



**Cooperation and Competition Panel**

**Procurement Guidelines**

**4 October 2010**

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## 1 EXECUTIVE SUMMARY

1. These guidelines set out the approach that the Cooperation and Competition Panel (CCP) takes in procurement appeals under the Principles and Rules for Cooperation and Competition (Principles and Rules) which came into effect in October 2010.<sup>1</sup>
2. The Department of Health and Monitor, the CCP's sponsors, require that the CCP provide advice on matters of compliance with the Principles and Rules. In the context of procurement disputes, the CCP considers procurement matters that have been considered by Strategic Health Authority (SHA) dispute resolution panels, or have been referred to it directly by SHAs.<sup>2</sup> Following an appeal, the CCP is responsible for advising the Secretary of State or Monitor (in the case of NHS Foundation Trusts (NHS FTs)) on whether there has been a breach of the Principles and Rules.<sup>3</sup>
3. In relation to procurement, commissioners are expected to follow Principles 1, 2 and 3.<sup>4</sup> In summary, these principles aim to ensure that the process to commission services, and the payment regimes that are put in place, are transparent and fair and that services are commissioned from those best placed to deliver the needs of patients.
4. Disputes over procurement processes and decisions should first be taken up with the relevant commissioner. Where a commissioner (for example, a Primary Care Trust (PCT)) is unable to resolve concerns over a procurement decision, the complainant should engage with the SHA in accordance with that SHA's dispute resolution process. Where a party wishes to contest the outcome of the SHA dispute resolution process, it can ask the CCP to consider the matter. The CCP does not consider procurement disputes until the local dispute resolution procedures have been exhausted. The matter must also satisfy the CCP's acceptance criteria.
5. The role of the CCP in assessing procurement appeals is to review the decision taken by the commissioner to determine whether it is reasonable under the relevant Principles and Rules. Where appropriate, the CCP applies a cost-benefit analysis to assess the matter. Once a procurement appeal has been accepted, the CCP will normally reach a decision and issue advice and recommendations within 40 working days. The final decision in relation to any dispute rests with the relevant decision maker to which the CCP provides its advice. This may be the Secretary of State for Health (or any person or organisation acting under delegated authority from the Secretary of State) or Monitor (in relation to NHS FTs).

## 2 INTRODUCTION

6. These guidelines set out the CCP's approach to procurement appeals under the Principles and Rules published by the Department of Health in July 2010 and which came into effect in October

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<sup>1</sup> The *Principles and Rules for Cooperation and Competition* are available on the CCP's web site at [www.ccp-panel.gsi.gov.uk](http://www.ccp-panel.gsi.gov.uk). They were first published in December 2007 as part of the 2008/09 Operating Framework.

<sup>2</sup> It is likely that the role of SHAs (and the CCP) will change significantly in the future. These guidelines will be updated, as necessary, to reflect these changes.

<sup>3</sup> Alternatively, the CCP may advise any person or organisation acting under delegated authority from the Secretary of State.

<sup>4</sup> Principles 5 and 6, relating to patient and commissioner choice, may also be relevant to procurement and commissioning.

2010. The CCP is required to advise the Secretary of State for Health (or any person or organisation acting under delegated authority from the Secretary of State) or Monitor (in relation to NHS FTs) whether the decision taken by the commissioner is reasonable under the Principles and Rules. The relevant Principles and Rules are set out below.

*Principle 1: Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and populations.*

- Commissioners must commission services from providers who are best placed to deliver the needs of their patients and populations having regard to their overall present and future needs and the sustainability of services.
- Commissioners, at board level, should be able to demonstrate a clear rationale for procurement and contracting decisions in terms of quality and value for money.
- Commissioners' boards must ensure that their organisations comply with the Procurement Guide, including when considering proposals from practice-based commissioners.
- Commissioners must hold all providers to account through their contract for the quality of their services in a proportionate manner, in accordance with the Procurement Guide, and give existing providers two opportunities to address underperformance or implement incremental improvements, prior to engaging potential alternative providers.

