specific localised service may be best provided by a local provider.

To assist the development of providers the CCG will be holding Provider Development workshops to describe commissioning intentions and to give help and guidance on procurement processes. In hosting these workshops all providers, both current and potential, should be invited as all providers should be treated equally. The Supply to Health website will be used to publicise the events.

**TRAINING AND AWARENESS**

The CCG plans to have access to an expert procurement team at CSU that can provide commissioners and other CCG staff with current up-to-date procurement advice and to ensure appropriate process governance is adhered to. The training shall be coordinated by the CSU procurement team.

**PUBLIC SECTOR EQUALITY DUTY**

The CCG will comply with its duties under the Equality Act 2010.

**INNOVATION**

The CCG will comply with its duties to promote innovation under the NHS Operating Framework.

**CHOICE AND SHARED DECISION MAKING**

In accordance with the Health and Social Care Act 2012, the CCG will comply with its duties to enable patient choice and shared decision making as set out in the CCG's Constitution.

**STAKEHOLDER CONSULTATION AND ENGAGEMENT**

Effective consultation is a key part of the procurement process and can provide the greatest threat of challenge if not undertaken carefully and in line with guidance. The CCG has a duty to involve and

consult with patients and the public on:

- the planning of the provision of services;
- the development and consideration of proposals for changes in the way those services are provided; and
- decisions to be made affecting the operation of those services.

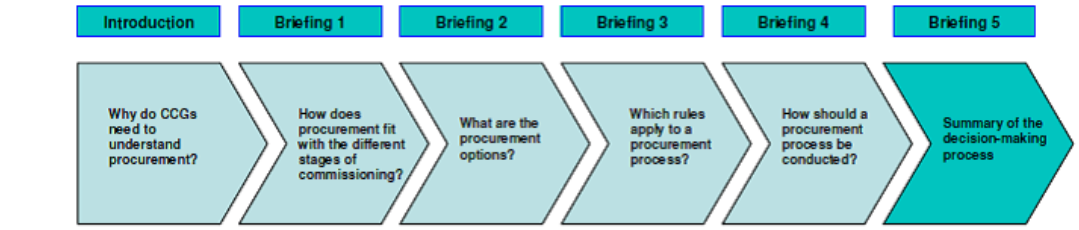
This is quite a wide responsibility, and is not limited to “substantial developments”. As the threshold for consultation is not defined, and there is a requirement to involve the public in planning the provision of services, it would be better for the CCG to engage on an ongoing basis through the Local Improvement Networks (LINk) and local HealthWatch (from April 2013). In addition where appropriate any proposals should be considered by the Overview and Scrutiny Committee.

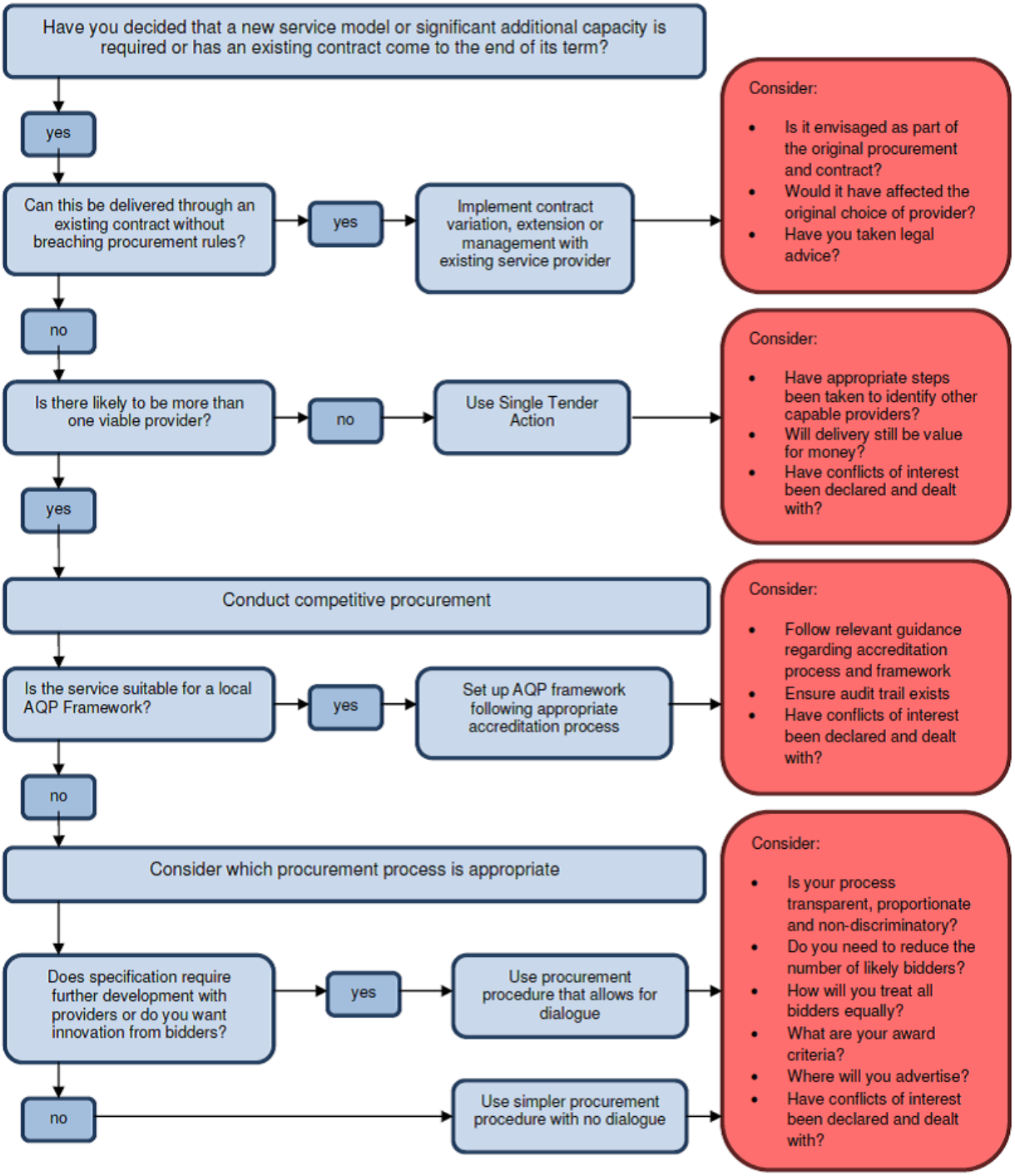
However, there will be times when formal consultation will be required, and the process needs to comply with the statutory requirements as judicial review can be sought if the process is flawed. To minimise any risk of a judicial review, there are four basic criteria that the CCG will adhere to through any consultation process:

- consult widely throughout the process;
- be clear about what the proposals are, who may be affected, what questions are being asked, and the timetable for responses;
- ensure that the consultation is clear, concise and widely accessible; and
- give feedback regarding the responses received and how the consultation process influenced the policy.

**Annex 1**

# Briefing 5: Summary of the decision-making process



NHS Commissioning Board
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# Procurement of healthcare (clinical) services

## *Introduction: Why do CCGs need to understand procurement?*

First published: September 2012

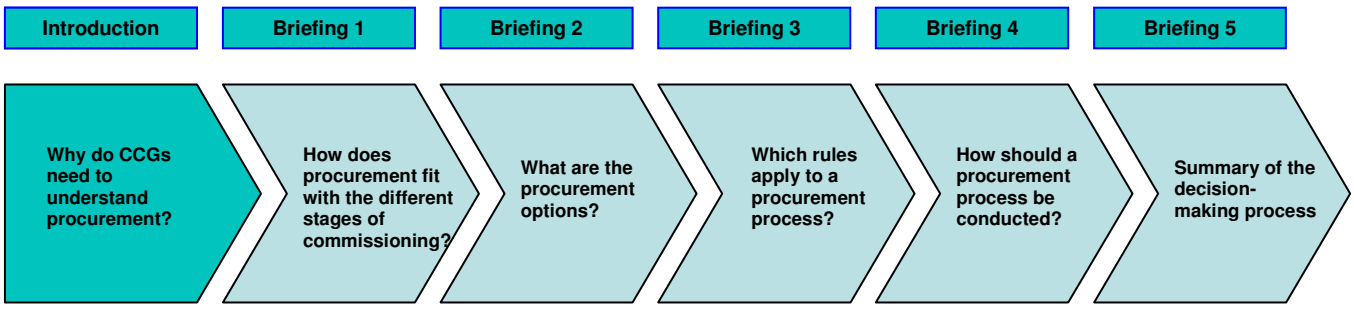
**Prepared by the Commissioning Development Directorate**

# Introduction: Why do CCGs need to understand procurement?

## What do these briefings cover?

This series of briefings for CCGs highlights and builds on some of the key messages in the *Procurement guide for commissioners of NHS-funded services.*[1]

The aim of these briefings is to help CCGs understand what procurement is and when to use procurement for **healthcare (clinical) services**, to provide an overview of the different procurement approaches that CCGs may adopt in appropriate circumstances and to outline some of the key considerations when undertaking a procurement process. There are a series of connected briefings.




These briefings will:

- set out the key milestones in the different stages of commissioning;
- explain the integral role of procurement in the stages of commissioning;
- explain your responsibilities in relation to procurement of healthcare (clinical) services;
- set out the points at which you need to make key decisions; and
- help you understand what governance arrangements you need to put in place to discharge your responsibilities.

## Who should read these briefings?

These briefings are for members of CCGs and may also be helpful for members of CCG governing bodies and staff. The *Procurement guide for commissioners of NHS-funded services*

[1] See http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118218

provides more detailed advice for commissioners of NHS-funded healthcare services and their agents.

