Since the publication of the white paper *Equity and excellence: liberating the NHS*, it has been clear that the transition to GP-led commissioning will require many of those involved to quickly get to grips with new roles and responsibilities.

Two important areas with which those leading commissioning consortia will need to be familiar are approaches to procurement and the management of competition in the NHS.

**Background**

Over recent years, procurement and competition rules have increasingly impacted on how the NHS operates and particularly on the commissioning of clinical services.

The aim of this *Briefing* is to provide an initial overview of these rules and some of the ways in which they can be used to best effect. It is designed for individuals with an interest in GP-led commissioning and who wish to understand more about the relevance and the importance of procurement and competition to their current or future roles.

However, it does not constitute professional legal advice, which should be obtained before applying the information set out in this document to particular circumstances.

These areas of law and policy continue to develop quickly. At the time of writing the legislation required to enact the white paper is still making its way through Parliament. Some of the details on exactly how procurement and competition rules will apply in the new system are therefore still unknown. However, it is clear that they will have significant...
implications for how commissioning consortia will operate.

Before setting out the relevant law and policy, it is worth outlining some of the benefits that policy-makers intend to achieve through good procurement and effective competition in the NHS:

• An appropriate procurement process can enable commissioners to improve the quality of the services they secure for their patients and to assure themselves and others that they are obtaining good value for money. In the current economic climate, GP commissioners will face pressure to make savings and drive improvements in efficiency and productivity. Strategic and effective procurement is a tool for achieving this.

• It can also be used to open up the market to a wider range of providers than otherwise might be the case. A more competitive market can increase choice for patients, as well as encouraging improvements in service quality and innovation.

• It is worth bearing in mind that competition rules also apply to providers. This gives commissioners an opportunity to ensure that providers do not restrict competition and engage in conduct which may be detrimental to patients or taxpayers.

What is procurement and when do the rules apply?

Public bodies are subject to public procurement law, which regulates how they buy goods, services and works. The rules come from European Union (EU) law and policy, which aims to ensure free movement of goods and services within the EU and to open public sector contracts up to competition. Broadly, this is achieved through requirements to advertise and competitively tender certain contracts, rather than simply awarding them to a chosen provider.

Procurement law applies wherever a purchase exceeds the minimum financial thresholds set out by the legislation. These thresholds are low, for example, £156,442 for a clinical services contract.

Where the full public procurement rules apply, they impose minimum timescales and detailed procedural rules which must be followed in procuring goods, services and works. These rules are enforced via the courts.

As statutory public bodies, GP commissioning consortia will be subject to the procurement rules and will need to comply with them in undertaking their commissioning activities.

What rules apply when commissioning clinical services?

Health and social services fall within a category of services referred to in the EU procurement rules as Part B services. The procurement rules draw a distinction between Part A and Part B services, applying different rules to each. This is significant because the full procurement rules apply only to Part A services, while a lighter regime applies to Part B services.

This means that not all of the detailed procurement rules apply when commissioning health services. In particular, there is no legal requirement to comply with the minimum timescales, or to follow one of the strict procedures, set out by the procurement rules. There is also no requirement to advertise the contract in the Official Journal of the European Union (OJEU).

Although fewer formal rules apply to the procurement of Part B health services, some important principles of public procurement do apply. These include requirements to act transparently and to treat providers equally and in a non-discriminatory way. For example, where there is potential for cross border interest in the contract (that is, potential interest from a provider in another EU member state to bid for the contract or supply the service), case law and guidance have clarified that the principle of transparency requires a contract to be subject to some form of advertising, proportionate to the scale of the contract and the potential level of interest.

What about other services?

As well as commissioning clinical services, commissioning consortia are likely to buy in other services. In buying non-clinical services (which might, for example, include management support services), it should be borne in mind that the full Part A procurement rules may apply and full tendering processes may be necessary.
NHS policy requirements

There are also NHS policy requirements in relation to procuring clinical services. These are set out in the Department of Health’s *Procurement guide for commissioners of NHS-funded services.*

The *Procurement guide* aims to help commissioners decide when it may be appropriate to use a procurement process to commission NHS-funded services. It contains mandatory guidance which commissioners, including practice based commissioning (PBC) clusters and shadow commissioning consortia, must comply with as part of the NHS Operating Framework. As existing PBC clusters and any new shadow consortia are expressly subject to this guidance, it is important to be aware of its content and the need for compliance.

The *Procurement guide* confirms that there is no general policy requirement for all NHS services to be put out to tender. However, its requirements do still go further than the requirements of procurement law. For example, the *Procurement guide* states that procurement must be used where a commissioner is seeking to secure new contracts to deliver a new service model or significant additional capacity.

Among its other requirements, the *Procurement guide* obliges commissioners to advertise procurements of clinical services, and contract awards, on the NHSSupply2Health website.

In addition, the *Procurement guide* reiterates the importance of compliance with the principles of equal treatment, non-discrimination and transparency. It also states that commissioners must not give any advantage to any market sector. This would include, for example, not favouring member practices of the consortium over other potential providers.

