

briefing

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New EU Directive on public procurement

Implications for NHS commissioners and providers

Key points

- A new EU Directive on public procurement was agreed in the summer of 2013 setting new rules for public bodies when purchasing goods and services, including clinical services.
- The new Directive is expected to be implemented in the UK during 2014.
- Some of the changes proposed are particularly important for NHS commissioners and providers, who will have to understand the new requirements and ensure compliance.
- The NHS European Office was successful in influencing the agreed text in the interests of the NHS.

The application of procurement and competition rules to the NHS has been at the centre of extensive discussions during the passage of the Health and Social Care Act and afterwards with the publication of the NHS (Procurement, Patient Choice and Competition) Regulations – known as s75 regulations.

Alongside complying with the domestic procurement regulatory regime, NHS organisations will also have to ensure that they act in respect of EU law in this area. This *Briefing* provides an overview of key aspects of the new EU public procurement Directive and its implications for the health service.

Background

The EU public procurement rules govern how public bodies purchase goods, services and works, and aim to guarantee equal access to and fair competition for public contracts within the EU market.

The European Commission published proposals to revise the existing EU public procurement Directive (Directive 2004/18/EC) at the end of 2011. The proposal

for a new Directive aimed at achieving more flexibility with the rules, facilitating access to contracts for small and medium-sized enterprises (SMEs), supporting strategic use of public procurement for environmental and social policy goals and providing more legal clarity on the application of the rules.

The proposals went through a lengthy EU decision-making



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process lasting 18 months, culminating with an agreement on the new EU Directive in June this year.

The NHS European Office engaged extensively with the revision on behalf of the NHS, briefing EU decision-makers on NHS views and putting forward proposals on how to improve the proposed text.

The new rules are expected to come into force in the UK during 2014, at a date to be set by the UK Government.

Relevance of existing EU public procurement law to the NHS

As public bodies, all NHS organisations have to operate in respect of EU public procurement law when they purchase goods, services or works. The Public Contracts Regulations 2006 transpose the existing EU Directive on public procurement into national legislation.

While the full regulatory regime has to be complied with when NHS bodies purchase medical equipment, furniture, uniforms, building works and a broad range of other goods and services supplies, a light touch regime applies for the procurement of clinical services – which classify as Part B in the current legal framework. European law does not require prior advertising in

the *Official Journal of the EU (OJEU)* or competitive tendering of Part B services. However, they are still caught by the general obligations of transparency, equal treatment, non-discrimination and proportionality that derive directly from the Treaty on the Functioning of the European Union when the contract is of a 'certain cross-border interest'.

Despite the limited reach of the EU legal framework on the commissioning of clinical services, public procurement has nevertheless become increasingly important for the NHS over recent years due to a number of domestic policy developments that have introduced foundation trusts as independent organisations, brought in a diversification of providers to the NHS 'market', and encouraged commissioners to use competitive procedures as a way of challenging existing service provision and securing innovative and more effective service delivery.

The extent of the application of EU public procurement rules to the commissioning of NHS services has been surrounded by a degree of legal uncertainty for some time, with individual commissioners being left to decide whether a competitive procedure was required or not for the procurement of clinical services. This uncertainty originates from the fact that public procurement rules only apply when national authorities decide to 'externalise' the provision of public services and this provision is not considered to be 'in-house', as well as from the principle that the rules only apply when there could be cross-border interest for the services in question

(i.e. if providers abroad could potentially be interested in bidding for these contracts). This clearly raises a number of questions on the extent of the application of the rules to contracts between NHS commissioners and NHS providers.

The new regime for health service contracts

Taking into account the limited cross-border interest for contracts for clinical services (as well as for social, educational and other few categories of services) a light touch regime is maintained for the procurement of services in these sectors. This regime is based on a higher threshold, set at €750,000 – health service contracts below this value will be considered to have no cross-border interest and as such will not be covered by the EU Directive.

For health service contracts of a value equal to or above €750,000, the following will be required:

- ex-ante advertisement in the *OJEU*, as well as publication of ex-post award notices
- compliance with national rules ensuring that the key EU principles of transparency and equal treatment of economic operators are respected – member states will be free to determine the procedural rules applicable taking into account the specificities of the sector concerned
- award criteria can take into consideration important elements in the provision of health services including quality, continuity, accessibility, comprehensiveness of services and innovation.

