

# Procurement Policy

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Name and Title of Individual	Groups consulted	Date Consulted
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## 1. Introduction

Procurement is defined as the process of finding and agreeing to terms, and acquiring goods, services, or works from an external source, often via a tendering or competitive bidding process. It encompasses everything from repeat, low-value orders through to complex healthcare service solutions developed through partnership arrangements.

There are a range of procurement approaches available which include working with existing providers, non-competitive and competitive tenders, multi-provider models such as Any Qualified Provider (AQP) and Framework Agreements.

This Procurement Policy has been developed to ensure that all procurements agreed to be undertaken on behalf of the Clinical Commissioning Groups (CCGs) of NHS North Staffordshire, NHS Stoke on Trent, NHS Stafford & Surrounds, NHS Cannock Chase, NHS South East Staffordshire & Seisdon Peninsula and NHS East Staffordshire are completed in a way that complies with all legal requirements and is consistent with the annual strategic objectives of each CCG and align with the principles set out below:

- To maximise health care outcomes for service users within Staffordshire and Stoke-on-Trent
- To improve the quality of services.
- To improve the efficiency with which services are provided.
- To develop intelligent partnerships with key providers
- To increase provider collaboration across the county and work with emergent ICPs.
- To deliver efficiencies and savings to fund system change and enable financial sustainability.

The policy also seeks to align and support delivery of the objectives of the Intelligent Fixed Payment programme that is currently in place in Staffordshire and Stoke-on-Trent and any future similar contracting arrangements that are introduced to support the system.

In addressing these objectives, the CCGs will seek to:

- Engage with all fellow commissioners, stakeholders and relevant parties when procurement is undertaken;
- Undertake and understand relevant policy and guidance regarding procurement type e.g. full tender/single provider tender;
- Ensure safe, high quality and equitable services are achieved and maintained across the CCGs;
- Ensure that the CCGs achieve value for money in its procurement activities;

- Ensure that the CCGs make clear and transparent decisions on whether any procurement is necessary in the interests of the local population;
- Ensure the CCGs avoid possible conflicts of interest by ensuring transparency of all decision making through recorded declaration of interests and, if unavoidable, the effective management of any conflicts of interest;
- Ensure that each procurement complies with all relevant guidance and legal regulations primarily the National Health Service (NHSI, Procurement, Patient Choice and Competition) Regulations 2013 and the Public Contracts Regulations 2015 (as amended from time to time).
- Ensure the CCGs comply with all legal requirements and best practice on procurement, including sustainability policies.

When a decision has been made to go out to procurement, this Policy sets out the CCGs' approach for facilitating open, fair, robust and enforceable contracts that provide value for money and deliver required quality standards and outcomes.

In carrying out its Commissioning role the Staffordshire and Stoke-on-Trent CCGs will adhere to the following key principles:-

- **Transparency** – We will apply standard criteria for considering whether or not to tender new and existing services and the results of all decisions will be published.
- **Efficiency** - We will standardise our main operating practices for commissioning services from providers and will work with its providers to improve efficiency and effectiveness of services.
- **Continuity** – We will identify partnership providers for key NHS Services such as Acute Emergency Services, Ambulance Services but will continually test these services to ensure that they deliver best value for money.
- **Equality** – We will clearly identify which services we will put out for competition. We will treat all providers (NHS and non NHS) equally.
- **Development** – We will provide support to all providers to encourage continual improvement in the quality of the services that are provided.
- **Proportionality** - The actions we take will be proportionate to the risks and benefits to patients and the services provided.
- **Consistency** – We apply national and local principles and rules consistently across the CCGs and over time.
- **Engagement** – In line with the Staffordshire and Stoke-on-Trent CCG's Communications and Engagement Strategy, we will engage with stakeholders in order to commission services that meet our population needs.

In relation to each purchasing decision concerning health care and social care services, the CCGs will consider the extent to which any form of competition is required and consider the most appropriate process and procedure for awarding the relevant contract or contracts. The CCGs will decide on the most appropriate procurement route on a case by case basis, in accordance with the Public Contract

Regulations 2015 and the framework of principles set out in NHSI 'Substantive Guidance' on the 2013 Regulations.

When there is a joint procurement with Local Authorities, the CCGs will ensure that it complies with applicable NHS Guidance.

In each procurement the CCGs will consistently comply with all the relevant law, both EU and international law.

This policy will be reviewed once the UK has enacted changes to the Health and Social Care Act, following our exit from the European Union and subsequent changes are made to the regulatory framework,. Consideration will be made at that point as to how the principles of the NHS England "Long Term Plan" January 2019 will be implemented including use of the best value test to determine whether a competitive procurement process is required.

## **2. Purpose**

The purpose of the policy is to ensure that when commissioning clinical services, the CCGs comply with the regulatory framework of all relevant legislation and guidance, its own Constitution, Standing Orders, Scheme of Delegation and Standing Financial Instructions and ensures that all procurements are conducted honestly and legally, avoiding conflicts of Interests.

The CCGs have a responsibility to ensure that services are commissioned to deliver its Commissioning vision and the Procurement Policy aims to support that vision.

This Procurement Policy sets out the principles, rules and methodologies that CCGs 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 value for money.

