

# Substantive guidance on the Procurement, Patient Choice and Competition Regulations

20 May 2013

## 1. Foreword



The Health and Social Care Act 2012 makes changes to the way health care services are regulated and expands Monitor's role in the sector by giving us a number of additional responsibilities. Monitor's main duty under the Act is to protect and promote the interests of people who use health care services.

One of Monitor's new responsibilities is to enforce the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013 (No. 2). These replace the existing administrative rules governing the procurement of NHS-funded services set out in the Principles and Rules for Cooperation and Competition and the Procurement Guide for Commissioners of NHS Funded Services. The

substance of many of these Principles and Rules is preserved in the regulations. The regulations require commissioners to adhere to rules to ensure good practice in relation to the procurement of NHS health care services and to protect patients' rights to make choices regarding their NHS treatment. They also prohibit commissioners from engaging in anti-competitive behaviour unless this is in the interests of health care service users.

It is for commissioners to decide what services to procure and how best to secure them in the interests of health care service users. The regulations adopt a principles-based approach that is intended to give commissioners flexibility. Monitor's role will be limited to ensuring that commissioners have operated within the legal framework established by the regulations.

The independent Cooperation and Competition Panel (CCP) previously advised on compliance with the Principles and Rules. As of 1 April 2013, the CCP became part of Monitor, working with the staff of its new cooperation and competition directorate. Monitor will provide informal advice on the application of the regulations in the same way as the staff of the CCP did in relation to the Principles and Rules.

The regulations will apply alongside the existing Public Contracts Regulations 2006 and there is some overlap between them. The regulations provide a bespoke set of rules for the health care sector and provide a mechanism for Monitor, as a sector regulator, to investigate complaints. They provide an accessible and effective alternative to challenging decisions in the courts.

Monitor will seek to ensure that the enforcement action we take is consistent with our duties under the Act and is proportionate. We recognise that this is a period of transition for the sector and that commissioning responsibilities have only recently been transferred to clinical commissioning groups and the NHS Commissioning Board (which has recently adopted the name NHS England).

This is a public consultation on the guidance that we intend to publish about how to comply with the regulations. We are also publishing a series of case studies which consider how the regulations might apply to a number of hypothetical scenarios available [here](#).

Monitor has consulted the Department of Health and NHS England in preparing the draft guidance. As well as taking into account views received in the context of this consultation, we will be seeking the approval of the Secretary of State ahead of publishing final guidance in line with our obligation under the Health and Social Care Act.

We will also continue to work with NHS England to ensure that our guidance and future guidance to be published by NHS England on best practice procurement for clinical commissioning groups are aligned.

A handwritten signature in black ink that reads "David Bennett". The signature is written in a cursive style with a long horizontal stroke extending to the right from the end of the name.

**David Bennett**  
**Chairman and Chief Executive**

## 2. Introduction

The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (the Procurement, Patient Choice and Competition Regulations),<sup>1</sup> which were made pursuant to sections 75, 76, 77 and 304(9) and (10) of the Health and Social Care Act 2012 (the Act), contain a number of requirements that commissioners must comply with to ensure that they:

- adhere to good practice in relation to the procurement of health care services funded by the NHS;
- protect the rights of patients to make choices with respect to treatment or other health care services funded by the NHS; and
- do not engage in anti-competitive behaviour unless this is in the interests of NHS health care service users.

The Procurement, Patient Choice and Competition Regulations are intended to give commissioners flexibility. They adopt a principles-based approach and do not generally include prescriptive rules on how commissioners must carry out their procurement activities. It is ultimately for commissioners to decide what services to procure and how best to secure them in the interests of health care service users. Neither the regulations nor this guidance set out a preferred approach. Monitor's role is limited to ensuring that commissioners have operated within the legal framework established by the Procurement, Patient Choice and Competition Regulations.

Since 2007, the Department of Health has required commissioners to comply with the administrative rules set out in the Principles and Rules for Cooperation and Competition.<sup>2</sup> These required commissioners to commission services from the providers best placed to secure the needs of patients, to act in a transparent and non-discriminatory way when commissioning services and to protect patients' rights of choice. They also prohibited commissioners from engaging in anti-competitive behaviour.

Since 2008, commissioners have also been required to comply with the Procurement Guide for Commissioners of NHS Funded Services (the Procurement Guide),<sup>3</sup> which included more detailed requirements to ensure best practice in procurement. For example, the Procurement Guide required commissioners to demonstrate the rationale for

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<sup>1</sup> The National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (SI. 2013 No.500), which were made on 6 March 2013, replace the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013 (SI. 2013 No.257), which were made on 11 February 2013.

<sup>2</sup> [Principles and Rules of Cooperation and Competition](#), Department of Health, July 2010.

<sup>3</sup> [Procurement Guide for Commissioners of NHS Funded Services](#), Department of Health, July 2010.

decisions on whether or not to competitively tender services. In particular, where commissioners decided to procure services through a single tender action, the rationale had to demonstrate that there was only one capable provider to deliver the services in question.<sup>4</sup>

The Procurement, Patient Choice and Competition Regulations replace these administrative rules. They preserve the substance of many of the rules and provide Monitor with associated enforcement powers to ensure that we are able to investigate potential breaches of the Regulations and ensure compliance as part of our new role as a sector regulator.

This is a consultation on the guidance that we intend to publish about how to comply with the Procurement, Patient Choice and Competition Regulations and with certain requirements relating to patient choice in the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (the Responsibilities and Standing Rules Regulations) which Monitor has the power to enforce under the Procurement, Patient Choice and Competition Regulations. It also fulfils Monitor's duty to publish guidance under section 78(1)(a) of the Act.

The guidance:

- describes the requirements in the Procurement, Patient Choice and Competition Regulations and the relevant requirements relating to patient choice in the Responsibilities and Standing Rules Regulations;
- sets out the factors that Monitor will take into account in considering whether conduct is consistent with the Procurement, Patient Choice and Competition Regulations and the relevant requirements in the Responsibilities and Standing Rules Regulations;
- describes the analytical framework that Monitor intends to apply when assessing particular types of conduct; and
- provides examples of conduct that might breach the Procurement, Patient Choice and Competition Regulations and the relevant requirements of the Responsibilities and Standing Rules Regulations.

We have written this guidance to be as clear as possible. We have tried to use straightforward language and have avoided quoting sections of the Procurement, Patient Choice and Competition Regulations and the Responsibilities and Standing Rules Regulations where possible. This means that we do not always use the exact wording in these regulations. Both sets of regulations ultimately override this guidance. The

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<sup>4</sup> Paragraph 2.32 of the Procurement Guide for Commissioners of NHS Funded Services.

circumstances of some cases may also make it appropriate for us to depart from this guidance. If we depart from this guidance, we will explain our reasons for doing so.

## 2.1 Scope of guidance

The guidance is relevant to clinical commissioning groups (CCGs) and the National Health Service Commissioning Board (which has recently adopted the name NHS England). In the guidance we refer to the NHS Commissioning Board as NHS England and refer to NHS England and CCGs collectively as commissioners.

This guidance covers compliance with the requirements in the Procurement, Patient Choice and Competition Regulations and the requirements relating to patient choice in the Responsibilities and Standing Rules Regulations. Commissioners must ensure that they comply with any other legal obligations including any obligations arising under the Public Contracts Regulations 2006, the Public Sector Directive (Directive 2004/18/EC) or under EU law.

The guidance does not describe how Monitor intends to go about the exercise of its powers under the Procurement, Patient Choice and Competition Regulations, including the investigation procedures that it intends to follow and the enforcement measures it might impose. We are also consulting on the guidance that we intend to publish on how we plan to go about exercising our enforcement powers. Information on that consultation is available [here](#).