*Principle 2: Commissioning and procurement must be transparent and non-discriminatory and follow the Procurement Guide issued in July 2010.*

- PCT boards and other commissioners must ensure that their organisations comply with the Procurement Guide, including when considering proposals from practice-based commissioners.
- Commissioners must be able to demonstrate at each stage of the procurement process that they have acted in a transparent and proportionate manner.
- Commissioners must be able to demonstrate at each stage of the procurement process that they have not acted in an unduly discriminatory manner.
- Commissioners' decisions to procure services via single or competitive tender must be authorised by the board and underpinned by a clear rationale.
- Commissioners must advertise competitive tenders and all contract award decisions on the Supply2Health procurement portal if required by the Procurement Guide and in the Official Journal of the European Union (OJEU) if required under EC law.

*Principle 3: Payment regimes and financial intervention in the system must be transparent and fair.*

- Commissioners must not create payment regimes which unjustifiably restrict choice or competition against patients and taxpayers' interests.
- Commissioners must be able to demonstrate that payment regimes are transparent and fair
- Commissioners and providers must adhere to the provisions for determining a non-tariff price contained in the NHS Standard Contracts.
- Commissioners must not make financial interventions which unjustifiably restrict choice or competition against patients and taxpayers' interests.
- Commissioners must be able to demonstrate that financial intervention in the system is transparent and fair.

- Rules on financial intervention are set out in the annual Operating Framework and are binding on all PCTs and SHAs.
7. A number of actions and behaviours are associated with these Principles and Rules; these are set out in the full version of the Principles and Rules, available at [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).
  8. These guidelines describe how the Principles and Rules are applied and cover the following topics:
    - Section 3: a summary of the policy rationale for procurement rules
    - Section 4: the CCP's role in relation to procurement disputes (including the acceptance criteria for appeals)
    - Section 5: the appeal process
    - Section 6: the CCP's policy on publishing and confidentiality
    - Section 7: the CCP's substantive approach to procurement appeals
    - Section 8: possible outcomes of a review by the CCP
    - Appendices
      1. Flow chart summarizing the process from acceptance to decision
      2. Guidance on the content of submissions
      3. Guidance on informal advice
  9. As the CCP gains more experience in dealing with procurement appeals and policy develops, these guidelines may need to be revised. Consistent with this, the CCP may find it necessary to deviate from these guidelines in the context of any dispute that raises novel issues. Where this is the case, the CCP will acknowledge that it has deviated from its guidelines and will set out its reasons for doing so.
  10. These Guidelines supplement the CCP's Rules of Procedure and are designed to provide information on the procedures that the CCP uses in considering procurement appeals. In the event of any conflict between the Rules of Procedure and the Procurement Guidelines, the Rules of Procedure will take precedence once they have been finalised.<sup>5</sup>

### **3 POLICY RATIONALE FOR PROCUREMENT RULES**

11. 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.<sup>6</sup> The use of a competitive procurement process 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.<sup>7</sup> 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 currently used, for example, in routine elective services.

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<sup>5</sup> The CCP's draft *Rules of Procedure* are available on the CCP's web site at [www.ccp-panel.gsi.gov.uk](http://www.ccp-panel.gsi.gov.uk).

<sup>6</sup> Commissioners can be PCTs as contracting authorities, specialist commissioning groups, Practice-based commissioning groups, or bodies specifically contracted to commission services on behalf of PCTs.

<sup>7</sup> See for example paragraph 2.40 of the Procurement Guide.

12. Decisions on when and how to hold competitive tenders for services are a matter for commissioners, having regard to the Principles and Rules and the guidance provided by the *procurement guide for health services (Procurement Guide)*.<sup>8</sup> Furthermore, *World Class Commissioning* requires PCTs to demonstrate eleven key competencies which include:<sup>9</sup>
  - stimulating the market to meet demand and secure required clinical, health and well being outcomes; and
  - securing procurement skills that ensure robust and viable contracts. PCTs are expected to have clear, written processes for tendering and to have clear contract specifications linked to expected outcomes.
13. Commissioners (with guidance from SHAs) in their role as commissioners must take responsibility for market making, identifying services where competition could provide a useful tool for improving value and quality and then attracting and selecting suitably qualified providers of those services. Each PCT must agree with its board a procurement strategy for large tenders, including novel, contentious or repercussive tenders. PCTs must gain the consent of their boards and inform their SHA where they decide not to tender a contract for new or significantly changed services.
14. Competitive tendering is not appropriate in all cases. The Procurement Guide indicates that it is for commissioners to decide which services require to be competitively tendered: ‘The onus is therefore on commissioners to demonstrate a rationale for their actions and decisions (e.g. Tender/No Tender decisions).’<sup>10</sup>

