Essex CHAMBERS

PODCAST ON CHANGES TO NHS PROCUREMENT: SUMMARY NOTE

This note summarises the key observations made in the “Changes to NHS Procurement” podcast, first broadcast on 4th November 2021, with Jennifer Thelen and Katherine Barnes (public law barristers at 39 Essex Chambers) and expert guest speaker Sharon Lamb (partner and health law specialist at McDermott Will & Emery).

The current position

At present the rules on the procurement of NHS services are set out in the Public Contracts Regulations 2015 (derived from EU law) and the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013. The former provide for a “light touch” competitive tendering regime for contracts worth over €750,000.

Rationale for the changes

Even though more than 90% of NHS commissioning contracts are already awarded without any competition, there is a view held by some in the NHS (and Government) that current procurement requirements impose an excessive burden on the NHS and prevent the effective integration of services. This led to the publication on 6 July 2021 of the Health and Care Bill, and in August 2021 the NHS England and NHS Improvement published their response to the consultation on the new proposed procurement regime which took place in early 2021.[1]

Summary of the new proposed regime

The intention is for the existing rules to be repealed, and instead for procurement to be organised into three streams:

(1) Continuation of existing arrangements

- Applies in the many situations where the incumbent provider is the only viable provider due to the nature of the service in question, and where the incumbent provider is considered to be doing a “good job” against key criteria.
- To rely on stream 1 the decision-maker needs to be satisfied they can justify continuing the existing arrangements, having regard to the best interests of patients, taxpayers and the population
- The decision-maker has to publish their intention to award the contract, and there must then be a notice period. If credible representations are received during the notice period then the decision-maker must address them.

(2) Selecting the most suitable provider when service is new or substantially changing

- Applies when a service is changing considerably, a new service is being established or the decision-maker wants to use a different provider.
- Decision-maker applies a set of “key criteria” and, where they have reasonable grounds for believing that a provider is “the most suitable provider”, the contract can be awarded without a tendering process.
- The key criteria are: 1. Quality and innovation; 2. Value; 3. Integration and collaboration; 4. Access, inequalities and choice; 5. Service sustainability and social value. Providers may also take into account “other relevant factors” and

[1] https://www.england.nhs.uk/publication/nhs-provider-selection-regime-consultation-on-proposals/

they should also consider other potential providers within the relevant geographical footprint.
- As with stream 1, there is a notice period following publication of the intention to award the contract during which representations may be made.

(3) Competitive procurement
- Competitive procurement is effectively a last resort, to be used where a decision-maker does not think it can identify a "most suitable" provider via the stream 2 process.
- Process reflects the way competitive procurement operates at present under the light touch regime (i.e. formal advertisement inviting providers to express interest, assessment of providers according to key criteria and other relevant factors, publication of intention to award the contract with a notice period during which representations can be made).

Queries and concerns about the operation of the new regime

- The consultation proceeded on the basis that the new regime would apply only to the procurement of NHS services (like the light touch regime at present). However, as currently drafted, the Health and Care Bill indicates that the new rules would also apply to "other goods or services that are procured together with […] health care services". If so, that would represent a significant change in approach – contracts for medicines, drugs and devices could also be covered (potentially at least) by the new rules.
- In respect of stream 1, it is unclear how it will be determined that an existing provider is doing a "good job", especially if (as the consultation response suggests) this is to be judged primarily according to whether the provider is delivering against the key criteria. These show the provider is meeting minimum standards but not necessarily doing a "good job".
- With regards to stream 2, it is uncertain how decision-makers are supposed to consider other potential providers (as they are required to do) without the benefit of the information usually submitted by providers as part of the tendering process. The extent to which a decision-maker is required to seek out proactively such information remains unclear.
- There is also real uncertainty as to how the submission of representations will be dealt with after a "minded to" decision has been made, and in particular if the notice period will be extended while such representations are addressed. It is presumed the time for the purposes of any legal challenge would only start to run once the final decision has been made, but at this stage it is unclear what time period will be afforded to potential challengers.

Legal challenges

In theory the new regime is supposed to reduce the risk of legal challenge. However, in circumstances where providers have no formal mechanism to ensure they are properly considered before the decision to award a contract is taken, an increase in judicial review challenges – the only means of challenges a decision to award a contract – seems probable. While in most cases it is likely to be difficult to challenge successfully the weight a decision-maker affords to the key criteria (this being a question of judgment which can only be

challenged on a *Wednesbury* basis), more fruitful lines of argument may lie in the breach of the *Tameside* duty of inquiry (given the obligation of a decision-maker under stream 2 to consider other potential providers). There may also be scope for basing claims on allegations of procedural fairness if representations are not properly considered before a final decision is made and/or if the many concerns raised by respondents to the consultation about a lack of transparency and conflicts of interest could be said to meet the public law test for apparent bias in a particular case.

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