These briefings are designed to be read by members of the CCG to ensure that everyone has at least a basic understanding of the CCG's responsibilities in relation to procurement of healthcare (clinical) services. You may decide to use commissioning support services to provide you with advice about procurement of healthcare services and to carry out procurements on your behalf but you will always remain responsible and accountable for making decisions throughout the process.

It is recommended that an individual and/or committee has specific responsibility for procurement matters. That individual and/or committee will need to understand the CCG's obligations in more detail and take responsibility to ensure that they are met.

## What is procurement?

CCGs will be responsible for securing health services to meet the needs of their patients. They will be able to secure these services in three broad ways:

- first, through the contracts with existing providers that they will inherit from PCTs and through future variations in those contracts;
- second, through enabling patients, when they are referred for a particular service, to choose from Any Qualified Provider (AQP) that wishes to provide the service;
- third, through tendering for a new or replacement service, i.e. identifying the single exclusive provider or group of providers that will be chosen to provide that service.

Procurement covers the second and third of these routes for securing services.

## Why do you need to understand procurement?

- Effective procurement is an essential component of commissioning improved services and outcomes for local patients and communities and ensuring value for money.
- It is your responsibility. To ensure they are in the driving seat, clinical commissioners will be responsible for determining (working within the statutory frameworks), when and how to use competition.
- It is a matter of law. As a public body, a CCG will need to adhere to legislation that governs the award of contracts by public bodies, including the Public Contracts Regulations 2006, and will need to satisfy the obligations of transparency, equal treatment and non-discrimination set out in the regulations. CCGs will also need to comply with regulations to

be implemented under section 75 of the Health and Social Care Act[2], which will place requirements on commissioners to ensure that they adhere to good practice in relation to procurement, do not engage in anti-competitive behaviour, and protect and promote the right of patients to make choices about their healthcare.

- These briefings will help you be aware of your CCG's obligations and how it can fulfil them.

## Will you use commissioning support services?

You may find it useful, or necessary, to use commissioning support services to help you manage your procurement processes.

Where you choose to use commissioning support, you will still need to understand the procurement requirements and legislation. **A CCG will remain accountable whether or not it appoints others to carry out activities on its behalf.** You must not unlawfully delegate to other organisations the responsibility for making decisions.

## What do I need to know for authorisation?

As part of the authorisation process, you will be required to declare that your CCG is compliant with current statutory and policy-led procurement requirements and will have systems in place to discharge those requirements.[3] You will therefore need to ensure that such systems are in place. These briefings will help you to understand these requirements.

[2] The consultation on the content of the section 75 regulations commenced on 15 August and can be found at http://www.dh.gov.uk/health/2012/08/consultation-commissioners/ Views are sought by 26 October 2012.
[3] See http://www.commissioningboard.nhs.uk/resources/resources-for-ccgs/auth/

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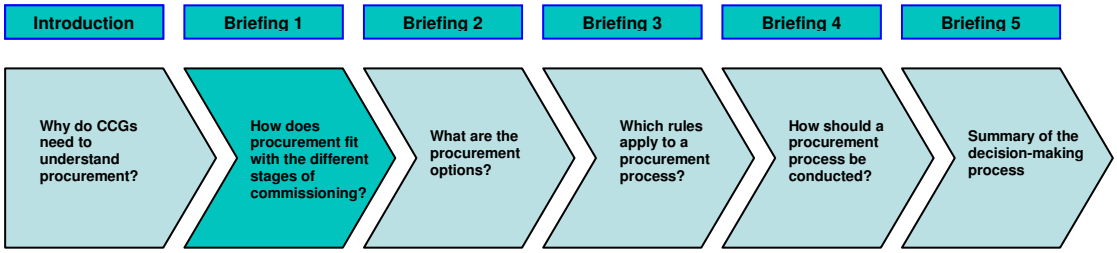
# Procurement of healthcare (clinical) services

## *Briefing 1: How does procurement fit with the different stages of commissioning?*

First published: September 2012

**Prepared by the Commissioning Development Directorate**

# Briefing 1: How does procurement fit with the different stages of commissioning?




*Commissioning* is the process of putting in place healthcare services that effectively meet the needs of the population. It is a complex process with responsibilities that include assessing population needs, prioritising health outcomes, specifying requirements, securing services and monitoring quality of services.

*Procurement* is the process of securing, or purchasing, those services.

When public sector bodies, such as CCGs, procure services, they are not simply allowed to award contracts to, or otherwise enter into arrangements with, providers of those services. Public sector bodies are subject to various rules and regulations governing procurement. You must ensure that your CCG complies with these rules and regulations. These are described further in **Briefing 3**.

## When will you need to decide whether to conduct a procurement process?

A decision to conduct a procurement process for healthcare services will be made, if at all, after you have been through a number of the different stages of commissioning.

