

## **17. TENDERING AND CONTRACTING PROCEDURE**

### **17.1 Duty to comply with Standing Financial Instructions**

The procedure for making all contracts by or on behalf of the Trust shall comply with these Standing Financial Instructions.

In instances where a major incident is declared, with the Trust enacting its emergency planning and preparedness framework, a deviation to the tender process outlined within the Standing Financial Instructions can take place to ensure adequate business continuity. The deviations are outlined in Appendix A on page 43

### **17.2 EU Directives Governing Public Procurement**

Directives by the Council of the European Union promulgated by the Department of Health and Social Care (DHSC) prescribing procedures for awarding all forms of contracts shall have effect as if incorporated in these Standing Financial Instructions.

### **17.3 Reverse eAuctions**

The Trust should have policies and procedures in place for the control of all tendering activity carried out through Reverse eAuctions.

### **17.4 Capital Investment and other Department of Health and Social Care Guidance**

The Trust shall comply as far as is practicable with the requirements of the Department of Health and Social Care current capital investment guidance and "Estate code" in respect of capital investment and estate and property transactions. In the case of management consultancy contracts the Trust shall comply as far as is practicable with Department of Health guidance "The Procurement and Management of Consultants within the NHS".

### **17.5 Formal Competitive Tendering**

#### **17.5.1 General Applicability**

The Trust shall ensure that competitive tenders are invited for:

- the supply of goods, materials and manufactured articles;
- the rendering of services including all forms of management consultancy services (other than specialised services sought from or provided by the DHSC);
- For the design, construction and maintenance of building and engineering works (including construction and maintenance of grounds and gardens); for disposals.

#### **17.5.2 Health Care Services**

Where the Trust elects to invite tenders for the supply of healthcare services these Standing Financial Instructions shall apply as far as they are applicable to the tendering procedure.

### 17.5.3 Exceptions and instances where formal tendering need not be applied

Formal tendering procedures **need not be applied** where:

- (a) the estimated expenditure or income does not, or is not reasonably expected to, exceed **£25,000**;
- (b) where the supply is proposed under special arrangements negotiated by the DH in which event the said special arrangements must be complied with;
- (c) regarding disposals as set out in Standing Financial Instructions No. 13;

Formal tendering procedures **may be waived** in the following circumstances:

- (d) in very exceptional circumstances where the Chief Executive decides that formal tendering procedures would not be practicable or the estimated expenditure or income would not warrant formal tendering procedures, and the circumstances are detailed in an appropriate Trust record;
- (e) where the requirement is covered by an existing contract;
- (f) where national or regional framework agreements available to the public sector are in place
- (g) where a consortium arrangement is in place and a lead organisation has been appointed to carry out tendering activity on behalf of the consortium members;
- (h) where the timescale genuinely precludes competitive tendering but failure to plan the work properly would not be regarded as a justification for a single tender;
- (i) where specialist expertise is required and is available from only one source;
- (j) when the task is essential to complete the project, and arises as a consequence of a recently completed assignment and engaging different consultants for the new task would be inappropriate;
- (k) there is a clear benefit to be gained from maintaining continuity with an earlier project. However in such cases the benefits of such continuity must outweigh any potential financial advantage to be gained by competitive tendering;
- (l) for the provision of legal advice and services providing that any legal firm or partnership commissioned by the Trust is regulated by the Law Society for England and Wales for the conduct of their business (or by the Bar Council for England and Wales in relation to the obtaining of Counsel's opinion) and are generally recognised as having sufficient expertise in the area of work for which they are commissioned.

The Director of Finance, Contracting and Estates will ensure that any fees paid are reasonable and within commonly accepted rates for the costing of such work.

- (m) where allowed and provided for within current Department of Health and Social Care capital investment guidance.

The waiving of competitive tendering procedures should not be used to avoid competition or for administrative convenience or to award further work to a consultant originally appointed through a competitive procedure.

Where it is decided that competitive tendering is not applicable and should be waived, the fact of the waiver and the reasons should be documented and recorded in an appropriate Trust record and reported to the Audit Committee at each meeting.

