

# Procurement Policy

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<b>Author:</b>	Simon Gartland, Associate Director of Contracting
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<b>Directorate lead:</b>	Associate Director of Corporate Services
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## 1. Introduction

Procurement is the all-encompassing term to describe the activities of obtaining the right goods, works and/or services from the right provider, at the right time, in the right place, of the right quality and at the right price. It encompasses everything from repeat, low-value orders through to complex healthcare service solutions developed through partnership arrangements.

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

This Procurement Policy has been developed to ensure that all procurements agreed to be undertaken on behalf of the NHS Herefordshire and Worcestershire Clinical Commissioning Group (HWCCG) are completed in a way that complies with all legal requirements and is consistent with the annual strategic objectives and align with the principles set out below:

- To secure the needs of health care service users.
- To improve the quality of services.
- To improve the efficiency with which services are provided.
- To increase the levels of Integrated Care delivered closer to home.
- To increase provider collaboration across the county.
- To deliver efficiencies and savings to fund system change and enable financial sustainability.

The policy also seeks to align itself with the Financial Recovery Programme and so support the delivery of the objectives of that programme of work.

In addressing these objectives, the CCG will seek to:-

- a) Engage with all fellow commissioners, stakeholders and relevant parties when procurement is undertaken;
- b) Undertake and understand relevant policy and guidance regarding procurement type e.g. full tender/single provider tender;
- c) Ensure safe, high quality and equitable services are achieved and maintained across the CCG;
- d) Ensure that the CCG achieves value for money in its procurement activities;
- e) Ensure that the CCG makes clear and transparent decisions on whether any procurement is necessary in the interests of the local population;
- f) Ensure the CCG avoids possible conflicts of interest by ensuring transparency of all decision making through recorded declaration of interests and, if unavoidable, the effective management of any conflicts of interest;

g) Ensure that each procurement complies with all relevant guidance and legal regulations, primarily the National Health Service (NHSI, Procurement, Patient Choice and Competition) regulations 2013 and the Public Contracts Regulations 2015 (as amended from time to time).

h) Ensure the CCG complies with all legal requirements and best practice on procurement, including sustainability policies.

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

In carrying out its Commissioning role the HWCCG will adhere to the following key principles:-

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

In relation to each purchasing decision concerning health care and social care services, the CCG will consider the extent to which any form of competition is required and consider the most appropriate process and procedure for awarding the relevant contract or contracts. The CCG will decide on the most appropriate procurement route on a case by case basis, in accordance with the framework of principles set out in NHSI 'Substantive Guidance' on the 2013 Regulations.

Where there is a joint procurement with Local Authorities, the CCG will ensure that it complies with applicable NHS guidance.

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

## **2. Purpose**

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

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

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

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

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

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

## **3. Scope**

As far as it is relevant, this Policy applies to all the CCG's healthcare procurements.

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

This Procurement policy covers the NHS Herefordshire and Worcestershire Clinical Commissioning Groups, that commission services for the CCG's population.

## **4. Statutory Framework**

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

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

Healthcare services within the meaning and scope of 6.1 of the legislation are subject to the 'Light Touch' regime of the Public Contracts Regulations 2015. This is a procurement threshold relating to Life Time cycle of contracts. All other services fall within the full force of the PCR 15 Regulations.

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

Where there is only one provider capable of supplying the services required, the CCG will need to articulate the grounds for using the negotiated procedure without a call for competition to record its decision making.

Following award of the contract, the CCG must publish within 45 calendar days a contract award notice. The new regulations also allow for a group award notice to be published on a quarterly basis. In this instance the award notices must be published within 45 calendar days of the end of each quarter.

The current threshold for clinical services which are directly impacted by the Light Touch Regime is £663,540 (2020/21) for the life of the contract. For these services, there are a number of mandatory requirements:

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

Even though services may fall below the threshold identified this does not mean that no procurement exercise is necessary. Each service needs to be reviewed on a case by case basis, with a proportionate procurement process put in place if necessary at the very least in accordance with CCG's SFIs.

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

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

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

Other legislation and guidance affecting procurement in the NHS includes:

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

**Section 242 of the National Health Service Act, 2006** provides that commissioners of healthcare services have, in relation to health services for which they are responsible, a legal duty to consult patients and the public – directly or through representatives – on service planning, the development and consideration of services changes and decisions that affect service operation.

**Section 75 of the Health and Social Care Act and Statutory Instrument National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013** places requirements on commissioners to ensure that they adhere to good practice in relation to procurement, do not engage in anti-competitive behaviour and promote the right of patients to make choices about their healthcare.

- Department of Health Changes to the National Health Service: Procurement, Patient Choice and Competition Regulations, 2013 (See Appendix 1 for details).
- NHS Improvement Agency: Enforcement guidance on Procurement, patient Choice and Competition Regulations, 2013
- CCG Standing Orders and Standing Financial Instructions.
- NHS England Procurement Policy, April 2017.
- Public Services (Social Value) Act 2012
- The EU Procurement Directives as implemented into UK law by the Public Contract Regulations 2015 (PCR 15) (See Appendix 1 for details), Subject to changes following Britain's Exit of the EU, this will need to be amended.

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

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

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

Further information on this ISAP can be found at: [www.england.nhs.uk/wp-content/uploads/2017/08/integrated-support-assurance-process-part-a.pdf](http://www.england.nhs.uk/wp-content/uploads/2017/08/integrated-support-assurance-process-part-a.pdf)

## 4.2 Anti-Competitive Behaviour

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

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

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

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

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

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

The CCG will address this in the context that market development and the procurement of service provision are key enablers to the delivery of the CCG's objectives. Through market exploration and development, the CCG will seek to identify and develop a provider base that can support the delivery of the shared CCG and STP objectives. As an alternative to the traditional full market tender exercise the CCG may select alternative routes to the market such as the Most Capable Provider, single tender action, the establishment of framework agreements and partnership agreements.

