

### Tenders/Reorganisations falling outside the Regulations

The Supreme Court ruling in *London Borough of Brent v Risk Management Partners (February 2011 “the LAML case”)* confirmed that cooperation over public service tasks between public bodies, in whatever form, is considered an in-house tender and therefore exempt from the obligations under the public procurement rules provided:

- there are no private interests involved;
- the public bodies are carrying out public service tasks solely in the public interest; and
- they are not contriving to circumvent the public procurement rules.

It is possible that, in certain circumstances, the procurement of pathology services will fall outside the Regulations particularly if what is involved is a region wide reorganisation of the provision of services by NHS providers. If a Commissioner considers that their envisaged procurement will fall outside the Regulations, they should take specific legal advice to assess the risks associated with running such a procurement outside of the Regulations.

### DH and CCP Policy on Procurement

The DH has issued various pieces of procurement guidance, including the “Procurement Guide for Commissioners of NHS Funded Services” which is useful to consider. This guidance indicates that, ultimately, the decision as to whether or not to undertake a procurement (and the choice of process used in a Part B service procurement) rests with Commissioners.

The CCP has in place Principles and Rules of Cooperation and Competition (“PRCC”) and has also published draft procurement guidelines. Commissioners who are procuring pathology services should take these into account when considering whether and how to undertake a public procurement. In particular, the PRCC states that procurement must be transparent, non-discriminatory and fair, and that Commissioners must commission services from the providers who are best placed to deliver the needs of their patients – as such there should be a clear rationale for procurement decisions in terms of quality and value for money.

## **Step 7: Procurement Strategy**

### **Tool 1: Key Considerations for Commissioners**

#### **This tool is for use in conjunction with Step 7 of the Commissioning Toolkit document**

If Commissioners satisfy themselves that their procurement of pathology services (which is Part B) does not have any cross-border interest, they can use a 'light-touch' procurement process. Provided that the Commissioners follow those limited parts of the Regulations that do apply and conduct a fair and transparent process, this approach is permissible under the Regulations. Commissioners may wish to consider sharing their plans with the local health and well being boards.

If Commissioners consider they that wish to undertake a 'full' procurement they should refer to the Tool entitled "Guidance note on which procurement route to use" which sets out the four procedures provided in the Regulations. These procedures are not required to be followed for Part B services which do not have cross-border interest, but even if Commissioners do wish to undertake a 'full' procurement this could be conducted quite quickly under the Regulations. For example, Commissioners could conduct an accelerated restricted tender procedure – using this procedure, the minimum timescales are reduced to 15 days (or 10 if electronic means are used) (from 37 days) for PQQ responses and to 10 days (from 40 days) for ITT responses. As such, and depending upon Commissioners' own administrative requirements (for example how long is required for evaluation), a reasonable period for an accelerated restricted procedure procurement may be approximately 3 months.

Whilst no specified procedure must be used for Part B service procurements, for Commissioners who have considered that they wish to follow a light-touch procurement an example is set out below:

- publish an advert in the HSJ with a 10-day period to gather Expressions of Interest ("EOI"). The advert should also be advertised on Commissioner's own website and the NHS "Supply2Health" website;
- issue a combined PQQ and MOI with a 2-week response period;
- issue an ITT and draft contract with a 4-week response period.
- check that the draft contract sent out is substantially complete (it should be) and no negotiation phase is needed (it should not be). In both cases, the evaluation criteria should be transparent and non-discriminatory – the criteria and short-listing process should be clearly set out to all bidders in advance (for example in a guidance and instructions document);
- allow a 2-week period for any clarifications and evaluation of ITT responses;
- appoint the preferred bidder and finalise the contract;
- observe a 10 day standstill period and be prepared to debrief unsuccessful bidders at this stage (it would be good practice for Commissioners to do this);
- immediately after the standstill period, arrange to have the contract signed; and
- within 45 days after the contract comes into force, publish a contract award notice in the OJEU and on the NHS "Supply2Health" website.