**Needs assessment and determining priorities:** through both the Joint Strategic Needs Assessment and more detailed underpinning analysis, this will involve an assessment of patient and population needs and how well existing services are meeting these needs. This stage will also include agreeing strategic priorities, as part of Joint Health and Wellbeing Strategies, for improving health outcomes and developing commissioning plans that reflect these agreed strategic priorities. This will involve determining where new service models or additional capacity are required.

**Service specification:** describing the patient/population need to be addressed, outcomes to be achieved, quality standards, key performance indicators (KPIs), access requirements, contractual terms and conditions etc.

**Provider engagement:** engaging with a range of current and potential providers to develop and refine service specifications, explore resource implications, consider whether services can be integrated to form new pathways and identify the likely number of prospective providers.

**Procurement**

**(a) Evaluating procurement options:** the previous, iterative, stages will identify whether new service models or significant additional capacity are needed, how services might be configured and whether there is more than one potential provider able to deliver the service(s). This will inform a decision on whether to use an existing contract or a procurement process to secure the provision of the services. Where you decide to conduct a procurement, you will also need to decide whether to conduct a competitive tender (or, in some cases, single tender) to determine the most suitable provider, or whether to allow patients to choose from any qualified provider. See **Briefing 2** for more detail.

**(b) Advertising of procurement and notifying contract award:** once a decision to procure services has been made, it is important to signal to providers that there will be an opportunity open to them. Accordingly, the relevant information should be notified to providers via NHS Supply2Health and (where appropriate) the Official Journal of the European Union (OJEU) as a minimum. See **Briefing 3** for more detail.

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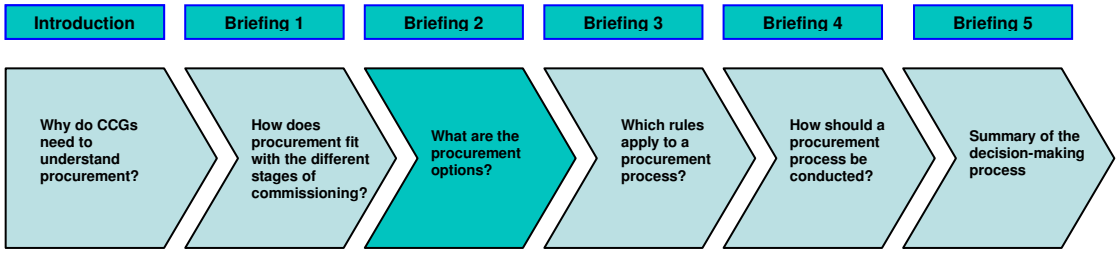
# Procurement of healthcare (clinical) services

## *Briefing 2: What are the procurement options?*

First published: September 2012

**Prepared by the Commissioning Development Directorate**

# Briefing 2: What are the procurement options?




## Should you carry out a procurement process for healthcare services?

The first step is to assess whether a new healthcare service is required. Where an existing service is not being delivered to the required quality or quantity, your first step will be to secure improvements through contract management, for example through payment mechanism, performance monitoring and/or dispute mechanisms. Only after these mechanisms have been exhausted should termination of the contract and its replacement with a new service be undertaken.

Having established that a new healthcare service is required, you should first consider whether any existing contractual arrangements could be used to deliver the required services.

Where there is a contract for healthcare services already in place, you may be able to use the variation or change processes in that contract to secure incremental change to service provision, but only where change was envisaged in the contract and where this change does not materially alter the nature of the contract as originally procured such that it amounts to a new contract. This would be likely to be considered the case where:

- other providers would have been interested in bidding for the contract if the change had originally been part of the specification when the service was originally procured;
- the contract would have been awarded to a different provider if the change had originally been included in the original service specification;
- the change involves genuinely new services not originally within the scope of the specification covered by the contract; or,
- there is a significant change in the value of the contract.

As your CCG may be subject to challenge if you use a contract variation inappropriately, you should always take appropriate procurement advice before following this route.

Where none of these options is available, you will need to consider your procurement options for letting a new contract.

## What sort of a procurement route is appropriate?

The main procurement routes available to you are:

- to open the service to Any Qualified Provider (AQP) and enable patients to choose from these providers;
- competitive tendering process to appoint a specific provider, a specified number of providers or collaboration of providers; or
- appoint a specific provider or group of providers without competition (Single Tender Action).

Which of these routes you choose will depend on various factors set out below, including the nature, scale and importance of the required service, the urgency of the clinical need, the number of potential providers, patients' preferences, and whether the service is suitable for an AQP approach.

The rationale for procurement decisions will need to be approved by the CCG (or under permitted delegated authority) and should be documented formally to ensure transparency and accountability.

In addition, and where appropriate, care should be taken to structure any procurement process in a way that makes it fair and transparent to all bidders (e.g. if using dialogue, all bidders that meet minimum requirements should be given the same opportunity to enter into such dialogue).