#### **4 THE CCP’S ROLE IN RELATION TO PROCUREMENT DISPUTES**

15. It is important to note that where a procurement is subject to dispute, it is good practice – where possible – for the commissioner to allow a standstill period and not to enter into the relevant contract with the winning bidder, so that all an effective remedy is available to the CCP in the event that the dispute is upheld.<sup>11</sup>
16. Disputes over procurement processes and decisions should, in the first instance, be taken up with the relevant commissioner. Where a commissioner (for example, a PCT) is unable to resolve concerns over a procurement, the complainant should attempt to resolve the dispute using the relevant SHA’s dispute resolution process, details of which are available on the SHA’s web site (see Table 1). Where a party wishes to contest the outcome of the SHA dispute resolution process, it may ask the CCP to consider the matter. SHAs may also refer procurement disputes directly to the CCP. The CCP will not consider procurement disputes until it is clear that local dispute resolution procedures have been exhausted.

**Table 1**

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<sup>8</sup> Department of Health, *Procurement Guide for commissioners of NHS-funded services* (30 July 2010).

<sup>9</sup> Department of Health (December 2007).

<sup>10</sup> Department of Health, *Procurement Guide for commissioners of NHS-funded services* (30 July 2010), paragraph 1.11.

<sup>11</sup> See also Department of Health, *Procurement Guide for commissioners of NHS-funded services* (30 July 2010), paragraph 1.25. This is similar to the obligation to observe a standstill period in respect of Part A procurements required by the EU Remedies Directive (Directive 2007/66/EC) and implementing legislation in the UK.

SHA Dispute Resolution Procedures	
SHA	Information on dispute resolution procedures available at:
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>

17. On some occasions, organisations other than PCTs are responsible for making procurement decisions, for example, as a result of the PCT delegating its commissioning function for specific services.<sup>12</sup> Where this is the case, and provided that the relevant services are NHS-funded, the CCP may also hear appeals about procurement decisions by these bodies.

18. In considering an appeal the CCP will review the decision taken by the commissioner to determine whether it is consistent with the Principles and Rules and will advise the Secretary of State or Monitor accordingly. The relevant Principles and Rules are set out in Section 2 above. There is a specific requirement for commissioners to comply with the Procurement Guide, hence the CCP will also assess if the decision taken by the commissioner is consistent with the Procurement Guide.

#### ACCEPTANCE CRITERIA FOR APPEALS

19. In order to have a decision reviewed by the CCP, a party must have already attempted resolution of the dispute directly with the commissioner, and through the dispute resolution process of the relevant SHA. Only once these avenues have been exhausted can a party appeal to the CCP.

20. In all circumstances, the CCP must consider whether an application for review meets its acceptance criteria. The acceptance criteria are:

- i. the dispute falls within the scope of the relevant Principles and Rules;
- ii. the party bringing the appeal (the applicant) provides all relevant, available information to enable the CCP to commence its analysis. The applicant's submission must include the information set out in Appendix 2, *Guidance on the content of submissions*;
- iii. local dispute resolution procedures conducted by the relevant commissioner and/or SHA have been exhausted;<sup>13</sup>

<sup>12</sup> The *Procurement Guide for commissioners of NHS-funded services* (30 July 2010) applies to commissioners of NHS-funded healthcare services and their agents (including but not limited to PCTs, practice-based commissioning consortia, shadow GP commissioning consortia and commercial support units. Providers of NHS-funded services are also expected to comply with this guidance where they are the prime contractor and are sub-contracting specific services or elements of services, for example part(s) of a long-term condition pathway (paragraphs 1.5 - 1.6).

<sup>13</sup> Where the commissioner or SHA have not dealt with the complaint within a reasonable timeframe, the CCP may decide to deal with the dispute directly.