## 2.2 Overview of the Regulations

The Procurement, Patient Choice and Competition Regulations are structured as follows:

- Regulation 2 sets out the objective that commissioners must pursue when procuring NHS health care services;
- Regulation 3 sets out the general requirements that commissioners must comply with when procuring NHS health care services. Complying with the general requirements will help commissioners to achieve the objective in Regulation 2; and
- Regulations 4 to 12 set out particular requirements relating to procurement activity that commissioners must comply with. These cover:
  - publishing contract opportunities and contract awards;
  - establishing and applying qualification criteria;
  - record-keeping;
  - obtaining assistance and support when commissioning services;
  - managing conflicts of interest;
  - anti-competitive behaviour; and

- patient choice (a number of regulations in the Responsibilities and Standing Rules Regulations also include requirements relating to patient choice that are enforceable by Monitor).

The Procurement, Patient Choice and Competition Regulations apply to all health care services for the purposes of the NHS (including those that may also constitute adult social care services). Health care includes all forms of health care, whether relating to physical or mental health.

Pharmaceutical services (including local pharmaceutical services) under Part 7 of the National Health Service Act 2006 are expressly excluded from the scope of the Regulations.

## **2.3 Structure of guidance**

**Chapter 3** provides guidance on compliance with the objective and general requirements.

**Chapter 4** provides guidance on the factors that commissioners should take into account in deciding whether and how to publish new contract opportunities.

**Chapter 5** provides guidance on how to establish and apply qualification criteria.

**Chapter 6** provides guidance on record-keeping.

**Chapter 7** provides guidance on obtaining assistance and support when commissioning services.

**Chapter 8** provides guidance on managing conflicts of interest.

**Chapter 9** provides guidance on the analytical framework that Monitor will apply in assessing anti-competitive behaviour.

**Chapter 10** provides guidance on the rules that commissioners must comply with relating to patient choice.

## 2.4 How to respond to this consultation

We welcome all responses to this consultation. We have asked a number of questions in each section of the document and a complete list of all questions appears on pages 51-3. We very much welcome any comments that you wish to make on our proposals. When you are considering your comments, we would be grateful if you would consider responding to our specific questions.

Please submit your responses to the questions and any other comments that you have by 5pm on 15 July 2013. There are a number of ways to send us your comments.

### Online

You can find a response form on our website [here](#). This is our preferred way of receiving your comments. However you are also welcome to send your response by email or post.

### By email

You can email your response to [RegulationsGuidance@monitor.gov.uk](mailto:RegulationsGuidance@monitor.gov.uk)

### By post

You can post your response to:

Procurement, Patient Choice and Competition Regulations Guidance Consultation  
Co-operation and Competition Directorate  
Monitor  
Wellington House  
133-155 Waterloo Road  
London  
SE1 8UG

### Confidentiality

If you would like your name or the name of your organisation to be kept confidential and excluded from the published summary of responses or other published documents, you can request this on the response form. If you send your response by email or post, please do not forget to tell us if you wish your name, or the name of your organisation, to be withheld from any published documents.

If you would like any part of your response - instead of or as well as your identity - to be kept confidential, please let us know and make it obvious by marking in your response those parts we should keep confidential. An automatic computer-generated confidentiality statement will not count for this purpose.

As we are a public body subject to, for example, freedom of information legislation, we cannot guarantee that we will not be obliged to release your response or name even if you say it is confidential.

### **What we will do next**

We hope and expect that we will receive a lot of responses to this consultation, so we do not intend to write back to everyone who contacts us. However we will read and consider all responses and, when we publish the final guidance, explain how your comments and views influenced our approach.

You can sign up to receive emails when we publish other engagement and consultation publications [here](#).

If you have any questions about this process please call 020 7340 2441.

### **3. Procurement objective and general requirements**

#### **3.1 Introduction**

This chapter provides guidance on the objective that commissioners must pursue and the general requirements that they must comply with when procuring (ie, obtaining) NHS health care services set out in Regulations 2 and 3 of the Procurement, Patient Choice and Competition Regulations.

#### **3.2 Procurement: objective**

Regulation 2 of the Procurement, Patient Choice and Competition Regulations requires commissioners to act with a view to achieving the following objective when procuring NHS health care services:

- securing the needs of health care service users;
- improving the quality of services; and
- improving the efficiency with which services are provided.

Commissioners must pursue this objective whenever they procure NHS health care services. Regulation 2 also makes it clear that commissioners must pursue this objective when taking decisions that do not in themselves result in the award of a contract to provide services, such as deciding which providers to enter into a framework agreement with and selecting providers to bid for potential future contracts.

There is no one-size-fits-all approach to realising this objective. By adopting a principles-based approach, the Procurement, Patient Choice and Competition Regulations are designed to give commissioners flexibility, within a framework of rules. The needs of health care service users will differ by area depending on the population mix and other local conditions and Monitor recognises that commissioners must be able to be responsive to those differences. There are also many different ways in which quality and efficiency can be improved.

Regulation 2 makes it clear that one way in which commissioners can seek to achieve this objective is through securing the delivery of health care services in an integrated way, including with other health care services, health-related services or social care services.

In addition, Regulation 3(4) of the Procurement, Patient Choice and Competition Regulations (considered in further detail in section 3.3.3 below) requires commissioners, in acting with a view to improving quality and efficiency, to consider appropriate ways of making such improvements including through services being provided in a more integrated way, enabling providers to compete to provide services and allowing patients a choice of provider. Although commissioners must consider whether improvements can be achieved through such means, it is for commissioners to decide the extent to which they seek to achieve improvements through these and/or other means.

Ultimately, it is for commissioners to decide how to secure the needs of the health care service users for whom they are responsible and how to improve the quality and efficiency of services those health care service users receive. Monitor's role in this respect is limited to ensuring that commissioners have acted with a view to achieving this objective and in accordance with the other requirements of the Procurement, Patient Choice and Competition Regulations considered in greater detail in the remainder of this guidance.

In deciding whether a commissioner has acted with a view to achieving the objective in Regulation 2, Monitor may consider, for example:

- what steps the commissioner has taken to evaluate and identify the health care needs of the population for which it is responsible, including through engagement with the local community, where relevant, to establish that the services being procured will help to secure those needs;
- whether the commissioner has taken a holistic view of the needs of health care users when procuring particular services, including their needs for related services. These may include services that patients must be able to access from the same provider on the same site when they receive the services being procured or services that can be provided across a range of different settings by different providers;
- whether the commissioner has considered the needs of all health care users for which it is responsible when procuring services, including:
  - what steps the commissioner has taken to ensure equitable access to services, including by vulnerable and socially excluded members of the population;
  - whether the commissioner has had regard to the different needs of groups of patients, such as the need for some patients to receive a service in a particular setting; and
  - whether the commissioner has considered the sustainability of services, including the impact that a procurement decision relating to one set of services may have on the ability of providers to deliver other services that health care users require (for example, because it is not viable for a provider to provide a particular service without also providing a different service);
- whether the commissioner has monitored the quality and efficiency of existing service provision and identified any areas where improvements are needed in advance of procuring services; and
- whether the commissioner has considered how the health care needs of the population can best be secured (including ensuring the safety of services, for example, where clinicians need to carry out sufficient volumes of particular services / or a particular case mix to deliver the services safely) and how the

quality and efficiency of services might be improved when procuring services, including through:

- the way the services are procured (for example, through a competitive tender process or otherwise);
- the service specification and contract design (for example through the use of quality and efficiency indicators); and
- ensuring that the services being procured are delivered more effectively alongside other services (whether provided by different teams in a single organisation or across multiple organisations).

Monitor will expect commissioners to rely on relevant evidence when considering how best to secure the needs of the population for which they are responsible and how to improve services. What is appropriate will depend on the circumstances of the case, but may include consulting publicly on proposals, engaging with local clinicians (including clinicians that provide the services being procured as well as those that provide related services), seeking the views of out of area experts and referring to relevant clinical guidelines and best practice.

