

# **GREATER NOTTINGHAM CCGs PROCUREMENT POLICY**

**For the following Clinical Commissioning Groups (CCG)**

**NHS Nottingham City CCG,  
NHS Nottingham North & East CCG,  
NHS Nottingham West CCG,  
NHS Rushcliffe CCG.**

**July 2018**

## Introduction

This policy document seeks to outline a single, shared policy and approach across the Greater Nottingham CCGs that addresses all areas of CCG spend, including contracts for healthcare services plus also for the procurement of goods and non-healthcare services, which takes account of current regulatory requirements.

The policy seeks to:

- Set out a clear purpose and scope for the policy;
- Reference the relevant regulatory frameworks;
- Outline key commissioning principles and considerations to be taken into account;
- Confirm responsibilities and how capability will be assured;
- Ensure use of robust and consistent contractual terms and conditions;
- Outline the basis of decision making and the processes associated with awarding contracts;
- Detail how the policy will be reviewed; and
- Reference other relevant and interlinking policies of the CCGs.

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## 1. Purpose

This policy recognises and seeks to support the key objectives of the Greater Nottingham CCGs including to commission a sustainable, affordable, and high quality NHS. When procuring health care services, CCGs are required<sup>1</sup> to act with a view to:

- securing the needs of the people who use the services;
- improving the quality of the services; and
- improving efficiency in the provision of the services.

This policy outlines how decisions to award contracts for both healthcare and non-healthcare should be approached, reflecting current regulatory obligations, national policy and statutory guidance.

The Procurement Policy outlines key principles and considerations that will inform decision making. It is not intended to be comprehensively prescriptive and recognises the necessity for situational discretion when appropriate.

Consideration will need to be given to application of this Procurement Policy when the CCGs seek to establish contracts collaboratively across wider contracting authority organisations, including other CCGs and local authorities. Recognition will be given to their respective procurement policies and agreement will be sought to ensure a mutually acceptable approach on a case by case basis, ensuring that potential conflicts with this Procurement Policy are considered by the Senior Management Team of the affected CCGs and /or local authorities, as the case may be.

This policy aims to support:

- delivery of the statutory objectives of the CCGs as NHS bodies;
- the provision of high quality NHS services;
- assurance of value for money;
- compliance with regulatory obligations;
- exercise of due diligence; and the
- assurance of public sector probity
- appropriate management of potential conflicts of interest,

The Procurement Policy will be relevant where:

- a new contract needs to be awarded; or
- an existing contract reaches the end of its lawful duration; or
- an existing contract needs to be reviewed for the provision of any goods or services, including healthcare services being established for the benefit of NHS patients.

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<sup>1</sup> NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

## SECTION A

### 2. Regulatory & Policy Framework

When considering awarding contracts for goods and services, specific regard should be given, in particular, but without limitation, to the following (which may be updated or amended from time to time):

- **Public Contracts Regulations 2015** – which prescribes how public bodies must act when deciding how to award public contracts (both clinical and non-clinical);
- **NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013**, including Monitor’s substantive guidance on the same – setting out the responsibilities of NHS commissioning bodies and their obligations when awarding contracts for healthcare services;
- **Health & Social Care Act 2012**;
- **Public Services (Social Value Act) 2012** – requiring consideration be given to how improvements might be made to economic, social and environmental well-being of the local area in making commissioning decisions;
- **Managing Conflicts of Interest: Revised Statutory Guidance for CCGs** (NHS England, June 2017);
- **Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)**;
- **Equality Act 2010 – (Section 149 sets out the Public Sector Equality Duty)**;
- **Bribery Act 2010.**

Below are some of the key elements of legislation driving procurement process and decision making.

#### 2.1 The Public Contract Regulations 2015 (“PCR”)

The Regulations are produced by the EU Courts and enacted into UK Law. Under the Light Touch Regime there are stipulations that MUST be met – these are as follows:

- a) Expenditure over £615,278, must be advertised in OJEU & Contracts Finder. The value of £615,278 is for total spend over the life of the contract and is not value per annum.
- b) If more than one expression of interest is received then a fair and transparent process must be undertaken and all bidders treated equally.
- c) A Regulation 84 compliant Award Report must be produced, approved and kept on file for audit purposes.
- d) An Award Notice fully detailing the process undertaken and outcome must be placed in OJEU and Contracts Finder.

Not following the above four points would breach the Regulations and may lead to a successful challenge from providers.

#### 2.2 The National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (“PPCC”)

The PPCC Regulations were produced by Monitor (now known as NHS Improvement) on behalf of the Secretary of State for Health to exercise powers conferred by sections 75-77 and Section 304(9) & (10) of the Health & Social Care Act 2012.

Commissioners have an obligation to ensure that when they procure healthcare services (irrespective of whether a formal procurement process has been carried out) that must act with a view to (Regulation 2):-

- 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.

In order to meet these requirements the CCG should consider a range of strategies including:-

- a) Providing the services in a more integrated way;
- b) enabling providers to compete to provide the services;
- c) allowing patients a choice of provider of the services;
- d) Consider collaborative procurement;

NHS Improvement is responsible for implementing the Regulations which it considers to be a set of principles to be used by Commissioners when procuring NHS Funded Services.

NHS Improvement may investigate a complaint received from a provider that the CCG has failed to comply with a requirement imposed by the regulations. NHS Improvement may on its own initiative investigate whether a relevant body has failed to comply with the Anti-Competitive Behaviour requirements of the regulations.

**Both sets of procurement Regulations in place to ensure Commissioners adhere to the following principles:**

- a) Act in a transparent and proportionate way, for example by advertising opportunities, publishing Commissioning plans, publicising evaluation criteria. In addition the Regulations require the CCGs to publish in OJEU & Contracts Finder all contract awards it makes including those where no formal procurement process has been undertaken. The award notice must include the name of the provider, description of the services, total amount to be paid, contract period and describe how the provider was accepted;
- b) Treat providers equally and in a non-discriminatory way, including not treating a provider more favourably than any other provider, in particular on the basis of ownership, i.e. you cannot “favour” an NHS organisation including General Practitioners over other NHS provider types such as the independent or third sector; ensure service specifications are based on outcomes required rather than how providers should deliver the service.

For contract requirements below £615,278 there is no legal obligation to advertise however it is important that the Commissioner can evidence their decision meets the stipulations of Procurement, Patient Choice & Competition (2) Regulations 2013.

Where it is identified that there is likely to be more than one capable provider CCGs should advertise their requirements in Contracts Finder and undergo a fair and transparent process to select the preferred provider.

The Regulations also cover other matters that CCGs must consider when procuring services. These include:-

## **Award of a Contract without Competition**

**For expenditure above £615,278**, a direct award with no competition is covered under Regulation 32 of the Public Contract Regulations 2015 which states it is possible but only under the following circumstances:

- a) Where no tenders or suitable tenders were received from providers in response to an Open or Restricted procedure procurement process.
- b) Competition is absent for technical reasons (i.e only one provider can meet the specification – and this can be evidenced and justified appropriately).
- c) For reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for procurement cannot be met and this can be justified appropriately. Poor planning is not appropriate justification and the guidance states that the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

**For expenditure below £615,278** CCGs may award a new contract for Healthcare Services without advertising an intention to seek offers but this approach should only be pursued where CCGs are satisfied that the service is capable of only being provided by that provider or there are statutory or other reasons why a particular provider must provide those services, for example on clinical or safety grounds. In these specific instances, Commissioners would need to evidence that this action meets the stipulations of the Procurement, Patient Choice & Competition (2) Regulations 2013.

## **2.3 Social Value Considerations – the Public Services (Social Value) Act 2012**

The 'Social Value' Act requires CCGs to consider the social value benefits of a procurement before the procurement process starts, including:

- a) Economic benefits of the procurement;
- b) Environmental benefits of the procurement; and
- c) Social benefits of the procurement.

The CCGs must also consider whether consultation is required in relation to these issues. Consultation will be particularly relevant when considering procurements for services which are delivered directly to patients. It is less relevant in procurements for "back office" services such as IT or HR where services are being provided directly to the CCGs. The SVA does not set out how consultation should take place, so individuals should use the most appropriate form of consultation having considered the needs and requirements of people and organisations being consulted, the size of the procurement and the likely social, and environmental impact of the procurement.

The CCGs are committed to commissioning for social value. When designing service specifications pre-procurement individuals should consider social value and should take into account the social value priorities of the CCG, and retain a record of how they have done so.

Social value issues can be best implemented at this stage of the process. However it is important to remember that the CCG should only consider social value to the extent that it is proportionate and relevant to the contract being procured.

If there is a need to conduct an urgent procurement process then consultation and the consideration of social value at the pre-procurement stage may possibly be disregarded. It is important to note however that if urgency is caused by delays on the part of the CCG (e.g. poor planning and management of the process) then this is not a valid reason for failing to comply with the SVA.

## 2.4 Consultation

Section 14Z2 of the NHS Act 2006 (as amended by the Health & Social Care Act 2012) states that: “The clinical commissioning group must make arrangements to secure that individuals to whom the services are being or may be provided are involved (whether by being consulted or provided with information or in other ways)”:-

- in the planning of the commissioning arrangements by the CCG,
- in the development and consideration of proposals by the CCG for changes in the commissioning arrangements where the implementation of the proposals would have an impact on the manner in which the services are delivered to the individuals or the range of health services available to them, and
- in decisions of the CCG affecting the operation of the commissioning arrangements where the implementation of the decisions would (if made) have such an impact

The CCG should seek advice from its Communications & Engagement service and, if necessary, legal advice regarding whether or not formal consultation is required.