- iv. the application for review by the CCP is made within 25 working days of a decision being taken by the SHA;<sup>14</sup>
  - v. the applicant was a party to the dispute that was the subject of dispute resolution at the local level;
  - vi. the CCP considers that it is the most appropriate body to consider or resolve the issue as compared to other regulators;
  - vii. there are no relevant on-going legal proceedings or investigations. Relevant legal proceedings or investigations are those which deal with the same issue and are brought elsewhere. Proceedings or investigations are considered to be on-going when the matter has been filed in a court or tribunal (or where an investigation has been commenced by professional or government regulatory bodies) and the matter has not been determined by the court, tribunal or other body where the proceedings were filed or commenced. If proceedings or investigations are commenced once the CCP has accepted a complaint, this may result in the CCP's process being terminated or suspended at the discretion of the CCP; and
  - viii. the dispute is not trivial, vexatious or an abuse of the CCP's procedures:
    - a dispute may be trivial where, for instance, the appeal relates to only part of the SHA or commissioner's decision and because of this the appeal would not materially change the outcome of that decision;
    - a dispute may be vexatious or an abuse of the CCP's procedures where, for instance:
      - the applicant has made several applications or complaints regarding the same or very similar subject matter and these have been rejected, or the CCP is satisfied that they have been dealt with appropriately; or
      - the applicant attempts to mislead the CCP, for instance by providing false, misleading or incomplete information in its submission.
21. If an application does not meet the acceptance criteria, the CCP will write to the applicant briefly explaining the reasons for this.

## **5 APPEAL PROCESS**

22. The appeal process is outlined below and presented in a flow chart at Appendix 1. The CCP will maintain an appeal process that is independent, objective, fair, prompt and efficient.
23. In summary, once the CCP has accepted an application for review, it will inform the applicant, the commissioner and the relevant SHA and ensure that the commissioner receives copies of the applicant's submission. All parties will be informed of the expected timetable and key steps in the process, which are generally as follows:
- i. the commissioner has the opportunity to respond to the application within a specified timeframe;
  - ii. a copy of the commissioner's response is provided to the applicant;
  - iii. the CCP engages with parties and any third parties as it considers appropriate (for example by sending information requests or holding meetings);

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<sup>14</sup> The day of the decision is the first day of the 25 working day period.

- iv. the CCP formulates a view on the appeal and produces draft advice and recommendations. This is sent to the commissioner and the applicant (and any other relevant parties that have been materially involved in the dispute and that the CCP considers have a significant interest in the outcome of the appeal) so that they can submit any final representations on the CCP's analysis within a specified timeframe;
- v. the CCP may hold (further) meetings with the parties;
- vi. the CCP takes into account any representations and finalises its decision; and
- vii. within 40 working days from publication of the Notice of Acceptance, the CCP gives the final advice and recommendations to the parties and sponsors and publishes a non-confidential version on its web site.

#### **APPLICATION, NOTICE OF ACCEPTANCE AND RESPONSE**

- 24. The initial application requesting an appeal will form the basis of the applicant's case and the commissioner will be expected to respond to this submission. It is therefore important that the application conveys the applicant's case comprehensively and accurately; at a minimum it should comply with the requirements set out in Appendix 2: *Guidance on the contents of submissions*.
- 25. Once the CCP has decided to accept the matter it will publish a Notice of Acceptance on its web site. The commissioner will be provided with a copy of the applicant's submission. At the start of the appeal process, the CCP will also write to the parties to inform them that the CCP is dealing with the matter and setting out the timetable that it expects to follow. The CCP will invite a response, within a specified timeframe, from the commissioner in reply to the applicant's submission. A non-confidential version of the response should also be provided. The CCP will give the applicant a copy of the response. If the response is not provided on time, the CCP may not be able to take it into account.