### **3.3 Procurement: general requirements**

Regulation 3 of the Procurement, Patient Choice and Competition Regulations sets out general requirements that commissioners must comply with when procuring NHS health care services.

These include a requirement:

- to act in a transparent, proportionate and non-discriminatory way;
- to procure services from the providers most capable of achieving the objective in Regulation 2 that provide best value for money; and
- to consider appropriate ways of improving services including through services being provided in a more integrated way, enabling providers to compete to provide services and allowing patients a choice of provider.

Commissioners must comply with these requirements whenever they procure services. Regulation 3 also makes it clear that commissioners must comply with these general requirements when taking decisions that do not in themselves result in the award of a contract to provide services, such as deciding which providers to enter into a framework agreement with and selecting providers to bid for potential future contracts.

Each of the general requirements in Regulation 3 are considered in more detail below.

### **3.3.1 Transparency, proportionality and equality**

Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations requires commissioners:

- to act in a transparent way;
- to act in a proportionate way; and
- to treat all providers equally and in a non-discriminatory way.

#### ***Transparency***

Commissioners must ensure that they conduct all of their procurement activities openly and in a manner that enables their behaviour to be scrutinised.

Transparency is fundamental to accountability. The requirement to act transparently is also closely linked to the requirement to treat providers equally.

In considering whether commissioners have complied with their general duty to act transparently, Monitor may consider, for example, the extent to which commissioners have:

- published information on their future procurement strategies and intentions;
- taken steps to ensure that providers are aware of their intention to procure particular services, including by publishing contract opportunities;
- when procuring services, provided feedback to any providers that have offered to provide services that have been unsuccessful;
- published details of the contracts they have awarded in a timely manner; and
- maintained suitable records of the key decisions that they have taken (including the reasons for those decisions).

#### ***Proportionality***

Commissioners' actions must be proportionate to the value, complexity and clinical risk associated with the provision of the services in question. Commissioners must therefore ensure that they adapt their activities to take account of the nature of the services being commissioned.

In considering whether commissioners have complied with their general duty to act proportionately, Monitor may consider the extent to which commissioners have allocated their resources in a way that is proportionate, including through the development of appropriate commissioning priorities.

Monitor may also consider the extent to which the following are commensurate with the nature of the services being procured by commissioners:

- the process put in place by commissioners to procure services. In assessing whether a procurement process is disproportionate, Monitor may compare, for example, the level of resources that the commissioner and potential providers have to commit to the process with the value of the services being procured;
- the criteria that providers must satisfy to supply the services, including, for example, any financial thresholds that providers must satisfy or any clinical or financial criteria against which bids will be judged as part of a competitive tender process put in place by a commissioner. Financial criteria may be disproportionate, for example, if they go beyond what is necessary to ensure the stability of services; and
- the information that potential providers must supply and any due diligence process that providers must undergo to be eligible to provide services.

### ***Equality / non-discrimination***

Commissioners must treat all providers equally and must not favour one provider (or type of provider including, for example, private, public, charity, voluntary and social enterprise) over another. Differential treatment between providers requires objective justification.

In considering whether commissioners have complied with their general duty to treat providers equally and in a non-discriminatory way, Monitor may consider, for example, whether:

- a provider has been given a more extensive role in engaging with the commissioner on service design than other providers that would give that provider an unfair advantage;
- all potential providers that might be interested in providing a service being procured by the commissioner have been given an adequate opportunity to express an interest in providing those services. Commissioners will need to consider what steps they need to take to identify providers that might potentially be interested in providing the services being procured. In some circumstances commissioners may be able to identify interested providers based on their knowledge of the market. In other circumstances, it may be necessary to advertise the contract in order to do so;
- the service specification has been designed in a way that excludes a provider or category of provider unnecessarily and without objective justification;
- any competitive tender process put in place by the commissioner to select a provider or providers has been run in a fair way, including, for example, whether:
  - the award criteria disadvantage a particular provider and are not objectively justified;

- the award criteria have been applied equally to all providers, including whether any criteria have been waived after the bidding process has started; and
- the deadline for submitting information during a tender process has been extended for the benefit of a particular provider.

Equal treatment also requires commissioners to take into account relevant differences between providers. A failure to take into account relevant differences may amount to a breach of the regulations. For example, depending on the circumstances, a failure to take into account unresolved concerns raised by the CQC over the safety of particular services provided by one provider but not by others, may amount to unequal treatment.

The National Health Service Act 2006 requires commissioners to promote health care research and to have regard to the need to promote education and training to future and existing employees involved in health care provision in England.<sup>5</sup> Commissioners will need to ensure that when they procure services they do so in a manner that is consistent with these statutory duties. Where a commissioner requires providers to participate in training, education and/or research as a condition of providing a service and this is necessary to enable the commissioner to comply with these statutory duties, the unwillingness of some providers to do so will be a relevant basis on which to distinguish those providers from providers that are willing to do so. A commissioner that chooses to procure the services only from those providers that agree to provide training and education and/or become involved in research in such circumstances will not be considered by Monitor to have breached the Regulations. However, the commissioner will need to ensure that the requirement to participate in education, training and research is transparent (see page 29 above for guidance on the requirement to act transparently).

### **Chapter 3, Question 1**

Do you agree with the examples of factors that Monitor may consider when deciding whether commissioners have complied with their duty to act transparently, proportionately and in a non-discriminatory way?

Are there other factors that you think we should highlight?

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<sup>5</sup> See s.13L, 13M, 14Y and 14Z of the National Health Service Act 2006 as amended by the Health and Social Care Act 2012.

### **3.3.2 Procuring services from the providers most capable of delivering commissioners' objective and that provide best value for money**

Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations requires commissioners to procure NHS health care services from one or more providers that:

- are most capable of securing the needs of NHS health care service users and improving the quality of services and the efficiency with which they are provided; and
- provide best value for money in doing so.

In order to comply with this requirement, commissioners must ensure that when they enter into new contracts they do so with the most capable provider or providers that provide best value for money. A provider will provide best value for money where it delivers the best overall quality and price (where prices are not set). The best value will not necessarily be delivered by the provider that supplies services at the lowest price.

Commissioners should also evaluate the performance of existing providers on an on-going basis and should consider using the mechanisms included in the contract to address any underperformance. For example, if a provider is in breach of contract as a result of failing to satisfy quality requirements, a commissioner should consider what action it can take under the contract to address those concerns. Depending on the circumstances of the case, where underperformance continues and it appears that the provider is no longer best placed to provide the services in the interests of patients, it may be appropriate to consider terminating the arrangement where this is possible under the terms of the arrangement.

In considering whether commissioners have complied with their general duty to procure services from the providers most capable of delivering commissioners' objectives and that provide the best value for money in doing so, Monitor may consider, for example, the extent to which commissioners when procuring services have:

- taken steps to identify existing and potential providers interested in and capable of providing the services being procured by the commissioner;
- objectively evaluated the relative ability of different potential providers to deliver the service specification and to improve quality and efficiency;
- required prospective providers to undergo suitable due diligence, as appropriate;
- considered both the short term and long term impact of their commissioning decisions (including the sustainability of services); and
- taken account of the effect of bundling different services together, including, for example:

- whether bundling may lead to better value for money through economies of scope;
- whether bundling is clinically necessary or may give rise to clinical benefits (as a result of, for example, clinical interdependencies between different services); and
- whether bundling results in the most capable provider or providers of a particular service being ineligible to provide that service (because they do not provide all of the services in the bundle) thereby preventing patients from being able to access services from the best providers.

