

# **WEST SUSSEX PCT**

## **Policies on Market Management and Buying for Healthcare Services**

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## 1 INTRODUCTION

Market management defines an approach to structuring and maintaining market sources of supply to secure the delivery of stated outcomes.

West Sussex Primary Care Trust (WSPCT) aims to deliver the best patient care and value for money, and where appropriate the PCT will seek to stimulate and structure the market to provide innovative solutions and to create an environment where these can be sustained. These aims are underpinned by a nationwide drive to increase patient choice and empowerment, to improve health outcomes and decrease health inequalities, to improve access to healthcare, and to enhance clinician involvement and clinical leadership leading to more innovative modes of practice. Market management will therefore play a key role to support this PCT in attaining these objectives by seeking to:

- Establish a more responsive market for the commissioner;
- Establish a more responsive market for the patient;
- Increase security of supply;
- Reduce the dependency on distinct suppliers; and
- Improve the dialogue and consultation with the supply side on demand requirement, leading to improved capacity planning for bidding and delivery by suppliers.

In tandem, as a Public Body, the PCT is bound by statutory and mandatory public procurement regulations to promote Transparency, Equity and Opportunity. WSPCT will work within the European Union Directives to ensure the requisite level of Equality, Diversity, Transparency and Accountability in all of its procurements. In that vein, the PCT will implement all essential information-sharing protocols to ensure compliance with the Data Protection Act whilst also recognising the influence of the Freedom of Information Act 2000.

West Sussex PCT's philosophy is to develop our provider relationships to ensure high quality services for our local population. The PCT will provide clear outcome based specifications supported by robust monitoring frameworks.

This document outlines WSPCT's approach to market management. It also outlines the procurement principles and processes that this PCT shall employ as the framework for procuring health services to ensure best value for patients and taxpayers.

## 2 THE CONTEXT FOR MARKET MANAGEMENT AND BUYING

### 2.1 West Sussex PCT's Key Commissioning Principles

WSPCT is home to a population of over 750,000 (projected to increase to over 790,000 by 2011) with boundaries extending over 782 square miles, 94 GP practices and an annual budget of over £1 billion. The PCT's Strategic Commissioning Plan states the intention to focus on 10 health outcomes identified through discussions involving key stakeholders.

As the leader of the NHS in West Sussex, WSPCT aims to:

- Promote long and healthy lives for people in our community;
- Treat our patients, the public, our partner organizations, stakeholders and each other with dignity, courtesy and respect;
- Value, support and empower our staff so they can commission and provide high quality healthcare which meets the needs of each individual patient and the wider community;
- Work with our partner organizations to commission and provide accessible healthcare which encourages new and better ways of working and thinking and is based on evidence;

- Be trustworthy, open and honest in the way we work, involving and listening to the views of our patients, staff, the public, and partner organizations, and putting into practice what we learn; and
- Be an organization that makes the best use of available resources of which staff and local people can feel proud.

To that end, the PCT has set out its key commissioning principles based on these values, and these are to:

- Focus on the needs of patients and carers based on good evidence, rather than assumptions;
- Be proactive in seeking out the views and experiences of the public, patients, their carers and other stakeholders, especially those least able to act as advocates for themselves;
- Design services in a way which focuses on outcomes and will prioritise patient safety and good patient experience;
- Stay focused on a number of critical priorities to ensure efforts are not spread too thinly to be successful;
- Procure the solutions or services from the most appropriate provider and will work actively to harness the skills of the voluntary and third sector; and
- Ensure solutions can be made widely available, are sustainable and offer the best value for our investment.

Further detail on the PCT's commissioning principles can be found in "*Lifelong Health and Wellbeing*<sup>1</sup>".

## 2.2 World Class Commissioning

The "*Next Stage Review: High Quality Care for All*<sup>2</sup>" published June 2008, describes a vision of a healthcare service focused on quality, choice, personalisation, safety and fairness. Central to this vision and to the delivery of services aimed at meeting the needs of the public is World Class commissioning (WCC).

World Class Commissioning aims to transform the way health and care services are commissioned by taking a more strategic and long-term approach to improving performance and outcomes. At the heart of WCC lie eleven core competencies, which are key drivers for the delivery of commissioning aims and objectives. Market management and buying contribute to the following WCC competency areas:

- **WCC Competency 7:** Effectively stimulate the market to meet demand and secure required clinical and health and well-being outcomes
- **WCC Competency 9:** Secure procurement skills that ensure robust and viable contracts

The table below outlines how WSPCT's approach to market management and buying will support the PCT in attaining world class levels in these competency areas:

**Table 2.2-I: World Class Commissioning, Market Management and Procurement**

ENABLING WCC COMPETENCIES		Market Management	Buying
WCC 7: Stimulate the Market	Knowledge of current and future provider capacity and capability	√	
	Alignment of capacity with health need projections	√	√
	Creation of effective choices for patients	√	√

<sup>1</sup> "Lifelong health and Wellbeing", December 2008, West Sussex PCT

<sup>2</sup> "Next Stage Review: High Quality Care for All", June 2008, Department of Health

ENABLING WCC COMPETENCIES		Market Management	Buying
WCC9: Secure Procurement Skills	Understanding of provider economics	√	√
	Negotiation of contracts around defined variables		√
	Creation of robust contracts based on outcomes		√

### 2.3 Transforming Community Services

The Department of Health publication “*Transforming Community Services*”<sup>3</sup> states that, by October 2009, Primary Care Trusts (as commissioners) and practice-based commissioners, will have developed a plan for transforming community services, including how we intend to stimulate the market and ensure that there is sufficient competition to drive up service quality and value for money. The document also places a requirement on the Commissioning arm of PCT’s to complete and publish (by October 2009) a procurement plan which sets out at an operational level the procurements required to deliver the PCT’s 5-year Strategic Commissioning Plan.

As part of the Options for Change process concluded in March 2009, the PCT committed to market testing 10-15% of community services over the next 3 years. The exact timetable and services to be tested will be agreed by end October 2009.

### 2.4 European Union Procurement Regulations

The procurement of Health and Social Services in the UK is governed by European Union (EU) law, and as a public body the PCT is bound to comply with the requirements of the EU Directives for procurement where they apply.

The EU regulations classify services into two categories:

- ‘Part A’ services, where procurements above a particular financial threshold are subject to the full requirements of the EU Directives; and
- ‘Part B’ services, where procurements are subject to a lesser regime of the EU Directives including, for example, the requirement to issue a Contract Award Notice in the Official Journal of the European Union (OJEU) for contract values above a particular financial threshold.

Under the EU, Health and Social Services are classified as ‘Part B’ services. It should be noted that for contract values above a particular financial threshold, **Part B services are not exempt from EU procurement regulations, they are held to a lesser regime of the EU Directives** and as such there is an over-arching requirement for the PCT to adhere to the principles of good practice in procurement.

Further information regarding EU legislation on procurement can be found in Appendix D of this document.

### 2.5 PCT Standing Orders and Standing Financial Instructions

The PCT is bound to comply with the requirements of its Standing Orders and Standing Financial Instructions (SFIs) for its procurements. Further information regarding the PCT’s Standing Orders and Standing Financial Instructions can be found in Appendix C of this document.

<sup>3</sup> “Transforming Community Services: enabling new patterns of provision”, January 2009, Department of Health

## 2.6 The Principles of Good Practice in Procurement

The “*PCT Procurement Guide*”<sup>4</sup> includes a guide to the actions, behaviours and principles of good practice in procurement that support both the EU procurement principles and NHS “*Principles and Rules of Cooperation and Competition*”<sup>5</sup>.

The table below sets out the core principles of good practice procurement, which form the basis of the actions and behaviours required of PCTs in the stewardship of public funds.

**Table 2.6-I:** Key principles of good practice in Procurement

No.	Principle	Description
1.	Transparency and Fairness	Fairness and transparency in all procurements including the use of sufficient and appropriate advertising of tenders, transparency in taking the decision not to tender and the declaration and separation of conflicts of interests
2.	Proportionality	Ensuring that procurement processes are proportionate to the value, complexity and risk of the services contracted and that they are critically not excluding potential providers through overly bureaucratic or burdensome procedures
3.	Non-discrimination	Ensuring that there is consistency of procurement rules, transparency on timescale and criteria for shortlist and award
4.	Equity and Equality	Ensuring that all providers and sectors have equal opportunity to compete where appropriate, that financial and due diligence checks apply equally and are proportionate, and that pricing and payment regimes are transparent and fair

## 3 WSPCT’S APPROACH TO MARKET MANAGEMENT

### 3.1 Overview of national guidance

The “*Commissioning Framework*”<sup>6</sup> describes market management as ‘shaping the structure of supply’. It states that:

“PCTs will be clear about the services and service specifications they and their practices and patients want to see developed and will give strategic support to proposals where necessary. They will seek to develop new services and will work with NHS Trusts and Foundation Trusts, expanding GP practices, neighbouring PCTs and private and third sector providers to ensure the best services for local people.