Overall, there is an onus on demonstrating robust justifications for commissioning decisions, particularly to show how value for money and quality have been achieved if no competitive process is used.

It is anticipated that there will be substantial revision to the *Procurement guide for 2011/12*, to reflect the creation of shadow GP commissioning consortia and the new NHS Commissioning Board.

In the longer term, the proposal is to introduce regulations which will require commissioners to adhere to good procurement practice.

What risks are there if you do not comply with procurement law and policy?

Failure to comply with the procurement rules will expose a commissioning consortium to a risk of challenge. Where this is a breach of procurement law, the most likely means of challenge is for a provider who has not been awarded the contract to take legal action in the High Court. Possibilities include applications for an injunction to prevent the contract award, for the award decision to be set aside or, in certain circumstances, for the contract to be cancelled. A further possibility is an action for an award of damages.

What is competition law and when does it apply?

EU and UK competition law respectively regulate anti-competitive behaviour which may affect trade between EU member states, or within the UK. The aim is to ensure a level playing
field and free movement of goods and services. Competition law is enforced in the UK by the Office of Fair Trading (OFT). Under the NHS reforms, Monitor will have the same powers as the OFT, in relation to competition in the provision of health services in England. Competition law regulates anti-competitive conduct, mergers and state aid. In relation to anti-competitive conduct, there are two main areas: anti-competitive agreements (collusion) between different organisations, and abuse of a dominant (monopoly) position in a market.

Where competition law applies, it carries potentially severe penalties for non-compliance. Competition law only applies to “undertakings”, which are defined as entities engaged in “economic activity”. Case law and OFT guidance about these definitions tell us that an entity which engages solely in purchasing activity is unlikely to be an undertaking. It also says that an entity which fulfils a purely social function is unlikely to be considered to be an undertaking. What this currently means is that PCTs, in commissioning NHS services, are not undertakings and are not subject to competition law.

Will competition law apply to GP commissioning consortia?
Based on the current law and current proposals for the role of GP commissioning consortia, it is possible that GP consortia will not be undertakings. This would mean that the full force of competition law would not apply to them in their role as commissioners of NHS services, although they may be subject to new regulations specifically requiring commissioners to promote competition.

Whether or not competition law actually applies to GP commissioning consortia in the future will, however, depend upon their exact form and functions and the precise legislative framework under which they act. Also, competition law is a highly complex area which is constantly developing, with new cases being decided and new guidance being issued all the time. This leads to uncertainty as to its application.

The proposed reforms make it clear that competition will be more robustly enforced in the health sector in future. Consortia will therefore need to consider competition law as the proposals develop.

NHS policy requirements
NHS policy imposes a system of competition rules within the NHS, based broadly on the principles of competition law. At present, this consists of the Principles and rules for cooperation and competition (PRCC).4 The PRCC sets out ten principles which regulate conduct, mergers and procurement. It also encompasses other NHS policy areas such as promoting patient choice. Both commissioners and providers of NHS services must comply with the PRCC as part of the NHS Operating Framework.5

The white paper makes it clear that competition is a key theme going forward. It states that providers will increasingly compete to provide services. It also sets out proposals for a new competition regime, which is due to be implemented in 2012. This will be enforced by Monitor, under legislation rather than NHS policy.

One of the proposals is that regulations will require commissioners to promote competition in health services.

In the meantime, the PRCC remains in force and expressly applies to both PBC clusters and shadow GP commissioning consortia. This means that GP commissioning consortia will need to be aware of, and comply with, the requirements of the PRCC as they begin to take on a commissioning role. Understanding and complying with competition policy may also assist in reducing the likelihood of non-compliance with competition law, if in the future it extends to GP commissioning consortia.

The PRCC will be revised to reflect the white paper reforms as they are implemented. It will be important to keep up to date with the changes.

What are the risks of failing to comply with competition requirements?
Under current NHS policy, a breach of the PRCC can be challenged via a complaint to the Co-operation and Competition Panel (CCP). Unlike procurement disputes, which are subject to an escalation process, conduct cases can be referred directly to the CCP. The CCP will investigate conduct which may adversely affect patients and/or taxpayers.

As with procurement, the CCP has an advisory role and makes recommendations to SHAs, the Department of Health and Monitor as to how breaches should be resolved.

Once the new NHS competition regime is implemented, Monitor
will have powers to enforce compliance and prevent anti-competitive behaviour. This is very different to, and much stronger than, the CCP’s current advisory role. This suggests that enforcement and sanctions will be more rigorous under the new regime.

If competition law were to extend in the future to GP commissioning consortia, the OFT has wide powers to investigate possible breaches and to award fines of up to ten per cent of an undertaking’s turnover. Anti-competitive agreements are also unenforceable. In addition, third parties affected by anti-competitive behaviour can claim damages from the undertaking which is in breach of the law.