There may be advantages and disadvantages to bundling services in any given case. Commissioners will need to weigh these factors against one another in order to reach a decision on whether commissioning a given set of services as a bundle would be in patients' interests. If, for example, it is necessary for two services to be provided at a single site by one provider in order for one of those services to be delivered safely to patients, it will be appropriate for those services to be procured as a bundle, even if that excludes a provider that is only able to provide one of the services from consideration. Before reaching a view that services need to be provided by a single provider, commissioners should consider whether it might be possible and in patients' interests for the services to be provided by several different providers operating from a single site.

### **Chapter 3, Question 2**

Do you agree with the examples of factors that Monitor may consider when deciding whether commissioners have complied with their duty to procure services from the providers most capable of delivering commissioners' objective and that provide best value for money?

Are there other factors that you consider we should highlight?

### **3.3.3 Improving quality and efficiency – integrated care, choice and competition**

Regulation 2 of the Procurement, Patient Choice and Competition Regulations requires commissioners to act with a view to securing the needs of NHS health care services users and to improving the quality and efficiency of services.

Regulation 3(4) of the Procurement, Patient Choice and Competition Regulations requires commissioners, when acting with a view to improving quality and efficiency, to consider appropriate means of making such improvements, including through:

- services being provided in a more integrated way (including with other health care services, health-related services or social care services);

- enabling providers to compete to provide services; and
- allowing patients a choice of provider.

The delivery of care in a more integrated way, competition between providers and patient choice can all play an important role in improving the quality of health care services and the efficiency with which they are provided.

We first consider in more detail what is meant by delivering care in an integrated way, competition and choice and then consider their role in improving quality and efficiency.

### Integrated care

Care and support is integrated when it is person-centred and coordinated. From a health care service user's perspective, care is delivered in an integrated way when *"I can plan my care with people who work together to understand me and my carer(s), allow me control, and bring together services to achieve the outcomes important to me."*

Many patients have complex health care needs and need to access a wide range of health, health-related and social care services. These services may be provided by a single provider (such as where a person receiving in-patient treatment for cancer requires access to a range of different services from a single site such as oncology, radiology and pathology) or by a range of different providers in different settings (such as a person with dementia who may access services from their local GP practice, community nurses, voluntary services and social services). Patients may also need to transfer from a provider in one setting to another provider as their treatment progresses, such as where a person is discharged from a local hospital following in-patient surgery and requires follow-up care from a community provider and their local GP.

Where care is provided to a patient by a number of teams from different disciplines within a single organisation or across multiple organisations there is a risk that patient care will be fragmented and that there will be gaps or delays in care. Physical distance between the locations at which related services are provided, and differences in working practices, culture, infrastructure and systems, can all contribute to the risk of fragmented care. There is no single model for addressing these challenges and ensuring that care is delivered in an integrated way. What unifies all models for the delivery of integrated care is that all of the different services accessed by a patient are delivered in a seamless way from the patient's perspective regardless of whether they are provided by different professionals within an organisation or different organisations altogether.

When care is delivered in an integrated way, it results in a better patient experience and may lead to improved clinical outcomes and more efficient health care (for example by reducing duplicative patient assessments by different teams or providers).

## Choice and competition

Competition and choice are closely related. Competition in the NHS typically takes one of two forms (although it can involve both):

- Competition based on patient choice. Also referred to as ‘competition in the market’, competition based on patient choice occurs when patients can choose between multiple providers of the same or similar services. Depending on the circumstances, patients may be able to choose between different NHS organisations as well as third sector or independent providers.
- Competition for contracts to provide services. Also referred to as ‘competition for the market’, competition for contracts to provide services occurs when providers compete for the right to provide a particular service to patients in circumstances where a commissioner may choose a single or limited number of providers. Competition for the market may arise, for example, where a commissioner runs a competitive tender process to select a provider or where a commissioner is considering which providers to award contracts to in the context of a reconfiguration process.

Competition between providers, whether to attract patients or to obtain contracts to provide services, can incentivise providers to improve both the quality of the services that they provide and value for money. Competition can therefore give rise to a range of benefits for users of health care services, including improved clinical outcomes, safer health care and a better patient experience (as a result of, for example, better amenities and surroundings or through care being delivered in a more integrated way with other services).<sup>6</sup>

## Relationship between choice, competition and integrated care

Choice, competition and integrated care are not mutually exclusive.

Competition (including competition based on patient choice) occurs between providers of the same or similar services (for example, between providers of dermatology services), whereas the delivery of care in an integrated way involves the seamless delivery of

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<sup>6</sup> For example, providers earn revenue for many elective services according to the volumes of patients that they treat. Revenues are therefore dependent on the number of patients that the provider is able to attract. In order to attract patients, providers need to offer high quality services. Failure to do so may result in patients choosing other providers. Even where services are subject to limited or no patient choice, such as some non-elective services, where a commissioner considers a range of potential providers from which to obtain services, for example as part of a competitive tender process or in the context of a reconfiguration of services, providers are incentivised to offer to provide higher quality care and better value for money in order to be chosen to provide the services. Where a commissioner regularly reviews service provision and/or competitively tenders services, providers can be expected to have the incentive to maintain or improve quality and value for money because of the possibility that the commissioner may terminate the contract and select another provider if service quality declines.

different services to a patient (for example, housing support, community nursing and GP check ups for a person with diabetes). In many circumstances, it will be possible to implement initiatives designed to lead to the delivery of care in a more integrated way alongside the use of competition and choice.

### **Chapter 3, Question 3**

Do you think that the description of integrated care, choice and competition is helpful?

#### ***Role of integrated care, competition and choice***

It is for commissioners to determine ways of improving the quality and efficiency of NHS health care services, including the extent to which improvements can be achieved through services being provided in a more integrated way, by allowing patients a choice of provider and/or by enabling providers to compete for contracts to provide services.

In particular, the Procurement, Patient Choice and Competition Regulations do not require commissioners to extend patient choice or promote competition by introducing plurality of provision where plurality does not already exist. For example, if a particular service (such as community dermatology services) is provided by a single provider in a local area, there is no requirement on the commissioner under the regulations to introduce patient choice (whether by opening up those services to the any qualified provider model or by entering into contracts with a small number of available providers in the area), although when the arrangement with the existing provider comes to an end, the commissioner will need to ensure that the process that it adopts to choose a provider in the future is consistent with the requirements of the Regulations.

However, Regulation 3(4) does require commissioners to consider whether introducing competition and choice and delivering care in a more integrated way could be used to improve quality and efficiency. Monitor will expect commissioners to be able to demonstrate that they have considered whether services might be improved through such means (including by extending patient choice to services where it is not currently available).

In assessing whether commissioners have complied with their general duty in this regard, Monitor may consider, for example, the extent to which commissioners:

- have considered how services might be delivered in a more integrated way with other health, health related and social care services that patients need to access, including for example, by:
  - requiring potential providers to demonstrate how the different professionals and teams that are responsible for different aspects of an individual patient's care will cooperate with one another (where a provider provides more than one service) and how the provider will cooperate with third party

providers that are responsible for other aspects of an individual patient's care. This could include, for example, requiring providers to submit plans detailing how they will organise patients' care where it involves multiple professional disciplines, share patient records and manage transfers of patients to different wards or sites etc;

- including requirements in their contracts with providers that oblige them to ensure that the different professionals and teams that are responsible for different aspects of an individual patient's care cooperate with one another (where the provider provides more than one service) and to cooperate with third party providers that are responsible for other aspects of an individual patient's care for example by sharing patient records; and
  - procuring services from a single provider where services are clinically interdependent and it is in patients' best interests for the services to be provided to patients from a single location by a single provider.
- have considered the potential to allow patients a choice of provider, for example, by entering into contracts to provide a particular service with more than one provider, in order to incentivise providers to improve both quality and efficiency in order to attract patients;
  - have considered what impact the award of a contract to provide services to a single or limited number of providers would have on the availability of credible alternative providers of those services in the future when the contracts terminate or expire; and
  - have considered the impact of reconfiguration decisions on the availability of patient choice for particular services.

