



**North Hampshire
Clinical Commissioning Group**



**South of England
Procurement Services**

Procurement Guide **(NHCCG COR/027/V4.00)**

Version 4 Dated 17th April 2015
To Remuneration and Procurement Committee

This Guide produced by SOEPS is intended to accompany the CCG's Financial Policies. It outlines the various procurement process options available to us and how South of England Procurement Services (SoEPS) provides support in each of those processes.



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1.0 Introduction

Effective procurement is an essential component in the commissioning of improved and innovative services and outcomes for our population as well as ensuring value for money is delivered. It involves knowing when and how to use competition and is a matter of NHS Policy and applicable procurement law.

Commissioning is the process of contracting for healthcare services that best meet the needs of the affected population/group. Procurement is the process of sourcing, evaluating and awarding those contracts from the best placed provider/s to perform those services.

Awarding contracts can be complex and unless carried out in accordance with prescribed guidelines and associated legislation, carries an inherent risk of challenge. It is therefore important that for each procurement decision the CCG decides to take, that it clearly evaluates the options available for that requirement and clearly records the rationale for the decision being made. It is best practice to advertise contract opportunities; sound and justified rationale must be present to follow an alternative course of action.

The purpose of this document is to share the advice of NHS South of England Procurement Services' (SoEPS) with the CCG so those undertaking a procurement are aware of their obligations when conducting procurement activity. The document advises further on the various procurement options/routes that are open to the CCG and an outline of the circumstances and situations which would lead to each procurement route/strategy being chosen.

This document must be read in conjunction with CCG constitution and other related policies and procedures.

This document will be reviewed in the event of any legislative changes for which amendments are mandated in accordance with UK Law.

2.0 Monitor Guidance

2.1 In May 2013, Monitor published a consultation document entitled Substantive guidance on the NHS Procurement, Patient Choice and Competition (No.2) Regulations 2013 (see 3.2). In December 2013 the final substantive guidance document was published taking into consideration the responses from the consultation.

2.2 Monitor concluded that there is no one size fits all approach to healthcare procurement. It encourages partnership working between procurement organisations and CCGs to ensure that a process is outlined that best meets the needs of the requirement, the CCG and the patient.

2.3 When conducting a procurement exercise, the key messages contained within the guidance are that when procuring healthcare services, NHS Commissioners:

- Should act in a transparent, proportionate and non-discriminatory way;
- Should procure services from the providers most capable of achieving the objective in Regulation 2 and providing best value for money;
- Should consider appropriate ways of improving services including through services being

provided in a more integrated way, enabling providers to compete to provide services and allowing patient choice.

- 2.4 The guidance further details particular requirements relating to procurement activity that commissioners must comply with. These cover:
- publishing contract opportunities and contract awards;
 - establishing and applying qualification criteria;
 - record-keeping;
 - obtaining assistance and support when commissioning services;
 - managing conflicts of interest;
 - Introduce competition where it is appropriate for local circumstances in the best interests of patients and prevent anti-competitive behaviour.

- 2.5 Full information on this Monitor Guidance can be found at <http://www.monitor-nhsft.gov.uk/node/3352>

- 2.6 SoEPS has developed a Decision Making Matrix to help commissioners navigate through the Monitor Guidance and the Procurement Patient Choice and Competition Regulations.

3.0 South of England Procurement Services (formerly Solent Supplies Team)

- 3.1 South of England Procurement Services (SoEPS) are the CCG appointed procurement support service provider. SoEPS provide support in an:

- a) **Advisory Capacity** – assisting with procurement decision making processes ensuring that any decisions are appropriate (see 3.2 below). This includes whether a procurement process is necessary (or if the current contract can be adapted) and if it is, which the most appropriate procurement process to follow is;
- b) **Procurement Project Capacity** – supporting commissioner’s procurement processes from inception to conclusion for all authorised projects adopting a partnership approach throughout.

- 3.2 All procurement decisions made by the CCG must be in accordance with the latest NHS Policy and applicable procurement law including the:

- Public Contracts Regulations 2006 applicable for healthcare and social services until April 2016
- Public Contracts Regulation 2015 which best practices we will start implementing after 25th February
- The NHS Procurement, Patient Choice and Competition (No.2) Regulations 2013 which came into force on 1st April 2013;
- Monitor’s Substantive Guidance on the Procurement, Patient Choice and Competition Regulations, and;
- CCG Detailed Financial Policies – Section 2.

