NHS
Protect

Pre-contract procurement fraud and corruption

Guidance for prevention and detection

Version 1.0 – March 2013

Tackling fraud and managing security

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1 Introduction

1.1 This document provides Local Counter Fraud Specialists (LCFSs) with guidance which can be used to support work to prevent and detect procurement fraud and corruption at a local level. The focus of the document is on pre-contract fraud and corruption. It reflects our current understanding of the key threats facing the NHS in these areas. This document is intended to supplement existing polices, directives and guidance available more widely in the NHS by providing an overview of the pre-contract procurement process from an anti-crime perspective.

1.2 This document has eight further sections:

Section Two outlines the NHS procurement environment and discusses the context to the threats described in this document.

Section Three provides basic information on the key procurement standards and guidelines affecting NHS procurement.

Section Four provides an overview of the generic risks faced from breaches to health body Standing Orders, Standing Financial Instructions and EU public procurement directives.

Section Five looks at the concerns surrounding conflicts of interest.

Section Six focuses on bribes and kickbacks.

Section Seven looks at the dangers of false quotations and tenders.

Section Eight discusses manipulating the tender process.

Section Nine explores the area of contract splitting.

1.3 While this document largely focuses upon individual threats, there are four clear strands which combine to form the foundation for effective anti-crime work in the area of procurement. These are: adhering to core standards, recording decision making, separating the core procurement duties and developing firewalls, and effective fraud reporting and investigation.

Adherence to core standards

1.4 It is a long established principle that public sector bodies must be impartial and honest in the conduct of their business and that their employees should remain beyond suspicion. The building blocks for the maintenance of these standards in the area of procurement are the policies, standards, regulations and directives that govern it.

1.5 A fair, open and transparent procurement process demands that any staff involved in undertaking or reviewing it (not only those in procurement departments or those regarded as procurement professionals) are adequately trained to fulfil their function. This training should include anti-fraud, corruption and bribery elements. Through adherence to core procurement standards, the risk of poor practices entering into business as usual can be avoided. Furthermore, an organisational culture that fails to maintain procurement standards can be seen to undermine the confidence that staff, patients, public regulators and contractors alike have in the health service.

Recording decision making

1.6 Good procurement processes require an auditable trail of why and how decisions are arrived at. The need for this is succinctly expressed by the Organisation for Economic Co-operation and Development (2007):

> *Accurate written records of the different stages of the procedure are essential to maintain transparency, provide an audit trail of procurement decisions for controls, serve as the official record in cases of administrative or judicial challenge and provide an opportunity for citizens to monitor the use of public funds. Agencies need procedures in place to ensure that procurement decisions are well documented, justifiable and substantiated in accordance with relevant laws and policies in order to promote accountability.*

Separation of duties

1.7 Public sector procurement should be conducted without favour or prejudice. Assurance can be brought to the procurement process through appropriate separation of duties. There should be clear separation between budgetary authority and procurement authority. Furthermore, it is recommended that there should be an appropriate separation of duties within the procurement cycle between those who draw up tender specifications, those who invite bids, and those who evaluate the bids and award contracts. These separations of duties should be aimed at safeguarding against impropriety and thereby ensuring achievement of value for money.

1.8 Another method for controlling internal risk, complementary to separation of duties, is the application of the 'four-eyes' principle, which ensures the joint responsibility of two or more people for key decision making.

Fraud reporting and investigation

1.9 There should be effective fraud reporting arrangements in the health body so that all staff know how they can raise concerns. In particular those close to the procurement process should feel free to report any concerns they have regarding bribery, fraud, and conflict of interest without fear of reprisal. It is strongly recommended that NHS Protect's own independent Fraud and Corruption Reporting Line is actively promoted. While LCFSs, supported by their Area Anti Fraud Specialist (AAFS), are likely to have a pivotal role in scoping emerging concerns and supporting investigations opened by NHS Protect, they do not have the authority to open or lead bribery and corruption investigations.

1.10 The NHS Fraud and Corruption Reporting Line number is 0800 028 40 60.

2 The NHS procurement environment

The regulatory framework

2.1 Standards and policies for public sector procurement in the UK are set by the Efficiency and Reform Group (ERG) of the Cabinet Office, which was formerly known as the Office of Government Commerce. The ERG's policy and standards framework aims to promote fair, open and transparent competition for business and mitigate the risk of fraud and unlawful procurement practices.

2.2 Public procurement in the UK is governed by the EU Treaty, the EU Procurement Directives and the UK Procurement Regulations (which implement the Directives). This legal framework is provided to ensure public procurement is conducted in a fair and transparent manner both within the UK and across the EU. The EU procurement requirements must be followed, in addition to the UK procurement regulations, in cases where the value of the procurement is over a certain monetary threshold.

The NHS procurement lifecycle

2.3 The procurement process can be divided into two core stages. These are *pre-contract* and *post-contract award*. The lifecycle below illustrates a typical procurement process as defined by the ERG. This process applies to health bodies as public sector entities and is outlined in more detail in its individual steps below.

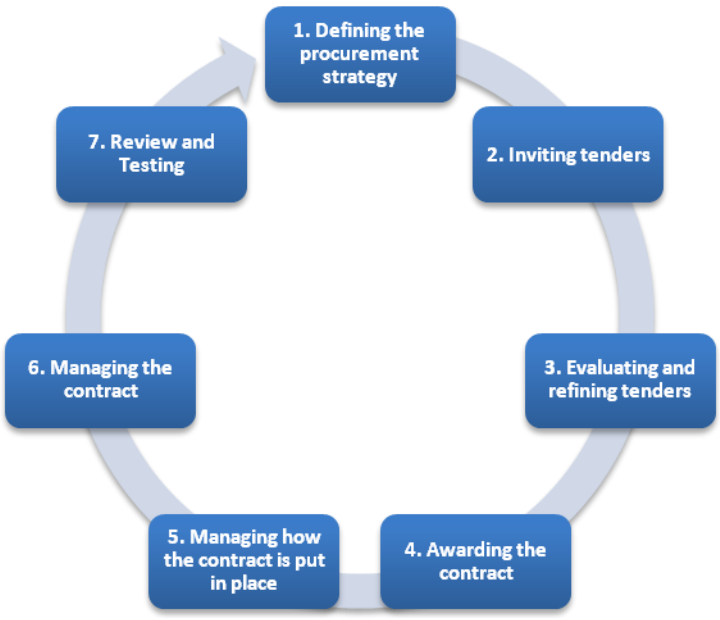

Fig. 1: The procurement lifecycle

2.4 Pre-contract award phase

- Defining the procurement strategy

  The health body defines its aims, decides what is needed, prepares the business case and then decides how the procurement exercise will be carried out. It will take account of market conditions, legislation and public sector policy.

- Inviting tenders

  The health body invites suppliers to submit expressions of interest, offers or tenders, often by an advert in the Official Journal of the European Union (OJEU) or a trade magazine. In some cases, suppliers have to meet certain criteria and 'pre-qualify' before being invited to tender. They do this by answering a questionnaire which includes their financial status, previous experience and references.

- Evaluating and refining tenders

  The health body evaluates the tenders against set standards relating to value for money and, if required, clarifies the tender with the supplier.

- Awarding the contract

  The organisation awards the contract to the supplier whose bid represents best value for money.

- Managing how the contract is put in place

  Everyone involved works together to put operations in place for the forthcoming contract to be implemented successfully.

2.5 Post-contract award phase

- Managing the contract

  The supplier and the organisation manage the contract and the supplier's performance is checked and monitored by the organisation.