Practical tips to get the most out of procurement and competition

On the face of it, the procurement and competition rules may appear onerous and inflexible. However, benefits can be achieved through appropriate use of procurement and encouraging competition. At the same time, there are steps which commissioning consortia will be able to take to reduce the resource burden and requirements of complying with the law and policy in these areas. The following options all help to make the best use of procurement and competition:

1. Taking advantage of flexibilities applying to Part B services

As noted above, full procurement processes are not strictly required for Part B services. This means that even where it is decided that some form of competitive process is appropriate, this does not have to be as onerous as would be the case under the full procurement rules. It would be acceptable to run a less formal, shorter process for the award of a Part B health service. This is a useful way to reduce the cost, timescale and resource impact of procurement while ensuring compliance.

2. Using the “Any Willing Provider” model

Under the Any Willing Provider (AWP) model, any provider who is able to provide the service in question and meets the requisite minimum standards, is able to be listed as a possible provider. No provider has any guarantee of any volume of business. Instead, patients are able to choose which provider on the AWP list they wish to see.

The white paper makes it clear that there is an intention to significantly increase the use of the AWP model, across most sectors of care. As well as opening up patient choice, one of the stated aims of this policy is to simplify the procurement process. The Procurement guide provides guidance on its use, setting out a process for advertising AWP opportunities and evaluating the responses. Again, this is a potentially simpler process than a full procurement, and will be an important mechanism for commissioners to understand and use in future.

3. Using framework agreements

A framework agreement is an umbrella agreement, under which it is possible to purchase services from those providers who have been appointed to the framework. The procurement rules are complied with at the point of setting up the framework agreement and this broadly means that it is not necessary to run a further tender process in order to purchase under that framework agreement. Instead, services are simply purchased from the most appropriate provider on the framework agreement, using the contract terms set by the framework agreement.

It is generally much quicker and more straightforward to buy under a framework agreement than to run a separate procurement process for each contract. Framework agreements are also useful because they can be set up on a regional, or even national, basis. This means that they can be used by a large number of purchasers, as well as producing economies of scale.

A framework agreement is usually set up for a maximum of four years and can be used by any purchaser who is referred to in the framework agreement.

4. Working together

It is worth considering when and how it is appropriate to work with other commissioners to benefit from economies of scale and reduce the resource impact on each commissioner.
There are several ways in which working with other commissioners can be beneficial. For instance, it may be appropriate for some services to be commissioned through a joint procurement process with other commissioners. This would equally be the case for individual contracts and for framework agreements. In procurement terms, this could be achieved by one consortium acting as a “central purchasing body” on behalf of others.

Where joint procurement is not considered appropriate, it can nevertheless be useful to share best practice and standard procurement documentation with other commissioners. This will reduce duplication across different organisations.

Sharing best practice may also be useful in the context of ensuring compliance with the PRCC. However, if competition law does extend to GP commissioners in the future, consortia will need to ensure that their working together does not in itself constitute anti-competitive behaviour (for example, by a group of consortia agreeing to deal exclusively with only one provider of particular services).

At the time of writing this Briefing, the Health and Social Care Bill (2011), which will establish the legislative framework to enable implementation of the white paper, is still making its way through Parliament. The full implications for commissioning consortia in terms of their approach to procurement and competition will not be known until the Bill is passed. However, the general principles discussed in this Briefing will continue to apply, and in many cases are likely to be strengthened under the legislation.

The NHS Confederation will be tracking and monitoring the details of this and many other aspects of emerging commissioning policy over the coming months.

For more information about the issues covered in this Briefing and the NHS Confederation’s work to support commissioners, or to suggest topics for future Briefings, please contact Elizabeth Wade, Senior Policy Manager, at elizabeth.wade@nhsconfed.org

A shorter two page summary of this Briefing can also be obtained from the NHS Confederation’s website: www.nhsconfed.org/Publications or by contacting publications@nhsconfed.org
Further information

More information about specific aspects of procurement and competition policy and law can be found in the following publications and websites:

www.nhsconfed.org/Publications/briefings/2009-Briefings/Pages/EU-comp-rules-for-the-NHS.aspx

www.nhsconfed.org/Publications/briefings/Pages/The-new-EU-Remedies-Directive.aspx

Mills and Reeve – GP commissioning lawyers
www.mills-reeve.com/gpcommissioning

Mills and Reeve Procurement Portal – an online resource for public procurement law
www.procurementportal.com

NHS Confederation – Competition and choice
www.nhsconfed.org/priorities/competition-choice/Pages/Competition-choice.aspx

The Co-operation and Competition Panel for NHS funded services
www.ccpanel.org.uk

Office of Government Commerce – procurement guidance
www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_guidance_on_the_UK_regulations.asp

Office of Fair Trading – competition guidance
www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act

References


3. NHS Supply2Health www.supply2health.nhs.uk


An introduction to procurement and competition for GP commissioners

The NHS Confederation

The NHS Confederation is the only independent membership body for the full range of organisations that make up today's NHS. Our ambition is a health system that delivers first-class services and improved health for all. We work with our members to ensure that we are an independent driving force for positive change by:

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- get expert advice and learn about services that can support your work from a wide variety of exhibitors.

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