

# **Procurement in the NHS**

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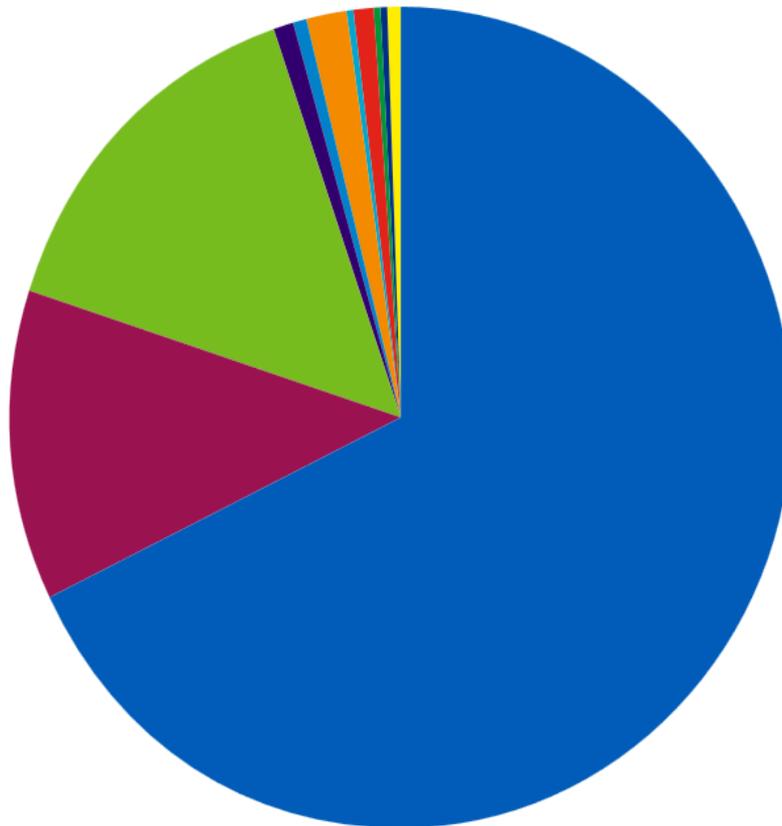
## What will this talk cover?

- What is different about procurement law in the NHS?
  - The National Tariff
  - The 2013 Regulations
- What are the problems in practice?
- What are the solutions?

## What does the NHS contract for?

- Overall NHS budget in 2016/17 was £123.7Bn
- £107Bn allocated to NHS England
- Balance for:
  - Department of Health
  - Local authorities for public health
  - Other funds such as research funding

# How does NHS England spend its money?



- Clinical Commissioning Groups £71.9bn
- Primary care GP £12.8bn
- Specialised £15.7bn
- Public health £0.9bn
- Other direct commissioning £0.6bn
- Sustainability fund £1.8bn
- Transformation fund £0.3bn
- NHS England programmes £0.7bn
- NHS England running costs £0.5bn
- Mental health investments £0.1bn
- Other £0.5bn

## Who are the contracting authorities?

- NHS commissioners:
  - Clinical Commissioning Groups
  - The National Health Service Commissioning Board (“NHS England”)
- NHS providers (NHS Trusts and NHS Foundation Trusts)
- The Department of Health

## Who contracts for what?

- NHS commissioners contract with providers of NHS services under contracts which require providers to deliver health services to NHS patients
- NHS providers enter into contracts to enable them to operate hospitals and other healthcare facilities:
  - Commercial arrangements for buildings, car parks, catering, medical supplies etc.
  - Contracting out some patient services

## Who are NHS providers?

- NHS Trusts
- NHS Foundation Trusts
- NHS GP and dental practices – private, for profit businesses
- Private providers such as Virgin Care Services Limited and Serco
- Care homes and mental health hospitals

## When do different rules apply?

- Normal rules under 2015 Regulations apply where:
  - NHS body is a contracting authority
  - Subject of the contract is not patient services
- Normal rules under 2015 Regulations plus extra NHS rules apply where:
  - NHS body is a contracting authority
  - Subject of the contract is patient services

# The 2015 Regulations rules for NHS contracts



- Threshold is contract value of €750,000
- So called “Light touch” regime applies
- But problems in practice are:
  - No competition because CCGs need to contract with all local hospitals to fulfil needs
  - Few new market entrants

# The particular rules applying within the NHS



- The key sets of rules are:
  - S115 of the Health and Social Care Act 2012 and the National Tariff
  - The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013
- Both are complex, largely un-litigated and have internal contradictions

## S115 and the National Tariff

(1) If a health care service is specified in the national tariff (as to which, see section 116), the price payable for the provision of that service for the purposes of the NHS is (subject to sections 124 and 125) such price as is determined in accordance with the national tariff on the basis of the price (referred to in this Chapter as “the national price”) specified in the national tariff for that service.