The CCGs will commission healthcare services, aiming for continuous improvement in the quality of services and will specifically:

- Manage the provider 'market' and commission services from a variety of providers.
- Ensure strong clinical insight and engagement.
- Use good quality contracts to assure the delivery of services.
- Have high quality procurement processes in place.

Health services have to be managed within the limits of available CCGs' resources, with a clear emphasis on value for money.

This Procurement Policy does not offer detailed advice for specific health care services but sets out guidance on the appropriate activity to be undertaken to ensure compliance with current European Union procurement regulation, UK Government legislation and Department of Health procurement best practice.

This policy is not designed to define the services which need to be commissioned; this information is contained within other specific documents. The policy details how CCGs will procure services from a range of providers.

### **3. Scope**

As far as it is relevant, this Policy applies to all the CCGs HealthCare procurements. Goods and Services Procurement is covered in the relevant CCG Standing Financial Instructions/Scheme of Delegation.

This Policy must be followed by all CCG employees and staff on temporary or honorary contracts, representatives acting on behalf of the CCGs including staff from member practices, and any external organisations/agencies acting on behalf of the CCGs.

This Procurement policy covers the six Staffordshire and Stoke-on-Trent Clinical Commissioning Groups, NHS North Staffordshire, NHS Stoke on Trent, NHS Stafford & Surrounds, NHS Cannock Chase, NHS South East Staffordshire & Seisdon Peninsula and NHS East Staffordshire (the CCGs), that commission services for the population of the county of Staffordshire and Stoke-on-Trent.

### **4. Statutory Framework**

#### **4.1 Public Contracts Regulations 2015**

The CCGs must comply with the 2015 Public Contracts Regulations when carrying out its clinical procurement activities. On 26<sup>th</sup> February 2015, the Public Contracts Regulations 2015 came into force. The new regulations replace the Public Contracts Regulations 2006.

With effect from the 18<sup>th</sup> April 2016 healthcare services within the meaning and scope of 6.10 of the legislation will be subject to the new 'Light Touch' regime of the Public Contracts Regulations 2015. This is a procurement threshold relating to Life Time cycle of contracts. All other services fall within the full force of the PCR 15 Regulations.

Time limits imposed by the CCGs on suppliers, such as for responding to adverts and tenders, must be reasonable and proportionate. There are no stipulated minimum time periods in the light touch regime. The CCGs will use their discretion and judgement on a case by case basis.

Where there is only one provider capable of supplying the services required the CCGs will need to articulate the grounds for using the negotiated procedure without a call for competition to record its decision making. If it is deemed that there may be a supplier market for services, a Voluntary Ex Ante Transparency (VEAT) notice may be published to notify the market of the CCG's intentions.

Following award of the contract the CCGs must publish within 45 calendar days a contract award notice. The new regulations also allow for a group award notice to be

published on a quarterly basis. In this instance the award notices must be published within 45 calendar days of the end of each quarter.

The current threshold for services which are directly impacted by the Light Touch Regime is £615,278 (2019/20) for the life of the contract. For these services, there are a number of mandatory requirements:

- OJEU advertising (as well as Contracts Finder UK)
- Compliance with the Treaty principles of transparency and equal treatment
- Conduct the procurement in conformance with the information provided in the Contract Notice.
- Time limits must be reasonable and proportionate.

Even though services may fall below the threshold identified this does not mean that no procurement exercise is necessary. Each service needs to be reviewed on a case by case basis, with a proportionate procurement process put in place if necessary and in accordance with CCGs Standing Financial Instructions.

There is significant flexibility under the Light Touch Regime for CCGs to be creative with the procurement process. The CCGs' intention will be to mirror standard EU procurement procedures but will tailor these procedures where necessary. This flexibility may be through the following aspects of the process.

- Timescales – shortened or lengthened as appropriate.
- Use of Pre-Qualification Questionnaire.
- Award Criteria i.e. empowerment of service users or innovation.
- Voluntary 10 day standstill period at Contract Award.

The CCGs will be clear in the Contract Notice and any subsequent documentation as to the form of the procurement route and how responses will be evaluated. All procurement processes will continue to adhere to the principles of transparency, equitable access, non-discriminatory and proportionality.

Other legislation and guidance affecting procurement in the NHS includes:

**Section 11 of the Health and Social Care Act, 2001** requires commissioners of healthcare services to ensure patients and their representatives are involved in and are consulted on planning of healthcare services.

**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 consult patients and the public – directly or through representatives – on service planning, the development and consideration of services changes and decisions that affect service operation.

**Section 75 of the Health and Social Care Act and Statutory Instrument National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013** places 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.

- Department of Health Changes to the National Health Service: Procurement, Patient Choice and Competition Regulations, 2013 (See Appendix One for details).
- NHS Improvement Agency: Enforcement guidance on Procurement, Patient Choice and Competition Regulations, 2013.
- CCG Standing Orders and Standing Financial Instructions.
- NHS England Procurement Policy, April 2017.
- Public Services (Social Value) Act 2012.
- The EU Procurement Directives as implemented into UK law by the Public Contract Regulations 2015 (PCR 15) (See Appendix One for details).

