

Procurement Strategy

Governing Body meeting

7 July 2016

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Sponsor	Julia Newton, Director of Finance
Is your report for Approval / Consideration / Noting	
<p>The purpose of this paper is to seek Governing Body <u>approval</u> for the refreshed Procurement Strategy (see <i>Appendix A</i>), which has been updated to reflect changes to the Public Contract Regulations (2015).</p> <p>These changes were summarised and presented to Governing Body in May 2016 (although a further summary is provided below).</p>	
Are there any Resource Implications (including Financial, Staffing etc)?	
<p>There are no immediate resource implications, although this will have an impact on the role of the South Yorkshire Procurement Service (hosted by NHS Sheffield CCG), as they will be required to publish more information about contracts awarded, than is currently required.</p>	
Audit Requirement	
<p><u>CCG Objectives</u></p> <p><i>Which of the CCG's objectives does this paper support?</i></p> <p>4. To ensure there is a sustainable, affordable healthcare system in Sheffield.</p>	
<u>Equality impact assessment</u>	
<p><i>Have you carried out an Equality Impact Assessment and is it attached?</i></p> <p>No, an equality impact assessment has not been done. There are no equality issues to note.</p>	
<u>PPE Activity</u>	
<p>How does your paper support involving patients, carers and the public?</p> <p>Through a more transparent approach to the publication of information relating to how and to whom contracts have been awarded; will ensure patients, carers and the public are more proactively informed about the work of the CCG.</p>	

Recommendations

Governing body members are asked to approve the revised version of the CCG's Procurement Strategy which has been amended to reflect changes to the Public Contract Regulations (2015).

Procurement Strategy

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1. Introduction/Background

The purpose of this paper is to seek Governing Body approval for the refreshed Procurement Strategy (see *Appendix A*), which has been updated to reflect changes to the Public Contract Regulations (2015). These are summarised below:

- The significant change from the 2006 Public Contract Regulations is the move away from the Part A-Part B distinction of services to a new 'light touch' regime for healthcare (clinical) service procurements;
- From 18 April 2016 the threshold for those contracts that should be advertised in the Official Journal of the European Union (OJEU) increased from £113k to £589k. Any clinical service with a contract value higher than this new threshold should be advertised on OJEU however the processes used to appoint providers can be designed with more flexibility than non-clinical services;
- There is now an obligation on the CCG to follow guidance around capturing decision making and reporting on decisions relating to the award of contracts (regulation 84). In summary the CCG has an obligation to:
 - i. Produce a written report for any contract entered into. This report must include a range of contract details as specified in the regulations (i.e. provider name, address, unsuccessful provider details, award methodology etc.);
 - ii. Make such reports available to the Cabinet Office as and when required; and
 - iii. The CCG must document decision making for any procurement decision taken (including single tender actions).
- A further requirement is to publish contract award notices for any contract entered into. This has been a standard requirement for a number of years but the new regulations mean that CCGs must do so for any contract entered into without competition (e.g. acute contracts, GP contracts etc.). To be compliant, all CCGs must publish contract award notices:
 - i. For any contract above the Contractsfinder threshold (currently £25,000 over the life of the contract) on www.contractsfinder.service.gov.uk;
 - ii. For any 'non-light touch regime' contract above OJEU threshold (currently £164,176 over the life of the contract) on <http://simap.europa.eu> as well as on www.contractsfinder.service.gov.uk; and

- iii. For any 'light touch regime' contract above OJEU threshold (currently £589,148 over the life of the contract) on <http://simap.europa.eu/> as well as on www.contractsfinder.service.gov.uk.

2. Recommendations

Governing body members are asked to approve the revised version of the CCGs Procurement Strategy which has been amended to reflect changes to the Public Contract Regulations (2015) (as summarised above).

Paper prepared by: Jim Millns, Assistant Director of Contracting; and
Hilary Porter, Interim Head of Procurement

On behalf of: Julia Newton, Director of Finance

June 2016

NHS Sheffield Clinical Commissioning Group Procurement Strategy

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Version:	1.4

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Aims of this Procurement Strategy

The aims of this strategy are three-fold:

1. To provide an overview of how the CCG will operate and the ethos that will be applied to all procurement activity whilst ensuring compliance with statutory procurement guidelines;
2. To provide advice and guidance for all staff working within the CCG who procure any goods or services by setting out the procurement principles, rules and methods that the CCG will work within; and
3. To set out a summary of expected procurement activity to be undertaken by the CCG in the short and medium term.

This policy reflects existing national guidance, in particular the requirements of the NHS Procurement, Patient Choice and Competition Regulations 2013 (No. 2)¹, the Procurement Guide for Commissioners of NHS Funded Services², and Monitor's * Substantive guidance on the Procurement, Patient Choice and Competition Regulations³.

The full legal and regulatory framework that the CCG will abide by is made up of:

- The NHS (Clinical Commissioning Group) Regulation 2012 no. 1631 (2012);
- Securing best value for NHS patients (2012);
- Procurement briefings for Clinical Commissioning Groups (2012);
- Procurement Guide for commissioners of NHS-funded services (2012);
- Public Services (Social Value) Act (2012);
- Health and Social Care Act (2012);
- The National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations (2013);
- Monitor's Substantive guidance on the Procurement, Patient Choice and Competition Regulations (2014);
- Managing Conflicts of Interest: Statutory Guidance for CCGs (2014); and
- The Public Contracts Regulations (2015).