#### **Chapter 3, Question 4**

Do you agree with the examples of the factors that Monitor may take into account in deciding whether commissioners have complied with their general duty to consider appropriate means of improving quality and efficiency, including through services being delivered in an integrated way, patient choice and competition?

Are there other factors that you consider we should highlight?

## **4. Publishing new contract opportunities for NHS health care services**

### **4.1 Introduction**

This chapter provides guidance on what factors commissioners should take into account in deciding whether and how to publish contract opportunities for NHS health care services. The decision whether or not to publish a contract opportunity is not an isolated decision and will need to be taken in the context of commissioners' decisions about what services to procure and how to go about procuring them more generally.

The previous chapter examined the objective and general requirements in Regulations 2 and 3 of the Procurement, Patient Choice and Competition Regulations that commissioners must comply with when procuring services. This objective and these requirements will be relevant to the decision whether or not to publish a contract opportunity.

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 publishing contract opportunities. These are:

- Regulation 4(1) of the Procurement, Patient Choice and Competition Regulations, which requires NHS England to maintain a website on which commissioners can publish:
  - opportunities for providers to provide NHS health care services; and
  - records of the contracts for NHS health care services that they award to providers;
- Regulation 4(4) of the Procurement, Patient Choice and Competition Regulations, which requires commissioners to secure that arrangements exist for enabling providers to express an interest in providing any NHS health care services;
- Regulation 4(2) of the Procurement, Patient Choice and Competition Regulations, 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;
- Regulation 4(3) of the Procurement, Patient Choice and Competition Regulations, which establishes requirements regarding the content of that notice; and
- Regulation 5(1) of the Procurement, Patient Choice and Competition Regulations, which provides that commissioners can award a new contract to a single provider without publishing an intention to seek offers from providers to provide the services in question where they are satisfied that the services are capable of being provided by only that provider.

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

There is no express 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.

When deciding whether or not to publish a contract notice, commissioners will need to ensure that this decision is consistent with:

- their general objective, when procuring services, to secure the needs of people who use the services and to improve quality and efficiency including through the services being provided in an integrated way (Regulation 2 of the Procurement, Patient Choice and Competition Regulation);
- the requirement to secure that arrangements exist to enable providers to express an interest in providing any NHS health care services (Regulation 4(4) of the Procurement, Patient Choice and Competition Regulations);
- the requirement to act transparently and not to discriminate between providers (Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations);
- the requirement to commission services from those providers that are most capable of securing the needs of health care service users and improving the quality and efficiency of services, and that provide the best value for money in doing so (Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations); and
- the requirement to consider appropriate means of improving NHS health care services including through enabling providers to compete to provide services (Regulation 3(4) of the Procurement, Patient Choice and Competition Regulations).

### ***Benefits of publishing a contract notice and competitive tendering***

Publishing a contract notice can help to identify those existing and potential providers that are interested in providing a service and to compare their relative ability to secure the needs of patients and to deliver high quality efficient care. This in turn can help commissioners to select the most capable provider or providers that provide the best value for money to provide the services in question.

Running a competitive tender process can also encourage prospective providers to offer to provide high quality care and better value for money in order to win the contract being tendered. If providers fail to do so, they risk losing the contract to another provider that is offering to provide a better service to patients that is also bidding for the contract. If a

contract is negotiated with a single provider or subset of providers from the outset, that benefit for patients may be lost.

***Circumstances where it may be appropriate not to publish a contract notice and/or competitively tender***

Ultimately, the decision whether or not to publish a contract notice is a matter for commissioners having regard to the rules described above. There will be circumstances where a decision to procure services without publishing a contract notice and/or running a competitive tender process will be consistent with the Procurement, Patient Choice and Competition Regulations.

Three situations are considered in more detail below:

- Where there is only one provider that is capable of providing the services in question. In these circumstances, the Procurement, Patient Choice and Competition Regulations make it clear that a commissioner can award a contract to a single provider without publishing a contract notice.
- Where a commissioner carries out a detailed review of the provision of particular services in its local area in order to understand how those services can be improved and, as part of that review, identifies the most capable provider or providers of those services.
- Where the benefits of competitive tendering would be outweighed by the costs of publishing a contract notice and/or running a competitive tender process.

In addition to these three situations, different considerations will also apply when services are provided under the Any Qualified Provider (AQP) model for acute elective care. Under the NHS constitution, patients have the right to choose which provider to go to when they are referred for a first outpatient appointment for a service led by a consultant, subject to certain exceptions. Patients are able to choose between any CQC registered provider with a standard NHS acute contract. Any provider with an NHS contract and CQC registration is therefore eligible to provide these services and, as such, commissioners do not need to run a competitive tender process in order to select which provider or providers to enter into a contract with.

#### **4.2.1 Single capable provider**

Regulation 5(1) of the Procurement, Patient Choice and Competition Regulations provides that a commissioner may award a contract without publishing a contract notice where the commissioner is satisfied that the services in question are capable of being provided only by that provider.

There may be a range of circumstances where there is only one provider that is capable of providing NHS health care services being procured by a commissioner. This may be the case, for example, where the commissioner concludes that:

- there is only one provider that has (or is able to develop) the necessary infrastructure and/or capacity to provide the services in question, such as, for instance, where there is only one provider capable of supplying accident and emergency services in a particular area or where there is only one provider capable of providing specialised services;
- it is necessary for services to be co-located in order to ensure patient safety as a result of clinical interdependencies between the services in question and there is only one provider that is able to provide all of the services (or that could develop the capacity to do so). The commissioner should consider before arriving at this conclusion whether it would be possible for some of the services to be provided by different providers from the same location; and
- there is only one provider that can meet an immediate interim clinical need. Such a need is only likely to arise in exceptional circumstances, for example, on clinical safety grounds such as where services have been suspended following regulatory intervention or in response to a major incident.

Monitor will consider what steps the commissioner has taken and what evidence it has relied on to satisfy itself that there is only one capable provider in assessing whether Regulation 5(1) is applicable.

## **4.2.2 General review of service provision**

A commissioner may decide to carry out a detailed review of the provision of particular services (for example accident and emergency services) in its local area in order to understand how those services can be improved in the interests of patients. The review may involve extensive public consultation and engagement with existing and potential providers and other stakeholders. Reviewing the market in this way is good commissioning practice and something that commissioners should consider doing as a matter of course.

In the context of this review, the commissioner may be able to identify with reasonable certainty those providers that are capable of providing the services (or that are capable of developing the capacity/infrastructure to do so) and to determine which provider or providers are most capable of securing the needs of health care service users and of improving services and represent best value for money. In these circumstances it may be appropriate to negotiate directly with the providers in question.

Such a process should also not be designed in order to avoid running a more formal process. The commissioner should also consider whether additional benefits could be gained through a more formal procurement process.

The commissioner would also need to ensure that its engagement with each of the prospective providers is consistent with its obligation to act transparently and to treat providers equally under the Procurement, Patient Choice and Competition Regulations. In particular, the commissioner would need to ensure that potential providers have a reasonable opportunity to express their interest in providing the services in question.

## **4.2.3 Proportionality**

Commissioners are required under Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations to act in a proportionate way whenever they carry out any procurement activity.

In order to comply with Regulation 3(2), the process put in place by a commissioner to secure services must therefore be commensurate with the nature of the services being procured, including their value and the clinical risk associated with their provision.

The cost and complexity of running a competitive tender process (including publishing a contract notice) can vary substantially. As set out above, tender processes should be adapted to be commensurate to the value, complexity and clinical risk associated with the provision of the services in question. Nevertheless, there may be circumstances where the costs of running a competitive tender process would be greater than the benefits of doing so. This may be the case, for example, where the contract is of low value and clinical risk and designed to meet a short term need for additional services.