- 3.3 Contact details for SoEPS are at para 8.0 below.

4.0 SoEPS Role in Your Procurement Processes

At the start of the procurement exercise, a SoEPS lead will be identified who will agree terms of reference for the proposed procurement that clearly sets out:

- The roles and responsibilities of the respective parties, including the SoEPS Procurement lead, the CCG lead or Project Lead, the project board and the wider project team. This will include the completion of (but not limited to) a Project Initiation Document (PID), Conflict of Interest (CoI) declarations, risk register and associated governance arrangements;
- Definition of key deliverables, who has the responsibility of producing them and who has authority to sign off the documents prior to issue;
- Agree the most appropriate procurement strategy for your requirement;
- Agree a detailed procurement project plan/timetable for delivering the procurement process with reference to any legally mandated timescales where required in order to facilitate close monitoring of progress and to identify sign off points and facilitate robust risk management;
- Clear identification of the decision making points in the process and who has authority to make the decision, by reference in particular to the Scheme of Delegation, Authorised Signatory List and any other applicable CCG policy.

5.0 SoEPS will deliver services that help you achieve:

5.1 Best Value for Money

Regulation 3 of the Procurement, Patient Choice and Competition Regulations requires commissioners to procure NHS health care services from one or more providers that:

- are most capable of securing the needs of NHS health care service users and improving the quality of services and the efficiency with which they are provided, and;
- provide best value for money in doing so.

All procurement decisions require an analysis of relevant costs and quality/benefits of each proposal throughout the whole procurement cycle/contract duration. Value for money is enhanced by:

- encouraging and using appropriate competitive procurement processes;
- ensuring non-discrimination in procurement;
- promoting the use of resources in an efficient, effective and ethical manner i.e. proportionality (see para 5.6 below);

- ensuring all procurement evaluation criteria/models reflect commissioner needs and priorities delivering an appropriate percentage weighting of price versus quality. Evaluation models will be agreed with the project board or the project team in order to reflect strategy and market conditions.

A provider will deliver best value for money based on the Most Economically Advantageous Tender (“MEAT”) which will be the offer which provides best overall quality and price. Best value is not solely determined by the provider that can supply services at the lowest price. Evaluation models can be complex and in addition to Clinical capability and Finance, will need to take account of areas such as Human Resources, Information Management and Technology (IM&T), Estates, Contracting, Governance etc (as and when applicable).

Running a competitive procurement process will encourage prospective suppliers to offer to provide high quality care and better value for money in order to win the contract being Tendered. If providers fail to do so, they risk losing the contract to another provider whose Tender offering provides a better service to patients.

If a contract is negotiated with a single provider or subset of providers from the outset, that benefit for patients may be lost.

5.2 Transparency

Regulation 3 of the Procurement, Patient Choice and Competition Regulations sets out general requirements that commissioners must comply with when making procurement decisions regarding NHS health care services. These include a requirement:

- to act in an open, transparent, proportionate and non-discriminatory way including when making decisions not to Tender, ensuring suitable records are kept of the key decisions that have been made and the reasons for those decisions ensuring that they will withstand the scrutiny of audit (refer to Monitor Guidance and SoEPS Decision Matrix);
- to procure services from the providers most capable of achieving the objective of providing best value for money;
- to consider appropriate ways of improving services including through services being provided in a more integrated way, enabling providers to compete to provide services and allowing patients a choice of provider;
- Use of sufficient and appropriate advertising of requirements/Tenders in the public domain;
- Recording and managing conflicts of interest;
- Appropriate risk management;
- Minimize the risk of legal challenge.

5.3 Fairness and Integrity

Ensuring a consistent, transparent and proportional approach during all procurement processes and their constituent stages, including:

- financial and due diligence checks;
- pricing and payment regimes;
- timescales that reflect complexity, risk and market conditions;
- publication of all evaluation criteria and associated scoring mechanisms *;
- issuing comprehensive de-brief reports to unsuccessful bidders detailing the characteristics and relative advantages of the successful bidder/s in accordance with procurement regulations and to minimise the risk of challenge;
- publishing contract award notices in the public domain and in accordance with procurement regulations.

