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1. **Introduction and Overview**

As commissioner of healthcare services, NHS Nottingham North and East Clinical Commissioning Group (CCG) has a clear responsibility to ensure we make decisions and commission services that meet the needs of our population. Services have to be affordable, within the limits of the available resources, with emphasis on the quality of outcome, rather than the quality of provision.

The CCG has an annual health budget of £165million to commission services to improve the health and wellbeing of the 145,000 population.

The CCG is committed to reducing health inequalities, delivering measureable population health benefits, improved patient experience and ease of access. Provision of health services within Nottingham North and East should be convenient, timely, and consistent and delivered in a way that is sustainable in the longer term.

A ‘business as usual’ approach to the commissioning and procurement of healthcare services will fail to secure better outcomes and value for money. Changes in the roles of hospitals and a shift to primary care leading and delivering more services in a community based setting, will require the CCG to work closely with all providers, including new providers, and develop innovative procurement and contracting solutions.

There are limits on the resources available, and we have to be able to demonstrate we are achieving value for money for our investments. Through service development proposals and QIPP schemes an evidence based approach to identifying and delivering commissioning priorities will continue to develop.

We will review the services we need to commission and identify opportunities to improve efficiency, extend choice and access, and improve the quality of outcomes and patient experience.

This Strategy sets out the context in which procurement and market intervention decisions are agreed and to ensure that the CCG is legally and procedurally compliant.

2. **Legal Context**

The Health & Social Care Act (2012) enabled the Secretary of State to pass regulations requiring:

- Adherence to good practice in relation to procurement.
- Protection and promotion of the right of patients to make choices in respect of treatments.
- Commissioners not to engage in anti-competitive behaviour.
- Competitive tendering for health care services.
- Management of conflicts of interest between those commissioning and those providing health care services.

The NHS Procurement, Patient Choice and Competition (No. 2) Regulations became law in April 2013. The CCG is required to comply with this legislation, and the Public Contract Regulations 2009, as they apply to public bodies and health care services.
These regulations apply to all forms of NHS funded health care provided for individuals whether relating to physical or mental health, including integrated health and social care.

When commissioning services the CCG will act with a view to meeting the following objectives:

- Securing the needs of service users.
- Improving the quality of the services.
- Improving the efficiency of the services.
- Operating in a transparent and proportionate way.
- Treating providers equally and in a non-discriminatory way.
- Non behaving in an anti-competitive manner.
- Demonstrating value for money.

3. **Decision Making Process – Competition vs. Co-operation/Integration**

The key issue in relation to commissioning decisions is that the CCG must undertake a robust process when deciding the most appropriate market intervention and procurement method for commissioning the service. In essence this is the decision to make a direct award to a provider or to undertake a competitive procurement process.

The CCG must have an audit trial of procurement decisions to demonstrate compliance with the regulations, evidence that conflict of interest issues have been considered and evidence of due process if any decision is challenged.

A Procurement, Patient Choice and Competition Committee will be established to:

- Review/challenge and approve/reject all case for service change requests and business cases and consider the market analysis and the proposed procurement intervention.
- Review/challenge and approve/reject all requests to pilot services or to extend existing pilots.
- Review/challenge and approve/reject all requests to extend existing contracts where such contracts have reached their expiry date.

The Committee will operate on a joint basis with the other County CCG’s to provide an element of challenge to the decision making process, provide an opportunity to collaborate with other CCG’s and to share procurement plans. Membership of the Committee will also include representation from a lay member and a procurement representative from the Commissioning Support Unit.

4. **Requirements of Competitive Tendering**

If the market analysis indicates that there is more than one provider capable of providing the services, by implication there is a requirement for the CCG to undertake a competitive procurement process. Failure to do so is likely to be a breach of the objective to treat providers equally and in a non-discriminatory way and may result in a challenge from potential providers.

The CCG is required to advertise via Supply2health a description of the service and the proposed procurement process. The CCG will put in place a robust procurement process including arrangements for providers to express an interest, the invitation to tender process, the evaluation process and contract award process.
At the end of the procurement the CCG must publish the outcome of the competitive process on Supply2Health.

The CCG will put in place a detailed procedure for all aspect of the competitive procurement process and the contract award process. The contract award process shall be in accordance with the CCG’s Standing Orders and Standing Financial Instructions.

