

# **Cooperation and Competition Panel**

## **Draft interim guidelines on Procurement Dispute Appeals**

**January 2009**

## 1. Introduction

- 1.1. There has been extensive Government investment in the NHS since 2000. During the same period, the NHS has moved from a system model based on control of the means of provision, towards a more open system with a defined division of roles between commissioners and service providers. The catalyst for change was the desire to make patient needs the main focus of the NHS.
- 1.2. For routine elective services, patients now have the right to choose<sup>1</sup> any willing and registered provider of these services regardless of the physical proximity or type of provider.<sup>2</sup> The NHS is also moving towards a more competitive (or contestable<sup>3</sup>) model in the procurement of health services as well as through patient choice. Competition, including through service contestability, encourages innovation, quality and responsiveness to patient needs.
- 1.3. Competition and choice are powerful levers to drive up service quality, deliver better value and reduce inequalities. Yet they can only be effective if there are clear, enforceable rules guiding and governing behaviour within the healthcare system.
- 1.4. To address this need, the Department of Health published the Principles and Rules of Cooperation and Competition as part of the NHS Operating Framework 2008/09 – 2010/11. Their purpose is to ensure fair and transparent cooperation and competition so as to make the best use of resources, enable innovation, and provide essential safeguards for the interests of patients, taxpayers, and the reputation of the NHS.
- 1.5. The Cooperation and Competition Panel (the Panel) helps ensure that the *Principles and Rules for Cooperation and Competition*<sup>4</sup> (Principles and Rules) in the provision of NHS-funded services support the delivery of high quality care for patients and value for money for taxpayers. It investigates potential breaches of the Principles and Rules, and makes independent recommendations to the Department of Health, Strategic Health Authorities (SHAs) and Monitor on how such breaches should be resolved. It also reviews proposed mergers, and advises on the wider development of cooperation and competition within the NHS. In carrying out its responsibilities, the Panel works with all parts of the NHS, the independent sector and others to drive improvements in service delivery.
- 1.6. These guidelines deal specifically with the Panel's responsibilities in relation to procurement dispute appeals (Procurement Guidelines). More detail on the Panel's wider responsibilities is provided on the Panel's website at [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).

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<sup>1</sup>Choice is exercised at the point at which a patient requires a referral for their first, consultant-led outpatient appointment.

<sup>2</sup>This right has now been enshrined within the NHS Constitution (Department of Health, January 2009).

<sup>3</sup>In economics a contestable market is one in which an incumbent faces strong competitive constraints from potential competitors because low barriers to entry and exit constrain an incumbent's ability to take advantage of their position. In the context of this document, however, we use the term 'contestability' to refer more generally to services where a commissioner may have the option of contracting with alternative service providers.

<sup>4</sup>The Principles and Rules are available at [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).

## **The Panel's role in relation to procurement disputes**

- 1.7. The Panel's role in relation to procurement disputes is advisory to SHAs. SHAs are responsible for performance management of PCTs and oversight of commissioning and system management in their regions more generally. For example, SHAs are responsible for assurance of local commissioning and payment rules, including ensuring coherence of approach across the region and consistency with the Principles and Rules for Cooperation and Competition.
- 1.8. The role of the Panel in relation to procurement disputes is limited to reviewing cases upon appeal from an SHA and where the responsible SHA confirms that opportunities for local dispute resolution have been exhausted. Further, the Panel's remit extends only to issues of compliance with the Principles and Rules. Examples of such issues might include: management of procurement processes; contract award decisions; and various forms of decisions not to tender (eg uncontested contract awards, uncontested contract extensions and so on).
- 1.9. The Panel's advice and recommendations in individual cases will be for SHAs to consider.
- 1.10. The Panel's Procurement Guidelines supplement the Rules of Procedure and are designed to provide information on the procedures that the Panel will use in considering procurement dispute appeals. (In the event of any conflict between the Rules of Procedure and the Procurement Guidelines, the Rules of Procedure will take precedence.)
- 1.11. These guidelines do not discuss the processes employed by Strategic Health Authorities (SHA) in considering and deciding on procurement disputes prior to any appeal to the Panel. Each SHA has its own procedures, and more information is available from the website for each SHA (see below).