Whilst formal consultation is likely to be required where a new service is being introduced or there are fundamental changes proposed to any existing service provision it is important that in any procurement there is continuous stakeholder engagement throughout. The CCG should consider whether patient group representatives should be involved in the project team and in tender evaluation teams where formal procurements are undertaken. Care will need to be taken to ensure there are no Conflicts or potential Conflicts of Interest.

When Consultation is undertaken in order for it to be lawful:

- It must take place when the proposal is still at a formative stage;
- Sufficient reasons must be put forward about the proposal to allow for intelligent consideration and response;
- Adequate time must be given for consideration and response; and
- The outcome of the consultation must be conscientiously taken into account.

## 2.5 Public Sector Equality Duty

Under the Equality Act 2010 when public bodies make decisions, referred to exercising its functions in the Act, they must consider the need to:-

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

This is known as the Public Sector Equality Duty ("PSED").

Failure to comply with the PSED can result in any procurement being subject to a Judicial Review which can be invoked up to three months after the alleged breach, or even longer at the Courts discretion. The PSED lies with the people making the decisions, usually the CCG Governing body. Responsibilities under the PSED cannot be delegated. The key is that the objectives of the Act are considered when making decisions ("have due regard to") but at the same time these are considered in the context of the prevailing circumstances, so would include matters such as financial or operational issues. As with Consultation if there is any doubt advice should be sought.

The Equality Act 2010 defines protected characteristics as:-

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race (including ethnic or national origins, colour or nationality);
- religion or belief;
- sex;
- sexual orientation;
- marriage and civil partnership.

## 2.6 Fair Deal

Fair Deal was implemented on the 07th October 2013. This gave access to all types of Providers of NHS services to have access to the NHS Pension scheme. A New Fair Deal which affects NHS Pensions further was implemented March 2014. The New Fair Deal ensures that NHS staff previously compulsorily transferred out of the public sector will continue to have access to the NHS Pension scheme and includes allowing such staff to rejoin the scheme.

Should staff who rejoin the scheme have suffered a shortfall in contributions as a consequence of being originally transferred out of the NHS pension scheme, the New Fair Deal indicates that the new commissioners are responsible for any shortfalls.

New Fair Deal and the potential financial implications of bulk transfer of pensions should be considered in any new procurement. It is not an issue in the majority of cases but it should be considered when the outgoing provider has previously had staff TUPE transferred to it from the NHS. Any new provider would have to offer the option for staff to bulk transfer pension funds back into the NHS which could result in shortfalls.

***See Annex A – Regulatory Framework: Reference Sources for further detail in relation to the areas mentioned above.***

Regard should also be given to applicable guidance as may be published from time to time by: The Cabinet Office; Crown Commercial Service; Department of Health; NHS England; and NHS Improvement.

This policy operates alongside and should be read in accordance with and subject to each CCG's:

- Constitution;
- Annual Commissioning / Operating Plan;
- Financial Policies and Scheme of Reservation and Delegation;
- Policy on the Management of Conflicts of Interest;
- Anti-Fraud and Anti-Bribery Policy;
- Raising Concerns (Whistle Blowing )Policy;
- Communication and Engagement Strategy;
- Disciplinary Policy;
- Freedom of Information Policy.

### 2.7 Integrated Support and Assurance Process (ISAP)

Proactive consideration regarding the applicability of the Integrated Support and Assurance Process (ISAP) to any Procurement should be given via proactive liaison with appropriate NHS England and NHS Improvement colleagues to enable those organisations to reach a decision regarding potential applicability.

## 3. Key commissioning principles & considerations

The following key principles and considerations will support and guide the CCGs when considering how to comply with their statutory obligations and in delivering their commissioning plans when making decisions as to how public funds will be invested through contracts for the procurement of goods and services, including health care services to be accessed by NHS patients.

- 3.1 Quality and value for money:** Assessments, processes and decision making will seek to identify the most capable provider(s) to support delivery of the statutory obligations and commissioning intentions of the CCGs (as outlined above). Decisions regarding contract award will be informed by assessments of value for money, this being an appropriate balance between quality and price. Contract award decisions should never be based solely on price.
- 3.2 EU Treaty derived principles:** As a public body and a contracting authority, as defined in statute, it is recognised that decisions regarding the awarding of contracts and how processes should be designed to award contracts are expected to comply with principles that have been derived from the EU Treaty and EU legislation (including Directives and Regulations) and which underpin both EU and UK national procurement regulations and public procurement policy and guidance, including:

*Transparency* – including in regard to decision making and advertising contract opportunities appropriately;

*Equality of treatment and non-discrimination* –ensuring that no providers or types of providers are treated more or less favourably;

*Proportionality* – ensuring that assessments, requirements and decisions are reasonable given the relevant factors, circumstances, total value and risks associated with the relevant contract under consideration.

[See Annex D – Regulatory requirements to publish Contract Notices, including Table AE1](#)

- 3.3 Competition:** The role of competition can potentially significantly contribute to the achievement of the overall objectives and purpose of procurements as outlined in section 1 and should be carefully considered and, where appropriate, assessed to understand how it may best support the delivery of the statutory obligations and the commissioning intentions of the CCGs.

Recognition is given to the underpinning assumptions behind EU and UK procurement regulations, of the benefit of competition to drive best value for money, innovation and improved patient experience.

However, it is also recognised that in making commissioning decisions (for clinical services) CCGs must not act anti-competitively unless to do so is in the interests of patients which may include integrative or cooperative delivery solutions. In making any such decisions, due consideration of all associated risks must be given and documented by the CCG.

Whilst the CCGs may use competition to select the most appropriate and best value provider(s) to be awarded a contract, recognition is also given to the role that patient choice can play in allowing providers to compete to offer for example, the most accessible services, or to deliver the best patient experience.

- 3.4 Patient choice:** When reviewing how services should be configured and contracts awarded for the provision of healthcare services for the purposes of the NHS, a key consideration will be the choices that can be offered to patients.

Recognition is given to both regulatory and national policy obligations to secure and safeguard patient choice for certain NHS services, and also the role that patient choice can play in driving quality and innovation, particularly in regard to patient focused care.

Where assessed as a viable and sustainable service delivery model, consideration will be given to the establishment of provider frameworks, offering contracts to more than one provider where each is able to offer NHS services to patients – including use of the Any Qualified Provider (AQP) model where a standard tariff can be established by the CCG.

Recognition in particular is given to regulatory obligations to ensure patients are able to choose between any providers of secondary care consultant led services<sup>2</sup>.

- 3.5 Integration:** Consideration will be given by CCGs to identifying and creating opportunities for the integration of services where such integration can deliver improved benefit to patients and/or the NHS. It is recognised that integration may take the form of providers of different services collaborating to offer joined up health and social care services for service users, or may involve services being provided by a single or lead provider.

- 3.6 Integrated Care Systems:** The potential benefits of Integrated Care Systems (ICSs) are recognised and how the bringing together of healthcare contracts through such arrangements can offer an increased ability to support the delivery of key objectives of the CCGs, including the assurance of delivering quality healthcare services and value for money. Consideration is required to be given as to how the CCGs can make best use of resources to support the establishment of provider partnership solutions, including how contracts can be established and structured in ways to support the greater benefits possible through ICSs.

- 3.7 Specifying requirements:** When seeking to award any contract for goods or services, a clear definition of requirements is always required to inform the decision making.

Where appropriate, the development of service specifications will seek to focus on the outcomes to be delivered by the service, enabling providers of services increased flexibility to develop and offer innovative solutions to deliver increased benefit to patients and the NHS.

The development of service specifications ought, where appropriate, to seek to involve relevant stakeholders, including existing providers, potential providers, other commissioning bodies and relevant patient representatives, including for the purpose of validating accuracy, reasonableness and appropriateness. The clearer the specification from the outset means the greater certainty that providers understand the required outcomes and will deliver against those outcomes.

Where requirements are being specified for the provision of health care services, the templates mandated within the NHS Standard Contract will be used. Specifications will ensure that clear measures of effectiveness and/or successful delivery of outcomes are clearly articulated to enable effective ongoing management of the contract (e.g. Key Performance Indicators (KPIs)).

**3.8 Market engagement:** Recognition is given to the benefits of timely engagement with both existing and potential providers to inform the review and development of requirements for future contracts, particularly for healthcare services.

Where assessed as appropriate, proportionate market engagement should take place prior to any procurement process to: validate commissioning intentions and planning assumptions (including demand and activity modelling and financial factors); identify new service delivery solutions (including best practice); refine service requirements; explore innovative solutions; gauge and stimulate market interest and competition; identify any potential barriers and/or issues; and to inform selection and design of an appropriate process to award a contract – including potential evidence of a single or most capable provider.

Where a contract is to be ‘called off’ from a framework, time permitting, engagement with framework providers should take place before any ‘mini-competition’ in order to assure provider interest and ability to respond to an invitation to propose a competitive solution.

It is recognised that market engagement can be used to satisfy the obligation for CCGs<sup>2</sup> to make arrangements for potential providers to express an interest in providing services.

Market engagement must be undertaken in a manner so as to ensure equal treatment and non-discrimination between providers and types of providers.

Notices inviting engagement from the market need to be published via Contracts Finder<sup>3</sup> and where applicable OJEU<sup>4</sup>.

**3.9 Collaborative working:** Opportunities should be explored to identify the potential benefits of collaborative approaches with other commissioning bodies; both NHS and local government, where common purchasing and commissioning requirements exist with the objectives to achieve shared efficiencies and improved leverage across the health and social care market.

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<sup>2</sup> NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

<sup>3</sup> Contracts Finder is the UK’s official website for publishing details of public sector contract opportunities and contract award decisions.

