

**NHS SOUTH OF ENGLAND PROCUREMENT SERVICES**

# **OVERVIEW OF PROCUREMENT AND COMPETITION RULES FOR COMMISSIONERS**

**GUIDELINE NUMBER G027**

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## OVERVIEW OF PROCUREMENT AND COMPETITION RULES FOR COMMISSIONERS

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### **IMPORTANT NOTES WHEN READING THIS DOCUMENT**

The purpose of this document is to provide an introduction to NHS public sector procurement and the associated legal framework. It explains general procurement principles and provides an outline of procurement procedures. It does not set out all the relevant rules for public procurement. It is not a substitute for project/requirement specific procurement advice and should not be used as such.

NHS South of England Procurement Services (SoEPS) is an NHS hosted organisation providing procurement advice and support to CCG Clients. SoEPS manage procurement processes on behalf of CCGs where each CCG makes decisions based on their own financial policies and applicable legislation. SoEPS follow each Client's Financial Policies (Standing Financial Instructions (SFI), standing orders (SO) and schemes of financial delegation).

**Brexit and the NHS Long Term Plan** – As at January 2019 no changes in procurement law have been implemented, therefore the legislation applies as it stands. The only notified potential change is to the publication platform (currently the Official Journal EU) if there is 'no deal' therefore unless notified, all rules will remain as per the Legal and Regulatory Requirements detailed in Section 2 below and any other applicable legislation under UK law.

#### **1. Introduction**

1.1 Procuring NHS healthcare services and awarding contracts can be complex and unless carried out in accordance with prescribed guidelines and associated legislation, carries an inherent risk of legal challenge as well as public/audit scrutiny. It is therefore important that each Contracting Authority procurement decision is supported by evidence based rationale, includes an evaluation of the options available and is recorded for audit purposes. **There is no one size fits all approach particularly in relation to healthcare services procurements which are less highly regulated by the Public Contract Regulations under the EU Light Touch Regime (see below).**

1.2 This document should be read in conjunction with the regulations detailed in section 75 of the Health and Social Care Act 2012 (The Act).

1.3 The EU procurement regime referred to in this guidance, is not static. It is subject to change via evolving case law, European Commission communications, new and revised Public Contracts Directives and amendments to the existing UK Regulations as well as Procurement Policy Notes from Crown Commercial Services.

1.4 Effective procurement is an essential component of commissioning improved and innovative services and outcomes 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. Commissioning is the process of contracting for healthcare services that best meets the needs of the affected population/group. Procurement is the process of sourcing, evaluating and awarding contracts to the best placed provider/s to perform/deliver those requirements.

1.5 It is increasingly important for authorities to ensure that they comply with their procurement obligations. In recent years, there has been a significant increase in the number of complaints/challenges made and court cases where bidders or interested parties claim that the

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authority has not followed proper/defined processes. A well-founded complaint can have serious consequences such as:

- Significant legal costs and the requirement to pay compensation and/or fines;
- Delay or abandonment of projects - contracts that the authority has entered into can be set aside by the courts;
- Reputational damage – political and public.

1.6 Within procurement regulations all decisions that involve entering into a contract or relate to an existing contract for the provision of goods or services, is considered a procurement decision, whether a competitive procurement process is followed or not. It is therefore important that SoEPS are involved in early procurement discussions so that we can advise at the outset on procurement options, any potential procurement risks and how they could be mitigated.

## 2. Legal and Regulatory Requirements - Overview

2.1 The European public contracts directive (2014/24/EU) applies to public sector authorities including amongst others, government departments, local authorities and the NHS (including Trusts and CCGs). The following are the key pieces of legislation (see also EU Thresholds at Section 3 below):

- Public Contracts Directive (2014/24/EU);
- Public Contracts Regulations (PCR) 2015 incorporating the Light Touch Regime;
- Health and Social Care Act 2012 (The Act) - section 75.
- The National Health Service (Procurement Patient Choice and Competition) (No 2) Regulations 2013;
- Social Value Act 2012;

### 2.2 Public Contracts Directive (2014/24/EU)

2.2.1 This Directive has been transposed into UK law as per 2.3

2.2.2 The Public Contracts Directive sets out the principles and procedures which must be followed before awarding a contract to suppliers (i.e. providers of works, supplies or services) when its value exceeds set thresholds (see 3 below), that has been made law by the countries in the European Union.