<b>Strategic Health Authority</b>	<b>Information on dispute resolution procedures available at:</b>
East of England	<a href="http://www.eoe.nhs.uk">www.eoe.nhs.uk</a>
East Midlands	<a href="http://www.eastmidlands.nhs.uk">www.eastmidlands.nhs.uk</a>
London	<a href="http://www.london.nhs.uk">www.london.nhs.uk</a>
North East	<a href="http://www.northeast.nhs.uk">www.northeast.nhs.uk</a>
North West	<a href="http://www.northwest.nhs.uk">www.northwest.nhs.uk</a>
South Central	<a href="http://www.southcentral.nhs.uk">www.southcentral.nhs.uk</a>
South East Coast	<a href="http://www.southeastcoast.nhs.uk">www.southeastcoast.nhs.uk</a>
South West	<a href="http://www.southwest.nhs.uk">www.southwest.nhs.uk</a>
West Midlands	<a href="http://www.westmidlands.nhs.uk">www.westmidlands.nhs.uk</a>
Yorkshire and the Humber	<a href="http://www.yorksandhumber.nhs.uk">www.yorksandhumber.nhs.uk</a>

- 1.12. The following sections of these guidelines set out:
  - the policy and legal framework for the Panel's consideration of procurement dispute appeals (Section 2);

- the acceptance criteria for appeals (Section 3);
- the process by which the Panel will consider procurement dispute appeals (Section 4);
- recommendations that may be made by the Panel following a successful appeal (Section 5); and
- the content of submissions to be made to the Panel (Section 6).

## 2. The policy and legal framework

2.1. This section sets out the policy and legal framework for the Panel's consideration of procurement dispute appeals, including first, the rationale for choice and competition in the NHS, including the use of procurement processes as a means of facilitating choice of provider by commissioners, and second, the administrative framework for procurement dispute appeals.

### Commissioning and procurement in the NHS

2.2. PCTs, as commissioners of NHS services, are responsible for assessing the health and care needs of their communities and procuring services from the provider(s) best able to meet these needs. These responsibilities are reflected in the Principles and Rules (eg see Principle 1 in Table 2.1 below).

2.3. The use of procurement processes is an important means by which commissioners can choose between alternative service providers and ensure that they are obtaining the best possible services for patients as well as the best value for money for taxpayers. This is often referred to, in the context of the NHS, as service contestability. It is an important part of the overall framework for cooperation, choice and competition in the NHS and complements the patient choice model that is used, for example, in routine elective services.

2.4. Decisions as to when and how to tender for services are a matter for PCTs, having regard to the Principles and Rules, and the guidance provided by the PCT Procurement Guide (see below).

2.5. In general terms, competition – either through patient choice or between service providers for contracts to provide services to PCTs – can be expected to have numerous beneficial effects: innovation and productivity increase, so increasing the quality and, more generally, the diversity of choice available as service providers respond to the individual preferences of patients. As set out in the *Framework for Managing Choice and Competition*<sup>5</sup>, choice and competition in the NHS can be expected to:

- improve quality and safety in service provision;
- improve health and well-being;
- improve standards and reduce inequalities in access and outcomes;
- lead to better informed patients;
- generate greater confidence in the NHS; and
- provide better value for money.

2.6. A procurement process that enables effective competition between service providers to provide services under contract to the PCT will help to ensure that the benefits of competition for patients and taxpayers are realised.

### Administrative framework for consideration of procurement dispute appeals by the Panel

2.7. Disputes over procurement processes and decisions should, in the first instance, be taken up with the relevant PCT. Where a PCT is unable to resolve

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<sup>5</sup>See [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_084779](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084779)

concerns over a procurement decision, each SHA has its own dispute resolution process (details of which are available on the relevant SHA website – see Table 1). Where a party wishes to contest the outcome of the SHA dispute resolution process, it may ask the Panel to consider the matter. The Panel will not consider procurement disputes until the relevant SHA confirms that local dispute resolution procedures have been fully used.