<sup>4</sup> OJEU – the Official Journal of the European Union. The official website for publishing details of public contracts with regard to the Public Contract Regulations 2015.

- 3.10 Authorised decision making:** Decision making for each stage of a process to award a contract will comply at all times with the Scheme of Delegation and Standing Financial Instructions of the relevant CCGs.
- 3.11 Managing potential Conflicts of Interest:** The CCGs recognise the statutory obligations<sup>5</sup> to identify and manage any potential or actual conflicts of interests in regard to any decision making regarding the awarding of contracts. The CCGs will, at all times, ensure compliance with both regulatory and statutory guidance in this regard, including the assurance of full probity and transparency of decision making.

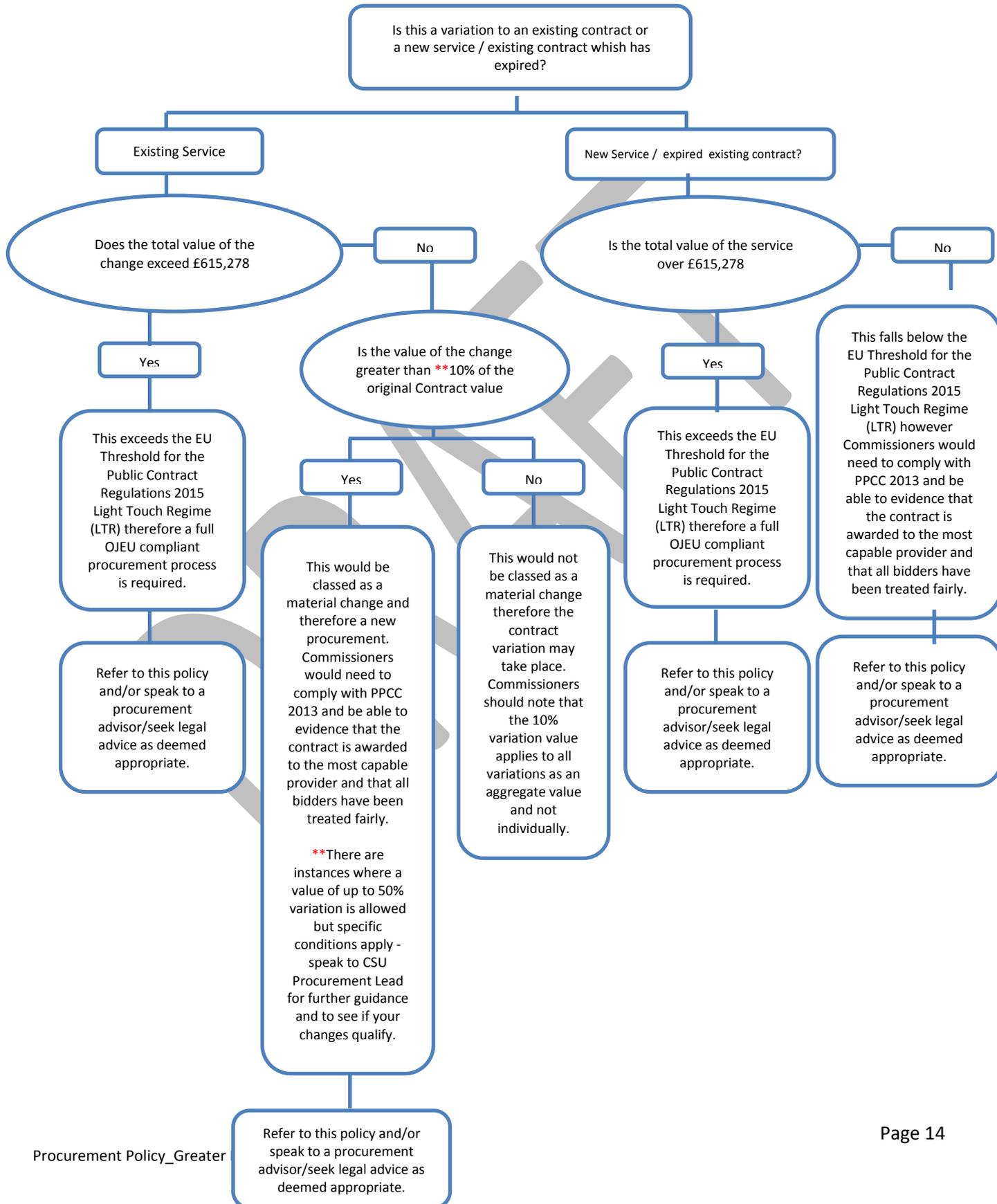
## 4 Summary checklists for procurement decisions

The following procurement Decision Flow Chart outlines the key considerations for a commissioner to follow a basic flow chart enabling them to see at a glance the process they need to follow regarding contract award

It should only be used as a guide regarding the key applicable principles.

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<sup>5</sup> Managing Conflicts of Interest: Revised Statutory Guidance for CCGs (NHS England, June 2016)



## Contract Award Notice Summary

Type of contract	Total potential life value	OJEU	Contracts Finder	CCG Website
Healthcare services	£615,278 or more	Yes	Yes	Yes
Healthcare services	Less than £615,278	No	Yes	Yes
Other Schedule 3 services	£615,278 or more	Yes	Yes	Yes
Other Schedule 3 services	£25,000 to £615,278	No	Yes	Yes
Other Schedule 3 services	Less than £25,000	No	No	No
Non-healthcare goods and services	£181,302 or more	Yes	Yes	Yes
Non-healthcare goods and services	£25,000 to £181,302	No	Yes	Yes
Non-healthcare goods and services	Less than £25,000	No	No	No
Works	£4,551,413 or more	Yes	Yes	Yes
Works	£25,000 to £4,551,413	No	Yes	Yes
Works	Less than £25,000	No	No	No

### EU Contract Value Thresholds as at 1<sup>st</sup> January 2018:

Category of contract	Current Threshold (applicable up to 31 December 2019)
Goods / Services Contracts (excluding healthcare services)	£181,302 or more
Works	£4,551,413 or more
Schedule 3 Services (including healthcare services)	£615,278 or more

## SECTION B

### 5. Responsibilities, capability and resourcing

- 5.1 Decision making and accountability:** The CCGs should ensure that all purchasing and procurement decisions, including contract awards, comply at all times with the CCG's Constitution and, specifically, the Schemes of Delegation plus Standing Financial Instructions.

Whilst external agencies and commissioning support functions may be used to provide procurement services (including the provision of advice, guidance, processing of purchase

requisitions, raising of purchase orders and undertaking competitive tendering), as well as contract management support, the CCG should, at all times, remain directly responsible for approving:

- business cases intending to commit resources of the CCG to invest through any contract;
- selection of processes to award a contract, including decisions to competitively tender (or not);
- final specifications, evaluation criteria and bidder questions;
- final content and tenor of any advert required to be published (whether on Contracts Finder and/or on OJEU);
- selection of potential bidders to invite to tender (where a pre-qualifying and short-listing stage is part of a procurement process);
- approval of feedback to be provided to unsuccessful bidders;
- final decisions regarding the awarding of a contract (whether to make an award or not);
- decisions to terminate a contract which involves investment of resources of the CCG;
- contract signature.

The CCGs should always ensure that records are maintained about decisions made in connection with the process undertaken leading up to the awarding of contracts which comply with the requirements of:

- Regulation 84 of the Public Contracts Regulations 2015; and
- Regulation 9(1) of the NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.

***See Annex B – Regulatory Requirements to Maintain Records regarding Contract Award Decisions***

- 5.2 Planning:** The CCGs should maintain a central Contracts Database that supports regular review and identification of the status of each contract, including timelines for expiry which will be used by the CCGs to inform timely service review and likely procurement planning (including market engagement). The Contracts Database should be updated by the responsible commissioning lead to confirm plans to use formal tendering processes to renew contracts.

The responsible commissioning lead for each contract will ensure that details of all contracts awarded are recorded within the CCGs' central Contracts Database.

A relevant procurement plan should be produced and updated as required that will identify prioritised procurement requirements which will take account of existing contracts, new service developments arising from CCG commissioning intentions, as well as local and national priorities.

When planning a formal tendering process, the responsible commissioning lead for the contract to be procured should identify the Contract Lead who will provide the support to prepare, populate and arrange for signing of contracts following conclusion of the procurement process.

***See Annex B – Regulatory Requirements to Maintain Records regarding Contract Award Decisions***

- 5.3 Qualified advice and guidance:** Recognising the often complex and continually developing regulatory regime that impacts on decisions to award contracts, appropriately qualified and experienced advice and guidance should be sought to inform decision making regarding the awarding of contracts and associated processes. Arrangements should exist for decision makers to have access to appropriately experienced procurement professionals and where appropriate, specialist procurement legal services.

- 5.4 Use of information technology:** Procurement processes should, where possible, be conducted electronically using appropriate systems that deliver benefit to the CCGs in terms of speed of communication with providers, shorter mandatory minimum timescales, robust audit trails and security of commercial confidentiality. Recognition is given to procurement regulations which include obligations to provide procurement information to potential bidders electronically, free of charge.
- 5.5 Procurement training:** The CCGs should ensure that decision makers, including procurement evaluation panel members, have access to appropriate levels of training in regard to procurement matters commensurate with their responsibilities which will include general awareness of regulatory obligations and how and when to seek further support, updates, advice and guidance. Training will include a focus on the safeguarding of information (including personal and commercial) to avoid breaches of regulatory and contractual obligations. Training should also ensure that there is awareness of the CCGs' Anti-Fraud and Anti-Bribery Policy, including how concerns can be raised through the Local Counter Fraud Specialists and NHS Protect.

