



Cooperation and Competition Panel

Procurement Response to Consultation Document

04 October 2010

PROCUREMENT DISPUTE APPEALS GUIDELINES

Introduction

In 2009 the Cooperation and Competition Panel (CCP) undertook a three-month public consultation on its interim draft guidelines. The guidelines set out how the CCP exercises its responsibilities under the Principles and Rules for Cooperation and Competition (Principles and Rules).

The CCP had intended to publish a revised set of guidelines in autumn 2009, following the outcome of the initial consultation. However, this was postponed at the request of the Department of Health (DH) in order that any changes arising from the DH's review of the PCT Procurement Guide and Principles and Rules could be taken into account.

Following publication of the *Procurement Guide for Commissioners of NHS-funded Services* and the revised *Principles and Rules* on the 30 July 2010, the CCP amended its guidelines to reflect changes in DH policy. The draft guidelines, incorporating a number of changes resulting from comments arising from the earlier consultation, were reissued for a further period of consultation over the summer of 2010.

Following the completion of the consultation period the CCP has carefully considered the responses and has today published revised guidelines to come into effect immediately in line with the new Principles and Rules.

4th October 2010

Summary of responses

1. The CCP received a total of 21 responses which commented specifically on the Draft Interim Guidelines on Procurement Dispute Appeals ('Draft Guidelines'). The CCP welcomes the input provided by respondents including SHAs, PCTs, medical bodies, royal colleges, trade unions, law firms, representative bodies and individual members of the public. The feedback has been used to test the reliability and veracity of the Draft Guidelines and has helped shape improvements to the document to ensure it is as sound and useful as possible. **Please note, in order to ensure consistency with the initial consultation process, this document should be read in conjunction with the original version of the Principle and Rules. These can be found on the CCP website here: <http://www.ccp-panel.org.uk/reports-and-guidance/consultations.html>**

2. This response document outlines the major issues raised by respondents in respect of each of the questions asked by the CCP in its consultation on the Draft Guidelines. It explains how the CCP has addressed such issues in the revised Procurement Guidelines ('Revised Guidelines') for example: taken the suggestion forward; analysed and decided against the suggestion; or changed the wording in the Revised Guidelines to address the issue.

3. Overall, the main issues arising from the responses, where multiple respondents raised questions or concerns about the CCP's proposed approach, were the following:

- that a number of Rules which may be relevant to procurement are not referred to in the Draft Guidelines (on the basis that they are dealt with in the Conduct Guidelines). A number of parties wanted to see these included in the Revised Guidelines as well.
- the interaction between the CCP's acceptance criteria for procurement disputes and actions to enforce rights under EU procurement law.
- the substantive approach that the CCP will take when assessing benefits to patients/taxpayers.
- what remedial action the CCP will recommend where there is a completed contract in place.

4. This document should be read in conjunction with the Draft Guidelines and Revised Guidelines. This summary document is not exhaustive in relation to all issues raised in the responses we have received, and the exclusion of a particular issue from this summary does not mean that we have not considered it.

Specific issues raised in response to individual questions

5. Specific issues raised by respondents in relation to individual questions are set out below. Where respondents commented on specific paragraphs in the Draft Guidelines, we have referred to those also. The CCP's response is set out in italics.

Section 1: the CCPs role in relation to procurement disputes & Section 2: the legal and policy framework

Question 1: Does this section provide sufficient context to the Panel's consideration of procurement matters?

6. **Informal advice:** one respondent queried whether the CCP would offer informal advice on procurement matters in the same way it intends to for conduct or merger matters. *The Revised Guidelines include an Appendix setting out the CCP's practice on giving informal advice. The CCP will provide non-binding informal advice on procurement matters in the same way that it does for conduct and mergers. 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, the CCP will not provide informal advice where the CCP considers that the provision of informal advice would or might prejudice its unbiased consideration of any procurement or other matter. Informal advice represents a staff view only.*