- 2.8. In considering an appeal, the Panel will advise the relevant SHA whether the disputed procurement decision would breach the Principles and Rules. (The relevant provisions of the Principles and Rules are set out in Table 2 below.) The Panel's advice in such cases would be copied to the Department of Health as the relevant sponsor.
- 2.9. In summary, these provisions of the Principles and Rules seek to ensure that services are commissioned from those providers best able to meet patient needs, including through fostering patient choice. The Principles and Rules also place certain obligations on commissioners in conducting procurement processes so as to meet these overarching objectives.
- 2.10. In particular, there is a specific requirement on commissioners to comply with the *PCT Procurement Guide for Health Services* (PCT Procurement Guide). The PCT Procurement Guide supports NHS commissioners in deciding whether and how to procure health services through formal tendering and market-testing exercises. (A copy of the PCT Procurement Guide is available at [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_084778](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084778).) In interpreting the procurement provisions of the Principles and Rules, the Panel will have regard to the PCT Procurement Guide.

**Table 2: Principles and Rules relevant to the Panel’s responsibilities regarding procurement**

Principles	Rules
<p>1. Commissioners should commission services from the providers who are best placed to deliver the needs of their patients and population.</p>	<ol style="list-style-type: none"> <li>1. PCTs are the only contracting authority for NHS direct patient care. Practice-based commissioners must operate through PCT-let contracts.</li> <li>2. Commissioners must hold all providers to account through their contract for the quality of their services in a proportionate manner.</li> <li>3. <i>[omitted - addressed under the Guidelines on conduct disputes]</i></li> <li>4. Commissioners must adhere to good practice commissioning guidance (Health Reform in England: update and commissioning framework, July 2006).</li> </ol>
<p>3. Commissioning and procurement should be transparent and non-discriminatory.</p>	<ol style="list-style-type: none"> <li>1. Commissioners must follow the guidelines set out in the Procurement Guide.<sup>6</sup></li> <li>2. Commissioners must comply with the PBC accountability framework and tender where a PBC proposal would result in a major services change or the creation of a monopoly.</li> </ol>
<p>4. Commissioners and providers should foster patient choice [and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.]*</p>	<ol style="list-style-type: none"> <li>1. All organisations must adhere to the Government’s choice policy. (Choice at referral guidance framework 2007/08 and subsequent updates.)</li> <li>2. <i>[omitted – addressed under the Guidelines on conduct disputes]</i></li> <li>3. Information requirements, NHS Contract clauses 29 and Schedule 5.</li> <li>4. Conflict of interest declaration, NHS contract clause 53.</li> <li>5. Providers cannot subcontract to other providers for choice services without first stating their intention to do so on NHS Choices and without the expressed will of the patient (and prior approval of the PCT). All activity and prices for subcontracted work must be overseen by the provider’s board.</li> </ol>
<p>7. Payment regimes must be transparent and fair.</p>	<ol style="list-style-type: none"> <li>1. Local commissioning rules must be consistent with these competition principles and the Payment by Results Code of Conduct.</li> <li>2. Commissioners and providers must adhere to the provisions for determining a non-tariff price contained in the NHS Contract (Clause 7.2).</li> <li>3. <i>[omitted - addressed under the Guidelines on conduct disputes]</i></li> </ol>

\*Cases dealing with potential breaches of the information component of this principle will be dealt with under the Panel’s guidelines on advertising and misleading information. The detailed rules under this principle have been omitted from this table and are dealt with under Panel guidelines for other types of cases.

NB. The full version of the Principles and Rules for Cooperation and Competition is available at [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).

<sup>6</sup>This refers to the *PCT Procurement Guide for Health Services* as discussed above in paragraphs 2.10 – 2.11.