### 2.3 Public Contracts Regulations (PCR) 2015

2.3.1 The main principles of the UK Public Contract Regulations 2015 state the following for above threshold requirements:

- Publication of a contract notice on the Official Journal of the European Union (OJEU) to communicate to the market the opportunity to offer goods/services;
- Are subject to the full force of the Public Contracts Regulation 2015 (the Regulations) and must follow a Procurement route specified within the regulations, unless the Light Touch Regime applies (as per PCR Regulations 74 to 77);
- Publication of a Contract Award Notice to communicate to the market the decision to award a contract.

2.3.2 The purpose of the EU procurement rules, underpinned by the EU Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. The EU rules reflect and reinforce the value for money (vfm) focus of the Government's

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procurement policy. This requires that all public procurement must be based on vfm, defined as “the best mix of quality/effectiveness and price over the full duration of the contract (including any extension options) which should be achieved through competition, unless there are clear justifications to the contrary.

### 2.3.3 Public Contracts Regulations - Light Touch Regime (LTR)

2.3.3.1 The procurement of Healthcare Services by NHS England and Clinical Commissioning Groups (CCGs) within the meaning and scope of the National Health Services (PPCC) (No 2) Regulations 2013 are subject to the Light Touch Regime. Other services such as Social Care, Legal Services and Education services are also covered under LTR.

2.3.3.2 LTR Procurements are not subject to the full requirements of the Regulations and do not have to follow any specific procurement procedure and have a higher financial threshold (£615,278 whole life costs ex VAT).

2.3.3.3 PCR Regulations 75 and 76 set out the mandatory requirements. These include that contracting authorities must ensure that:

- There is sufficient and appropriate advertising of requirements/tenders in the public domain, e.g. via Prior Information Notice (PIN) or a Contract Notice (CN) in OJEU (or Contracts Finder for below threshold requirements) to communicate to the market the intentions to procure;
- They fully comply with the principles of transparency and equal treatment of providers;
- Conduct the procurement in conformity with the information provided in the advertisement regarding conditions for participation, time limits for contacting the authority and the evaluation/award procedure to be applied;
- All time limits are reasonable and proportionate to the value, complexity, risk and market conditions;
- Negotiation – where a negotiated/dialogue process is used, they cannot be negotiated strictly on price alone;
- They comply with Standstill requirements prior to contract award;
- A Contract Award Notice (CAN) is subsequently published in OJEU and/or Contracts Finder.

**Important Note:** Whilst LTR requirements do not have to follow any specific procurement procedure, it is best practice to follow a prescribed procedure and to tailor this to the individual requirement/strategic need. In practice, the above rules mean authorities do not need to follow any of the award procedures prescribed for fully regulated procurements (such as the Open or Restricted procedure), but they must set out the proposed procurement process in advance and then correctly follow it without any deviation (see Important Note above).

### 2.3.4 Electronic Procurement Systems

Electronic Procurement Systems must be used to conduct procurement processes in accordance with EU Directives.

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

2.4.1 Procurements for Healthcare Services must also be conducted taking into consideration the NHS (Procurement, Patient Choice and Competition) Regulations 2013. These Regulations impose requirements on CCGs to ensure good practice when procuring Healthcare Services, to protect patients’

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rights to make choices and to prevent anti-competitive behaviour. These Regulations provide scope for complaints to, and enforcement by NHS Improvement (NHSI - formerly known as Monitor) as an alternative to formally challenging decisions in the courts. These Regulations apply alongside the Public Contracts Regulations (PCR) 2015 and do not affect their application.

### 2.4.2 General Requirements

When procuring health care services for the purposes of the NHS, a relevant body must:

- Act in a transparent and proportionate way, and;
- Treat providers equally and in a non-discriminatory way, including by not treating a provider, or type of provider, more favorably than any other, in particular on the basis of ownership.

The relevant body must procure the services from one or more providers that:

- Are most capable of delivering the objective in relation to the services, and;
- Provide best value for money in doing so.