* All material/responses submitted throughout a procurement process, must be evaluated against objective and pre-determined criteria which must be published. All evaluation criteria that will be taken into account by commissioners must be described clearly. Reliance on a 'professional expectation' is not permitted.

5.4 Effective competition

Ensures the most appropriate procurement procedure is selected with consideration to value, complexity and risk and with consideration for the associated market conditions.

Ensures all decisions are taken promoting competition and participation in Tenders.

5.5 Equal Treatment and Non Discrimination

Ensures equal opportunities are given to all Suppliers/Providers in the market by advertising requirements and publishing detailed evaluation criteria/models which will enable Tenders to be assessed objectively and transparently.

Ensures that during the procurement process, the CCG provides information in a non discriminatory manner and does not provide a bidder or bidders with an advantage over others.

All communication with suppliers/providers during a procurement exercise shall be made through the SoEPS Procurement Team utilising their electronic Tendering tools.

5.6 Proportionality

Commissioners are required to act in a proportionate way whenever they carry out any procurement activity.

The requirements of Suppliers/Providers and the procurement process must be proportionate to the value, complexity, clinical risk and market conditions associated with the provision of the goods and services and the operational objectives of the CCG, not excluding potential providers through overly bureaucratic or burdensome procedures.

5.7 Sustainable Procurement & Social Value Act

Sustainable procurement addresses social, economic and environmental issues. The importance and relative priority of different issues varies between different categories of spend and CCG's business priorities. SoEPS not only focus on the products and services being procured but also on sustainability of the wider supply chain.

The Public Services (Social Value) Act 2012 places a duty on the Authority when procuring services to consider:

- how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and;
- how, in conducting the process of procurement, it might act with a view to securing that improvement.

Please refer to SoEPS Briefing Note "Addressing The Public Services (Social Value) Act" and SoEPS commentary on "Protect Our NHS" v Bristol CCG.

6.0 What is the most appropriate procurement route for your requirement?

6.1 Public Contract Regulations 2015

The Public Contract Regulations 2015, incorporating EU Procurement Directive 2014/24/EC, divides the provision of goods and services into:

Full regime goods and services (old Part A Services). Some examples are:

- Non-Emergency Patient Transport – the main aim of the service is to provide patient transport to and from clinical treatment sessions, not to provide healthcare.
- Wheelchair Services including provision of the chair – the highest spend element of this contract is the wheelchairs themselves, they are classed as 'goods'. In circumstances where a procurement process covers both goods and services on a full regime and a particular regime (HealthCare and social...), the highest proportion of Whole Life Costs will take precedence so in this instance, Wheelchairs would fall under Part A.
- All Clinical Goods and Non Clinical Goods.

Particular Regime services (old Part B services), are those that are considered would largely be of interest only to bidders located in the Member State and includes Health and Social Services.

The same principles and rules apply to procuring goods and services under Full and Particular Regimes, however, there is a greater degree of flexibility within the rules that can be applied for Particular Regime procurement processes.

These classifications, along with the CCG Financial Policies, should inform the CCG procurement route with advice obtained from SoEPS.

Any values/thresholds stated in this document are excluding any applicable VAT.

6.2 Thresholds

6.2.1 Full Regime – Any contract opportunities which total value exceeds €207,000 (£150,000 as of April 2015), over the duration** of the contract, must be advertised in the Official Journal of the European Union (OJEU). The outcome of the contract award must also be published in the same way.

6.2.2 Part B (applicable until April 2016)– Any contract opportunities must be advertised via Contracts Finder. Any contract opportunities which total or exceed €207,000* (£172,514*) over the duration of the contract must have an award notice published in OJEU.

Particular Regime (applicable from 2016) – Any contract opportunity must be advertised and awarded via OJEU. Any contracts opportunities which total or exceed €750,000 (£539,000 as of April 2015) over the duration of the contract.