#### **INFORMATION GATHERING AND INVOLVEMENT OF THIRD PARTIES**

- 26. Third parties may respond to invitations to comment which are published on the CCP's web site. Responses to the invitation to comment must generally be provided within the deadline indicated in the relevant notice published on the CCP's web site. Submissions should be made as early as possible so that they can be considered, verified and taken into account properly. Whenever possible, third parties should substantiate and support any points raised by examples, documents and other evidence. It will be more difficult for the CCP to take into account assertions that are not supported by evidence.
- 27. During a procurement appeal the CCP may need additional, or more comprehensive, information from the parties (or third parties) than is provided in the initial submission made by the applicant and the commissioner's response. The CCP will ask for such additional data, information or documents as soon as it is clear they are necessary. Requests for such information will normally allow a short deadline for response so that the CCP can comply with the appeal timetable. The CCP will specify what information is required and fix the timescale for responding each time it makes an information request. If that deadline cannot be met, it may be necessary to suspend the timetable ('stop the clock') until the requested information is provided. A notice to this effect will

be published on the CCP's web site. If, despite repeated requests, information is not forthcoming the CCP may decide on whether or not it is appropriate to proceed with the appeal without the requested information, or to set aside the appeal.

28. Where appropriate the CCP may seek external economic and/or clinical expertise and launch its own economic studies to inform its investigation.<sup>15</sup> Clinical input may be sought from members of the CCP's Clinical Reference Group.<sup>16</sup> Where the Group's members do not have the relevant clinical expertise, they may assist in identifying individuals with relevant clinical knowledge.
29. Current policy and legislation give weight to patient and public involvement in the NHS.<sup>17</sup> The CCP may therefore seek the views of the relevant Local Involvement Networks (LINKs) on procurement appeals, provided that, in the opinion of the CCP, this would be useful and appropriate. LINKs and other (patient) organisations are also free to respond to the invitation to comment on the CCP's web site.
30. Where relevant, the CCP may contact the Care Quality Commission to obtain an up-to-date assessment of an organisation's quality.
31. The CCP may decide to have meetings with relevant parties (the parties to the appeal and, if appropriate, third parties). Panel Members may attend these meetings.

## **REPRESENTATIONS AND FINALISING THE DECISION**

32. The CCP will assess all the information received in the course of the appeal and prepare draft advice outlining its provisional findings. The CCP will send its draft advice (and any recommendations) to the applicant and the commissioner for any final representations, indicating a deadline for response. The CCP may hold meetings with the parties and this stage. Having taken into account any representations from the parties, the CCP will reach a decision on the matter and finalise its advice and recommendations. A non-confidential version of the final advice and recommendations will be published on the CCP's web site. The CCP will also provide a copy to the parties.
33. The CCP expects to reach a decision and publish its advice and recommendations within 40 working days from the date of publishing the Notice of Acceptance. This is subject to any extension of the timetable, for example due to a delay in responding to information requests, or any extension agreed with the relevant Sponsor.

## **6 PUBLISHING AND CONFIDENTIALITY**

34. The CCP will publish on its web site non-confidential versions of key information and documents received from the parties and third parties in the context of any appeal that it has accepted. It is therefore important that the parties also provide a non-confidential version of documents

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<sup>15</sup> CCP staff may also obtain input from the Economics Reference Group. This Group provides expert competition economics advice on issues under consideration by the CCP (<http://www.ccp-panel.org.uk/about-the-ccp/economics-reference-group.html>).

<sup>16</sup> [www.ccp-panel.org.uk/about-the-ccp/clinical-reference-group.html](http://www.ccp-panel.org.uk/about-the-ccp/clinical-reference-group.html).

<sup>17</sup> The Local Government and Public Involvement in Health Act 2007 established Local Involvement Networks from April 2008.

submitted to the CCP. The CCP will also publish notices to 'stop the clock' or set aside an appeal, and a non-confidential version of the final advice and recommendations.

35. Before publication, the relevant organisation will be offered the opportunity to request the excision of confidential information from the public version of the documents and to check factual accuracy. There will normally be a short deadline for response. The CCP may publish or disclose information where it is compelled by law or the Courts or where it is reasonably necessary to facilitate the CCP's exercise of its functions or in the interest of transparency.
36. To the extent that the CCP's reasoning in any decision relies on confidential information, the CCP will make this information available to the relevant Sponsor, subject to the Sponsor confirming that it shall treat such information as confidential and that it shall use the relevant information only for the purpose of its decision.

