

Session delivered by the European Office

## **Procurement in the NHS - to tender or not to tender**

**Chair: Peter Ware**

Partner, Browne Jacobson LLP

**Elizabeth Zanon**

Director, NHS European Office



## Speakers

- **Elisabetta Zanon**, Director of the NHS European Office. The NHS European Office is based in Brussels and works on EU developments of importance for the NHS, including EU policy and legislation, European funding and the exchange of best practice. Elisabetta has been particularly active in influencing the revision to the EU Procurement rules, currently being discussed in Brussels, and on which she will be speaking.
- **Peter Ware** is head of Browne Jacobson's Government and Infrastructure Team, specialising in complex procurement, shared services, PFI, outsourcing and public sector joint ventures. Peter worked for a local authority for several years prior to joining Browne Jacobson and so fully understands working within the public sector. Peter regularly advises all types of public bodies on procurement and commissioning, vires issues and their decision making processes.



# The Current procurement landscape for NHS Commissioners

Peter Ware

Partner, Browne Jacobson LLP



## What Is Procurement Law?

- Rules governing the purchase of goods, works and services by authorities to ensure fair competition in the market place
- Who has to comply with the rules?



## Background

- Several competing frameworks
  - EU Directives and the Public Contracts Regulations 2006 (and the case law surrounding it)
  - Regulatory oversight such as through Monitor and the NHS provider licence
  - Primary procurement UK legislation eg The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013
  - Other legislation which impacts on procurement and policy for example the Public Services (Social Value) Act 2012, Equalities Act 2010 and Competition Act 1988
  - Policy guidance such as the (consultation draft) guidance on the procurement, patient choice and competition regulations from Monitor and historically the Principals and Rules for Cooperation and Competition

## General Rules Under the European Regime

- Goods contracts
  - Purchase of supplies e.g. uniforms, office equipment
- Works Contracts
  - Construction of new premises
- Services Contracts
  - For the purposes of the PCRs this means
    - Part A services
    - Part B services – (which include health services)

## General Rules Under the European Regime

- Goods, Works and Part A Services
  - Thresholds (below threshold contracts treated in same manner as Part B services contracts)
  - Rules on type and form of procurement
    - Open procedure
    - Restricted procedure
    - Competitive dialogue
    - Negotiated procedure
  - Time frames for running each stage of the relevant procurement process

## Procuring Part B Services – no rules?

- European Interpretative communiqué
  - Compliance with standard principles
  - Cross border interest test. Is the contract relevant to the internal market?
- Basic principles: *Telaustria*
  - Equal access for economic operators from all member states
  - Non-discriminatory description of the subject matter
  - Mutual recognition of qualifications
  - Appropriate time limits
  - Transparent and objective

## The Role of Monitor and Cooperation and Competition

**Monitor's stated role in this area is to safeguard choice and prevent anti-competitive behaviour which is against patients' interests, they have established a cooperation and competition directorate.**

### **What does the Cooperation and Competition Directorate do?**

Monitor has a number of powers to enable them to protect choice and prevent anti-competitive behaviour. Which includes

- apply and enforce sections of the provider licence related to integrated care and choice and competition;
- apply and enforce the Procurement, Patient Choice and Competition Regulations and relevant sections of the Responsibilities and Standing Rules;
- apply and enforce provisions of the Competition Act 1998 and the Treaty on the Functioning of the European Union that prohibit anti-competitive behaviour; and
- make market investigation references under Part 4 of the Enterprise Act 2002 to the Competition Commission.

# Provider Licence Section 3 ( Condition C ): Choice and Competition Conditions

## Condition 1: The rights of Patients to make choices

- At every point where a patient has a choice of provider (either under the NHS Constitution or as a result of local commissioning choices) he or she must be told about that choice and where information can be found about it.
- Information must not be misleading
- Information must be balanced and not favour one provider over another
- Where you are a provider there must not be any gifts or other benefits to induce your referral

## Condition 2: Competition Oversight

- There must be no agreement which has the effect of distorting, restricting or preventing competition
- Must be no other conduct which may distort restrict or prevent

to the extent it is against the interests of people who use health care services

**Guidance currently out to consultation until 25 June**



## Draft Guidance on Choice and Competition Licence Conditions: Choice

- Expectation that commissioners to make investigations so that they are aware of where choices have been made locally (AQP Resource Centre).
- Information is to be given at every opportunity where choices arise and the information must be given in form suitable for the recipient. No *duty* to prepare materials or advice but you can do if you wish provided it is balanced.
- Monitor will draw on other legislative regimes to help them decide what amounts to “misleading” on the information provided.
- Although there can be no “Inducements” a licensee may advertise and promote their activity.

## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

Primary objective is contained in regulation 2 this underpins the remainder of the regulations:

*When procuring health care services for the purposes of the NHS (including taking a decision referred to in regulation 7(2)), a 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).*



## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

- Regulation 3 requires commissioners to act in a transparent and proportionate way and treat providers equally and in a non discriminatory manner (akin to EU general treaty requirements).
- Regulation 3(4) requires that when considering how to improve quality and efficiency bodies need to consider amongst potentially other things whether it would be appropriate to:
  - *Consider services being provided in a more integrated way;*
  - *Enabling a competition*
  - *Allowing patients a choice of provider*



## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

- Regulation 4 Advertising and expressions of interest.
  - Regulation 4(1) requires NHS England to maintain a website where opportunities can be advertised.
  - Regulation 4 (2) where advertising an opportunity this website must be used by all relevant bodies
  - Regulation 4(3) sets out what must be included in any advertisement
- Also is this be used as the UK equivalent of the VEAT notice?

## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

- Regulation 5 (1) is the one that has caused some controversy
  - (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.*
- Regulation 5 (2) material change

## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

- Regulation 6 Conflicts of Interest

**6.**—(1) *A relevant body must not award a contract for the provision of health care services for the purposes of the NHS where conflicts, or potential conflicts, between the interests involved in commissioning such services and the interests involved in providing them affect, or appear to affect, the integrity of the award of that contract.*

## The National Health Services (Procurement, Patient Choice and Competition) (No 2) Regulations 2013

- Part 3 Regulations 13 to 17 deal with Monitor's investigatory and interventionary powers
- Regulation 13 provides the circumstances in which Monitor may investigate
- Regulation 14 introduces "Ineffectiveness" as a concept for health care services
- Regulation 15 gives Monitor the power to make directions to commissioners about current procurements or already completed award decisions

## Substantive guidance on Procurement, Patient Choice and Competition: Consultation draft 20 May 2013

- Guidance largely reflects the structure of the Regulations asking a series of questions about the approach taken. The consultation is to close 15<sup>th</sup> July 2013.
- As with other guidance, it sets out the principle and then gives a series of typical behaviours which would be considered by Monitor when looking at breaches of the requirements of the regulations.



# Substantive guidance on Procurement, Patient Choice and Competition: Consultation draft 20 May 2013

- The guidance makes it clear that the requirements set out in Regulation 2 must be considered even when taking decisions which aren't the award of the contract. This could mean a decision under regulation 5 as well as 7
- Monitor make it clear commissioners must conduct all of their procurement activities openly and in a way that allows scrutiny
- Confirms that all providers must be treated equally, this would include a prohibition on involvement in service design and all being given an opportunity to express an interest
- Any exercise that is carried out must be proportionate to the contract in question
- Delivering value money does not stop at award of contract, it is suggested that active contract management and termination for poor performance is also captured by regulation 3 (3)
- Commissioners must actively consider whether bundling services together may offer better value for money
- However, integration must be one of the key considerations

# Substantive guidance on Procurement, Patient Choice and Competition: Consultation draft 20 May 2013

- No requirement to publish a notice under the Regulations. However, how does this sit with the rest of the guidance and the *Objectives* set out in Regulation 2
- Monitor consider that “*proportionate*” in regulation 3 (2) (a) potentially gives Commissioners the ability to consider how the benefits of a procurement exercise might be outweighed by the costs of carrying out the exercise and accordingly when commissioners may not be obliged to carry out a competition. This is not obvious in the face of the regulations
- The guidance gives examples of where single provider exemption in 5 (1) would be allowable. If this exemption is used the guidance confirms that a clear audit trail of the decision will be necessary.
- The guidance confirms that substantial variations to existing contracts may amount to new procurements. This is borrowed from EU jurisprudence on procurement but is not obvious on the face of the regulations.

## Substantive guidance on Procurement, Patient Choice and Competition: Consultation draft 20 May 2013

- The guidance provides advice on Record keeping and the support being given by CSUs
- It provides further guidance on the interpretation regulation 6 (conflicts of interest) and 10 (anti competitive behaviour)
- This builds on previously issued guidance
- Separate draft guidance has been published in relation to enforcement powers.