- Review and testing

  The contract will be reviewed regularly and, after a set period of time, it may be advertised again.

3 Key NHS procurement standards and guidelines

3.1 The information contained in this section is intended only as a guide and, as such, it should not be relied upon as comprehensive.

3.2 Standing orders (SOs), together with standing financial instructions (SFIs), provide a framework of rules for the business conduct of the health body. They fulfil the dual role of protecting the health body's interests (ensuring, for example, that all transactions maximise the benefit to the health body) and protecting staff from the accusation that they have acted less than properly (provided, of course, that staff have followed the correct procedures outlined in the relevant document).

3.3 All Executive Directors, non-Executive Directors and members of staff should be aware of the existence of these documents and, where necessary, be familiar with their detailed provisions. All SOs should encompass the operational requirements for tendering and contract procedures, although details may vary to some extent.

3.4 SFIs set a financial threshold above which competitive tendering should be sought. This is set by the health body and should be reviewed annually. While there may be good reasons why competitive tendering is not sought in particular cases even above the threshold, the reason for this decision must be recorded. The limited application of single tender rules should not be used to avoid competition, for administrative convenience or to award further work to a contractor originally appointed through a competitive procedure.

3.5 Formal tenders are very different from quotes. This is because the formal invitation to tender includes a written explanation of the health body's requirements as well as legal terms and conditions. Further, it requests information which will allow the health body to assess factors other than price before awarding the contract.

3.6 Where it has been decided to put goods or services out to tender, this information should be recorded in the health body's register of tenders. Once all tenders have been opened and evaluated against pre-determined criteria, which will identify the weight given to various components of the offer, the winning tender will be selected on the basis of value for money. Records of these processes can typically be found within the health body's purchasing department. In smaller health bodies they may be maintained by the finance department.

3.7 All contracts should be awarded to the candidate whose proposal offers the best value for money. While there may be good reasons why the tender with the lowest price has not been awarded the contract, these should be recorded and maintained.

3.8 Many health bodies have local procurement policies that complement their standing orders and must be adhered to when undertaking procurement. While these local policies are likely to share many elements with those of other health bodies, individual roles, functions and opportunities to exercise discretion may vary. This diversity is likely to make direct comparisons complex. However, procurement conducted outside of local policies is unlikely to be in the interests of a health body.

3.9 The EU Public Procurement Directives require all public bodies in the EU, including NHS health bodies, to provide details of proposed procurements over certain financial values. This is to ensure compliance with the EU Treaty, which ensures open and fair competition, and it is a mandatory legal requirement. These details are

published as adverts in the OJEU. This allows all companies replying to an advertisement to have an equal opportunity to express an interest to tender.

3.10 The EU sets the value of contracts above which tenders must be published in the OJEU on a two-year cycle. The UK legislation for this process is set out in the Public Contracts Regulations 2006. The values are known as the 'thresholds' and refer to the total value of the contract. As the central thresholds are set in Euros (€), the thresholds in pounds sterling depend on the exchange rate at the time the thresholds are set. Under the current EU procurement thresholds for 2012-13, the NHS must advertise all contracts with a total value over €130,000 / £113,057 (for supplies and services) or €5,000,000 / £4,348,350 (for works, i.e. the outcome of building or civil engineering).

3.11 Although below-threshold contracts are not caught by the regulations, UK case law exists to say that where a contract is of 'certain interest' to suppliers located in other EU members states, contracting authorities must still run the procurement for it in line with the general EU procurement principles of non-discrimination, equal treatment, transparency, proportionality and mutual recognition. What these principles imply in practice is that the contract has to be adequately advertised and some form of fair competition for it must be run.

3.12 After publishing the tenders in the OJEU, one of the following four procedures is followed:

a) **The open procedure**

This is available in all circumstances and involves a single-stage approach where all candidates may respond and submit a tender. However this does not necessarily mean that everyone's tender will be evaluated. The health body can evaluate all tenders if it wants to do so, but it can also decide only to evaluate the tenders of those candidates who meet any selection criteria that the buyer may have set. The selection criteria must be known and decision-making should be auditable. This procedure is used where there are a limited number of suppliers, or where health bodies are not familiar with the market they are dealing with.

b) **The restricted procedure**

This is available in all circumstances and involves a two-stage process where interested candidates may express an interest in tendering for the contract but only those meeting the health body's selection criteria will actually be invited to do so. Candidates who get shortlisted in the selection stage will then submit a tender when invited to do so by the health body. This procedure is used where there are many suppliers and the health body wishes to restrict the number of companies it invites to tender to those most suitable/capable of delivering the works, goods or services required. It also makes the process more manageable. A minimum of five candidates should be invited to tender.

c) **The negotiated procedure**

This procedure is for when the customer does not have the skills to create a technical specification and so seeks expertise on available options from the market. It means that more than one tender 'solution' can be offered and therefore the evaluation scoring becomes output-based. Care is required to ensure the technical specification does not unjustly favour a particular supplier. The negotiated procedure should only be used in very rare circumstances, where there

are clear reasons why another one is not appropriate. Circumstances where it may be appropriate to use this procedure are detailed in the Public Contracts Regulations 2006: **http://www.legislation.gov.uk/uksi/2006/5/contents/made**

d) **Competitive dialogue**

This is a relatively new procedure, which has the advantage of allowing the input of those participating in the tender process. All interested candidates may express an interest in tendering for the contract but only those meeting the health body's selection criteria will actually be invited to do so. This procedure is used where the outcomes from the tendering exercise are important and health body wishes to use ideas from the marketplace to influence the service specification or design of the service required. During the dialogue candidates are able individually to discuss all aspects of the contract with the awarding health body. A minimum of 3 candidates should be invited to tender.

3.13 The time-consuming and costly process involved in the open and competitive dialogue procedures, combined with the limitations of the negotiated procedure, means that the most commonly used procedure is the restricted one. Where the restricted procedure is used, the health body must allow a minimum of 37 days from the date the OJEU notice was given to the closing date for expressions of interest. After short-listing, a minimum of 40 days must be allowed for offers to be returned – although this may be shortened to 26 days if a 'Prior Information Notice' (PIN) has been published in the OJEU.

3.14 Tender specifications following procurement best practice will contain evaluation criteria by which bidders and evaluators alike are able to determine both essential and desirable components. EU law requires health bodies to state the scoring mechanism and to explain how a bidder can achieve maximum marks. The scoring mechanism will contain both quantitative and qualitative elements which must be clearly defined.

4 Breaches of SOs, SFIs and EU public procurement directives

4.1 Standing orders, standing financial instructions and EU public procurement directives are issued for the regulation of conduct. They are designed to ensure that the financial transactions of public bodies are carried out in accordance with both law and government policy.

4.2 Spend that has not received the correct authority or has taken place outside an authorised contract is called 'maverick spend'. In itself, the presence of maverick spend does not indicate that corrupt activities have taken place. Maverick spend, either intentional or unintentional, nonetheless opens up various opportunities for short-cuts, reduced scrutiny and collusion that would not be present if the correct procedures were followed.

4.3 Over time the number of EU and UK regulations and guidelines has grown, creating the perception in some quarters that public procurement is an excessively bureaucratic process. Claims that breaches of SFIs have been carried out in the best interest of a health body should always be viewed with caution. An organisational culture that allows poor procurement practices to enter into 'business-as-usual' exposes purchasers to preventable losses or increased costs and severely limits the possibility of criminal prosecution where wrongdoing has occurred.