## 6. Terms and conditions of purchase

### 6.1 Regulatory compliance of providers

As appropriate and lawful, the CCGs should ensure that contractual terms and conditions, and procurement processes are designed and used to ensure at all times that providers recognise, commit to and evidence their ability in:

- Complying with all relevant employment and information governance legislation;
- Maintaining acceptable standards of health and safety and comply fully with all legal obligations in this regard;
- Meeting all tax and national insurance obligations;
- Meeting all equal opportunities legislation;
- Being reputable in their standards of business conduct;
- Respecting the environment and taking appropriate steps to ensure they minimise their environmental impact;
- Evidencing an appropriate record of involving patients in their services and providing high quality services;
- Demonstrating an appropriate record of successful partnership working with commissioners and other providers in the best interests of patients and public;
- Ensuring openness and transparency with commissioners on all Patient Safety and Quality issues within their services with accurate information and reporting;
- Abiding by and promoting awareness of the NHS Constitution, including the rights and pledges set out in it;
- Information governance assurance framework requirements;
- Maintaining appropriate regulatory registration (e.g. with the Care Quality Commission and the ICO).

### 6.2 Purchase Orders

Official Purchase Orders should be raised with all purchases of goods and services ensuring compliance at all times with the CCGs' Standing Financial Instructions. Purchase Orders forwarded to suppliers of goods and non-healthcare services should ensure clear reference to the nationally developed NHS terms and conditions of goods and services. Payments should not be permitted to be made until properly authorised purchase orders are issued by the commissioning CCG.

[See Annex C – Contract Terms and Conditions \(for details of NHS terms and conditions for goods and services\)](#)

### 6.3 Written Contracts

All contracts for the provision of healthcare services will be in writing and incorporate nationally developed and mandated terms and conditions as relevant to the type of service.

Suitable terms and conditions for the purchasing of goods and services must be adopted with every contract awarded.

[See Annex C – Contract Terms and Conditions \(for mandated forms of contracts for healthcare services\)](#)

### 6.4 Contracts ‘called off’ from Framework Agreements

The use of pre-procured Framework Agreements can be a sensible way to avoid having to undertake additional procurement process; care always needs to be taken to ensure that the CCG’s specific requirements can be met by the scope and terms of the relevant Framework Agreement.

Where contracts are entered into under a Framework Agreement, the ‘call-off’ contract template prescribed by the Framework Agreement including the terms and conditions of the Framework Agreement should be used as the commercial basis of agreement between the parties. In any event any call-off contract should always be entered into under a written contract.

### 6.5 Grants

Where the CCG agrees the award of a grant, the terms of the grant will be agreed with the third party recipient and recorded using a Grant Agreement having reference to such model agreements published by NHS England.

[See Annex C – Contract Terms and Conditions \(for model Grant Agreement\)](#)

## 5. Processes to award a contract

### 7.1 Choosing a process to award contracts

Recognition is given to the variety of processes that may be available to the CCGs to award a contract for the provision of goods and services. It is important to ensure that decisions about which procedure is appropriate at the time are robust and documented. Appropriately qualified and experienced advice and guidance should be sought to inform an understanding of the options available, including any potential risks in the particular circumstances and how these might best be mitigated.

As appropriate, consideration will be given to the following approaches and issues:

**Modification** – Consideration may be necessary to be given to whether it is possible to vary or modify an existing contract, whether this will be to vary the scope of service, the term and/or the overall contract value.

Recognition is given to regulatory limitations as to when and to what extent an existing contract may be lawfully modified (varied) without triggering the need to re-procure a new contract.

Recognising that modifying a contract does require negotiation with the incumbent provider in line with the process set out in the terms of the existing contract, the CCGs will also need to consider alternative approaches, including establishing a new contract. The leverage of the CCG

should be considered and whether there is a continuing assurance of value for money, or whether it will be in the best interests of the CCG and patients to explore wider competition.

**Use of Frameworks** – It will be appropriate that where a framework agreement is being established, or an existing framework is to be re-opened to new applicant providers, including the Any Qualified Provider (AQP) for healthcare services, the process to award a place on the framework will be one of assurance rather than competition between providers.

Where appropriate, the CCGs should seek to award a contract as a ‘call off’ from an existing framework, where:

- The framework is able to meet the CCG’s specific requirements; and
- The call-off process is considered proportionate and able to avoid a more resource intensive and longer procurement process.

Where a contract is to be ‘called off’ from a framework, time permitting, engagement with framework providers should take place before any ‘mini-competition’ is undertaken in order to assure their interest and ability to respond to an invitation to propose a competitive and robust solution.

Where it is lawful to directly award a contract as a ‘call off’ from an existing framework without a ‘mini-competition’, the CCG should consider the relevant costs and benefits of this option.

**Competition** – will be considered for both the awarding of single contract or multiple contracts (including where a service requirement may be split into smaller ‘lots’). Where a contract is to be ‘called off’ from a framework, there is usually (but not always) a requirement to select the most economically advantageous provider through a ‘mini-competition’ process involving all providers on the framework.

**Negotiation / direct award** – the CCGs should consider whether it is appropriate and compliant to directly award a contract without any competitive process, involving a directly negotiated solution with a single provider, where specific lawful circumstances exist including without limitation the following circumstance :

- A framework that lawfully allows the direct awarding of call-off contracts without any further competition;
- Evidence available through transparent market engagement (i.e. formally advertised engagement via OJEU and Contract Finder), of there only being a single capable provider;
- An urgent requirement presenting insufficient time to run a competition, where such circumstances could not have reasonably been foreseen (noting that a failure to plan sufficient time into a commissioning decision does not constitute an urgent requirement for these purposes).

Any such direct award decisions need to be appropriately documented and approved via the CCGs governance framework.

**CCG financial procedures** - In all cases, reference should be made to the CCG’s Scheme of Delegation and Standing Financial Instructions to determine the financial value thresholds as to: when competitive proposals are expected to be sought for low value contracts; and when a formal procurement process is required.

The CCGs’ financial procedures must be followed to document and authorise any decision to award a contract without a competition, including use of the Single Tender Waiver (if deemed appropriate).

**Regulatory financial thresholds** - Where regulatory thresholds indicate the need for a formal competitive procurement process, the CCGs should consider which of the procedures prescribed by the regulations will be appropriate and proportionate, having reference to the nature of the service, its total value, the level of competitive interest from the market and the ability of the CCGs to sufficiently specify the CCGs' requirements.

The selection and design of any competitive procurement process should always be informed by a review of the market (e.g. market engagement) and the extent to which there is a competitive market for the goods or services being procured.

## 7.2 Deciding which process is appropriate – health care services

The CCGs recognise the specific responsibilities and obligations they have when commissioning health care services for the local population as outlined in sections 2 and 3, and also important flexibilities available to NHS commissioners when designing procurement processes for healthcare services contracts<sup>6</sup>, whilst ensuring compliance with EU Treaty derived principles.

Healthcare Services fall within Schedule 3 services (known as the Light Touch Regime (LTR)) under The Public Contracts Regulations 2015 which implement the European Union Procurement Directives into UK Law. For Schedule 3 services (LTR) the CCG is bound by the full impact of the Regulations but is allowed a degree of flexibility in terms of timescales and processes used. However the CCG MUST ensure that when procuring services it complies with the principles of the Public Contract Regulations 2015 and acts TRANSPARENTLY, EQUITABLY and in a NON-DISCRIMINATORY manner.

Procurements for Healthcare Services must also be conducted taking into consideration

The National Health Service (Procurement, Patient Choice and Competition) Regulations 2013. These Regulations impose requirements on CCGs to ensure good practice when procuring Healthcare Services, to protect patients' rights to make choices and to prevent anti-competitive behaviour. These Regulations provide scope for complaints to, and enforcement by NHS Improvement (NHSI) (formerly known as Monitor), as an alternative to challenging decisions in the courts. The Regulations apply alongside the Public Contracts Regulations 2015 and do not affect their application.

Given the need to achieve their commissioning objectives, the CCGs should select the most appropriate and proportionate process to award contracts that also maintain a focus to ensure best use of available commissioning, procurement and contract management resources. In regard to contracts for health care services, the following considerations should be taken in addition to those within the preceding section:

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<sup>6</sup> Healthcare contracts commissioned by NHS commissioners fall within the scope of Schedule 3 of the Public Contracts Regulations 2015 offering flexibility in how procurement processes are designed and run (and introduces the concept of the Light Touch Regime to the procurement process kitbag).

**Integrated Care Systems** - When reviewing a contract for health care services, whether for a new or existing service, the CCGs will consider the contractual relationship the service will need to have with any existing or soon to be commissioned Integrated Care System (ICS), Multi-speciality Community Provider (MCP) or some other collaborative arrangement of providers, the CCGs should give consideration to the following matters:

- Whether an existing contract could be extended, or an interim short-term contract be established during a transitional period whilst an ICS is established – where the service is to be subsumed within the scope of the ICS; or
- Whether a new contract to be established will need to include a clear provision to lawfully transfer (e.g. novate) from the CCG and the existing provider to the future ICS during the lifetime of the new contract; or
- Whether an existing service should be de-commissioned in light of the emergence of a new ICS contract and the implications of doing this.

The role of competition and the need to comply with associated regulatory obligations should be considered when establishing ICSs and any contracts that are likely to fall within their scope.

**Assessing market competitiveness** – The CCGs recognise the regulatory requirements to make arrangements for potential providers to be made aware of and then to express their interest to provide services through advertisements on the appropriate online portals.