However, commissioners will need to determine on a case-by-case basis whether the costs of a competitive process would inevitably outweigh the benefits that could be

achieved, or whether the process could be adapted so that it both secures the benefits of a contested process and is proportionate to the nature of the services being procured.

Commissioners will also need to ensure that their actions are consistent with the requirement to act transparently and treat providers equally. For example, a commissioner might consider announcing its intention to award a contract without running a competitive tender process on its website and [www.supply2health.nhs.uk](http://www.supply2health.nhs.uk), so that other providers have a reasonable opportunity to express their interest in providing the services. In the event that the commissioner receives expressions of interest, it would need to consider what steps it should take to ensure that its engagement with providers is consistent with the requirement not to discriminate between providers. Depending on the circumstances of the case, this may include running a competitive tender process.

#### **Chapter 4, Question 1**

Do you think the description of the considerations that commissioners should take into account when deciding whether or not to publish a contract opportunity is helpful?

Do you think there are other considerations that we should list?

#### **Chapter 4, Question 2**

Do you think that the examples of situations where it may be appropriate for a commissioner to award a contract without publishing a contract notice and running a competitive tendering process are helpful?

### **4.3 Content of contract notice**

Where a commissioner decides to publish an intention to seek offers from providers in relation to a new contract for the provision of NHS health care services, it must publish a contract notice containing:

- a description of the services to be provided; and
- the criteria against which any bids for the contract will be evaluated.

When considering the level of detail that a contract notice should contain, commissioners will also need to bear in mind the requirement in Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations to act in a transparent way and to treat all providers equally.

The information should be sufficient to enable providers to decide whether they are interested in providing the services in question and to make an offer to provide the services. Relevant additional details may include, for example, the place of delivery, the

approximate value of the contract, the duration of the contract, any conditions to participation in the bidding process including any pre-qualification criteria and the procedure for awarding the contract.

#### **4.4 Form of advertisement**

Where a commissioner decides to publish an intention to seek offers from providers in relation to a new contract for the provision of NHS health care services, it must publish a contract notice on the website maintained by NHS England for this purpose, which is currently: [www.supply2health.nhs.uk](http://www.supply2health.nhs.uk)

#### **4.5 New contracts**

In most cases it will be clear when a contract constitutes a new contract

There will be a new contract, for example, where a commissioner seeks to secure a contract to deliver a completely new service or an existing service delivered in a completely different way.

Where an existing contract with a provider terminates or expires and a commissioner enters into a new contract with a different provider for the provision of those services, there will also be a new contract. There may also be a new contract where a contract with a provider terminates or expires and the contract with that provider is renewed where there is no mechanism for renewal in the contract.

It is also possible that in some circumstances, a variation to an existing contract may lead to the award of a new contract where it results in terms and conditions that are materially different in character from those in the original contract. This may be the case where the duration of a contract is extended, if new services are included in the contract, or if significant additional capacity is added to supplement existing services and/or improve access to services in particular geographical areas where this results in a material change to the initial contract.

Regulation 5(2) of the Procurement, Patient Choice and Competition Regulations recognises two specific situations that will not be regarded as amounting to the award of a new contract. These are described below.

##### ***(i) Transfer of contracts to CCGs and NHS England***

The first is where the rights and liabilities under a contract are transferred to a commissioner by the Secretary of State, a Strategic Health Authority or a Primary Care Trust.

This is intended to help to deliver a smooth transition from the commissioning of services by these organisations to the commissioning of services by CCGs and NHS England.

**(ii) Changes in contracts mandated by NHS England**

The second is where NHS England changes the terms and conditions of commissioning contracts entered into by CCGs pursuant to Regulation 17 of the Responsibilities and Standing Rules Regulations. Any changes to terms and conditions that CCGs are mandated to make to their contracts by NHS England pursuant to this Regulation will not give rise to new contracts.

**Chapter 4, Question 3**

Do you think that the description of the circumstances in which a contract will be treated as a new contract is helpful?

Are there other situations where a contract may amount to a new contract that you think we should highlight?

## **5. Qualification of providers**

### **5.1 Introduction**

This chapter provides guidance on how to establish and apply qualification criteria.

Under Regulation 7 of the Procurement, Patient Choice and Competition Regulations, commissioners are required to comply with a number of requirements when deciding whether providers qualify for any of the following:

- to be included on a list from which a patient is offered a choice of provider (consistent with their rights under the NHS constitution) for their first outpatient appointment with a consultant or a member of a consultant's team;
- to be included in a list from which a patient is otherwise offered a choice of provider (where a commissioner has decided to introduce choice for other services);
- to enter into a framework agreement with the commissioner; or
- to bid for future contracts.

Regulation 7 requires commissioners to establish and apply transparent, proportionate and non-discriminatory criteria when deciding whether providers qualify for these purposes and prevents commissioners from refusing to qualify providers that meet the criteria that they have set other than in limited circumstances.

Regulation 7 does not apply to the use of award criteria in the context of a competitive tender process, which is governed by the objective in Regulation 2 and the general requirements in Regulation 3 of the Procurement, Patient Choice and Competition Regulations. However, many of the same considerations set out in this chapter will apply to establishing and applying award criteria in a manner that is consistent with Regulations 2 and 3.

### **5.2 Transparency**

The qualification criteria established by a commissioner must be clear so that providers understand what requirements they must satisfy in order to qualify and what information they must provide to the commissioner as part of the qualification process.

In considering whether commissioners have complied with the requirement to establish and apply transparent qualification criteria, Monitor may consider, for example:

- whether qualification criteria have been described clearly and in sufficient detail to potential providers; and
- whether all the criteria taken into account by a commissioner in deciding whether providers qualify were disclosed to potential providers.

### 5.3 Non-discrimination

The qualification criteria established by a commissioner must not favour a particular provider or category of provider. Once established, the criteria must be applied equally to different providers.

In considering whether commissioners have complied with the obligation to establish and apply non-discriminatory qualification criteria, Monitor may consider, for example:

- whether commissioners have adopted criteria that favour the incumbent provider without objective justification, such as, for example, using criteria that take into account a provider's previous experience with that commissioner but not other commissioners;
- whether commissioners have conducted appropriate due diligence to ensure that providers that say they can provide equivalent or higher quality care for less money are able to do so; and
- whether commissioners have waived certain criteria part way through their decision making process to the advantage of a particular provider.

### 5.4 Proportionality

The qualification criteria set by commissioners must be proportionate to the value, complexity and risk associated with the provision of the services in question.

In considering whether commissioners have complied with the requirement to establish and apply proportionate qualification criteria, Monitor may consider whether commissioners have, for example:

- required providers to satisfy financial or clinical criteria that are disproportionate given the nature of the services in question; or
- required providers to undergo financial due diligence which is not commensurate with the services to be provided.

#### Chapter 5, Question 1

Do you agree with the examples of the factors that Monitor might take into account in deciding whether commissioners have complied with their duty to apply and establish transparent, proportionate and non-discriminatory qualification criteria?

Are there other factors that you consider we should highlight?

### 5.5 Rejection of qualifying providers

Under Regulation 7(3), commissioners must not refuse to include a provider on a list from which a patient is offered a choice for a first outpatient appointment with a consultant or a

member of a consultant's team where the provider has satisfied the qualification criteria established by the commissioner.

Regulation 7(4), (5) and (6) recognise that commissioners may limit the total number of providers included on a list from which a patient is otherwise offered choice, the number of providers to enter into a framework agreement with and the number of providers that are eligible to bid for future contracts. Where a limit on the number of providers is exceeded, the commissioner will be entitled to refuse to qualify a provider for these purposes even if the provider has satisfied the relevant qualification criteria.