Contracts awarded by the Head of Procurement in conjunction with Points (f) and

(g) are not required to be waived, as contracts awarded in these circumstances have been let through nationally negotiated contracts which have demonstrated best value and have been let through open competition in accordance with National Procurement legislation. The Head of Procurement is not required to document and report this to the Trust Board.

#### **17.5.4 Fair and Adequate Competition/Single Tender**

Where the exceptions set out in SFI Nos. 17.1 and 17.5.3 apply, the Trust shall ensure that invitations to tender are sent to a sufficient number of firms/individuals to provide fair and adequate competition as appropriate, and in no case less than three firms/individuals, having regard to their capacity to supply the goods or materials or to undertake the services or works required unless:

- the goods required are from a sole manufacturer, or monopoly supplier then single tender is permitted.

#### **17.5.5 List of Approved Firms**

The Trust shall ensure that firms/individuals invited to tender are technically competent to undertake to fulfil the supply of goods and services. Contracts should only be awarded to firms/individuals who are financially and technically competent or are among those on the approved lists.

#### **17.5.6 Building and Engineering Construction Works**

Competitive Tendering cannot be waived for building and engineering construction works and maintenance (other than in accordance with EU Procurement Regulations) without Departmental of Health approval.

#### **17.5.7 Items which subsequently breach thresholds after original approval**

Items estimated to be below the limits set in this Standing Financial Instruction for which formal tendering procedures are not used which subsequently prove to have a value above such limits shall be reported to the Chief Executive, and be recorded in an appropriate Trust record.

### **17.6 Contracting/Tendering Procedure**

#### **17.6.1 Invitation to tender**

- (i) All invitations to tender shall state the date and time as being the latest time for the receipt of tenders.
- (ii) All hard copy invitations to tender shall state that no tender will be accepted unless:
  - (a) submitted in a plain sealed package or envelope bearing a pre-printed label supplied by the Trust (or the word "tender" followed by the subject to which it relates) and the latest date and time for the receipt of such tender addressed to the Chief Executive  
or  
nominated  
Manager;

- (b) that tender envelopes/ packages shall not bear any names or marks indicating the sender. The use of courier/postal services must not identify the sender on the envelope or on any receipt so required by the deliverer.
- (iii) Every tender for goods, materials, services or disposals shall embody such of the NHS Standard Contract Conditions as are applicable.
- (iv) Every tender for building or engineering works (except for maintenance work, when Estatecode guidance shall be followed) shall embody or be in accordance with the terms of a recognised form of construction contract e.g. the Joint Contracts Tribunal (JCT) standard forms of building contract or the NEC4 Engineering and Construction Contract. Where the content of the work is primarily engineering, the Model Forms of general conditions of contract recommended by the Institution of Mechanical and Electrical Engineers or the Institute of Civil Engineers, may be more appropriate. These documents may be modified and/or amplified to accord with Department of Health guidance and, in minor respects, to cover special features of individual projects

#### 17.6.2 Receipt and safe custody of tenders

The Chief Executive or his nominated representative will be responsible for the receipt, endorsement and safe custody of tenders received until the time appointed for their opening.

The date and time of receipt of each tender shall be endorsed on the tender envelope/package.

##### *The Electronic Return of Tenders*

Tenders may be sought and returned electronically via an external service system approved by the Chief Executive/Director of Finance, Contracting and Estates, provided that:

- Such systems will be configured so that responses are secure and visible to the delegated staff only, upon the expiry of the published response deadline only.
- The electronic system will not detract in any way from the provisions of this document in any other way.

Tender responses will be accessed electronically by approved/delegated staff, whereupon all offers will be printed and recorded in the same way as hard copy only Tenders.

#### 17.6.3 Opening tenders and Register of tenders (paper based responses)

- (i) As soon as practicable after the date and time stated as being the latest time for the receipt of tenders, they shall be opened by two senior managers designated by the Chief Executive and not from the originating department.
- (ii) A member of the Trust Board will be required to be one of the two approved persons present for the opening of tenders estimated above £25,000. The rules relating to the opening of tenders will need to be read in conjunction with any delegated authority set out in the Trust's Scheme of Delegation.
- (iii) The 'originating' Department will be taken to mean the Department sponsoring or commissioning the tender.
- (iv) The involvement of Finance Directorate staff in the preparation of a tender proposal will not preclude the Director of Finance, Contracting and Estates or any approved Senior Manager from the Finance Directorate from serving as one of the two senior managers to open tenders.