** From 1st April 2016, Monitor became part of NHS Improvement. However for the purposes of this strategy and the documents referenced within, Monitor will continue to be used by way of referencing NHS Improvement.*

¹ http://www.legislation.gov.uk/uk/si/2013/500/pdfs/uk/si_20130500_en.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216280/dh_118219.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf

Section 1 – Sheffield CCG’s Approach to Procurement

1.1 Introduction

NHS Sheffield Clinical Commissioning Group (CCG) comprises 86 GP practices and is fully authorised as the statutory organisation with responsibility for commissioning (buying) many of the healthcare services for the Sheffield population of approximately 560,000 people. To maximise our ability to commission the highest quality services within the available resource allocation we work jointly with a range of partners which include, NHS England, Sheffield City Council, local health providers and the Voluntary Sector. As a CCG we are working to deliver an NHS that is fair, personalised, effective, safe and provides effective choices for the population of Sheffield.

To ensure we commission services fairly and transparently NHS Sheffield CCG will comply with procurement and competition law.

The overarching principles of public procurement within the NHS are as follows:

- **Transparency** – Commissioners are required to publish procurement strategies and intentions to procure, provide feedback to unsuccessful bidders, publish details of awarded contracts and maintain records which demonstrate how procurement decisions have been made;
- **Proportionality** – The level of capacity and resource involved in the procurement process both on behalf of the commissioner and the potential providers in relation to the value and complexity of the service being procured must be proportionate; and
- **Equality/Non-discriminatory** – The duty to treat all potential providers equally. This could include engagement with providers on service design to ensure service specifications have not been designed to exclude certain providers and the deadline for tender submissions has not been set to favour certain providers.

Where appropriate the CCG will work collaboratively across the wider health economy to jointly commission and procure services. The CCG will actively participate in projects/programmes where there are benefits to the Sheffield population, including the reduction of procurement costs and increased leverage with providers, by acting regionally.

Sheffield CCG purchases all specialist procurement advice from the NHS South Yorkshire Procurement Service

1.2 NHS Sheffield CCG’s Constitution

We aim to be an organisation capable of commissioning high quality services in an affordable and sustainable local health system.

The NHS Sheffield CCG Constitution⁴ sets out the arrangements made by the CCG to meet its responsibilities for commissioning care for the people to whom it is accountable. It describes the governing principles, rules and procedures that the CCG will establish to ensure probity and accountability in the day to day running of the Clinical Commissioning Group, to ensure that decisions are taken in an open and transparent way and that the interests of patients and the public remain central to our four priority aims which are:

1. To improve patient experience and access to care;
2. To improve the quality and equality of healthcare in Sheffield;
3. To work with the City Council to continue to reduce health inequalities in Sheffield; and
4. To ensure there is a sustainable, affordable healthcare system in Sheffield.

NHS Sheffield Clinical Commissioning Group commits to:

- Involving all GP practices in clinical commissioning through the mandate offered to CCG committee representative and engagement in our strong localities;
- Citywide implementation of effective innovations and opportunities for improvement;
- Placing patients at the heart of all our commissioning decisions and seeking their views;
- Healthcare decisions led by Doctors, nurses and other health professionals;
- Collaborative working across practices through strong locality arrangements;
- Strengthening relationships and partnership work between organisations and clinicians; and
- Improvement that is well managed and benefits all parties.

1.3 The Role of the CCG Governing Body in the Procurement Process

The Governing Body has the ultimate responsibility for ensuring that the CCG meets its statutory requirements when procuring healthcare services.

The Governing Body will be the authorising body for awarding a contract once a formal tender process has been completed. When considering options for procurement the Governing Body will work within the guidelines set out by Monitor as the appointed regulator of healthcare procurement and apply the Monitor Key test's as described within section 2.3 of this document.

1.4 Staff, Public and Patient Engagement

Sheffield CCG is committed to engaging relevant stakeholders in all aspects of procurement. The NHS Constitution⁵ pledges that staff should be engaged in

⁴ <http://www.sheffield.nhs.uk/ccgboard/070612/PAPERD.pdf>

⁵ <http://www.nhs.uk/choiceintheNHS/Rightsandpledges/NHSConstitution/Pages/Overview.aspx>

changes that affect them. Staff engagement is principally the responsibility of employers, but as commissioners the CCG recognises the value of effective staff engagement in improving the quality of commissioning and procurement.

The CCG recognises that the engagement of clinicians, patients and public in designing services results in better services. Our business processes require evidence of engagement for business cases to be approved and as a result, any procurement of services will have been informed by engagement at the design stage.

As well as engaging staff and service users at the business case development stage, the CCG is committed to involving individuals in the procurement process. The CCG will ensure that the views of the public and service users are taken into account when making any decision to go out to competitive procurement and when developing relevant tender documentation. The CCG will also ensure engagement with service users and the public when evaluating tender submissions; our expectation is that relevant service users will be represented on tender evaluation panels and be given the opportunity to influence the outcome of procurement decisions.

1.5 Quality

The overall quality of a Healthcare Service will be determined by the successful implementation of the procurement process. Quality will be embedded throughout each process using the following tools:

1.5.1 Quality, Innovation, Productivity and Prevention (QIPP)

All tender activity undertaken by the CCG will focus on the QIPP agenda and each successfully delivered healthcare tender will contribute to this wider programme:

- **Quality** – The quality of each service will be assessed through the evaluation of the successful bidder's tender submission and subsequently managed through an agreed performance management framework established at the tender stage and included in the Contract. This will cover, where relevant, any appropriate health outcome measures specified as part of the tender process.
- **Innovation** – Emphasis will be placed on innovation to enable suppliers to introduce efficiencies and new working methods into every area of service delivery.
- **Productivity** – Each tender will be evaluated against published assessment criteria and weightings using the published scoring mechanism to ensure that the Contract is awarded to the Provider/Providers who is/are adjudged to have submitted the Most Economically Advantageous Tender (MEAT).