4.4 The most common breaches of procurement processes identified from NHS Protect experience are:

- no tender process adopted at all
- inappropriate use of tender waivers
- undervaluation of the contract
- splitting contracts with no rationale
- negotiation with one supplier contrary to the rules of the procurement process being adopted
- negotiation of key contract issues post award
- failure to keep or publish evaluation criteria
- vague specification criteria
- failure to receive a sufficient number of bids
- failure to provide a rationale for the selection of certain bidders chosen to be invited to tender/quote.

4.5 The common justifications for preferring a supplier are satisfactory performance, working with known and trusted faces and the requirement for speed, although these may be a cover for corrupt transactions (Søreide 2002).

4.6 Failure to comply with SFIs and EU procurement directives can be regarded as a disciplinary matter that could result in dismissal. It may also lead to a procurement exercise having to be re-tendered. It is a corporate offence under the Bribery Act 2010 for an organisation to fail to prevent active bribery (i.e. promising or giving a financial or other advantage) by not having adequate preventative procedures in place.

Preventing breaches of SOs, SFIs and EU public procurement directives

4.7 It is incumbent on NHS bodies to have appropriate governance arrangements which will enable them and their boards to discharge their financial responsibilities. These arrangements will assist in good governance, leading to transparency in the policies adopted, the decisions made and the process used to arrive at a decision. Health bodies should also make sure that staff involved in procurement processes are aware of these arrangements, and stress to them the importance of ethical behaviour in their role of public servants. This should be supported by adequate training and opportunities to receive advice on ethical dilemmas. The seven principles of public life, known as the Nolan principles, can be accessed from **http://www.archive.official-documents.co.uk/document/parlment/nolan/nolan.htm**

4.8 The following measures can contribute to both effective governance and the target-hardening of health body procurement processes:

4.9 **Process**

- Encouraging the use of e-procurement systems so that the various stages of the procurement process are transparent and auditable. These systems can limit the interaction with potential suppliers, especially during negotiations. This limits the opportunities for bias and corruption to emerge.
- Having robust procurement project plans setting out key roles and responsibilities, the outcome of risk assessments and plans to address identified risks.
- Documenting decisions and providing a clear rationale for the choices made.
- Demonstrating transparency in the process by posting in advance procurement schedules and plans, advertisements and contract award notices.
- Ensuring that the health body's 'contracts register' is kept up to date.
- Promoting the effective use of business interests registers among staff involved in procurement decisions in health bodies and raising awareness about conflict of interests and hospitality guidelines.
- Providing clear written instructions and procedures for staff involved in procurement.
- Following the recommendations of the National Fraud Authority's Procurement Fraud Working Group, by considering the assessment of fraud and corruption risks against the Chartered Institute of Public Finance and Accounting's (CIPFA) Contract Audit Toolkit. The toolkit is designed to assist auditors in detecting and mitigating risks during their audits of procurement and contract management. It is available at a small cost from **http://www.cipfa.org/Policy-and-Guidance/Publications/C/Contract-Audit-Toolkit**
- A fair and transparent process for handling supplier complaints.

4.10 **Personnel**

- Ensuring that changes to procurement regulations or internal policy are communicated promptly to appropriate staff.

- Ensuring that staff involved in procurement have the necessary skills and experience to undertake the task required of them.
- Introducing clear separation of duties among staff involved in the different stages of the procurement process.
- Rotating procurement staff between contracts to prevent the possibility of improper relationships developing over time.
- Providing those involved in conducting or reviewing procurement processes with an understanding of the key fraud and corruption issues, and of how they can report any concerns that may arise.
- Taking action against staff found breaching procurement regulations and procedures.

4.11 **Assurance**

- Ensuring that procurement decisions are subject to proper scrutiny and do not merely rely upon the assurances of staff involved in the process.
- Using gateway reviews to assess and consider fraud and corruption risks to the procurement process.
- Reporting on procurement activities to the Director of Finance and Audit Committee on an annual basis.
- Deterring wrongdoing by implementing and being seen to administer checks to the procurement process.
- Having an independent complaint, review and resolution system in relation to suppliers who believe the procurement process conducted has not been fair or transparent. Complaints should be dealt with separately from those involved in the procurement.
- Ensuring those on the Audit Committee and any governance groups have sufficient understanding of the procurement process to enable meaningful scrutiny to take place.

Detecting breaches of SOs, SFIs and EU public procurement directives

4.12 It is recommended that breaches of SOs, SFIs and Directives are reported through an escalation process which includes informing the LCFS, Director of Finance and Audit Committee. Informing the LCFS enables them to determine whether or not enquiries are necessary to establish if wrongdoing has occurred. All action should be documented and proportionate to the risk identified.

4.13 The LCFS will need to liaise with all relevant groups that are informed of any breaches of SFIs and procurement regulations. These may include internal and external audit, Audit Committees, procurement departments, the Finance Directorate and any Capital Investment Committee or relevant governance group. Relevant governance groups such as the Audit Committee should also be able to challenge the way decisions are made and the reasons given for them, ensure the appropriate processes have been followed and establish the reasons for non-compliance and their validity. In some circumstances, an audit may be required to establish in more detail what breaches of the tender and procurement process have taken place. This

will usually include an assessment of the historical and future value of the works being procured.

4.14 The LCFS should ensure that the health body has followed robust policies for informed decision making and procurement. These will include:

- a robust business case for the proposed procurement
- a system for overseeing single tender waivers
- a process for preparing tender documentation
- a clear evaluation process which includes appropriate scoring and assessment of 'value for money'.

4.15 There are a number of key areas and indicators that the health body and the LCFS should consider. This may assist them in determining the level of risk that specific breaches of SOs, SFIs and procurement regulations pose for the health body. Factors to be taken into account include:

- The percentages of non-pay spend influenced by procurement professionals. The health body should determine and document what degree of influence from the procurement department is appropriate to each level of spend. An example of good practice seen by NHS Protect sets the following levels of influence for different levels of spend:
  a) For spend between £10,000 and £50,000, the procurement department obtains written quotations using a health body template.
  b) For spend from £50,001 to the OJEU threshold, the procurement department conducts a sealed bid tender with a minimum of three suppliers.
  c) For spend over the OJEU threshold, the procurement department completes a formal OJEU tender process.
- Levels of procurement influence at different stages of the procurement process. These need to be set out across the health body to ensure good practice is maintained. This can involve the procurement department's role in overseeing the appropriate advertisement and invitation to tender, agreeing the specification and evaluation criteria as well as being involved in project team membership and holding the tender documentation for future audit requirements.
- The values of individual supplier spend for contracts not influenced by procurement professionals. What are the reasons for the expenditure being outside the influence of the procurement department and are there good reasons and controls around the process and spend incurred?
- The percentages of non-pay spend covered by contracts. It is good practice for procurement to maintain a contracts register to assist in the good management of the contracts and to plan for future procurement requirements.
- The value of non-compliant spend (spend without contract). There should be regular monitoring of individual suppliers, with a corrective action plan and an identified business/procurement lead responsible for implementing it.
- The percentage and amount of spend with no purchase order. Reports should be run to identify payments where no purchase order has been raised. The reports should be considered to determine the reasons and to ascertain whether there are any units not following correct procedures.

- The number of incidents of non-compliance with procurement policies and standards.
- The number of legal challenges.
- The percentage, number and value of single tender procurements.

4.16 The LCFS should examine the use of 'pilot' projects. Pilots can be used to circumvent procurement regulations and are a way to introduce a supplier into an organisation. Once this happens, 'contract creep' can develop and the supplier's position in the health body becomes stronger. The use of pilots should be examined, especially when it results in high value work being awarded to the supplier involved.