Key provisions in the new EU Directive

Different elements in the new Directive are of great importance for the NHS. In particular, key changes include:

- the current Part A/Part B services distinction is abolished and there will be a new light touch regime for health, social, educational and other similar service contracts above a new €750,000 threshold. The specifics of how this regime will operate domestically are left largely up to the UK Government to determine
- building on decisions in the European Court, the Directive includes provisions allowing public bodies to pool their public service delivery activities without always having to go out to tender
- national governments are given the possibility to reserve health, social and educational contracts to employee mutuals and social enterprises only, provided certain conditions are met
- the notion of conflicts of interest is clarified and member states will be required to take measures to effectively prevent, identify and remedy them
- a more flexible competitive negotiated procedure, allowing public purchasers greater ability to negotiate with suppliers, is introduced. This should help NHS organisations to procure innovative products and services adapted to their specific needs and to achieve best value in public contracts. The Directive also introduces a new procurement procedure specifically for the development and subsequent purchase of innovation
- greater emphasis is put on considering environmental and social issues in public procurement, including considering the life-cycle costs rather than the up-front costs of assets purchased. Simply considering price, rather than quality, as the only award criterion will be discouraged
- the distinction between selection of tenderers and award of the contract (often a source of errors and misunderstandings) has been made more flexible, allowing contracting authorities to decide on the most practical sequencing by examining award criteria before selection criteria, and taking into account the organisation and quality of the staff assigned to performing the contract as an award criterion
- grounds for exclusion of candidates and tenderers have been reviewed and clarified. Contracting authorities will be entitled to exclude economic operators that have shown significant or persistent deficiencies in performing prior contracts
- codifying decisions in the European Court, the Directive clarifies in a certain level of detail when and how a modification to a public contract already in existence is allowed and when, on the contrary, it must be considered to be a new contract and as such the competitive procedure must begin again
- contracting authorities will be encouraged to divide contracts into lots to make them more accessible to SMEs. If they decide not to do so, they will have to provide an explanation of their reasons.

These provisions will replace the current Part B regime. An important change compared to the current Part B regime will be the required use of the *OJEU* to advertise above threshold contracts. This implies that for NHS bodies it will no longer be sufficient to place a notice in *Supply2Health*, but that the contract notice should also be

published in the *OJEU* specifying the services to be purchased and, if possible, the criteria that will be used for the award of the contract.

Alternatively, the commissioner could decide to publish a Prior Information Notice (PIN) in the *OJEU*, which will indicate its intention to purchase certain services at a later stage and ask

potentially interested providers to express an interest. The publication of the PIN will be sufficient to meet the transparency requirement, and no other notice will have to be published in the *OJEU* consequently when interested providers will be invited to submit their bids.

The ex-ante publication in the *OJEU* will, however, not be required in situations where there is only one provider capable of supplying the services required or for reasons of extreme urgency brought about by *force majeure*.

The required ex-ante use of the *OJEU* to advertise is particularly significant given that failure to comply with it, such as in case of a direct award, could trigger the application of the public procurement remedies regime with the risk of the contract being declared ineffective.

With regard to the development of national rules to put in place the light touch regime for health, social, educational and other few categories of services, it should be noted that the Cabinet Office has issued a consultation document that acknowledges that the s75 regulations already provide rules for the procurement of clinical services by NHS England and clinical commissioning groups.

Derogation from the rules for forms of cooperation between public bodies

Building on a number of judgments in the European Court, the new Directive seeks to clarify when contractual relationships between public bodies are not subject to public procurement rules. More specifically, it provides derogation from the rules for contracts between public bodies meeting all of the following requirements:

- the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common
- the implementation of that cooperation is governed solely by considerations relating to the public interest
- the participating contracting authorities perform on the

open market less than 20 per cent of the activities concerned by the cooperation.

The extent to which these provisions would allow some NHS commissioning activities or other forms of collaboration between NHS bodies (such as a combination of back office functions or other tasks) to be excluded from EU procurement rules is not yet clear, as an in-depth legal analysis of the text will be necessary to fully appraise their applicability to an NHS context.

The rules also allow for excluding contracts awarded 'in-house', i.e. to an organisation on which the contracting authority exercises a decisive influence over its strategic objectives and significant decisions. The rules make it clear that the influence could also be exercised by a separate but related body, again raising questions on their possible applicability to the NHS architecture.