### *Patient choice of Any Qualified Provider*

Under AQP, any provider assessed as meeting rigorous quality requirements who can deliver services to NHS prices, under the NHS Standard Contract is able to deliver the service. Providers have no volume guarantees and patients will decide which providers to be referred to on the basis of quality. It is a means of securing innovative services in line with patient preferences.

To determine whether patient choice of AQP is appropriate for a given service, you should consider the characteristics of the service and the local healthcare system. This will include whether the service lends itself to patient choice, an assessment of the current market, how much competition and choice there is now and how much is required and what the barriers to entry are. The Directory of Qualified Providers will show whether similar opportunities for AQP for that service have been created elsewhere and what price and service specification were used giving you a starting point for the procurement of your service.

One of the key features of the suitability of AQP is whether the circumstances of the service mean that patients would be in a position to exercise choice. So, it is more likely to be suitable for planned services than emergency services. Good examples are podiatry and adult hearing services and the current system effectively uses AQP for the vast majority of planned, acute care as patients choose which provider to be referred to for their first consultant led outpatient appointment for most elective procedures. It is also important that a range of providers would be available.

The AQP Resource Centre provides more information and a checklist[1] of activities commissioners should review when deciding on commissioning services through Any Qualified Provider.

Where you decide to use the AQP route, you will need to determine the service specification and associated pricing structure, key contractual terms and assessment criteria before advertising the opportunity to the market. As set out above, you may find it helpful to refer to existing service specifications and prices before placing the advertisement. Once the opportunity is advertised, providers are assessed using the nationally consistent qualification process and should qualify if they can:

- meet rigorous quality requirements;
- meet the Terms and Conditions of the NHS Standard Contract;
- accept the NHS price for the service; and
- provide assurances that they are capable of delivering the agreed service requirements that you have set and can comply with referral protocols.

Providers may challenge a decision not to qualify them where they feel that this has not been made on reasonable grounds. It is therefore essential that you use the nationally consistent qualification process and that your decisions are objective, reasoned and recorded at all times.

For more information, there is a commissioner toolkit for AQP at http://www.supply2health.nhs.uk/AQPResourceCentre/Pages/AQPHome.aspx

### *Competitive tendering process*

This is the most common and wide-ranging route for procurement. Where there is more than one potential provider for a service and an Any Qualified Provider approach is not considered suitable, you may elect to run a competitive tender process in order to award a contract. A competitive process should ensure fairness and help demonstrate value for money.

[1] https://www.supply2health.nhs.uk/AQPResourceCentre/AQPServices/Qualification/Pages/Stage0.aspx

There are several types of competitive tendering processes. For instance:

- if a large number of providers are likely to be interested, you should consider using a multi-stage tendering process to restrict the number of providers that are ultimately invited to bid. This can make the process more manageable and reduce costs both for your CCG and for the bidders;
- for a complex procurement or where you are seeking innovative solutions or need to work with the providers to develop the service model, it may be more appropriate to use a process that allows for a dialogue with bidders, rather than just asking for bids in response to a defined specification.

### *No competition - Single tender action*

Where you determine through analysis of the market and proportionate and transparent engagement with potential providers that the services are capable of being provided only by one particular provider (e.g. for technical or economic reasons), or there is an urgent clinical need, you may consider it appropriate to proceed with a single tender action, where a contract is awarded to a single provider – or a limited group of providers – without competition.

The law in this regard is complex and carries an inherent risk of challenge. It is therefore important if you decide to take this route that you record the rationale for the decision. Failure to plan adequately is unlikely to be accepted as an urgent clinical need. Where a service is put in place for reasons of urgency or safety, you should consider this as an interim step and plan to undertake a competitive process as soon as possible.

It may be possible, in very limited circumstances, to award a contract to one provider to protect exclusive rights (e.g. intellectual property) that the provider holds, but only if another provider could not offer an equivalent service or way of providing the service, which would achieve the same outcome or aim.

It is good practice and prudent to advertise a single tender opportunity in the same way as any for other contract opportunity to demonstrate transparency and equality of treatment and to determine that there really is only one capable provider. You should ensure that you have in place evidence of the review and options appraisal that led to the decision that a single tender action is appropriate.

## Conflicts of Interest

In all of the procurement routes described above, it is possible that the chosen provider or key personnel are also a member of the CCG. There is a conflict of interests in this situation. The Code of Conduct for CCGs[2] describes safeguards that

[2] See http://www.commissioningboard.nhs.uk/files/2012/07/c-of-c-conflicts-of-interest.pdf

CCGs are advised to put in place where commissioning services that may be provided by members of the CCG. These include a template to help CCGs assure themselves and others that the right process has been followed and a protocol to ensure that conflicted individuals do not participate in decision-making wherever possible.

You should ensure that these additional safeguards, as well as more general advice regarding conflicts of interest[3], are followed with particular rigour where a single tender action procedure is used to award a contract. Failure to do so could result in a legal challenge to the procurement.

