NHS provider selection regime: response to consultation

July 2021 - a reduction in regulation and scrutiny, no need for tendering, and help for private providers

**Just to remind everyone**

The government’s Health and Care Bill proposes to revoke the procurement and competition requirements under section 75 of the Health and Social Care Act 2012 as well as remove arrangements for healthcare services between NHS commissioners and providers from the scope of the Public Contracts Regulations 2015.

**the procurement options suggested are:**

1. rolling over contracts with incumbent providers,
2. selecting a single most suitable provider, for new/substantially changed arrangements
3. running a competitive process
4. The regime should be followed whenever decisions are made about which provider should provide a healthcare service
5. NHSEI want the new rules to ensure decision-making is robust and defensible with commissioners satisfied that they can justify all procurements having regard to ‘three best interests’, those of i) patients; ii) taxpayers; iii) and the local population.
6. There are key criteria to consider for all options:
* quality (safety, effectiveness and experience) and innovation
* value
* integration and collaboration
* access, inequalities and choice
* service sustainability and social value.

NHSEI will not state which of these is more important in case it reduces flexibility for decision makers to meet the ‘three best interests’ for their local population.

1. The regime must be followed ‘even-handedly’ when making decisions about who provides healthcare services, with no exemptions based on the type of provider, or the type of service being planned. It should use tendering to enable market entry for new providers and support innovation.
2. There are no plans to set a limit on the number of times a contract can be rolled over, nor to allow contracts to continue in perpetuity. It is felt that there should be appropriate ‘breaks’ in the contract cycle, and sufficient ‘review periods’. This suggests that all contracts will be reconsidered regularly in a changing provider environment.
3. There will be future guidance for decision-makers who are genuinely unsure about whether there is an alternative provider, but decision-making bodies are reminded that they must routinely assess the provider landscape as part of their strategic work.
4. Because of the risk of conflicts of interests on ICBs, guidance about the occasional need for representatives of NHS trusts/foundation trusts to recuse themselves from decisions will be sent out.
5. A notice period is required for all decisions save those where a contract is rolled over as there is no alternative provision, or alternative provision is available through other means (eg patient choice arrangements). Most respondents thought that the 4-6 weeks suggested was too short. NHSEI accepted that there may be benefits to a notice period of around 30 working days for providers that wish to make representations to commissioners, and will give further thought to this in the guidance.
6. The lack of independent scrutiny in the regime is due to the removal of a competitor’s right to legally challenge decisions set out in the Public Contracts Regulations 2015. Instead representations can be made directly to the commissioner once a decision is published; judicial review is available to challenge the lawfulness of any decision. Some respondents felt that this change seriously reduced scrutiny and that the use of judicial review was inappropriate.
7. NHSEI indicated that the change was to avoid over-burdening the system with bureaucracy and noted suggestions that ‘the prospect of legal action erects a barrier to different parts of the system working together, as well as bringing unnecessary delays and costs to the process’. Indeed some contracts are felt to be unnecessarily put out to tender because of the threat of legal challenge. These are barriers that the service has wanted removed to create a more flexible regime based on the discretion ‘to do the right thing’ with regard to the ‘three best interests’. They also think that the introduction of an independent third- party scrutiny or formal NHSEI regulatory powers would unhelpfully cut across other accountability relationships within the system.
8. Respondents expressed concerns about the further development of Any Qualified Providers (AQPs) access to the NHS (felt to be necessary to provide patient choice) in that they may discriminate when triaging referrals (cherry picking), and in terms of the changes proposed to the AQP regime-that the removal of a decision-making bodies’ ability to ask local questions/use local criteria, will effectively mean that a provider qualified in one region could deliver services across the country (if geographically able).
9. NHSEI simply stressed the importance of patient choice as set out in the remaining regulations of s75 of the Health and Social Care Act 2012, and noted that provisions would be set out in secondary legislation.
10. One key question was why the NHS is not simply included in the Cabinet Office regime along with Local Authorities? NHSEI did not really answer this, stating that they have been engaging with Cabinet Office officials and will continue to do so particularly in relation to the competitive tendering process where there needs to be clarity on which regime applies.
11. Local Authorities are to be an important part of the ICS, and integrating health and social care services is fundamental to improve population/ patient outcomes, and this will only be more difficult if local authorities, as part of an ICS, are subject to a different legislative procurement regime.
12. NHSEI wish to support the integration of commissioning and avoid erecting barriers to this for those services that would benefit from being arranged under the same contract. However decisions on how social care should be commissioned are for government to take, and they ask colleagues from across government to consider the benefits of greater integration of health and social care as they continue to consider measures to reform the operation of the public procurement and the social care system in England.