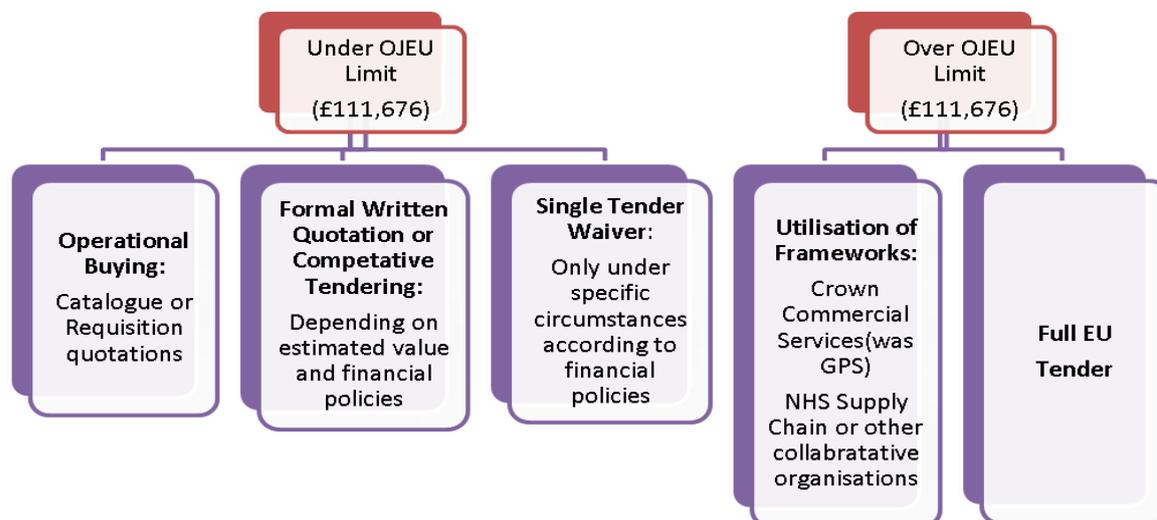
* This threshold was reviewed and converted into GBP accordingly and it entered into effect the 1st of January 2014.

**The total contract value refers to the estimated value of the contract during the specified term and shall include any extension options as detailed in the Tender documentation and contract award notice. See 6.3 below for definition of Whole Life Costs.

Whole Life Costs (WLC) for all aspects of goods and services, including Health and Social Care services, are required to be calculated (this must be evidence based) when estimating the value of any proposed contract that is the subject of a procurement decision. For example, when buying equipment, the WLC calculation would include the value of the equipment itself, all consumables, calibration and maintenance requirements and disposal costs at the end of its useful life. Breaking down constituent costs in order to avoid competition is illegal under EU 'Rules of Aggregation'. The same principles apply when procuring all services.

6.3 Procurement Route Details – also refer to CCG Scheme of Delegation

If your requirement is Part A (products and non-clinical services):



6.3.1 Operational Buying

The SoEPS Operational Procurement Team will process all of the CCG’s electronic requisitions after validation against CCG financial policies and relevant procurement policies. For low value purchases that are under quotation or Tender thresholds, SoEPS can advise on the use of catalogues and other procurement routes where appropriate.

6.3.2 Quotations

Orders may be placed and expenditure incurred within budgetary provision and within delegated limits of the CCG authorised member of staff (as set out in the Scheme of Delegation). If only one quotation is required and obtained, value for money must be demonstrated. Quotations can be obtained by the SoEPS Operational Buying Team upon request.

Competitive quotations are required for expenditure within the range specified in the CCG Financial Policies and where formal Tendering procedures do not need to be applied.

Quotations should be obtained in writing from at least three Suppliers/Providers based on specifications or terms of reference that will be issued by the SoEPS Operational Buying Team.

Quotations should be evaluated by the nominated CCG lead, in order to determine the quote that provides the best value for money.

6.3.3 Single Tender Waiver/Single Tender Action

A Single Tender Waiver (STW)/Action (STA) may only be used in exceptional circumstances. For example, when there is only one supplier or single source specialist expertise in the market that can provide the services or goods required (STA). Where the timescale genuinely precludes competitive Tendering a STW may apply; failure to plan the work properly would not be regarded as a justification for a Tender waiver. For more information please consult the CCG Financial Policies and seek advice from the SoEPS Team.

6.3.4 Framework Agreements

Framework Agreements are the result of compliant EU procurement processes. They can be utilised by Contracting Authorities where they have been identified as a potential user and outlined as such in the corresponding procurement advertisement e.g. National Frameworks awarded by the Crown Commercial Service (CCS) which are accessible nationally by all Central Government Contracting Authorities.