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- **Prevention** – For procurements this focuses on the problem of under or over supply as opposed to considering any health improvement and inequalities issues, which will be addressed as part of the quality and outcome specifications. A contract that delivers too much or too little activity is wasteful and will inevitably be an unwelcome expense to the commissioner of the service. There can also be associated risks to the provider which emphasises the need for thorough market analysis and the understanding of the service requirements.

1.5.2 Commissioning for Quality and Innovation (CQUIN)

CQUIN payments enable commissioners to reward suppliers by linking payments to local quality improvements goals. The South Yorkshire Procurement Service will offer advice to enable commissioners to embed these payments into the contractual agreement through an appropriate performance management framework as part of the tender process.

1.5.3 UK Government's Approach to Quality

Regulation 67 of the Public Contracts Regulations 2015 ('the PCR 2015') confirms that all contract awards must now be made to the 'Most Economically Advantageous Tender' (MEAT) using a cost effectiveness approach such as life-cycle costing to assess this; this may include best 'price-quality ratio' as assessed on the basis of the award criteria.

1.6 Collaborative Procurement

There are areas of supply management in which procurement collaboration is likely to bring benefits to Sheffield CCG whether it is the sharing of operational resources, or commitment to specific joint projects and/or contracts. Economies of scale can be achieved in both operational activity and through leveraging collective spend. Where a specific procurement warrants joint procurement activity and it can be evidenced that this would be the best thing for the Sheffield population, NHS Sheffield CCG will enter into collaborative procurement processes.

1.7 Decommissioning Services

The CCG Governing Body has considered a set of principles to guide our approach to decommissioning services, as set out below. The principles were developed to clarify the circumstances, and by what processes, services will be decommissioned and, if necessary, re-commissioned. The CCG will ensure that the way we approach the decommissioning of services will be fair, open and transparent.

- a. Proposals to decommission a service will meet the Secretary of State's four key tests for service change:

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- Support from GP commissioners;
 - Strong engagement, including local authorities, public and patients;
 - A clear clinical evidence base underpinning proposals; and
 - The need to develop and support patient choice.
- b. There must be clear and objective reasons for the decommissioning of a service. These are likely to be based on one or more of:
- Failure to remedy poor performance;
 - Evidence that the service is not cost-effective;
 - Evidence that the service is not clinically effective – i.e. patient outcomes cannot be shown; and/or
 - Insufficient need for the service.
- c. Proposals will be clearly in line with the CCG's business aims and objectives, as set out in our annual commissioning intentions.
- d. Patient and service users' views will be taken into consideration in any decision to decommission a service, with formal public consultation when required.
- e. Proposals will be led by clinicians and will be based upon clear and strong evidence of clinical and cost effectiveness.
- f. There will be no negative impact on the quality of care patients receive or on equality of care provision.
- g. Proposals will be backed by a robust business case that describes the benefits of decommissioning and demonstrates that the benefits will be achieved.
- h. Decommissioning decisions will be consistent with the commitments in the Contract with Voluntary, Community and Faith (VCF) sector providers and with partnership principles agreed with NHS Foundation Trusts and the Local Authority.
- i. NHS Sheffield CCG will ultimately take the decision with regard to the decommissioning of any service.

Section 2 – Ensuring CCG Compliance with Procurement Rules and Regulation

2.1 Statutory Framework

NHS Sheffield Clinical Commissioning Group (CCG) was established under the Health and Social Care Act (2012)⁶. CCGs are statutory bodies which have the function of commissioning services for the purposes of the health service in England and are treated as NHS bodies for the purposes of the National Health Service Act 2006 ('the 2006 Act'). The duties of clinical commissioning groups to commission certain health services are set out in section 3 of the 2006 Act, as amended by section 13 of the 2012 Act, and the regulations made under that provision.

The NHS Principles are outlined in National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations (2013) and Monitor's Substantive guidance on the Procurement, Patient Choice and Competition Regulations (2014). The key deliverables are:

- a) Securing the needs of the people who use the services;
- b) Improving the quality of the services; and
- c) Improving efficiency in the provision of the services.

2.2 Procurement Rules and EU Treaty Principles

2.2.1 Responsibilities

All managers and commissioners with budgetary responsibility must make themselves familiar with the CCG Standing Orders (SO) and Prime Financial Policies (PFPs), which form part of the CCG's Constitution, together with relevant detailed financial policies available via the intranet and all relevant procurement procedures described in this document.

- All procurements will comply with the requirements of the SO and PFP's.
- Where applicable, all procurements will comply with the requirements of the European Union (EU) Procurement Directive 2014/24/EU as promulgated in UK law by The Public Contracts Regulations 2015 ('The Regulations'). Managers and commissioners should seek advice from the NHS South Yorkshire Procurement Service to confirm when and if these Regulations apply.
- All clinical service procurements will abide by Monitor's Substantive guidance on the Procurement, Patient Choice and Competition Regulations.

⁶ http://www.legislation.gov.uk/ukpga/2012/7/pdfs/ukpga_20120007_en.pdf

The EU Treaty and EU Directive on procurement require competition as the mechanism by which contracting authorities ensure equality of treatment, transparency and non-discrimination of providers.

Regardless of whether procurement is an 'above threshold' procurement, i.e. the contract value exceeds the threshold level above which it is mandatory to advertise the procurement in the Official Journal of the European Union (OJEU), it is important to note that the EU Treaty Principles still apply.

2.2.2 Health and Social Care Act 2012

The Health and Social Care Act describes the responsibilities of the commissioning organisations within the NHS and the wider UK healthcare landscape.

2.2.3 Integrated Care, Choice and Competition

A key feature of the Health and Social Care Act is the emphasis on Integrated Care. Section 75 of the Act entitled 'Procurement, Patient Choice and Competition Regulations' requires commissioners to consider how they can procure services in a more integrated fashion to consider other Healthcare services, Healthcare related services and Social services.