### **Integrated Support and Assurance Process (ISAP May 2017)**

NHS England and NHS Improvement recognise that the contractual arrangements through which some new complex care models will be implemented may mean:

- The contract structure, form, content or the calculation of the financial value of the contract envelope are 'novel';
- The bidder's organisational forms may be complex, as providers form legal entities and arrangements that allow for greater collaboration between partners;
- A single procurement for a new care model can significantly affect incumbent NHS providers.

Further information on this ISAP can be found at:

[www.england.nhs.uk/wp-content/uploads/2017/08/integrated-support-assurance-process-part-a.pdf](http://www.england.nhs.uk/wp-content/uploads/2017/08/integrated-support-assurance-process-part-a.pdf)

### **4.2 Anti-Competitive Behaviour**

The Procurement, Patient Choice and Competition Regulations, 2013 and in particular Regulation 10, prohibits the CCGs from engaging in anti-competitive behaviour, unless to do so is in the interests of NHS health care service users. Quite often this will be judged from the basis of integration of pathways, where to introduce a new provider element may not be in the interests of the patient and may disrupt efficiency, quality and safety.

Regulation 10 of this guidance also provides that an arrangement or contract for the provision of clinical services must not include any term or condition restricting competition which is not:

- necessary for the attainment of the intended outcomes which are beneficial for the people who use the services;

The CCGs must ensure that it always complies with its obligations under Regulation 10.

The 2013 Regulations also govern the circumstances when the CCGs may award a new contract for clinical services without a competition (Regulation 5). They provide that the CCGs:

*“may award a new contract for the provision of health care services for the purposes of the NHS to a single provider without advertising an intention to seek offers from providers in relation to that contract where the relevant body is satisfied that the services to which the contract relates are capable of being provided only by that provider”.*

The CCGs will address this in the context that market development and the procurement of service provision are key enablers to the delivery of the CCGs objectives. Through market exploration and development, the CCGs will seek to identify and develop a provider base that can support the delivery of the shared CCGs and STP objectives. As an alternative to the traditional full market tender exercise the CCGs may select alternative routes to the market such as the Most Capable Provider, single tender action, the establishment of framework agreements and partnership agreements. This approach is supported by the NHS England ‘Long Term Plan (January 2019).

## **5. Governance and Standards of Business Conduct**

When procuring clinical services, CCGs will ensure that it complies with its duties under its Constitution, including its Standing Orders, Scheme of Delegation, the CCG’s financial policies and the Standards of Business Conduct.

Standing Orders and the Scheme of Delegation ensure that decision-making is informed by intelligent information covering the full range of corporate, financial, clinical information and research governance and are central to CCG's governance framework and to sustaining the highest standards of corporate and personal probity, accountability and openness. Good governance provides the bedrock for effective performance and assuring better health and health services for the local population of Staffordshire.

Prime Financial Policies are referred to within the CCG's Constitution for the management of the CCG's financial affairs.

The CCG's Standing Financial Instructions detail the financial responsibilities, policies and procedures adopted by the CCGs to ensure that the CCG’s financial transactions, including procurement transactions are carried out in accordance with the law and with Government policy. They are used in conjunction with the Scheme of Delegation adopted by CCGs and included within the Constitution’s Scheme of Reservation and Delegation.

The CCGs’ financial policies identify the financial responsibilities which apply to everyone working for the CCGs.

Should any difficulties arise regarding the interpretation or application of any of the CCG's financial policies then the advice of the Chief Finance Officer must be sought before acting.

The failure to comply with Standing Orders and Standing Financial Instructions can in certain circumstances be regarded as a disciplinary matter that could result in dismissal.

## **6. Confidentiality and Conflicts of Interest**

All tenders must comply with our Prime Financial Policies, Scheme of Delegation and Standing Orders. To protect the integrity of the process, all stages of the process are to be treated as commercially sensitive/confidential, unless required by statute to disclose at any stage of the process.

It is also essential that all members of the CCGs involved in procurements will be asked to confirm that they have no potential conflict of interest in the procurement process and that any information they are party to will be treated as confidential and not discussed outside of the procurement project group. The Clinical Commissioning Group Policy on Conflict of Interest applies at all stages of the process.

When procuring services from GP Practices, including provider consortia or organisations in which GPs have a financial interest, the Clinical Commissioning Groups when making its decisions should ensure that the Governing Body can assure the Membership and other interested parties that the Clinical Commissioning Group has taken appropriate steps in making this decision with regards to potential Conflicts of Interest.

A conflict of interest arises where an individual's ability to exercise judgement or act in one role is or could be impaired or otherwise influenced by his or her involvement in another role or relationship. The individual does not need to exploit his or her position or obtain an actual benefit financial or otherwise. A potential for competing interests and/or a perception of impaired judgment or undue influence can also be a conflict of interest.

The management of conflicts of interest is vitally important in the procurement of clinical services and managing them appropriately is paramount to the probity and accountability of a CCG's decision making and will ensure that the principles of transparency, fairness and non- discrimination are upheld.

As an organisation led by GPs, CCGs will be particularly subject to conflicts of interest or potential conflicts of interest when procuring clinical services. The CCGs will therefore adopt rigorous standards in the identification and management of conflicts or potential conflicts of interest to ensure that the above principles can be upheld.

Please refer to the CCG's Conflict of Interests Policy for further guidance.

