

Monitor's Substantive Guidance on the Procurement, Patient Choice and Competition (No.2) Regulations 2013

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Background

The Procurement, Patient Choice and Competition Regulations (No.2) 2013 (the "2013 Regulations") adopt a principles-based approach to regulate how NHS England and Clinical Commissioning Groups procure NHS health care services.

Monitor has now published substantive guidance to ensure that commissioners have operated within the legal framework established by the 2013 Regulations (the "Guidance"). The Guidance gives key examples of behaviour that Monitor thinks would satisfy the 2013 Regulations and includes a list of questions that commissioners will be expected to answer, although makes it clear that there is no one-size-fits-all approach. Monitor has also published guidance on how it will enforce the 2013 Regulations.

This note provides a brief overview of some key points to note and sets out how DAC Beachcroft can assist commissioners.

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Some key points to note

Applicability of Regulations

The 2013 Regulations only apply to NHS England and Clinical Commissioning Groups ("Relevant Commissioner(s)"). The Guidance sets out that although local authorities are not bound by the 2013 Regulations, where they are working with a Relevant Commissioner to jointly commission an NHS healthcare service, they may need to take the 2013 Regulations into account to ensure that the Relevant Commissioner has met its obligations. The Guidance also encourages Relevant Commissioners to pass on certain principles under the 2013 Regulations to providers and sub-contractors.

The 2013 Regulations reflect general procurement obligations under EU law, most notably requiring Relevant Commissioners to act transparently, proportionately and treat providers equally and in a non-discriminatory manner. The 2013 Regulations run in parallel with the Public Contracts Regulations 2006 (as updated and amended) (the "2006 Regulations"). As well as meeting general procurement obligations, Relevant Commissioners must ensure their commissioning decisions are in the best interests of the patients/service users and that they improve the quality and efficiency of the services.

It is important that Relevant Commissioners apply the 2013 Regulations to existing contracts as well as any new services/contracts that they are seeking to award. When considering existing contracts, Relevant Commissioners need to address whether the quality of the services under those contracts can be improved, by amending key performance indicators for example.

Transparency

Transparency is a key message in the Guidance - this includes liaising with all potential providers about procurement plans, publishing contract notices and contract awards, declaring conflicts of interest and keeping records of key decisions. The Guidance also provides that transparency includes Relevant Commissioners having to consider what feedback they should give to unsuccessful bidders in a tender process. Unlike the 2006 Regulations, the 2013 Regulations do not prescribe the feedback to be given or indeed how Relevant Commissioners should run tender processes.

Proportionality

In their commissioning decisions, Relevant Commissioners must act proportionately to the value, complexity and clinical risk associated with the provision of the relevant services. The Guidance provides that this may involve looking at the cost of procurement against the cost of the relevant services and also what is involved in a process, such as appropriate financial thresholds and what information the Relevant Commissioners require bidders to provide.

Integration v competition

The 2013 Regulations promote both integration and competition - two seemingly contradictory ideas. However, the Guidance makes it clear that they are not mutually exclusive, and that the sole question that Relevant Commissioners should ask

themselves when making any decision is “what would be in the best interest of the patients?”. If integrating a service could be seen as anti-competitive then Relevant Commissioners need to assess whether that anti-competitive behaviour is in the best interests of the patients. If it is, then it may be permitted under the 2013 Regulations.

Compensation?

The Guidance has made it clear that Monitor will not be able to order a Relevant Commissioner to pay compensation to a successful complainant when enforcing the 2013 Regulations (unlike a Court could when dealing with a challenge under the 2006 Regulations).

Conflicts of interest

The 2013 Regulations provide that a Relevant Commissioner must not award an NHS healthcare service contract where conflicts or potential conflicts between the interests involved in commissioning, such services and the interests involved in providing them affect or appear to affect the integrity of the award of that contract. The Guidance sets out that conflicts can arise in different situations, and includes a list of factors for Relevant Commissioners to consider when assessing whether there is a conflict and whether a contract can be awarded in the circumstances.

Comment

Now that Monitor has finalised its guidance, Relevant Commissioners should ensure that they put processes in place to ensure they comply. This will involve looking at what evidence will be required to ensure that they award NHS healthcare service contracts to the most appropriate providers, and so that in the event of any complaint they can demonstrate compliance with the 2013 Regulations.

How can DAC Beachcroft Help?

Expertise

DAC Beachcroft has a number of experts advising Relevant Commissioners and providers on the application of the 2013 Regulations and 2006 Regulations. These experts can assist Relevant Commissioners to develop template documents and processes to ensure compliance with the new regime and can advise in the event of any complaint.

Workshop

To assist Relevant Commissioners, DAC Beachcroft is running a number of free of charge workshops nationally, the first one being on 4 March 2014 from 9:30am - 1pm in Leeds. The workshops will cover the key issues and challenges coming out of the 2013 Regulations, and practical ways for Relevant Commissioners to comply with the requirements, and how they can plan and carry out their commissioning successfully.

Discussion points will include:

- A practical guide to the Regulations and how commissioners can comply;
- The guidance from Monitor;
- Reflections on recent work with commissioners;
- Learnings from the Monitor investigations that DAC Beachcroft have been involved in.

The workshops will be attractive to commissioners from NHS England and Clinical Commissioning Groups, but also local authorities and other organisations who may commission health and social care services with NHS England or Clinical Commissioning Groups.

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