The Regulations ask commissioners to consider when procuring services the impact on the patient who may have multiple healthcare needs and hence may traditionally have had to:

- Receive treatment from a number of different healthcare teams across a range of disciplines;
- Receive treatment over a number of different sites; or
- Receive treatment from a number of different healthcare providers.

No direct solution is given to address the issue other than to ensure that when procuring services they interface in a way which gives the patient a seamless service. Monitor (as described in section 2.3) may test a commissioner's effectiveness in this by asking providers how they will co-operate in the delivery of a patients care with other providers.

In relation to Choice and Competition, commissioners are required to ensure appropriate choice and competition exists in the market to drive up quality and efficiency. In testing this Monitor will assess how available 'Choice' is for patients and whether the number of providers in a particular market impacts on the incentive for providers to improve patient care. Where plurality of providers does not exist there is no requirement to introduce this until the incumbent provider's contract is up for renewal.

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2.2.4 Publishing Contract Opportunities

The Health and Social Care Act 2012 deals with the requirements for:

- NHS England to maintain a website in which commissioners can publish notices (i.e. Contractsfinder⁷);
- Arrangements to be put in place to enable providers to express interests in providing services;
- Commissioners to publish a notice where they do intend to publish their intention to seek offers from providers for a new contract;
- The content of published notices; and
- The ability of commissioners to avoid posting a notice where they don't wish to invite interest from providers and which to award the contract with a single provider.

In assessing the decision to not publish a notice Monitor would assess whether there is only one provider capable to deliver the service or whether after a detailed review of local healthcare provision it is concluded there is a particular provider which is clearly superior in delivering the particular service and where the benefits of competitive tendering are outweighed by the cost of publishing the notice or running a competitive tender exercise.

There are certain benefits in selecting a particular provider and this could be due to location of provision, availability of particular infrastructure or where there is an immediate clinical need for which the selection of a particular provider is necessary on clinical safety grounds.

2.2.5 Public Services (Social Value) Act 2012 (UK)

Commissioners must consider their responsibilities under the Public Services (Social Values) Act (2012)⁸ for all healthcare (clinical) procurements conducted. Consideration should be proportional and equitable whilst ensuring that the economic, social and environmental needs of the local community are met.

There is specific provision in UK and EU legislation to enable commissioners to include evaluation criteria which supports economic, social and environmental well-being within an area. Criteria could include financial investment, employment opportunities, carbon reduction and wider supply chain impacts amongst others.

2.2.6 Equality Act 2010 (UK)

Commissioners must consider their responsibilities under the Equality Act 2010⁹ for all healthcare (clinical) procurements conducted. Potential Providers

⁷ <https://online.contractsfinder.businesslink.gov.uk>

⁸ <http://www.legislation.gov.uk/ukpga/2012/3/enacted>

⁹ <http://www.legislation.gov.uk/ukpga/2010/15/contents/enacted>

must not be discriminated against, in compliance with the requirements of the act, during the term of contract or the procurement process itself.

2.2.7 Freedom of Information 2000 (UK)

Commissioners must consider their responsibilities under the Freedom of Information Act 2000 (FOI)¹⁰ for all healthcare (clinical) procurements conducted. Care must be taken to ensure the rights of individuals and the rights of all organisations associated with the procurement process are protected during all correspondence and associated actions. Potential bidders must be made aware of the commissioner's responsibilities as a public sector organisation under the act during the preliminary stages of any procurement process.

2.3 Monitor's Role

Under the Health and Social Care Act 2012, Monitor, as the sector's regulator, must ensure that relevant procurement guidelines are adhered to across the health economy. A provider who raises a challenge or dispute in relation to a tender process should be initially managed through a local Dispute Avoidance and Reconciliation process (DARP). Where the bidder is not satisfied by local DARP outcome bidders should be referred to Monitor who will investigate procurement disputes to establish if there is a case to answer.

Monitor's decision is binding in these instances, as described by the role of Monitor as the independent regulator of competition within the NHS (section 62 of the Health and Social Care Act (2012)). Monitor may request that the commissioning authority re-tenders an opportunity should any fault be found in the methodology used to select service providers.

A provider also has the right to approach the County Court directly without approaching the CCG or Monitor and in such instances the case may be heard through the local judicial system.

2.3.1 Monitor's Testing Criteria

The overarching purpose of the Monitor testing criteria is to ensure that any healthcare procurement achieves the following:

- Securing the needs of health care service users;
- Improving the quality of services; and
- Improving the efficiency with which services are provided.

The following not only applies to let contracts but also when selecting providers for frameworks or shortlisting as potential future providers. The criteria that

¹⁰ <http://www.legislation.gov.uk/ukpga/2000/36/contents>

Monitor will evaluate in assessing whether the aforementioned objectives have been met are as follows:

- Steps taken to establish the levels of public engagement in the local community to establish whether the services being procured meet local health need.
- Establish whether a holistic view of the needs of healthcare users has been undertaken when procuring particular services, including their needs for related services i.e. services that health care users/patients can access from the same provider on the same site.
- Whether the commissioner has considered the needs of all health care users for which it is responsible when procuring services, including:
 - What steps the commissioner has taken to ensure equitable access to services, including by vulnerable and socially excluded members of the population;
 - Whether the commissioner has had regard to the different needs of groups of patients, such as the need for some patients to receive a service in a particular setting;
 - Whether the commissioner has considered the sustainability of services, including the impact that a procurement decision relating to one set of services may have on the ability of providers to deliver other services that health care users require; or
 - Whether the commissioner has monitored the quality and efficiency of existing service provision and identified any areas where improvements are needed in advance of procuring services.

