

NHS Procurement and Commissioning

*Issues with the current legal regime and
some areas for reform*

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2012 Act reforms on the political agenda?

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Health

Government could scrap some controversial NHS reforms

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The government is understood to be considering whether to scrap some of the controversial NHS reforms introduced by the coalition in England in 2012.

The changes included abolishing primary care trusts and replacing them with new local clinical commissioning groups.

Health campaigners and the doctors' union, the BMA, say the reorganisation was



Content

- **Part 1:** Price Competition
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The layers of duties

- Public Contract Regulations 2015 (implementing the 2014 Public Procurement Directive)
- NHS Act 2006 (as amended by HASC 2012)
- NHS Commissioning Board and CCGs (Responsibilities and Standing Rules Regs) 2012
- NHS Procurement, Patient Choice and Competition (No.2) Regs 2013

Price competition

- Section 115 HASC 2012:

- (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.

Price competition (2)

- **Section 116(2) HASC 2012:**

The national tariff may provide for rules under which the commissioner for a health care service specified in the national tariff and the providers of that service may agree to vary:

- (a) *the specification of the service under subsection 1(a), or*
- (b) *the national price of the service*

Price competition (3)

- **s.124 HASC 2012 and upward only price variation:**

(1) The commissioner and provider of a health care service may agree that the price payable to the provider for the provision of the service for the purposes of the NHS in such circumstances or areas as may be determined in accordance with the national tariff for that service as modified in accordance with the agreement.

(5) Monitor may approve an agreement under this section only if, having applied the method specified under section 116(1)(d), it is satisfied that, without a modification to the price determined in accordance with the national tariff for that service, it would be uneconomic for the provider to provide the service for the purposes of the NHS

PART 2: THE DUTY TO ADVERTISE CONTRACTS FOR HEALTH SERVICES

- For contracts over £750,000 the Light Touch Regime under the PCRs applies (under Regs 74 – 77)
- But what about non LTR contracts?
- Regulation 5 NHS Procurement Regs:
 - 5.— Award of a new contract without a competition**
 - (1) A relevant body may award a new contract for the provision of health care services for the purposes of the NHS to a single provider without advertising an intention to seek offers from providers in relation to that contract where the relevant body is satisfied that the services to which the contract relates are capable of being provided only by that provider.

The duty to advertise (2)

- Regulation 3(2) of the NHS Procurement Regs: commissioners must:
 - a) act in a transparent and proportionate way, and
 - (b) 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.



Duty to advertise (3)

Explanatory notes to the 2013 NHS Procurement Regs:

“We have removed the words that inadvertently created that the impression that there were only very narrow circumstances in which commissioners could award a contract without competition. Monitor’s guidance on the Regulations will make clear that we are continuing the same approach as now under the Principles and Rules for Co-operation and Competition”.



Monitor's guidance regarding no advertising/competition

- “• Where there is only one provider that is capable of providing the services in question. In these circumstances, the Procurement, Patient Choice and Competition Regulations make it clear that a commissioner can award a contract to a single provider without publishing a contract notice
- Where a commissioner carries out a detailed review of the provision of particular services in its local area in order to understand how those services can be improved and, as part of that review, identifies the most capable provider or providers of those services
- Where the benefits of publishing a contract notice would be outweighed by the costs of doing so.”

Limited scope for permissible contract modifications under the PCRs

The exceptions under Reg 72 PCRs (examples):

- Review clauses which “*do not provide for modifications or options that would alter the overall nature of the contract*”
- Unforeseen circumstances “where the modification does not alter the overall nature of the contract”
- Non-substantial modifications which do not “change the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement”

When is it permissible not to advertise under the PCRs?

- **PCRs Reg 32(1):**

“(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.”

- **PCRs Reg 32(2)(a):**

“where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests”



PART 3: REMEDIES

Damages for breach of the NHS Procurement Regs?

- **S.76(7) HASC 2012:**

“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”
- **Reg 17 NHS Procurement Regs:**

“A person who has brought an action under the Public Contracts Regulations 2015 or the Concession Contracts Regulations 2016 for loss or damage may not bring an action under section 76(7) of the Health and Social Care Act 2012 in respect of the whole or part of the same loss or damage”
- **Note s.9 Limitation Act:** 6 year limitation period? “an action to recover any sum recoverable by virtue of any enactment shall not be brought after 6 years from the date of the cause of action”

Does a complaint to Monitor constitute an alternative remedy to JR?

- Reg 13 PCRs and Monitor's discretion to investigate:
 - (1) *Monitor may investigate a complaint received by it that a relevant body has failed to comply with a requirement imposed by regulations 2 to 12, or by regulations 391 , 42 or 43 of the 2012 Regulations (choice of health service provider);*
 - (2) *Monitor may on its own initiative investigate whether a relevant body has failed to comply with a requirement imposed by regulation 10.*
 - (3) *Monitor may not investigate a matter which is raised by a complaint under paragraph (1) where the person making the complaint has brought an action under the Public Contracts Regulations 2015 or the Concession Contracts Regulations 2016 in relation to that matter.*



Monitor's guidance re enforcement

Our key consideration will be the expected benefit of our work for health care service users. When we decide whether to devote resources to a matter, we will consider all types of benefits that our actions may generate or protect. Such benefits may include:

- *Direct benefits to health care service users.* We will consider the impact of our actions on the quality of health care services, access to care and value for money spent on health care. We will consider both the short and longer-term impact of our proposed interventions.
- *Indirect benefits to health care service users.* We will consider whether a particular action in one area may lead to wider, more general benefits to health care service users. This might arise by reducing the likelihood of any future breaches by the commissioner in question. This might also arise, for example, by prompting positive changes in the general behaviour of commissioners, providers or health care service users, for health care service users, resulting in future policy improvements.

Limitation periods and JR based on the NHS Regs/PCRs

- CPR54.5(6):

Where the application for judicial review relates to a decision governed by the Public Contract Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulations) to start any proceedings under those Regulations in respect of that decision