## 5. Governance and Standards of Business Conduct

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

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

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

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

The CCG's financial policies identify the financial responsibilities which apply to everyone working for the CCG.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **8. Roles and Responsibilities**

### **8.1. Herefordshire and Worcestershire CCG**

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

## **8.2. The Governing Body (GB) (for procurements over £10 million) overall contract value.**

The CCG's GB will be responsible corporately for:-

- Approving the procurement route, the business case and financial value.
- Making final decisions on the selection of the preferred provider(s).
- Sign off of the final decision to award and ratification of the Award Report.

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

## **8.3. The Clinical Commissioning and Executive Committee**

The CCG's Clinical Commissioning and Executive Committee will be responsible corporately for:-

Procurements of overall contractual value between £1.01million and £9.99 million:

- Approving the procurement route, business case and financial value.
- Making final decisions on the selection of the preferred provider(s).
- Sign off the final decision to award and ratification of the Award Report.

All procurements:

- Signing off specifications and evaluation.
- Scrutinising all procurement risks and ensuring that all mitigation actions are addressed.
- Scrutinizing and providing the approval level of challenge to information and advice provided by professional advisors e.g. legal, financial, commercial, and procurement expertise.
- Oversight of all procurements of any value and receipt of quarterly highlight reports from Herefordshire and Worcestershire Procurement Oversight Group (HWPOG).

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

It is noted that the CCG's Accountable Officer has, under the Scheme of Delegation, authority to sign off procurements up to a value of £1million. However, the aim will always be, where possible, for these procurements to be signed off by the Clinical Commissioning and Executive Committee. The Accountable Officer's delegated authority will only be used in exceptional circumstances and where time constraints do not allow for the normal decision-making route. It is not envisaged that, with proper planning, that any such exceptional circumstances should develop.

#### **8.4. Lead Director**

The Lead Director responsible for this Policy is the CCG's Chief Finance Officer.

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

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

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

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

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

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

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

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

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

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

#### **8.8. Procurement Advice**

Where it is required and considered appropriate, the CCG will determine the level of procurement advice (legal, financial, commercial or other) needed to undertake the procurement safely. This will be directed in the first instance via the Procurement Team at NHS Midlands and Lancashire CSU.

#### **8.9. Herefordshire and Worcestershire Procurement Oversight Group (HWPOG)**

The Oversight Group is already established in the CCG and its role is to provide strategic oversight for the entire procurement portfolio, HWPOG provides assurance and constructive challenge to procurement projects.

HWPOG also monitors all contracts and engages with the appropriate CCG colleagues to provide early warning where contracts are approaching their end, with a view to ensuring that all services are properly evaluated and corporate decisions on the future arrangements for the services are made in good time. In so doing this will allow procurements to run in a timely way and remove the need to extend contracts.

Oversight of all procurement activities includes oversight of pilot programmes which will lead to a requirement for a procurement process when the pilot is deemed viable for full service delivery implementation.

It is not the role of HWPOG to run the actual procurements. That function sits with the relevant project team.

Each year, the CCG will, via HWPOG ensure that a Procurement Plan will be maintained that will list all current and future procurements. The Procurement Plan will be reviewed on a quarterly basis at Clinical Commissioning and Executive Committee taking into account local and national priorities, the CCG's commissioning intentions and nationally mandated procurements. In addition, it will take into account the impact of completed and on-going procurements.

The Plan will highlight the priority, timescale, risk and, resource requirement for each potential procurement. Not every priority on the Procurement Plan will result in procurement but indicates the CCG's intention to review the service or activity which may result in procurement.

The Plan will be developed as a key element to provide communication between the CCG, its membership and potential providers. Through transparent and open processes, the CCG will actively encourage provider engagement. This is something that will be developed in collaboration with the STP programme.

## **8.10 Project Team**

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

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

## 9. Procurement Decision Making Process

The first step is to assess whether a new healthcare service is required. Where an existing service is not being delivered to the required quality or quantity, the primary action is to secure improvements through contract management, for example through payment mechanism, performance monitoring and/or dispute mechanisms. Only after these mechanisms have been exhausted should termination of the contract and its replacement with a new service be undertaken.

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

This approach can however only be considered within the terms of the original contract, where the original contract allowed for extensions or for variation of service. Such variations may then be allowed where the change is not of a significant material nature, such that would amount to a new contract. In procurement terms, in accordance with PCR 2015 Regulation 72. Such variations should not exceed 10% of value of the original contract, or 10% of volume of the original contract.

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

- Other providers would have been interested in bidding for the contract if the change had originally been part of the specification when the service was originally procured;
- The contract would have been awarded to a different provider if the change had originally been included in the original service specification;
- The change involves genuinely new services not originally within the scope of the specification covered by the contract;
- There is a significant change in the value of the contract.

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

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

- Contract value – the higher the value the greater the case is likely to be for competitive tendering
- Provider Market – the greater the number of providers the stronger the case for open competition. There may also be other CCGs who have recently tendered for equivalent services thus stimulating the market.
- Single or multiple provider(s) – would the needs of the population be best served by a single or multiple supplier arrangement. Multiple supplier options may lend themselves to Framework Agreements or Any Qualified Provider arrangements.
- Regulations – These will include the CCG's Standing Financial Instructions & Standing Orders, EU Procurement Regulations and DH Guidance.

- Government policy on protected services – for key services that are a significant and vital part of the NHS, for example Accident & Emergency Services, Intensive Care Services, Emergency Ambulance Services, etc. shall automatically follow a partnership provider route and negotiation would take place directly with that provider.
- Jointly Funded Projects - Competition may not be appropriate for jointly funded projects.
- Patient Choice – consider results of consultation. This shall include, where appropriate, choice of providers, models of care and location. Further details of how patient consultation is carried out are contained within the CCG's Communication and Engagement Strategy which can be found on the CCG's website.
- Patient Safety – if there is a genuine risk to patient safety by changing provider then the CCG can negotiate directly with the existing provider of the services.