- As appropriate to the expected financial value of the service, market engagement will be undertaken to:
  - Notify potential providers of the CCG's commissioning intentions;
  - Invite expressions of interest to provide the services;
  - Where appropriate and proportionate:
    - Invite further engagement to become involved in developing and/or reviewing draft service specifications, identifying new service delivery models and innovation, proposing and reviewing financial payment models and performance indicators, validating demand and activity modelling assumptions, etc.
    - Facilitate provider networking to enable collaborative provider solutions to meet CCG requirements;
    - Understand any specific issues or challenges within the relevant health and social care sector that might impact timely and effective development, implementation and sustainable delivery of the services to be commissioned by the CCGs.
    - Provide information on issues and indicative timescales for any potential procurement processes and/or mobilisation.
- Expressions of interest received through market engagement will inform the CCGs as to the appropriate design of a proportionate procurement process to award a contract:
  - Where there are many potential bidders, consideration will be given to the inclusion of a prequalifying or shortlisting stage;
  - Where responses to an invitation for expressions of interest from potential providers is intended to evidence whether a competitive process is appropriate, this will be made clear within the invitation/advertisement;
  - Where responses do confirm a single (interested) capable provider, this may be used to evidence the appropriateness to directly negotiate with the single

provider, or may inform consideration of wider market engagement to stimulate the level of competition considered appropriate by the CCGs, or to develop the market to meet the needs of the CCGs.

**Competition** - Where a contract falls outside the scope of ICSs, or which cannot be lawfully modified, the role of competition will be considered.

Given the status of health care service contracts within the procurement regulations<sup>7</sup> the CCGs recognise and will use, as may be appropriate, the flexibility to design and run a procurement process that best meets the needs of the CCGs whilst ensuring that any such process remains compliant with the EU Treaty derived principles of transparency, equal treatment, non-discrimination and proportionality; consideration to be given to the requirements of the “light touch regime” when commissioning healthcare services above the appropriate value threshold when structuring a suitable procurement process.

**Regulatory thresholds** – The CCGs must ensure that notices are published in compliance with regulatory requirements in regard to: invitations for market engagement; invitations for expressions of interest; and calls for competition (to invite tenders). The CCGs also recognise their obligations to publish details of all contracts awarded, whether as a result of a competition or a direct award.

*See Annex D – Regulatory requirements to publish Contract Notices*

**Contract award decision tree** – *Annex E – ‘Decision Guide’: selecting an approach to award a contract (healthcare services)* provides a summary of the key considerations and process for identifying the most appropriate route to awarding a contract which incorporates the issues discussed above.

### 7.3 Evaluation approach & contract award criteria

#### ***(i) Specific Any Qualified Provider (AQP) Frameworks plus First Outpatient Appointment Providers Considerations***

**Any Qualified Provider (AQP) Frameworks** -Processes to appoint providers to an AQP Framework should be designed to transparently validate applicant providers’ ability to meet the CCGs’ requirements (as detailed in the published service specification) and accept the terms and conditions of the framework and the prices as may be set by the CCGs.

**First Outpatient Appointment Providers** - In the case of providers expressing an interest to offer first outpatient appointments with a consultant or a member of a consultant’s team, the CCG recognises its obligations to allow any suitably qualified providers<sup>7</sup> to be awarded a contract for the benefit of patient choice. Processes to enable interested providers to be accessed (i.e. a legitimate contractual route) should be designed to validate their ability to meet the CCGs’ requirements, involving a proportionate assurance process which may be along the lines of an AQP or co-commissioning arrangements via other CCG contracts as an associate commissioner

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<sup>7</sup> NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

## **(ii) Key contract award principles**

**Value for money** - Where a competitive process is to be used to award a contract, the CCGs should ensure that the evaluation methodology is able to identify the provider offering the 'most economically advantageous tender' (MEAT) which involves an assessment of value for money (covering a combination of price and quality considerations).

'Value for money' will be specifically defined within each procurement process to ensure that there is the right balance between quality and price and that the evaluation process will be transparent to all potential bidders.

**Proportionality** – When designing a procurement process and its evaluation methodology, the CCGs should consider the total value of the contract and the level of potential risk associated with the service so that the approach to the procurement can be planned to be proportionate.

- For example: *Low value, low risk contracts* – consideration should be given to the use of fewer, less in-depth questions, shorter bid submission timeline, fewer evaluation panel members, and reduced due diligence.
- For example: *High value, high risk contracts* – consideration ought to be given to the inclusion of more involved pre-procurement market engagement, an increased range and depth of bidder questions, longer bid timeline where the service solution is complex, wider range of evaluation panel membership, increased due diligence, followed by a resourced mobilisation phase.

Contracts for goods, services (non-healthcare) and/or works below the relevant value threshold cannot use a pre-qualification stage in a process, but may undertake some form of selection by way of utilising suitability assessment questions as part of a single tender stage process. The pre-qualification stage ban on below value threshold procurements does not apply to healthcare service procurements, but with low value healthcare contracts CCGs should consider whether it is in fact proportionate to have a separate pre-qualification stage in the particular circumstances based on complexity / risk etc.

[See Annex F – Regulatory procurement thresholds](#)

## **(iii) Procurement evaluation stages**

Depending on the value, risk and complexity of the service being procured, the CCGs should give consideration to the incorporation of the following procurement stages and elements:

**Pre-Qualification of bidders** – where a formal procurement process is to be used to award a contract, the CCGs should ensure that potential bidders are appropriately qualified, capable and experienced:

- To ensure appropriateness and financial stability of potential bidder;

- To ensure compliance with regulatory requirements and fitness to hold a public contract<sup>8</sup>;
- To reserve the right of the CCGs to exclude bidders presenting unacceptable levels of risk that cannot in the assessment of the CCGs be sufficiently mitigated;
- Where the potential number of bidders is likely to be high, this preliminary stage will be designed to 'pre-qualify' and to short-list the most qualified and experienced potential bidders to then be invited to develop and submit a bid or tender;
- The CCGs acknowledge Crown Commercial Service<sup>9</sup> guidance that mandates that public bodies must use the nationally mandated 'Selection Questionnaire' (SQ) documentation where needing to pre-qualify potential bidders during a procurement for a contract falling within scope of the procurement regulations. The CCGs should have due regard to the scope and standards benchmarked by the standard SQ when designing procurement processes for contracts falling outside the scope of the procurement regulations and for sub-threshold value procurements. Selection criteria which are to be used must be very transparently disclosed to bidders (including the use of any sub-criteria).

**Written bid response** – either in the form of a bid response questionnaire or inviting the bidder to submit a written proposal, ensuring that the questions are appropriately focused on the specified requirements of the CCG;

**Bid price** – which may be a competitive price within thresholds determined by the CCGs, or confirmation of a tariff or service price proposed by the CCGs. The CCGs should ensure that bidders provide sufficient detail to justify bid prices being tendered to enable proportionate due diligence and scrutiny on the part of the CCGs;

**Employment protection** – the CCGs should have regard to relevant employment protection legislation<sup>10</sup> and ensure that where relevant, there is an assurance that bidders understand, assess and take full account of their responsibilities in this regard and that the CCG has full control over information relating to staff affected by the procurement process and ultimate contract award;

**The possible use of bidder presentation and interview** – including the role of setting scenarios for bidders to respond to, an awareness of the fact that presentations and interviews are not always necessary / desirable but if used, consideration must be given, prior to issuing any tender documentation, as to the manner in which the interview is to contribute towards the overall evaluation process (if at all);

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<sup>8</sup> Including compliance with the mandatory and discretionary exclusion criteria outlined within the Public Contracts Regulations 2015 (Regulation 57)

<sup>9</sup> CCS Procurement Policy Note (PPN): Standard Selection Questionnaire Action Note 8/16 – 9th September 2016

<sup>10</sup> Including the Transfer of Undertakings (Protection of Employment) Regulations 2006 - (TUPE)

**Site visits** – consideration should be given as to how site visits to a bidder’s premises may be used as either a scored element of the procurement evaluation, or forming part of the CCGs’ due diligence before finalising any contract award decision;

**Dialogue and negotiation** – where considered beneficial to the CCGs and following expert procurement advice, the CCGs may include some form of dialogue or negotiation stages with bidders as part of a formal procurement process (but this will depend entirely upon the choice of process made at the outset).

**Contract award criteria** – The CCGs must ensure that the criteria to be used to award a contract are carefully considered and relevant to each contract and its critical success factors, ensuring an absolute relevance to the CCGs’ requirements, including how these are expressed through the developed service specification. In developing contract award criteria the CCGs should consider:

**Proposed solution** – including for example the bidder’s service delivery model, workforce and management approach, systems, accessibility, etc.;

**Assurance of quality** – how the bidder will assure that the required standards and levels of quality will be achieved and improved upon (including ensuring safeguarding);

**Governance** – how the contract will be effectively overseen and reported on;

**Social Value** – the CCGs recognise their obligations<sup>11</sup> as public bodies, to consider how contract award criteria can address how a bidder’s solution might offer ways to bring about additional added value in the form of improvements in regard to the social, economic and environmental well-being of the local area;

**Mobilisation** – the confidence to be had in how the bidder is able to plan, resource and prepare for implementation of service delivery in a timely, compliant and safe manner;

**Prices** – the CCGs will consider what role prices will play in the evaluation.

Where prices are being determined and set by the CCGs, evaluation will ensure bidders accept the CCGs’ prices whilst demonstrating the ability to provide a sustainable service.

Where bidders are to be invited to tender competitive prices, the CCGs will consider setting clear and robust<sup>12</sup> upper and lower affordability thresholds within which bid prices must comply.

All award criteria (and sub-criteria, if any) to be used, must be transparently disclosed to bidders with tender documentation.

