

Governing Body (public) meeting

DATE: 26 March 2015

Title	Procurement changes to thresholds	
Recommended action for the Governing Body	That the Governing Body: NOTE the new public procurement regulations that came into force from 26 th February 2015, the implications and actions required are laid out the attached report.	
Executive summary	<p>From 26th February 2015 the new Public Contracts Regulations 2015 come into force. These regulations mandate how public sector organisations should procure goods and services. The regulations have changed greatly from the previous 2006 edition and the paper sets out the major changes to how the CCG will procure in the future and the implications and actions required. It is worth noting that any procurement of “health care services for the purposes of the NHS” will not be obliged to follow the 205 regulations until April 2016.</p> <p>These may have some very major implications on the annual contracting round (inter NHS services) and further advice is being sought from our solicitors, the Commissioning Support Unit, and then from NHS England.</p>	
Which objective does this paper support?	Patients: Improve the health and wellbeing of people in Bexley in partnership with our key stakeholders	✓
	People: Empower our staff to make NHS Bexley CCG the most successful CCG in (south) London	✓
	Pounds: Delivering on all of our statutory duties and become an effective, efficient and economical organisation	✓
	Process: Commission safe, sustainable and equitable services in line with the operating framework and which improves outcomes and patient experience	✓
Organisational implications	Key risks (corporate and/or clinical)	Additional requirements within the new regulations could have significant impacts on workload.
	Equality and	N/A

Clinical Commissioning Group

	diversity	
	Patient impact	N/A
	Financial	Open competition should ensure a fair price to the CCG.
	Legal issues	Risk to the CCG if these regulations are not adhered to.
	NHS constitution	N/A
Consultation (public, member or other)	N/A	
Audit (considered/approved by other committees/groups)	N/A	
Communications plan	All staff to be advised as well as GP membership.	
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Date	16 March 2015	

**Implications of the new
Public Procurement Contract Regulations 2015
March 2015**

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1. Introduction

On 5 February 2015, the Public Contracts Regulations 2015 (SI 2015/102) were published (and came into force on 26 February 2015). These Regulations will replace the Public Contracts Regulations 2006 in their entirety. They implement Directive 2014/24 on public procurement and contain a number of provisions aimed at ensuring small businesses have better access to public sector contracts.

The Regulations will not apply to any contract award procedure commenced before 26 February 2015 (any process with a tender advert/OJEU published before 26 February 2015 will be subject to the current, 2006 Regulations).

In addition, nothing in the 2015 Regulations will apply to any contract award procedure commenced before 18 April 2016, if that procedure relates to the procurement of “health care services for the purposes of the NHS” within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.

The new Regulations will bring into effect a variety of changes – but changes that nevertheless may have a significant impact for both “authorities” (so the CCG as an authority) and contractors.

2. What does Bexley CCG need to consider?

At present the existing regulations do not apply to the procurement of “health care services for the purposes of the NHS” until April 2016, however all other types of procurement will be bound by these regulations from that point in time.

Below are the key changes to be noted:

2.1. The EU Procurement Thresholds 2014-2015 will change:

	Previous Limits			New Limits		
	Services	Supplies	Works	Services	Supplies	Works
Part A	£113,057 (€130,000)	£113,057 (€130,000)	£4,348,350 (€5,000,000)	£111,676 (€134,000)	£111,676 (€134,000)	£4,322,012 (€5,186,000)
Part B	£173,934 (€210,088)	£173,934 (€210,088)		Part B services are no longer applicable		
New Lighter Regime - Health and Social Care services				£625,050 (€750,000)	£625,050 (€750,000)	

2.2. Advertising of contracts

There is an obligation to advertise all contracts on the Contracts Finder website where the value is:

- £25,000 or more, net of VAT, for sub-central authorities, including local authorities.

The CCG will not be obliged to advertise if they have already brought the contract to the attention of pre-selected providers, for example, providers on a framework agreement or select list. If the CCG

has previously undertaken a tendering exercise and awarded providers a contract on a call off basis, these types of contracts would not require any additional advertising.

However, the legal advice sought so far suggests that we would have to advertise all NHS to NHS contracts, including all inter NHS contracts, this would have a major impact on workload (& the processes and implications for the NHS on our annual contracting rounds). We are therefore:

- Seeking additional legal advice as to whether this applies to all NHS to NHS annual contracts (or is there a differential position on a non Foundation Trust such as Lewisham & Greenwich where it is not a legally binding contract but an inter organisational Service Level Agreement).
- Seeking advice from the Commissioning Support Unit as to whether they have considered the above as our professional agents.
- Will need guidance from NHS England on the implications of the above.

2.3. All Tender Documentation is to be available upon advertisement of the tender

Under the new regulations, there is requirement for all procurement documentation (PQQ, ITT & all scoring methodologies and award criteria) to be available via an 'unrestricted and full direct access free of charge' from the date of publication of the advert. This means that prior to advertisement we will have to have determined the full specification and tender document (including advertisement), at present this is often developed during the advertisement period.

Guidance from the European Commission is that provided that the access to a site is free of charge and available to all, a hyperlink can be included in the Contract Notice that leads to contracting authorities own website or national website such as Contract Finder.

2.4. Shorter Time Limits & New Procedures

The time limits for EU tendering will be changing and reducing for certain procedures.

