NHS
Kernow
Clinical Commissioning Group

Procurement Protocol for managing commissioning changes

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This policy was adopted by NHS Cornwall and Isles of Scilly Integrated Care Board (ICB) on 1 July 2022.

We are working to change the branding on our policies and to make sure they are accessible.

We intend to complete this work by 1 April 2023. While this work is underway, all references to NHS Kernow, the CCG and related structures should be taken to relate to the ICB.

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Please see the disclaimers within the introduction of this policy.

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Version control

Version number	Revision date	Revision by	Nature of revisions
V1.0	April 2018	Julie Davies and Gill Beardsmore	New document
V1.1	28 May 2018	Finance committee	Ratified
V1.2	20 January 2021	Jayne-Louise Jackson	Changed 'the CCG' to 'NHS Kernow' throughout the document Formatted document to NHS Kernow corporate style Added links to appendices where applicable Changed 'direct award' to 'single action waiver tender' Formatted the appendices correctly
V1.3	22 January 2021	Jayne-Louise Jackson	Additions made to reflect the new business planning and performance group (BPPG) committee and include BPPG terms of reference

Version number	Revision date	Revision by	Nature of revisions
V2.0	5 March 2021	Jayne-Louise Jackson	Approved by finance senior management team
V2.3a	25 January 2022	Gill Beardsmore	Additions made to include “or any successor organisation” Disclaimer added to reflect the two new pieces of legislation
V3.0	28/04/2022	Gill Beardsmore	Full review of document and appendices

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1. Introduction

Disclaimer 1: This policy is correct at time of publication. The UK has left the EU and there is now a transition period until the end of 2020, while the UK and EU negotiate additional arrangements. We already know that from 1 January 2021 a new e-notification service called Find a Tender will be used to post and view public sector procurement notices instead of on the Official Journal of European Union site.

(Public sector procurement after a no deal Brexit).

Disclaimer 2: This policy is correct at time of publication. The UK government released two new pieces of legislation as Green Papers for consultation during 2021. It is unlikely that these two pieces of legislation will be mandated into public law and released until 2023; therefore, until such times as the impact of this new legislation is understood, the contents of this policy remain correct, and adherence is maintained.

Disclaimer 3: All reference to NHS Kernow Clinical Commissioning Group (NHS Kernow) within this document should also refer to any successor organisation, in relation to the proposed updates to the Health and Care Bill and the proposed demise of Clinical Commissioning Groups.

There will be numerous additional changes that the procurement team and NHS Kernow will need to consider, to that end, this policy will be updated again when the transition period is over, and more detail is available. This policy sets out NHS Kernow's management of change to the commissioning of services.

NHS Kernow is committed to providing high quality clinical services that meet the needs of local communities as set out in its corporate objectives, annual delivery plan and commissioning intentions, and agreed by its governing body. NHS Kernow will undertake full options appraisals, engaging and/or consulting as appropriate to secure the best services for the local population.

NHS Kernow also purchases goods on behalf of the community and itself, the same overarching principles apply.

Applying a consistent approach for the gathering of evidence, exploration of options, identification of the most appropriate option, governance, and compliance to all relevant laws and guidance is essential to the successful commissioning of goods and services. This policy and its appendices support this approach.

2. Guiding principles

NHS Kernow recognises the importance in making decisions about the services it commissions in a way that does not call into question the decision that has been made

or the process followed. NHS Kernow will commission services in a manner that is transparent, non-discriminatory and in a fair way with a view to:

- Meeting the needs of the people who use the services
- Improving the quality of the services
- Improving efficiency and value for money in the provision of the services

On occasions we will work together with system partners to identify the most appropriate solution.

