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In this document we focus on providing guidance for commissioners on the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. These regulations are also sometimes referred to as the “section 75 regulations” or “the commissioner regulations”. While the regulations replace the previous administrative rules governing the procurement of NHS-funded services set out by the Department of Health (in Principles and rules for cooperation and competition and Procurement guide for commissioners of NHS-funded services), the substance of the former rules is preserved within them.

3: Guidance on publishing new contract opportunities for NHS health care services

3.1 Introduction

This section provides guidance on what factors commissioners should take into account in deciding whether and, if so, how to publish contract opportunities for NHS health care services.

There is no requirement in the Procurement, Patient Choice and Competition Regulations for commissioners to publish a notice inviting offers from prospective providers to supply NHS health care services (a contract notice) before awarding a contract to provide those services.

The decision whether or not to publish a contract notice is a matter for commissioners having regard to the decision-making framework described in Section 1.3. This decision is not an isolated decision. It will need to be taken in the context of a commissioner's decisions about what services to procure and how to go about procuring them more generally.

The previous section examined the objective that commissioners must pursue and the general requirements that they must comply with when procuring services (Regulations 2 and 3). This objective and these requirements are relevant to the decision whether or not to publish a contract notice. For example, publishing a contract notice may be a way for a commissioner to identify the most capable provider (or providers) and to increase transparency around its actions. Conversely, publishing a contract notice may be unnecessary where, for example, only one provider is capable of providing the services in question.

In addition, Regulations 4 and 5 of the Procurement, Patient Choice and Competition Regulations contain specific requirements that commissioners must comply with that are relevant to the question of whether or not to publish a contract notice. These are:

- Regulation 4(4), which requires commissioners to make sure arrangements exist to enable providers to express an interest in providing any NHS health care services; and
- Regulation 5(1), which provides that commissioners can award a new contract to a single provider without publishing an intention to seek offers from providers where they are satisfied that the services are capable of being provided by only that provider.

Regulation 4 also contains specific requirements that commissioners must comply with, that are relevant to the question of how to go about publishing a contract notice where a commissioner decides to do so. These are:

- Regulation 4(1), which requires NHS England to maintain a website on which commissioners can publish:
 - o opportunities for providers to provide NHS health care services; and
 - o records of the contracts for NHS health care services that commissioners award to providers;
- Regulation 4(2), which requires commissioners to publish a contract notice on the website maintained by NHS England where they decide to publish an intention to seek offers from providers in relation to a new contract for the provision of NHS health care services; and
- Regulation 4(3), which establishes requirements about the content of that contract notice.

3.2 Deciding whether or not to publish an intention to seek offers for new contracts

Commissioners need to make an informed and balanced judgment on the mix of factors relevant to their local circumstances. What is relevant will depend on the circumstances, but may include, for example: existing provider performance; ensuring service sustainability; delivering care in a more integrated way; whether there is likely to be more than one capable provider; whether providers have expressed an interest in providing the services or are likely to be interested in providing them; whether it would be beneficial to enter into a contract with one provider, several providers or all providers of the service; how much time has passed since services were last reviewed; and the value of the contract and the costs associated with running the different procurement processes being considered.

Where a commissioner does decide to publish a contract notice as a way of procuring services, it will need to consider what steps it should take to avoid any disruption to patient care if a new provider is selected as a result of the process.