4.17 When a specific breach has been identified, the LCFS may wish to examine the procurement process cycle to ascertain in what areas it did not follow a proper procurement route and the reasons given for that. The rationale for action (e.g. the justification given for a tender waiver) should be looked at objectively and the extent of any challenge by the relevant oversight function at the health body (e.g. Audit Committee) should be examined.

4.18 Where any breaches have occurred it may be necessary to examine whether legal opinion has been sought and whether the legal opinion is from the usual legal representatives of the health body on procurement matters. For example, there have been examples of health body staff representatives using the same legal adviser as a potential supplier in order to influence and legitimise decisions on bids by that supplier.

Case example - Breaches of SOs, SFIs and EU public procurement directives

Allegations were received that a Director of Finance (DoF) in collusion with two consultants acted both with impropriety and against the interests of their NHS health body. There were numerous breaches of the health body's Standard Operating Procedures and of EU procurement rules.

A concept for selling and leasing back health body assets was floated to the Board by the DoF. With tentative agreement from the board that the proposal should be explored, the DoF engaged two consultancy companies to advise whether or not the health body should proceed. Representatives of both consultancy companies were believed to be personal friends of the DoF. There was no tender process undertaken to engage either of the consultants.

The two consultants advised that the health body should proceed. This was put to the board, which subsequently agreed. The tender process was driven with extreme haste, disregarding the stringent timelines and requirements for public sector procurement contracts. There was an inappropriate use of the 'accelerated restricted' procedure. While the total value of the contract was over £50m, the DoF's timings allowed only twelve working days to scrutinise, evaluate, interrogate and address issues raised by the submitted tenders. A specification had not been fully prepared and developed and this resulted in the bidders being unable to bid in a uniform manner. It was thus impossible to compare bids. There

was very little documentation to support a robust or fair selection process when the successful bidder was awarded the contract.

The contractual process required a valuation of the health body assets transferred in the contract. An independent valuation of these assets was organised by the DoF. In a clear breach of both the health body's Standard Operating Procedures and directions from the Board, the DoF appointed a company to perform the valuation. The company was linked to the winning bidder.

The contract contained a clause which required the health body to buy back assets at the end of the contract. This was not referred to in the original specification and contract terms and was negotiated post-award. The value of the 'buy back' element also required board approval and had serious implications for the value for money achieved by the health body. Board approval was never sought and the contract was implemented.

After concerns were raised, a truly independent valuation of health body assets was undertaken. Health body assets were found to have been significantly overvalued in the previous valuation. The impact of this was that the cost of leasing and maintaining the assets in return for the next 12 years were significantly greater for the health body than they otherwise would have been. It was found that the health body could have saved around £21 million over the lifetime of the contact had an open and transparent procurement exercise been undertaken.

The DoF left his role shortly after the contract was signed. No prosecutions were possible in this case, and a major contributing factor for this were the failings of the board in terms of oversight and good procurement practice.

5 Conflict of interest

5.1 A conflict of interest can arise during any stage of the procurement process and exists where an individual has an economic or personal interest in a transaction. When a conflict of interest arises, it is the responsibility of the health body to manage that conflict and ensure that it does not impact on a fair and transparent procurement.

5.2 A conflict of interest might occur due to the possibility of individuals having:

- a direct financial interest
- an indirect financial interest
- a non-financial or personal interest
- a conflict of loyalties.

There may also be a negative interest that needs to be declared, as it may mean someone will not be impartial to a certain company (e.g. for personal reasons).

5.3 The NHS has long-established processes for managing conflict of interest situations. These are reflected in the model Standing Financial Instructions issued by the Department of Health to NHS bodies. These provide a recommended framework for the declaration of relevant and material interests and the maintenance of a 'register' for them. These standards of conduct exist in recognition of the reality that mixed loyalties may lead individuals to make decisions that are not in the interests of the NHS or its patients, but in their own or others' interests. While establishing and running systems and processes for managing conflicts of interest is just one aspect of good governance, a failure to acknowledge, identify and address a conflict of interest may result in poor decisions, legal challenge and reputational damage.

5.4 A conflict of interest can lead to bias and corruption in the bid evaluation and approval processes. Bias can be said to have occurred when a fair minded observer, having considered the facts, would conclude that there was a real possibility of it occurring. A person who dishonestly abuses a position that they occupy and is expected to safeguard the organisation's interests may also be guilty of the offence of fraud by abuse of position according to section 4 of the Fraud Act 2006. Even when bias does not occur, a lack of transparency in the declaration and management of a conflict of interest can lead to the perception that wrongdoing exists.

5.5 In the reformed NHS, clinicians will have a greater role in commissioning healthcare. In accordance with the Health and Social Care Act 2012, Primary Care Trusts (PCTs) and Strategic Health Authorities (SHAs) will be abolished by April 2013. Clinical Commissioning Groups (CCGs) will take over secondary and community care commissioning, while the NHS Commissioning Board (NHS CB), which will assume full statutory duties and responsibilities at the same time, will have responsibility for commissioning primary care and specialist national services.

5.6 The Department of Health will issue regulations, under section 75 of the Health and Social Care Act 2012, placing requirements on commissioners to ensure that they adhere to good practice in relation to procurement, do not engage in anti-competitive behaviour, and promote the right of patients to make choices about their healthcare. These regulations will build on existing rules and guidance and come into effect from April 2013.

5.7 The Department of Health has issued a 'Procurement guide for commissioners of NHS-funded services'. The document is available at:

http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_118219.pdf

The guidance states that medical practitioners must tell the commissioner and patients where a conflict of interest might apply in the referral of patients. This is in relation to a financial or commercial interest in an organisation to which the practitioner plans to refer a patient for treatment or investigation.

5.8 The NHS Commissioning Board has produced a code of conduct for managing conflicts of interest where GP practices are potential providers of CCG-commissioned services. The document is available from:

http://www.commissioningboard.nhs.uk/files/2012/09/c-of-c-conflicts-of-interest.pdf

Managing a conflict of interest

5.9 The following measures can contribute to both effective governance and the target hardening of health body processes against conflicts of interest:

Process

- There should be a clear Conflict of Interest Policy and Standards of Business Conduct which are well publicised and enforced. The policy should detail who should have to complete a declaration of interests and this should include staff or agents of the health body who may be involved in any way with procurement decisions. Staff (or agents) should disclose any interest that family and friends may have in any potential supplier. Staff (or agents) should not be involved in any part of the procurement process if they have a conflict of interest with any of the potential suppliers bidding. An ethical set of values and culture should be encouraged, which will assist in avoiding conflict of interest situations and help prevent bribery or a biased procurement process.
- In terms of commissioning healthcare, guidance issued by the Department of Health (2010) states that 'all tendering documentation should clearly state the commissioner's policy on managing conflict issues'. Prior to any decision to exclude bidders on conflict of interest grounds, care is needed as this decision could be challenged if the bidder can show they were excluded on grounds that are not consistent with the selection criteria. Each commissioner should have its own dispute resolution process and a policy for dealing with conflicts of interest. It is recommended that this includes a procedure for the exclusion of individuals from the procurement process on account of relevant interests.
- A register should be maintained in which conflicts of interest are recorded. Disclosure should be full and include the business interests of the family and close friends of those involved in the procurement process. The register must include 'nil returns'. A model declaration form is available in NHS Protect's Bribery Act guidance which is available on the NHS Protect secure site (**https://nww.cfsms.nhs.uk/Extranet/**).
- All potential suppliers should be required to declare any personal or family relations within the health body at the pre contract stage.