## **7 ASSESSMENT OF PROCUREMENT APPEALS**

37. In assessing procurement appeals, the CCP reviews the decision taken by the commissioner to determine whether it is reasonable under the Principle and Rules and the Procurement guide for commissioners of NHS-funded services (the Procurement Guide).<sup>18</sup> This means that the CCP considers whether the commissioner's decision was within the range of decisions that it could reasonably have taken, both in terms of substance and process, within the context of the Principles and Rules and the Procurement Guide. The CCP does not consider whether the decision of a commissioner was correct on its merits and, accordingly, when an applicant is successful, the CCP does not substitute its own decision for that of the relevant commissioner. The CCP will also have regard to general government policy on procurement matters (for example, guidance produced by the Office of Government Commerce) to the extent that it considers this relevant.
38. In conducting its review of the commissioner's decision, the CCP may apply a cost-benefit analysis to assess the implications of the disputed behaviour in terms of its impact on patients and taxpayers under the Principles and Rules. In these cases the CCP will assess the costs (detriments) to patients and taxpayers from reduced choice or competition resulting from the conduct under appeal. If the CCP identifies such costs, it will assess the benefits of the conduct and weigh these against the costs. If the costs outweigh the benefits (in other words, if there are material net costs), the CCP is likely to find that there is an adverse effect on patients and taxpayers and a breach of the Principles and Rules.
39. Costs to patients include: loss of choice or competition between service providers. Costs to taxpayers include: any expected increase in the price paid by commissioners for services. Benefits to patients include: higher quality services, a greater choice of services or greater innovation. Benefits to taxpayers include: any expected reduction in the price paid by commissioners for services. Such benefits must accrue within a reasonable period of time after the procurement and must flow directly from the procurement decision.

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<sup>18</sup> The CCP may also comment on the SHA's decision but this will not be the main subject of its review.

40. 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.

#### **DISPUTES REGARDING THE HANDLING OF A TENDER PROCESS**

41. Disputes regarding a tender process might encompass, for example:
- whether a tender award decision was based on the evaluation criteria set out 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; or
  - the handling of conflicts of interest in the procurement process.
42. In assessing disputes regarding the tender process, the CCP will assess whether the commissioner's actions were reasonable and consistent with the Principles and Rules and the Procurement Guide, in particular, Principle 1: *Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and population*; and Principle 2: *Commissioning and procurement must be transparent and non-discriminatory and follow the Procurement Guide*.<sup>19</sup>

#### **DISPUTES REGARDING TENDER DESIGN**

43. Disputes regarding tender design may overlap with disputes over tender process; for example, whether bidders were given sufficient time to submit a proposal, or whether the contract was advertised sufficiently widely. In assessing tender design, the CCP will look at whether the commissioner acted reasonably and consistently with the Principles and Rules and the Procurement Guide, in particular: Principle 1: *Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and population*; Principle 2: *Commissioning and procurement should be transparent and non-discriminatory and follow the Procurement Guide*,<sup>20</sup> and Principle 3: *Payment regimes must be transparent and fair*.
44. The CCP would take a strong interest in 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 (for example 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. In considering disputes over aspects of tender design that have the effect of limiting competition for a contract, the CCP will be concerned that such decisions are objectively justified.

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<sup>19</sup> In assessing whether or not Principle 1 has been complied with the CCP will look at relevant guidance in the Procurement Guide and/or other good practice commissioning guidance.

<sup>20</sup> In assessing whether or not Principle 2 has been complied with the CCP will look at relevant guidance in the Procurement Guide, and/or other good practice commissioning guidance.

## DISPUTES REGARDING DECISIONS NOT TO TENDER

45. Finally, in considering disputes over decisions by commissioners not to tender a particular service, the Panel will assess whether a decision was reasonable and consistent with the Principles and Rules in particular: Principle 1: *Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and population.*<sup>21</sup>
46. The CCP will also assess whether or not the decision was consistent with the Procurement Guide. The Procurement Guide indicates that a decision to award a contract without a competitive process (referred to as a single tender action) is likely only to be appropriate in limited circumstances, for example, where there is only one provider that is capable of providing the service or in the event of immediate clinical need. The CCP will be concerned that single tender actions are objectively justified and in line with the Procurement Guide.