2.4 CCG's Prime Financial Policies

Section 13 of the CCG's Prime Financial Policy document within the CCG's Constitution sets out the procurement limits for both revenue and capital purchases these are as follows:

Total Contract Value	Type of Procurement Required	Procurement Options	Timescales
Up to £10k	1 quotation required use standard requisition process. For audit purposes and to demonstrate that value for money has been considered, wherever possible staff should ensure that a quotation is	Adhere to local/national contracts	1 week

	attached to the requisition for both single and multiple items if this is not already available via an existing contract.		
Between £10k and £50k	3 quotations sought (waiver required if 3 quotes weren't sought)	'Call for further competition' through framework agreement	2-4 weeks
		SFI tender published on e-tendering website	
Between £50k and £100k	5 quotations sought (waiver required if 5 quotes weren't sought)	'Call for further competition' through framework agreement	2-8 weeks
		SFI tender published on e-tendering website	
Over £100k	Full tender required (Any decision not to put a service out to tender should be discussed and confirmed at Governing Body.)	Any Qualified Provider (AQP)	2-4 months
		Standard OJEU - Open	5-6 months
		Standard OJEU - Restricted	
		Complex OJEU - Competitive Dialogue	5-6months +

In certain circumstances the procurement route specified below might not be appropriate. In such circumstances a procurement Waiver may be requested by the relevant director and authorised by the Accountable Officer or Chief Finance Officer.

2.4.1 For expenditure up to £10k

The procurement can be done locally and should follow the normal requisitioning procedures. All requisitioners will be expected to adhere to those contracts which have been negotiated by Regional or National Procurement teams for all goods/services; this includes items under £10K. Where no contracts have been negotiated, or if they prove unsuitable, purchasers are free to request quotes from the open market.

2.4.2 For expenditure between £10k to £50k

The procurement can be done locally and should follow the normal requisitioning procedures. All requisitioners will be expected to adhere to those contracts which have been negotiated by Regional or National Procurement teams for all goods/services. Where no contracts have been negotiated, or if they prove unsuitable, purchasers are free to request quotes from the open market. A minimum of 3 organisations should be approached to provide quotes.

2.4.3 For expenditure over £50k

Some form of competitive process should take place. This is likely to require input from NHS South Yorkshire Procurement Service and the budget holder should seek appropriate advice.

If a competitive process is not going to be followed then a waiver form must be completed.

A full competitive process is expected to take place for services over £100k unless the Governing Body has determined that the service will not be subject to tender and has set out the rationale for its decision.

Where a full OJEU compliant tender is required the procurement work-plan must be updated and the NHS South Yorkshire Procurement Service informed to enable capacity planning. Procurement requests should be routed through the Head of Procurement.

2.4.4 Tender/No Tender Proforma

A proforma has been developed to help budget holders and commissioners to decide if a contract opportunity should be tendered or not and CCG staff should ensure they have the full understanding of the CCG's Policy for the Management of Competitive Tender & Quotation Exercises (March 2013). All 'no tender' decisions must be documented and should represent the decision of the organisation rather than an individual.

Advice should be sought from the NHS South Yorkshire Procurement Service if there is any doubt as to whether a tender should be conducted.

2.5 Awarding of contracts

The Governing Body may choose, depending on the nature and value of the procurement, to delegate sign off to the Accountable Officer or Chief Finance Officer. If this process is not agreed for an individual procurement, the CCG Governing Body should be consulted on the outcome of a process and receive a recommendation for contract award before the CCG can make an award of contract.

2.6. Avoidance of procurement rules

The UK courts take a strict line when they perceive that public contracts have been awarded without taking the necessary steps to ensure competition rules have been adhered to. Commissioners should be aware of several forms of avoidance that have been commonplace within the NHS:

- a) Pilot Projects – Awarding a contract through the guise of a ‘pilot project’ without following the correct procedure (as described below in Pilot Projects 2.23):
 - Pilot Projects have been awarded as a stop-gap measure when the commissioner has no intention to undertake a competitive process in the future. These contracts are often extended without competition, and;
 - Projects have been labelled as a pilot when the previous contract lapses and procurement has not taken place.
- b) Contract lengths are reduced (i.e. a 3 year contract is awarded as a 1 year contract) to artificially alter the contract value to avoid the compulsory OJEU thresholds¹¹, and;
- c) Using negotiation with existing providers as a mechanism to improve services when the contract lapses (for clarification, negotiation is a viable method within the contract term but should not be used to renew or extend a contract).

The UK courts have the authority to award damages to providers who have been unfairly excluded from the market through the use of such tactics, depending on the circumstances.

2.7 Document Hierarchy

The CCG recognises that there is the potential for conflict between local, regional, national and European legislation within the UK healthcare system. The CCG will ensure that the processes it adopts comply with judicial legislation in accordance with the most up to date policies, guidance and procedures.

2.8 Most Economically Advantageous Tender (MEAT)

With support from the NHS South Yorkshire Procurement Service the CCG will ensure that every healthcare (clinical) service procurement will evaluate bidders' submissions using the MEAT strategy rather than solely on a lowest price basis. This approach allows commissioners to consider the whole life cost of bids and takes into account the quality of the deliverable elements. It will be

¹¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62101/10_2011_20Threshold_20Rates_20for_202012_20and_20AR_20Procedure_20Update.pdf

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for the commissioner of the service to determine the priorities when setting out the bid evaluation criteria.

2.9 Managing Conflicts of Interest

When commissioning services for which GP practices/CCGs could be potential providers, or where staff may have a conflict of interest, the CCG will refer to the advice and guidance published by NHS England¹² dealing with potential conflicts of interest. This guidance describes the responsibility of the CCG to demonstrate that those services commissioned:

- Clearly meet local health needs and have been planned appropriately;
- Go beyond the scope of the GP contract; and
- The appropriate procurement approach is used.