7. **Market making by commissioners and SHAs/ Department of Health approach to individual PCT plans** – paragraph 2.4: one respondent suggested that the guidelines should provide further context around the market-making role of PCTs and SHAs. Others suggested that it would be helpful to explain the Department of Health's approach to individual PCT plans. *We have included revised text on background to the procurement regime at paragraphs 11-13.*

8. **Benefits and costs of competition**– paragraphs 2.5-2.6: one respondent noted that they thought that discussion regarding the positive role of competition needed to be balanced against an acknowledgement that competition can lead to service fragmentation/lack of continuity. *We acknowledge that not all circumstances will call for competitive tendering of services (see paragraph 14). We have revised the guidelines to refer more specifically to the PCT Procurement Guide for Health Services ('Procurement Guide') which sets out the circumstances in which competitive tenders are likely to be appropriate.*

9. **Commissioning decisions by bodies other than PCTs:** one respondent pointed out that, on rare occasions, bodies other than PCTs may make commissioning decisions, e.g., SHAs or *Foundation Trusts*. *We have acknowledged that this is the case (paragraph 11). The PCT Procurement Guide states that commissioners can be PCTs as contracting authorities, specialist commissioning groups or other bodies specifically contracted to commission services on behalf of PCTs.*

Question 2: Are the Principles and Rules relevant to procurement matters identified sufficiently clearly?

10.**Principle 2** – Table 2: one respondent suggested that Principle 2: “Providers and commissioners must cooperate to ensure that the patient experience is of a seamless health service, regardless of organisational boundaries, and to ensure service continuity and sustainability.” which is currently referred to only in the Draft Interim Guidelines on the assessment of Conduct, be referred in the Procurement Guidelines as well. The respondent believed that this Principle could be relevant to a decision not to tender services. *Under the new Principles and Rules (published in March 2010 and coming into effect in October 2010), this has become Principle 4 (providers and commissioners must cooperate to improve services and deliver seamless and sustainable care to patients). Responsibility for supervising the duty to cooperate lies with boards and is overseen by SHAs and the regulators.*

11.**Principle 1, Rule 3, Principle 4, Rule 2 and Principle 7, Rule 3** – Table 2: one respondent suggested that these Rules, which had been specifically excluded from the Procurement Guidelines, should be included because they may have a bearing on procurement disputes. *The CCP deals with two different types of matters – reserved matters, where complainants can approach the CCP directly, and referrals and appeals, where local dispute resolution processes need to be exhausted before the CCP can review the matter. Reserved matters are, in general, more likely to have a significant effect on competition which is why the CCP has been designated as the ‘first port of call’ for these matters. Although we agree that the Rules outlined above may sometimes be relevant to procurement matters, we think it is appropriate to exclude these specific rules from the Procurement Guidelines to ensure that there is a clear distinction between matters which parties can approach the CCP about directly and those that local processes must be applied to first. The CCP acknowledges that there may be some overlap in conduct and procurement cases, in particular in relation to Principle 4 which places an obligation on providers and commissioners to foster patient choice, and Principle 1 which requires commissioners to commission services from those providers who are best placed to deliver the needs of their patients and populations. The CCP will consider which avenue is the most appropriate for a particular case to which Principle 1 or Principle 4 applies.*

12. **NHS contract** – Table 2: A number of respondents suggested that more information on the relevant NHS contract clauses should be provided in the Guidelines. *Enforcement of the NHS contract is not part of the CCP's role, therefore we have not referred to the clauses of the contract in the Revised Guidelines.*

Section 3: Acceptance criteria for appeals

Question 3: Are the acceptance criteria clear?

13. **Days v working days:** old paragraph 3.2 (iv): a number of respondents asked that we clarify whether the timeframe for making appeals was 25 days or 25 working days. *We have clarified that the timeframe is 25 working days from the date of the SHA decision.*

14. **When the Panel is the most appropriate body to consider the matter** - paragraph 3.2(iv): several respondents asked for Guidelines on (a) how the most appropriate body to consider the matter is to be determined; and (b) whether appellants need to prove that this criterion is met. *It is for the CCP to decide whether or not it is the most appropriate body to consider the matter, and as such the party making the appeal does not need to provide evidence of this. This has now been clarified in the wording.*