In acting with a view to improving quality and efficiency in the provision of the services the relevant body must consider appropriate means of making such improvements, including through:

- The services being provided in a more integrated way (including with other health care services, health-related services, or social care services);
- Enabling providers to compete to provide the services, and;
- Allowing patients a choice of provider of the services (where appropriate).

2.4.3 It is for the commissioner to decide which services to procure and how best to secure them in the interests of patients. For this reason, the regulations set out a principles-based framework to enable commissioners to decide in individual cases what is best for the people they serve. Monitor's role is to ensure that the framework is respected so that decisions are taken in patients' interests.

### 2.5 Social Value Act 2012

2.5.1 The Act requires public authorities to consider economic, social and environmental benefits in connection with public services contracts. This should be undertaken before the procurement process commences. The Act does not mandate how social value should be considered; the authority should contemplate social value on a case by case basis in relation to the scope of the requirement ensuring compliance with the following principles:

- How what is being proposed to be procured might improve the economic, social and environmental wellbeing of the relevant area;
- How in conducting the process of Procurement, it might act with a view to securing that improvement;
- How consultation requirements are complied with.

2.5.2 Social value is to be considered only if it is relevant to the service to be procured and needs to be proportional to the object of the contract.

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2.5.3 The Act does not set out who should be consulted in the pre-procurement stage of contracting for services, however, the authority must have due regard for the need to conduct patient and public consultation exercises as defined in the NHS Act and the need to consult with health professionals.

### 3. EU Financial Thresholds and Financial Considerations

3.1 The Directives set out detailed procedures and financial thresholds that apply for the award of contracts whose value equals or exceeds these thresholds and therefore require the publication of notices in the Official Journal of the European Union (OJEU). Details of the thresholds applying from 1st January 2018 are given below. Thresholds exclude VAT:

All figures are for <u>Whole Life Costs</u> (including any contract extensions)	Supply (goods), Services and Design Contracts	Works Contracts	Healthcare, Social Care (and other specific services) subject to the Light Touch Regime (LTR) (includes NHS CCGs)
Central Government (Includes NHS Trusts)	£118,133	£4,551,413	£615,278
Other contracting authorities (includes NHS CCGs)	£181,302	£4,551,413	£615,278
Small Lots	£65,630	£820,370	Not Applicable

**Note:** There are exceptions to these thresholds e.g. research and development services, specialised works contracts - advice should be sought from SoEPS. Thresholds are updated every 2 years to reflect fluctuations in exchange rate mechanisms.

#### 3.2 Whole Life Costs

The thresholds are for Whole Life Costs of any procurement requirement. Therefore, if you have a requirement with a budget/forecast expenditure of £200K per annum and you wish to procure a 3 year contract with a 2 year extension option, the in scope finances are £1.0m (i.e. regardless of whether the extension option is actually taken).

#### 3.3 Requirements below EU Thresholds

It should be noted that for requirements that are below EU financial thresholds (whole life costs), the Authority should refer to its own Financial/Internal Policies as a form of competitive procurement process may still be required in order to demonstrate best value. It should be noted that the requirements of the Procurement Patient Choice and Competition Regulations 2013 still apply. Competitive procurement opportunities can be advertised in Contracts Finder (UK Government Procurement Portal).

#### 3.4 Aggregating/Dis-aggregating Spend

There are strict rules on dis-aggregating spend (anti-avoidance rules) so you should seek advice before determining that a requirement or group of requirements is below EU thresholds (whole life costs). There are also strict rules on aggregating spend that could lead to a narrowing of the market i.e. artificially narrowing competition.

### 4. The Commissioning Cycle

4.1 Procurement includes activities and events before and after the signing of a contract as well as the general management activities associated with a range of contracts including (but not limited to):

- Pre-contract activities such as strategic planning, complying with any statutory duties e.g. patient and public consultation, needs identification/assessment and analysis;
- Post contract activities such as contract management, supply chain management and disposal;
- General activities such as corporate governance, supplier relationship management, risk management and regulatory compliance.