There are two ways of accessing suppliers under an existing framework agreement:

- **Direct Call-Off:** if the terms of the framework agreement allow it you can choose a preferred supplier / provider as long as the framework requirements are equivalent to your needs. This is more commonly applicable for provision of Goods, not Services;
- **Competitive/Secondary Call-Off (often referred to as a Mini Competition):** This is a formal competitive Tender, carried out under the terms specified in the framework and therefore it requires a specification and weighting criteria in order to select the Most Economically Advantageous Tender (MEAT). Every supplier on the framework that can meet your minimum requirements must be invited to participate. The timeframe for this exercise is shorter than for a full EU Tender and should be relative and proportionate to the scale of the opportunity.

SoEPS can analyse available Frameworks and their terms and conditions and inform you if there is a suitable framework option available for the CCG requirement.

Examples of useful and relevant Crown Commercial Services (CSS) frameworks are:

- Consultancy One (which incorporates Multi-Specialism Programme Delivery, Management Consultancy, Functional Advice and Support, Finance, Audit)
- ICT (Hardware and Software)
- Agency and Temporary Staffing

Timescales for Mini Competition - The procurement process will usually take 4 to 10 weeks depending on the requirement. This timescale excludes any requirements for mobilisation of a new service/contract and TUPE Consultation process (where applicable – see para 7.4).

Details of the aforementioned frameworks can be found at <http://ccs.cabinetoffice.gov.uk/i-am-buyer/find-a-product-or-service> or please seek advice from the SoEPS Procurement Team.

CCG specific Frameworks can be delivered via compliant procurement procedures specifically for commissioner requirements in appropriate circumstances. Advice should be obtained from the SoEPS Procurement Team.

Timescales for CCG Specific Framework - The procurement process will usually take 4 to 6 months depending on the associated value, complexity, risk and market conditions following the Restricted procedure detailed at para 6.4.6 below. This timescale excludes any market engagement activity before going out to Tender (see below) and any requirements for managing an exit strategy from a current Contract/s and mobilisation of a new service/contract.

6.3.5 Formal Competitive Tenders

Formal Tendering procedures are required for expenditure within the range specified in the CCG Financial Policies. The most appropriate procurement route should be determined in consultation with the SoEPS Procurement Team based on value, complexity, risk, market conditions and whether expenditure falls under Part A or Part B procurement rules (see para 6.1 above).

A competitive Tender will require a full specification and evaluation/weighting criteria in order to evaluate goods or services provided in terms of the Most Economically Advantageous Tender (MEAT) by evaluating quality/service and finance/whole life costs.

There are various EU compliant Tendering procedures for Part A requirements. The same principles and rules apply to procuring goods and services under Part A and Part B, however, there is a greater degree of flexibility within the rules that can be applied under Part B procurement processes. The EU recognised procurements are termed as:

- Restricted
- Open
- Competitive Dialogue
- Competitive Procedure with Negotiation
- Negotiated procedure without publication

See below for definitions and approximate timescales.

Under Part B/Particular Regime rules, the following processes can also be used in appropriate circumstances:

- Limited Local Tender
- Any Qualified Provider

See below for definitions and approximate timescales.

Each of these processes have criteria and conditions attached which have to be fulfilled in order to permit their use. This should be reviewed with SoEPS in order to decide the appropriate procurement route and strategy, regardless of whether the spend is covered under Part A or Part B of EU Directives (see para 6.1 above).

All procurements for goods covered under Full Regime of EU Procurement Directives and non-clinical services over the value of £150,000 ex VAT, must be advertised in the Official Journal of the European Union under EU Law.

6.3.6 Restricted Procedure – Two Stage

A two stage process involves a primary stage called a Pre-Qualification Questionnaire (PQQ). This is used to evaluate all interested providers against minimum capability standards and enable short-listing of the most capable providers that will subsequently be invited to participate in the Tender stage. Where the competition allows, a minimum of 5 bidders must be selected for the Tender stage.

The shortlisted bidders are then issued the Tender incorporating the full specification and evaluation model, to which they respond; all Tender responses are evaluated.

The Restricted procedure is the most commonly used procurement route for competitive Tender situation, in order to pre-select providers to invite to Tender.