## **7. Fraud, Bribery and Corruption**

The Bribery Act 2010 created an offence, under section 7, which can be committed by organisations which fail to prevent persons associated with them from committing active bribery on their behalf. Bribery is defined as giving or receiving a financial or other advantage in connection with the 'improper performance' of a position of trust, or a function that is expected to be performed impartially or in good faith.

The term 'improper performance' means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. Bribery does not necessarily involve cash. In a procurement context, it might involve suppliers providing procurement staff with gifts, hospitality, holidays or promises of future employment or exclusive memberships in exchange for favourable treatment. In addition, the employee who is the beneficiary would usually omit to declare these transactions, which in addition to being illegal in their own right, also create a serious conflict of interest.

An organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. It is a full defence for an organisation if it can demonstrate that, despite active bribery taking place, it had adequate procedures in place to prevent persons associated with it from bribing. An individual found guilty of bribery on indictment may face up to 10 years' imprisonment and an unlimited fine. An organisation failing to prevent bribery is punishable by an unlimited fine.

All employees have a duty to ensure that public funds are safeguarded. If an employee suspects that there has been a potential act of fraud, bribery or corruption, or has seen any suspicious acts or events, they must report the matter to the CCGs Counter Fraud Team (contact details can be found on the CCGs public website and intranet) or report the matter to the NHS Fraud and Corruption Reporting Line on 0800 028 4060. Alternatively, reports can be made through the online reporting tool at [www.cfa.nhs.uk/reportnhsfraud](http://www.cfa.nhs.uk/reportnhsfraud).

All CCG employees are required to declare to their line manager any involvement with outside NHS, private business enterprises, both on appointment and as personal circumstances change during the course of their CCG employment. Failure to declare such interests or alternative employment may result in disciplinary action and/or criminal investigation by the CCG.

Further advice and guidance should be sought from Human Resources and/or Line Managers in the first instance. Advice is also available from the Chief Finance Officer and the CCGs Counter Fraud Specialist.

There should be no splitting of procurements or waivers simply to avoid the application of a fuller procurement process. Where a contract is split, and its splitting would prevent it from reaching a higher procurement process threshold (e.g. one triggering EU tendering requirements), the rationale for this should be recorded and brought to the attention of the appropriate governance group.

## **8. Roles and Responsibilities**

Note: to be updated once CCG Governance structure approved

### **8.1. Staffordshire and Stoke-on-Trent CCGs (NHS North Staffordshire, NHS Stoke on Trent, NHS Stafford & Surrounds, NHS Cannock Chase, NHS South East Staffordshire & Seisdon Peninsula, NHS East Staffordshire)**

The CCGs are legally accountable for commissioning of health services for its local population. In so far as clinical procurement is a means of commissioning clinical services, including service redesign, the CCGs are responsible for the outcome of the procurement process; and ensuring the process is carried out fairly and in accordance with the law, whilst ensuring improved health outcomes and value for money.

### **8.2. The Governing Body (GB)**

The CCGs' GB will be responsible corporately for:

- Making final decisions on the selection of the preferred provider(s).
- Sign off of the final decision to award and ratification of the Award Report.

When authorising and approving clinical procurement decisions the CCGs will comply with their Scheme of Delegation as set out in their Constitutions and Standing Financial Instructions.

Virtual Approval by Governing Body may be used in exceptional circumstances and where time constraints do not allow for the normal decision making route.

### **8.3. Locality Committee/Board**

The CCGs' Locality Committees will be responsible corporately for:

- Approving the procurement route, service specification, business case and financial value.

When authorising and approving clinical procurement decisions the CCGs will comply with its Scheme of Delegation as set out in its Constitution and Standing Financial Instructions.

### **8.4. Lead Director**

The Lead Executive Director responsible for this Policy is the CCG's Director of Commissioning & Operations.

### **8.5. Senior Responsible Owner (SRO)**

The CCGs' Director leading the clinical commissioning work is known as the Senior Responsible Owner (SRO) for both the procurement exercise and for any follow up commissioning work needed once the procurement exercise has been completed. Directors involved in commissioning, in consultation with relevant stakeholders, are responsible for agreeing service and care pathway designs and overseeing the specification of services as required.

Depending on the value of the new clinical services arrangement, the specification for a service may need CCGs Governing Body approval before a competition for the service being launched.

It will be the responsibility of the SRO to ensure that they hold a direct relationship with any professional advisors appointed to support the procurement process including legal, financial and commercial advice.

It will also be the responsibility of the SRO to ensure that members of the Project Team have the relevant and appropriate procurement training to support the process.

#### **8.6. Chief Finance Officer**

The Chief Finance Officer or Deputy Chief Finance Officer will be responsible for oversight of all financial risks and ensuring that these are managed effectively and escalated to the appropriate governance structure.

#### **8.7. Procurement Support**

The CCGs currently buy in Procurement Support from Midlands and Lancashire CSU. It is required by the CCGs that all procurement projects include the full and active participation of the Procurement Manager, from the start of the process to the end.

The Procurement Manager will be responsible for leading the Procurement process and will work with the Commissioning Lead to ensure that the procurement is robust and in accordance with best practice.