How the NHS will benefit from the new Directive

Some of the proposed changes are clearly positive from an NHS perspective, making the public procurement process faster, more flexible and more effective. While the new Directive has a similar overall structure to the existing rules, and still requires public contracts to be competed for and awarded transparently and without discrimination, it can be expected that the new flexibilities it provides will enable better commercial outcomes to be achieved.

The Department of Health and NHS England have recently put forward a Procurement Development Programme for the NHS that proposes a range of measures targeting NHS providers aiming to achieve savings in procurement of £1.5 billion by the end of 2015/16. The new EU Directive, and in particular the greater ability to negotiate with bidders that it will allow, can help NHS trusts achieve this objective.

It should be emphasised, however, that the text of the new Directive is particularly lengthy and complex, and that some time and effort will be required for NHS trusts to understand and take advantage of the new set of rules.

'The new Directive broadens the possibilities to negotiate with bidders during the tendering process'

Use of procurement to support innovation

Public procurement rules have often been cited as an obstacle to the development and spread of innovation. The new Directive seeks to address this by broadening the possibilities to negotiate with bidders during the tendering process. In particular, the new rules will allow NHS bodies to use the competitive procedure with negotiation and the competitive dialogue procedure whenever their needs cannot be met without adaptation of readily available solutions. The rules will also provide clarity on the conduct of market consultation prior to the launch of a procurement process to assess the structure, capability and capacity of the market.

In addition, the new Directive will introduce a new procurement procedure, called Innovation Partnership, for the development and subsequent purchase of innovation. Under the existing procurement Directive, an exemption exists for the purchase of research and development (R&D) services where the benefit of the services is not limited to the public body's own operations. This has given rise to the use of pre-commercial procurement (PCP) as a means of awarding contracts for R&D services in the NHS through the Small Business

Research Initiative (SBRI). Falling outside of the full application of procurement rules, PCP has allowed NHS bodies to engage with service providers to develop their ideas. It is not, however, possible to proceed directly from the R&D phase to commercial procurement without a separate competition, which in part explains the low take-up of PCP.

The new Directive supplements the current exemption for R&D services with an Innovation Partnership, which allows contracting authorities to apply a negotiated procedure for the development and purchase of innovative supplies, services and works. This covers both the R&D phase and the purchase of any resultant innovation – addressing one of the limitations of PCP. The Innovation Partnership procedure will be structured in successive phases following the sequence of steps in the research and innovation process, setting intermediate targets to be attained by the partners and providing the possibility to halt the process in case the targets are not met.

Next steps

Further to the agreement reached by EU decision-makers in June this year, the text of the new Directive still requires formal approval and publication in the *OJEU* to enter into force. We expect this process to be completed towards the end of this year, with no changes to the agreed text.

After this, national governments will have a maximum of two years

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to implement the legislation domestically. The Cabinet Office, which leads the implementation in the UK, has, however, indicated its intention to transpose the Directive into national regulations earlier, so that the UK can take advantage of the additional flexibilities in the new rules as soon as possible.

The NHS European Office will engage with this process, feeding NHS views on key aspects of the new rules. This will include responding to the Cabinet Office's consultation on the implementation of the light touch procurement regime for health, social and education services, which requires the development of national rules to ensure compliance with the EU principles of transparency and equal treatment as outlined above.

We will also continue to brief NHS organisations on key changes and their implications, to help them prepare for implementation.

Further information

For additional information or to download a copy of the agreed text of the new Directive, please see www.nhsconfed.org/publicprocurement. If you would like to discuss this *Briefing*, please contact elisabetta.zanon@nhsconfed.org

The NHS European Office

The NHS European Office has been established to represent NHS organisations in England to EU decision-makers. The office is part of the NHS Confederation. EU policy and legislation have an increasing impact on the NHS as a provider and commissioner of healthcare, as a business and as a major employer in the EU. Our work includes:

- monitoring EU developments which have an impact on the NHS
- informing NHS organisations of EU affairs
- promoting the priorities and interests of the NHS to European institutions
- advising NHS organisations of EU funding opportunities.

To find out more about us, and how you can engage in our work to represent the NHS in Europe, visit www.nhsconfed.org/europe or contact european.office@nhsconfed.org

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