### **9.1. Obtaining Approval to Procure**

All procurement projects must be signed-off in line with the CCG's Scheme of Delegation as follows:-

### **9.2. Consultation with Financial Sustainability Committee**

Consultation by the Commissioner to the Financial Sustainability Committee is advised prior to proceeding with full approval to Procure.

### **9.3 Approval to Procure**

- Procurements over £10 million (total contract value) - CCGs Governing Body.
- Procurements of up to £9.99m (total contract value) - Clinical Commissioning and Executive Committee

### **9.4 Contract Award**

- Procurements over £10 million (total contract value) - CCGs Governing Body.
- Procurements of up to £9.99m (total contract value) - Clinical Commissioning and Executive Committee

It is noted that the CCGs' Accountable Officer has, under the Scheme of Delegation authority to sign off procurements up to a value of £1million, if needed as a contingency.

Values shown are for the life of a contract. Procurement Award decisions need to be made by the same groups and planning within the Procurement timescales needs to take this sign-off process into account. Procurement processes need to be planned out with due consideration being given to Pre-procurement planning; evaluation phase; and Award Governance requirements.

The processes to obtain approval to progress with procurements for new services, existing services where the contract is ending and pilot services, are set out in Appendices 2 and 3.

## **10. Procurement Approach**

The CCG recognises that effective engagement with stakeholders is an essential requirement of all NHS organisations and will also offer substantial benefits to the generation of outcome-based service specifications. Therefore, the CCG will engage with stakeholders at all appropriate times during the commissioning and procurement processes.

Stakeholder engagement including patient involvement with new and existing providers and the involvement of members of the public, clinicians and other service users will occur at key points in the service review and procurement processes.

Input from the above groups, will be used to ensure the views of patients are included in the services being commissioned and the CCG will work with patients and patient groups to ensure that their views are included.

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

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

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

## **11. Risk Management**

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

- Clinical procurements are adequately prepared and planned;
- Each clinical procurement project has a Senior Responsible Owner and that roles, responsibilities, reporting lines and channels of communication within the wider commissioning and Procurement Team are clear;
- The individuals involved have the necessary expertise, experience and training to match the requirements of the role and its responsibilities;
- Each project has a pre-agreed and end to end procurement plan and timetable tailored to the requirements of the project; the resources available, the business objective and which has identified and sought to minimise any risks involved;
- Adequate and appropriate records are kept to comply with CCG's statutory obligations and to provide a robust audit trail of decisions and actions taken;

- A risk identification and escalation process is established at the outset, to include a risk register which is regularly reviewed and updated with appropriate risk management strategies to address each risk identified;

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

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

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

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

## **12. Approach to Market**

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

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

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

### **12.2 Competitive Tendering**

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

#### **12.2.1. Open Procedure**

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

#### **12.2.2. Restricted Procedure**

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

### **12.2.3. Competitive Dialogue**

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

### **12.2.4. Accelerated Procedures**

These can be used in all procedures where there is a call for competition and where urgency makes the normal timescale impractical. It does not alter the processes of the procedure, but it does reduce the timescales: The normal time limits of 37 days (or 30 days for electronic) to express an interest can be reduced to 15 days (or 10 days for electronic). Accelerated procedures are only used in very extreme emergency cases, e.g., risk to life etc.

### **12.2.5. Competitive Procedure with Negotiation**

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

### **12.2.6. Innovation Partnership Procedure**

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

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

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

## **12.3. Non Competitive Process**

This process sits outside the realms of this policy, however, it should be said that competition may be waived in circumstances where the CCG is satisfied that the services to which the contract relates are capable of being provided only by one provider. In these circumstances the procedures set out within the CCG's Standing Orders and Standing Financial Instructions must be followed.

Where it is decided not to competitively tender for new services or where services are significantly changed, the CCG's Governing Body approval or that of Clinical Commissioning and Executive Committee, must be obtained following any recommendation to follow this approach.

In order to mitigate any risk with direct award situations the CCG may consider placing a transparency notice (VEAT – Voluntary Ex Ante Transparency) to notify the market of its intent. This gives the market 10 calendar days in which to lodge a challenge. This may reduce any remedies later on if subsequent issues are raised.

#### **12.4 Partnership Agreements**

Where collaboration and coordination is considered essential, for example in developing new integrated pathways, enabling sustainability of services, ensuring smooth patient handover, coordination, etc, the CCG may wish to continue with existing “partnership” arrangements. These “Partnership” arrangements must be formalised using the appropriate contract form and must provide:

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

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

#### **12.5 Spot Purchasing**

There will be the need to spot purchase contracts for particular individual patient needs or for urgency of unique placements requirements at various times. At these times, a competitive process may be waived. It will be expected that these contracts will undergo best value reviews to ensure the CCG are getting value from the contract.

In all cases the CCG should ensure that the provider is fit for purpose to provide the particular service. Generic placements should still be procured competitively in accordance with the regulations. This includes the setup of frameworks for calling off generic placements for care. Regular reviews of spot purchasing practices should take place to ascertain whether competitive tendering becomes necessary.

#### **12.6 Framework Agreements**

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

A framework can be established by the CCG for its own use; or by another clinical commissioning group, contracting authority or a central purchasing body such as the Crown Commercial Service.

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

In particular, the CCG should check that it has been identified as a body which is entitled to use the framework; that its requirements fall within the specification of goods/services covered by the framework; that the term of the framework has not expired; that the terms and conditions applicable to call-offs made under the framework are acceptable to the CCG, as the CCG will be unable to make substantial modifications to these.