In doing so NHS Kernow is committed to:

- Engage with providers and service users about its commissioning proposals and take their responses into account
- Where appropriate, undertake formal engagement and consultation
- Act in a proportionate and transparent way
- Clear and transparent governance arrangements
- Treat providers equally and in a non-discriminatory way, including by not treating a provider or a type of provider more favourably than any other provider in particular on the basis of ownership

3. Adherence to legislation

When NHS Kernow intends to procure a new contract by testing the market in competition, it will ensure compliance with Procurement Directives as implemented by UK Law and national guidance from NHS England and NHS Improvement and Crown Commercial Services, namely:

- The Public Contract Regulations 2015
- Light Touch Regime Guidance (2015)
- Bribery Act 2010
- The Equality Act 2010 (Section 149)
- The Public Service (Social Value) Act 2012
- Modern Slavery Act 2015 (see appendix 1 for NHS Kernow Modern Slavery Statement)
- Freedom of Information Act 2000 (see appendix 2 for NHS Kernow Freedom of Information Policy)
- The NHS (Procurement, Patient Choice and Competition) Regulations 2013 which support interpretation of Section 75 of the Health and Social Care Act 2012 (11.03.2013)
- Also, within the Act – section 140 Managing Conflicts of Interest

- Procurement Guide for Commissioners of NHS funded services (DH, 30 July 2010)
- The Principles and Rules for Co-operation and Competition (PRCC, July 2010)
- Framework for Managing Choice, Co-operation, and Competition (May 2008)
- Procurement of Healthcare (Clinical) services, briefings 1 to 4 (NHS Commissioning Board, Sept 2012)
- Managing conflicts of interests: Statutory Guidance for clinical commissioning groups (NHS England, June 2017)
- A fair playing field for the benefit of NHS patients: Monitor's independent review for the Secretary of State for Health (March 2013)
- Policy paper - 2010 to 2015 government policy: greenhouse gas emissions – publicly reporting carbon emissions from businesses and the public sector
- Commissioning Contracting for Integrated Care (Kings Fund Nov 2014)
- NHS Constitution
- GDPR
- Any Procurement Policy Notices (PPN) issued by the UK Government

Where NHS Kernow intends to work collaboratively with an existing provider to effect a major change, it will ensure adherence to all relevant national legislation (as above) and regional guidelines and evidence how due process has been followed to ensure all risks and benefits have been appropriately evaluated and why a procurement process, although considered, is not the most effective route.

All evidence and exploration of options will be evidenced within a suite of documents (see appendices 3 and 4).

4. Financial controls

NHS Kernow's constitution (see appendix 5) sets out the financial limits for the management best value on any purchases carried out on its behalf. (See appendix 6 and 7 for NHS Kernow's standing financial orders, standing financial instructions and Scheme of delegation).

NHS Kernow will ensure all commissioned services aim to deliver value for money ensuring best quality and price for the service supplied.

5. Governance

To ensure thoroughness, consistency and to provide assurance to the governing body, the Operations Board (Ops Board) provide scrutiny and recommendations endorsed for onward approval to one of two Boards:

- Audit Committee for any Public Contract Regulations 2015 under-threshold Single Action Tender Waivers
- Finance and Performance Committee for all Public Contract Regulations 2015 over-threshold Single Action Tender Waivers and all project proposals

The Finance and Performance Committee (FPC), reporting to the governing body, will oversee the delivery of each project as NHS Kernow's responsible group.

To ensure NHS Kernow has acted fairly, adhered to the regulations, and followed best practice guidance, each commissioning proposal, will be presented to the Ops Board who will then make recommendations endorsed for onward approval by FPC for a decision to proceed. (See appendix 3 and 4 for project initiation document/full business case template and supporting information templates). Auditable governance procedures must be followed to ensure due process to minimise the risk of legal challenge of any potential or unsuccessful bidders or other parties.

Where NHS Kernow decides to procure a clinical service collaboratively with another clinical commissioning group or organisation, a lead commissioner or joint commissioning governance structure will need to be identified and used to oversee the process; after initial sign-off to proceed from the NHS Kernow FPC and with updates at key stages of the project.

Each project will consist of a project delivery group which is overseen by a project steering group. Each group will have terms of reference to ensure thoroughness, consistency and assurance is maintained.

Operations Board

The Ops Board is formally accountable to both the FPC and the people and organisational governance committee for the relevant aspects of its remit.

The Ops Board will provide reports to both the FPC and the joint senior leadership team, using standard reporting formats.

The Ops Board will make recommendations and are the receiver of all business cases requiring NHS Kernow funding. Without a positive and quorate response from the Ops Board, business cases will not move forward. (It is recognised some business cases may go through other mechanisms, e.g., programme boards, recovery cell, Primary Care Operations Group, etc. before being received by the Ops Board.)