#### **8.8. Staffordshire Procurement Group**

The Staffordshire Procurement Group have a responsibility to ensure that appropriate operational processes are in place to procure services effectively, oversee the procurement work plan and deliver the CCGs statutory duty to engage. The Procurement Group reports to the CCGs Finance & Performance Committee.

#### **8.9. Project Team**

A Project Team will be established to take forward the operational management of the procurement process. The project team will be a multidisciplinary team and will usually include representation from:

- Clinicians - appropriate to the service being procured
- Finance
- Procurement
- Quality
- Contracting
- Human Resources
- Equality and Diversity
- Information Governance
- Health & Safety
- Service User

## **9. Procurement Decision Making Process**

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, the primary action is 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, the CCGs must first consider whether a procurement process is required. If there is still time left on an existing contract in place, the CCGs can review this contract to see if a variation or change process could be used to secure the new healthcare service.

This approach can however only be considered within the terms of the original contract, where the original contract allowed for extensions or for variation of service. Such variations may then be allowed where the change is not of a significant material nature, such that would amount to a new contract. In procurement terms, such variations should not exceed 10% of value of the original contract, or 10% of volume of the original contract.

A new procurement should be considered where the following factors apply from the original procurement exercise:

- 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;
- There is a significant change in the value of the contract.

The CCGs may be subject to challenge if a contract variation was used inappropriately, and therefore the CCGs will always take appropriate procurement advice before following this route.

Factors to consider with regard to procurement options for letting a new contract:

- Contract value – the higher the value the greater the case is likely to be for competitive tendering
- Provider Market – the greater the number of providers the stronger the case for open competition. There may also be other CCGs who have recently tendered for equivalent services thus stimulating the market.
- Single or multiple provider(s) – would the needs of the population be best served by a single or multiple supplier arrangement. Multiple supplier options may lend themselves to Framework Agreements or Any Qualified Provider arrangements.
- Regulations – These will include the CCG’s Standing Financial Instructions & Standing Orders, EU Procurement Regulations and DH Guidance.
- Government policy on protected services – for key services that are a significant and vital part of the NHS, for example Accident & Emergency Services, Intensive Care Services, Emergency Ambulance Services, etc. shall automatically follow a partnership provider route and negotiation would take place directly with that provider.
- Jointly Funded Projects - Competition may not be appropriate for jointly funded projects.
- Patient Choice – consider results of consultation. This shall include, where appropriate, choice of providers, models of care and location. Further details of how patient consultation is carried out are contained within the CCGs’ Communication and Engagement Strategy which can be found on the CCGs’ website.
- Patient Safety – if there is a genuine risk to patient safety by changing provider then the CCGs can negotiate directly with the existing provider of the services.

## **10. Procurement Approach**

The CCGs will decide on the most appropriate procurement route on a case by case basis, in accordance with the framework of principles set out in NHSI’s ‘Substantive Guidance’ on the 2013 Regulations.

When making decisions on procurement options, the CCGs will work with Commissioning Partners and will seek to ensure that the final decision complies with relevant legislation and regulations.

The procurement approach will be proportionate to the likely contract value and the commissioning objectives.

The use of technology and eProcurement will be used for all processes in line with legislation stipulating use of eProcurement systems by all Public Sector bodies from October 2018. Supplier access is through registration to the eTendering system and is free of charge.

### **10.1 Equality, Quality and Data Protection Impact Assessments**

As part of the CCGs consultation process an equality, quality and data protection impact assessment will be undertaken at relevant stages in the procurement process to ensure that the proposed/planned changes are assessed with regard to impact on groups, individuals or communities. The outcomes of such impact assessments will be published by the CCG upon request and as part of its equality scheme.

### **10.2 Cost Modelling and Finance**

The CCGs have developed cost models which can be used to benchmark the costs of existing services and that can be used to assess the affordability of Bidders' proposals.

Affordability envelopes will be in place for all procurement processes and will be published with the tender documents on most occasions. Bidders are required to submit pricing proposals within the published affordability envelope or may be disqualified as detailed in the relevant tender documents.

Pricing strategies will be determined for each service, with the default approach being to request a fixed price based on published activity levels. With an ever increasingly challenging financial environment, Bidders are reminded that pricing proposals need to be realistic and demonstrate good value for money.

### **10.32 Stakeholder Consultation and Engagement**

Effective consultation is a key part of the procurement process. The CCGs have 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 in which those services are provided
- 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, the CCGs shall engage on an on-going basis through the local HealthWatch, LINK network and directly with patients and the public through user groups, patient participation groups and other engagement events timed to coincide with the annual cycle of planning and priority setting linked to the publication of an appropriate Joint Strategic Needs Assessment.

The CCGs recognise that effective engagement with stakeholders is an essential requirement of all NHS organisations and will also offer substantial benefits to the generation of outcome-based service specifications. Therefore, the CCGs will engage with stakeholders at all appropriate times during the commissioning and procurement processes. There will be occasions when formal consultation will be required and our process will have to comply with the defined statutory requirements.