### **3. Acceptance criteria for appeals**

- 3.1. In order to have a decision reviewed by the Panel, a party must have already attempted resolution of the dispute directly with the PCT and through the dispute resolution process of the relevant SHA. Only once these avenues have been exhausted can a party appeal to the Panel.
- 3.2. In all circumstances, the Panel must consider whether an appeal meets its acceptance criteria. The acceptance criteria are:
  - (i) The content of the dispute is covered by the PRCC;
  - (ii) The appellant makes available all relevant and applicable information on the case to the Panel, including that outlined below under Submission Content requirements<sup>7</sup>. This does not preclude the Panel from asking for further information as it requires. Furthermore, any individuals connected to the complaint are on hand to provide further evidence/testimony as required;
  - (iii) Local dispute resolution procedures under the auspices of the relevant SHA have been exhausted;
  - (iv) The Panel is most appropriate to consider or resolve the issue (ie over other regulators including the Office of Fair Trading (OFT) and Advertising Standards Authority (ASA));
  - (v) No legal proceedings have commenced;
  - (vi) The dispute is not trivial, vexatious or an abuse of the Panel's procedures;
  - (vii) Appeals must be made within 25 days of a decision being taken at the local level; and
  - (viii) An appellant must be a party to the original dispute being appealed to the Panel.

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<sup>7</sup>Found in section 6 of this document.

#### **4. Appeals process**

- 4.1. The Panel will promote and maintain an appeals process that is independent, objective, fair and efficient.
- 4.2. The process by which appeals will be considered is outlined below and also at Appendix 1.
- 4.3. A party should notify the Panel in writing of its request for an appeal within 25 days of the relevant decision by the SHA. The Panel will confirm receipt of the request within 5 days.
- 4.4. The initial application requesting an appeal will form the basis of the appellant's case and parties will be expected to respond to this submission. Consequently, the applicant's submission must demonstrate it meets the acceptance criteria outlined above. If the submission meets the acceptance criteria, the Panel will publish a Notice of Acceptance and non-confidential version of the applicant's submission on its website within 10 days of confirming receipt. If the appeal does not meet the acceptance criteria, the Panel will write to the party requesting the appeal and explain the reasons for refusal.
- 4.5. The Panel will, at the same time as it publishes the Notice of Acceptance, write to all parties involved notifying them of the appeal as well as the process and timetable that it intends to follow. The Panel will also invite submissions from the parties to the dispute in reply to the appellant's submission as well as the relevant SHA in their role as system manager. The Panel will place non-confidential versions of party submissions on its website.
- 4.6. The Panel will accept submissions from third parties which have sufficient interest in the matter in response to the publication of the Notice of Acceptance. Although the Panel reserves the right to invite third party submissions in limited circumstances, the onus is on the parties to the appeal to provide all information that is necessary for the Panel to conduct a thorough review of the decision in question. Party and third party submissions must be received within 10 days of the publication of the Notice of Acceptance.
- 4.7. The Panel will then conduct hearings with the parties to the appeal. The purpose of such hearings is to provide participants an opportunity to set out their arguments, including all relevant issues and material facts; and for the Panel to ask questions and seek certainty around the issues. Hearings will run for a maximum of 2 days and parties must be prepared to articulate their arguments and concerns clearly and succinctly.
- 4.8. Third parties that have a sufficient interest may be invited to present at hearings, however this remains at the Panel's discretion.
- 4.9. Once a hearing has concluded, parties will be given the opportunity to make further submissions on issues arising out of the hearing. Parties will have 10 days within which to make further submissions. The process is not intended for parties to present existing arguments or evidence and the Panel will only consider new material addressing issues arising out of the hearing (if any).
- 4.10. The Panel will then assess all information received during the course of the appeals process and prepare a decision outlining its findings. The decision will

be published 15 days from the closing of further submissions and a non-confidential version placed on the Panel's website.

4.11. The Panel expects to reach a decision and publish its recommendation within 40 days from the date of publishing the Notice of Acceptance.