Where appropriate, PCTs will encourage practices to offer services locally and also attract private sector and third sector providers to offer services in line with identified needs and priorities.”

The “*Commissioning Framework for Health and Well-being*”<sup>7</sup> elaborates further on the concept of market management by stating that:

“Commissioners have a key role to play in shaping the market through dialogue and procurement to stimulate providers to produce innovative solutions and create an environment where these can be sustained.

This includes more strategic, earlier discussion with provider communities about need (for example by making available the Joint Strategic Needs Assessment and the

<sup>4</sup> “PCT Procurement Guide”, May 2008, Department of Health

<sup>5</sup> “Principles of Cooperation and Competition”, December 2007, Department of Health

<sup>6</sup> “Commissioning Framework”, July 2006, Department of Health

<sup>7</sup> “Commissioning Framework for Health and Well-being”, March 2007, Department of Health

Prospectus), transparent fair procurement, and introducing or increasing contestability by addressing potential barriers to entry.”

It also places emphasis on the need to enable third sector participation in the market as part of a drive toward increasing the scope for innovation and flexibility in service provision. To that end, it states that:

“Potential new providers, particularly third sector providers, may find it difficult to enter new areas without active support because barriers to entry may be too high. Grants and contracts are often conflated, resulting in issues about full cost recovery.

PCTs need to consider which elements of the market require some form of intervention in order to deliver improvements in patient care and value for money. In some cases, market management activity and priority setting should be done in partnership with local authorities and/or other PCTs. The PCT needs to see market management as one of a number of tools to deliver key strategic and service aims.”

National policy relating to market management and contestability has evolved rapidly over the past year. The requirement for PCTs to take more initiative in shaping and developing the market means that PCTs need to consider which elements of the market require some form of intervention to deliver improvements in patient care and value for money. In some cases, market management activity and priority setting may need to happen in partnership with local authorities and/or other PCTs.

This section of the document outlines how West Sussex PCT will address market management through support, development and the encouragement of innovation from its providers.

### 3.2 Market Management Principles

West Sussex PCT's aim is to work with other NHS Providers, third sector providers and private sector providers to ensure best services and health outcomes for its community. The PCT's approach to market management is therefore focused on:

1. Proactively shaping and developing the market through dialogue and procurement;
2. Stimulating innovation by addressing potential barriers to market entry (which includes third sector), creating an environment where these principles can be sustained; and
3. Using Competition and Choice as levers to improve service quality, deliver better services and reduce health inequalities.

In the context of Competition and Choice, Contestability is an indicator of the extent to which the provision of goods or services is open to alternative suppliers.

This document designates 'Contestability' as the extent by which West Sussex PCT will identify and secure future providers of health services for its local population through tendering health services in an open market.

### 3.3 Shaping and developing the market

The PCT aims to take positive decisions in relation to market management, i.e. actively to decide whether or not to take action to manage the market. To support this approach, the PCT proposes to apply the following considerations to support decision taking:

Should the PCT take action to shape the supply market?

- Are the current services delivering key national and local targets?
- Do current providers offer services that are consistent with 'best practice' and local and national strategy?

- Do existing services offer good value for money?
- Are service users offered a choice of provider?
- Is there potential and a willingness for the existing provider to change the way that it provides services to be consistent with local and national strategy?
- Are there other potential market entrants either established locally or able to establish themselves effectively?
- Are there services that the PCT is seeking to develop or provide which the current supply market does not currently provide as part of a service portfolio?

What impact will the action have?

- Is the effort of developing the supply market justified by the benefits for patients?
- Will the introduction of new providers have a detrimental impact on the provision of services to patients (e.g. reduction of critical mass in a service leading to it becoming unviable)?
- Will action taken in this PCT have a detrimental impact on patients in other areas?

What are the options to address challenges/failures in the supply market?

- Develop a clear service specification, and share it widely with existing and new providers and also with service users and carers to raise expectations (under the choice guidance, any provider who meets Health Care Commission criteria and who can provide services within tariff, can seek inclusion on the PCT's choice menu);
- Actively commission a new or changed service through a tender process (in accordance with the PCT's Financial Instructions and Standing Orders);
- Work with existing providers to improve performance in the existing service; or
- Decommission services where they are deemed not subject to a formal improvement plan or plans for continuation.

Key to this approach is a need to develop a strong understanding of the market to ensure the PCT maintains the right balance between a pure free market approach and any management in context where applicable.

### **3.4 Stimulating Innovation by addressing potential barriers to market entry**

The PCT view is that encouraging new entrants into a market can increase patient choice and can also be used as a lever to stimulate improvements in quality and value for money. However, the PCT also recognizes the need to target such activity to be consistent with its strategic objectives and priorities.

There may be instances when the PCT will find its partners wish to encourage or even limit entry into a local market, for example, where there is a need to support a vital but vulnerable local service which is at risk due to competition from other providers in the market. Alternatively, there could be cases where market management is used as part of the demand management strategy, for example in relation to low priority procedures which are not normally funded. Note that in the context of national policy around plurality, contestability and choice, it is unlikely that this latter scenario will be supportable in anything other than extreme circumstances.

The PCT is seeking to encourage and develop commissioning with the Third Sector by ensuring that commissioning procedures are proportionate to potential value of the contract in accordance with the PCT's Standing Orders and Standing Financial Instructions. The PCT is also seeking to support / facilitate consortia and partnership supply models, in particular as one potential mechanism to enable Third Sector participation in the market.

### **3.5 Framework for Contestability**

Competition and choice are powerful levers to improve service quality, deliver better services and reduce health inequalities. The PCT view is that contestability will promote competition amongst providers and increase innovation, thereby providing patients with improved services and a broader spectrum of choice.

The key principles of the PCT's framework for contestability are:

1. The PCT shall define and stimulate its local healthcare market where appropriate;
2. The PCT shall consider all approaches to contest a particular service;
3. If the PCT does not consider contestability to be appropriate, it shall substantiate why not, and the decision-making processes shall be clear, transparent and auditable;
4. The PCT undertakes a responsibility for market management and for identifying and encouraging plurality in healthcare suppliers, including new market entrants;
5. The PCT shall ensure a 'level playing field' when utilising a competitive process, and there shall be no undue advantage afforded to in-house or other preferred providers;
6. The PCT shall not restrict choice through collusive behaviour or the formation of monopolies within its locality;
7. The PCT has an obligation to work in partnership with other organizations, in particular the Local Authority;
8. The PCT shall engender patient empowerment through choice;
9. The PCT shall uphold the principles of the Department for Health's Willing Provider models.

A key premise to be advocated within the framework for contestability is that thorough recognition of the risks and potential adverse consequences of a contested approach should be considered throughout any procurement

Please see Appendix E for further detail on the contestability framework.

### 3.6 Potential routes to market

In procuring services from the market, the following potential routes are open to the PCT:

- Competitive quotation – in accordance with the PCT's Standing Orders and Standing Financial Instructions;
- Formal competitive tender – in accordance with the PCT's Standing Orders and Standing Financial Instructions;
- The Department of Health's Willing Provider models:
  - Any willing provider (AWP) – under free choice, where the opportunity for 'any willing provider' to supply services for routine elective care shall not be constrained by commissioners other than in exceptional circumstances;
  - Any willing PCT accredited provider (AWPP) – under free choice, the opportunity for 'any willing provider' to supply services in the community where commissioners have the right to specify additional, service specific 'accreditation' requirements, such as specific standards or access requirements, to meet specific local service and patient needs, which, might not be covered in sufficient detail in the essential requirements for safety and quality that need to be met in order to be registered with the Care Quality Commission.

For services that do not fall under the 'Willing Provider' models, ultimately the decision whether or not to enter a formal tender process lies with contracting authorities. Nonetheless, the PCT shall consider whether contestability shall apply to the provision of a service under the following circumstances:

- Commissioning a new service for which there is no existing provider;

- Significant change to a service for which there is an existing provider;
- At the end of a previously awarded contract term; and
- Where there are concerns about the quality, effectiveness, appropriateness or value for money of an existing service (subject to having the right to terminate that existing service).

In line with guidance from the EU and Department of Health and the PCT's Standing Orders and Standing Financial Instructions, the PCT shall decide on the type of tendering process to run. This will also depend on the value, complexity and proposed duration of any contract awarded. (Refer to section 4.5 of this document)

The table below sets out the criteria, which the PCT shall consider in determinations about whether a formal competitive tender process is preferable with respect to value for money, competition and compliance with UK and EU rules and regulations, or whether the PCT shall in effect execute a single tender action.