- (v) All Executive Directors/members will be authorised to open tenders regardless of whether they are from the originating department provided that the other authorised person opening the tenders with them is not from the originating department. This may be delegated to Deputy Directors where a director is not available.

The Trust Secretary and Chief Information Officer will count as Directors for the purposes of opening tenders.

- (vi) Every tender received shall be marked with the date of opening and initialled by those present at the opening.
- (vii) A register shall be maintained by the Chief Executive, or a person authorised by him, to show for each set of competitive tender invitations despatched:
- the name of all firms individuals invited;
  - the names of firms individuals from which tenders have been received;
  - the date the tenders were opened;
  - the persons present at the opening (includes present via Microsoft Teams);;
  - the price shown on each tender;
  - a note where price alterations have been made on the tender.

Each entry to this register shall be signed by those present.

A note shall be made in the register if any one tender price has had so many alterations that it cannot be readily read or understood.

- (viii) Incomplete tenders, i.e. those from which information necessary for the adjudication of the tender is missing, and amended tenders i.e., those amended by the tenderer upon his own initiative either orally or in writing after the due time for receipt, but prior to the opening of other tenders, should be dealt with in the same way as late tenders. (SFI No. 17.6.5 below).

As soon as practicable after the date and time stated as being the latest time for the receipt of tenders, they shall be opened by two senior managers designated by the Chief Executive and not from the originating department. In the event that the two senior managers availability is limited to Microsoft Teams, this is deemed acceptable, as long as there is another senior manager, or a member of the executive support team (in addition to the existing two senior managers) also present at the opening of the tender and in receipt of hard copy paper based tender document. The meeting must be recorded and saved for audit/ assurance purposes

#### **17.6.4 Opening tenders and Register of tenders (Electronic Responses) – Procurement and Supplies Department Only**

- (i) As soon as practicable after the release date of the tender, they shall be opened and printed by designated staff from the originating Department.
- (ii) The 'originating' Department will be taken to mean the Department sponsoring or commissioning the tender.
- (iii) The Head of Procurement and the Deputy Head of Procurement will be required to be one of the two approved persons present for the releasing of the tenders estimated above £25k. In the case where the Head of Procurement or the Deputy Head of Procurement is the tender originator, a separate delegated officer will need to be present. The rules relating to

the opening of tenders will need to be read in conjunction with any delegated authority set out in the Trust's scheme of delegation.

- (iv) A register shall be maintained by the Head of Procurement , or a person authorised by them, to show for each set of competitive tender invitations despatched:
- the name of all firms individuals invited;
  - the names of firms individuals from which tenders have been received and for electronic tenders:
  - the date the tenders were opened;
  - the persons present at the opening (includes present via Microsoft Teams);
  - the price shown on each tender;
  - a note where price alterations have been made on the tender.

A note shall be made in the register if any one tender submission has had so many re-submissions that it cannot be readily read or understood.

- (v) Incomplete tenders, i.e. those from which information necessary for the adjudication of the tender is missing, and amended tenders i.e., those amended by the tendered upon his own initiative either orally or in writing after the due time for receipt, but prior to the opening of other tenders, should be dealt with in the same way as late tenders (17.6.6 below)

#### 17.6.5 Admissibility

- i) If for any reason the designated officers are of the opinion that the tenders received are not strictly competitive (for example, because their numbers are insufficient or any are amended, incomplete or qualified) no contract shall be awarded without the approval of the Chief Executive.
- (ii) Where only one tender is sought and/or received, the Chief Executive and Director of Finance, Contracting and Estates shall, as far practicable, ensure that the price to be paid is fair and reasonable and will ensure value for money for the Trust.

#### 17.6.6 Late tenders

- (i) Tenders received after the due time and date, but prior to the opening of the other tenders, may be considered only if the Chief Executive or his nominated officer decides that there are exceptional circumstances i.e. despatched in good time but delayed through no fault of the tenderer.
- (ii) Only in the most exceptional circumstances will a tender be considered which is received after the opening of the other tenders and only then if the tenders that have been duly opened have not left the custody of the Chief Executive or his nominated officer or if the process of evaluation and adjudication has not started.
- (iii) While decisions as to the admissibility of late, incomplete or amended tenders are under consideration, the tender documents shall be kept strictly confidential, recorded, and held in safe custody by the Chief Executive or his nominated officer.