Evaluation of bid prices should ensure that bidders understand:

- how bid prices will translate into contract prices and how these will be paid by the CCGs (including the frequency and nature of the payment);

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<sup>11</sup> Public Services (Social Value Act) 2012

<sup>12</sup> For example, having been tested and validated through market engagement and/or cost modelling

- the extent to which bid prices are required to be comprehensive, for example to include all set-up, mobilisation, TUPE transfer, equipment and systems costs;
- the potential requirement for block pricing, caps and / or marginal pricing;
- how any performance, incentive, penalty or risk/gain share payments will be calculated and applied to the contract.

In line with regulatory obligations<sup>13</sup>, the CCGs must determine whether any bid prices are not abnormally low and where this appears to be the case, the CCGs will require the bidder to explain their bid price, including evidencing that this is sustainable. The CCGs will ensure that their rights are reserved during any procurement process, to reject any bid where the price is abnormally low and the bidder cannot provide a reasonable, robust explanation assessed to be acceptable to the CCGs.

**Value for money** – the CCGs should ensure that the contract award criteria are appropriate to support a contract award decision on the basis of overall value for money in accordance with its published MEAT award criteria.

In assessing overall value for money through a competitive procurement process, unless there are reasonable grounds for not doing so, the CCGs should adopt a default methodology that considers the evaluated quality score for each bid along with the bid price tendered, to result in a “quality points per £100,000” evaluation score.

i.e. The final evaluation score to be calculated as follows:

Bidder’s Quality Score (based on the evaluation of the written bid response, inclusive of any other procurement stages such as bidder interview), divided by the Bid Price, multiplied by a factor of £100,000 (or a more appropriate factor) to deliver a final evaluation score being a whole integer.

Where an alternative methodology is to be used to assess the relative value for money for competitively tendered bids, the reasons for this should be recorded and the decision approved by a member of the CCG’s Senior Management Team. Where alternative methodologies need to be considered, the CCGs will model the effects or quality scores with bid prices to ensure that the methodology is appropriate to deliver a reasonable and proportionate outcome.

**Evaluation panel** – where appropriate (and proportionate to the contract award) the CCGs will resource and appoint work-stream and subject matter experts to participate within a panel to evaluate bids received during a competitive procurement process. Where appropriate to the procurement of healthcare services, the role of patient representatives should always be taken into consideration. At all times, the CCGs will have regard to the CCGs’ Policy on the Management of Conflict of Interests. Evaluation panel members will be required to declare any potential conflicts of interest which the CCGs can then review and manage appropriately. Such declarations will be sought as the evaluation panel is formed, and declarations reviewed immediately following

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<sup>13</sup> Public Contracts Regulations 2015

bidders being identified and prior to bids being shared with evaluation panel members and on an on-going basis as the procurement proceeds (circumstances can change).

**Moderation of evaluation panel scoring** – where an evaluation panel has been established to evaluate bids, the CCGs will ensure inclusion of a moderation phase to agree consensus evaluation scoring on behalf of the CCGs which will inform the evaluation panel’s identification and recommendation of preferred bidder(s) to be awarded a contract(s).

**TUPE information** – when sharing TUPE assessment information with bidders, the CCGs should ensure that such information is supplied in an accurate and timely fashion and is appropriately safeguarded to protect personal data in compliance with regulatory obligations. Any data protection breaches should be logged and reported in line with the CCGs’ policy and procedures.

#### 7.4 Due diligence

The CCGs should ensure that proportionate due diligence is undertaken during and following procurement process to provide necessary assurance on the preferred bidder’s ability to deliver what they have offered to the CCGs. The CCGs should consider what evidence and assurances will be appropriate to obtain from the Recommended Bidder in regard to its ability to comply with contractual terms and conditions and its lawful responsibilities.

The precise level and nature of due diligence required will vary depending upon the exact nature of the contract being awarded and should be carefully considered as part of the procurement or direct contract award planning process.

#### 7.5 Contract award decision

The CCGs will ensure that all contract award decisions are made and recorded in compliance with the overall CCG approved governance procedures, which include but are not limited to specific adherence to the CCGs’ Policy on the Management of Conflicts of Interest.

The CCGs will ensure that contract award decisions are communicated to successful and unsuccessful bidders as soon as possible and will ensure in a suitably completed compliant standstill letter as a matter of best practice that:

- The provision of detailed written feedback to show the reasons for the decision; and
- That the relative merits and advantages of the winning bid are identified; and
- Where considered proportionate to invest the time and effort, to enable bidders to learn from any potential weaknesses in their submitted procurement response to improve the quality of future procurement responses to the CCGs; and
- Inclusion of a clearly defined standstill period before any contract will be entered into, unless not lawfully required to do so, and assessed to not be in the interests of the CCG (for example, for low value contracts, or where a “call off” contract is being awarded off a framework which might not mandate the observance of any standstill period).

The CCGs will ensure that, where required, Contract Award Notices are published in compliance with regulatory requirements in terms of where and when notices are to be published and the level of detail to be published, including details of the contract and the appointed provider.

Where contracts are awarded without a competition, the CCGs will consider the benefits of publishing Contract Award Notices ahead of, rather than after, entering into the contract to allow timely transparency where there is the potential for external challenge to the contract award decision.

*See Annex B – Regulatory Requirements to Maintain Records regarding Contract Award Decisions plus Annex E – Regulatory requirements to publish Contract Notices*

**7.6 Mobilisation:**

To ensure that there is a seamless transition of service provision between incumbent and newly appointed service providers, the CCGs will ensure that the awarding of a new contract will ensure a focus on how mobilisation will be planned, resourced, factored into the overall procurement timetable and overseen.

The CCGs will assess the appropriateness to resource a governance role during the mobilisation phase, having regard to the relative risks, value and significance of service.

**7.7 Contract signature:**

Contracts should be signed with providers at the earliest opportunity following satisfactory necessary due diligence and following completion of a standstill period of at least 10 calendar days following notification to bidders of the contract award decision, where required to do so.

A pre-requisite to contract signature for healthcare service contracts will be the development by the provider of a comprehensive mobilisation plan considered sufficient by the CCG.

Where the CCGs identify any potential gaps or weakness during a procurement or assurance process leading up to the award of a contract, the areas of weakness will be addressed prior to concluding the procurement and entering into a contract.

The CCGs will ensure that all relevant documentation received from a provider during the procurement, or assurance process will be incorporated within the contract along with the CCG's service specification, as key 'documents to be relied upon' as the basis of understanding of the services to be provided.

**7.8 Purchase Orders and Contracts Database:**

When contracts are signed, the responsible commissioning lead will ensure that:

- a Purchase Order (PO) is formally raised, including specific references to the contract entered into, to support linked information systems between contracts, accounting ledgers and payment processes; and
- the CCGs' central Contracts Database is updated.

## SECTION C

### 6. Policy monitoring and review

This Procurement Policy will be reviewed at least annually to ensure that account can be taken of any changes to regulations, policy and guidance, including nationally reviewed procurement thresholds relevant to the application of the Public Contracts Regulations.

The CCGs will at least bi-annually commission an appropriately qualified third party provider to audit compliance with this policy and that robust processes and decision making in regard to the procurement of goods and services will be audited on a regular basis by an appropriately qualified third party provider.

The CCGs will arrange from time to time, independent checks to be carried out on random procurements to ensure compliance with the Procurement Policy, compliance with regulatory requirements and to deter and detect wrongdoing.

The CCGs will consider all appropriate actions that will offer a proportionate response to findings where there have been breaches of compliance with this Procurement Policy including possible disciplinary action in accordance with the CCGs' Disciplinary Policy and where any actions identified have the capacity to result in a criminal offence, a criminal investigation may be carried out.

Breaches of this Procurement Policy and/or concerns in regard to wrongdoing should be reported to the Chief Finance Officer, the Local Counter Fraud Specialist and the Audit Committee as appropriate, having regard also to the CCGs' Anti-Fraud and Anti-Bribery Policy.

## Annex A – Regulatory Framework: Reference Sources

The following provides a list of reference sources for the Regulations and Acts of Parliament referred to within Section 2 of this policy that will be taken into account when the CCGs consider awarding contracts.

Public Contracts Regulations 2015

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

NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013

<http://www.legislation.gov.uk/uksi/2013/257/contents/made>

Monitor's substantive guidance on the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

<https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance>

Health & Social Care Act 2012

<http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted>

Public Services (Social Value Act) 2012

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

Managing Conflicts of Interest: Revised Statutory Guidance for CCGs (NHS England, June 2017)

<https://www.england.nhs.uk/commissioning/pc-co-comms/coi/>

Transfer of Undertakings (Protection of Employment) Regulations 2006(TUPE)

<http://www.legislation.gov.uk/uksi/2006/246/regulation/4/made>

Equality Act 2010

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

Bribery Act 2010

<http://www.legislation.gov.uk/ukpga/2010/23/contents>

## Annex B – Regulatory Requirements to Maintain Records regarding Contract Award Decisions

Section 4.1 of this Policy (Decision Making and Accountability) recognises the regulatory obligations to maintain certain records in connection with the processes associated with the awarding of contracts. These are more fully set out below:

### **Regulation 84 Documentation**

Regulation 84 of the Public Contracts Regulations 2015 sets out specific requirements for contracting authorities:

For every contract or framework agreement (or dynamic purchasing system), falling in scope of the PCR 2015, the CCG must draw up a written report to include:

- Name and address of CCG;
- Subject matter;
- Value of contract or framework agreement (or dynamic purchasing system);
- Names of selected bidders and reasons for their selection;
- Names of rejected bidders and reasons for their rejection;
- Reasons for any tenders being rejected for their price being abnormally low;
- Name of successful bidder and the reasons for tender being successful;
- Names of any main sub-contractors and the share of the contract intended that they will deliver;
- Where either a Competitive Procedure with Negotiation or a Competitive Dialogue Procedure used, the circumstances justifying the use of such procedures;
- Where a Negotiated Procedure without prior notice being issued is used, the circumstances justifying the use of this procedure;
- Where applicable, the reasons the CCG has decided not to award a contract, or framework agreement or dynamic purchasing system;
- Where applicable, the reasons why electronic communications were not used for the submission of tenders;
- Details of conflicts of interests detected and subsequent measures taken to manage the conflicts.