The Ops Board is authorised to provide recommendations for approval on business cases and efficiency savings plans to the finance and performance committee and the joint senior leadership team.

The Ops Board terms of reference are currently under development.

Finance and performance committee

The finance and performance committee reporting directly to the governing body has been established, with clear terms of reference, to ensure robust and transparent decision making regarding the identification and delivery of major commissioning changes. A regular report will be tabled at governing body and will include assurance on the management of conflicts of interest in relation to each project. (The finance and performance committee terms of reference can be found at appendix 9).

Project steering group (task and finish)

Formed to manage and oversee each project, this group exists for the life of the individual project and disbands after the contract is mobilised. This group will consist of the chief finance officer or delegated deputy, senior responsible officer, commissioning manager and/or project manager, contract manager, patient representative and a clinician where appropriate. This group will adopt terms of reference to oversee the project progress (see appendix 10). It will be disbanded once the commissioning change has been mobilised.

Conflicts of interests are managed for members of this group to ensure fairness and transparency remain throughout the life of the project, please see conflicts of interest section below.

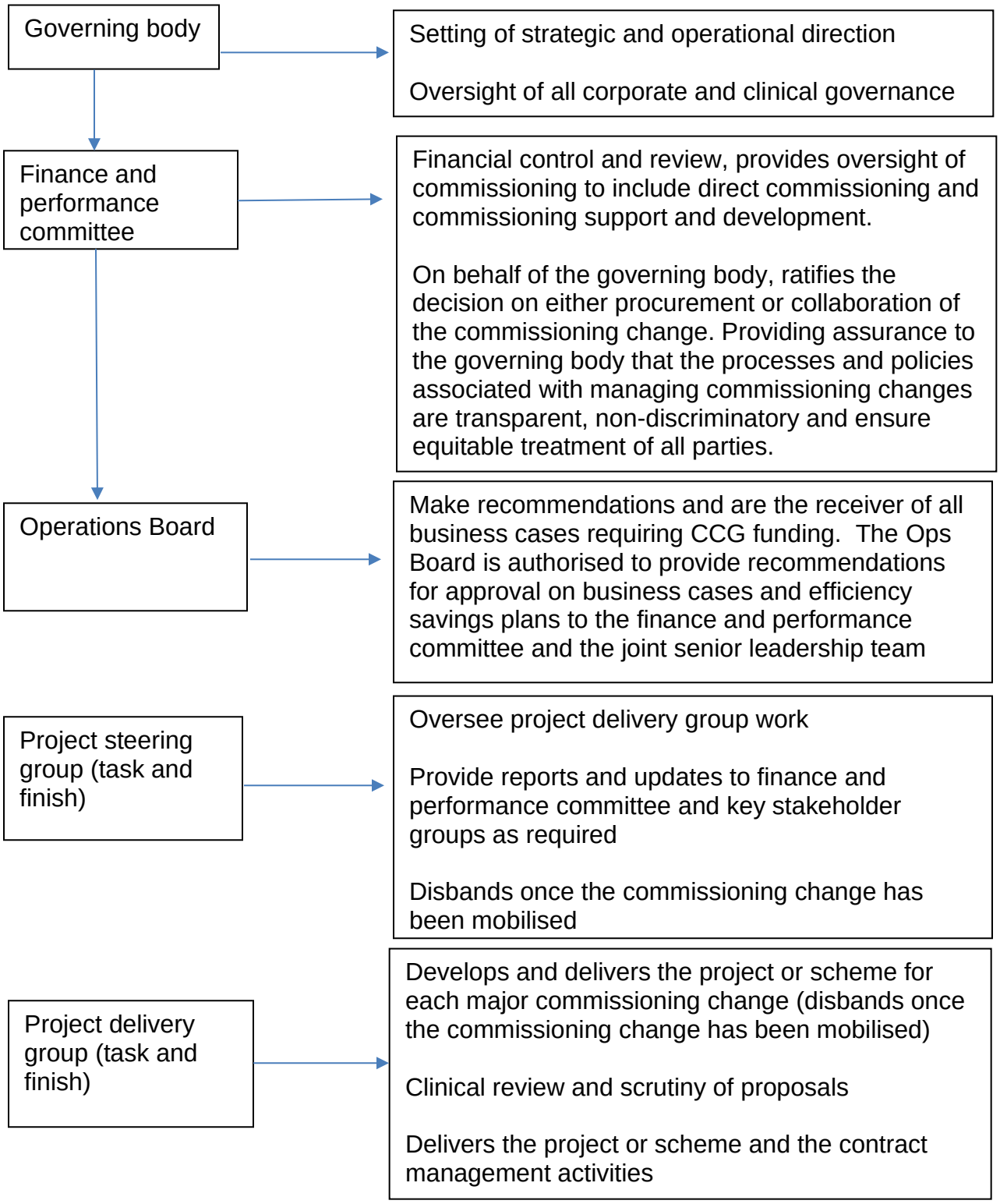
Project delivery group (task and finish)