Timescales - The procurement process will usually take 16 to 26 weeks depending on the associated value, complexity, risk and market conditions. This timescale excludes any market engagement activity before commencing the full procurement (see below), any requirements for managing an exit strategy from a current Contract/s and mobilisation of a new service/contract and TUPE Consultation process (where applicable – see para 7.4).

6.3.7 Open Procedure - One Stage

A one stage process in which the Tender and specification are sent to all interested providers and all responses must be evaluated. The one stage process incorporates elements of the PQQ stage of a Restricted process (see para 6.4.6 above).

This process is generally used for low value, low risk, low complexity projects or projects where it is known that there is a very limited market.

This process is used sparingly as all Tenders received must be evaluated and there is no restriction on who can access the published documentation. This can prove to be a lengthy process where there are numerous bidders.

Timescales - The procurement process will usually take 8 to 16 weeks depending on the associated value, complexity, risk and market conditions. This timescale excludes any market engagement activity before commencing the full procurement (see below), any requirements for managing an exit strategy from a current Contract/s and mobilisation of a new service/contract and TUPE Consultation process (where applicable – see para 7.4).

6.3.8 Competitive Dialogue and Negotiated Procedures

Competitive Dialogue (CD) should only be used where the contracting authority is not objectively able to determine what the market can offer to satisfy its requirements and cannot:

- Your needs cannot be met with readily available solutions
- Define the technical means or standards or technical specifications in relation to the required performance or functional requirements;
- Specify the legal and/or financial make-up of a requirement.

The following is an Extract from Cabinet Office Policy Note (PPN) Dated May 2012:
“Accountable Officers (AOs) must satisfy themselves that:

‘Commercial teams have conducted extensive pre-market engagement with current and potential suppliers in accordance with lean principles and as a result of those discussions; they are still unable to use a less complex procurement procedure and must use competitive dialogue.’

- Accountable Officers should not sign off the use of competitive dialogue if:
 - Further pre-market engagement would enable the contracting authority to better define its requirement and consequently use a less complex procurement procedure.
 - The requirement is not complex.
 - Where the procurement is for a Part B/Particular Regime service, a procedure that replicates a competitive dialogue should not be endorsed”

Timescales - The CD procurement process will usually take 6 to 12 months depending on the associated value, complexity, risk and market conditions. This timescale excludes any market engagement activity before commencing the full procurement (see below), any requirements for managing an exit strategy from a current Contract/s and mobilisation of a new service/contract and TUPE Consultation process (where applicable – see para 7.4).

Competitive Procedure with Negotiation: this process is similar to a Competitive Dialogue in relation to the circumstances where it can be applied.

Negotiated without Publication: this is applicable where after a procurement process there were no suitable tenders or there are specific Intellectual Property Rights (IPR) that are not transferrable.

6.3.9 Limited Local Tender - Part B/Particular Regime Services Only

A limited local Tender is a competitive process where bidding parties are selected by the contracting authority to participate without the need to advertise the requirement, for example, known providers in the local health economy. It can only be used in limited circumstances e.g. to support a pilot or proof of concept study, for low value/low risk requirements or for a short term need whilst a longer term procurement strategy is considered. Evidence must be available to support the recommendation including how bidders have been pre-selected to participate.

This process is not applicable to any procurements covered under Full regime of EU Procurement Directives (see para 6.1 above). Advice should be obtained from the SoEPS Procurement Team.

Timescales - The procurement process will usually take 6 to 10 weeks depending on the associated value, complexity, risk and number of eligible providers. This timescale excludes any requirements for mobilisation of a new service/contract and TUPE Consultation process (where applicable – see para 7.4).

6.3.10 Any Qualified Provider (AQP) – Part B/Particular Regime Services Only

An AQP is best suited to clinical services that are routine or non-complex. It is a way of managing multiple providers to increase patient choice. Commissioners adopt nationally defined pathways or

set local pathways and referral protocols that providers must meet.

AQP is an accreditation process, NOT a competitive procurement process. All providers will be awarded a contract if they assure commissioners that they:

- Meet quality requirements;
- Agree to provide at defined tariff (local or National);
- Accept all relevant NHS Terms and Conditions.

AQP Contracts have no volume guarantees. Providers are required to secure their own premises. The 'Accreditation Window' can be re-opened (as defined from the outset of the process) to allow for updates in the market and supplier base.