\*The CCGs use of a Post-Procurement Outcomes Report, recommending an award of a contract decision, should be designed to meet the above requirements.

\*The above report is not required for contracts called off from an existing framework agreement.

Where a Contract Award Notice is issued in accordance with PCR 2015, to the extent it already contains all information required above, this can be referred to in the alternative

Upon request from the EU Commission (while the UK remains in the EU) a copy of this Report must be supplied to the EU Commission.

The CCGs shall ensure documented progress of all procurement procedures.

The CCGs shall keep sufficient documentation to justify decisions taken in all stages of procurement procedures including:

- communications with interested providers and bidders;
- preparation of the procurement documents;
- where relevant, dialogue or negotiation with any bidder;

- selection and award of the contract.

Documentation required by Regulation 84 shall be kept for at least 3 years from the date of the award of the contract.

***NHS 2013 Regulations Documentation***

Additionally, Regulation 9(1) of the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013 sets out requirements for CCGs to:

Maintain and publish on the website maintained by the Board under regulation 4(1),

a record of each contract awarded for the provision of health care services for the purposes of the NHS which shall include:

- Name and registered address of the provider;
- Description of the health care services to be provided;
- Contract value or payments to be paid;
- Contract start and end dates;
- Description of the process adopted for selecting the provider.

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## Annex C – Contract Terms and Conditions

Section 5 of this policy sets out that the CCGs will ensure that when procuring goods or services, that clear terms and conditions of purchase and supply are agreed and that these are to be determined by the CCGs in line with national policy and guidance as issued by the Department of Health and NHS England. The following sets out the reference sources for the terms and conditions to be used by the CCGs.

Type of provision being procured	Contract terms to be used and reference source
Goods and/or [non-healthcare] services	<p>NHS Terms and conditions for the supply of goods: contract version                      NHS Terms and conditions for the supply of goods: purchase order version                      NHS Terms and conditions for the supply of services: contract version                      NHS Terms and conditions for the supply of services: purchase order version                      NHS Framework Agreement for the provision of services                      NHS Terms and conditions for the provision of managed services  <a href="https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services">https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services</a></p>
Healthcare services	<p>NHS Standard Contract, as mandated by NHS England  <a href="https://www.england.nhs.uk/nhs-standard-contract/">https://www.england.nhs.uk/nhs-standard-contract/</a>                      For use across all patient accessed health care services including:</p> <ul style="list-style-type: none"> <li>- Ambulance Services</li> <li>- Community Services</li> <li>- Acute Hospital Services</li> <li>- Mental Health Services</li> <li>- Community Services</li> <li>- Care Homes Services</li> </ul> <p>Or where relevant, use will be made of any nationally developed forms of contract to support emerging Accountable Care systems  <a href="https://www.england.nhs.uk/new-business-models/publications/">https://www.england.nhs.uk/new-business-models/publications/</a></p>
Sub-contracts for healthcare services	<p>NHS Standard Sub-contract for the provision of Clinical Services  <a href="https://www.england.nhs.uk/nhs-standard-contract/">https://www.england.nhs.uk/nhs-standard-contract/</a></p>
GP services	<p>General Medical Services (GMS) Contracts                      Personal Medical Services (PMS) Contracts                      Alternative Provider Medical Services (APMS) Contracts  <a href="https://www.england.nhs.uk/commissioning/gp-contract/">https://www.england.nhs.uk/commissioning/gp-contract/</a></p>
Grants being provided to voluntary organisations	<p>A non mandatory, locally adaptable model published by NHS England  <a href="https://www.england.nhs.uk/nhs-standard-contract/grant-agreement/">https://www.england.nhs.uk/nhs-standard-contract/grant-agreement/</a></p>

## Annex D – Regulatory requirements to publish Contract Notices

There are two sets of regulations which govern the transparency of public contracts, including those awarded by CCGs. The relevant provisions have been summarised below in relation to both the procurement of healthcare services and also the separate requirements relating to contracts for goods, non-healthcare services and works.

There are different requirements depending on whether the contract financial values exceed the procurement thresholds or are ‘below threshold’ – see Annex G to this policy (Regulatory Procurement Thresholds).

### ~ Healthcare Contracts Only ~

#### **NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013**

Regulation 4 of the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013 provides that where the CCGs intend to invite offers from providers in relation to a healthcare contract, as follows:

*“4(2) (2) Where **advertising** an intention to seek offers from providers in relation to a new contract for the provision of health care services for the purposes of the NHS, a relevant body must publish a contract notice on the website maintained by the Board under paragraph (1).”*

In practice, what this means is that a CCG must first decide whether or not the particular healthcare service for the purpose of the NHS requires to be advertised at all. If, upon taking advice, they are comfortable that no form of advertising is required (eg having determined after market engagement that there is genuinely only one provider of the service required) then it does not need to issue an advert on Contracts Finder; alternatively, if the CCG determines that some form of advertising is appropriate in the circumstances, then they must place an advert on Contracts Finder (subject always to the points raised in relation to the application of PCR 2015 to healthcare contracts above and below the relevant threshold set out in that legislation).

#### **Public Contracts Regulations 2015 – the Light Touch Regime**

**Notifying the market of a contract opportunity:** Regulation 75 requires that where a contracting authority intends to award a contract for healthcare services, being of a value above the relevant threshold (see Annex G) in which event the light touch regime is engaged, then this intention must be published through OJEU (the Official Journal of the European Union) by means of either a:

- **Contract Notice**, to include:
  - Identification of the CCG as the Contracting Authority;
  - Brief description of the contract including CPV codes;
  - Conditions for participation in the process of selection;
  - Time limits for contacting the CCG in view of participation;
  - Brief description of the main features of the award procedure to be applied.
- **Prior Information Notice (PIN)**, which shall:
  - Contain the following information:
    - Identification of the CCG;
    - Brief description of the contract including CPV codes;
    - Timeframe and duration of the contract;

- Conditions for participation in the process of selection;
- Brief description of the main features of the award procedure to be applied.
- Confirm the types of services for which the contract is to be awarded;
- If appropriate, confirm that the contract will be awarded without further publication and invite interested providers to express their interest in writing.

Online copies of these forms can be found at:

<http://simap.europa.eu/enotices/changeLanguage.do?language=en>

**Contract Award Notices:** After the award of any contract by a CCG in respect of healthcare services for a value in excess of the relevant threshold (in which case a Contract Notice or PIN will have been issued already), then Regulation 75 also requires the CCG to publish a Contract Award Notice through OJEU (the Official Journal of the European Union) which must include:

- Identification of the CCG as the Contracting Authority;
- Brief description of the contract, including CPV codes;
- Number of tenders received;
- Price or range of prices to be paid;
- Name and address of the successful bidder being awarded the contract;
- Any other relevant information.

Contract Award Notices must be published within 30 days following a contract being awarded, or may be published in bulk within 30 days at the end of each quarter.

Whilst the Public Contracts Regulations 2015 include a specific exemption for CCGs from publishing details of 'below threshold' healthcare service contracts awarded on Contracts Finder, the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013 obliges CCGs to publish on Contracts Finder a record of all contracts awarded for the provision of healthcare services for the purposes of the NHS (regardless of the contract value).

## ~ Contracts for goods and non-healthcare services ~<sup>14</sup>

### Public Contracts Regulations 2015

**Notifying the market of a contract opportunity:** Regulations 48 and 49 require that where a contracting authority intends to award a contract for goods or non-healthcare services, being of a value in excess of the relevant threshold (see Annex G), that this intention is published through OJEU (the Official Journal of the European Union) by means of either a:

- Prior Information Notice (PIN), which shall:
  - Contain information including:
    - Identification of the CCG;
    - How the procurement documents can be accessed electronically;

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<sup>14</sup> Note that healthcare services are only one example of the range of services which are captured by Schedule 3

- Brief description of the contract including CPV codes;
- Timeframe and duration of the contract;
- Timeframe for the contract delivery and duration;
- Time limits for expressions of interest;
- Brief description of the main features of the award procedure to be applied.
- Confirm the types of services for which the contract is to be awarded;
- If appropriate, confirm that the contract will be awarded without further publication and invite interested providers to express their interest in writing.
- Contract Notice, to include:
  - Identification of the CCG;
  - How the procurement documents can be accessed electronically;
  - Brief description of the contract including CPV codes;
  - Conditions for participation in the process of selection;
  - Type of award procedure and any reasons for use of an accelerated procedure;
  - Explanation as to how any lots may or may not be limited, or reasons why the contract has not been divided into lots;
  - Contract award criteria;
  - Time limits for each stage of the procedure;
  - Brief description of the main features of the award procedure to be applied.

Online copies of these forms can be found at:

<http://simap.europa.eu/enotices/changeLanguage.do?language=en>

**Contract Award Notices:** After the award of any contract by a CCG in respect of goods and/or non-healthcare services for a value in excess of the relevant threshold, then Regulation 50 also requires the CCG to publish a Contract Award Notice through OJEU (the Official Journal of the European Union) which must include:

- Identification of the CCG;
- Brief description of the contract, including CPV codes;
- Description of the procurement;
- Contract award criteria;
- Number of tenders received;
- Price or range of prices to be paid;
- Name and address of the successful bidder being awarded the contract;
- Details of main subcontractors and proportion of the contract.