**Table 3.6-I: Criteria for determining whether or not to tender**

No.	Criteria	Consideration
A.	Estimated value of the contract	<ul style="list-style-type: none"> <li>• The greater the value of the contract, the stronger the case for advertising the tender</li> </ul>
B.	Level of market interest and capability	<ul style="list-style-type: none"> <li>• The larger the number of potential providers for the services there are, the stronger the case for advertising the tender. This could override considerations based on the value of the contract</li> </ul>
C.	Government policy on protected services	<ul style="list-style-type: none"> <li>• Where the contracting authority can demonstrate that the service must be provided by a particular provider to protect essential public services, an advertised tender is unlikely to be necessary. (This must not be used to protect providers that are not best placed to deliver the needs of their patients and population.)</li> </ul>
D.	Do urgency considerations, due to factors beyond the contracting authority's control, preclude an advertised tender?	<ul style="list-style-type: none"> <li>• Is there a reason that competition is not appropriate in this circumstance?</li> <li>• Are the services protected by monopoly rights in accordance with a legal or administrative instrument?</li> <li>• Is there only one supplier capable of providing service due to technical reasons or special exclusive rights?</li> </ul>

In instances where the PCT deems that the procurement of a service is exempt from the formal competitive tendering, the PCT shall undertake a 'waiver' in accordance with its Standing Orders and Standing Financial Instructions to authorize the procurement and shall maintain an audit trail which shall include the authority to purchase, as well as any quotations or terms agreed with the supplier. Such single tender actions shall only be pursued with the approval of the Director of Finance or his acting deputy.

[Note that additional service development via extension of existing GMS, PMS, APMS contracts shall not require tendering. However good practice dictates that whether there exists a need to tender or not, a good audit trail should be maintained concerning the decision making process.]

### 3.7 Supplier development

The PCT recognizes that for specific service plans, it may need to develop its service providers, in particular those who are inexperienced at working in a competitive environment and at undertaking business processes in a healthcare system. For some suppliers there is a poor understanding of the PCT's obligations with regard to procurement, and the associated rules represent an appreciable barrier to market entry. In these situations, development activity will be aimed at addressing some of these issues via engagement in a manner that does not contravene the good practice procurement principles of Transparency, Equality of Treatment and Non-Discrimination.

Nonetheless, the PCT recognizes that the move towards a systems management approach to commissioned services needs to include a parallel work stream for development and building the capabilities of suppliers.

The PCT may seek to engage suppliers and raise awareness of its procurement processes and service areas of focus through a number of potential channels, including but not limited to:

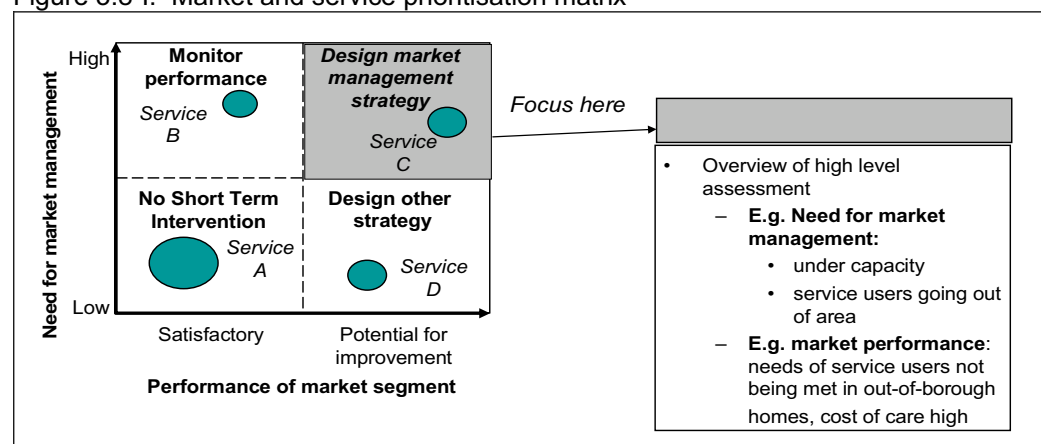
- A Supplier Portal page on the PCT website which should include:
  - An introduction to Supplier Engagement;
  - A news update section on events, supplier meetings, development workshops for service reviews or tender specification development;
  - Links to the rolling programme that includes what services are currently being reviewed/developed/tendered;
  - Best practice updates;
  - Link to decision making flow-charts for different components of services;
  - Registration page where all suppliers (existing and potential) can register with the PCT to display their intent to participate in the provision of NHS services.
- Formation of links with relevant trade bodies;
- Open supplier development sessions, in which current providers and potential suppliers are taken through the procurement process, contestability and the willing provider models;
- Addition of a supplier FAQ section on the PCT's website, which is routinely updated with answers to queries from suppliers;
- Dissemination of a supplier readiness pack, a step-by-step guide through the tendering process;
- Links on the PCT website to relevant procurement guidance for suppliers; and
- Bidder days for specific procurements, e.g. open Q&A sessions for providers who have expressed an interest in specific procurements.

### 3.8 Market and service development

The PCT shall adopt a Prioritisation Matrix to identify market segments where there are either service performance issues or market management issues to address:

- Services located in the lower left Quadrant would be examples of stable performance, with no intervention needed (Service A);
- Services located in the top left quadrant would indicate that the services performance needs to be monitored (Service B);
- Underperforming market segments, which require market management strategies would be located in the top right quadrant (Service C); and
- Any service falling into the lower right quadrant would require the design of other strategies (Service D).

Figure 3.8-I: Market and service prioritisation matrix



WSPCT will conduct an initial market analysis in order to assess its market base using a mixture of both primary and secondary data sources, including stakeholder interviews, PCT documentation and a stakeholder workshop discussion. This process will form the basis of the PCT's market management activity and segmentation into priority areas.

## 4 PROCUREMENT AND BUYING

### 4.1 Procurement goals and objectives

Procurement, dependent on the nature of the services being acquired, can be a highly complex and protracted process. The PCT in its approach to procurement is seeking to:

- Support the delivery of the PCT's commissioning aims and objectives;
- Ensure that there are clear guidelines to help manage the process, and encourage competition amongst suppliers;
- Limit any legal issues that may arise via non compliance with national and international procurement rules;
- Provide value for money (VfM) for the contracting PCT and the community it serves; and
- Increasing patient choice.

To that end, the PCT shall adhere to the following principles in its approach to its procurements:

- **Value for money** – Price shall not be the sole or over-riding factor in the decision-making process. Providers will need to demonstrate that services offer the best possible value for money for the investment made based on a number of criteria for evaluation including, but not limited to, price, quality, sustainability, innovation and technical merit;
- **Risk management** – As part of World Class Commissioning, procurement and service delivery, WSPCT will deploy formal methods of assessing and managing risk as part of overall performance management;
- **Good record keeping** – WSPCT shall keep records in accordance with good commercial practice, its Standing Orders and the PCT Freedom of Information Policy. The information recorded shall be clear and auditable in the event of a provider raising a dispute;
- **Effective programme and project management skills** – Each procurement shall be managed as a distinct entity, using the processes outlined in the PCT's procurement manual;
- **Legal processes and local rules** – As a public body, the PCT's commissioning decisions shall comply with EU regulations. The PCT recognizes that such decisions may be challenged by service users and may be susceptible to Judicial Review in the High Court. Some commissioning issues may also engage the PCT's legal obligations to consult with the public and/or Health Overview and Scrutiny Committee (HOSC);
- **Partnerships with Providers** – The PCT recognizes the importance of maintaining positive and ongoing relationships with providers so that services are sustained and improved continuously. Subject to its overriding legal obligations to advertise and/or tender services, the PCT will (as part of its assessment process) seek providers that are committed to the health and well being of the West Sussex population.

## 4.2 Rules of Engagement

To ensure that there is equity in the market and also to protect the right and well-being of patients, the PCT has strict Rules of Engagement for the Supplier relationship. In particular, WSPCT expects the following from its suppliers:

- Transparency – Access to information, sharing of best practice and highlighting any bad practices;
- Resources – Contribution to systems redesign;
- Timeliness – Includes information provision and performance reporting;
- Communications – Joint communications on strategic issues, adherence to the NHS code of conduct;
- Responsiveness – Striving for an improved patient experience;
- Efficiency – Evidence of improved value for money;
- Suppliers must not discriminate against patients and must promote equality and fulfil their objectives under equality legislation;
- Suppliers and commissioners must cooperate to ensure that the patient experience is of a seamless health service, regardless of organizational boundaries and to ensure service sustainability and continuity;
- Suppliers must foster patient choice when referring on to a different service and ensure that patients have accurate and reliable information with which to make a choice;
- Suppliers cannot subcontract to other providers for choice services without first stating their intention to do so on NHS Choices and without the prior approval of the PCT; and
- Suppliers must have a regard for the Advertising Standards Agency codes and the NHS code of promotion.