Sheffield CCG has a requirement to manage conflicts of interest and has the following processes in place:

- Arrangements for declaring interests;
- Maintaining a register of interests;
- Excluding individuals from decision-making where a conflict arises; and
- Engagement with a range of potential providers on service design.

The PCR 2015 also regulates conflicts of interest (Regulation 24), imposing a requirement that contracting authorities take measures to prevent, identify and remedy such conflicts and ensure equal treatment and non-distortion of competition.

In particular, Regulation 24 highlights the potential for conflict where staff members of the contracting authority have a direct or indirect interest which could prejudice their impartiality in the running of the procurement. An unresolvable conflict of interest forms a new ground for discretionary exclusion at selection stage.

2.10 Pre-Procurement Engagement

The PCR 2015 officially gives blessing to consultation of the market pre-procurement, provided this is within the parameters of Regulations 40 and 41. Regulation 40 expressly allows contracting authorities to use advice gained as part of a pre-market engagement process in the planning and conduct of the procurement, provided that this is not anti-competitive or a breach of transparency and non-discrimination principles.

Regulation 41 imposes express requirements where a supplier has had prior involvement in the preparation of the procurement; a contracting authority must ensure that the relevant information is disseminated amongst all bidders to ensure a level playing field and that sensible bid deadlines are set. There is a

¹² <http://www.commissioningboard.nhs.uk/resources/resources-for-ccgs/>

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presumption that the bidder with prior involvement will only be excluded if there is no other way to ensure equality of treatment amongst bidders.

2.11 OJEU Thresholds

As with the PCR 2006, the PCR 2015 will only apply where the contract being awarded is within the scope of the PCR 2015 and exceeds a value threshold (which is set out in Article 4(a) to (c) of the Directive). Regulation 6 of the PCR 2015 sets out the rules on how to calculate the value of a contract for the purposes of assessing whether the threshold is exceeded (broadly speaking, the position here is unchanged from that of the PCR 2006, in particular the rules around aggregation of requirements and contract values).

Thresholds are published every two years. Current published thresholds are applicable for the period 1st January 2016 to 31st December 2017. Commissioners should consult the NHS South Yorkshire Procurement Service for advice on current thresholds and their application to ensure the correct procurement route is adopted.

2.12 Advertising Opportunities

Regulation 53 of the PCR 2015 requires all contracting authorities to offer full and unrestricted access to all the procurement documents from the date that a contract (OJEU) notice (or invitation to confirm interest following a PIN) is published in the OJEU. 'Procurement documents' is a defined term in the PCR 2015 and will include, in addition to the call for competition itself, and non-exhaustively, technical specifications, descriptive documents, pre-qualification questionnaires, invitations to tender, and the terms and conditions of the contract.

2.13 Service Contracts

Under the PCR 2006, contracts for so-called Part B Services were exempt from the full application of the rules (particularly, there was no requirement to advertise in the OJEU). Under the PCR 2015, the distinction between Part A and Part B Services has been removed and replaced by what is becoming known as the 'Light Touch' regime. Details of this regime are at Regulation 74 onwards of the PCR 2015.

A services contract will fall within the scope of the Light Touch regime if it is for the certain types of services listed at Schedule 3 of the PCR 2015. For these Light Touch regime contracts, a higher threshold than that for ordinary service contracts will apply, before the Light Touch regime is applicable. This threshold is set out at Article 4(d) of the Directive and at the time of writing is £589,148.

Note that the services listed at Schedule 3 of the PCR 2015 do not exactly mirror what used to be categorised as Part B Services under the PCR 2006; if a service is not listed at Schedule 3 of the PCR 2015 it will be subject to the full

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regime rather than only the Light Touch regime. Health, Social and Related Services are included in Schedule 3.

While the Light Touch regime is not prescriptive as to how contracting authorities design their procurement process for Light Touch regime services contracts, it does for the first time require that services contracts that fall within the Light Touch regime are advertised.

2.14 Exemptions for In-House Contracts and Joint Co-Operation

Previously we relied on European case law (particularly, the Teckal and Hamburg cases) for authority on when an in-house contract or joint co-operation arrangement fell outside the scope of the PCR 2006. The PCR 2015 now sets out these exemptions in statute for the first time.

Regulation 12 states that a contract will be regarded as an exempt in-house contract where:

- The contracting authority exercises over the contractor concerned a control which is similar to that which it exercises over its own departments (“similar control” in this context means the contracting authority exercising “a decisive influence over both strategic objectives and significant decisions” of the contractor. It includes where this control is exercised by another body, provided that other body is itself controlled by the contracting authority); and
- More than 80 % of the activities of the contractor are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other bodies that are themselves controlled by that contracting authority; and
- There is no private sector ownership of the contractor, with certain exceptions.

Regulation 12(2) specifically permits an extension of the Teckal exemption to what can be called “horizontal in-house transactions”. Provided that the three conditions listed above have been met, Regulation 12(2) states the exemption will also apply where “a controlled legal person, also being a contracting authority, awards a contract to its controlling contracting authority or to another entity that is also controlled by that controlling contracting authority”.

Regulation 12 also provides an exemption for joint co-operation between contracting authorities where:

- The contract establishes joint co-operation in the performance of public services with a view to achieving mutual objectives; and
- The implementation of the co-operation is governed only by the public interest; and
- The participating authorities perform “on the open market” less than 20% of activities concerned by the co-operation.