## **12.7. Grants**

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

The model grant agreement is non-mandatory and is for local adaptation as required. For further information, please visit

<https://www.england.nhs.uk/nhs-standard-contract/grant-agreement/>

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

## **12.8. Pilot Projects**

It is important to use Pilot Projects only in circumstances where the clinical outputs are not known or cannot be accurately predicted. Pilot Projects can be subject to legal challenge if they do not comply with EU procurement legislation therefore the CCG's approval must be sought before a pilot commences. Please refer to Appendix Three for details of approval process.

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

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

## 12.9. Section 75 Agreements

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

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

## 13.0 Stages in the procurement process

The procurement process can be designed on a bespoke basis but should reflect the market, value and complexity of the service being commissioned so that a proportionate procurement approach is applied. Appendix five gives some basic process guidance for Commissioners.

All the CCG's Procurements will need to be reviewed through the Herefordshire and Worcestershire Oversight group (WPOG). Whilst sign-off/approval will be given by the CCG's Governing Bodies or the Clinical Commissioning and Executive Committee Committee. HWPOG will need to scrutinise the management of individual Procurement processes via the overall CCG Work Plan, by individual Procurement Initiation Documents (PIDs), and by regular Project Highlight reports. The Chair of HWPOG will then escalate key issues/risks to either the CCG's Governing Body, or the Clinical Commissioning and Executive Committee, dependent on value of procurement.

The process will consist of some or all of the following stages:



\*Bidder Selection includes Evaluation/Moderation/Clarification Interview/Post Moderation

### 13.1 Planning Stage

A review of the service need, specification and options available to procure the service will take place. A project team when necessary should be set up and a project plan drawn up.

As part of the planning stage, each project member is required to complete a Potential Conflict of Interest form and a Confidentiality Declaration regarding the specific procurement process.

This is then assessed by the commissioning lead/procurement lead for the project and the project member is deemed to be either eligible to proceed in the evaluation process or is excluded from the process. If any issues are identified, these are flagged up to the Head of Corporate Governance and reviewed/signed off as having had the appropriate action taken.

Furthermore, once expressions of interest have been received on specific tenders, the names of the bidders are circulated to the project team and all project members are asked to confirm

their ability to participate in the evaluation process. Market Analysis may also take place at this stage.

### **13.2. Advertisement Stage**

When required an appropriate tender advertisement will be placed commensurate with the value and complexity and extent of the services being procured. Opportunities that are selected for a competitive process must be sufficiently advertised to ensure fair competition. It is recommended that a contract notice is published including a description of the services to be provided and the criteria against which the bids will be evaluated (i.e. Most Economically Advantageous Tender (MEAT) or lowest price/quality ratio). Additional information, including place of delivery, approximate value of the contract, duration of the contract and any pre-qualification criteria may be included.

Advertisements will be clear and precise, and will succinctly promote the procurement opportunity, encouraging suitably qualified providers to respond. The advert will be published in an appropriate means including Contracts Finder UK, The CCG's website and when applicable the Official Journal of the European Union (OJEU) website. N.B. Subject to changes following Britain's Exit of the EU, this will need to be amended.

Advertisements are key to alerting the market in increasing market stimulation and ensuring adequate competition.

If the contract value is below the relevant threshold value at which an advert is mandatory, an advert can still be placed 'on a voluntary basis'.

The Government recommendations state that any procurement over **£25,000** must be published on Contracts Finder. This also includes the award notice.

### **13.3. Specification stage**

Generic terms should be used when specifying the services required avoiding brand names and other references which would have the effect of distorting competition. Specifications should be performance-based specifications linked to achieving Key Performance Indicators to trigger payment of a proportion of the contract price.

Contract specifications for Healthcare Services must utilise the NHS standard specification template as in the NHS Standard Contract. The Invitation to Tender must include agreed evaluation criteria and weightings. Where services are tendered the Evaluation Criteria used must be published in the Invitation to Tender and once published cannot be altered.

All appropriate interested parties should be involved in writing the specification and the results of consultation must be also considered. The time required to prepare the service specification should not be underestimated.

### **13.4. Bidder Events**

Bidder events allow providers to obtain a more in depth understanding of the procurement requirements and provide an opportunity to: stimulate market interest, raise clarifications and questions, request additional information and obtain market information which may help

shape the CCG requirements. Due to the cost implications of holding bidder events, the overarching principle of Proportionality will remain.

### **13.5. Pre-Qualification Questionnaires**

A Pre-Qualification Questionnaire (PQQ) is used to enable the CCG to evaluate providers on their suitability, capacity, capability and eligibility to be short listed for the invitation to Tender stage. Potential providers will complete a standard format PQQ with questions tailored to reflect the service and procurement requirements.

The PQQ document is issued to all parties who submit a formal expression of interest. The PQQ will then be evaluated against predetermined PQQ criteria and enable the CCG to move from a long list of suppliers to a shortlist. This is used in the Restricted process. It is recommended that PQQ is only used on tenders under the threshold where a large number of bids are anticipated.

### **13.6. Invitation to Tender**

The Invitation to Tender (ITT) documents are issued to (short listed )bidders who were selected following the PQQ process in the case of a Restricted Process. In an Open Process the documents are made electronically available to those potential bidders who register and download the documents.

The ITT documents consist of guidance and instructions to the bidders on the process and a response guide based on the approved detailed Service Specification. Elements of the ITT may include terms and conditions, contract specification, insurance, quality plans, method statements, pricing and timing schedules, bonds and guarantees, key performance indicators.

Bidders are required to submit their responses to address requirements within the ITT documents. The responses are evaluated against pre-determined and pre-documented criteria.

The ITT Evaluation, if not carried out correctly can lead to a potential challenge to the Commissioner's decision-making process.

### **13.7. Bidder Selection stage**

When selecting potential bidders, the process used must be open, transparent and fair. No sector of the market should be given an unfair advantage including the current provider if applicable. If a high number of responses to the opportunity are predicted, bidder events can be used to evaluate potential provider's capabilities, capacity and financial standing prior to a full technical evaluation.