Formed in readiness for the commissioning change and made up of specific job roles from various departments, this will be a core group who sit on the project to determine the requirements of the change and if procurement is the agreed option, generate all the required documentation to undertake the exercise. Many of this group's representatives also become the evaluation panel to ensure consistency and continuity of approach. A standard terms of reference, to govern the duties, responsibilities and actions of the group will be adopted (see appendix 11). This group will seek appropriate clinical, professional, and patient representative involvement as required. This group will also be responsible for ensuring robust public engagement is sought, as appropriate for the project and manage conflicts of interests. It may develop into single subject smaller task and finish groups for specific elements of work; reporting back to the project delivery group allowing findings to be incorporated into the decision making. The project delivery group is disbanded once the commissioning change has been mobilised; however, members of this group will become members of the mobilisation team.

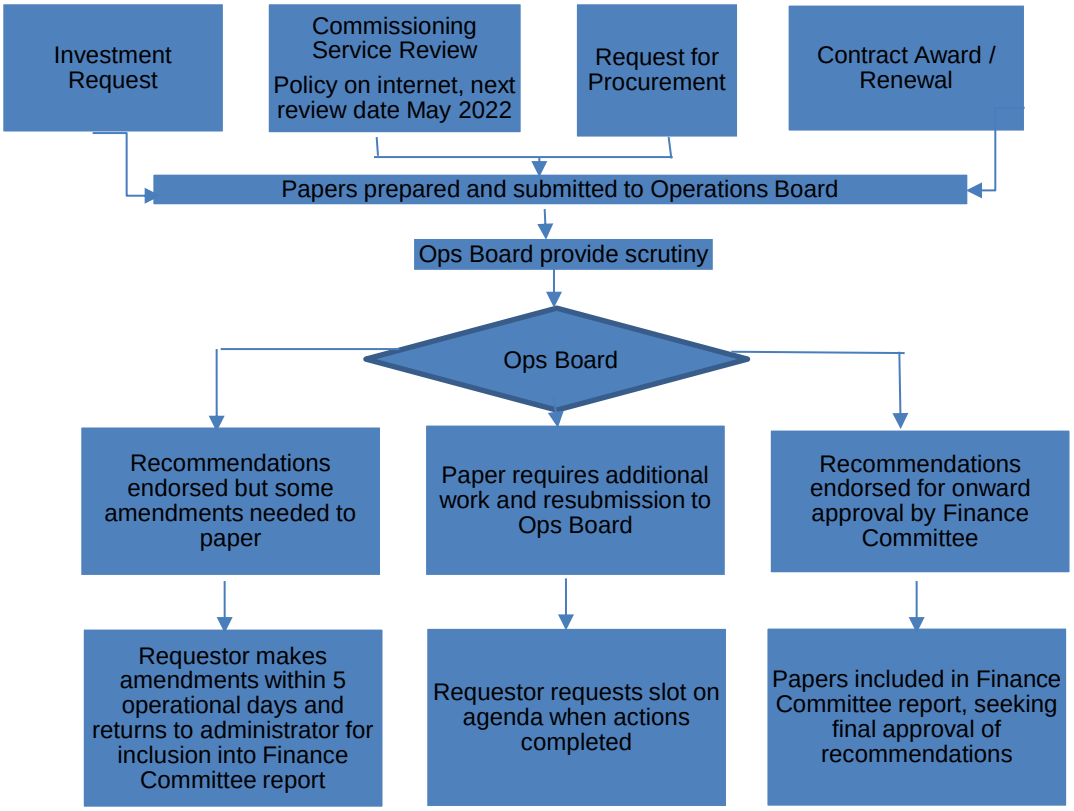
Conflicts of interests are managed for members of this group to ensure fairness and transparency remain throughout the life of the project, please see conflicts of interest section below.