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2.15 Choice of Procedure

2.15.1 New Procedures Available

Under the PCR 2015 five standard procurement procedures are available, as follows:

- Open (Regulation 27);
- Restricted (Regulation 28);
- Competitive with negotiation (Regulation 29);
- Competitive dialogue (Regulation 30); and
- Innovation partnership (Regulation 31).

2.15.2 Greater freedom to use competitive with negotiation and competitive dialogue procedures

Under the PCR 2015 these procedures can now be used when:

- Needs can't be met without adapting readily available solutions; or
- Requirements involve design or innovative solutions; or
- The contract cannot be awarded without negotiation due to nature, complexity, legal or financial make up or risks attached; or
- The specifications can't be established with sufficient precision; or
- Following an open/restricted procedure, where only irregular or unacceptable tenders were submitted.

2.16 Timescales

Timescales for all the procedures have been shortened; please refer to the NHS South Yorkshire Procurement Service for advice on procurement timescales.

Commissioners should note that there is a requirement at Regulation 47(3) to extend time limits where information requested by bidders is not provided to them at least 6 days prior to the bid deadline or where significant changes are made to the procurement documents (for example, such changes could perhaps be needed because the contracting authority has had to rush the preparation of the procurement documents in order make these available electronically from day one, in accordance with Regulation 53).

2.17 Selection (Pre-Qualification) Stage

2.17.1 New grounds for mandatory exclusion

The PCR 2015 has updated the list of offences set out at Regulation 57(1). New offences include those under the Counter Terrorism Act 2008 and the Serious Crime Act 2007. In addition, for example, where a supplier has failed to

pay taxes or social security contributions and there has been a binding judgment or decision in the case, that supplier must be excluded (Regulation 57(3)).

2.17.2 Extension of grounds for discretionary exclusion

Regulation 57 includes new grounds for discretionary exclusion which the CCG will need to address, for example, where the supplier has:

- Failed to pay taxes or social security contributions and the contracting authority can demonstrate this by 'appropriate means' even in the absence of a formal ruling; or o performed poorly on previous contracts, resulting in termination or damages or the equivalent; or
- Exerted undue influence on procurement decision making process; or
- Various other circumstances which would distort competition e.g. conflicts of interest, collusion, prior involvement (where the impact of this is incapable of being neutralised by dissemination of information to other bidders).

2.17.3 Duration of exclusion and 'self-cleaning'

Bidders may not be excluded forever. Regulation 57(11) states that for a mandatory exclusion offence a bidder shall be excluded for a period of five years, and for a discretionary exclusion, a period of three years.

In addition, Regulation 57(13) sets out a "self-cleaning" mechanism where a supplier may provide evidence that, despite the existence of mandatory or discretionary grounds, it can demonstrate its reliability and that it has taken compensatory measures to prevent the issue happening again (see Regulation 57(15)).

There is an obligation on the CCG to evaluate the evidence in the light of the gravity and circumstances of the misconduct, and to provide reasons to the supplier if it considers the 'self-cleaning' to be insufficient and it wishes to proceed to exclude in any event (Regulation 57(17)).

2.17.4 Financial standing

Regulation 58 limits the maximum turnover requirements that the CCG may set to a maximum of twice the contract value.

2.17.5 Technical capability

Regulation 58 confirms the CCG may require a sufficient level of experience to perform a contract to 'an appropriate quality standard' and this may be required to be demonstrated by references from previous contracts.

2.18 Abnormally Low Tenders

Regulation 69 requires contracting authorities to demand an explanation where a tender appears to abnormally low and states that bids may only be rejected where this explanation is unsatisfactory (Regulation 69(4)). However, where it is established that the tender is low due to breaches of environmental, social or labour law, the contracting authority is obliged to reject the tender (Regulation 69(5)). The regulation does not contain any real definition of what amounts to an 'abnormally low' bid.

2.19 Evaluating Experience at Award (Invitation to Tender) Stage

The PCR 2015 confirms (Regulation 67(3)(b) that it is possible to evaluate the experience of the staff assigned to performance of the contract, where staff quality is likely to have significant impact on performance levels (this is particularly likely to be true for example, contracts for training and consultancy services).

2.20 Regulation 84 Reports

Regulation 84 requires the CCG to draw up a report in relation to each contract or framework that is awarded and ensure that it includes all the information set out at Regulation 84(1). This requirement does not apply to contracts called off from a framework agreement (see Regulation 84(2)). There is an ability to cross refer to the contract award notice where this already contains all the information required. Note, the Cabinet Office has the right to request a copy of the report.

As well as the general details of the winning bid, the suppliers involved, the value and subject matter of the contract, the Regulation 84 report on a particular contract must also include:

- Where the competitive with negotiation, competitive dialogue, or negotiated without notice procedure was used, the justifications for this choice;
- Where a procurement procedure is abandoned, the reasons why the contracting authority decided not to proceed;
- Details of any conflicts of interest identified and how these were resolved; and
- If any bids were found to be abnormally low, reasons for the rejection of these.

A further requirement is to publish contract award notices for any contract entered into which includes contracts entered into without competition (e.g. acute contracts, GP contracts etc.). To be compliant, all CCGs must publish contract award notices:

- For any contract above the Contractsfinder threshold (currently £25,000 over the life of the contract) on www.contractsfinder.service.gov.uk;
- For any 'non-light touch regime' contract above OJEU threshold (currently £164,176 over the life of the contract) on <http://simap.europa.eu/> as well as on www.contractsfinder.service.gov.uk; and

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- For any 'light touch regime' contract above OJEU threshold (currently £589,148 over the life of the contract) on <http://simap.europa.eu/> as well as on www.contractsfinder.service.gov.uk.

The NHS South Yorkshire Procurement Service will publish contract award notices on behalf of CCG commissioners.

2.21 Framework Agreements

A framework is an umbrella agreement which sets out the terms on which the purchasing organisation and the provider(s) will enter into contracts.