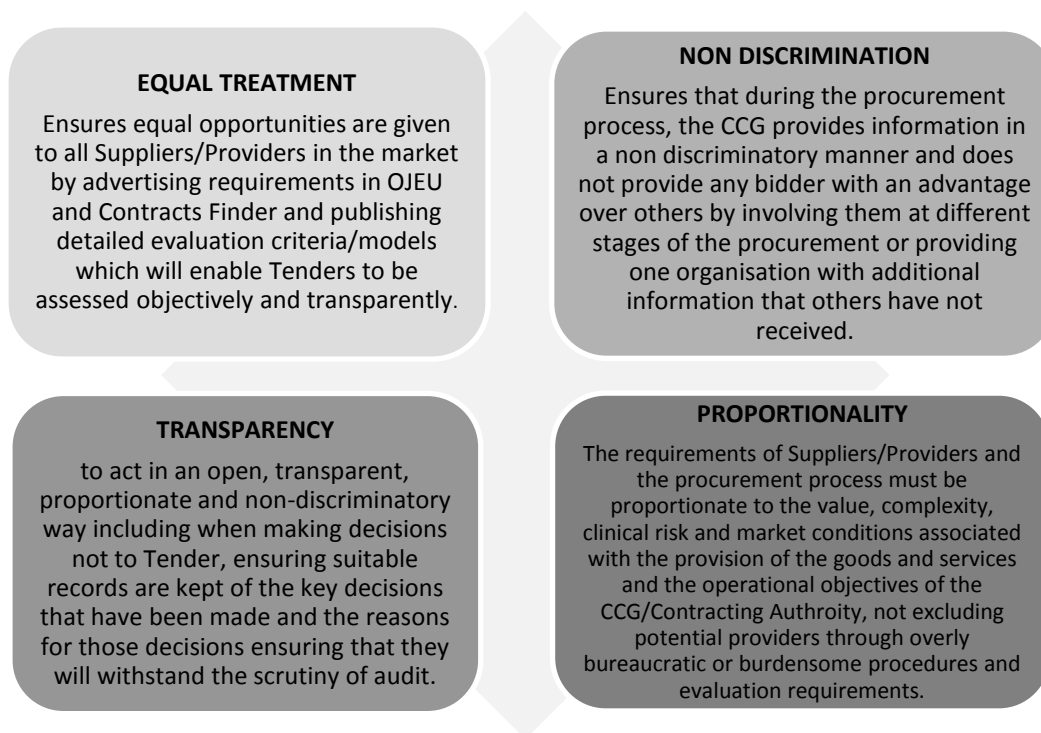
Courtesy of The NHS Information Centre for health and social care. Full diagram available at: [www.ic.nhs.uk/commissioning](http://www.ic.nhs.uk/commissioning)

4.2 Despite the number of models and approaches used in commissioning, there is general agreement that this is a cyclical process consisting of four phases (analyse, plan, do and review) but in reality the cycle is not a discrete entity with a beginning and an end. SoEPS can provide support to the various stages of the Commissioning cycle including Strategic Planning, Procuring Services and Monitoring & Evaluation.



### 5. Procurement Principles and Key Legal Considerations/Requirements

5.1 All public sector procurement decisions and processes must respect the principles of:



### 5.2 Advertising Opportunities and Publishing Notices

5.2.1 Opportunities are given to all Suppliers/Providers in the market by advertising requirements, including when decisions are taken to direct award contracts. For requirements above the EU thresholds (see 3 - EU Financial Thresholds above) this requires the publication of a notice in the Official Journal of the European Union (OJEU). There are various key types of EU advertisement/notice:

- Prior Information Notice (PIN) - for market engagement;
- PIN as a call for competition (Light Touch Regime only)
- Contract Notices;
- Contract Award Notice (CAN).

**Note:** A VEAT (Voluntary Ex-Ante Transparency) Notice is also available but this should only be used in specific circumstances as it is likely to bring a legal challenge if a competitive market exists for a requirement – its use is not covered in this document.

5.2.2 PIN - can be used to provide advance notice of the Authority's requirements and is often used to invite interested parties to participate in market engagement.

5.2.3 In some cases the Authority may use the PIN as a call for competition when procuring services under the Light Touch Regime (LTR), instead of publishing an OJEU contract notice, or, to notify an intention to direct award a contract (see 5.2.5 below).

5.2.4 Contract Notice - Unless an authority is permitted to use a PIN as a call for competition, procurements must commence with publication of a Contract Notice to advertise details of the

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procurement to prospective bidders across the EU.