Governance structure

The diagram below sets out NHS Kernow's governance structure for major commissioning changes



The diagram below sets out NHS Kernow's governance structure Ops Board.



Resources

A number of commissioning change projects may be running simultaneously, and other projects will be drawing from the same resources.

It is recognised that the resource available internally is limited and careful management and timetabling of projects and potential procurements will be required to avoid 'overload' in certain areas. Reference to the work plan of current projects supported by a resource plan, will be essential in deciding how to proceed with any new projects and balanced against resources already allocated to the management of the existing projects to avoid project slippage. The overview of this work plan is the responsibility of the finance and performance committee in conjunction with the procurement team.

The inclusion of patient representatives and service users in the project groups is essential to ensure the voice of the individual is heard and learned experience is utilised, their experience informs the future service requirements and NHS Kernow has complied with its requirement to engage throughout the commissioning cycle within the Procurement, Patient Choice and Competition Regulations 2013.

Conflicts of interest

NHS Kernow recognises that conflicts of interest may arise in relation to managing a major commissioning change. For example:

- Where a proposed competitive tender is likely to attract bids from organisations in which a member of a decision-making body has a financial or material interest, this interest must be declared, and the group member will be excluded from relevant parts of those meetings and evaluations
- Where a member of the Ops Board and/or FPC or key evaluation member are a member of staff or on the Board of the incumbent provider, this interest must be declared, and the group member will be excluded from the relevant parts of those meetings and evaluations

To ensure active management of conflicts of interest, NHS Kernow will maintain registers of interest at a corporate level and at a project level (see appendix 12 for Management of COI in competition and collaboration process SOP). Each member will sign a declaration of interest and confidentiality form for a particular project; each project will have a log of the completed forms (see appendix 13 for Declaration of interest and confidentiality template). NHS Kernow will keep corporate records as to how conflicts of interest have been managed in line with section 14O of The National Health Service Act 2006, the NHS (Procurement, Patient Choice and Competition) regulations 2013 and with the NHS England and NHS Improvement Managing Conflicts of Interest: Revised Statutory Guidance for CCGs (June 2017). All project conflicts of interest registers are subject to internal audit to ensure compliance on an annual basis.

6. Commissioning change

Any procurement or collaboration will be conducted in accordance with the following:

General fairness and transparency: In accordance with Clause 6.2 General Duties of its Constitution (NHS Kernow Constitution), NHS Kernow will be clear and transparent in all communications with providers about NHS Kernow's commissioning intentions, decisions (or not) to tender, advertising of opportunities, procurement evaluation criteria, publication of decisions and mechanisms for feedback.

Efficiency: NHS Kernow will ensure that any procurement process is as efficient and time effective as possible for both commissioners and providers. As an outcome, all procurements will aim to improve productivity, efficiency and effectiveness of services whilst maintaining and seeking to improve clinical quality.

Quality: NHS Kernow commissioners will procure services to meet patient needs which are of the highest possible quality standard and use appropriate measurable quality standards to monitor provider performance. NHS Kernow will ensure that the contract awarded as the result of a procurement process, as well as the procurement process

itself, encourages all providers to deliver continual improvement in the quality of services that they are commissioned to provide.

Continuity: NHS Kernow will continue to work in partnership with key providers of NHS services to continually test these services to ensure that the current providers deliver best value for money.

Equality of treatment and non-discrimination: NHS Kernow will clearly identify those services which will be put out to competitive tender, and to ensure that all sectors and providers (NHS and non-NHS) will be treated with equity in terms of procurement rules, access to information, timescales, financial and quality assurance checks, and pricing and payment regimes.

