Selling to the NHS: public procurement rules for NHS suppliers

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Each year, the NHS procures approximately £18 billion worth of goods and services, including medical devices, pharmaceuticals, food, cleaning services, decontamination services and waste disposal. Above certain thresholds and subject to certain rules, this procurement must be undertaken in accordance with the UK public procurement law rules. This article outlines these rules, and provides some background on the NHS bodies involved in procurement.

Overview of NHS procurement

As anyone who has experience of NHS contracts will know, the way the NHS goes about procurement is complex and is constantly evolving. In February 2011, the National Audit Office issued a report which found that the NHS could achieve considerable cost savings through consolidating purchasing, standardising products and greater use of pricing data. In response to this, in May 2012, the Department of Health launched a review of NHS procurement, starting with a call for evidence and best practice guidance. The Department of Health has stated that it intends to publish a formal strategy for NHS procurement in December 2012.

The NHS in England is comprised of approximately:

- 165 acute trusts, which manage hospitals, of which 141 are foundation trusts;
- 11 ambulance trusts, which manage emergency services;
- 58 mental health trusts, which provide health and social care for people with mental health problems; and
- 150 primary care trusts.

In general terms, to purchase medical devices, consumables and other goods and services other than pharmaceuticals, trusts can use the following routes:

- by placing orders under framework agreements established and managed by NHS Supply Chain;
- by placing orders under framework agreements established and managed by “hubs” or General Procurement Organisations (GPOs);
- by placing orders under pan-government contracts such as those tendered by Buying Solutions; and
- by running their own tenders and establishing their own contracts.

As for pharmaceuticals, in primary care, pharmacies purchase medicines directly from manufacturers or via wholesalers and dispense them to patients presenting GP prescriptions. Pharmacists are then reimbursed by the NHS for the cost of these medicines.

In secondary care, pharmaceuticals are generally purchased via public tenders. This activity is led by the NHS Commercial Medicines Unit (CMU) which tenders for framework agreements for branded, generic and specialised medicines. In addition, some “hubs”, such as the Yorkshire and Humber Pharmaceuticals Purchasing Consortia, tender for regional pharmaceuticals contracts, such as

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1 NHS procurement: Raising our game, Department of Health, 28 May 2012.
3 World Class Procurement in the NHS Call for Evidence and Ideas, 28 May 2012.
unlicensed medicines contracts, either under their own name or via the CMU. Finally, some acute trusts run their own local pharmaceuticals tenders.

What are the UK procurement rules?

The UK procurement rules are contained in the Public Contracts Regulations 2006. These Regulations are based on an EU Directive. In addition, general principles of EU law, such as “equal treatment” and “transparency” also apply. The UK Cabinet Office Efficiency and Reform Group is responsible for the legal and policy framework for UK public procurement. However, as will be discussed below, enforcement of the Regulations is primarily via action before the High Court. The European Commission can also intervene.

In addition to the Regulations, guidance issued by the Cabinet Office Efficiency and Reform Group, the European Commission and in some cases by NHS bodies can be immensely helpful to suppliers. Whilst guidance is not legally binding, in terms of presentation it is difficult for NHS bodies not to comply with it.

The thresholds

Only contracts above certain financial thresholds are subject to the Regulations. The current threshold for NHS supply and services contracts is £113,057 (net of VAT). It is important to remember that contracts not subject to the Regulations, for example below threshold contracts, are still subject to some rules. For example, the general principles of equal treatment and transparency apply and European Commission guidance recommends that such contracts should be sufficiently advertised to open the contract to competition and bring it to the attention of likely bidders, including bidders in other Member States.