5.2.5 CAN - When contracts have been awarded, it is a legal requirement to publish a Contract Award Notice.

### 5.3 Direct Awarding Contracts

5.3.1 The PPCC Regulations (see 2.4 above) state that a CCG may direct award a contract for the provision of healthcare services to a provider without advertising an intention to seek offers from other providers where the Contracting Authority is satisfied that the services to which the contract relates are capable of being provided only by that provider. e.g. for technical reasons or reasons associated with the protection of exclusive rights. The Contracting Authority must therefore have strong evidenced based rationale that supports such decisions. A contract can also be direct awarded for reasons of extreme urgency brought about by unforeseeable events that a diligent Authority had no influence over/could not have foreseen.

5.3.2 the requirement as stated in the PPCC Regulations (see 2.4) to act in a transparent and proportionate way and treat prospective providers equally can be said to amount to such an obligation. If an Authority has not been robust and diligent in its process to establish market capability, this is highly likely to be interpreted narrowly by the courts if a legal challenge was pursued. Therefore best practice is to publish intentions via a notice (PIN as a call for competition or Contract Notice). This notice would set out the reasons/case for the direct award in terms of patient needs, quality and efficiency (and other relevant criteria) and enable providers to express an interest, however, it should be noted that a party can seek to challenge the process directly in the courts with no obligation to notify the Authority until up to 7 days after this legal action.

5.3.3 If a Contracting Authority chooses not to act transparently and is later found to have breached their obligations under the PCR 2015 i.e. an economic operator is able to demonstrate that it will suffer or risks suffering loss as a result (which includes the loss of an opportunity to be awarded the contract) there are potential legal remedies/actions which could result in an order setting aside the decision to award the contract and/or damages.

5.3.4 A Contract Award Notice (CAN) is still required for contracts that are direct awarded, regardless of whether it is preceded by a notice.

### 5.4 Time Limits to Bring a Legal Challenge

5.4.1 A challenge under the PCR 2015 (that seeks any remedy other than Ineffectiveness (see below) would need to be started within 30 days beginning with the date when the challenger first knew or ought to have known about the breach, The timelimit to notify the contracting authority that it is taking action via the courts is 7 days after the application has been submitted.

5.4.2 The challenge period can be extended by the Courts up to a maximum of 3 months at the discretion of the court.

5.4.3 A claim that seeks an Ineffectiveness Remedy can be brought up to 6 months from the date that the contract is entered into, although this can be reduced to 30 days if a Contract Award Notice (CAN) is published. That period would start from publication of the CAN. It should be noted that there is debate amongst legal practioners regarding whether the Ineffective Remedy applies to contracts under the Light Touch Regime (LTR), however, this has not been tested in the Courts. Other Remedies including contract shortening, financial penalty, damages, could still be sought under the LTR.

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5.4.4 As stated above, time limits in which to bring a legal challenge/claim vary in accordance with specific circumstances and there are various remedies available. Formal legal advice should therefore be sought in relation to specific circumstances where required.

### 5.5 Complaint to NHS Improvement (NHSI)

5.5.1 It should also be noted that NHS Improvement has the power to investigate complaints about breaches of NHS regulations and can declare an arrangement ineffective or direct Contracting Authorities to take steps to remedy breaches. Whether or not NHSI will investigate a complaint will depend on the strength of the complaint/challenge.

5.5.2 A complaint to NHSI has no immediate/automatic effect on a contract award decision, unlike claims directed to the Courts. There are no time limits to bring a complaint, however it is in the interests of a complainant to bring a complaint early so that where appropriate, NHSI can direct the contracting authority not to enter into the contract until an investigation has been completed.

5.5.3 Where a contract has been entered into, NHSI has the power to declare it ineffective.

### 5.6 Challenge by way of Judicial Review

It is also possible for a challenger to bring a procurement related Judicial Review challenge based on breach of public law principles. This would most likely be based on statutory procedural breaches such as failure to ensure proper patient and public consultation or to fulfil the Public Sector Equality Duty.

### 5.7 Competitive Tendering

#### 5.7.1 Most Economically Advantageous Tender (MEAT)

When a Contracting Authority undertakes a competitive tender, it is required to fully publish/disclose the Award criteria and award the contract to the bidder submitting the most economically advantageous tender (MEAT) based on a price and quality ratio.