However, commissioners will need to ensure that any decision to limit the maximum number of providers is consistent with other requirements in the Procurement, Patient Choice and Competition Regulations, including the duty to consider appropriate ways of improving quality and efficiency, including through allowing patients a choice of provider and enabling providers to compete to provide services (Regulation 3(4)) and the requirement to treat providers equally (Regulation 3(2)). Whether it is appropriate to limit the number of providers will depend on the circumstances of the case. It may be appropriate, for example, to limit the number of providers that a patient is able to choose to receive treatment from where there is a link between patient outcomes and caseload volumes.

Under Regulations 7(4), (5) and (6), commissioners must not refuse to qualify providers that satisfy the criteria set by the commissioner for any other reasons.

## **6. Record keeping**

### **6.1 Introduction**

This chapter provides guidance for commissioners on record-keeping.

The Procurement, Patient Choice and Competition Regulations include a number of specific obligations relating to record keeping. Commissioners must:

- publish details of all contracts they award (Regulation 9(1) of the Procurement, Patient Choice and Competition Regulations);
- record how any conflicts of interest have been managed (Regulation 6(2) of the Procurement, Patient Choice and Competition Regulations); and
- maintain details of how a contract award complies with their duties relating to effectiveness, efficiency and improvement in the quality of services and the delivery of services in an integrated way in the National Health Service Act 2006 (Regulation 3(5) of the Procurement, Patient Choice and Competition Regulations).

These requirements are considered in further detail below (the requirement to record how any conflicts of interest have been managed is considered in further detail in Chapter 8).

More generally, commissioners must ensure that their record-keeping is consistent with the requirement to act transparently in Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations.

### **6.2 Publication of contract awards**

Regulation 9(1) of the Procurement, Patient Choice and Competition Regulations requires commissioners to maintain and publish a record of all the contracts that they award on the website maintained by NHS England for this purpose. This is currently: [www.supply2health.nhs.uk](http://www.supply2health.nhs.uk)

Regulation 9(2) specifies certain information that this record must contain. This includes:

- the name of the provider to whom the contract has been awarded and the address of its registered office or principal place of business;
- a description of the services to be provided;
- the total amount to be paid under the contract, or where the total amount is not known, the amounts payable to the provider. For example, where services are to be provided on an AQP basis, such that the total volume of services that will be provided by any given provider is not known in advance, the commissioner should publish details of how payments are calculated under the terms of the contracts with providers;

- the dates between which the services will be provided; and
- a description of the process adopted for selecting the provider.

The Procurement, Patient Choice and Competition Regulations do not specify a time frame within which this information must be published. However, commissioners should ensure that this information is provided within a reasonable time frame, consistent with their general duty to act transparently. Commissioners will also need to consider what steps they need to take to update this record to ensure its on-going accuracy. This may include, for example, updating the record from time to time with details of the actual amounts paid to providers where services are provided on an AQP basis once these are known.

### **6.3 Record of compliance with duties relating to effectiveness, efficiency and quality and the delivery of integrated care in the 2006 Act**

Commissioners are required to exercise their functions effectively, efficiently and economically and with a view to securing a continuous improvement in the quality of services for the prevention, diagnosis or treatment of illness (s.14Q and 14R (for CCGs) and s.13D and 13E (for NHS England) of the National Health Service Act 2006).

NHS England is additionally required to exercise its functions with a view to securing the continuous improvement in the quality of services for the protection or improvement of public health (s.13E of the National Health Service Act 2006).

Commissioners are also required to exercise their functions with a view to securing that health services are provided in an integrated way, including with health-related services or social care services, where they consider that this would:

- improve the quality of health services (including outcomes);
- reduce inequalities between persons with respect to their ability to access those services; or
- reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services

(s.13N (for NHS England) and s.14Z1 (for CCGs) of the National Health Service Act 2006).

Regulation 3(5) of the Procurement, Patient Choice and Competition Regulations requires commissioners to maintain a record of how a contract award complies with these duties. The content and level of detail of this record will vary depending on the circumstances of the case, but Monitor would generally expect a commissioner to set out the following:

- the reasons for procuring the services in question;
- the reasons for specifying the services in a particular way;

- the rationale for procuring a number of different services as a bundle and the composition of that bundle, if applicable;
- an analysis of how the services will be delivered in a way that is coordinated from the perspective of patients alongside other health care, health-related and social care services;
- the rationale for key terms of the contract, such as, for example, quality requirements that the provider must satisfy, the consequences of breaches and the duration of the contract;
- the reasons for the procurement route chosen, such as for example, the reasons for any decision to procure the services through a single tender, through a formal competitive tender process, on an AQP basis or otherwise;
- the basis on which it decided how to choose a provider, including for example the decision on how to score bids in the context of a competitive tender process; and
- the reason for choosing to award the contract to the provider in question.

**Chapter 6, Question 1**

Do you agree with the suggestions of the types of information that may be relevant for the purposes of compiling an adequate record of a contract award decision to demonstrate that commissioners have complied with their relevant duties under the National Health Service Act 2006?

Are there other types of information that may be relevant that you consider we should highlight?

## **7. Assistance and support**

### **7.1 Introduction**

This chapter provides guidance for commissioners on obtaining assistance and support when commissioning NHS health care services.

Regulation 8 of the Procurement, Patient Choice and Competition Regulations requires commissioners to ensure that any person that provides them with commissioning assistance or support in the exercise of their procurement functions acts in accordance with the requirements in Regulations 2, 3, 4(2) to (4), 5 to 7, 9 and 10 of the Procurement, Patient Choice and Competition Regulations.

### **7.2 Ensuring that contractors comply with the Regulations**

Commissioners are free to obtain support and assistance to carry out their commissioning functions, including from new NHS commissioning support units (CSUs) or other sources of commissioning support, such as from the independent or voluntary sectors. Support and assistance may be obtained for a range of different commissioning functions, such as service redesign, contract negotiation and information analysis.

Commissioners retain overall responsibility for ensuring that any procurement activity is consistent with the Procurement, Patient Choice and Competition Regulations, regardless of whether that activity is carried out by the commissioner or by any other person on the commissioner's behalf. However, it is up to commissioners to decide what, if any, external support and assistance to use.

In considering whether commissioners have complied with the requirement to ensure that any person providing commissioning support or assistance acts in accordance with the relevant requirements of the Procurement, Patient Choice and Competition Regulations, Monitor may consider, for example, whether commissioners have:

- taken appropriate steps to evaluate the capability of the person providing support and assistance to provide services in accordance with the Procurement, Patient Choice and Competition Regulations. What is appropriate will depend on the circumstances of the case, but may include requiring the person to demonstrate how the support they provide will be compatible with the Regulations before entering into a contract with the person; and
- put in place appropriate measures to ensure that the person acts in accordance with the Procurement, Patient Choice and Competition Regulations once their support services have been commissioned. What is appropriate will depend on the circumstances of the case, but may include:
  - requiring the person to report regularly on how their activities are compliant with the relevant requirements; and

- including provisions in the contract with the person that give the commissioner the right to take remedial action if the person fails to comply with the relevant requirements (and invoking those provisions as appropriate).

**Chapter 7, Question 1**

Do you agree with the examples of the factors that Monitor might take into account in deciding whether commissioners have complied with their duty to ensure that any person providing commissioning support or assistance acts in accordance with the relevant requirements of the Procurement, Patient Choice and Competition Regulations?

Are there other factors that you consider we should highlight?

## **8. Conflicts of interest**

### **8.1 Introduction**

This chapter provides guidance for commissioners on handling conflicts of interest.

Regulation 6(1) of the Procurement, Patient Choice and Competition Regulations prohibits commissioners from awarding a contract for NHS health care services where conflicts or potential conflicts between the interests involved in commissioning such services and the interests in providing them affect, or appear to affect, the integrity of the award of that contract.

Regulation 6(2) requires commissioners to maintain a record of how any conflicts that have arisen have been managed.

s.14O of the National Health Service Act 2006 includes further requirements relating to conflicts of interest. Guidance on how to comply with these requirements (including managing conflicts of interest) has been published by NHS England and is available [here](#).