All bidders must declare any Potential Conflicts of Interest so that these can be dealt with to ensure a fair and impartial approach to any selection.

### **13.8. Offer stage**

This is where the potential Provider's offer is made to provide the service including the price for providing those services. Where competition is waived or is not applicable this will be by direct negotiation with the Provider and once agreed a contract will be signed.

### **13.9. Tender Evaluation Panel**

The tender evaluation panel is a legal requirement of any tender process and its function is to ensure the safety, quality, performance, financial viability and merit of potential providers to serve patients on behalf of the CCG. An evaluation methodology is formally agreed before the ITT is issued as the ITT must include the relevant scoring criteria and weightings for each section.

The evaluation panel will be multi-disciplinary including representation from relevant specialists e.g. Clinicians, Contracting, HR, Finance, IM&T, Governance, Communications & Patient Engagement, Equality and Diversity will be established for all procurements to ensure fair and transparent scoring of each submission.

The evaluation process should seek to identify the most economically advantageous bid(s), both in terms of qualitative and quantitative criteria.

In conducting the evaluation, the evaluators must act in accordance with the key principles of the EU Procurement Directives:

1. Fair & Open Competition
2. Non-discrimination
3. Equal Treatment
4. Transparency
5. Proportionality

All recorded comments and notes would be made available under a Freedom of Information Act request. Confidentiality must be respected and maintained throughout the evaluation process. Any potential or actual conflict of interest must be advised in advance of the tender evaluation.

Managing potential conflicts of interest appropriately is needed to protect the integrity of commissioners from any perceptions of wrongdoing. Any potential or actual conflict of interest must be advised to Project lead in advance of any tender evaluation. A conflict of interest may include but not be restricted to any direct or indirect links to any of the Bidders and significant shareholdings associated with any of the Bidders.

### **13.10. Award stage**

The award of contract is based on “the Most Economically Advantageous Tender (MEAT)” to the purchaser. This focuses on the best combination ratio of Price/Quality. For example, it may be that the evaluation of the procurement is undertaken based on 60% weighting of final scoring being given to technical capabilities, and 40% given to the finance element of the bid. The final scores are therefore a combination of the two ratios leading to combined highest score being given the award.

### **13.11. Post Award Stage**

Where the CCG has placed an OJEU advert a 10-day Standstill (Alcatel) period will apply. Whilst not mandatory for those services contained within the Light Touch regime, its use will help the CCGs further demonstrate openness and transparency of processes and help mitigate any risk of any potential future legal challenge.

- A **signed contract** will be entered into with the successful provider(s) using the relevant NHS standard contract and the schedules populated with details from the winning bidder(s) Tender response. A contract award notice will then be placed via the e-Tendering system to close the process.
- A **record of the contract award** must be maintained in order to comply with PCR 2015 and Regulation 3(5) of the Procurement, Patient Choice and Competition Regulations. Alongside this record, a procurement decision register is held by the CSU. All prospective bidders are asked to complete a conflict of interest form prior to submitting any responses to the CCGs through the electronic sourcing portal. A register is held detailing any such conflicts of interests and the details of the connecting project.

### **13.12. Post Contract Award Period**

All awards are published following contract signature. A contract award notice will be created, and will either be published immediately after contract signature or in some circumstances; these will be published on a quarterly basis. These notices are then available to the public on the OJEU website.

Prior to the contract award notice being published, the CCG will not be able to answer specific Freedom of Information requests relating to the award of the contract.

### **13.13 Regulation 84 (PCR 2015)**

This regulation requires contracting authorities to draw up a report in relation to each contract of framework that is awarded, and ensure it includes all the information set out at Regulation 84 (1).

This does not apply to a contract called off from a framework agreement where a direct award is made or there is only one provider on the framework that can supply (see Regulation 84 (2)).

There is an ability to cross-refer to the Contract Award Notice, where this already contains all the information required. NB: A template report compliant with this regulation is provided by the MLCSU procurement team.

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

These regulations arose because of the 1977 EU Acquired Rights Directive and were updated in 2006. They apply when there are transfers of staff from one legal entity to another because of a change in employer. This is a complex area of law which is continually evolving.

Commissioners need to be aware of these regulations and the need to engage HR support and possibly legal advice if there is likely to be a TUPE issue. Additionally, NHS Bodies must follow Government guidance contained within the "Cabinet Office Statement of Practice 2000/72 and associated Code of Practice 2004 when transferring staff to the Private Sector" also known as "COSOP".

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

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

## **15. Training Needs**

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

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

## **16. Documentation and Record Keeping**

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

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

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

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

## **18. Equality Statement**

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

18.2. The CCG will endeavour to challenge discrimination, promote equality, respect human rights, and aims to design and implement services, policies and measures that meet the

diverse needs of our service, and population, ensuring that none are placed at a disadvantage over others.

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

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

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

## **References**

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

The Public Contracts Regulations 2015; SI 2015 no.102. February 2015.

Equality Act 2012 26.2 NHS Policy

Procurement Guide for commissioners of NHS-funded services; May 2008; DH (Gateway Ref: 9915).

Framework for Managing Choice, Cooperation and Competition. May 2008. DH. (Gateway Ref: 9914).

NHS Procurement. Raising our game; May 2012; DH (Gateway Ref 17646).

