

Application of the NHS (Procurement, Patient Choice and Competition) Regulations 2013



This summary sets out the British Association of Dermatologists (BAD) review of the application of the NHS (Procurement, Patient Choice and Competition) Regulations 2013, and the revised regulations (the NHS (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013) tabled on the 11 March 2013 (“the regulations”).

The purpose of ‘the regulations’ is to facilitate the transfer of the procurement requirements, which currently apply to primary care trusts, to the new NHS commissioners. The rules, that currently govern co-operation and competition in the commissioning and provision of NHS services in England, are set out in the Principles and Rules for Co-operation and Competition 2010.

While the substance of those rules will remain, from April 2013, the rules will be given a firmer statutory footing through the conditions of the provider license, and through secondary legislation imposing requirements on commissioners as to procurement, patient choice and competition. The Regulations make provision for Monitor, as the sector specific regulator, to enforce these license conditions and this secondary legislation.

The applicability of EU and UK procurement law (the Public Contract Regulations 2006) to the NHS is unaffected by the regulations. *The DH has stated this in its response of March 2013, to legal challenges:*

*“Current procurement law has always applied to, and will continue to apply to the procurement of goods and services by NHS providers, and the commissioning of clinical services (not just those subject to patient choice) is also subject to procurement rules. This has been clearly set out in, for example, successive versions of the PCT Procurement Guide provided by the previous Government. The provisions of the Bill do not change the requirement to comply with procurement law, nor do they change that law “.*¹

Therefore, absent the regulations, the requirements of procurement law would continue to apply to the NHS. The BAD continues to apply these principles to service issues and commissioning challenges.

The reforms to the NHS, including these regulations, have been largely misinterpreted as an attempt to privatise the NHS. However, it is for commissioners to decide, not the Secretary of State and not Monitor, which providers - whether from the public, private or voluntary sectors - can best meet the needs of their patients and deliver high quality care. Therefore, any use of private or other type of provider will be a result of decisions by commissioners, taken in the best interests of their patients.

This is best demonstrated through the use of Any Qualified Provider (AQP), implemented in the NHS since 2007, to secure acute services, which include a number of private provider hospitals. There are also a number of private providers who have been appointed by PCTs and incoming CCGs under ‘AQP’ or as ‘Single preferred provider’ to run community services.

Under the regulations, commissioners continue to have discretion to decide whether, where and when to introduce the engagement needed to stimulate or create a market for services. The regulations do not impose compulsory competitive tendering requirements on commissioners, and

¹ Department of Health response to the legal opinion published by 38 Degrees on the application of procurement and competition law, 6 September 2011

expressly preclude Monitor from directing a commissioner to hold a competitive tender. The position is exactly the same as under the existing Principles and Rules for Cooperation and Competition, Procurement guidance and the Public Contracts Regulations 2006.

Where the commissioner requires an integrated service, there is nothing in the regulations which requires them to procure a cheaper alternative that does not meet their requirements. Regulation 2 makes clear that integration is a key tool that should be used to achieve the objective of meeting the needs of patients and improving the quality and efficiency of services. Regulations also require commissioners to choose the provider which can meet their requirements *and* provide best value in doing so. 'Best value' is the best combination of quality and price. Monitor's guidance will make this absolutely clear.

The circumstances in which a commissioner may award a contract without a competition, under the regulations will be identical to the requirements of existing procurement law, as reflected in mandatory guidance to the NHS applicable since 2008. Mandatory guidance published in June 2010 stated:

*'Where there is only one capable provider for a particular bundle of services or the objective of the procurement is to secure services to meet an immediate interim clinical need there will be a case for Single Tender Action (i.e. uncontested procurement)'.*²

For example, a single tender action may be justified on the basis that there is only one provider able to meet the clinical quality and safety standards required by a commissioner.

Further examples of services where there may typically only be one capable provider include:

- acute hospital services on single sites and accessible 24 hours a day 7 days a week;
- a range of integrated services delivered in the community;
- highly specialised care; or
- services in more rural or remote areas of the country.

In addition, the NHS Future Forum noted: competition and integration are not opposing forces, and competition can and should be used by commissioners as a powerful tool to drive integration for patients.³ The regulations recognise this, and allow commissioners to specify an integrated service and run a tender to secure the best possible provider, or providers, to deliver that integrated service.

Guidance

Monitor's statutory guidance, which will be published to support commissioners in complying with the regulations, will make absolutely clear that there has been no change to this position. It will set out in exactly the same terms the position in the 2010 procurement guidance. Further details are in their joint note on *Choice and competition in commissioning clinical services in the NHS in England*, available here:

<http://www.commissioningboard.nhs.uk/wpcontent/uploads/2013/03/choice-comp-note.pdf>

² Procurement guide for commissioners of NHS-funded services, July 2010

³ Choice and Competition Delivering Real Choice, a report from the NHS Future Forum

Key Points

- Current procurement law has always applied to, and will continue to apply to the procurement of goods and services by NHS providers. The commissioning of clinical services (not just those subject to patient choice) is also subject to procurement rules. This has been clearly set out in, for example, successive versions of the PCT Procurement Guide provided by the previous government. The provisions of the Bill do not change the requirement to comply with procurement law, nor do they change that law.
- Therefore, absent the regulations, the requirements of procurement law would continue to apply to the NHS. The BAD continues to apply these principles to service issues and commissioning challenges.
- It is for commissioners to decide, not the Secretary of State and not Monitor, which providers - whether from the public, private or voluntary sectors - can best meet the needs of their patients and deliver high quality care.
- Under the regulations, commissioners continue to have discretion to decide whether, where and when to introduce the conditions needed to stimulate or create a market for services. The regulations do not impose compulsory competitive tendering requirements on commissioners, and expressly preclude Monitor from directing a commissioner to hold a competitive tender.
- Where the commissioner requires an integrated service, there is nothing in the regulations which requires them to procure a cheaper alternative that does not meet their requirements.
- Regulations also require commissioners to choose the provider which meets their requirements *and* provides the best value in doing so. 'Best value' is the best combination of quality and price. Monitor's guidance will make this absolutely clear.
- The circumstances in which a commissioner may award a contract without a competition, under the regulations will be identical to the requirements of existing procurement law, as reflected in mandatory guidance to the NHS applicable since 2008.

'Where there is only one capable provider for a particular bundle of services or the objective of the procurement is to secure services to meet an immediate interim clinical need there will be a case for single Tender Action (i.e. uncontested procurement)'⁴.

Further examples of services where there may typically only be one capable provider include:

- acute hospital services on single sites and accessible 24 hours a day 7 days a week;
- a range of integrated services delivered in the community;
- highly specialised care; or
- services in more rural or remote areas of the country. `

⁴ Procurement guide for commissioners of NHS-funded services, July 2010