Personnel

- A sensible degree of separation of duties should exist between those administering and managing contracts, and those responsible for procurement or commissioning. This can assist in maintaining a 'firewall' between suppliers and purchasers.
- It is recommended that consultants engaged to assist in a procurement process report directly to a senior executive within the procurement team and have sufficient training and understanding of NHS procurement standards.
- Where a potential supplier is working with an organisation to assist in the development of a specification, care should be taken to integrate the views of more than one supplier. This will assist in avoiding specifications that are tailored to one particular supplier (see section 8). There should also be clear criteria as to how suppliers are selected to assist in drawing up specifications, and their involvement should be disclosed in any resulting procurement process.
- It is good practice to require consultants to sign a declaration which includes identifying any previous work with potential suppliers.

Assurance

- The register of interests should be regularly reviewed and submitted to the board or audit committee for scrutiny and publication.
- Audit should routinely check compliance with policies and procedures.

Detecting a conflict of interest

5.10 The detection of conflict of interest situations depends on having good governance arrangements and ensuring that a robust policy for managing this threat is adhered to. The following checks will assist in the detection of an undeclared conflict of interest:

- Identifying conflicts of interest not declared in the 'register of interest'; this will help determine whether or not a suspicion of fraud exists. Such instances should be monitored and action taken to determine the effectiveness of the organisation's response.
- Analysing information relating to supplier spend awarded by specific members of staff, and looking out for unusual and long-term patterns. Are individuals giving large amounts of work to certain suppliers, and if so, can this be justified?
- Ensuring that all allegations of a conflict of interest are recorded on FIRST. This process will allow the development of intelligence over time on issues which may not be immediately evident when considered in isolation.
- Carrying out pro-active checks of the register of interests and register of contracts. These checks can be made against both Land Registry (e.g. property ownership) and company information which are available in the public domain.

Case example – Conflict of interest

NHS Protect investigated a case of suspected corruption at a health body involving an external consultancy company (Company A). Company A's remit included seeking out potential partnership arrangements on behalf of the health body.

Company A began developing a business relationship with an overseas company (Company B). Company A entered into a contract with Company B to represent them in promoting a number of their products and services globally.

Company A subsequently promoted the benefit of a particular product offered by Company B to the health body. With the backing of the health body, Company A then ran an exercise to procure this type of product.

Two companies were shortlisted and invited to present their product, one of which was Company B.

It became clear that a representative from Company A had been central to the procurement and subsequent award of the contract to Company B. It was a clear conflict of interest as the two companies had a business relationship and their own contract binding them.

It was identified during the investigation that the representative from Company A had:

1) written the tender specification relying almost entirely on input from Company B
2) been centrally involved in the evaluation of the products from the two companies
3) negotiated the contract terms with Company B.

6 Bribes and kickbacks

6.1 In simple terms, a bribe is the giving or receiving of something of value to influence a transaction. A kickback is a form of 'negotiated bribery' (Wrage 2007) where a portion of the value of a contract is demanded by an official as a bribe for services rendered, for example securing the contract itself. For the purposes of the Bribery Act 2010, a kickback is equivalent to a bribe. The kickback might be said to vary from other kinds of bribes in that there is implied collusion between the two parties, rather than one party extorting the bribe from the other.

6.2 The Bribery Act 2010 defines bribery as giving or receiving a financial or other advantage in connection with the 'improper performance' of a position of trust, or a function that is expected to be performed impartially or in good faith. The term 'improper performance' means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. Bribery does not necessarily involve cash. In a procurement context, it might involve suppliers providing procurement staff with gifts, hospitality, holidays or promises of future employment or exclusive memberships in exchange for favourable treatment. In addition, the employee who is the beneficiary would usually omit to declare these transactions, which in addition to being illegal in their own right, also create a serious conflict of interest.

6.3 Those seeking bribes or giving kickbacks are seeking an unfair advantage. The immediate victims of bribes or kickbacks are therefore the firms that lose out unfairly and the procuring organisation, which may not receive best value for money. More widely, victims include the NHS, the government and society, which is undermined by a weakened rule of law and damaged social and economic development (MoJ 2012). Bribes and kickbacks generally degrade the proper operation of free markets. The Office of Fair Trading (2004) has highlighted that a process that is perceived as unfair could discourage companies from submitting tenders, may lead to increased contract prices as companies seek to balance the cost of illicit payments and may also facilitate collusion between contractors. The damage to an organisation's reputation should the corruption be uncovered is also significant.

6.4 The Bribery Act 2010 created an offence, under section 7, which can be committed by organisations which fail to prevent persons associated with them from committing active bribery on their behalf. An organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. It is a full defence for an organisation if it can demonstrate that, despite active bribery taking place, it had adequate procedures in place to prevent persons associated with it from bribing. An individual found guilty of bribery on indictment may face up to 10 years' imprisonment and an unlimited fine. An organisation failing to prevent bribery is punishable by an unlimited fine.

6.5 The Ministry of Justice has published detailed guidance about the procedures relevant organisations can put in place to prevent persons associated with them from bribing. A British Standard is now in place for health bodies to consider applying for (BS10500).

Preventing bribes and kickbacks

6.6 The following measures can contribute to both effective governance and the target hardening of health body processes against bribes and kickbacks:

Process

- Overall responsibility for the effective design, implementation and operation of anti-bribery initiatives should be at director level.
- Organisations should adopt a risk-based approach to tackling bribery and an initial assessment of risk across the organisation is therefore a necessary first step.
- Once risks have been assessed, organisations should put in place procedures that are *proportionate* to the bribery risks that have been identified.
- There should be clear 'gifts and hospitality' and 'standards of business conduct' policies which are publicised and enforced. A model policy and declaration of interests as well as hospitality and gifts forms are contained in NHS Protect's Bribery Act guidance which is available on the NHS Protect secure site (**https://nww.cfsms.nhs.uk/Extranet/**). This policy should make it clear that the offering or accepting of bribes is a criminal offence and a potential disciplinary matter.
- A register should be kept in which staff are required to record any receipt and offering of hospitality or gifts. The policy should make clear what constitutes hospitality or a gift, who should complete the register and how often this should be done. Completion of the register should extend to health body representatives such as consultants or agents.
- Business partners should be made aware in writing of the organisation's anti-bribery policies. Suppliers should sign a declaration confirming that they understand these policies when submitting quotes or tenders.
- The Chief Executive Officer should make a statement in support of anti-bribery initiatives and this should be published on the organisation's website.

Personnel

- Managers should be provided with sufficient resources and proper authority to implement and monitor relevant anti-bribery activities aimed at protecting the health body's interests.
- Awareness training should be provided to relevant staff on anti-bribery issues, for example values and culture, avoiding conflicts of interest situations and helping to prevent bribery.
- Appropriate action should be taken against staff found breaching anti-bribery procedures and publicity should be sought. The pro-active use of publicity is encouraged to promote a strong anti-bribery culture.
- There should be separation of duties between those who identify a procurement need and those undertaking the procurement exercise.

Assurance

- The relationships between long term contractors, including those commonly found in Estates departments, and procurement personnel should be monitored. It is recommended that key procurement personnel are rotated during long term

projects. This has the dual benefit of reducing the opportunity for the development of inappropriate relationships and facilitating the detection of those that have developed.

- A robust justification should be sought for the use of preferred suppliers. To provide this, the procurement team can look at the scoring given to quotes or tenders and the rationale used to justify the score. Recommended suppliers can be evaluated by personnel not directly involved in the procurement project.

Detecting bribes and kickbacks

6.7 Bribery by its very nature is secret and therefore difficult to detect. The preventative measures introduced by health bodies to help mitigate this threat can however also assist in its detection.