[3]The NHS Commissioning Board will publish guidance for CCGs on their duties with regard to managing conflicts of interest under the Health and Social Care Act 2012.

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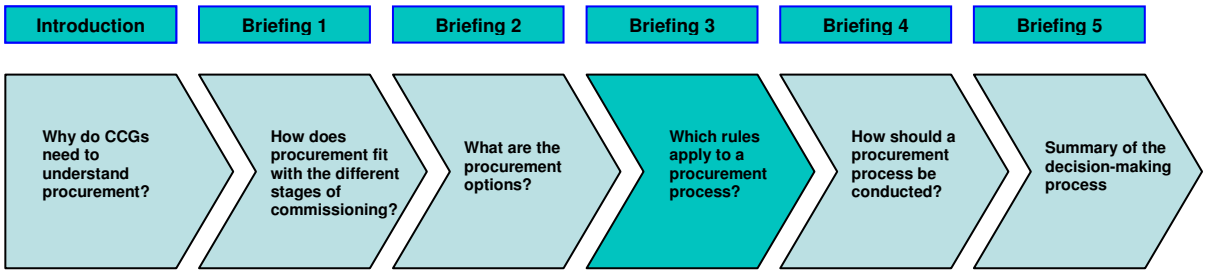
# Procurement of healthcare (clinical) services

## *Briefing 3: Which rules apply to a procurement process?*

First published: September 2012

**Prepared by the Commissioning Development Directorate**

# Briefing 3: Which rules apply to a procurement process?




Whether you use Any Qualified Provider (AQP), a competitive process or award a contract following a Single Tender Action, you need to be aware of the rules and regulations that apply.

## Procurement legislation

The EU Procurement Directives[1], implemented into UK law by The Public Contracts Regulations 2006[2], apply to the award of contracts by public bodies.[3]

Under the current Procurement Regulations, services are categorised as Part A or Part B services. Health and social care services are categorised as Part B services. Part A services include, for example, payroll services, patient transport services, cleaning services, consumables and equipment and commissioning support services.

When awarding a contract for Part A services, prescribed procedures and timescales must be followed. These are not dealt with in this Briefing. The NHS Commissioning Board will shortly be engaging with CCGs to explore the ways in which they might procure other goods and services, including commissioning support services (e.g. through procurement frameworks), and guidance will be published later in the year.

Currently, more flexible procedures can be used in conducting a procurement for Part B services (i.e. when awarding a contract for healthcare services). It is up to you to decide what form the procurement process takes but whichever process is chosen, the overarching principles of transparency, proportionality, equality of

[1] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_134/l_13420040430en01140240.pdf

[2] http://www.legislation.gov.uk/uksi/2006/5/contents/made

[3] The EU Commission has published proposals to revise the existing EU procurement rules. CCGs will need to be aware of any changes when implemented and ensure that they comply with the revised rules as appropriate.

treatment and non-discrimination apply. One way to demonstrate that these principles have been followed is to mirror a Part A process.

## Sector specific regulations on procurement, choice and competition

In addition to the legislation above, CCGs will need to be familiar with the requirements of the sector-specific regulations - the Procurement, Choice and Competition Regulations[4] that will establish minimum standards governing procurement and contracting for healthcare services. The Department of Health is consulting on proposals for these regulations over the autumn and the regulations will come into force from April 2013. The proposed regulations build on the existing rules for commissioners set out in the Principles and Rules for Cooperation and Competition but place them on a firmer, statutory footing.

## The overarching requirements of procurement

The existing guidance to commissioners, *the Procurement guide for the commissioning of NHS funded services,* sets out requirements to meet the overarching obligations of procurement law, namely:

### *Transparency*

You must be able to account publicly for your expenditure and actions by:

- publicly stating your commissioning strategies and intentions;
- publicly stating the outcome of service reviews and how services will be secured (e.g. competitive tendering, AQP, or single tender action);
- advertising procurements on NHS Supply2Health® (where over £100,000) and OJEU, where appropriate (i.e. where high value and/or cross-border interest);
- publishing evaluation and scoring criteria in your procurement documents;
- publishing details of contract awards on NHS Supply2Health® and in OJEU (where over €200,000 in value);
- maintaining an auditable documentation trail of key decisions; and
- complying with Cabinet Office policy and guidance[5] by publishing all tender opportunities and contract awards over £10,000 on Contracts Finder[6].

[4] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_118220.pdf

[5] http://www.cabinetoffice.gov.uk/content/policy-and-guidance-transparency-public-sector-procurement-and-contracting

[6] http://www.contractsfinder.businesslink.gov.uk/

### *Proportionality*

The level of resources you apply to the procurement process should be proportionate to the value, complexity and risk of the services contracted.

Low value and less complex contracts may be procured using more streamlined processes. However, you must ensure that quality standards, including patient safety, are not compromised as a result. You must still ensure that you comply with the other principles of transparency, non-discrimination and equality of treatment.