In order to minimise any risk of a judicial review, there are five basic criteria that we shall adhere to through any consultation process:

- Consult widely throughout the process
- Be clear about what the proposals are, who may be affected
- The timetable for responses
- Ensure that the consultation is clear, concise and widely accessible
- Give feedback about the responses received and how the consultation process influenced the policy

## **11. Risk Management**

In line with its Risk Management Policy, the CCGs will ensure that it has adequate measures in place to identify and manage risk. Such measures may include ensuring:

- Clinical procurements are adequately prepared and planned;
- Each clinical procurement project has a Senior Responsible Owner and that roles, responsibilities, reporting lines and channels of communication within the wider commissioning and Procurement Team are clear;
- The individuals involved have the necessary expertise, experience and training to match the requirements of the role and its responsibilities;
- Each project has a pre-agreed and end to end procurement plan and timetable tailored to the requirements of the project; the resources available, the business objective and which has identified and sought to minimise any risks involved;
- Adequate and appropriate records are kept to comply with CCGs' statutory obligations and to provide a robust audit trail of decisions and actions taken;
- A risk identification and escalation process is established at the outset, to include a risk register which is regularly reviewed and updated with appropriate risk management strategies to address each risk identified;

Due weight will be given to the non-clinical aspects of the procurement.

Where any identified risks have an impact on the CCGs' statutory functions and strategic aims, these will be escalated to the CCGs' Assurance Framework and Risk Register. The SRO will be responsible for ensuring that all mitigating actions are completed in line with agreed Action Plans.

The use of robust and up to date project and procurement documents which are legally compliant, clear and unambiguous, and subject to a strict policy of version control.

The conduct of the entire process is in accordance with the law and key procurement principles namely: transparency; equal treatment; non-discrimination; proportionality and sound administration.

## **12. Approach to Market**

There are a variety of ways in which services can be procured.

### **12.1. Any Qualified Provider**

With the AQP model, for a prescribed range of services, any provider that meets criteria for entering a market can compete for business within that market without constraint by a commissioner organisation. Under AQP there are no guarantees of volume or payment, and competition is encouraged within a range of services rather than for sole provision of them. AQP is not used so extensively since the PCR 2015 came in.

### **12.2. Competitive Tendering**

It is anticipated that an increasing number of services will be subject to competitive tendering in order to demonstrate the application of the principles of transparency, openness, equitability and obtaining and delivering value for money. Most common routes include:

### **12.3. Open Procedure**

In the Open Procedure all applicants who respond to the Contract Notice will be invited to submit a tender for the contract opportunity. Generally speaking, the Open Procedure will be used for simple and straightforward procurements and for tenders under the EU threshold.

### **12.4. Restricted Procedure**

The Restricted Procedure is used where the Contracting Authority wants to restrict the number of Bidders who will be issued with the Invitation to Tender. The restricted procedure is not recommended for procurements under the EU threshold.

### **12.5. Competitive Dialogue**

The competitive dialogue procedure allows the contracting authority to enter into dialogue with bidders, following an OJEU notice and a selection process, to develop one or more suitable solutions for its requirements and to determine which chosen bidders will be invited to tender. The competitive dialogue procedure is a flexible procedure, suitable where there is a need for authorities to discuss aspects of the proposed contract with candidates. For example, the procedure would be used where authorities cannot define clearly in advance the technical means capable of satisfying their needs or objectives, or where there is a range of options for the legal and/or financial structure of a project.

### **12.6. Accelerated Procedures**

These can be used in a Restricted Procedure or Negotiation with a call for competition procedure where urgency makes the normal timescale impractical. It does not alter the processes of the procedure, but it does reduce the timescales: The normal time limits of 37 days (or 30 days for electronic) to express an interest can be reduced to 15 days (or 10 days for electronic).

### **12.7. Competitive Procedure with Negotiation**

This is used where a selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract. The contracting authority may then open negotiations with the tenderers to seek improved offers.

### **12.8. Innovation Partnership Procedure**

This is used where a selection is made of those who respond to the advertisement and the contracting authority uses a negotiated approach to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority is allowed to award partnerships to more than one supplier.

### **12.9. Negotiated Procedure Without Prior Publication.**

In certain narrowly defined circumstances the contracting authority may also award a contract using this method. Here the contracting authority would approach one or more suppliers seeking to negotiate the terms of the contract. One of the permitted circumstances is where, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular supplier.

### **12.10. Non Competitive Process**

Competition may be waived in circumstances where the CCGs are satisfied that the services to which the contract relates are capable of being provided only by one provider. In these circumstances the procedures set out within the CCGs' 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, CCGs Governing Body approval must be obtained following any recommendation to follow this approach. In order to mitigate any risk with direct award situations the CCGs may consider placing a transparency notice (VEAT – Voluntary Ex Ante) to notify the market of its intent. This gives the market 10 calendar days in which to lodge a challenge. This may reduce any remedies later on if subsequent issues are raised.

### **12.11 Partnership Agreements**

Where collaboration and coordination is considered essential, for example in developing new integrated pathways, enabling sustainability of services, ensuring smooth patient handover, coordination etc. the CCGs may wish to continue with

existing “partnership” arrangements. These “Partnership” arrangements must be formalised using the appropriate contract form and must provide:

- Transparency particularly with provision of information sharing good and bad practice.
- Timely provision of information and performance reporting.
- Evidence of improved patient experience year on year.
- Evidence of value for money.
- Partnership status must not be used as a reason to avoid competition and should only be used appropriately and be regularly monitored.