National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013

## Appendix 1

### National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 provides that when a CCG procures health care services for the purpose of the NHS, it must act with a view to achieving the following objectives, thus the CCG:

- Must act with a view to securing patients' needs and improving the quality and efficiency of the service;
- Must act in a transparent and proportionate way and treat bidders equally and in a non-discriminatory way;
- Where third parties, assist or support a commissioner in their procurement activity, the commissioner must ensure that they follow the requirements of the Regulations in the same way the commissioner must do itself;
- Must maintain and publish a record of each contract awarded for the provision of healthcare services through the development of a Procurement Register. In addition Regulation 9(1) of the Procurement, Patient Choice and Competition Regulations requires commissioners to maintain and publish a record of all the contracts that they award on the website maintained by NHS England for this purpose. This is currently <https://www.contractsfinder.service.gov.uk/Search> N.B. Subject to changes following Britain's Exit of the EU, this will need to be amended.
- Must not engage in anti-competitive behaviour unless in the interests of patients;
- Must maintain a record of how any conflicts of interest between commissioners and providers are managed;
- Must maintain a record of how, in awarding the contract, the CCG / NHS England complies with certain statutory duties under the NHS Act 2006;
- Provide thorough justification if competition not required where services are only capable of being provided by a particular provider;
- Must publish contract notices (if applicable) and facilitate expressions of interest; and
- Consider improving quality and efficiency of services through providing services in an integrated way, enabling providers to compete and allowing patients a choice of provider.

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

*“may award a new contract for the provision of health care services for the purposes of the NHS to a single provider without advertising an intention to seek offers from providers in*

*relation to that contract where the relevant body is satisfied that the services to which the contract relates are capable of being provided only by that provider”.*

When advertising an intention to seek offers for a clinical services contract, the 2013 Regulations require CCGs to publish a contract notice on the dedicated Websites (Regulation 4) i.e., Official Journal of the European Union (“OJEU”); and Contracts Finder UK. N.B. Subject to changes following Britain’s Exit of the EU, this will need to be amended.

The notice must include:

- a description of the services to be provided;
- the criteria against which any bids for the contract will be evaluated.

The CCG must also have arrangements in place which enable providers to express an interest in providing clinical services.

The obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising enough to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

The 2013 Regulations also set out the role of NHSI including its investigation and enforcement powers in relation to breaches or potential breaches of the 2013 Regulations.

Failure to comply with the 2013 Regulations can have serious consequences and result in serious sanctions for the CCG. Where there is doubt regarding CCG’s compliance with its obligations, legal advice should be sought via Corporate Affairs.

## **European and UK Procurement Legislation**

When procuring clinical services, the CCG will ensure that it complies with EU procurement law and the UK’s implementing Regulations to the extent that these are applicable to the clinical services being procured. It will ensure compliance with the requirements of:

- The Treaty on the Functioning of the European Union (“EU Treaty”);
- Directive 2014/24/EU and the Remedies Directive 2007/66/EC;
- The Public Contracts Regulations 2015 (as amended); and
- Relevant EU and UK procurement case law.

The EU Procurement Rules and Public Contract Regulations will apply where the CCG proposes to enter in to a legally enforceable, written contract, for clinical services which has an estimated full-life value above the relevant financial threshold.

With regards to the EU Procurement Regulations Clinical Services come under the Light Touch Services Regime. This means that the EU Procurement Rules only apply in part. The EU thresholds apply at the higher threshold of £ £663,540 (2020/21 level).

The obligations applicable to clinical Light Touch services, and which the CCG will ensure it complies with include:

- treating providers equally and in a non-discriminatory way;
- acting transparently (including the duty to advertise a contract where there is a likely cross-border interest);
- complying with the rules on technical specifications, including that these do not favour particular providers or present unjustified obstacles to competition;
- Publishing a contract advertisement and an award notice OJEU; and the provision of statistical and other reports.

For all procurements that will exceed the EU Procurement Thresholds an advert must be prepared and sent to the OJEU. For adverts in the OJEU the following steps must be followed:

The Contract Notice and Contract Award standard forms should be used – these are also available to download from the SIMAP website: <https://simap.ted.europa.eu/> Alternatively Commissioners may choose the templates within an electronic tendering system. OJEU will publish the advert within 12 days. If using an electronic tendering system, the advert will be placed in OJEU within 5 working days.

The CCG may choose to advertise in other publications e.g. the national press, the

Contracts Finder and in these circumstances the CCG must not:

- Send the advert to the other publication(s) before the CCG sends the advert to OJEU. Note: the CCG does not have to await the publication of the OJEU advert, the CCG's obligation is to ensure that the OJEU advert is dispatched before any other advert
- Provide information or detail in the other advert(s) that does not appear in the OJEU advert.
- At every stage of the procurement process up to selection of preferred bidder if there are changes to bidder's organisational form that bidder is required to be assessed again. This is to confirm that the provider still meets the requirements of the procurement.
- For below threshold procurements a tender process that utilises the PQQ, such as the Restricted Process, is not recommended.
- If the contract value is below the relevant threshold value at which an advert is mandatory, an advert can still be placed 'on a voluntary basis'. Case-law seems to indicate that voluntary publication of a notice in OJEU does not mean that the competition is subject to the processes and procedures of the Directives; however, it is best practice to make this clear in the OJEU notice and subsequent tender documents.

Where the contract falls under the threshold of the EU Regulations, the procedure employed must be still be consistent with the principles of the treaty, particularly the obligation of

transparency and timescales for response to tenders, and that therefore a "sufficient" degree of advertising should be used.