5. **Monitor and Procurement Challenges**

The Health & Social Care Act (2012) expended Monitor’s role. One of its new responsibilities is to enforce procurement regulations. Monitor can investigate non-compliance through initiating its own investigation as well as complaints brought by a third party.

Providers also have the option of instigating a legal challenge under the Public Contract Regulations or through Judicial Review. Monitor has no power to investigate if a legal process has been initiated.

Any individual or organisation with an interest in compliance with regulations can complain to Monitor. The process is free.

The complainant is required to demonstrate how the business has been affected by the alleged activity and/or how people who use health care services have been adversely affected by the alleged activity. Monitor will then decide if it will investigate in accordance with its prioritisation principles.

Monitor can direct a commissioner to:

- Put in place measures to prevent non compliance.
- Put in place measures to mitigate the effect of non-compliance.
- Vary or withdraw an Invitation to Tender.
- Vary an arrangement for provision of healthcare services.
- Declare a contract ineffective if the breach sufficiently serious.
- Declare a contract term ineffective if the breach is serious.
- Otherwise remedy the non-compliance.

The CCG should put in place a local dispute resolution process to manage any competition or procurement issues.

6. **Conflict of interest**

A conflict of interest is a situation where an individual’s ability to exercise judgment or act in one role is or could be impaired or otherwise influenced by that individual’s involvement in another role.

Conflicts can arise in the decision making process about whether to undertake a competitive process or not and also at the various stages of the competitive procurement process.

A range of interests in the provision of services may give rise to a conflict with the interests in commissioning them, including:

- Direct financial interest.
- Indirect financial interest.
- Non-financial or personal interests.
• Professional duties or responsibilities.

Even if a conflict of interest does not actually affect the integrity of a contract award, a conflict of interest that appears to affect the integrity of a contract award can damage a commissioner’s reputation and public confidence in the NHS.

As well as affecting the decision whether or not to award a contract and to which provider, a conflict of interest may affect a variety of decisions made by a commissioner during the commissioning cycle in a way that affects, or appears to affect, the integrity of a contract award decision taken at a later point in time.

Depending on the circumstances of the case, there may be a number of different ways of managing a conflict or potential conflict of interest in order to prevent that conflict affecting or appearing to affect the integrity of the award of the contract.

The CCG should maintain a record of how any conflicts that have arisen have been managed. The CCG will need to include all relevant information to demonstrate that the conflict was appropriately managed, particularly important in respect of any investigation by Monitor. The relevant information to include:

• Details of the individual who was conflicted and their role/position within the commissioner.
• The nature of their interest in the provision of the services.
• When and how the individual’s interest in the provision of the services was declared.
• Details of the steps taken to manage the conflict.

The CCG should put in place a detailed Conflict of Interest Policy.

7. **Stakeholder Engagement/Public Consultation**

The CCG recognises that effective engagement with stakeholders is an essential requirement of all NHS organisations and will offer benefits to the generation of outcome-based service specifications. The CCG will engage with stakeholders at appropriate times during the commissioning and procurement process. Stakeholder engagement with new and existing providers, members of the public, clinicians and other service users will occur at key points in the service review and procurement process. Any potential conflict of interest issues that arise during the engagement process need to be managed in accordance with the CCG Conflict of Interest policy.

8. **Collaborative Procurement**

Where there is clinical, quality, financial or process benefit the CCG should consider the option of joint commissioning with other health or local authority commissioners.

Where procurement is the subject of joint commissioning between several commissioners or with local authority partners, decision-making will be consistent with the contents of this strategy.

When a procurement process is the subject of joint commissioning with the Local Authority, Local Authorities are subject to the same legislative frameworks, Public Contract Regulations and European Union Procurement Directives, but may not be required to comply with NHS specific guidance and regulations, this will be considered and any issues arising from any difference will be clearly articulated in any joint procurement decision.
The CCG should consider the range of collaborative procurement support services available from Commissioning Support Units where they offer potential financial and process benefits to the CCG.

9. **Provider Development**

The CCG will ensure that services are commissioned from the providers that are best placed to deliver a quality and cost effective service. To support the process of delivering more services in community based settings the CCG will ensure all providers are ‘business ready’ to respond to competitive procurement projects.

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\(^1\) Health and Social Care Act (2012)
\(^2\) The NHS Procurement, Patient Choice and Competition (No. 2) Regulations 2013