Procedure	Current Time Limit	New Time Limits
Open Procedure	Open for 52 days bidders to respond to ITT	35 days (30 days where a tender can be submitted electronically)
Restricted Procedure	37 days for advert 40 days to respond to ITT	30 days for advert 30 days to respond to ITT (25 days where the ITT can be submitted electronically)
Competitive Dialogue	30 days for advert	No changes.
Negotiated procedure without prior publication In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated		

<p>procedure without prior publication.</p> <ul style="list-style-type: none"> • where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure. • where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:— <p>(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;</p> <p>(ii) competition is absent for technical reasons;</p> <p>(iii) the protection of exclusive rights, including intellectual property rights</p> <ul style="list-style-type: none"> • insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. 		
** NEW PROCEDURES **		
<p>Competitive Procedure with Negotiation</p>		<p>30 days to request to participate 30 days for initial tender submission</p>
<p>Innovation Partnerships (Authorities shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and shall indicate which elements of this description define the minimum requirements to be met by all tenders.)</p>		<p>30 days to request to participate No set time period for final tender responses, several successive stages and tenders responses may apply.</p>

2.5. Abolition of Part A and Part B Services

With the abolition of the distinction between the two elements means that all services / supplies / works which are over the EU threshold will have to follow the EU procedures.

	Current Process	New Process
Part A	Full EU procurement regime	No change – Full EU Procurement regime applies Comply with new thresholds
Part B (which includes Health, Social Care, Education. Legal.....)	Significantly reduced procurement timescales. Need to place advertisement and contract award notice	Full EU Procurement regime applies Comply with new thresholds
New Lighter Regime - Health and Social Care services		New threshold limits apply Publish contract advert and award notice only. Significantly reduced procurement timescales

2.6. Division of contracts into “Lots”

Part of the regulations enforce that authorities are required to devise their contracts into Lots (i.e. into smaller individual Lots that make up the whole requirement or contract), the CCG will have to consider the possibility of division into lots when planning procurements and making our procurement decisions. The CCG are required to provide reasons if they decide not to lot.

This differs to the previous regulations as “Lots” were not a mandatory requirement.

2.7. Selection Stage – NEW exclusions

- There are new grounds for mandatory exclusion which include child labour and other human trafficking offences along with failure to pay taxes and social security contributions.
- The discretionary grounds for exclusion have been expanded to include previous poor contract performance

2.8. Award Criteria

Regardless of the type of tender, the CCG are required to award contracts based on the Most Economically Advantageous Tender (MEAT). This means that we have to consider the quality of the service / supply / works as well as the price. Price/ costings means the whole lifetime cost of the contract.

This differs to the previous regulations as the detail of award criteria was at the discretion of the contracting authority and was previously permissible to award on price alone. However, as the majority of our awards are service based, quality is always a key consideration in the evaluation.

2.9. Modification of Contracts during their term & changes in contractual partner

A contract or framework may only be changed without a new procurement in the following circumstances:

- To use another contractor for technical / economic reasons to deliver additional requirements would cause significant inconvenience or duplication, subject to the change not being more than 50% of the total value
- The need is unforeseen and the change does not alter the overall nature of the contract, again subject to the change not being more than 50% of the total value
- Where the value of a change is both below the EU financial limits and is below 10% for services & supplies, or 15% for work of the initial contract value and does not alter the overall nature of the contract or framework.

3. Implications

What does this mean for Bexley CCG? As stated above for the procurement of “health care services for the purposes of the NHS” these regulations will not be applicable until April 2016, however best practice would be to start implementing the new regulations into the current working practices.

The potential problems with the new directives are:

- If we now need to procure formally all of the annual NHS to NHS contracts this will have a major work load issue for the NHS as a whole.
- Building in additional time to procurements to ensure all documentation, award criteria and scoring methodologies are ready for publishing with the tender advert – this will be a steep learning curve as previously the documents have been prepared as the tender progressed.
- Abolition of Part B services will mean that the full regulations will need to be adhered to, previously the procedures had some flexibility where the service was part B.
- Justifying why tenders should not be in Lots, the CCG has been paramount in developing and designing integrated contracts.
- The Schedule of Matters need to be amended to include advertising contracts of £25,000 and changes to the thresholds.
- The Procurement Policy needs to be amended and updated to reflect the changes.
- Communicating the new changes to all staff – this is to ensure that staff do not use old regulation practices and put the CCG at risk.
- Where a supplier has had prior involvement in the preparation of the procurement; a contracting authority must ensure that the relevant information is disseminated amongst all bidders to ensure a level playing field and that sensible bid deadlines are set. There is a presumption that the bidder with prior involvement will only be excluded if there is no other way to ensure equality of treatment amongst bidders. As we already involve the market as stakeholders this should have little impact but we need to be cognisant of this throughout.
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There are benefits in the new regulations which afford opportunities for the CCG

- Shorter timeframes when tendering
- Discretionary grounds for exclusion to now include previous poor contract performance
- Dedicated portal for adverts – Contracts Finder
- For the first time, the regulations officially gives blessing to consultation of the market pre-procurement, the CCG can use advice gained as part of a pre-market engagement process in the planning and conduct of the procurement, provided that this is not anti-competitive or a breach of transparency and non-discrimination principles

4. Actions & Approvals

The Schedule of Matters will need to be updated immediately to reflect the changes on when contracts should be advertised and also changes to the tender thresholds.

There should be a communication to staff to make them aware of the new changes, there is a risk staff are still using the 2006 regulations as a source of guidance.

Further advice (from our solicitors, the Commissioning Support Unit and also NHS England) needs to be sought to clarify the impact and issues for the annual NHS to NHS contracting rounds.

It is the recommendation of the Head of Procurement that Bexley CCG moves to implement the regulations prior to April 2016. This will ensure that processes are robust and negate the risk of legal challenges and will continue the reputation that Bexley CCG as a pioneering CCG. This will be for all routine contracts, we will need to await further guidance on the inter NHS contracts referred to above.

Sarah Valentine – Director of Commissioning &

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