## 4.3 Separation of Duties

Within the PCT, the roles involved in the various steps involved in procuring goods and services shall be separated to avoid any possibility of impropriety and to allow the maintenance of a comprehensive audit trail.

As a consequence there shall be a separation of duties for staff roles involved in authorising the contract and/or purchase order, certifying receipt and acceptance of goods/services/works and authorising payment to the supplier. Alternatively, a rotation of roles could also ensure the separation of duties, by ensuring that key decision points are not the responsibility of any one individual. (WSPCT preferred position awaits board's decision).

## 4.4 Risk management

The PCT wishes to manage risk and not simply seek to avoid risks. In any given procurement scenario, the fullest range of supply options will be considered with identification of the preferred option being based on a range of measures of which finance will be but one criterion.

Within the PCT itself, an internal approval process will be established to ensure that all processes are adhered to prior to the contracts being awarded. A well motivated and skilled workforce is essential to deliver high quality and sustainable services. It is absolutely essential that the healthcare services purchased by the PCT meet required standards as the health of the population must not be put at risk due to problems within supplier organisations. Every contractor used by the PCT must therefore commit to implementing employment practices that will deliver high quality clinical and performance reliability.

All contract performance will be routinely monitored within the PCT but particular emphasis placed on monitoring of high risk/high value projects.

#### 4.5 Procurement rules and procedures

The PCT shall consider a number of legal obligations throughout the duration of individual procurements:

- UK policy, audit requirements and the PCT's own Standing Financial Instructions require that value for money is achieved through open and fair tendering; and
- National rules on procurement include the key elements of contract law. As a result, the PCT is considered a formal contracting authority and thus falls under purview of the European Union Directives for procurement.

According to the Department of Health's 'Guide to buying services and goods', all services should be bought using a process involving competition unless they are of low value or unless there are convincing reasons to do otherwise (refer to section 4.2 of this document).

The PCT's Standing Orders and Standing Financial Instructions set out the following conditions for the PCT to meet when asking for quotes or tenders:

Table 4.5-1: Financial thresholds for quotation and formal tender

Threshold	Requirements
Up to £10,000	One quote
£10,000 to £30,000	Three written quotes
£30,000 and over up to the EU threshold	Formal competitive tender in accordance with the PCT's guidelines
EU threshold for supplies, services and works	The EU public procurement procedures shall apply – see Appendix D for further detail

In European Union Procurement Directives and UK Procurement Rules, health services are generally classified under Part B services, as such they are only subjected to a proportion of the requirements under the EU procurement regime. Depending on whether the services being procured are Part A or Part B, different regulations will apply once over the EU Directive threshold (see Appendix D for further details).

In summary, above the EU thresholds, the EU requirements for tendering Part B services have the following requirements:

- Sufficient degree of advertising to satisfy principles of transparency, non-discrimination on grounds of nationality, and equality of treatment;
- Issue of contract award notice to European Commission within 48 days of award; and
- Collation of relevant statistical data.

For its Health and Social Services procurements, the PCT shall advertise on the procurement portal [www.supply2health.nhs.uk](http://www.supply2health.nhs.uk) (Supply2Health) and on the West Sussex PCT website. Advertising shall be accurate and fair and in line with NHS brand values.

Whilst there is no legal requirement for the PCT to advertise its Health and Social Services procurements in the Official Journal of the European Union (OJEU), for large and complex tenders the PCT may choose to follow the good practice formal tendering processes set out in

the EU Directives and Public Contracts Regulations 2006. In that respect, the PCT may choose to advertise in the OJEU in addition to *Supply2Health*<sup>8</sup>, and it may also choose whether it is appropriate to adopt the formal EU tender processes that do not automatically apply to Part B Services.

#### **4.6 Process for Acute Procurements**

The majority of acute service contracting and procurement is conducted with other Sussex PCTs through the Sussex Area Contracting Service (SACS): a structure which offers the benefit of consistency and control with regard to contract monitoring and management. Current plans are that SACS will diversify and extend the scope of services contracted during 2009/10. The services being considered are community, transport and mental health.

West Sussex is also a member of the South East Coast Specialised Commissioning Group (SECSCG), which commissions specialist services on behalf of the 8 PCTs in Kent, Surrey and Sussex.

#### **4.7 Procurement plan and timetable**

The PCT shall update its procurement plan annually to matches its overall strategic direction, setting out a timetable designed to deliver national and local priorities (including those outlined in Lifelong Health and Wellbeing). As such, the PCT will prioritise the procurements following review and will allocate a timescale for delivery and/or review. This approach will enable to PCT to plan and resource procurements effectively, manage provider and service user expectations, and encourage engagement from interested parties at an early stage.

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<sup>8</sup> NHS Supply2Health, [www.supply2health.nhs.uk](http://www.supply2health.nhs.uk)

## Appendices

**Appendix A: Glossary of terms**

The following acronyms and terms have the following descriptions:

<b>Term</b>	<b>Description</b>
APMS	Alternative provider medical services
ASA	Advertising standards agency
AWP	Any willing provider
AWPP	Any willing PCT accredited provider
Best practice	Asserts that there is a process that is more effective at delivering a particular outcome than any other process,
Best value	An optimum balance between relatively low costs, high productivity and successful outcomes.
CI	Conflict of interest
Contestability	The extent to which the provision of goods or services is open to alternative suppliers.
CSF	Critical success factors
DH	Department of Health
Fit for purpose	Quality with the fulfilment of a specification or stated outcome
GMS	General Medical Services
HOOSC	Health and overview scrutiny committee
IM & T	Information management and technology
IS	Independent sector
LAA	Local area agreements
Market management	the process of shaping and influencing the market to achieve an optimal structure of suppliers and ultimately high quality, cost effective services for patients. The outcomes of a successful approach to Market Management could be described as:
OFT	Office of fair trading
PBC	Practise based commissioning
PEC	Professional executive committee
PMS	Personal Medical Services
PRCC	Principles and Rules for Co-operation and Competition
Procurement	Sourcing of goods and services
SCB	Strategic commissioning board
SFI	Standing Financial Instructions
SFO	Standing Financial Order
SLA	Service level agreement
Tender	Public procurement
VFM	Value for money
WCC	World class commissioning
WSPCT	West Sussex PCT

## Appendix B: Policy specific to competition and choice

Published as an annex to the 2008/9 Operating framework, the Principles and Rules for Co-operation and Competition (PRCC) includes 10 key principles broken down into 76 detailed regulations defined as either actions, behaviours or rules. It provides guidance for situations where the legal boundaries around procurement are discretionary, allowing commissioners with a wide range of choices.

The 10 key principles are:

- Commissioners should commission services from the best providers in order to build a world class health service;
- Cooperation, continuity and sustainability should prevail across the system to allow for a seamless patient experience;
- Transparency and non-discrimination of procurement;
- Fostering patient choice and providing adequate information about services to patients;
- Responsible promotion of provision in the best interest of patients and in accordance with NHS brand values;
- Providers must not discriminate against patients;
- Payment regimes must be transparent and fair;
- Financial intervention must be transparent and fair;
- Mergers, de-mergers and joint ventures are permissible as long as they do not allow collusion and the formation of monopolies; and
- Vertical integration is possible but only in patients' best interests and retaining the primacy of the GPs role as gate keeper.

The principles included allow strategic decisions to be made in the best interest of the local market.

The PRCC policy was reinforced by the later publication of the 'Framework for managing choice, cooperation and competition'. It identifies what factors are necessary for success to work, defines 10 principles to follow and describes the roles and responsibilities of various organisations e.g. SHAs and PCTs. The principles are:

- Decisions around system management ought to be made for the right purpose;
- Transparency of information sharing within the system;
- Objectivity of key decision-making based on objective data and information;
- Proportionality of transactions and ensuing consequences/risks for organisations;
- Non-discrimination between commissioners and providers and visa versa;
- Accountability where it is clear (both in policy and in practice) who is responsible for what;
- Subsidiary where decisions should be made by the lowest competent authority;
- Consistency of both formulation and implementation of policy;
- No double jeopardy – that multiple institutions should not hold providers to account inconsistently for the same issue; and
- Interdependency – when assessing issues commissioners and providers should understand and minimise any unintended consequences of any actions.

An important feature in national policy is the development of the national competition and cooperation panel. This is an independent regulator with an independent chair which has access to a range of experts including economists, lawyers, procurement specialists and consumer advocates. It is anticipated that the existence of a national panel will incentivise resolution of contestability disputes at a local level i.e. applied through appropriate subsidiary.

The panel is operational from January 2009 and adheres to the PRCC. It is responsible for considering complaints and reviewing cases from associated with:

- The procurement of clinical services;

- Advertising and promotion of NHS-funded services;
- The competitive conduct of commissioners and providers of healthcare services; and
- Mergers, joint ventures or acquisitions of healthcare providers where an NHS body is involved.

