FOR INFORMATION – NOT STATEMENT OF POLICY

Public Contracts Regulations 2015

1 Introduction

New Public Contracts Regulations (PCR 2015) came into force on 18 April 2016. The PCR 2015 requires commissioners to advertise when they intend to award contracts for healthcare services valued at more than the threshold - €750,000 (about £590,000) - over the contract’s lifetime, unless an exemption applies (see below). This does not mean every contract requires a full formal competitive procurement exercise.

Where contracts do need to be advertised, commissioners can use the light touch regime (LTR) described in the legislation. The LTR allows the commissioner flexibility to design an appropriate, proportionate process so they can minimise the burden on their limited commissioning resources.

Because of the local flexibilities and specific local circumstances that will apply in respect of each contract, NHS England is not able to set out a centrally devised standard approach that is guaranteed to be compliant. Commissioners must decide the approach they take to meeting the new requirements, and should keep a robust audit trail of decisions taken in case the approach is challenged.

The PCR 2015 form part of the procurement landscape alongside the NHS Procurement, Patient Choice and Competition (No. 2) Regulations 2013 (PPCCR). Commissioners should bear in mind that they have to comply with both sets of regulations, and, although there is some alignment between the two, compliance with one regime does not automatically mean compliance with the other.

2 Requirements of the LTR under the PCR 2015

The main requirements of the LTR are:

 Advertise in the Official Journal of the European Union (OJEU) through a contract notice or a prior information notice (PIN);

 Set out the criteria and process to be used to award

the contract in the contract notice or PIN as clearly as possible; these criteria must not: artificially constrain competition; or specify organisational form;

 Run a transparent process that treats bidders equally, and conforms to the process set out in the contract notice or PIN;

 Set reasonable and proportionate time limits for responding; and

 Publish a Contract Award Notice in the OJEU when the process is complete and the contract has been awarded.

Commissioners can adopt or adapt one of the formal procedures set out in the PCR 2015 if they wish.

3 Choose an item.

If there is only one expression of interest in response to the OJEU advert, the commissioner can assess whether the provider is suitable and, if appropriate, negotiate and award the contract (which must reflect the original advert).

If more than one provider expresses an interest in response to the advert, the commissioner must run an evaluative process to award the contract in accordance with criteria that must be open, transparent and fair to all providers.

4 Exemptions

In addition to the financial threshold, the PCR 2015 also includes some specific but limited exemptions to the requirement to advertise in OJEU, as set out in more detail in the attached Annex A. Commissioners considering using an exemption should seek their own specific legal advice, and keep a clear audit trail of their decision making process.

The high level view given during NHS England’s informal discussion with the European Commission is that the exemptions are not intended to provide commissioners with a routine way to avoid advertising contracts, and should only be used in the circumstances described in the PCR 2015. Further, they do not actually reduce the burden much, if at all – there is a high standard of proof required to demonstrate that credible alternative providers do not exist, in the event of challenge. In many cases it may be less burdensome to issue a contract notice or PIN, which will relatively quickly establish whether there is interest from more than one provider, than to carry out the work needed to justify an exemption.

5 Contract variations and extensions

The PCR 2015 sets out rules on the extent to which existing contracts may be varied or extended without advertising. These permissive provisions are aimed at ensuring that the burden of making changes is proportionate while being fair to providers.

 An existing contract can be extended or rolled forward without advertising if the option is stated in the contract and the possibility of extension was notified to the market as part of the process to award the original contract.

 Changes that do not materially change the nature or value of the contract do not trigger the need to advertise.

However, the provisions are limited in scope and include cumulative financial thresholds so that annual extensions are likely to be caught in subsequent years, even where a first extension falls within the financial scope of an exemption.

Making changes to (or extending) a contract which do not fall within these modification exemptions could attract a legal challenge on the basis that the change is a direct award; so commissioners should carefully consider the impact of the modification on the contract to assess whether it is a permitted modification or whether the change is significant enough to require an advert.

Commissioners should be mindful of the implications of this for future contracts, and how they might want to provide for extension/variation in future.

6 Bundled contracts

Commissioners may need to think carefully about how services are grouped, particularly in acute hospital contracts. Bundling services together (with the effect that there becomes only one provider capable of providing the services) without demonstrating that they are interdependent and need to be procured as a whole could be challenged by providers who consider themselves capable of providing part of the services.

Clinical interdependencies might mean that individual elements of a particular contract cannot feasibly be separated out, and that such contracts can only be let as a whole. For example, it might be possible to argue that, because of clinical interdependencies, a range of acute services should only be delivered in the same location as A&E and intensive care.

On the other hand, unbundling services might enable commissioners to test whether there is a better provider for those services that don't absolutely have to be done alongside A&E, intensive care etc., but the commissioner would need to balance the benefits of taking such an

approach against the effect on the stability of other services.

7 Legal challenges

Even a process designed to be fully compliant could attract legal challenge by providers or by the European Commission. Commissioners should focus on reducing the risk of successful challenge by understanding and meeting the requirements and keeping an audit trail of all decisions taken during the process.

Any legal challenge will be heard in the Courts if proceedings are issued. This can be extremely costly and time consuming for the commissioner. If the challenge is made before contract award, the procurement process would be halted automatically with the commissioner unable to award the contract until the case is determined or settled. Even after the contract is awarded, the procurement process can be ordered to be re-run, potentially incurring significant financial and reputational damage.

8 More information

More practical guidance, particularly on the light touch regime, has been published by the Crown Commercial Service, and the Procurement Lawyers’ Association.

1 There is a range of publications that can provide evidence of the need to co-locate (eg the Keogh review sets out interdependencies, and the Royal Colleges’ good practice guidance on what services should be provided together), and commissioners own local evidence or patient feedback may help justify advertising a single trust wide contract.

NHS England is working through its own approach to meeting the requirements for directly commissioned and specialised services, which other commissioners may find useful.

NHS England is also intending to develop a repository of case studies and examples of documentation.