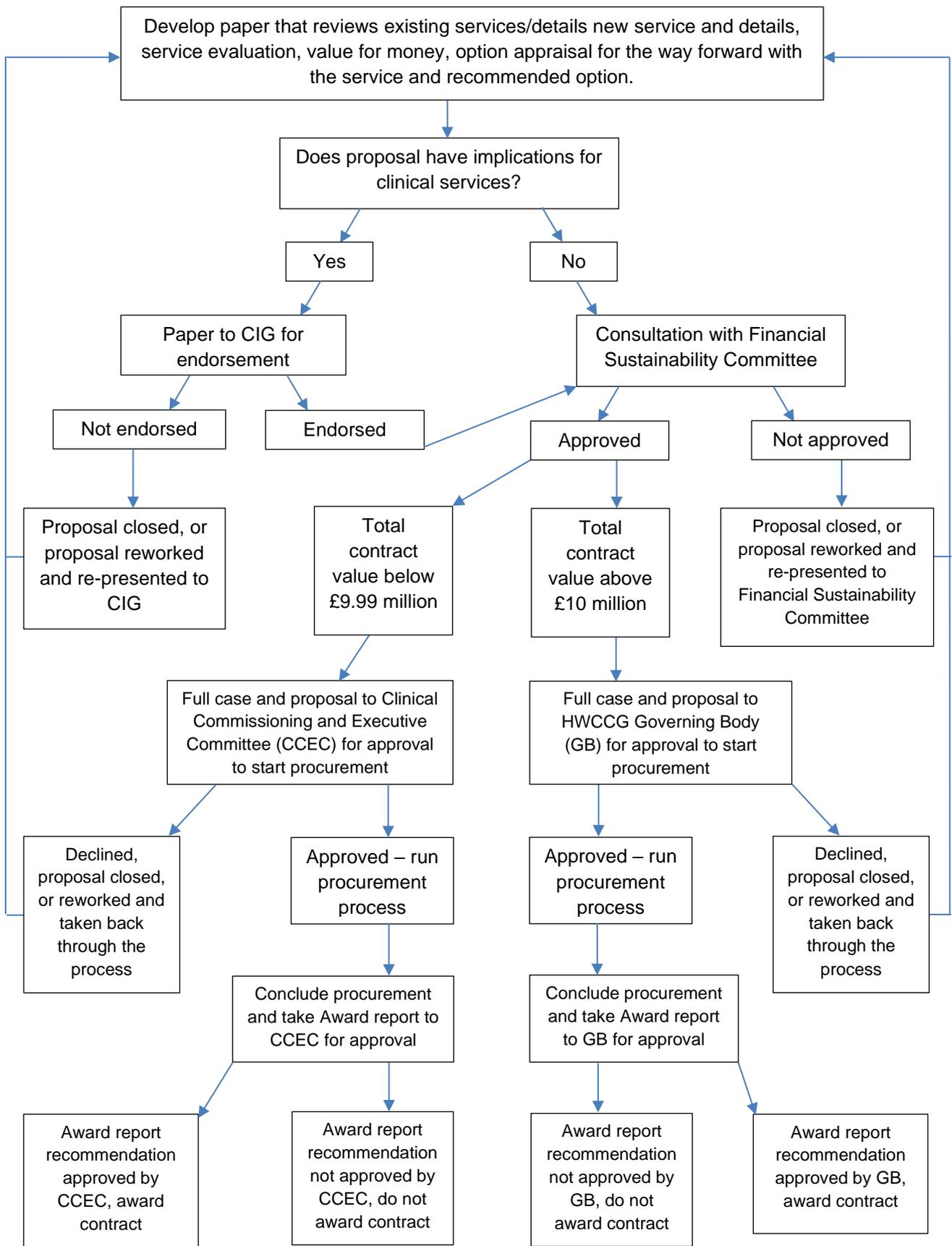
Failure to comply with the EU Procurement Rules can have serious consequences and result in sanctions for the CCG.

The Public Services (Social Value) Act 2012 (the "Social Value Act") applies to CCGs when it carries out its clinical procurement activities. In accordance with its obligations under the Social Value Act, CCGs will consider, at both selection stage (such as PQQ) and award tender stage:

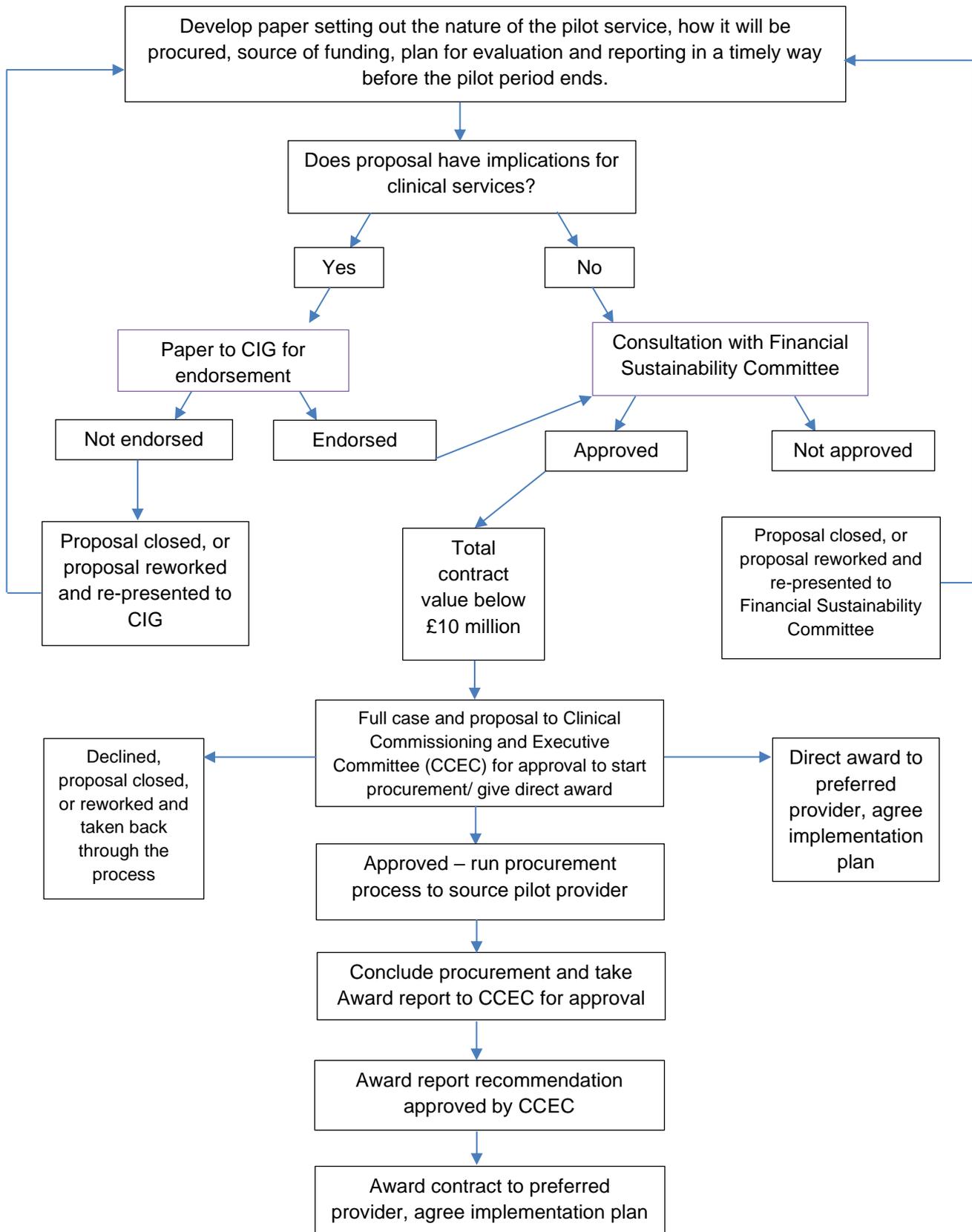
- how the services to be procured may improve the social, environmental and economic wellbeing of its area
- how in conducting a procurement process CCGs might act with a view to securing that improvement, including whether to undertake a consultation on these matters.