The panel has currently produced 4 interim documents that address these four areas of responsibilities under the Principles and Rules. These documents are currently undergoing a consultation and review process.

This policy document will continue to be reviewed and updated in accordance with further national guidance, particularly that issued by the independent competition and cooperation panel.

In line with the principle of subsidiarity, the contracting PCT will be the first port of call for dealing with disputes at a local level. All disputes shall be referred to the PCT disputes panel which will implement the disputes resolution process. This process has the following objectives:

- To resolve disputes relating to the principles and rules for cooperation and competition in a transparent, fair and consistent manner;
- To reassure providers that the process is fair and transparent, thereby engendering willingness of providers to participate in the market;
- To mitigate risks and protect the reputation of the NHS; and
- To prevent, where possible, legal challenge and/or expensive external referral processes.

The PCT will publish its approach to dealing with disputes on its website. This shall include a web-based step guide and pro-forma for making a complaint that is compliant with the PRCC and clearly identifies the criteria for consideration of any complaint. The assessment of the complaint/dispute must include reference to locally agreed policy in addition to the PRCC. The PCT will only consider complaints/challenges that have been lodged through the formal process.

Any disputes unresolved at this local level shall be directed to the SHA. If the dispute remains unresolved, it is appropriate to be directed on to the national competition and cooperation panel.

## **Appendix C: WSPCT Standing Orders and Standing Financial Instructions**

The PCT's Standing Orders and Standing Financial instructions set out its duties and obligations, and the extent to which it is accountable. SFIs must be adhered to in all procurement and contract procedural rules.

## Appendix D: EU Regulations on the procurement of health services

The contents of this appendix should be read in conjunction with the Department of Health's 'PCT Procurement guide for health services'<sup>9</sup>.

### Public procurement law

As a member of the European Union (EU) and a signatory to World Trade Organisation (WTO) agreements, public procurements in the UK are governed by EU legislation. The current legislation that forms the basis of mandatory procedures to be adopted for procurement in the public sector in the UK includes the EU Treaty, EU Directive and other relevant case law of the European Court of Justice.

It is the aim of the EU member states to create a single European market devoid of all trading restrictions and barriers in which all businesses have an equal opportunity to compete for a market share. The EU regulates and monitors public sector procurement primarily through the EU directive covering the supply of goods, services and works.

More information and guidance is available online from the Office of Government Commerce (OGC) at [www.ogc.gov.uk](http://www.ogc.gov.uk) or <http://europa.eu>. Details of Department of Health and NHS Purchasing and Supply Agency (PASA) procurement activities are available from [www.pasa.nhs.uk](http://www.pasa.nhs.uk), **however note that from mid-2009 PASA's role is under review.**

### EU Procurement Directives

EU procurement rules classify different types of procurement into three categories:

- "Supplies" – meaning the purchase or hire of goods. Examples of supplies are stationary, office furniture, office equipment, clothing and machinery;
- "Works" – mainly meaning construction and engineering contracts. Examples of works are construction of new buildings, repairs, maintenance, civil engineering (a list of activities constituting 'works' can be found in Schedule 2 of the Public Contracts Regulations 2006); and
- "Services" – meaning the purchase of engaging a person or company to provide services. These are further divided into two types depending upon whether they are listed in Part A or B of Schedule 3 of the Public Contracts Regulations 2006.

Schedule 2 and 3 of the Public Contracts Regulations 2006 is available from the OGC website at: [http://www.opsi.gov.uk/si/si2006/ukSI\\_20060005\\_en.pdf](http://www.opsi.gov.uk/si/si2006/ukSI_20060005_en.pdf) (date checked June 2009)

The EU has set threshold values for supplies, works and services contracts where all contracts let by public authorities that are above these levels (and are not covered by the exclusions listed in the Regulations) must comply with and adhere to the processes and procedures set out in the EU regulations. In the UK, the directives apply to all NHS contracting authorities. These rules are in place to assure taxpayers and service users that public spending is used in a way that seeks best value for money for the contracted services.

The table below sets out the threshold values that apply to Primary Care Trusts:

	SUPPLIES	SERVICES	WORKS
<sup>a</sup> Entities listed in Schedule 1  (Updated 1 <sup>st</sup> Jan 2008)	£90,319 (€ 133,000)	<b>Part A: £90,319 (€ 133,000)</b>  <b>Part B: £139,893 (€ 206,000)</b>	£3,497,313 (€ 5,150,000)

<sup>9</sup> "PCT Procurement guide for health services", Department of Health, May 2008

a: The list of Entities in Schedule 1 of the Public Contracts Regulations 2006 (of which Primary Care Trusts are one such Entity) are available from OGC website - [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_uk\\_regulations.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_uk_regulations.asp) (link last checked June 2009)

The EU threshold values are based on the Euro and are net of VAT. They are revised every 2 years.

### Part A and Part B Services

The EU Directives have two levels of application for Services:

- The full regime for services designated as Part A where the value of the Part A contract exceeds the relevant thresholds; and
- A lighter regime for other services designated as Part B.

Part A services (the full regime) include services such as financial services, IT services, telecommunications and consultancy services. Part B services (the lighter regime) include legal services, educational, health and social services. Thus, clinical services are usually assessed by contracting authorities as Part B services. Nonetheless, Commissioners and providers should refer to the OGC website (and Common Procurement Vocabulary codes) to determine the correct categorisation.

The table below illustrates the application of the regulations to Part A and Part B services.

Requirements	Part A	Part B
Sufficient degree of advertising to satisfy principles of transparency, non-discrimination on grounds of nationality and equality of treatment	X	X
Tender advertised in the Official Journal of the European Union (OJEU)	X	
Compliance with specified minimum timescales for providers to respond to adverts, pre-qualification checks and tenders	X	
Competitive dialogue or negotiated procedure allowed only in specified circumstances	X	
Detailed rules on selection and award criteria; contracts awarded either on the basis of the lowest price or the most economically advantageous offer (but note: award criteria must still be fair and non-discriminatory in the case of Part B contracts)	X	
Provision of feedback to unsuccessful providers and standstill requirement after contract award and prior to contract execution ( but note: the 'openness' principle may require that this should happen in practice in Part B contracts)	X	
Issue of contract award notice to European Commission within 48 days of award	X	X
Collation of relevant statistical data	X	X

## Appendix E: Parameters for Contestability

### 1. The PCT shall define and stimulate its local healthcare market

The PCT recognises competency 7 of the world class commissioning framework which states that commissioners are required to 'effectively stimulate the market to meet demand and secure required clinical, health and well-being outcomes.

The PCT should have a clear definition of its market and understand the market characteristics. This shall be done through market analysis and market segmentation methodology which will allow effective assessment of competitive dynamics and the levers needed to allow contestability. Market analysis and market segmentation has been initiated within the PCT. The current work has identified and prioritised ten under-performing market segments which require careful market management.

The PCT should stimulate the market by having strong awareness of the surrounding provider landscape and actively engage with potential providers. Performance and development reviews with providers can be utilised in the annual PCT business planning cycle and to foster strong relationships and collaborations with providers.

### 2. The PCT shall consider all approaches to contest a particular service

Opening up a service to tender the existing service may result from external requests this may arise from:

- G.P. consortia;
- Potential future providers wishing to enter the market. This could include providers from independent and third sectors;
- 'Community petition' models – linked to patient groups; and
- Social enterprises e.g. groups or individual members of staff. The 'Transforming Community Services' document published in January 2009 states that PCTs should provide support to prospective providers (including staff) who request to found a robust social enterprise that complies with the PRCC rules. These requests shall be given due consideration and approved or rejected within no longer than 6 months of the request being made

An increasingly contestable approach may also arise following the internal review of services. A key driver for this is the annual commissioning cycle which will review the PCT-wide commissioning intentions.

There are several internal reasons to decommission a service which may arise due to:

- An existing SLA or contract coming to the end of its agreed term or can reasonably be considered to be likely to come to an end for other reasons (e.g. a provider notifying commissioners that it is considering withdrawing provision);
- Where an existing provider is failing to achieve (or make sufficient progress in achieving) local or national quality standards or targets, or is not meeting the reasonable expectation of service users;
- Where an existing service offers poor Value for Money when compared to other relevant local or national benchmarking information;
- Where a new type of service differs significantly from that currently in place (in terms of service model, volumes or types of activity, or financial value) such that a new range of service providers or partnerships might offer advantages in terms of patient care or cost compared to that already in place;
- Where other key commissioners have decided to contest a 'shared' service such that it is highly likely that a residual service would become clinically, operationally or financially unviable for the PCT; or
- To provide a more complete service;

Decommissioning must be transparent in its process and will target services that are redundant, poor value for money or of low quality. The information behind a decision to decommission must be of high quality, be auditable and able to be presented as evidence which can withstand challenge in any ensuing dispute.