15. **'No legal proceedings' criterion** – paragraph 3.2(v): A number of different comments were received on this section:

- several respondents indicated that we should define what was meant by 'legal proceedings'; i.e. early stage solicitors' correspondence or the case being accepted by the courts. *We have now defined the commencement of legal proceedings in the Guidelines as follows: "Legal proceedings are considered to have commenced once the matter has been filed in a court or tribunal (or where investigations have been commenced by other professional government regulatory bodies)".*
- one respondent thought that this requirement should be dropped given that legal action in relation to procurement matters under EU law/the Public Contracts Regulations 2006 needs to be taken within a short time frame, usually 3 months – meaning that complaints would be faced with a choice between court processes and local/CCP dispute resolution procedures. *We will consider how the Guidelines operate in practice. Given that procurement of health services is not subject to the full requirements of public procurement law¹, it may be that retaining this criterion will not have a material impact on use of the Panel's procedures.*
- one respondent asked what would happen if legal proceedings were commenced during the course of the CCP's procurement dispute appeals processes. *We have clarified in the Guidelines that the commencement of legal proceedings during the course of the CCP's review may result in the CCP's process being terminated or suspended at the discretion of the CCP.*

¹ As health services are classified as Part B services under the public procurement regime.

Question 4: Should anything additional be included in the Panel’s acceptance criteria? Should anything be excluded from the acceptance criteria?

16.Information required – paragraph 3.2(ii): one respondent indicated that this should be limited to the Submission Content requirements as opposed to “all relevant and applicable information” as otherwise it is unclear what needs to be provided. *We have revised this to indicate that the applicant’s submission must include the information set out in what is no Appendix 2, Guidance on the content of submissions.*

Section 4: Appeals Process

Question 5: Is the Panel’s procedural process for appeals of procurement disputes sufficiently clear and fair?

17.Calendar days or working days: a number of respondents asked that we clarify whether the timeframes referred to are working days or calendar days. *We have indicated where relevant that timeframes are in working days.*

18. ‘Sufficient interest’ of third parties –paragraph 4.6: a number of respondents said that they would like clarification on what ‘sufficient interest’ meant in relation to third parties seeking to make submissions or participate in hearings. *We have considered this and have now decided that it would be preferable to allow all third parties to make submissions without having to establish a ‘sufficient interest’.*

19.Hearings: paragraph 4.7: one respondent queried whether hearings will occur in public and whether advisers will be permitted to attend. *We have decided that ad hoc meetings are likely to be more appropriate and useful than formal hearings. Meetings will not be open to the public but legal and other advisers can attend.* Panel Members may also attend meetings.

20.Draft decision – review by parties: paragraph 4.10: respondents commented that parties to the appeal should have the opportunity to review the CCP’s draft decision and to make final comments, or at least have the opportunity to make sure that the non-confidential version does not contain any confidential information. *We have indicated clarified that the CCP’s process involves giving the applicant and the commissioner the opportunity to comment on the draft advice and recommendations. Representations from these parties will be taken into account before the CCP takes a final decision. Before the advice and recommendations are published, the CCP will also give relevant parties the opportunity to request the excision of business secrets or other confidential information and to check the accuracy of any factual information.*

Question 6: Does the appeals process as outlined allow parties sufficient opportunity to present their case?

21.Respondents generally agreed the process offered sufficient opportunity.

Question 7: Are the timeframes for conducting the appeals process sufficient?

22. Appeals process: A number of parties commented that the overall timescale for procurement dispute appeals (40 working days) was likely to prove challenging for the CCP. Others commented that, in particular, the 10 working day period for third party submissions may prove too tight in practice. *In view of the short length of the overall timeframe for procurement appeals (40 days) we do not think that allowing a greater period for third party submissions is advisable, as this would put more time pressure to other parts of the process.*

Question 8: Should third parties be afforded greater involvement in the Panel's referrals and appeals processes in terms of providing submissions to the Panel and attendance at hearings?