(2) If a health care service is not specified in the national tariff, the price payable for the provision of that service for the purposes of the NHS is such price as is determined in accordance with the rules provided for in the national tariff for that purpose

## What is the effect of s115?

- Designed to rule out price competition in the NHS
- Probably sets up both public and private law duties
- Key question is whether the service has a “price” specified in the National Tariff:
  - If Yes – subject to s124 and 125 – that must be the price
  - If No – the rules of the National Tariff must be followed to fix the price
- S124/5 allows Monitor to approve higher price on one-off basis

## Rules of the National Tariff (1)

- Rule 1: Providers and commissioners must apply the principles in Section 6.1 when agreeing prices for services without a national price.
- Rule 2: Commissioners and providers should have regard to the efficiency and cost uplift factors adopted under the ETO for 2015/16 and the efficiency and cost uplift factors for 2016/17 (as set out in Section 4 of this document) when setting local prices for services without a national price for 2016/17”

## Rules of the National Tariff (2)



- Principles in Section 6.1:
  - the approach must be in the best interests of patients
  - the approach must promote transparency to improve accountability and encourage the sharing of best practice, and
  - the provider and commissioner(s) must engage constructively with each other when trying to agree local payment approaches

## These rules are not followed in practice?

- 2011 policy in favour of price competition
- Obligated to give concessions to get 2011 Bill into 2012 Act
- As long as no one enforces, policy carried on as before
- Probably incorrect interpretation of s116(2) to bring price competition back in to avoid s115
- Hence largely ignored by the NHS and no one has challenged so far
- However only a matter of time before there is focus on effect of s115

**Hence a challenge waiting for a challenger!**

# National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013



- **Who:** They apply to NHS England and all CCGs
- **When:** Regs apply “When procuring health care services for the purposes of the NHS..”: Reg 3(1)
- **Duties imposed:**
  - Objectives
  - Specific duties

## 2013 Regs: Objectives

Each relevant body ..

“must act with a view to—

- (a) securing the needs of the people who use the services,
- (b) improving the quality of the services, and
- (c) improving efficiency in the provision of the services

including through the services being provided in an integrated way (including with other health care services, health-related services, or social care services)”

## Specific Duties (1)

- Act in a transparent and proportionate way, and
- Treat providers equally and in a non-discriminatory way, including by not treating a provider, or type of provider, more favourably than any other provider, in particular on the basis of ownership
- Procure the services from one or more providers that—
  - (a) are most capable of delivering the objective referred to in regulation 2 in relation to the services, and
  - (b) provide best value for money in doing so

## Specific Duties (2): Reg 3(4)

“In acting with a view to improving quality and efficiency in the provision of the services the relevant body must consider appropriate means of making such improvements, including through—

- (a) the services being provided in a more integrated way (including with other health care services, health-related services, or social care services),
- (b) enabling providers to compete to provide the services, and
- (c) allowing patients a choice of provider of the services”

## Other aspects of the 2013 Regs

- Reg 4: contract notices and [www.supply2health.org](http://www.supply2health.org)
- Reg 5: Single supplier test
- Reg 6: Conflicts of Interest provisions
- Reg 9: Publishing record of all contracts awarded
- Reg 10: Anti-competitive behaviour

# Consequences of breaches of the 2103 Regs



- Internal NHS option to complain to Monitor
- Specific right to damages: section 76(7):  
“A failure to comply with a requirement imposed by regulations under section 75 which causes loss or damage is actionable, except in so far as the regulations restrict the right to bring such an action”
- But note Reg 17: “A person who has brought an action under the Public Contracts Regulations 2006 for loss or damage may not bring an action under section 76(7) of the Health and Social Care Act 2012(1) in respect of the whole or part of the same loss or damage”

## Problems with the 2013 Regs

- No *de minimis* financial level
  - Hence do they apply to every care home placement?
- No provision for emergency contracting outside the Regs
- Conflicts between s115, rules of National Tariff and procurement style tendering approach under 2013 Regs