#### 17.6.8 Acceptance of formal tenders (See overlap with SFI No. 17.7)

- (i) Any discussions with a tenderer which are deemed necessary to clarify technical aspects of his tender before the award of a contract will not disqualify the tender.
- (ii) The lowest tender, if payment is to be made by the Trust, or the highest, if payment is to be received by the Trust, shall be accepted unless there are good and sufficient reasons to the

contrary. Such reasons shall be set out in either the contract file, or other appropriate record.

It is accepted that for professional services such as management consultancy, the lowest price does not always represent the best value for money. Other factors affecting the success of a project include:

- (a) experience and qualifications of team members;
- (b) understanding of client's needs;
- (c) feasibility and credibility of proposed approach;
- (d) ability to complete the project on time.

Where other factors are taken into account in selecting a tenderer, these must be clearly recorded and documented in the contract file, and the reason(s) for not accepting the lowest tender clearly stated.

The Head of Procurement may enter into post tender negotiations on terms of costs provided that the reasons for, and the results of, such negotiations are maintained in a permanent record.

No tender shall be accepted which will commit expenditure in excess of that which has been allocated by the Trust and which is not in accordance with these Instructions except with the authorisation of the Chief Executive.

- (iv) The use of these procedures must demonstrate that the award of the contract was:
  - (a) not in excess of the going market rate / price current at the time the contract was awarded;
  - (b) that best value for money was achieved.
  - (c) in accordance with MEAT (Most Economically Advantageous Tender) criteria
- (v) All tenders should be treated as confidential and should be retained for inspection.

#### 17.6.9 **Tender reports to the Trust Board**

Reports to the Trust Board will be made on an exceptional circumstance basis only.

#### 17.6.10 **List of approved firms (see SFI No. 17.5.5)**

##### (a) **Responsibility for maintaining list**

A manager nominated by the Chief Executive shall on behalf of the Trust maintain lists of approved firms from who tenders and quotations may be invited. These shall be kept under frequent review. The lists shall include all firms who have applied for permission to tender and as to whose technical and financial competence the Trust is satisfied. All suppliers must be made aware of the Trust's terms and conditions of contract.

##### (b) **Building and Engineering Construction Works**

- (i) Invitations to tender shall be made only to firms included on the approved list of tenderers compiled in accordance with this Instruction or on the separate maintenance lists compiled in accordance with Estmancode guidance..

- ii) Firms included on the approved list of tenderers shall ensure that when engaging, training, promoting or dismissing employees or in any conditions of employment, shall not discriminate against any person because of colour, race, ethnic or national origins, religion or sex, and will comply with the provisions of the Equality Act 2010, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disabled Persons (Employment) Act 1944 and any amending and/or related legislation.
- iii) Firms shall conform at least with the requirements of the Health and Safety at Work Act and any amending and/or other related legislation concerned with the health, safety and welfare of workers and other persons, and to any relevant British Standard Code of Practice issued by the British Standard Institution. Firms must provide to the appropriate manager a copy of its safety policy and evidence of the safety of plant and equipment, when requested.

(c) **Financial Standing and Technical Competence of Contractors**

The Director of Finance, Contracting and Estates may make or institute any enquiries deemed appropriate concerning the financial standing and financial suitability of approved contractors. The Director with lead responsibility for clinical governance will similarly make such enquiries as is felt appropriate to be satisfied as to their technical / medical competence.

(d) **Procurement**

The Head of Procurement should seek to ensure that all firms, with whom the Trust enters into a contract, are technically and financially competent to undertake to fulfil the supply of goods and services, making use of the national and regional framework contracts, the NHS Supply Chain, and Trust approved contractors.