Contract Award Notices are to be published within 30 days following a contract being awarded.

### ~ Transparency through the CCGs' websites ~

#### Contract Award Notices

Summarising the position explained above: **Table AE1- Award Notices**

Type of contract	Total potential life value	OJEU	Contracts Finder	CCG Website
Healthcare services	£615,278 or more	Yes	Yes	Yes
Healthcare services	Less than £615,278	No	Yes	Yes
Other Schedule 3 services	£615,278 or more	Yes	Yes	Yes
Other Schedule 3 services	£25,000 to £615,278	No	Yes	Yes

Other Schedule 3 services	Less than £25,000	No	No	No
Non-healthcare goods and services	£181,302 or more	Yes	Yes	Yes
Non-healthcare goods and services	£25,000 to £181,302	No	Yes	Yes
Non-healthcare goods and services	Less than £25,000	No	No	No
Works	£4,551,413 or more	Yes	Yes	Yes
Works	£25,000 to £4,551,413	No	Yes	Yes
Works	Less than £25,000	No	No	No

### NHS England Statutory Guidance on the Managing of Conflicts of Interest

Statutory Guidance issued by NHS England requires CCGs to ensure that there is complete transparency in relation to how conflicts of interest are disclosed, and then how they have been managed and the details of those involved in the decision making (key individuals and decision making forums). The Guidance specifically requires CCGs to publish such details on its website

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## Annex E – ‘Decision Guide’: selecting an approach to award a contract (healthcare services)

Section 6.2 of this policy outlines considerations when selecting the most appropriate route to awarding a contract. The following guidance is set out to assist with the application of the considerations outlined in the previous sections of this policy document.

### **Q1. Is the service contract within the scope of an existing or soon to be established, Integrated Care System (ICS), Multi-specialty Community Provider (MCP) or similar collaborative provider arrangement?**

If ‘Yes’ – consider how the service contract should either be replaced by, or transferred into the ICS arrangement and the timing of this – see Notes below.

If ‘No’ – go to Question 2.

Notes: Consideration to be given as to how, in contract form, the service is to be incorporated within scope of the ICS (or new form contract MCP, etc.). Should an existing service contract be decommissioned as a replacement service arrangement is to be established through an ICS? Can provision be made to novate/transfer an existing contract into the ICS contract? If the ICS has yet to be established, is it appropriate to extend an existing service contract for an interim period until the ICS is to be established? If an interim arrangement is required on a standalone basis see steps below. Will the arrangement continue to deliver quality services and value for money? What are the associated procurement risk of challenge (if any?).

### **Q2. Can the services required be lawfully procured through an established framework?**

If ‘Yes’ – progress a process to award a contract under the relevant framework agreement.

If ‘No’ – go to Question 3.

Notes: An increasing range of frameworks are being established nationally by commissioning bodies and procurement organisations which can enable the CCG to avoid a full procurement process and instead, either directly award a contract to a framework provider, or undertake a ‘mini competition’ as may be appropriate under the terms of the relevant framework. Caution should be exercised when considering using a framework from another commissioner (whether a CCG or a local authority), to ensure that the framework lawfully permits the CCG to contract through the framework, this having been transparently communicated to the market when the framework was established; also that the service required is within the value range permissible within the framework. Advice regarding access to frameworks should be sought from the procurement service to be sure.

### **Q3. Is there a need to pilot a new service model for a limited time before investing in a substantive service contract?**

If ‘Yes’ – consider whether it is justifiable and proportionate to award a contract without any competition for the duration of the pilot.

If ‘No’ – go to Question 4.

Notes: A ‘pilot’ service is not necessarily a reason to avoid a procurement process to decide which provider is most capable of delivering a value for money service. Where a pilot is intended to run for 6 – 18 months, it may be reasonable and proportionate to directly award a contract, however regard should be given to the level of risk involved (including financial, clinical, reputational, etc.) to ensure that the selection of the provider is appropriate including all necessary due diligence being undertaken.

Consideration should be given to whether a speedy, proportionate process can be undertaken to invite interest from the market and select a provider. Also, CCGs should record/document the rationale behind not competing the opportunity if this option is chosen.

**Q4. Is there an urgency to award a contract that precludes any reasonable timescale to run any competitive process?**

If 'Yes' – commence direct negotiation to award the contract without any competition

If 'No' – go to Question 5.

Notes: Procurement regulations do provide for circumstances where a contracting authority could not have reasonably foreseen the requirement, e.g. an unanticipated need to contract for a complex package of care that has arisen and requires an urgent solution. Caution to be exercised in that a lack of commissioner planning and a reasonable anticipation of requirements are unlikely to be considered reasonable justification to avoid a competitive or other process. Internal 'Single Tender Waiver' documentation must record the reasons and the decision taken.

**Q5. Can the services be concurrently provided through one or more providers offering a choice (whether mandatory by statute or desirable based on the commissioning intentions) to patients?**

If 'Yes' – consider the benefits of establishing a framework of providers. Go to Question 6.

If 'No' – go to Question 7.

Notes: Engagement with the market is essential to understand the viability and appropriateness of a framework. Presumptions should not be made regarding the potential interest of providers to willingly share in the provision of healthcare capacity. Consideration should also be given to the overall costs and benefits to the CCG as well as patients when offering choice through multiple contracts. Issues to be explored may include service sustainability, economies of scale and minimum clinical activity levels to sustain clinical competence and patient safety.

**Q6. Can a fixed tariff be determined by the CCG which will apply to all providers offering a choice of service to patients?**

If 'Yes' – consider establishing an Any Qualified Provider (AQP) framework.

If 'No' – consider establishing a bespoke framework involving competitive or differentiated prices.

Notes: An AQP framework is an NHS framework where any provider interested in providing a patient service can apply to be awarded a contract, with the requirement that they are appropriately qualified, registered and agree to NHS Standard Contract terms and the fixed tariff set by the CCG. AQPs support the offering of choice to patients in where they can receive healthcare from a range of providers. Engagement with potential providers should explore, test and validate interest from providers and the factors affecting their level of interest. Tariff setting should have regard to the commercial factors of relevance to the type of service provision and the feedback from potential providers. There may be occasion where competitive pricing may be appropriate, e.g. where the services offered across the provider landscape is variable and differentiated – such as care homes with nursing, where a common tariff may not be reasonable or feasible.

**Q7. Is there only one single provider capable of and/or interested in providing the service?**

If 'Yes' – commence direct negotiation to award the contract without any competition.

If 'No' – go to Question 8.

Notes: A single capable provider could arise for various reasons including: sole infrastructural or technical knowledge / ability; having specialist capability; clinical interdependency; etc. Justification for there being a single capable provider should be evidenced through documented market engagement, or there is a risk of subsequent legal challenge where the CCG has failed to identify alternative capable providers. i.e. publishing via Contracts Finder / OJEU to invite expressions of interest.

**Q8. Is there more than one interested and capable potential provider?**

If 'Yes' – consider a proportionate competitive process.

If 'No' – consider market stimulation and development to meet commissioning requirements.

Notes: Market engagement is critical to understand the level of potential provider interest and to inform the process of developing the relevant service specification. The designing of an appropriate and proportionate competitive procurement process should be informed as to the likely number of potential bidders. Consider whether it is appropriate to hold a pre-qualifying stage. Bear in mind that CCGs' have considerable flexibility to design a procurement process for commissioning healthcare services to suit their particular needs, as long as it respects the EU Treaty derived principles of transparency, equal treatment, non-discrimination and proportionality. Where market engagement fails to identify interested providers, a review should take place to understand possible reasons, particularly where this could be due to unreasonable or unrealistic service specifications of commissioning requirements including payment models etc. Ways should be identified to further engage with the market to develop the capacity being required to meet commissioning requirements.

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## Annex F - Regulatory procurement thresholds

### NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

The NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013 require that where a competition is to be advertised<sup>15</sup> to award a contract for the provision of health care services for the purposes of the NHS (amongst other social and educational services), regardless of financial value (i.e. no financial threshold is stipulated), arrangements must be made to advertise such a competition, through the publication of an appropriate notice through Contracts Finder (the UK's national web portal for ensuring transparency of all public sector contract opportunities and contract award decisions is available at <https://www.contractsfinder.service.gov.uk> )

### Public Contracts Regulations 2015

The Public Contracts Regulations 2015 set out financial thresholds above which the regulatory obligations discussed above will apply.

These thresholds are reviewed and published by the Cabinet Office every two years, are published in Euros (€) and then fixed in pounds sterling (£) for the corresponding period.

Thresholds relate to the total potential life value of a contract over its expected term, including any potential extensions.

e.g. A contract with an annual value of £200,000 being awarded for 2 initial years with the option to be extended for a further year will have a total potential life value of £600,000 for the purposes of determining which set of procedural requirements are to apply to its award.

### EU Contract Value Thresholds as at 1<sup>st</sup> January 2018:

Category of contract	Current Threshold (applicable up to 31 December 2019)
Goods / Services Contracts (excluding healthcare services)	£181,302 or more
Works	£4,551,413 or more
Schedule 3 Services (including healthcare services)	£615,278 or more

<sup>15</sup> Note that only where a competition is to be "advertised" does it have to go on Contracts Finder – for example, if a CCG were to determine (assuming sub £615k) that they could appropriately invite three bids, then this would not constitute "advertising" and trigger the obligation to put an ad on Contracts Finder.

\*Note: 'Schedule 3' refers to Schedule 3 of the Public Contracts Regulations 2015 which lists specific types of social and other specific services (including healthcare services) which are not bound by all of the regulatory requirements of other more general services and have a higher contract value threshold before issuing any form of advertisement is mandated through OJEU.

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