For partnership services the CCGs may choose to commission the service from a partner but may also choose to tender for provision of the service, for example where the partner cannot meet the service model requirements or costs cannot be agreed.

### **12.12 Spot Purchasing**

There will be the need to spot purchase contracts for particular individual patient needs or for urgency of unique placements requirements at various times. At these times, a competitive process may be waived. It will be expected that these contracts will undergo best value reviews to ensure the CCGs are getting value from the contract. In all cases the CCGs should ensure that the provider is fit for purpose to provide the particular service. Generic placements should still be procured competitively in accordance with the regulations. This includes the setup of frameworks for calling off generic placements for care. Regular reviews of spot purchasing practices should take place to ascertain whether competitive tendering becomes necessary.

### **12.13 Framework Agreements**

Framework Agreements are pre-tendered agreements which are established in compliance with the EU Procurement Rules and which, once established, can be used by the CCGs to purchase certain products and/or services without the need to carry out a full procurement process. The advantages of using a framework agreement is that, once established, it can be used to save both time and cost.

A framework can be established by the CCGs for its own use; or by another clinical commissioning group, contracting authority or a central purchasing body such as the Government Procurement Service (GPS).

If the CCGs wish to use a framework agreement established by another organisation, it should check that that the framework agreement has been established correctly, in accordance with any applicable obligations under the EU Procurement Rules and that it is fit for the CCGs’ purpose.

In particular, the CCGs should check that it has been identified as a body which is entitled to use the framework; that its requirements fall within the specification of goods/services covered by the framework; that the term of the framework has not expired; that the terms and conditions applicable to call-offs made under the

framework are acceptable to the CCGs, as the CCGs will be unable to make substantial modifications to these and that the pricing under the framework is acceptable.

### **12.15. Grants**

Grants can be used to provide financial support to a voluntary organisation which provides or arranges for the provision of services which are similar to those in respect of which the CCGs have statutory functions. NHS England has published a Grant Agreement, Guidance on the use of the draft model Grant Funding Agreement and a Bitesize Guide. Grants usually sit outside of the remit of the Procurement regulations.

The model grant agreement is non-mandatory and is for local adaptation as required. For further information, please visit <https://www.england.nhs.uk/nhs-standard-contract/grantagreement/>

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

### **12.16. Pilot Projects**

It is important to use Pilot Projects only in circumstances where the clinical outputs are not known or cannot be accurately predicted. Pilot Projects can be subject to legal challenge if they are not procured correctly. All pilot projects will be competitively tendered through open advertising and evaluation of short service proposals. A minimum of 6 weeks needs to be built into the commissioning process to enable a procurement process to be conducted.

In order to identify new working practices through the use of Pilot Projects, the CCGs must establish that a project is in fact a pilot via the following definitions:

- There is a specific goal.
- The timetable is clearly laid out with defined periods for start date, end date, and the period for lessons to be learnt.
- Clear and signed contract with the pilot service provider.
- Robust plan/process for evaluation.
- Right to terminate a pilot must be included if it is found to be unsafe or the outcomes cannot be met.

It is recommended that procurement advice is sought before considering a pilot project.

### **12.17. Section 75 Agreements**

Where appropriate, the CCGs will enter into Section 75 Agreements which are an agreement made under section 75 of National Health Services Act 2006 between a local authority and an NHS body in England, Section 75.

Agreements can include arrangements for pooling resources and delegating certain NHS and local authority health-related functions to the other partner(s) if it would lead to an improvement in the way those functions are exercised.

### **13. Ethical and Sustainable Procurement**

CCGs can have a significant impact on the local health economy by helping reduce health inequalities and improving the wellbeing of the community we service. This will be achieved by commissioning services that are appropriate and are sourced from providers best placed to provide those services.

When making purchasing decisions, we need to consider the Public Services (Social Value) Act 2012 and the opportunities for any additional social, economic or environmental benefit that we can bring to the community whilst working within the current procurement rules and principles. Thereby ensuring that our day to day activities support, rather than hinder progress, with sustainable development.

It is the intention of the CCGs to develop and utilise 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, CCGs may hold Provider Development workshops to inform commissioning intentions and to provide help and guidance on procurement processes. It should be noted that all providers both current and potential, shall be invited to Provider Development workshops as all providers must be treated equally.

#### **13.1 Public Services (Social Value) Act 2012**

Strategic procurement by nature is sustainable procurement and by considering socio-economic and environmental factors, it can deliver the best value for money over the lifetime of the goods, services or work being procured. The focus needs to be on the whole life cost of all that is procured rather than just focusing on the up front prices.

The Public Services (Social Value) Act 2012 was implemented in January 2013. The Act requires the CCGs to consider how the procurement of services may improve the economic, social and environmental wellbeing of the relevant area. The Act applies to contracts for the:

- Provision of services and framework service agreements
- Provision of services together with the purchase or hire of goods or the carrying out of works

The Act only applies to those contracts above the EU threshold. While the Act encourages economic, social and environmental wellbeing considerations to be taken into account, the emphasis is that authorities may only do so within the context of existing constraints emanating from the EU rules. The EU procurement regime already permits social issues to be included in public procurement, but this is subject to a number of significant controls and limitations. The Act should not be misconstrued as giving the CCGs a broad scope to include generic economic, social

and environmental wellbeing considerations where these are not relevant to the subject matter of the contract.