## 8 RECOMMENDATIONS

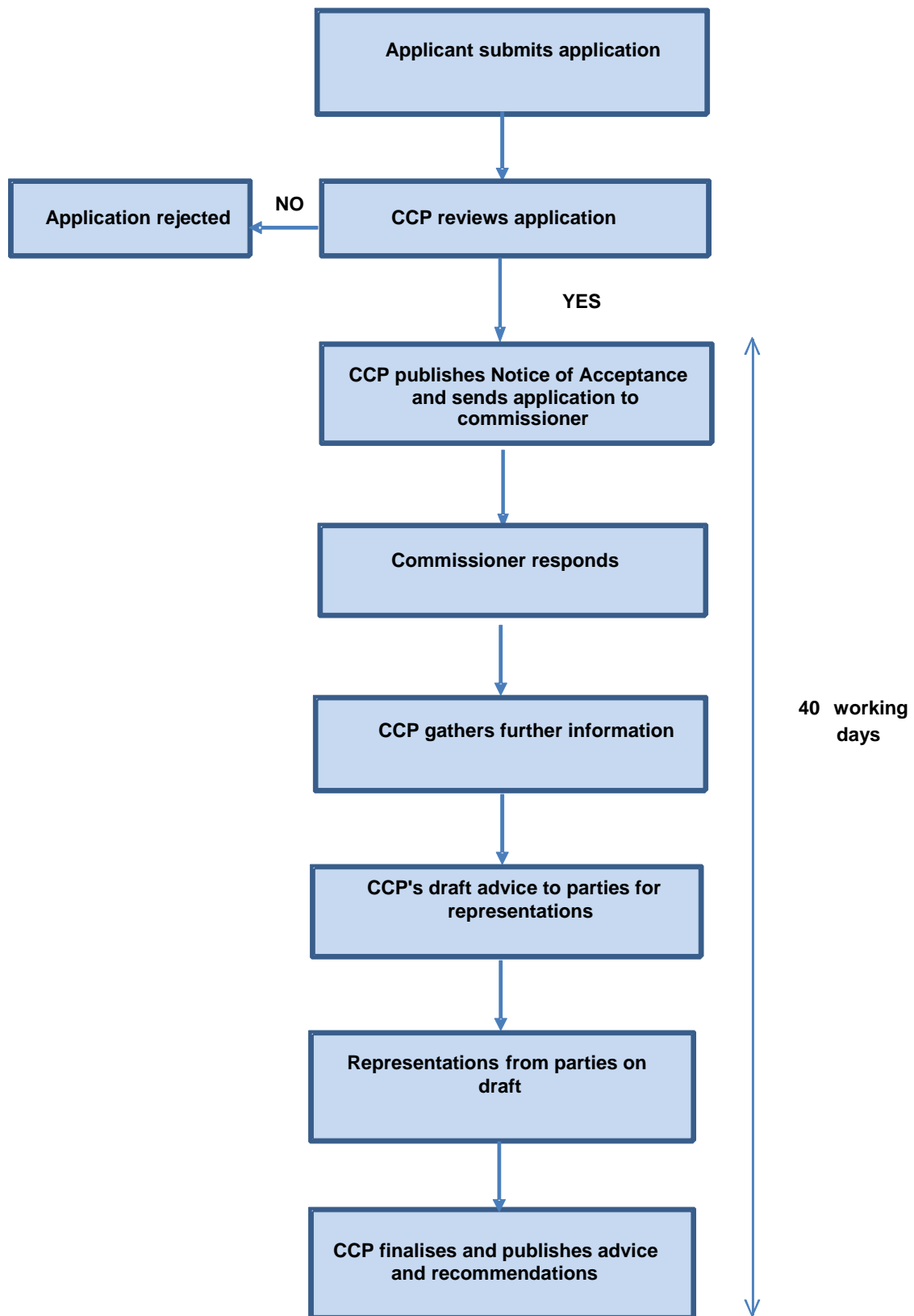
47. The CCP may either:
- dismiss the appeal; or
  - uphold the appeal and recommend to the Secretary of State for Health (or any person or organisation acting under delegated authority from the Secretary of State) or Monitor (in relation to NHS FTs):
    - i. that the relevant decision be reconsidered by the commissioner;
    - ii. that the commissioner re-run the tender;
    - iii. that the commissioner run a tender process (where a decision had been made not to run one);
    - iv. that the commissioner amend its tender evaluation criteria or scoring procedure;
    - v. that a contract be terminated;
    - vi. that tenders be re-evaluated by an independent panel (where relevant against amended tender evaluation criteria or scoring procedure); or
    - vii. any other remedy the CCP deems fit.
48. The CCP's recommendations will depend on the legal options available in each case. When deciding on an appropriate recommendation, the CCP will have regard to its effectiveness, the associated cost and the principle of proportionality.<sup>22</sup> The CCP may also take into consideration the CCP's prior decisions when deciding on remedies.