The authority of decommissioning needs to be formally delegated to the Strategic Commissioning Board (SCB).

If decommissioning is to occur due to introduction of a new service model, then the PCT needs to agree whether the change is substantial enough for a consultation process to be done. If a consultation is to be carried out, it will be undertaken by the West Sussex Health and Overview Scrutiny Committee (HOSC) and should take a minimum of 3 months. The procurement of a new service provider may not begin prior to the end of the consultation. The existing contract will be re-negotiated or the service opened to tender based on the results of the consultation.

However, a caveat to this principle is that not all services will be deemed appropriate to open to a contestable market. This may be the case where opening a service to tender may destabilise the local health economy or potentially put patients at risk. In this situation, the PCT is required to unequivocally justify why a particular service is not open to competition.

### **3. If the PCT does not consider contestability to be appropriate, it shall substantiate why not, and the decision-making processes shall be clear, transparent and auditable**

Contestability is a tool that the PCT will want to utilise flexibly to achieve improvement in service delivery only in specific circumstances. It is not appropriate to be the default approach that the PCT would wish to take in every case. The Department of Health publication Annex D 'The Principles and Rules for Cooperation and Competition' states that for services other than elective services, it is for individual PCTs as commissioners to decide and agree with their respective SHA which services ought to be subject to direct competition, the extent of that competition and how this should be secured.

There are a number of qualifying conditions where the PCT may not want to contest services in an open market. They are based on principles which concern commissioned patient pathways being safe and that the interests of patients must be put first. These may include:

- The service being a specialised one where provider designation is done at a national level;
- Where the service has a dependence upon another existing service which ought to prevail;
- Where the service is required to be provided by a particular provider in order to protect essential public services and public safety e.g. public health protection services – vaccination programmes provided by the PCT provider arm;
- Where the cost of undertaking a contested approach cannot be warranted in light of the contract value;
- Where the PCT wishes to meet its responsibilities in stimulating the market by encouraging provision from a sector that might otherwise not succeed through a contested approach i.e. third sector providers;
- Where there is not reasonable expectation of multiple providers coming forward to compete to provide services; or
- Where failing to award a contract to a preferred provider would significantly endanger other core services.

Where a service falls within the remit of any of the qualifying criteria, the bidders for this service need to be informed of the comprehensive reasons for the PCT not tendering the service. All decision-making must be auditable as the PCT may be required to produce this

audit trail as evidence to the competition and cooperation panel for any appeals lodged by any unsuccessful bidders.

Any disputes regarding contestability must be directed to the Strategic Health Authority competition board. If a dispute still prevails, it should be referred to the national competition and cooperation panel via a local resolution process.

#### **4. The PCT undertakes responsibility for market management and for identifying and encouraging plurality in healthcare suppliers, including new market entrants**

All public procurement decisions must be based on value for money with no favourable treatment of any supply market. Value for money is more likely to be secured if it is open to ideas from all potential supply markets including the third sector.

The PCT will engage with and work closely with the third sector to increase plurality of provision of healthcare within West Sussex

State aid encompasses any economic advantage that could not have otherwise been obtained under normal market conditions. Previously, funding for NHS hospitals has not come under the remit of state aid. However, in an increasingly contestable environment, this may no longer be tenable. Thus, any assistance offered to any new market entrants will need to be declared. State aid is discussed further in Appendix H.

#### **5. The PCT shall ensure a 'level playing field' when utilising a competitive process, and there can be no undue advantage afforded to in-house or other preferred providers**

The documents "*NHS Operating framework 2009/10*" and "*Transforming Community Services*" have stated the importance for the PCT provider arm to be sufficiently separated from the commissioning elements. By April 2009, all PCT direct provider organisations will have to move into a contractual relationship with their PCT commissioning function. Then by October 2009, the PCT provider services should be reviewed and evaluated to see what the best governance arrangement will be for them.

PCT provider arms should be subject to competition policy in the same manner as any other provider and they must not be shown any preferential treatment in a tendering process. If there is evidence that the PCT is preferentially commissioning services from its own provider arm (without due regard for the other providers), this may be termed 'abuse of a dominant position', thereby infringing article 82 of the Competition Act.

#### **6. The PCT shall not restrict choice through collusive behaviour or the formation of monopolies within its locality**

The PRCC states that whilst mergers, de-mergers and joint ventures are permissible, commissioners and providers must not restrict choice via collusive behaviour. It reiterates that commissioners should regularly review the services they commission to identify possible collusion.

Agreements between NHS and independent sector (IS) providers do not come within the competition act where parties to a joint venture agreement are not actual or potential competitors. However, the following type of 'joint venture' between the NHS and IS providers would give rise to competition issues:

- Joint tenders or 'teaming arrangements' between competitors, particularly where they are bidding on price;
- Cooperation between NHS and IS providers which leads to the exchange of competitively sensitive information; and

- Joint ventures between an NHS provider having control over key resources ('essential facility') and a private undertaking, in order to commercialise a new market.

In the absence of a clear restriction of competition, a joint venture will only infringe the Competition Act where the parties have some degree of market power and where it is likely that the agreement will have a negative impact on the relevant market in relation to prices or the variety or quality of services available on the market.

Collusive behaviour also concerns clinicians. It may be the case that the referring clinician has a financial interest in the service that they are referring the patient to. In the importance of maintaining public trust, it is imperative that general practitioners take an objective stance when referring patients. Furthermore, disclosure of such a financial interest by the GP ought to be stated clearly to the patient from the outset. The issue of probity needs to be addressed with local professional bodies who represent clinicians e.g. Local Medical Committee. It is imperative that this is recorded and documented appropriately by the clinicians in question. The PCT Conflict of Interest policy can be found in Appendix F.

### **7. The PCT has an obligation to work in partnership with other organizations, in particular the Local Authority**

To be a market steward, the PCT must first understand its existing market and then consider how to stimulate change within it taking into account the development of personalisation, choice and the response to identified need.

"*Transforming Community Services*" states that PCTs should work in close collaboration with local authorities to enable joined-up health and social care provision. Other key partners include the third sector. Partnership working is reinforced in the NHS Operating framework 2009/10 and the NHS Constitution which both stress that this is key to personalised healthcare.

As such, PCT operational plans should be aligned with local area agreements (LAAs) to ensure wide stakeholder buy-in to priorities. PCTs should then work in tandem with their local authorities and other partners through the Local Strategic Partnership to deliver LAAs. The PCT already has pooled budget arrangements for which there are clear regulations regarding governance of this, under the NHS Act 2006 section 75 and local partnership and local partnership agreements of which Mental Health (hosted by the PCT) and also Learning Difficulties (hosted by West Sussex County Council) are covered.

New rules and principles around contestability ought to be clarified to valuable commercial or local authority partners. This is imperative as uncertainty around new reforms or legislation may translate into new organisations being reluctant to invest in the NHS. Implementing transparency around contestability and competition will enhance joint commissioning e.g. that of children's service between West Sussex PCT and West Sussex county council. Joint tenders between the PCT and other organisations fall under the remit of this contestability framework.

### **8. The PCT shall engender patient empowerment through choice**

The NHS constitution states that patients will have a right to choose their G.P. and to make choices about their care. Patients also have a right to information to support them in these choices. The NHS therefore has the corresponding duty to provide information and choices about healthcare.

National reforms support patient choice and encourage patient empowerment. Initiatives such as 'Choose and Book' and the NHS patient choice website allows patients to direct their own healthcare to some degree. Patient empowerment is a combination of providing patients with adequate information about services and then allowing them to make an informed choice about future care based on that information.

In order for patient choice to be elicited, it is imperative that patients feel that they have a genuine choice. This can be realised by patient engagement prior to a commissioning cycle. Often it is the patients who are experts at navigating sometimes complex care pathways and can provide important input. Engaging patients will encourage involvement and discourage inertia. The recent reforms of putting patients first can only be realised once patients are actively making choices for themselves.

An effective information dissemination strategy needs to be employed. This is imperative in overall market management. There are several avenues by which to disseminate information which include:

- NHS choices website
- PCT website
- Leaflets at G.P. practices
- Advice from their G.P.
- Expert patient initiatives

Patients need high quality, easy to understand information that is easily accessible to them.

PCTs are encouraged by the NHS Operating framework to integrate development of NHS Choices into the local support and advice for patients and to encourage G.P. practices to improve the information they have about services. Promotional activities by the PCT must be in the best interest of patients and must not conflict the nature of the NHS brand.

Contestability will facilitate genuine choice for patients as this will decrease monopolies within the local healthcare landscape which may arise from G.P. consortia, the PCT Provider arm or from acute trusts.