#### 17.6.11 **Exceptions to using approved contractors**

If in the opinion of the Chief Executive and the Director of Finance, Contracting and Estates or the Director with lead responsibility for clinical governance it is impractical to use a potential contractor from the list of approved firms/individuals (for example where specialist services or skills are required and there are insufficient suitable potential contractors on the list), or where a list for whatever reason has not been prepared, the Chief Executive should ensure that appropriate checks are carried out as to the technical and financial capability of those firms that are invited to tender or quote.

An appropriate record in the contract file should be made of the reasons for inviting a tender or quote other than from an approved list.

### **17.7 Quotations: Competitive and non-competitive**

#### 17.7.1 **General Position on quotations**

Quotations are required where formal tendering procedures are not adopted and where the intended expenditure or income exceeds, or is reasonably expected to exceed £25,000.

#### 17.7.2 **Competitive Quotations**

- (i) Quotations should be obtained from at least three firms/individuals based on specifications or terms of reference prepared by, or on behalf of, the Trust.
- (ii) Quotations should be in writing unless the Chief Executive or his nominated officer determines that it is impractical to do so in which case quotations may be obtained by telephone. Confirmation of telephone quotations should be obtained as soon as possible and



the reasons why the telephone quotation was obtained should be set out in a permanent record.

- (iii) All quotations should be treated as confidential and should be retained for inspection.
- (iv) The Chief Executive or his nominated officer should evaluate the quotation and select the quote which gives the best value for money. If this is not the lowest quotation if payment is to be made by the Trust, or the highest if payment is to be received by the Trust, then the choice made and the reasons why should be recorded in a permanent record.

### 17.7.3 Non-Competitive Quotations

Non-competitive quotations in writing may be obtained in the following circumstances:

- (i) the supply of proprietary or other goods of a special character and the rendering of services of a special character, for which it is not, in the opinion of the responsible officer, possible or desirable to obtain competitive quotations;
- (ii) the supply of goods or manufactured articles of any kind which are required quickly and are not obtainable under existing contracts;
- (iii) miscellaneous services, supplies and disposals;
- (v) where the goods or services are for building and engineering maintenance the responsible works manager must certify that the first two conditions of this SFI (i.e. (i) and (ii) of this SFI) apply.

### 17.7.4 Quotations to be within Financial Limits

No quotation shall be accepted which will commit expenditure in excess of that which has been allocated by the Trust and which is not in accordance with Standing Financial Instructions except with the authorisation of either the Chief Executive or Director of Finance, Contracting and Estates.

## 17.8 Authorisation of Tenders and Competitive Quotations

Providing all the conditions and circumstances set out in these Standing Financial Instructions have been fully complied with, formal authorisation and awarding of a contract may be decided by the following staff to the value of the contract as follows:

Head of Procurement	up to	£25,000
Prime Budget Holder	up to	£50,000
Deputy Director	up to	£75,000
Director	up to	£100,000
Chief Executive and DFCE	up to	£600,000
Trust Board	over	£600,000

These levels of authorisation may be varied or changed and need to be read in conjunction with the Trust's Scheme of Delegation.

Formal authorisation must be put in writing. In the case of authorisation by the Trust Board this shall be recorded in their minutes.

In the event that the Director of Finance, Contracting and Estates is deputising for the Chief Executive and the authorisation limit has been reached where both signatories are required, the function of DFCE will be delegated to the Deputy Director of Finance but supported by additional Executive Director approval.

Where the Trust is involved in a financial decision relating to the WYMHSC, the threshold would be set at £500k. For other decisions that rest solely with the BDCFT Board, the £600k threshold would be retained.

In the event of a major incident being declared with the Trust commencing its business continuity framework, Appendix A outlines the authorised signatories.

### **17.9 Instances where formal competitive tendering or competitive quotation is not required**

Where competitive tendering or a competitive quotation is not required the Trust should adopt one of the following alternatives:

- (a) the Trust shall use the NHS Supply Chain for procurement of all goods and services unless the Chief Executive or nominated officers deem it inappropriate. The decision to use alternative sources must be documented.
- b) The Trust shall use national and regional framework contracts.
- (c) If the Trust does not use the options in (a) and (b) - where tenders or quotations are not required, because expenditure is below £25,000, the Trust shall procure goods and services in accordance with procurement procedures approved by the Director of Finance, Contracting and Estates.