Proportionality: By means of advice, guidance and support, NHS Kernow will use procurement processes that are proportionate to the value, complexity, and risk/benefit to patients of services procured. Different procurement routes for different types of services will enable this, potential costs to bidders will also be considered when assessing which procurement route to follow.

Consistency: NHS Kernow will apply national and local principles and rules consistently to all clinical procurements that they undertake.

Professional conduct: NHS Kernow will ensure that all procurement personnel who undertake procurements will be subject to Professional Code of Conduct as published by the Chartered Institute of Purchasing and Supply (CIPS) or overseen by such Professional.

Equality and non-discrimination

The Health and Social Care Act 2012 Section 14z2 requires CCGs to ensure public involvement and consultation. The Public Services (Social Values) Act 2012 requires CCGs to ensure improvement in economic social and environmental wellbeing of the area and how any procurement would secure that improvement.

NHS Kernow will not discriminate and will promote equality of opportunity and pay particular attention to those groups or sections of society with poorer health and life expectancy. Public Sector Equalities Duties 2012 S149 promotes integration and the use of protected characteristics.

NHS Kernow will evidence through an economic, social, and environmental impact assessment how it can evidence improvement to the wellbeing of the area.

Bribery

On 1 July 2011, the Bribery Act 2010 came into force; a commercial organisation may be criminally liable for corrupt acts carried out on its behalf by third parties, and subject

to potentially unlimited fines. In order to comply with the Bribery Act 2010 legislation, NHS Kernow has put into place mechanisms to establish and maintain adequate procedures that prevent bribery.

To further comply with the Act a proper, thorough assessment of risk is essential during the change process. Where a proposed competitive tender is likely, NHS Kernow shall assess the level of risk and conduct a proportionate level of due diligence in order to take all necessary precautions to ensure that NHS Kernow only forms business relationships with reputable and qualified partners and representatives.

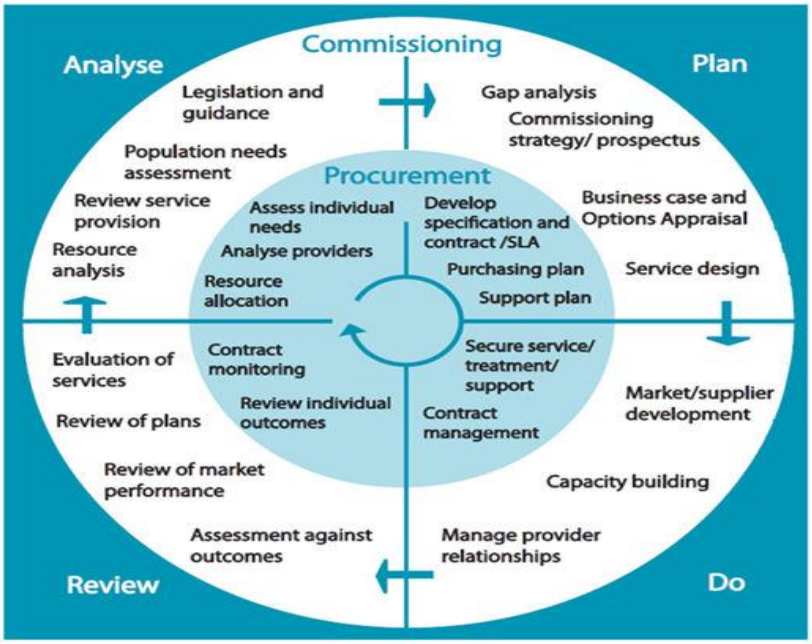
Ethical sourcing

NHS Kernow recognises its responsibility for ethical and responsible purchasing of goods and services within its procurement protocol. The protocol details how we purchase goods and services in line with legislation, including our responsibilities under Procurement Policy Notice PPN 06/20 - Taking Account of Social Value in the Award of Contracts and Procurement Policy Notice PPN 05/19 – Tackling Modern Slavery in Government Supply Chains. It provides a clear, systematic way to evaluate these priority policies in the award of a contract. Evaluation of the social value aspect of bids should be qualitative so all potential suppliers, including SMEs, VCSEs and those new to NHS business, can successfully bid by describing what they will deliver and how they will deliver it. A minimum weighting of 10% of the total score for social value is applied in all procurement activity to ensure that it carries a heavy enough score to be a differentiating factor in bid evaluation; however, the commercial team retains flexibility in deciding which of the outcomes should be applied to a particular procurement to ensure relevance and proportionality.