### *Non-discrimination*

The specification and bidding process must not discriminate against or in favour of any particular provider or group of providers. You must apply objective evaluation criteria and weightings to all bids. Your procurement process should not give any advantage to any market sector or nationality/geographical background. In awarding a contract, you should consider how the potential providers meet your objective evaluation criteria, not what sort of organisations they are or where they are from.

### *Equality of treatment*

You must ensure that all potential providers are treated the same throughout the process. This means that you must:

- provide the same information to all potential providers at the same time; and
- specify rules of engagement and evaluation criteria in advance of provider involvement and apply them in the same way to each potential provider.

## Conflicts of interest

You also need to be able to recognise and manage any conflicts of interest that may arise in relation to procurement. The NHS Commissioning Board Authority has published a *Code of Conduct,* which sets out recommended safeguards for CCGs when commissioning services for which GP practices are potential providers.

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# Procurement of healthcare (clinical) services

## *Briefing 4: How should a procurement process be conducted?*

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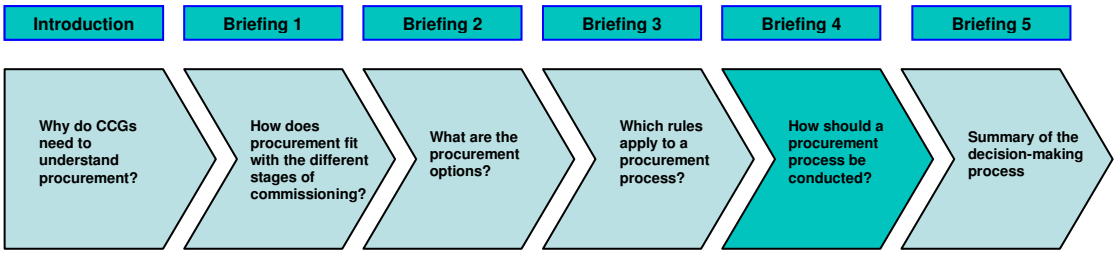
**Prepared by the Commissioning Development Directorate**

# Briefing 4: How should a procurement process be conducted?




This briefing focuses on the key points that are applicable in any procurement:

## 1. *Advertising the procurement*

Where you decide to proceed with a procurement, this should be notified to potential providers via NHS Supply2Health® and, where appropriate, the Official Journal of the European Union (i.e. where there is likely to be cross-border interest in the contract or it is a high value contract).

Advertising should provide sufficient detail of the services (what they are, how they are to be delivered, how they are to be priced, expected outcomes etc) and how you will award the contract (i.e. your evaluation criteria). This must allow bidders to clearly understand the requirements and express interest in providing the service.

If an Any Qualified Provider (AQP) approach is being adopted, an advertisement is also necessary so that providers are able to respond to the opportunity.

Where using commissioning support services to carry out procurements, a CCG will need to have developed and signed off service plans and service specifications, decided upon the appropriate procurement route and ensured that the advert correctly reflects its intentions.

## 2. *Inviting providers to respond to your requirements*

You will then need to issue a form of 'invitation to tender' or 'invitation to participate in a dialogue', which should specify the clinical and other requirements that the providers will need to meet, how providers should demonstrate their ability to meet those requirements, the process by which you will choose your preferred provider (e.g. method of shortlisting, terms of any negotiation etc.) and the criteria that you will use to evaluate the providers' responses. The invitation should set out the

timetable of the process, which should be realistically set with adequate time included for each stage.

This invitation will need to include the pricing strategy that will be adopted, the type of contract being offered, any associated contractual requirements and the length of the opportunity.

It is important that you are clear and consistent and you adhere to your stated processes so that providers have a fair and equal opportunity to respond to the offer you are making.

Where using commissioning support services your CCG will need to ensure that the invitation correctly reflects your intentions and determine evaluation criteria that reflect its priorities and requirements.

### *3. Evaluating the responses*

Once a contract opportunity has been offered, you must then use a non-discriminatory, transparent and objective process to evaluate the responses. These evaluation and scoring processes should be stated at the time of the offer so that providers understand how the procurement process will be operated.

If you are looking to 'short-list' providers before evaluating bids, a pre-qualification process will be required. If you are looking to explore with providers new solutions and ways of working, you will need a procedure involving dialogue with bidders.

Public procurement policy usually requires that commissioners award contracts by selecting the Most Economically Advantageous Tender. This means that, rather than simply accepting the lowest price, you take into account overall value for money by considering factors such as quality and business risk.

For AQP, there needs to be a clear explanation of the way in which providers will be assessed when responding to the opportunity being offered.

Where using commissioning support services, CCGs should still be involved in the evaluation process to ensure that it is carried out appropriately. **The CCG should always make the final decision about any appointment.**

### *4. Standstill period*

A standstill period is a period of at least 10 days between the decision to award a public contract and the signing of the contract and is intended to give unsuccessful tenderers an opportunity to challenge the decision before their rights to obtain relief other than damages are closed off.

