


To tender or not? A first look at the proposed NHS Provider Selection Regime

This article looks at some of the key points set out in the Consultation Paper and invite you to join our working group to discuss and consider the proposed regime.

 01 March 2021

Since September 2019 NHS England and Improvement have made known their view that the commissioning of healthcare services should sit outside of the current Public Contracts Regulations 2015 (PCR) and that the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 ("PPCCR") should be revoked. Now, following publication of the Department of Health and Social Care's White Paper: [Integration and Innovation: working together to improve health and social care for all](#) the detail of the NHS proposals for a new procurement regime the [NHS provider selection regime](#) have been published.

In this article we look at some of the key points set out in the Consultation Paper and invite you to join our working group to discuss and consider the proposed regime. Keep an eye out for our more detailed briefing.

Overview

The proposed regime sets out the framework which specified NHS organisations and local authorities must follow when arranging healthcare services (whether NHS or public health) and they are proposing to continue existing contractual arrangements, select a provider to deliver a service (without a tender) or compete a new contract.

The proposed regime has been designed to allow the NHS and local authorities to arrange healthcare services as they consider appropriate, largely without the burden of competitive tendering. However, whilst those organisations will have significantly more control over how arrangements are built up it is not a case of having carte blanche and much like in the Cabinet Office Green Paper: Transforming public procurement the concept of transparency runs through the proposals. Whilst challenges under the PCR and PPCCR would be a thing of the past, providers will be entitled to raise issues and seek a judicial review of a relevant organisation's decision.

The PPCCR, however, were not only concerned with procurement and key aspects of the PPCCR relating to the management of conflict of interest and patient choice will be retained. The latter being dealt with through new 'Standing Rules' regulations which the Secretary of State will issue for the new legislative framework.

The best interests of patients, taxpayers and the population

The proposed regime is centred around the principle of ensuring that healthcare services are arranged in the best interests of patients, taxpayers and the population and that decision-making bodies are not constrained by overly bureaucratic rules nor faced with unnecessary barriers to delivering integrated care and collaborative arrangements.

Who does it apply to and when?

The proposed regime will apply to organisations classed as 'decision-making bodies':

- NHS England

- ICS Boards

(ICS Boards are a new form of statutory body proposed under the White Paper. At present ICS Boards do not exist although there are a number of ICSs currently operating across the country through alternative governance mechanisms)¹

- NHS trusts
- foundation trusts, and
- local authorities

The proposed regime would only apply, however, when those decision-making bodies are arranging healthcare services (whether NHS or public health).

The circumstances set out in the Consultation Paper describing when this regime would apply include when local authorities are arranging healthcare services either as part of their public health functions or as part of s.75 arrangements with the NHS. Whilst this is reflective of the integration and collaboration agenda across health and social care, the regime will not apply to the commissioning of social care services.

The three scenarios

The Consultation Paper sets out the framework for decision making in the three scenarios below:

1. the continuation of existing arrangements
2. to identify the most suitable provider for new/substantially change arrangements
3. competitive procurement

and describes in the case of scenarios 2 and 3 the key criteria which the decision-making bodies must have regard to.

Key criteria

The Consultation Paper makes clear that the key criteria which have been identified have no particular hierarchy attached to them and it would be for decision-making bodies to prioritise the criteria should they consider it appropriate.

The key criteria are:

- Quality (safety, effectiveness and experience) and innovation
- Value
- Integration and collaboration
- Access, inequalities and choice
- Service sustainability and social value

Whilst prioritisation of the key criteria would be permissible, all of the criteria must be considered in some way. There is, though, an emphasis in the Consultation Paper on applying the proposed regime proportionately to reflect the scale, cost and significance of the services in question. We can, therefore, expect when tendering is undertaken for it to look very different to how it does now.

When making these types of decisions, then decision-making bodies would need to remember to have regard to all their statutory duties and not simply this framework and the key criteria.

No right to challenge?

As noted above decision-making bodies will need to be transparent about how they apply the proposed regime and will need to give advance notice of certain intentions/decisions. This will allow, in certain circumstances, a provider to question the approach of a decision-making body by submitting representations to the decision-making body in question.

This would be done in the 'notice period' between a decision-making body publishing an intention to award a contract and actually doing so. The decision-making body would be required to discuss the issue with the providers or their representatives, then publish a response to the objections and confirm how it intends to proceed. For aggrieved providers they would also have recourse to judicial review proceedings should they consider it necessary but any such action would need to be taken promptly to meet the relevant limitation periods.

Aside from the specific proposals set out in the Consultation paper, decision making bodies should also be mindful of the powers of NHS England to intervene and the role of local authority overview and scrutiny committees in considering these issues when they are brought

to their attention. As is the case now under the PCR and PPCCR a good audit trail of the decision-making process will be essential not just to address any objections received but also to assist decision-making bodies in meeting the various reporting requirements which would accompany the proposed regime.

Round table event

As part of our series of working group round tables looking at the detail of the Green Paper: Transforming Public Procurement we hosted a very lively debate on the subject of whether or not the commissioning of healthcare services should be subject to the prevailing public procurement regime. In response to this consultation we have now scheduled an additional working group session to specifically consider the proposals of the NHS Provider Selection Regime.

To register your interest for this session or our next health sector Green Paper working group please [email Rachel Whitaker](#).

- NHS Provider Selection Regime: Working Group March 15th 11 am – 12.30 pm
- Health Sector Green Paper working Group March 1st 11 am – 12.30 pm

The sessions will be facilitated using the MS Teams platform.

Consultation

The proposals are now subject to an 8 week consultation period which will close on 7th April. [The consultation can be accessed here](#).

Green Paper: Transforming Public Procurement

Readers will be aware that the recent Cabinet Office Green Paper: [Transforming public procurement](#) was intentionally silent on the issue of whether and if so, how the public procurement regime should apply to the commissioning of healthcare services going forward. As such there is no overlap between the proposals being consulted on by the NHS and the current Green Paper consultation.

Please contact [Rachel Whitaker](#) with any queries you have about the NHS Provider Selection Regime.

¹ ICS Boards are a new form of statutory body proposed under the White Paper. At present ICS Boards do not exist although there are a number of ICSs currently operating across the country through alternative governance mechanisms

Contact

Rachel Whitaker

Partner

rachel.whitaker@brownejacobson.com

+44 (0)115 976 6538

Related expertise

Commissioner and integrated care systems

Health

NHS acute trusts

NHS mental and community health trusts