NHS Kernow will support responsible and ethical sourcing; meaning socially, environmentally and economically accountable procurement to ensure that the organisation awards contracts in line with its regulatory and legislative responsibilities, including the Modern Slavery Act 2015. Activities as part of the sourcing lifecycle ensure that those undertaking procurement activity are taking every opportunity to identify where there is the possibility of Modern Slavery occurring within the supply chain, for example, costs that appear abnormally low, and seeking assurance from bidders that that subcontractors will be managed to ensure Modern Slavery is identified and tackled further down the supply chain.

7. Major commissioning change process

The process for managing a major commissioning change within NHS Kernow covers the 4 key stages of a commissioning cycle:



1. Analyse – include market engagement, stakeholder engagement, potential for collaboration or competition, etc
2. Plan – pre procurement phase including specification development, pre-procurement testing, project and procurement planning
3. Do – procurement or collaboration process resulting in implementation and mobilisation of the change
4. Review - contract and performance management

Each stage of the commissioning process has a lead and a range of specific subject matter experts involved. A commissioning change process – “who is involved?” document can be found at appendix 14.

Development of the project initiation document (PID) / full business case (FBC) will utilise a range of skills of individuals within the organisation, along with patient representation and, if required, NHS England and NHS Improvement representation (see appendix 15, ISAP Process) for strategically important and innovative projects. The development of a project steering group as a task and finish group will be established to oversee its delivery and a project delivery group to undertake the compilation and development of the project documentation.

Reference to the decommissioning and disinvestment policy should also be considered. This policy can be found at appendix 23.

All policies and similar documents must be dated when approved and a review date also included. This will usually be 3 years unless there is an indication to the contrary. It is the responsibility of the author (or nominated officer) to be aware of influencing factors and to initiate reviews promptly within the 3 years if appropriate.

Analysis phase

Each commissioning change will commence with a PID outlining the findings following a review of the current state and where a commissioning view is that change is required. The PID should include, but not limited to, the following:

- Service review findings
- Contract review findings
- Provider engagement
- Case for change
- Stakeholder/public engagement (if appropriate)
- Brief co-operate or competition decision options
- Market assessment/procurement strategy
- Options appraisal
- Contracting strategy
- Recommendation

(see appendix 3 and 4 for PID/FBC template and supporting information templates and appendix 16 for an aide memoir of considerations in preparation for procurement).

Plan phase

The PID is developed further in this phase, becoming a FBC, to give further detail around the options going forward (procurement or collaboration) and is supported by a number of key documents, incorporated into one, covering:

- Project plan
- Market assessment
- Pre-procurement/collaboration 21 question test/regulation 84 test
- Procurement/collaboration plan
- Full Impact assessment (which incorporates an equality impact assessment)
- Comprehensive data protection impact assessment
- Risk register and issues log
- Highlight report
- Issues log
- Resource plan
- Change steps
- Financial envelope

If procurement is the recommended option, then consideration would be given to the route to market. Appendix 17 sets out the options for the route to competition. Additionally, further consideration would be given to the potential information to be released to the market, as set out in appendix 18. This information would form part of the tender pack.

For collaboration the following additional documents can be developed with the provider at this stage:

- Service mobilisation plan (appendix 19 sets out some key thoughts about mobilisation and implementation of a new service/contract)
- Potential exit plan/strategy

The PID/FBC, which includes the projects recommended option to proceed is taken to the Ops Board who will then make recommendations endorsed for onward approval by FPC for review and decision. The FPC may agree with the findings and recommendation or advise on what further work is required to re consider the project at a later date or will accept the risk of undertaking another option.

When the FPC agree to proceed, the project moves into the 'Do' phase.

'Do' phase

This phase is the mechanism to deliver the agreed option in order to mobilise the service for the preferred start date. This could either be collaboration or competition.