Although the Procurement Regulations do not require a standstill period for Part B services, recent case law has determined that in some cases (e.g. for high-value

contracts and/or where there is likely to be cross-border interest), procurement processes should include a standstill period. You should therefore consider including a standstill period in any procurement process.

### *5. Contract award*

Contract awards over £100,000 are required to be published on NHS Supply2Health®. Contract awards over €200,000 are also required by law to be published in OJEU. In addition, in keeping with Cabinet Office rules for public procurement all public bodies, including NHS commissioners, are required to publish details of all contracts awarded over £10,000, including the name and address of the provider, the scope of services, contract value and expiry date in Contracts Finder[1].

Where using commissioning support services, CCGs will need to check that these requirements are met.

## What are the consequences of not complying with procurement obligations?

Where a commissioner does not comply with its procurement law obligations, legal action may be brought against it. If an action is brought before the contract has not yet been entered into, the remedies could include: payment of damages, the procedure being suspended, or a decision or action being set aside.

Where the contract has been entered into already, the remedies include setting aside the contract and/or awarding damages, depending on the circumstances.

The Cooperation and Competition Panel, which currently applies the Principles and Rules of Cooperation and Competition, will have a distinct role within Monitor (the healthcare sector regulator) and will be able to investigate complaints of breaches by NHS commissioners of the regulations governing procurement.

## Where can you find further guidance on procurement procedures?

More detailed guidance is set out in the *Procurement guide for commissioners of NHS-funded services*. This includes an overview of competitive procurement models in Annex C.

[1] http://www.contractsfinder.businesslink.gov.uk/

## Can you delegate these responsibilities to another body?

No. You are responsible for complying with these procurement obligations. Although you may enter into arrangements with other organisations (e.g. commissioning support services) for the delivery of certain procurement activities, the obligations remain yours. It is therefore essential that you understand your obligations and that you participate actively in the procurement activities even though decisions may be made on the basis of recommendations put to you by your commissioning support provider.

## Collaborative and joint commissioning

Where a procurement is the subject of joint commissioning between several commissioners and/or with Local Authority partners then decision-making should be consistent with the governance of the joint commissioning arrangement.

Local Authorities are subject to the same legislative frameworks, e.g. Public Contract Regulations and EU Procurement Directives, but may not be required to comply with NHS specific guidance and regulations.

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# Procurement of healthcare (clinical) services

## *Briefing 5: Summary of the decision-making process*

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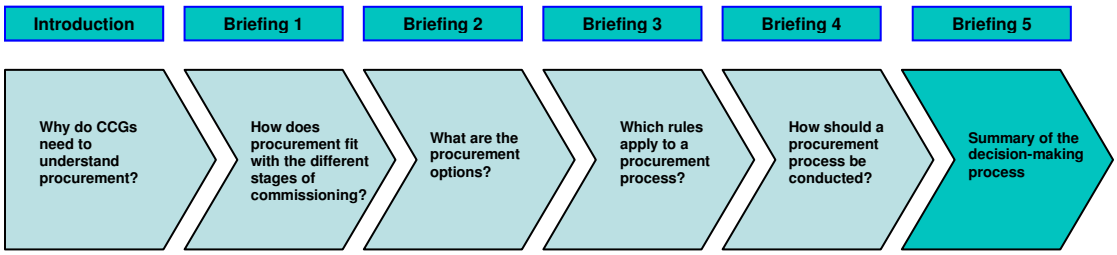
**Prepared by the Commissioning Development Directorate**

# Briefing 5: Summary of the decision-making process




Have you decided that a new service model or significant additional capacity is required or has an existing contract come to the end of its term?

yes

Can this be delivered through an existing contract without breaching procurement rules?

yes

Implement contract variation, extension or management with existing service provider

Consider:

- Is it envisaged as part of the original procurement and contract?
- Would it have affected the original choice of provider?
- Have you taken legal advice?

no

Is there likely to be more than one viable provider?

no

Use Single Tender Action

Consider:

- Have appropriate steps been taken to identify other capable providers?
- Will delivery still be value for money?
- Have conflicts of interest been declared and dealt with?

yes

Conduct competitive procurement

Is the service suitable for a local AQP Framework?

yes

Set up AQP framework following appropriate accreditation process

Consider:

- Follow relevant guidance regarding accreditation process and framework
- Ensure audit trail exists
- Have conflicts of interest been declared and dealt with?

no

Consider which procurement process is appropriate

Does specification require further development with providers or do you want innovation from bidders?

yes

Use procurement procedure that allows for dialogue

no

Use simpler procurement procedure with no dialogue

Consider:

- Is your process transparent, proportionate and non-discriminatory?
- Do you need to reduce the number of likely bidders?
- How will you treat all bidders equally?
- What are your award criteria?
- Where will you advertise?
- Have conflicts of interest been declared and dealt with?