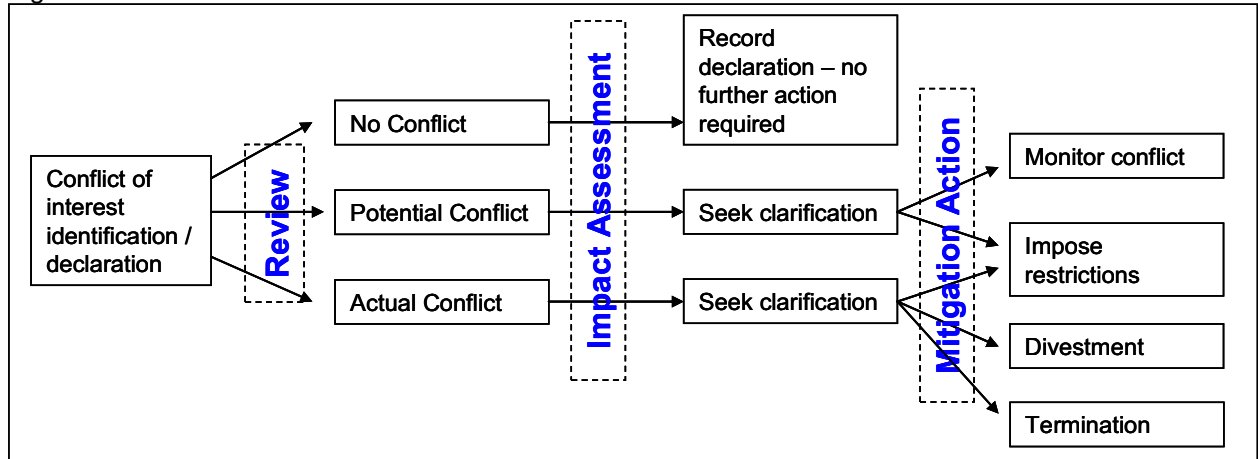
#### **9. The PCT shall uphold the principles of the Department for Health's Willing Provider models**

Please see the "Any willing provider and Any willing PCT provider policies" for further details.

## Appendix F: Reviewing and Managing Conflicts of Interest

A framework below outlines the process that WSPCT will follow in situations where a conflict of interest (CI) arises.

Figure C-1: Conflict of Interest Decision Tree



The decision tree above contains the following steps:

- Identify the CI / receive a declaration;
- Review the identified/declared CI and decide whether:
  - There is an actual CI (e.g. a bidder may declare that they are currently delivering services under a GMS contract and will bid for new services, in which case this would not be seen as a CI for the procurement);
  - A CI may materialise in the future but it does not currently exist (e.g. a clinical advisor/GP is advising the PCT on service specifications and has the intention of getting involved in a bidding organisation); or
  - A CI does exist (e.g. a PCT bid evaluator is related to the bid lead in a bidding organisation)

The impact of any CI on the procurement (with specific focus on fairness and transparency) needs to be considered to inform actions to be taken. In many cases, PCTs will need to seek further clarification before making a decision on the line of action.

Various actions can be taken to manage a CI and these will be particular to the specific CI. These actions are broadly categorised as:

- Monitor the situation – this may be most appropriate if there is the potential for a known conflict to materialise and it is currently premature to take any action or where it may be too late in the process to implement any corrective action;
- Restrictions may need to be placed on, for example, certain individuals or specific bidders may be restricted from participating in PCT procurement schemes – restrictions may be time limited;
- Divestment of assets by the conflicted individual. If the CI is identified early, PCT Officers may be given the option of either resigning from their PCT role or to divest their financial interest in a bidder organisation; and
- Termination of the procurement may need to be considered where a material CI has occurred and has substantially increased the procurement risk – legal advice and PCT Board approval must be sought if this option is pursued.

WSPCT retains the right to exclude any Bidder from the procurement, where there is a material CI and there are no other appropriate mitigating actions which could be adopted. WSPCT will ensure that it is clear that a chosen mitigation action will be effective. Where

doubt exists over the effectiveness of a mitigation action, WSPCT will pursue a safer option of implementing restrictions and excluding bidders from the process where required.

Experience from previous DH procurements, and the nature of the primary care delivery market (i.e. strong link between commissioners and providers), show that many bidders may have CI in some form or other. However, if all such bidders were excluded from the bidding process, PCT procurements may become unviable because of a lack of competition. Therefore, the approach to managing conflicts during the procurement process will be to deal with each conflict on a case-by-case basis, within the parameters set by procurement law. The concerns around CI will be set against ensuring sufficient bidder participation.

The PCT's approach for dealing with each type of CI is for conflicts to be considered in a fair and transparent manner that can be documented and audited by the PCT and/or an independent review panel.

## Appendix G: Legality of contestability

Historically, clinical services did not fall within the remit of competition law. However market inclusion of a variety of providers through market plurality deems this status increasing untenable. A major challenge will be to ensure that the principles of a level playing field are enshrined in all areas of health reform.

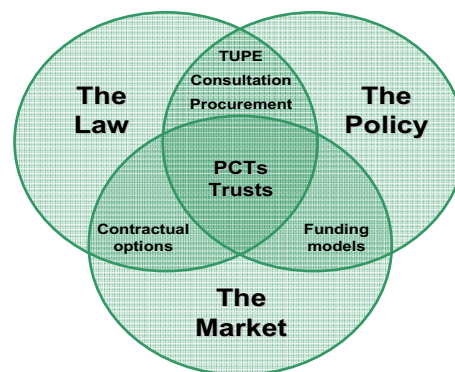
Thus, it is imperative to maintain competitive neutrality. This entails a commitment to fair markets with emphasis on a level playing field between all parties (public, private and third sector). Competitive neutrality is especially significant in the public sector; if public, private and third sector providers compete with unfair advantage, public spending will be directed away from the most efficient provider and importantly, away from the public's best interest.

The hierarchy of competition laws are based on the supremacy of the European Union (EU) law which is designed to safeguard a free market between EU member states. If the competition laws begin to impact health, then the NHS needs to adhere to these principles:

- Fair, non discriminatory procurement of services by commissioning bodies;
- Fair competition, enablement of minimising barriers to entry and discouragement of anti-competitive conduct;
- Management of issues around 'state aid', access to patient information and other essential facilities which could threaten the level playing field; and
- Establishment of an institutional framework which has an independent regulator to deal with health specific competition issues.

It is imperative to understand that contestability encompasses the three large sectors of government policy, health care markets and the law and that the position of the PCT is firmly entrenched between all three (see Figure D-I).

<sup>10</sup>Figure D-I: The major factors involved in contestability



Source: NHS Elect website [www.nhselect2.org.uk](http://www.nhselect2.org.uk)

<sup>10</sup> A fair field and no favours: Competitive neutrality in UK public sector service markets. CBI & The Serco Institute, January 2006

## Appendix H: State Aid

A tenet within the European Commission treaty states that financial assistance granted through state resources in a form that distorts (or threatens to distort) competition by favouring certain undertakings could constitute unlawful State aid. State aid encompasses any economic advantage that could not have otherwise been obtained under normal market conditions. Loans, loan guarantees, favourable taxation treatment and indemnities against trading losses fall under the umbrella of State aid.

Previously, the funding available to UK NHS hospitals has not fallen within EU state aid rules. However, as NHS services become open to contestability, Department of Health funding for these trusts has become subject to scrutiny under the state aid rules. In the context of health reforms, the following are of relevance with respect to state aid:

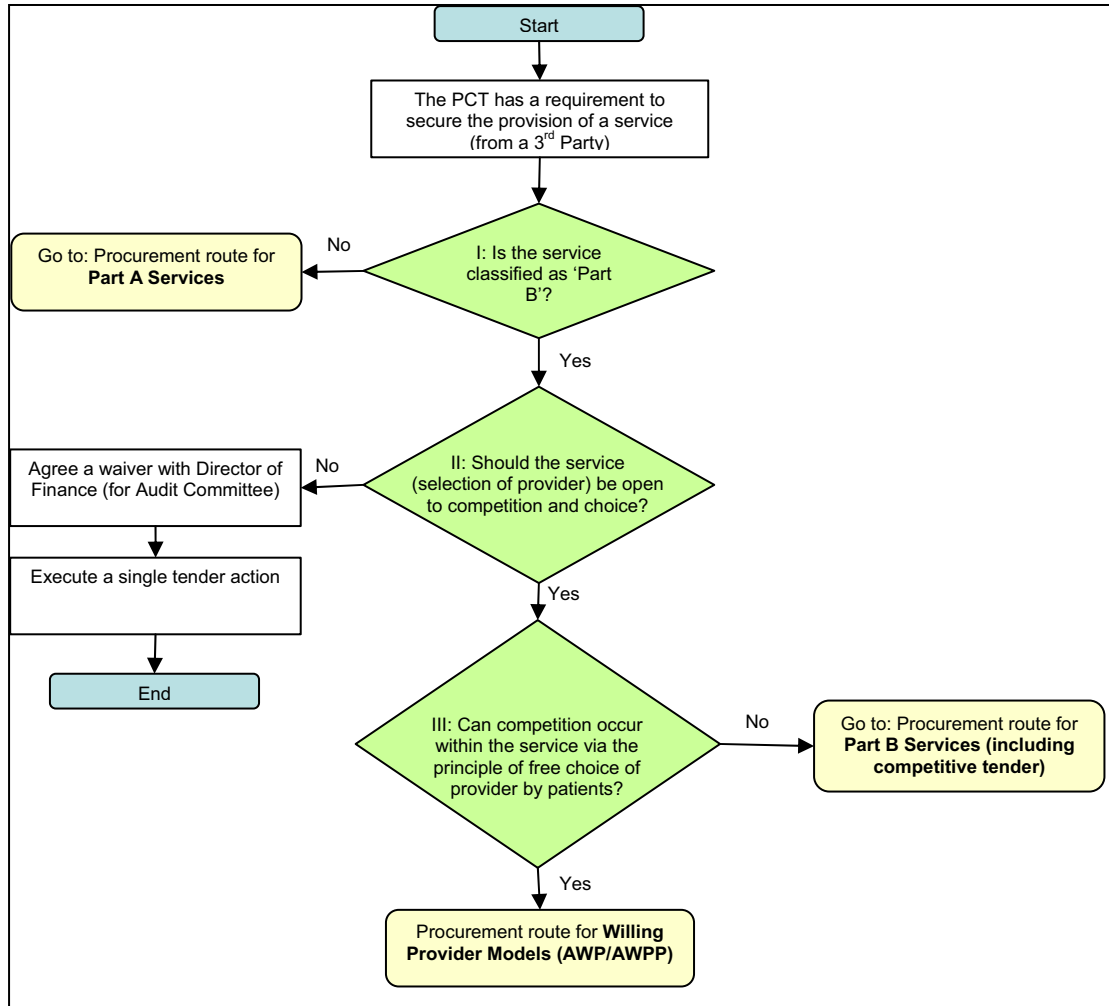
- Price – Trusts that can provide a service significantly below a fixed NHS tariff could be viewed as receiving State aid if the margin they earn is ‘unreasonable’;
- Central budgets – Many trusts have a variety of income streams external to those directly linked to PCT commissioning of patient care e.g. training for doctors, research and development. They may also receive free goods i.e. Oracle licenses;
- Financial regimes – Trusts operate under a financial regime that may offer a lower cost of borrowing than the private sector; and
- Accounting – Trusts do not currently prepare accounts that explicitly demonstrate the extent to which they deploy resources provided for the performance of their public service obligations in their commercial activities.

State aid, which has not been notified, is unlawful and open to challenge. The consequences of unlawful State aid can be severe; the European Commission or national courts may order all aid (including interest) to be recovered.

The ‘historical funding’ extended to NHS providers, relating to a period where there is no competition involving the service in question is unlikely to constitute ‘state aid’. However, if contestability is introduced, any ongoing advantages for NHS providers may constitute existing aid. In this situation, it would be open to the European Commission to decide that there is illegal State aid.

## Appendix I: Decision Tree for Routes to Market

Figure I-A: Decision tree for procurement route to apply

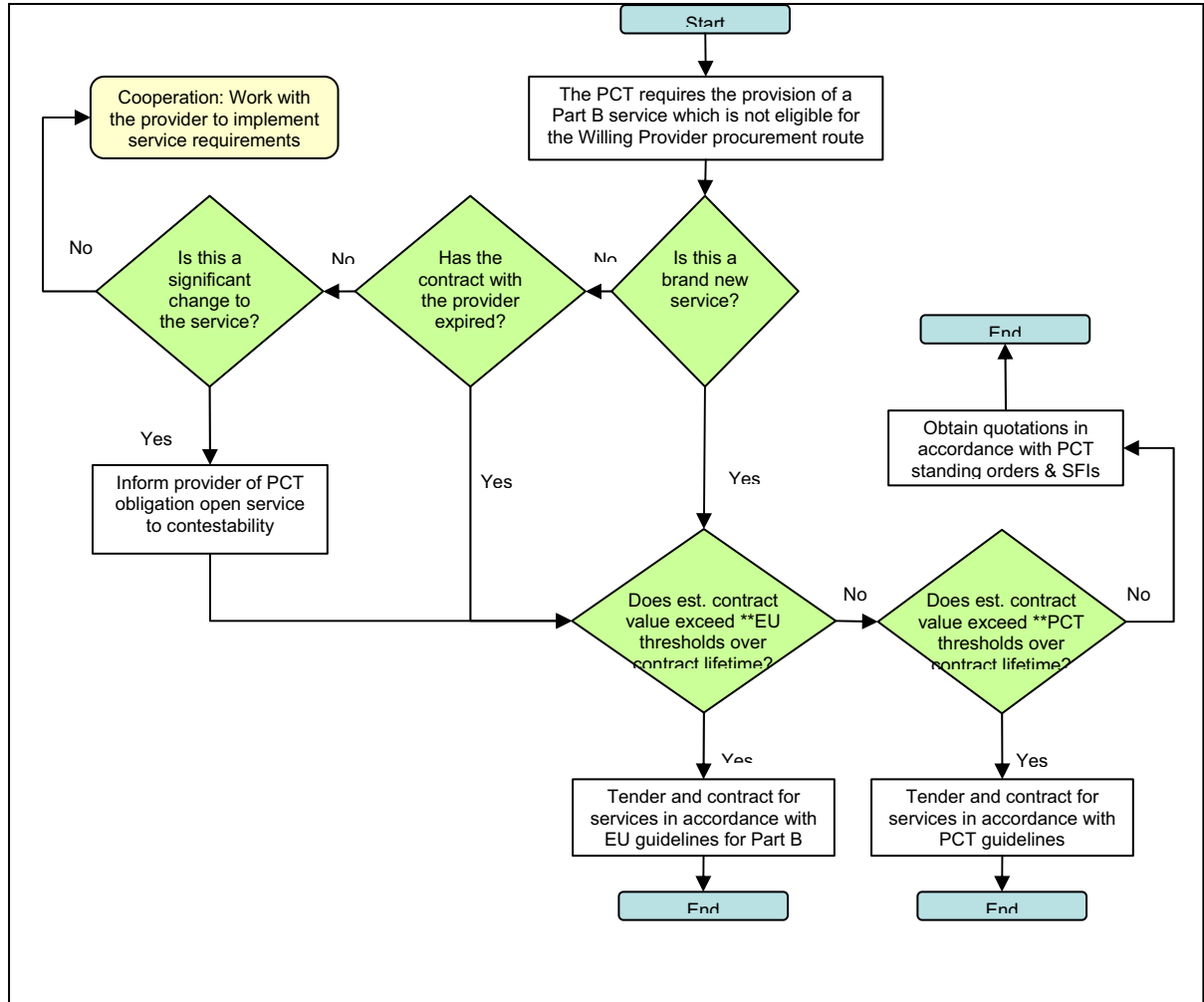


### Notes on decision points

- I: The EU regulations classifies services as Part A or Part B (see Appendix D)
- II: There may be instances where the PCT believes that a service is not eligible for contestability. However such instances will be handled on a case by case basis. See section 3.5 and section 3.6
- III: See section 3.5 and section 3.6

**Procurement route for Part B Services**

Figure I-B: Decision tree for Part B Services including competitive tender (follows on from decisions taken in figure I-A)



Notes on decision points

- \*\* The EU thresholds are described in Appendix D; the PCT thresholds are outlined in Section 4.5 and in the PCT’s Standing Orders and Standing Financial Instructions.

## Appendix J: References and Sources

### National policy documents:

- NHS Constitution
- NHS Operating Framework 2008/9 and 2009/10
- High Quality Care for All: The next stage review final report, Department of Health, June 2008
- Framework for managing choice, cooperation and competition, Department of Health, May 2008
- PCT Procurement Guide for Health Services, Department of Health, May 2008
- Transforming Community Services: enabling new patterns of provision, Department of Health, Jan 2009
- Competition and Cooperation Panel consultation

### Local policy documents:

- South East Coast SHA: Healthier people, excellent care
- West Sussex PCT Commissioning Plan
- JSNA
- Fit for the Future consultation
- North East Review

### Other documents:

- Market management strategy, Tribal Newchurch and WSPCT, June 2009
- Procurement strategy, Tribal Newchurch and WSPCT, June 2009
- Any willing provider policy, Tribal Newchurch and WSPCT, June 2009
- Any willing PCT provider policy, Tribal Newchurch and WSPCT, June 2009