# Revision of EU public procurement Directive: Which implications for the NHS?

Elisabetta Zanon, NHS European Office



## Revision of the EU Directive

- Existing Directive agreed in 2004, implemented in the UK with the Public Contracts Regulations 2006
- Ensure competition in the EU internal market, by setting rules for the award of public sector contracts
- Revision process started in early 2011, European Commission Green Paper consultation, etc.
- Proposal for a new Directive released in December 2011
- EU decision-making process in final stage
- New Directive expected to be agreed by Autumn
- Max two years for domestic implementation

## Key changes for the NHS

- New regime for health service contracts
- Exemption for some forms of cooperation between public bodies
- Preventing conflicts of interest
- Allowing pre-market consultation
- Increased access to negotiation with bidders
- New procedure for procurement of innovation
- Modification of existing contracts

## New regime for health service contracts

Light regime for the award of health service contracts maintained but strengthened:

- Threshold EUR750,000 - below which presumption of no cross-border interest
- Ex-ante advertisement in OJEU (contract notices or PINs)
- National rules for the award of contracts
- Award criteria not only based on price
- Quality, continuity, accessibility, comprehensiveness of services and innovation can be taken into account

## When will this regime apply?

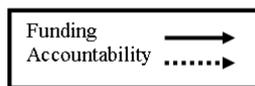
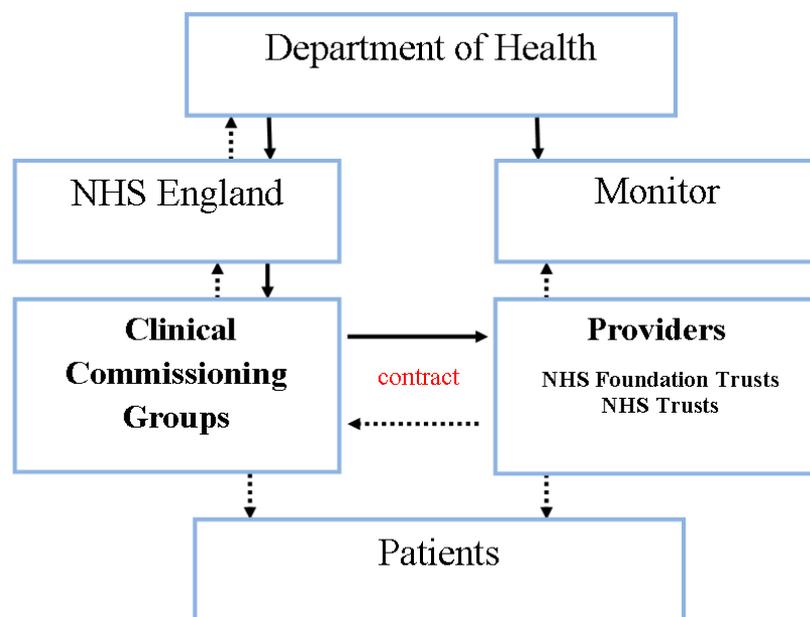
- “...nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts”*
- “..this Directive should not affect the social security legislation of the Member States nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities”*
- “The scope of this Directive shall not include non-economic services of general interest”*

# Derogation for some forms of cooperation between public bodies

## Article 11 – based on European Court cases

- **Vertical cooperation:** “in house” contract (i.e. awarded to a controlled entity)
- **Horizontal cooperation:** “contract is concluded in a framework of genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties”

# Can this derogation apply to inter-NHS contracts?



## What implications will the new Directive have for the NHS?

- A lot will depend on final wording of article 11 - negotiations not completed yet and NHS European Office still lobbying
- Interplay between EU Directive and domestic law (s75 Regulations, Monitor Guidance)
- Will the use of the derogation in article 11 be compatible with requirement in domestic law and guidance to treat all potential providers equally?
- If not, then advertisement of NHS contracts (above EUR750,000) in the OJEU will be compulsory and failure to comply (e.g. direct award) could trigger ineffectiveness

## Conclusions

- The new emerging Directive will not fundamentally change the regime for health service contracts
- Still “light touch”, but requirement to advertise in the OJEU and rules on cooperation between public bodies are key changes
- Domestic policy context and regulatory framework has however changed
- Possible tensions between different frameworks
- Increasing uncertainty for commissioners and risk of challenges?



## Any questions?

- [Elisabetta.Zanon@nhsconfed.org](mailto:Elisabetta.Zanon@nhsconfed.org)
- [Peter.Ware@brownejacobson.com](mailto:Peter.Ware@brownejacobson.com)

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