N.B. The section above will need to be amended subject to changes following Britain's Exit of the EU.

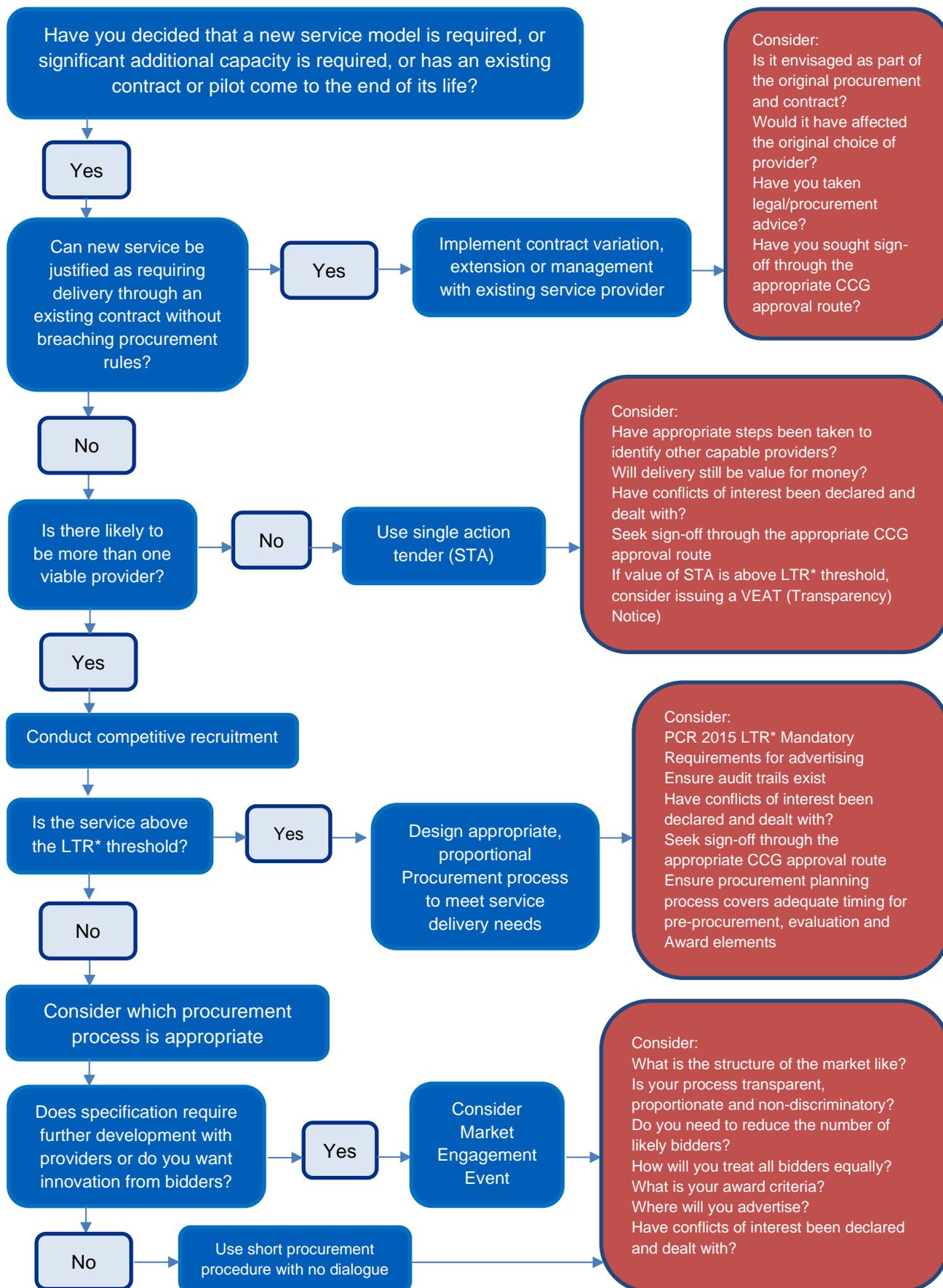
## Appendix 2 – Existing/New Services – Approval Process to go out to Procurement



### Appendix 3 – Pilot Services – Approval Process to go out to Procurement



## Appendix 4 – Decision Making Flowchart



\* LTR = Light Touch Regime. Threshold value is £663,540 for 20/21

## Appendix 5 - Procurement Process Guide