### **17.10 Private Finance for capital procurement (see overlap with SFI No. 11)**

The Trust should normally market-test for PFI (Private Finance Initiative funding) when considering a capital procurement. When the Board proposes, or is required, to use finance provided by the private sector the following should apply:

- (a) The Chief Executive shall demonstrate that the use of private finance represents value for money and genuinely transfers risk to the private sector.
- (b) Where the sum exceeds delegated limits, a business case must be referred to the appropriate Department of Health for approval or treated as per current guidelines.
- (c) The proposal must be specifically agreed by the Board of the Trust.
- (d) The selection of a contractor/finance company must be on the basis of competitive tendering or quotations.

### **17.11 Compliance requirements for all contracts**

The Board may only enter into contracts on behalf of the Trust within the statutory powers delegated to it by the Secretary of State and shall comply with:

- (a) The Trust's Standing Financial Instructions;
- (b) EU Directives and other statutory provisions;
- (c) any relevant directions including the Capital Investment Manual, Estatecode and guidance on the Procurement and Management of Consultants;
- (d) such of the NHS Standard Contract Conditions as are applicable.
- (e) contracts with Foundation Trusts must be in a form compliant with appropriate NHS guidance.

- (f) Where appropriate contracts shall be in or embody the same terms and conditions of contract as was the basis on which tenders or quotations were invited.
- (g) In all contracts made by the Trust, the Board shall endeavour to obtain best value for money by use of all systems in place. The Chief Executive shall nominate an officer who shall oversee and manage each contract on behalf of the Trust.

#### **17.12 Personnel and Agency or Temporary Staff Contracts**

The Chief Executive shall nominate officers with delegated authority to enter into contracts of employment, regarding staff, agency staff or temporary staff service contracts.

#### **17.13 Healthcare Services Agreements (see overlap with SFI No. 7 )**

Service agreements with NHS providers for the supply of healthcare services shall be drawn up in accordance with the NHS and Community Care Act 1990 and administered by the Trust. Service level agreements are not contracts in law and therefore not enforceable by the courts. However, a contract with a Foundation Trust, being a PBC, is a legal document and is enforceable in law.

The Chief Executive shall nominate officers to commission service agreements with providers of healthcare in line with a commissioning plan approved by the Board.

#### **17.14 Disposals (See overlap with SFI No. 13)**

Competitive Tendering or Quotation procedures shall not apply to the disposal of:

- (a) any matter in respect of which a fair price can be obtained only by negotiation or sale by auction as determined (or pre-determined in a reserve) by the Chief Executive or his nominated officer;
- (b) obsolete or condemned articles and stores, which may be disposed of in accordance with the supplies policy of the Trust;
- (c) items to be disposed of with an estimated sale value of less than £5,000, this figure to be reviewed on a periodic basis;
- (d) items arising from works of construction, demolition or site clearance, which should be dealt with in accordance with the relevant contract;
- (e) land or buildings concerning which DHSC guidance has been issued but subject to compliance with such guidance.

#### **17.15 In-house Services**

17.15.1 The Chief Executive shall be responsible for ensuring that best value for money can be demonstrated for all services provided on an in-house basis. The Trust may also determine from time to time that in-house services should be market tested by competitive tendering.

17.15.2 In all cases where the Board determines that in-house services should be subject to competitive tendering the following groups shall be set up:

- (a) Specification group, comprising the Chief Executive or nominated officer/s and specialist.
- (b) In-house tender group, comprising a nominee of the Chief Executive and technical support.

(c) Evaluation team, comprising normally a specialist officer, a supplies officer and a Director of Finance, Contracting and Estates representative. For services having a likely annual expenditure exceeding £100,000, a non-officer member should be a member of the evaluation team.

17.15.3 All groups should work independently of each other and individual officers may be a member of more than one group but no member of the in-house tender group may participate in the evaluation of tenders.

17.15.4 The evaluation team shall make recommendations to the Board.

17.15.5 The Chief Executive shall nominate an officer to oversee and manage the contract on behalf of the Trust.

#### **17.16 Applicability of SFIs on Tendering and Contracting to funds held in trust**

These Instructions shall not only apply to expenditure from Exchequer funds but also to works, services and goods purchased from the Trust's trust funds and private resources.