The procedures

Following the EU Directives, the Regulations make provision for four procurement procedures: open procedure, restricted procedure, competitive dialogue and negotiated procedure. The majority of NHS tenders are undertaken under the open procedure or the restricted procedure. The stages of the open and restricted procedures can be summarised as follows:

- the contracting authority (i.e. the NHS body running the tender) advertises the contract in the OJEU;
- under the open procedure, the Invitation to Tender (ITT) is freely available and any party may submit a tender;
- under the restricted procedure, suppliers complete a Pre-Qualification Questionnaire; the contracting authority selects those suppliers whom it wishes to invite to tender and issues them an ITT which they then submit (so the tender is “restricted” to those suppliers);
- the contracting authority selects the winning bidder(s) and notifies all bidders of the outcome;
- the contracting authority’s notification of its decision triggers a ten day standstill period;
- at the end of the ten day standstill period, absent any challenges to the tender process, the contracting authority enters into the contract with the winning bidder(s) and publishes a contract award notice in the OJEU.

Selection criteria

Selection criteria are used by contracting authorities to ensure that bidders satisfy minimum levels of economic and financial standing and technical and professional ability. These criteria focus on the supplier’s characteristics and it is therefore permissible that they can relate to the supplier’s previous experience.

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National Procurement Bodies

**NHS CMU**

The CMU is the primary body responsible for the procurement of medicines for use in secondary care. It is part of the Procurement Investment and Commercial Division of the Department of Health. It is one of the successor bodies to PASA and is based in the old PASA building in Reading. It also has a site at Runcorn. The CMU runs tenders for branded and generic medicines. Generics contracts are typically national in scope – meaning that any acute trust within the NHS may purchase under them. In the past, most of the branded contracts have been regional in scope (i.e. CMU tendering on behalf of regional groups) but the CMU has recently undertaken its first national contract for branded medicines.


**NHS Supply Chain**

NHS Supply Chain is a procurement and logistics entity which is run by DHL (the logistics company) on behalf of the Department of Health. It was established in 2006 when the Department of Health awarded DHL a ten year contract. It is tasked with establishing and managing framework agreements across a range of categories, in particular catering, dental, theatre, orthopaedics, infection prevention, audiology, pathology and ophthalmology. Any NHS trust may purchase off its framework agreements. It does not tender for pharmaceuticals. Its headquarters are in Normanton in West Yorkshire and it operates seven regional delivery centres throughout the country.

[http://www.supplychain.nhs.uk/](http://www.supplychain.nhs.uk/)

**Scotland, Wales and Northern Ireland**

NHS National Services Scotland, Welsh Health Supplies and the Northern Ireland HSC Business Services Organisation manage medical device and pharmaceuticals contracts for their respective regions.

The Hubs

**NHS Shared Business Services (NHS SBS)**

NHS SBS provides a range of business support services to NHS trusts, including Commercial Procurement Solutions, Finance & Accounting and Payroll & HR. It is operated by Steria, the business services company, on a contract granted by the Department of Health in 2005. Most of NHS SBS' member trusts are based in the North West of England (including Manchester, Cheshire & Merseyside and Cumbria & Lancashire) as NHS SBS incorporated NW Collaborative Commercial Agency in December 2010. However, NHS SBS is expanding beyond the North West and now has member trusts in London and Swindon. NHS SBS’ procurement activities include business services such as agency staffing, an extensive range of medical devices (including capital equipment and consumables), estates & facilities services, office services and some pharmacy products such as medical gases.


**HealthTrust Europe**

HealthTrust Europe is a General Purchasing Organisation based in Birmingham. It was established in 2011 when University Hospitals Coventry and Warwickshire tendered for an operator to take over the procurement activities of the West Midlands Healthcare Purchasing Consortium. HCA, the American hospital group, won the tender, establishing HealthTrust Europe. It has over 40 member trusts based in the West Midlands, Luton and London. It tenders for and manages framework agreements for a wide range of medical devices such as endoscopy, cardiology and surgical, some pharmaceuticals such as chemotherapy drugs, as well as office services and estates & facilities.


**NHS CPC**

NHS CPC is a procurement collaborative funded and owned by its member trusts and based in Sheffield. It has taken over from the Yorkshire and Humber Commercial Procurement Collaborative but is now operating nationally. Its membership comprises approximately 50 trusts, primarily located in Yorkshire and Humber. It procures a wide range of medical devices including medical gases, intraocular lenses and orthopaedics as well as corporate services. It does not tender for pharmaceuticals but does tender for related contracts such as pharmaceuticals clean room services.