## **5. Panel consideration of procurement dispute appeals**

- 5.1. In general terms, procurement disputes are likely to fall into one of three categories:
  - i. disputes regarding the handling of a tender process;
  - ii. disputes regarding tender design; and
  - iii. disputes regarding decisions not to tender.
- 5.2. Disputes regarding the handling of a tender process might encompass, for example:
  - whether a tender award decision was based on the evaluation criteria included in the tender documentation;
  - whether a decision maker allowed a bid to be submitted after the deadline;
  - whether a bidder met the eligibility criteria specified in the tender documentation; and
  - the handling of potential conflicts of interest in the procurement process.
- 5.3. Disputes regarding tender design, may be similar to disputes over tender process. For example, whether bidders given sufficient time to submit a proposal, or whether the contract was advertised sufficiently widely. Again, in these instances, the Panel does not anticipate taking an approach that would be different to any other review body considering a procurement dispute.
- 5.4. One particular issue concerning tender design in which the Panel would take a strong interest would be decisions by commissioners that have the effect of limiting eligibility to bid for a contract. This might take the form of explicit criteria that limit eligibility (eg only incumbent service providers are eligible to bid) or it may take the form of other requirements that have the same effect. For example, a requirement that a bidder already undertakes a certain volume of activity in a particular area would, in effect, exclude new service providers from bidding for a contract.
- 5.5. In considering disputes over aspects of tender design that have the effect of limiting competition for a contract, the Panel will be concerned that such decisions can be justified in terms of benefits to patients or taxpayers, and that those benefits are sufficient to outweigh the costs associated with limiting competition for the contract. As such, the Panel would look for evidence that this issue was adequately considered by decision makers in the design of the tender.
- 5.6. Finally, in considering disputes over decisions by commissioners not to tender a particular service, the Panel will take into account the following factors:
  - a PCT's overall plan in relation to the procurement of services and the introduction of choice and competition;
  - the consistency of any individual decision not to tender with that overall plan; and
  - the reasonableness of the PCT's overall plan.
- 5.7. The Panel does not believe that it should substitute its own judgement for that of a PCT in relation to the appropriate means by which services should be procured at a local level provided that a PCT is approaching such a task in a reasoned manner that is consistent with overall policy in this area. The Panel notes that SHAs have systems in place to oversee PCT plans, and as a result,

it would generally expect that a plan approved by an SHA would meet the Panel's own test of 'reasonableness' in relation to such plans.

## **6. Recommendations**

- 6.1. The Panel's recommendations may include one or more of the following:
- dismissing the appeal; or
  - upholding the appeal and recommending to the relevant SHA:
    - (i) that the relevant decision be reconsidered by the PCT;
    - (ii) that the PCT re-run the tender;
    - (iii) that the PCT run a tender process (where a decision had been made not to run one);
    - (iv) that a completed procurement contract be set aside;
    - (v) that tenders be re-evaluated by an independent panel; or
    - (vi) any other remedy the Panel deems fit.
- 6.2. The Panel's recommendations will depend on the legal options available to each SHA or PCT, and will take into account any changes arising from future amendments to UK procurement law.
- 6.3. In general, the Department of Health expects that SHAs will seek to implement the Panel's recommendations in seeking to avoid protracted disputes and ensure compliance with the Principles and Rules by PCTs in their regions.
- 6.4. It is anticipated that the Panel's review of procurement disputes will provide learning for PCTs and SHAs for the purposes of local dispute resolution in the future.

## **7. Submission content**

7.1. A party wishing to file a request for an appeal must include the following details in its submission:

- Name, addresses, telephone number, fax number and email address of the applicant;
- Name and title of the person(s) authorised to represent the organisation in the appeal;
- Evidence that each of the acceptance criteria has been met;
- A full copy version of the decision being challenged;
- Copies of all previous decisions relating to the matter (including those of the relevant PCT);
- A detailed statement of reasons for appealing against the local decision. And a statement outlining the breaches of the Principles and Rules and PCT Procurement Guidelines in relation to the procurement issue being challenged;
- Desired outcome or resolution; and
- A non-confidential version of the above submission.

## Appendix 1: Panel's decision making processes for Procurement Disputes appeals