Timescales - The procurement process will usually take 10 to 16 weeks depending on the associated complexity and market conditions. This timescale excludes any market engagement activity before going out to Tender (see below) and any requirements for managing an exit strategy from a current Contract/s and mobilisation of a new service.

7.0 Supporting Information

7.1 Financial and Quality Assurance Checks

The CCG shall require assurance about potential providers. Where this is not achieved through a formal tender process, the following financial and quality assurance checks of the provider will be expected to be undertaken before entering into a contract:

- Financial viability;
- Economic standing;
- Corporate social responsibility
- Clinical capacity and capability;
- Clinical governance;
- Quality/Accreditation.

7.2 Conflicts of Interest (Col)

The NHS Code of Accountability requires Clinical Commissioning Group (CCG) members and sub members to declare conflicts of interest which are relevant to the Service area being procured.

The Procurement, Patient Choice and Competition regulations 2013 also have a provision to ensure potential conflicts of interest are declared. Monitor's Substantive guidance on the Regulations 2013 provides further guidance.

All personnel identified as a project member including any activity required during the development of the requirements, (or have an interest in developing the requirements) will be required to complete a Col declaration. In order to ensure a fair process, all actual or potential conflicts of interest must be identified and resolved to the satisfaction of the Co-coordinating Commissioner.

For these purposes, a conflict of interest is defined as:

- Any fact or matter which might prevent (or might be seen by others as preventing) involvement in the design of services from being fair and impartial;
- A situation in which a member is influenced, or could appear to be influenced by; any significant personal or private gain or advantage, or possibility of any loss or disadvantage; or personal involvement in, or pre-judgment of any issues, regardless of any financial connection, where such influence might be seen as improperly or materially affecting the members' judgment.

For more information, please use the CCG search engine for "Managing conflicts of interests: Statutory Guidance for Clinical Commissioning Groups" where you will be able to download an Adobe file/document or go to NHS England's web pages www.england.nhs.uk.

7.3 Market Engagement & Patient and Public Involvement (PPI)

7.3.1 Market Engagement

Engaging with the market prior to commencing a formal procurement process is good commissioning practice and something that commissioners should consider doing as a matter of course.

It is not against EU procurement law to engage with potential suppliers before starting the formal procurement process provided this is conducted in an open, fair and transparent manner and is not focused on a single entity. SoEPS Procurement Team will facilitate this process and conduct the market engagement exercise in partnership with you by utilising e-procurement tools in order to ensure robust processes are undertaken and provide a full audit trail. The process can be initiated by submitting a Prior Information Notice (PIN) in OJEU or by publishing the potential opportunity on Contracts finder and/or SoEPS e-tendering Portal.

Early Market Engagement may benefit both the contracting authority and potential suppliers by engaging in early two-way communication.

The benefits that this engagement with providers can deliver are:

- It helps manage the market through stimulating increased competition;
- It helps to define the requirement, by informing the business case and helping identify/develop the requirements;
- It can provide a better understanding of the feasibility of the requirement and the capacity of the market to deliver and possible risks involved.

Engagement with the market can either be face to face, e.g. by inviting potential providers to engagement events or via a request for information process e.g. via market engagement questionnaires. SoEPS can advise on which would be the most suitable method.

To ensure that market engagement is successful and facilitates the process, you must NOT give any one potential supplier an advantage over another, shape your requirement in favour of one particular supplier or engage in a way that disadvantages a particular potential supplier or group of potential suppliers.

Important Note: Dialogue as part of market engagement is not to be confused with 'Competitive Dialogue' which is an EU Procurement Process in its own right (see para 6.4.8).

7.3.2 Patient and Public Involvement (PPI)

As per the requirement contained in the Section 242 of the National Health Service Act 2006, Commissioners are required to consult patients and the public directly or through representatives on various phases of the commissioning cycle. The Decision Making Matrix provided by SoEPS can support the commissioners decision making in relation to PPI.

SoEPS recommends that commissioners consult patients and/or the public in the following instances:

- a) In the planning of the commissioning arrangements. It may be convenient for commissioners to consult with patients and the public in relation to their Commissioning Strategy and Procurement Policy;
- b) in the development and consideration for changes in the commissioning arrangements where the implementation of such proposal 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
- c) In the decision to award a contract without competition to ensure such decision is for the benefit of patients

7.4 Pilot/Proof of Concept Schemes

It is a common misconception that fulfilling a healthcare service requirement through the use of a pilot scheme negates the application of procurement rules (except where extremely low value/low risk, see para 5.6 Proportionality - guidance should be obtained from the nominated Finance lead and/or SoEPS Procurement Team).