These agreements can be established on both a national or regional level and are constituted by a number of pre-approved providers who supply a similar range of goods from which a purchase can be made relatively quickly and easily.

Various framework agreements are available through:

- The Crown Commercial Services (CCS)¹³;
- NHS Shared Business Services (SBS)¹⁴;
- NHS Supplychain¹⁵; or
- Department of Health¹⁶.

There are two options available to purchase from a framework agreement:

- **Apply the terms of the framework agreement:**
This option would apply when the terms and conditions of a purchase are set out (e.g. Provider A is cheaper than provider B for the product you are looking for therefore no competition is required).
- **Hold a mini-competition:**
Where the requirements are more complex the CCG will hold a mini-competition or 'call for further competition'. Note, the CCG cannot just pick suppliers off the list and should approach all suppliers appointed to the framework in relation to a proposed call-off. In practice, frameworks with a large number of suppliers can, for this reason, be just as time consuming as embarking on a new procurement exercise.

The purchaser can be assured that the providers on a framework are financially stable and that the goods and/or services on offer are of a high quality because the suppliers have already been approved and rigorously assessed. Any purchase made through a framework is also compliant with procurement legislation, provided that the rules to engage providers through the terms of the framework have been followed.

¹³ <http://ccs.cabinetoffice.gov.uk/>

¹⁴ <http://www.sbs.nhs.uk/>

¹⁵ <http://www.supplychain.nhs.uk/>

¹⁶ <http://www.dh.gov.uk/>

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The NHS South Yorkshire Procurement Service can advise commissioners on either the use of existing framework agreements or the procurement of a new framework agreement.

2.22 Any Qualified Provider (AQP)

The use of AQP should be determined at a local level where increasing the role of competition and patient choice can be proven to improve quality and patient care. Providers must be Care Quality Commission (CQC) registered (or, where CQC registration is not required to deliver the service, an appropriate registration body) or licensed by Monitor to take part in this truncated selection process, and all providers will be required to operate within the same pricing structure.

The NHS South Yorkshire Procurement Service will advise commissioners on the suitability and applicability of the Any Qualified Provider procurement route.

2.23 Pilot Projects

In order to identify new working practices through the use of pilot projects, the CCG 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
 - Period for lessons to be learnt.
- Clear and signed contract with the pilot service provider;
- Robust plan/process for evaluation; and/or
- Right to terminate a pilot must be included if it is found to be unsafe or the outcomes cannot be met.

It is important for commissioners to use pilot projects only in circumstances where the clinical outputs are not known or cannot be accurately predicted. The CCG should contact the NHS South Yorkshire Procurement Service for specialist advice before embarking on a pilot project to ensure compliance with procurement and competition law.

2.24 Dispute Avoidance

Where disputes arise as a result of a competitive procurement process the CCG dispute policy will apply.

2.25 Sustainable Procurement

NHS Sheffield CCG is committed to the principles of sustainable development and demonstrates leadership in sustainable development to support central

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Government and Department of Health commitments in this area of policy, and the improvement of the nation's health and wellbeing.

Sustainable procurement is defined as a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves 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.

Sustainable procurement should consider the environmental, social and economic consequences of:

- Design;
- Non-renewable material use;
- Manufacture and production methods;
- Logistics;
- Service delivery;
- Use / operation / maintenance / reuse / recycling and disposal options; and
- Carbon Reduction.

Each supplier's capability to address these consequences should be considered throughout the supply chain and effective procurement processes can support and encourage environmental and socially responsible procurement activity.

2.26 Third Sector/SME Support

The NHS South Yorkshire Procurement Service will support and encourage Small & Medium sized Enterprise (SME) suppliers, Third Sector/Voluntary organisations and local enterprises in bidding for contracts. NHS Sheffield CCG will ensure that Healthcare (clinical) Service tender processes promote equality and do not discriminate on the grounds of age, race, gender, culture, religion, sexual orientation or disability.

The CCG will aim to support Government guidelines seeking the optimal involvement of SME's and the Third Sector in public service delivery without acting in contravention of public sector procurement legislation and guidance.

The NHS is keen to encourage innovative approaches that could be offered by new providers – including independent sector, voluntary and third sector providers. NHS Sheffield CCG is committed to the development of local providers that understand the needs of local communities. It is vital to ensure that the Organisation's approach to healthcare procurement is open and transparent and that it does not act as a barrier to new providers.

Section 3 – Sheffield CCG’s Annual Procurement Plan

3.1 Procurement Work Plan

A procurement work plan will be prepared and published at the beginning of each financial year to support the priorities and requirements set out in the CCG’s annual commissioning and business plans.

The function of the procurement work plan is to highlight the proposed procurement priorities and opportunities, clearly defining the CCG’s direction of travel for potential and existing providers. By adopting a project management approach to the prioritisation and delivery of all procurement activities, resources can be allocated to ensure effective delivery.

The work plan is a key tool to improve communication between the CCG and providers. By having transparent and open processes, we will seek to actively encourage provider engagement at an early stage of any procurement, particularly when reviewing existing services with existing providers.

The procurement work plan is a public document and ensures that the CCG is transparent about its procurement decision making processes and rationale. It will be published annually on the CCG internet site, and updated quarterly. This will allow us to communicate short, medium and long term goals to the widest possible audience, and demonstrates a range of potential opportunities within the Sheffield health economy, rather than a series of ‘one-off’ procurements. This will encourage greater provider interest.

Not all commissioning priorities will have or will result in formal procurement activity. When considering appropriate actions to effect required changes and improvements, competition is only one lever available to NHS Sheffield CCG, and a range of other levers will also be considered (e.g. delivery of service redesign through partnership working).