

NHS Procurement and Commissioning

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

James Neill

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 *damaging and excessive*.



NHS Long Term Plan and proposed legislative changes (Chapter 7.14)



- Give CCGs and NHS providers new duties shared new duties to promote the triple aim of better health for everyone, better care for all patients, and sustainability, both for their local NHS system and the wider NHS
- Remove specific impediments to place-based NHS commissioning
- Support the more effective running of Integrated Care Systems
- Support the creation of NHS integrated care trusts.
- Remove the counterproductive effect that general competition rules and powers can have on the integration of NHS care
- Cut delays and costs of the NHS automatically having to go through procurement processes
- Increase flexibility in the NHS pricing regime
- Make it easier for NHS England and NHS Improvement to work more closely

The end of the NHS Procurement Regs?



- Paragraph 7.14:

Cut delays and costs of the NHS automatically having to go through procurement processes. We propose to free up NHS commissioners to decide the circumstances in which they should use procurement, subject to a 'best value' test to secure the best outcomes for patients and the taxpayer. The current rules lead to wasted procurement costs and fragmented provision, particularly across the GP/urgent care/community health service workforce. This would mean repealing the specific procurement requirements in the Health and Social Care 2012 Act. We also propose to free the NHS from wholesale inclusion in the Public Contract Regulations. We would instead set out our own statutory guidance for the NHS to follow. At the same time, we propose to protect and strengthen patient choice and control, including through our wider programme to deliver personalised care

The layers of duties under the current regime



- 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

Areas of uncertainty/complexity in the current “dual” regime



- The duty to advertise
- Extensions to current contracts
- Remedies

The light touch regime under the PCRs

- Regulations 74 – 76 of the PCR
- Regulation 74: applies the LTR to contracts set out under Schedule 3 (for these purposes health and social care contracts but also includes education services, social services, social security and benefit services, hotels, administrative services, some prison services , some fire and rescue services, international services and postal services and some legal services)
- Regulation 75: provides that a contract notice should be published, either in line with the Directive or by way of a prior information notice and must specify what is being procurement, when and that no further notice will be given prior to the award. Also provides that a contract award notice shall be provided setting out who has won as set out in the relevant Directive and sent to the EU publications office (see Reg 51 of the PCR 2015)

The procurement principles – Reg 76 of the PCR 2015



76(2) – Provides that the process must ensure compliance with the principles of transparency and equal treatment (i.e. basic procurement principles) of bidders

76(3) – if a contract notice has been published, must conduct the procurement in line with the conditions set out in the notice re: time limits, conditions for participation and the award procedure to be applied

Light Touch Regime – Reg 76 (continued)



- Can depart from the information set out in the notice of procurement as long as:
 - (a) Would not infringe the principles of transparency and equal treatment
 - (b) The authority thinks about and documents how it has considered (a) above
 - (c) It has informed those bidding /expressing an interest in the contract of the changes it proposes to make.
- Any time limits imposed upon bidders as part of the bidding process have to be reasonable and proportionate.
- Can use processes set out in the Regulations or other processes
- Can take account of any relevant considerations when evaluating the bids including:
 - (a) Need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services.
 - (b) The specific needs of different categories of users, including disadvantaged and vulnerable groups.
 - (c) The involvement and empowerment of users
 - (d) Innovation.

AREA OF UNCERTAINTY (1): THE DUTY TO ADVERTISE CONTRACTS FOR HEALTH SERVICES



- For contracts over £750,000 the Light Touch Regime under the PCR's 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”.

- 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.

Monitor's guidance regarding no advertising/competition – consistency with the procurement principles?



- “• 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.”

Area of Uncertainty (3): Contract extensions and modifications



- NHS Procurement Regs silent on when contract extensions/modifications allowed
- Real problem in practice particularly in instances where CCG decides to abort procurement exercise prior to award

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 PCR's?

- **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”

AREA OF UNCERTAINTY 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