Collaboration

Where NHS Kernow is satisfied it can meet the requirements of the single provider evidence, a collaboration commissioning change project process which includes the supporting documentation as listed in section 7.2 will be followed after seeking approval from the finance and performance committee to proceed and a single action tender waiver form (see appendix 20 and 20a for single action tender waiver forms under and over threshold) completed.

Competition

When considering whether or not a service should be competitively tendered, NHS Kernow will ensure that any decision taken complies with the regulations and guidance set out in this policy. When using the PCR 2015 regulations, they can be used in two ways:

- LTR How to use PCR regulations 1
- full regulations How to use PCR regulations 2

Please note – the PCR 2015 regulations will change in light of the current government green paper out for review. This element of the process will need to be reviewed once the new regime has gone through statute.

The financial control limits, the scale of the procurement, the degree to which the service specification and funding model has been developed and the number of potential providers for the service are all contributing factors to which procurement process is utilised.

Notifications to the market using a prior information notice (PIN) or contract notice cannot be issued without FPC approval.

A number of key steps need to be taken when using competition. Some standard operating procedures have been developed to support a number of these stages; a list of these can be found in appendix 21.

Undertake the change

Following the agreement of FPC to undertake the project and whether to collaborate or enter into a competitive phase, the project delivery group will work up the appropriate suite of documents to ensure a smooth process to implementation.

NHS Kernow is committed to ensuring new services and changes to services are fully implemented following a major commissioning change. Working with the outgoing provider to ensure a smooth exit strategy of the current service that is seamless to patients and protects patient safety and with the new provider to ensure smooth transition to the new service, applying appropriate resources to ensure communication to relevant groups, operational procedures are set up and financial and contractual processes are in place. (see appendix 22 – PID to award flowchart).

Once the change is completed the project steering group and the project delivery group hand over responsibility for contract and performance management to the commissioning team and the two groups are disbanded.

Contract and performance management

The appropriate commissioning team will take over responsibility for the new contracted service after the commencement date of the new contract alongside the decommissioning of the old service. Until that point the new service remains the responsibility of the project delivery and steering groups. Refer to appendix 18 for the Contract Management Framework.

Links to policies and procedures referred to above

Appendix 1 Draft modern slavery statement final Draft modern slavery document
Appendix 2 Freedom of information policy and process Freedom of information policy and process

Appendix 3 (PID)/Full business case document template (PID)/Full business case document template
Appendix 4 PID supporting information templates PID supporting information templates
Appendix 5 NHS Kernow constitution NHS Kernow constitution
Appendix 6 SFIs/SFOs Standing financial instructions and orders
Appendix 7 Scheme of delegation Scheme of delegation
Appendix 8 Operations Board terms of reference UNDER DEVELOPMENT
Appendix 9 Finance and performance committee terms of reference Corporate governance
Appendix 10 Project steering group terms of reference template Project steering group terms of reference template
Appendix 11 Project delivery group terms of reference template Project delivery group terms of reference template
Appendix 12 Management of COI in competition and collaboration process SOP Management of COI in competition and collaboration SOP
Appendix 13 Declaration of interest and confidentiality template Declaration of Interest
Appendix 14 Commissioning change – who is involved? Commissioning Change Who is in Charge?
Appendix 15 ISAP Process (NHS England and NHS Improvement Assurance process) APPENDIX 15 ISAP NHS England » Integrated Support and Assurance Process
Appendix 16 Considerations in preparation for procurement Next steps in preparation for Procurement
Appendix 17 Competition route options Competition Route Options
Appendix 18 Contract Management Framework
Appendix 19 Mobilisation and implementation checklist Mobilisation and Implementation checklist
Appendix 20 Single action tender waiver under threshold Single action tender waiver under threshold
Appendix 20a Single action tender waiver over threshold Single action tender waiver over threshold
Appendix 21 Procurement standard operating procedures Procurement SOPs
Appendix 22 PID to award flowchart PID to Award Flowchart
Appendix 23 Commissioning service change policy Commissioning Service Review Policy And Procedure REDRAFTED IN MARCH 2022 INTO A DECOMMISSIONING AND DISINVESTMENT POLICY IN READINESS FOR THE START OF THE ICB