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<sup>21</sup> Principles 5 and 6, relating to patient and commissioner choice, may also be relevant to procurement and commissioning.

<sup>22</sup> Between two recommendations that the CCP considers equally effective, it will choose the recommendation which the CCP considers imposes the least cost or is least restrictive.

## PROCESS FOR PROCUREMENT APPEALS



## GUIDANCE ON THE CONTENT OF SUBMISSIONS

1. A party requesting a review of a procurement dispute must include the following information in its submission:
  - name, addresses, telephone number and email address of the applicant;
  - name and title of the person(s) authorised to represent the organisation in the appeal;
  - contact details for the commissioner;
  - evidence that the relevant acceptance criteria have been met;
  - a copy of the decision being appealed and copies of all previous decisions relating to the matter (including those of the relevant PCT and SHA dispute resolution panels).<sup>1</sup>
  - a detailed statement of reasons why, in the opinion of the applicant, the commissioner's decision is unreasonable under the Principles and Rules and the Procurement Guide;
  - copies of any relevant correspondence and any evidence relating to the statement of reasons;
  - a chronology outlining relevant events;
  - a statement of the desired outcome of the appeal process; and
  - a non-confidential version of the entire submission for publication on the CCP's web site.

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<sup>1</sup> If the commissioner's decision is not contained in a specific document, then a statement by the applicant outlining the commissioner's decision is sufficient.

## CCP PRACTICE ON GIVING INFORMAL ADVICE

1. The CCP is willing to provide informal advice to parties who have concerns about the application of the Principles and Rules or the Procurement Guide. Informal advice is intended to assist parties in identifying potential concerns (for example, in order to assist PCTs and SHAs in procurement planning).
2. Informal advice on procurement matters will generally be given orally by the Director of the CCP or other senior members of staff; it represents the view of CCP staff, not the Panel Members. To ensure that resources are used effectively, and to preserve the CCP's role as an appeal body, the CCP reserves the right in all cases not to provide informal advice. In particular, it will not provide advice about procurement matters where the CCP considers that the provision of informal advice would or might prejudice its unbiased consideration of any procurement or other matter.
3. Parties seeking informal advice are not required to meet the acceptance criteria outlined in Section 4. Informal advice by the CCP is not binding on the CCP and is not a substitute for the CCP's assessment of a matter on appeal. The CCP only provides informal advice on the application of the Principles and Rules and the Procurement Guide, and not, for example, on the Public Contracts Regulations 2006.
4. To provide informal advice, the CCP will need information about why there may be a concern under the Principles and Rules or the Procurement Guide. Although submissions are not expected to be extensive, the quality and accuracy of the CCP's informal advice will, to a large extent, reflect the quality of the information provided. The CCP recommends that clear, full and accurate information is provided in the context of requests for informal advice.
5. There is no administrative timetable for the provision of informal advice, but the CCP will endeavour to accommodate parties' timeframes as much as possible.
6. The CCP will not have tested the information provided by the parties externally. Informal advice should be kept confidential and should not be used by the recipient as advice on which third parties can rely. Relevant correspondence between the CCP and the party requesting informal advice is confidential and must not be disclosed outside the party's organisation (or than for the purpose of obtaining legal advice). The CCP will not disclose informal advice to any other party, but may permit parties to share the advice with other parties including DH and Monitor with its express, prior, consent. If a party receives informal advice and then discloses it to third parties without the CCP's express consent, the CCP will consider whether it is appropriate to provide informal advice to the party which made the disclosure in future.
7. In the first instance, parties seeking informal advice (or simply wishing to discuss whether to request informal advice) should contact the CCP on the details provided on its web site at [www.ccpanel.org.uk](http://www.ccpanel.org.uk).