



Briefing for House of Lords motion on the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013
23 April 2013

This briefing note sets out the Royal College of Surgeons' (RCS) view on the procurement, patient choice and competition regulations. There are a number of elements of the regulations we welcome but we believe Peers should ask for further clarification on how commissioners' tendering process will work in practice.

The RCS supports the use of competition and the independent sector (private, not-for-profit, and charitable providers) providing competition happens on the basis of quality, not price, and where this benefits the patient.

The independent sector is playing an increasing role in the NHS – particularly in elective surgery. Although the independent sector only provides roughly 3% of all elective NHS care, for elective hip and knee surgery this figure rises to almost a fifth (19%)¹. Independent providers of hip and knee surgery are highly regarded by the public according to patient reported outcome measures².

RCS statement on procurement and competition regulations

What we welcome

We believe the regulations help to clarify how EU and UK procurement law should be applied to the NHS. Without regulations, sensitive decisions about the future of NHS services would be more frequently decided by the law courts rather than allowing intervention by Monitor, a regulator with specialist healthcare expertise.

The RCS believes there are many welcome elements of the regulations including:

- The requirement for tendering criteria to be set by commissioners;
- Procurement to be done on the basis of improving the quality of services and securing the needs of the people who use the services;
- The proposal for improved transparency regarding contracts that are awarded;
- Improvements to the regulations which make clear that services need to be 'provided in an integrated way'.

Our remaining concerns

In practice these regulations give significant powers to commissioners and Monitor in how they interpret and implement the regulations. The revised regulations are clearer about where 'anti-competitive' behaviour by commissioners is permissible – particularly to ensure

¹ <http://www.nhsconfed.org/Networks/NHSPartners/Pages/Data.aspx>

² *Ibid*



services remain integrated – but it remains to be seen how this will be defined and applied in practice.

Similarly, while we support the decision to allow commissioners to design service specifications it is unclear what criteria will or will not be permissible. The RCS believes new providers must support good surgical and medical practice now and in the future: like the NHS they must demonstrate how they will support training, education, participation in clinical audit data and research.

The Government should clarify whether commissioners will be able to disqualify providers who refuse to participate in these activities and whether commissioners are expected to engage with Local Education and Training Boards to ensure local providers are supporting education and training plans.

As part of any tendering process, commissioners must also be able to look at whether any change to an existing service will de-stabilise other related services provided by existing organisations, and whether all services in the NHS – regardless of ownership – help to join up a patient’s care between different providers.

It is also essential to improve understanding about the practical intentions of these regulations. While the Government has provided some case studies³, Monitor’s guidance on the regulations has still not been published. Given commissioners’ limited legal resources, such guidance is likely to have a significant impact on how they tender services. It is disappointing that this guidance has not been published given the regulations came into force on 1 April.

We would like to see the following issues addressed during the House of Lords debate:

- When Monitor’s guidance on the competition and procurement regulations will be published.
- Whether commissioners will be able to discriminate against providers who will not participate in training, education, research, and the collection of clinical audit data.
- Whether commissioners will be expected to engage with Local Education and Training Boards to ensure commissioning decisions are aligned with local training plans.
- How commissioners will prevent de-stabilisation of services in local NHS trusts that are providing multiple services.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175528/DH_response_to_38_Degrees_legal_advice_-_FINAL.pdf