6.8 The following checks will assist in the detection of bribes and kickbacks:

- The gifts and hospitality register should be examined on a regular basis and any concerns investigated. The register should be cross-referenced against the conflict of interest register to identify any concerns. Things to look out for include individuals recording significant amounts of hospitality or gifts, or items known to have been received not being declared.
- Looking out for significant lifestyle changes, while remaining mindful that many legitimate reasons are likely to exist for them.
- Looking out for artificially low bids and subsequent inflated charges in the post contract phase.
- Heightened concerns may be raised when a key member of the procurement team obtains employment with a supplier after a contract has been awarded.
- Reviewing single tender waivers and the quantity of work going to contractors to see if one particular supplier is being awarded more work than would reasonably be expected.

Case example – Bribes and kickbacks

An individual was in charge of a tender exercise (Tender 1) to engage consultancy services for a health body. It was known that one of the companies (Company A) bidding for the consultancy services had already carried out extensive work for the health body and had forged close links with two key members of the department running the procurement exercise.

An audit into the procurement raised concerns about the process and a referral was made to NHS Protect.

The subsequent investigation found that during the tender process Company A had received confidential information that related to the bids of their competitors. The tender was awarded to Company A.

Following the award of the tender to Company A, a contract was awarded to a company (Company B) following a separate tender process (Tender 2). Company B also had a contract with Company A to promote their services. Company A was integral in the procurement process run by the health body to award a contract to Company B (see Conflict of interest case example). Soon after the award of Tender 2, the health body individual involved also started to actively promote Company B in the NHS and received a monthly sum from Company B. This sum was in addition to and exceeded their NHS salary and was not declared to the health body. Payments were made through Company A.

7 False quotations and tenders

7.1 Procurement exercises often allow NHS officials to use their discretion in deciding which individuals or companies should be invited to bid. Limiting the call for bids is one way in which a dishonest employee can influence the procurement process. The need to demonstrate that competitive tendering requirements have been met can lead to the generation of false quotes and tenders. The production of phantom quotes or tenders from rival or fictitious companies creates the illusion of competition, when in reality a preferred bidder will succeed.

7.2 The risk of false quotes or tenders is more prevalent in procurements that follow a less stringent process, i.e. those under the OJEU threshold or those conducted outside of a centralised procurement team/office. The risk of false quotes or tenders may also co-exist with that of contract splitting (see section 9). False quotations can also take place when a procurement need has been inflated or created; fictitious quotes in these cases result from the fact that there is no genuine desire to complete the work or order the full extent of goods or services.

7.3 The uncompetitive market created through the use of false quotes will often lead to higher prices being paid. Individuals engaging in false quotes may be guilty of Fraud Act and Bribery Act offences.

7.4 False quotes and tenders should not be confused with bid rigging, which occurs when bidders agree among themselves to eliminate competition in the procurement process, thereby denying the public a fair price.

Preventing false quotations and tenders

7.5 The following measures can contribute to both effective governance and the target hardening of health body procurement processes against false quotations and tenders:

Process

- Suppliers should be selected from an approved list (where available) according to predetermined and justifiable criteria.
- The use of negotiated or restricted tendering should be justified.
- The time and date for the return of tenders should be specified at the outset.
- Invitations to submit quotes or tenders should be retained. This should include all correspondence with potential suppliers.
- Bids should be received within the required timeframe.
- Exceptional decisions to include bids submitted after the deadline must be justified in writing.
- A record of quotes/tenders should be maintained, including the names of contractors and the amount of tenders submitted by each.

Tenders received by post

- The return envelopes should be marked ‘tender‘.

- The date and time of tenders should be noted on the envelope.
- Bids should be opened at the same time by a minimum of two people not otherwise involved in the tender process.
- Bids should be stored securely.
- The signatures of persons opening tenders and the signature of the person receiving tenders for evaluation should be recorded in a register of quotes/tenders.

E-procurement systems

- E-procurement systems can significantly reduce the time spent creating and awarding a tender. A system of prequalification, including security mechanisms to identify the party using the system, minimises the potential for a person to submit a tender without the appropriate authority or for a person to forge a tender adopting another person's identity.

Personnel

- There should be separation of duties between individuals involved in the selection of potential suppliers (including an invitation to bid), those involved in sending out the invitations to bid and those responsible for evaluating the tenders.
- Staff involved in procurement (and not just staff in the procurement department) should have the relevant competencies and skills to contribute to procurement projects.

Assurance

- The procurement of all goods and services should be subject to robust internal governance, e.g. auditors/managers engaging in regular spot checks of procurement transactions, including the regular review of procurement files.

Detecting false quotations and tenders

7.6 Special consideration should be given to examining the conditions that could lead to the submission of false quotations and bids. These include the splitting of contracts (see section 9) and creating a procurement need. The latter can be monitored by examining the basis of the procurement need and the proposed spend levels for any project. This may be best done by an overseeing committee, who should refer any concerns to either Internal Audit or the health body's LCFS.

7.7 The following checks will assist in the detection of false quotations and tenders:

- Identifying how bids are received, stored and opened. Is there a robust process in place to ensure that all bids are administered in the same way?
- Examining records of which suppliers have bid for particular projects. This may show a pattern whereby the health body is inviting the same suppliers to bid on numerous projects, or the same supplier is winning numerous tender exercises and the same rival suppliers are constantly losing. This kind of situation requires close examination, in that it would be unusual for losing bidders to continue to bid on a large number of tender exercises if they were always unsuccessful. An added

warning indicator is if they never asked for feedback as to why they were unsuccessful. The LCFS should look for patterns with regard to which suppliers are bidding for work and whether any communication (e.g. request for feedback on unsuccessful bids, especially if numerous) has been received.

- Running sample checks on unsuccessful quotes. Does the company exist, is it known to the health body, are there any links between successful suppliers and unsuccessful bidders (e.g. subcontracting)? This should be done when other indicators raise concerns regarding the procurement process.
- Contacting unsuccessful suppliers to verify their quote.
- Analysing spend against each supplier and looking at other quotes received, looking out for similar templates on quotes.

Case example – False quotations and tenders

An estates department worked with an external contractor (Company A) and used them for various building works across the hospital.

A referral was received from a whistleblower who stated that the company being used for this work was greatly inflating the cost of materials used, which they subsequently billed to the health body.

Once an investigation commenced, it was discovered that the company had been paid almost £1 million in three years. All of their work had been in lump sums of £25,000 or less and had gone through a three-quote process. Approximately 40 pieces of work had been awarded to the company. On closer examination of the other quotes submitted, it was found that the same two companies had been unsuccessful bidders for every piece of work.

The two unsuccessful bidders were contacted and confirmed that they had only bid for one or two pieces of work at the health body over the 3-year period. It was established that the other quotes had been falsified by a member of the estates team. The investigation also uncovered that the wife of the Estates Manager worked for Company A and that materials were being inflated to increase invoice values.

This example illustrates that a concern in one area may lead to several concerns in other areas of the procurement process.