#### 5.7.2 Disclosing the Evaluation Criteria

5.7.2.1 It is a legal requirement to devise the award criteria, sub-criteria, weightings and scoring methodology and disclose them in full, this includes for Selection Questionnaires and Invitations To Tender (ITT) and must include everything that will inform economic operators on how a decision will be reached. The Contracting Authority can only evaluate what is stated in the published criteria and in the corresponding response. Consensus scores and supporting comments must be agreed with contemporaneous notes to support the conclusions of the assembled evaluation panel with subject matter specialists used for each specialist area.

5.7.2.2 Inadequate disclosure of the criteria used to evaluate and their relative weightings, or deviating from what has been stated, are two of the most common reasons cited by bidders for bringing a legal challenge against a Contracting Authority's contract award decision.

### 5.8 Division of Contracts into Lots

There are various advantages to splitting a procurement requirement into lots. It can increase competition and it provides opportunities to Small and Medium-sized Enterprises. A provider may be

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able to provide excellent services for parts of your requirement, but not all of them. By splitting your total requirement into lots, you could enable the best provider to win for each lot, rather than an organisation that can do everything reasonably well.

### 5.9 Contract Award Decision - Stand Still Period

Once the selection of the winning tender has been made fairly and transparently in accordance with the criteria notified to bidders, the contracting authority is required to notify all unsuccessful bidders of the decision and the reasons for it. At this point in time the contract is not awarded; it is a notification process that must be concluded before contracts can be signed. This includes advising the unsuccessful bidder of all of their scores, all of preferred bidders scores and reasons/justifications for the scores compared to those achieved by the preferred/highest ranked compliant bid. A minimum ten day stand still period is applied before contracts can be formally awarded and signed by the parties.

## 6. Contracts & Contract Monitoring

### 6.1 Contract Extensions

Where legal provision is made in the procurement process for contract extension options, these can be taken up with the Contractor, by allowing sufficient time to give the appropriate notice period stated in the contract. Once all legally provisioned extension options have been utilised, any further extension(s) will be considered a breach of the procurement rules therefore the Contracting Authority would need to consider the risks of extending the contract further, which in legal terms, is directly awarding a new Contract. Clients wishing to extend under these circumstances should seek advice in order to understand the risks associated with the requirement in question and subsequent approvals needed as well as the requirement to publish notices in the EU.

### 6.2 Contract Variations

If Contracting Authorities vary a contract, the Authority is at risk of a legal challenge for breach of the Regulations. Making a substantial or material change is the equivalent of making a direct award in breach of the procurement rules.

If the answer to any of the following questions is 'yes', there is a risk that an aggrieved party may challenge the decision to amend the contract, as a breach of the procurement rules:

- Do any of the changes result in the essential terms of the contract being different, requiring the parties to renegotiate the contract;
- Had the changes been part of the initial procedure, might the outcome of the procurement been different;
- Is there a "considerable" change in the scope of the specification;
- Does the amendment change the economic balance of the contract in favour of the contractor.

### 6.3 Contract Monitoring

Contracts will require monitoring and how this should be carried out will be set out in the contract in the form of key performance indicators and review/governance arrangements. These mechanisms should be strictly adhered to.

**7. Conflicts of Interest – NHS England Guidance**

7.1 Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. See SoEPS Guidance on Conflict of interest or NHSE - Managing conflicts of interest in the NHS as at November 2018.

7.2 NHSE Guidance

7.2.1 Decisions involving the use of NHS funds should never be influenced by outside interests or expectations of private gain, but NHSE recognise that conflicts of interest are unavoidable in complex systems. NHS staff need to be empowered to use good judgement in managing conflicts of interest effectively, and need to be safeguarded so they can continue to work innovatively with partners whilst also providing transparency to the taxpayer. On 9 February 2017, NHS England issued new guidance on managing conflicts of interest in the NHS. The guidance came into force on 1 June 2017 and is applicable to CCGs.

7.2.2 A Register of Procurement Decisions and Contracts Awarded which includes a summary of conflicts of interest declared and how they were managed, is required to be published and maintained by all CCGs/Contracting Authorities on their own websites.