23. One respondent suggested that FT Boards of Governors, LINKs and Overview and Scrutiny Committees should be named specifically as third parties who should be afforded greater involvement in the Panel's processes. *As we have removed the qualification of 'sufficient interest' for submissions made by third parties, we do not think that it is necessary to nominate specific third parties that the CCP will involve in its processes, as all interested parties will be able to put their views forward. We have also indicated that in appropriate cases we may consult LINKs and the Care Quality Commission. We have clarified that patient groups are free to respond to the invitation to comment published on our website at the start of a case.*

CCP consideration of procurement dispute appeals

Question 9: Is the Panel right to seek to balance other benefits to patients and taxpayers against limitations on competition when assessing tender design?

24. Substantive approach: A number of respondents were keen for greater detail to be included on the Panel's likely substantive approach to assessing benefits to patients and taxpayers. *We have included additional text on the CCP's proposed approach to assessing benefits to patients and taxpayers at paragraphs 39-40 of the Revised Guidelines. The Guidelines adopt a 'reasonableness' approach to assessing commissioner decisions about procurement matters generally, where decisions are likely to be considered reasonable when they are consistent with the Principles and Rules.*

25. Counterfactual: one respondent indicated that the Panel should, where services have been competitively tendered, assess the counterfactual where competition was more limited, in order to assess the benefits/costs to taxpayers of a particular tender design. *We have noted at paragraph 40 of the Revised Guidelines that in reviewing disputes about procurement any cost/benefit analysis undertaken by the CCP will only take into account benefits that flow directly from a procurement decision. This is intended to capture the 'counterfactual' in that benefits to patients/taxpayers will only be taken into account if they could not be achieved other than as a result of the PCT's decision to, for example, restrict competition for a tender, or not to tender a service.*

26. Policy drivers: one respondent said that it would be helpful for the Guidelines to clarify the extent to which policy drivers would be taken into account in the Panel's assessment of costs and benefits to patients and taxpayers. *In considering appeals under the Revised Guidelines, the Panel will apply the Principles and Rules and the PCT Procurement Guide and general government policy on*

procurement matters (for example, guidance produced by the Office of Government Commerce) to the extent that it considers this relevant.

Question 10: Should the Panel be applying a different benchmark when assessing PCT decisions not to tender?

27. A number of respondents indicated that the criterion of 'reasonableness' set out in paragraph 5.6 of the Draft Guidelines did not conform with the considerations set out in the PCT Procurement Guide for deciding whether or not to tender a service, and this could create confusion. *We have now linked the reasonableness criterion in the Guidelines to consideration of any relevant criteria in the Principles and Rules. The new Principles and Rules (published in March 2010) state that commissioners' boards must ensure that their organizations comply with the PCT Procurement Guide, so consistency with the Principles and Rules implies consistency with the PCT Procurement Guide.*

Question 11: Although this list is not intended to be exclusive, are there any other remedies that should be expressly mentioned in these Procurement Guidelines?

28. **Suggested remedies** – paragraph 6.1: one respondent indicated that the CCP's suggested remedies should include a recommendation to PCTs to amend or change their tender evaluation criteria/scoring system. *We have included this at paragraph 48 and added that we may also recommend that the PCT re-evaluate against the revised criteria/scoring criteria where appropriate.*

29. **Enforcement** – paragraph 6.2: a number of queries were raised by respondents on how the CCP's recommendations would be enforced when a completed contract for services was in place – as setting aside a completed contract could expose the PCT to risk of a claim for damages by the contractor. One respondent also queried whether it would be possible for a 'stand-off' period to be put in place to prevent contracts being completed before the appeal period for disputes has expired, in order to avoid later problems with enforcement. *We recognise that there are difficulties with the CCP's recommendations being followed where completed contracts are in place. It is unlikely to be appropriate (other than perhaps in very exceptional circumstances) for the CCP to recommend that a contract for services is invalid or is set aside, although the CCP may recommend that a contract is terminated in accordance with its terms. To address this point we have also indicated that we consider it to be good practice for the commissioner not to enter into the contract for services where the relevant procurement process is subject to a dispute. The CCP intends to issue Guidelines on Assurances and Remedies that will provide more information on the topic of remedies.*