8 Manipulating the tender selection process

8.1 The processes of writing a tender specification, inviting tenders and evaluating bids all provide opportunities for unfairly favouring contractors while maintaining the illusion of competition. Methods for achieving this include:

- Biased, restrictive or vague tender specifications which unjustifiably favour a particular bidder.
- Biased selection of potential bidders. Invitations to tender can be sent out to companies that are highly unlikely to bid or offer meaningful competition. Advertisements inviting tenders can be placed in very obscure publications, or publications which are not geographically suitable.
- A deliberately rushed process which puts a number of competitors at a serious disadvantage. Preferred suppliers can be given advance notice to prepare a bid, whereas the competition is provided with an unreasonably short timescale to produce a meaningful submission. Alternatively, preferred suppliers may be afforded unjustifiable deadline extensions.
- Skewing tender weightings. This involves setting evaluation criteria in a way that does not correspond to the actual requirements of the buyer, for example criteria that are not particularly relevant to price, volumes of work required or quality and which will either favour a particular supplier or allow one supplier to manipulate the price offered. This supplier will be aware of the weightings being skewed. They will quote a very low price for tasks listed in the tender which have been given an artificially high weighting and a high price for tasks given a low weighting. The tasks given a low weighting are the tasks that will in reality be required by the health body. The impact of this is that the supplier who is awarded the work will not provide best value for money to the health body.
- Disguising a new contract as a change of specification to an existing contract with a favoured supplier, removing the need for a procurement process.

8.2 These methods share one essential feature: they all prevent the buyer from paying a fair price for the product bought. As a consequence of a corrupted tender process, the buyer may end up with a product or service the attributes of which neither correspond to business need nor represent value for money. The implications for the buyer may be a direct impact in terms of cost, quality and suitability as well as the indirect cost associated with re-running and/or compensating for a flawed procurement exercise.

Preventing a manipulated tender selection process

8.3 The following measures can contribute to both effective governance and the target hardening of tender selection processes against manipulation.

Process

- Specifications should be checked by someone other than the author to ensure that they are easy to read and consistent with other similar specifications, and that they contain only essential information and tasks.
- Having been checked, the specification should be approved by procurement personnel. The approval process should certify that the product is needed by the

organisation and is included in the budget. It should also be certified that the specification accurately defines what is needed, is free from bias and does not favour a particular company or person. Extra care is needed when the specification is highly technical and there has been a reliance on one individual to draw it up. Overreliance on an individual with a high level of technical expertise is a risk and consideration should be given to recruiting external assistance in some cases to provide oversight and maintain the 'four eyes principle'.

- All suppliers should have sufficient time to prepare adequately for a tender.
- The specification and evaluation model should be based on a study of essential needs and this should be documented. The requirements and evaluation model may be derived from past procurements and historic service use. All decisions should have a rationale and an audit trail reflecting how they are arrived at. Key service stakeholders should be involved in the process.

- The decision relating to where to advertise and who to invite to bid should be well reasoned and documented.
- Business partners should be made aware in writing of the organisation's anti-bribery policies. Suppliers should sign a declaration confirming that they understand these policies when submitting tenders.
- Bidders should have access to debrief material following a selection process and there should be a formal complaints process for them to pursue any concerns they may have.

Personnel

- There should be separation of duties with respect to drafting and approving specifications.
- Tender evaluation panels can be established to include service users and operational personnel with experience in the field being procured. The panel should be balanced so as not to favour a particular bidder. Care should be taken not to unfairly steer criteria towards the strengths of one particular supplier and the weaknesses of another.

Assurance

- Those reviewing a proposed procurement should ensure that there is sufficient detail and information to justify, for example, tender specifications, the process for inviting bidders, and weightings and evaluation criteria before suppliers are invited to tender.

Detecting manipulated tender selection processes

8.4 The following checks will assist in the detection of manipulated tenders:

- It is important to examine whether or not the procurement process identified as many suitable suppliers as possible to ensure the best likelihood of obtaining value for money.
- It should be established whether or not the time frame allowed for the procurement exercise afforded suppliers a proper opportunity to effectively compete.

- The rationales used for inviting suppliers to bid should be examined. Relevant suitability factors may include:
  a) size of the supplier (they may be too large to consider a small amount of work)
  b) location of the supplier (they may not be in the correct geographical area to want to bid for the work)
  c) capability to do the work (is it their normal sphere of work?)
  d) links between potential suppliers (does one firm typically subcontract for another?)
  e) information from past invitations to bid (are suppliers being invited to bid who consistently fail to do so?)

- The LCFS may wish to consider monitoring the percentage of non-returns of invitations to bid over time. An increase in this number may indicate that procurement has become less competitive. Further steps may then be taken to establish why this is the case.
- It may be appropriate to question why the same companies are repeatedly being invited to bid. This may simply indicate a lack of real competition. Nonetheless, the invitation of companies that consistently fail to bid or win may also indicate deliberate manipulation of the tender process.
- It should be examined in which publications the adverts for the work are placed. Is the choice of publication sensible in relation to the need and would it reach the desired audience to provide a good selection of potential suppliers? Is the publication one that has proved successful in past procurements and is there any deviation from normal publications used? On balance, are the most suitable suppliers bidding for the work?
- The evaluation process can be looked at to ensure that there were relevant detailed evaluation criteria. What was the rationale for using these criteria and were relevant service users involved in the design or award?
- Are there significant differences between the specification used on the invitation to tender and the contract awarded? Any differences may need to be looked at to determine the reasons for the change and to ascertain how they came about. It may be necessary to determine the extent of negotiation after the submission of tender bids. Whether negotiation is allowable will depend on the type of procurement process being followed (see 3.12).
- Where the anticipated cost of a contract has risen beyond reasonable expectations, checks can be undertaken examining the nature of the goods, works or services invoiced and whether this is an accurate reflection of the goods, works or services originally predicted in the tender weightings. If there are large variances between anticipated and actual charges and/or between the work that has been carried out and the volumes and types of work in the specification, the reasons for this need to be examined. The acceptable level of variance should be determined and variances over that value should be investigated further.
- Unsuccessful bidders should be contacted if concerns are identified through the procurement process. Experience suggests that companies are unwilling to come forward to complain about an unfair specification due to fear of damaging future

bids. This is so even when it is clear that a specification favours one of the rival bidders. A proactive approach should be considered when concerns exist.

Case example – Manipulated tender selection processes

Allegations were received that an NHS project manager had used his position to obtain decorating work for a relative and that excessive payments had been made by the health body as a result.

An investigation established that the relative initially worked for the health body as a subcontractor. The managing director (MD) of the firm hired as main contractor was instructed by the project manager to use the relative as a subcontractor. The MD was not aware of the work being carried out by the subcontractor and was also told by the project manager how much he should invoice the health body. The relative then submitted a tender to provide decorating services directly to the health body. The tender appeared to show that it was competitive, which justified it being the winning bid.

A subsequent analysis of the procurement process established that the tender weightings had been rigged. The project manager had applied incorrect weightings to certain elements of the specification when formulating the tender, resulting in a skewing of the volume and amount of work required. The specification had placed particular emphasis on the requirement for specific tasks which in reality were not needed or relevant. The relative's bid deliberately showed a low cost associated with those tasks, making the rival bidders' tenders appear to be over-priced and less competitive. Conversely, the tasks which were required in large quantities were given a low weighting in the tender. This allowed the supplier to bid a high price for these tasks. Because of their low weighting, these high charges did not impact greatly on the competitiveness of the bid submitted by the relative's company.

The investigation found that the contract and the work carried out had been poorly managed by the project manager and the health body. The estimated cost of the contract was £154,000 over five years. However in the first 18 months of the contract the health body had been billed and paid out over £300,000.

There were few or no records to verify the amounts being invoiced by the relative's company, although there were detailed records of work undertaken by other contractors, including timesheets and receipts of materials.

The health body's procurement department should have been fully involved in the tendering process, which instead was controlled by the estates department. The health body also failed to adequately record staff business interests. Furthermore, the invoices should have detailed what work had been carried out and what was being charged.

Had the tender specification and bids been reviewed by an independent quantity surveyor, it is likely that the skewing of specification weightings would have been identified.