London Procurement Programme (LPP)
The LPP is a collaborative procurement hub owned and funded by approximately 70 trusts across the London region, many of which are strong, independent teaching hospitals. It tenders for medical and surgical products, IT & telecoms, professional services and estates & facilities services. In the medical device sector, LPP procurement includes stents, defibrillators, pacemakers, orthopaedics, haemodialysis, negative pressure wound therapy and spinal implants. It uses member trusts as the procuring entity, for example, St George’s Healthcare Trust, Epsom St Helier and UCH London. LPP has an active pharmaceuticals procurement programme for branded medicines, but uses the NHS CMU to run the actual tenders. LPP is currently in negotiations with Office Depot in relation to a Floorstock Wholesaler Service contract; LPP originally intended to award the contract to BMI Healthcare Limited (BMI) but BMI withdrew from the negotiations.
http://www.lpp.nhs.uk/default.asp/

Peninsula Purchasing and Supply Alliance (PPSA)
The PPSA is an NHS collaborative procurement hub owned and operated by approximately 19 member trusts in Devon, Cornwall, Somerset and parts of Wiltshire and Dorset. The PPSA procures medical devices such as dressings and stoma and diagnostics such as pathology and radiology. They run some tenders for regional pharmaceuticals themselves (in the name of a member trust) and work closely with the CMU on the tendering of other pharmaceuticals requirements.
http://www.ppsa.nhs.uk/

Bristol and Weston NHS Purchasing Consortium
The Bristol and Weston NHS Purchasing Consortium is a buying group on behalf of three acute trusts. It procures capital equipment, medical devices and consumables but not pharmaceuticals.

East of England CPH (EOECPH)
The EOECPH is an NHS collaborative procurement hub with approximately 35 member trusts in Bedfordshire, Cambridgeshire, Essex, Hertfordshire, Norfolk and Suffolk. It procures medical devices and pharmaceuticals (via the NHS CMU) as well as non-clinical supplies and services.
http://www.eoecph.nhs.uk/

Pro-Cure Collaborative Procurement Hub
Pro-Cure is an NHS collaborative procurement hub with approximately nine member trusts in the South of England (Hampshire, Berkshire, Oxfordshire and Buckinghamshire). It is based in Theale, Southampton and Aylesbury. It procures medical and surgical products and some corporate services and uses the NHS CMU to tender for pharmaceuticals contracts for its member trusts.
http://www.pro-cure.nhs.uk/

NHS Commercial Solutions
NHS Commercial Solutions is an NHS collaborative procurement hub with approximately 26 member trusts in Surrey, Sussex and Kent. It procures medical and surgical products, corporate services, facilities & estates, IT & telecoms, healthcare services and, via the NHS CMU, pharmaceuticals.
http://www.commercialsolutions-sec.nhs.uk/
Award criteria

Award criteria are used to assess the merits of the tender. Contracts can either be awarded on the basis of “lowest price” or “most economically advantageous”. “Lowest price” is best suited to commodity products such as stationary and most of the contracts which medical device and pharmaceutical companies tender for are awarded on a “most economically advantageous” basis. Award criteria must be linked to the subject matter of the tender, such as its price and technical merit. They cannot relate to the experience of the supplier. A typical example of award criteria in a restricted tender for medical devices would be:

<table>
<thead>
<tr>
<th></th>
<th>Barrier</th>
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<tbody>
<tr>
<td>Price</td>
<td>50%</td>
</tr>
<tr>
<td>Range</td>
<td>10%</td>
</tr>
<tr>
<td>Customer Support</td>
<td>20%</td>
</tr>
<tr>
<td>Product Training</td>
<td>20%</td>
</tr>
</tbody>
</table>

The contracting authority must disclose the weighting of each criterion in the ITT. Further, any sub-criteria must also be disclosed. This requirement was confirmed in the Lettings v Newham Council case. In that case, Newham Council had tendered for the provision of accommodation services and stated that the award criteria were:

<table>
<thead>
<tr>
<th></th>
<th>Barrier</th>
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<tbody>
<tr>
<td>Compliance with specification</td>
<td>50%</td>
</tr>
<tr>
<td>Price</td>
<td>40%</td>
</tr>
<tr>
<td>Suitable premises and staff</td>
<td>10%</td>
</tr>
</tbody>
</table>

What Newham Council did not reveal was that Compliance with Specification, worth 50%, was broken into five sub-criteria, the weightings of which ranged from 5% to 17%. Lettings argued that had it been aware of the sub-criteria and their weightings, it would have structured its bid differently. In a rare victory for an aggrieved bidder, the High Court suspended the award procedure (i.e. prohibited the Council from entering into the contract with Lettings’ competitor).
Notification of award decision

Once it receives the tenders, the contracting authority will apply the award criteria in order to identify the winning bidder(s). It must then notify bidders of the award decision under Regulation 32. The Regulation 32 notification, also referred to as an Alcatel letter, must set out the reasons for the decision, including the characteristics and relative advantages of the successful tender.

As discussed above, the Regulation 32 notification triggers a standstill period\(^7\). This means that, starting from the day on which it dispatches the notice of the award decision to bidders, the contracting authority must wait ten calendar days before entering into the contract with the winning bidder\(^8\). The objective of the standstill period is to give bidders the opportunity to request feedback and, if they wish, to bring proceedings against the contracting authority to prevent the award of the contract. The Regulation 32 notice must include a statement of when the standstill period is expected to end and whether this might be affected by any contingencies.

The former UK Office of Government Commerce, whose functions have now been transferred to the Cabinet Office Efficiency and Reform Group, has published immensely helpful guidance on the feedback which contracting authorities should provide to bidders during the standstill period\(^9\). The contract may only be formally awarded and signed upon expiry of the standstill period.

Challenging an award decision

Prior to the award of the contract, an aggrieved bidder may apply for automatic suspension under Regulation 47G. This is simple to do. The aggrieved bidder must only file a claim form in the High Court. This has the effect of automatically suspending the award procedure and the contracting authority must refrain from entering into the contract. However, if the contracting authority wishes to contest the automatic suspension, it may seek an interim order to have it lifted.

When automatic suspension was introduced in December 2009 it was welcomed as providing aggrieved bidders with a relatively inexpensive route to challenge. However, in the cases heard to date, the courts have readily granted orders to lift the automatic suspension\(^10\). In these instances, the aggrieved bidder is then often liable for the contracting authority’s costs.

After the award of the contract, an aggrieved bidder may seek damages. However, damages actions are costly to bring, and there have been few successful cases\(^11\).

An alternative remedy which aggrieved bidders may seek after the award of the contract is “ineffectiveness” under Regulation 47J. Where a contract is declared “ineffective”, it will be prospectively void. Since this remedy came into force in December 2009, there have been no successful actions.

Compared to other EU Member States, there have historically been relatively few legal challenges to public tender procedures in the UK. This may be because bidders in the UK are reluctant to “bite the hand that feeds” but is also undoubtedly due to the difficulty of mounting a legal challenge before the High Court. In contrast, some EU Member States have specialist procurement law tribunals which ease the path for aggrieved bidders to bring claims.

\(^7\) The standstill period originates from the Alcatel (Case C-81/98) and Austria (Case C-212/02) cases in which the European Court of Justice held that bidders must have adequate time to challenge decisions.

\(^8\) There are certain cases in which a standstill period is not required, for example for Part B tenders.


\(^11\) One of the few successful cases in which an aggrieved bidder has been granted damages is Risk Management Partners Ltd v Brent London Borough Council [2008] EWHC 1094 (Admin). In a recent Scottish case, Healthcare at Home Limited (HAH) challenged the Common Services Agency’s decision to award a contract for herceptin to BUPA primarily on the grounds of breach of the principles of equality, non-discrimination and transparency in the application of the award criteria. The challenge was dismissed by the Scottish courts as unfounded (Healthcare at Home Ltd v The Common Services Agency [2012] CSOH 75).