When implementing a pilot scheme, the provider appointment must be transparent i.e. you can demonstrate that you have selected the most capable provider to 'prove the concept'. A way of fulfilling this requirement would be through a Limited Local Tender (see para 6.4.9) to arrive at the successful supplier to be involved in the proof of concept study. Pilot schemes that are not supported by competition will require a Single Tender Waiver (see para 6.4.3).

From the outset of the project there should be a clear indication that you intend to offer the service to a full competition should the concept be proven, or be able to clearly demonstrate that the pilot requirement is not suitable for market testing/competition.

When planning the duration of a Pilot Contract, you must consider the time-scales required to conduct any resulting procurement process and incorporate this into you strategic planning.

A new procurement procedure can now be undertaken if there is a need for an innovative service that is not readily available in the market

7.5 TUPE

Commissioners must consider the Human Resource implications when an existing service is to be the subject of a procurement process. Transfer of Undertakings Protection of Employment (TUPE) legislation is applicable to all members of staff that will potentially be affected by a change in service provider, where they can be assigned to an organised grouping of employees in the

current service Contract. This resource must be identified at an early stage as this information is required as part of the procurement process and it is essential that it is included in Tendering documentation so that bidders are aware of the staff that may transfer and the associated cost of pension implications etc. A TUPE Consultation process will be required (where applicable) once a new provider has been successfully appointed and prior to the roll out of a new service.

Early advice should be obtained from the CCG nominated Human Resources lead. SoEPS can also provide advice on procurement requirements and implications.

7.6 Estates/Premises and Assets

Early consideration should be given to an Estates/Premises impact/strategy as part of any procurement process. If NHS premises are being mandated to deliver services or can be offered for the delivery of services, supporting information must be provided as part of the Tendering process in the form of a Draft Heads of Terms which includes details of, for example, accompanying facilities and the associated rental costs.

Assets may also be transferrable as part of a service requirement and include fixed assets that are part of premises being utilised and/or transferrable assets that are owned by the NHS.

Early advice should be obtained from your nominated Estates lead e.g. NHS Property Services. SoEPS can also provide advice on procurement requirements and implications.

7.7 Monitor Investigation Procedures and EU Remedies Directives

7.7.1 Monitor Investigation Procedures

The Health and Social Care Act 2012 gives Monitor concurrent, or shared, powers with the Competition and Market Authority (CMA) to enforce provisions of the Competition Act 1998 and the Treaty on the Functioning of the European Union (TFEU) in relation to the provision of health care services in England.

Using their competition law powers, Monitor can:

- Impose interim measures to prevent serious and irreparable damage or protect the public interest;
- Carry out investigations, both on their own initiative and in response to complaints, including requiring the production of documents and the provision of information;
- Impose financial penalties, taking account of the statutory guidance on penalties issued by the OFT.

For more information, please refer to the Monitor website www.monitor-nhsft.gov.uk

7.7.2 EU Remedies Directive

It should be noted that Monitor do NOT have to be relied upon to investigate breaches of public

sector procurement regulations. There can be consequences for not carrying out procurement processes correctly under EU Remedies Directives. For these Directives to apply, a case has to be brought before a judicial court.

7.7.3 Other consequences

There are other consequences that can result from improper procurement:

- Bidders can sue for e.g. lost profit/bid costs (if the breach is a direct result of an improper competitive Tendering process)
- Threat of audit
- Negative publicity

8.0 Documents related to this Procurement Guide:

8.1.1 The Decision Making Matrix detailed in appendixes are available to support the CCG's decision making process in relation to the need to procure and in line with Monitor's Substantive Guidance

8.1.2 Addressing the Public Services (Social Value) Act 2012 and the CCG social value policy.

9.0 Contact Details

For information regarding procurement processes and rules please contact:

Name	Role	Email address	Landline	Mobile
Keith Myhill	Head of Procurement South Commissioning MCIPS	keith.myhill@soeprocurement.nhs.uk	01489 779739	07825 256668
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