The project manager was dismissed from his position following evidence from NHS

Protect in relation to irregularities in the tendering process. However the Crown Prosecution Service chose not to prosecute. Part of the reason for this were the systemic failings within the health body to control costs and a culture of work being given to favoured contractors with little work being tendered.

9 Contract splitting

9.1 A contract's known or estimated value should determine the nature of the competitive procurement process that is applied. The financial thresholds which dictate this are provided by both SFIs and EU procurement directives. A contract's value is defined as the total consideration, excluding VAT, that is to be paid over its lifetime.

9.2 By splitting what would be a single contract into a number of parts having smaller value, it is possible to avoid thresholds that would otherwise ensure a more stringent procurement process is applied. Also referred to as contract disaggregation, the splitting of a contract can be done to avoid more intense scrutiny of the procurement process. Where procurement is under less scrutiny, the likelihood of offenders being caught is lower.

9.3 It is known that contract splitting is sometimes used inappropriately by those involved in the procurement to simply speed up the process. While transgressions of this kind may appear relatively minor, such behaviour is likely to constitute a breach of health body policy and could be an offence under EU regulations. Furthermore, an organisational culture that allows for breaches of procurement rules to enter into 'business-as-usual' undermines the organisation's own ability to effectively tackle fraud and corruption (see 4.3). On its own, therefore, the presence of contract splitting does not automatically mean that fraud and corruption has taken place. It does, however, create an environment in which criminality can thrive.

Preventing contract splitting

9.4 The following measures can contribute to both effective governance and the target hardening of health body processes against contract splitting:

Process

- A health body's procurement policy should state that there should be no splitting of purchases simply to avoid the application of a more stringent procurement process.
- Where a contract is split, and its splitting would prevent it from reaching a higher procurement process threshold (e.g. one triggering EU tendering requirements), the rationale for this should be recorded and brought to the attention of the appropriate governance group.
- There should be an effective categorisation of spend so that reports can be made against it. Classification coding assists in spotting anomalies. It is important to ensure that common goods and services are given the same code if they belong to the same product type (e.g. rubber gloves are recorded under one code rather than several different codes according to type). Rationalising the product line is important to determine whether there are any issues in this area and for value for money.

Personnel

- Changes to procurement regulations and thresholds should be communicated promptly to appropriate staff.

Assurance

- There should be regular spot checking of procurement files and transactions.
- It is suggested that the governance group's remit should include the examination and assessment of all supplier spend by tender process followed.

Detecting contract splitting

9.5 There are a number of mechanisms that can assist a health body in identifying contract splitting.

- The overall expenditure on a particular supplier can be looked at and cross checked against the number and types of procurement processes the supplier undertook. This may indicate whether pieces of work are being split. The reasons for splitting work will need to be looked at as there may be good operational reasons for doing so. However, the rationale behind such decisions should be recorded and the records kept for future examination.
- Classification coding reports should be compiled so that any anomalies around common spend being split can be identified.
- The contracts (or lack of contracts) held by a supplier can be looked at to determine whether a proper process has been followed. The absence of a contract may indicate that an abuse of process has occurred.
- The health body's biggest suppliers should be checked twice a year for unexpected high costs. Where there are outliers, cross referencing orders, values and contracts can be useful. Where they do not align, contract splitting may have occurred.

Case example – Contract splitting

Allegations had been made against a manager regarding inappropriate awarding of contracts to a preferred contractor. It was noted that the values of contracts awarded to the preferred building contractor were mostly under the value above which the health body's SFIs dictated that a formal process for obtaining three competitive quotes should be applied.

An investigation established that over a three-year period the value of contracts awarded to the building company in question had risen alarmingly. Most of the contracts awarded were for amounts that were under the threshold for obtaining quotes.

The health body procurement team did enquire about the amount of orders placed by the manager, who responded by arguing that the contractor always provided value for money.

The investigation established that the manager was 'contract splitting' to avoid a competitive process. It was also found that the manager had been given too much autonomy with regard to managing the planning and tendering of projects, with no separation of duties. There was also a lack of supervision and an absence of controls in the management of these projects.

It was subsequently established that the contractor had also provided their services directly to the manager in a private capacity.

10 Glossary

Accountable Officer	The NHS officer responsible and accountable for funds entrusted to the health body. They are responsible for ensuring the proper stewardship of public funds and assets.
Bribery (active and passive)	Giving or receiving a financial or other advantage in connection with the improper performance of a position of trust, or a function that is expected to be performed impartially or in good faith. (Active bribery: promising or giving a financial or other advantage. Passive bribery: agreeing to receive or accepting a financial or other advantage).
Commissioning	The process for determining the need for and obtaining the supply of healthcare and related goods/services by a health body within available resources.
Conflict of interest	A situation in which a person has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties as a public official, an employee, or a professional.
Contract	A legally enforceable agreement between two parties (does not necessarily have to be, but usually is, in writing).
Contract disaggregation	An alternative term for contract splitting.
Contract splitting	By splitting what should be a single contract into a number of parts having smaller value, it is possible to avoid thresholds that would otherwise ensure a more stringent procurement process is applied.
Contracts register	A document which lists all the contracts held between an NHS body and its suppliers that are valued over a certain threshold.
Framework agreement	A contractual vehicle that allows purchasers to order goods or services under the terms and conditions specified in the agreement.

FIRST	NHS Protect's on-line fraud case management and information reporting system.
Gifts and hospitality register	A document which lists offers of gifts and hospitality which have been declared, typically reviewed annually by a governance committee.
Government Procurement Service	An executive agency of the Cabinet Office whose priority is to provide procurement savings for the UK public sector as a whole and specifically to deliver centralised procurement for central government departments.
Nominated officer	An officer charged with the responsibility for discharging specific tasks within Standing Orders and Standing Financial Instructions.
Invitation to tender	A step in the procurement process in which qualified suppliers or contractors are invited to submit sealed bids.
Official Journal of the European Union	The EC Public Procurement Directives require all public bodies, including NHS health bodies, to provide details of proposed procurements over certain financial values in order to demonstrate adherence to the EC Treaty principles of non-discrimination, equal treatment and transparency. These details are published as adverts in the Official Journal of the European Union (OJEU). This allows all companies replying to an advertisement to have an equal opportunity to express an interest to tender.
Procurement	The process of acquiring goods, works or services.
Public Private Partnership	Public Private Partnerships are those initiatives which involve the private sector in the arena of public services.
Register of interests	A document which details personal or business interests held by individuals which may affect, or be perceived to affect, the performance of their role.

Register of tenders	Document used by health bodies to keep a record of the tendering process, the opening of bids and details of the successful bidder.
Standing Financial Instructions	A document setting out the measures a health body has adopted for the regulation of its proceedings and business.
Single tender waiver	The decision that competitive tendering is not applicable and should be waived. The fact of the waiver and its reasons should be documented, recorded and reported to the audit committee.
Standards of business conduct	A document aimed at providing employees with an awareness of their own personal responsibilities in their conduct as public service employees in the NHS.
Standing Orders	Standing orders set out the responsibilities of individuals with regard to proceedings and business.
Target hardening	A strategy aimed at designing crime out of systems and polices by making it harder for crimes to be committed, and reducing potential gains from them.
Tender	A formal offer to supply goods, works or services at a stated cost or rate.
Tender specification	A document that seeks to clearly, accurately and completely describe in detail what the health body needs to purchase.
Tender weighting	A process for the assessment of tenders which places greater significance on the performance of certain elements over other, non-critical factors.
Value for money	The best combination of whole-life costs and quality, to meet the health body's needs.

11 Further reading

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