However, consideration will be given to five key areas when undertaking a procurement process:

- Pre-procurement – consider any non-commercial considerations where relevant
- Contract terms – incorporation of social and environmental requirements into standard terms and conditions
- Selection stage – non-discriminatory, proportionate and linked to subject matter
- Award stage – social and environmental issues may be included in award criteria, if clearly stated in documents
- Post award – consideration as to what is expected from provider and how social value benefits will be monitored through service delivery

### **13.2 Sustainable Procurement**

Sustainable development matters will apply to the CCGs procurement processes. The four key domains are:

- Responsibility: procuring from legal and sustainable sources; minimising pollution and adverse impacts on the environment, individuals or communities; promoting transparency; and limiting the scope for unethical conduct
- Opportunity: promoting standards and rights; not restricting opportunity as a result of procurement processes or practices; promoting equitable working relationships through the supply chain; and engaging with a diverse supply base
- Innovation: stimulating innovative and sustainable solutions within evidence-based practice
- Efficiency: developing business cases that consider alternative solutions to deliver required outcomes; driving efficiency through the supply chain; and upholding minimum contracting arrangements

Throughout the evaluation the CCGs will consider and ensure that sustainability is a key criteria in the competitive tendering process, this will be used to ensure that Providers embrace sustainable development, tackle health inequalities and reference low carbon operations through their day to day activities.

### **14. Decommissioning Services**

The need to decommission service contracts can arise through:

- Contract termination due to performance against the contract not delivering the expected outcomes. This can be mitigated through contract monitoring and management and provider involvement. 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.
- Expiry of contract
- Services are no longer required

Where decommissioning involves Human Resource issues, such as Transfer of Undertakings and Protection of Employment (TUPE), providers will be expected to cooperate and be involved in discussions to deal with such issues.

## **15. Transfer of Undertakings and Protection of Employment Regulations (TUPE)**

These regulations arose as a consequence of the 1977 EU 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. This is a complex area of law which is continually evolving.

Commissioners need to be aware of these regulations and the need to engage HR support and possibly legal advice if there is likely to be a TUPE issue. 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” also known as “COSOP”.

It is the role of the CCGs to advise potential bidders that whilst not categorically stating TUPE will apply it is recommended that they assume that TUPE will apply when preparing their bids and ensure that adequate time is built into procurement timelines where it is anticipated that TUPE may apply.

Any logistical arrangements with regard to staff transfer under TUPE, when there is a change of provider, as a result of a procurement, is a provider to provider issue, it is not an area for Commissioners to involve themselves with.

## **16. Training Needs**

All the CCGs’ staff and others working with the CCGs will need to be aware of this policy and its implications. It is not intended that staff generally will develop procurement expertise, but they will need to know when and how to seek further support. The most urgent requirement is that all commissioning staff throughout the CCGs should know enough about procurement to know to seek help when they encounter related issues; they must also be able to give clear and consistent messages to providers and potential providers about the CCGs’ procurement intentions in relation to individual service developments.

Awareness of procurement issues will be raised through organisational development and training sessions for clinical and non-clinical members of the CCGs.

## **17. Documentation and Record Keeping**

The CCGs will comply with its statutory obligations to keep and maintain appropriate records.

Accurate record keeping and documentation is also fundamental to any procurement process and is also consistent with the CCGs' obligation of transparency. A robust audit trail should be maintained which records all steps and decisions taken and the reasons for those decisions. This assures the CCGs' accountability, that its decisions can be scrutinised, and that it can accurately respond to formal complaints or challenges. Formal document version control should also be implemented and all document versions retained in case of future need.

## **18. Monitoring compliance with this Policy**

This policy will be reviewed annually. In addition, it will be kept under informal review in the light of emerging guidance, experience and supporting work. Effectiveness in ensuring that all procurements comply with this Policy will primarily be achieved through review by the Procurement Group.

## **19. Equality Statement**

All public bodies have a statutory duty under the Equality Act 2010 to set out arrangements to assess and consult on how their policies and functions impact on race equality. This obligation has been increased to include equality and human rights with regard to disability, age, gender, sexual orientation, gender reassignment and religion.

The CCGs endeavour to challenge discrimination, promote equality, respect human rights, and aims to design and implement services, policies and measures that meet the diverse needs of our service, and population, ensuring that none are placed at a disadvantage over others.

All staff are expected to deliver services and provide care in a manner which respects the individuality of patients and their carer's and as such treat them and members of the workforce respectfully, regardless of age, gender, race, ethnicity, religion/belief, disability and sexual orientation.

Providers and Commissioners are expected to use the appropriate interpreting, translating or preferred method of communication for those who have language and/or other communication needs.

When assessing bids, commissioners will ensure that there is fair and equitable process for all providers and the requirements of the Equality Act 2010 and associated local and national regulations with regard to equality are part of the assessment process.

## **References**

- Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Mar 2004.

- The Public Contracts Regulations 2015; SI 2015 no.102. February 2015.
- Equality Act 2012 26.2 NHS Policy
- NHS Procurement. Raising our game; May 2012; DH (Gateway Ref 17646).
- National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013
- NHS England “Long term plan” January 2019