### **8.2 What is a conflict?**

Broadly, a conflict of interest is a situation where an individual's ability to exercise judgment or act in one role is or could be impaired or otherwise influenced by that individual's involvement in another role.

For the purposes of Regulation 6, a conflict will arise where an individual's ability to exercise judgment or act in their role in the commissioning of services is impaired or otherwise influenced by their interests in the provision of those services.

### **8.3 What constitutes an interest?**

Regulation 6 of the Procurement, Patient Choice and Competition Regulations makes it clear that an interest includes an interest of:

- a member of the commissioner;
- a member of the governing body of the commissioner;
- a member of its committee or sub-committees or committees or sub-committees of its governing body; or
- an employee.

### **8.4 What interests in the provision of services may conflict with the interests in commissioning them?**

A range of interests in the provision of services may give rise to a conflict with the interests in commissioning them, including:

- Direct financial interest for example, a member of a CCG or NHS England who has a financial interest in a provider (for example is a shareholder or has a pension that is funded by a provider where this might be affected by the success or failure of the provider) that is interested in providing the services being commissioned or that has an interest in other competing providers not being awarded a contract to provide those services;
- Indirect financial interest for example, a member of a CCG or NHS England whose spouse has a financial interest in a provider that may be affected by a decision to reconfigure services;
- Non-financial or personal interests for example, a member of a CCG or NHS England whose reputation or standing as a practitioner may be affected by a decision to award a contract for the provision of services; and
- Professional duties or responsibilities for example, a member of a CCG who has an interest in the award of a contract for the provision of services because of the interests of a particular patient at that member's practice.

#### **Chapter 8, Question 1**

Do you agree with the examples of interests in the provision of services that may give rise to a conflict with the interests in commissioning them?

Are there other examples that you consider we should highlight?

### **8.5 Conflicts which affect or appear to affect the integrity of an award**

Even if a conflict of interest does not actually affect the integrity of a contract award, a conflict of interest that appears to affect the integrity of a contract award can damage a commissioner's reputation and public confidence in the NHS. Regulation 6 of the Procurement, Patient Choice and Competition Regulations therefore also prohibits commissioners from awarding contracts in these circumstances.

As well as affecting the decision whether or not to award a contract and to which provider, a conflict of interest may affect a variety of decisions made by a commissioner during the commissioning cycle in a way that affects, or appears to affect, the integrity of a contract award decision taken at a later point in time. For example, conflicts of interest might affect decisions regarding the reconfiguration of services, service specification/design, the selection of qualification criteria, as well as the award decision itself, where these decisions affect the interests of the provider in relation to which a conflict has arisen.

In considering whether a conflict affects or appears to affect the integrity of a contract award, Monitor will take into account all relevant circumstances, which may include:

- the nature of the individual's interest in the provision of services, including whether the interest is direct or indirect, financial or personal and the magnitude of any interest;
- whether and how the interest is declared, including at what stage in the process and to whom;
- the extent of the individual's involvement in the procurement process, including, for example, whether the individual has had a significant influence on service design/specification, has played a key role in setting award criteria, has been involved in deliberations regarding which provider or providers to award the contract to and/or has voted on the decision to award the contract; and
- any steps taken to manage the actual or potential conflict, such as through external review of the decision.

### **Chapter 8, Question 2**

Do you agree with the examples of factors that Monitor may take into account when deciding whether a conflict affects or appears to affect the integrity of a contract award?

Are there other factors that may be relevant that you consider we should highlight?

## **8.6 Managing conflicts**

Depending on the circumstances of the case, there may be a number of different ways of managing a conflict or potential conflict of interest in order to prevent that conflict affecting or appearing to affect the integrity of the award of the contract.

It will often be straightforward to exclude a conflicted individual from participating in decisions or activities where that individual's involvement might affect or appear to affect the integrity of the award of a contract. The commissioner will need to consider whether in the circumstances of the case it would be appropriate to exclude the individual from involvement in any meetings or activities in the lead up to the award of a contract in relation to which the individual is conflicted, or whether it would be appropriate for the individual concerned to attend meetings and participate in discussions, having declared an interest, but not to participate in any decision-making (not having a vote in relation to relevant decisions). It is difficult to envisage circumstances where it would be appropriate for an individual with a material conflict of interest to vote on relevant decisions.

Where it is not practicable to manage a conflict by simply excluding the individual concerned from participating in relevant decisions or activities, for example because of the

number of conflicted individuals, the commissioner will need to consider alternative ways of managing the conflict. For example, depending on the circumstances of the case, it may be possible for a CCG to manage a conflict affecting a substantial proportion of its members by:

- involving third parties on the governing body of the CCG who are not conflicted, such as out of area GPs, individuals from a Health and Wellbeing board or independent lay persons; or
- inviting third parties who are not conflicted to review decisions to provide additional scrutiny, such as for example, the Health and Wellbeing Board or another CCG.

## 8.7 Recording how conflicts have been managed

Regulation 6 of the Procurement, Patient Choice and Competition Regulations also requires commissioners to maintain a record of how any conflicts that have arisen have been managed.

Commissioners will need to include all relevant information to demonstrate that the conflict was appropriately managed. This may include:

- details of the individual who was conflicted and their role/position within the commissioner;
- the nature of their interest in the provision of services;
- when the individual's interest in the provision of the services being commissioned was declared and how;
- details of the steps taken to manage the conflict; and
- the individual's involvement in the procurement process, including, for example, the individual's involvement in the decision to reconfigure services and service design, attendance at meetings to discuss the proposed contract and participation in the award decision.

### Chapter 8, Question 3

Do you agree with the suggestions of the types of information that may be relevant for the purposes of compiling an adequate record to demonstrate that a conflict of interest has been appropriately managed?

Are there other types of information that may be relevant that you consider we should highlight?

## **9. Anti-competitive behaviour**

### **9.1 Introduction**

This chapter provides guidance to commissioners on the circumstances in which behaviour may be anti-competitive and contrary to the Procurement, Patient Choice and Competition Regulations.

Regulation 10(1) of the Procurement, Patient Choice and Competition Regulations prohibits commissioners from engaging in anti-competitive behaviour unless it is in the interests of NHS health care service users.

Regulation 10(2) clarifies that an arrangement for the provision of NHS health care services must not include any term or condition restricting competition that is not necessary for the attainment of intended outcomes which are beneficial for people who use such services or the objective in Regulation 2. This is because where restrictions of competition are not necessary to achieve such benefits they are unlikely to be in the interests of health care service users.

### **9.2 What sort of behaviour is covered**

The prohibition on anti-competitive behaviour applies to all types of behaviour that commissioners might engage in when commissioning NHS health care services, including agreements (for example with a provider or another commissioner) as well as other conduct. It is not necessary for an agreement to be legally binding for Regulation 10 to apply – informal agreements and understandings are also subject to the prohibition.

### **9.3 When will behaviour be anti-competitive and not in the interests of users of health care services?**

Where a commissioner's conduct is in the interests of patients its behaviour will not be inconsistent with the prohibition on anti-competitive behaviour in Regulation 10.

In assessing whether or not anti-competitive behaviour is in the interests of health care service users, Monitor will carry out a cost/benefit analysis. Monitor will consider whether by preventing, restricting or distorting competition behaviour gives rise to material adverse effects (costs) for health care service users.

If we find that behaviour gives rise to material costs, we will consider whether it also gives rise to benefits that could not be achieved without the restriction on competition.

Monitor will then weigh the benefits and costs against each other.

This analysis is described in more detail below.

### ***Assessing costs***

In assessing the costs of anti-competitive behaviour, Monitor will consider whether the behaviour affects competition in a way that removes or materially reduces the incentives on providers to provide high quality services, provide value for money and/or improve services. In carrying out this assessment Monitor may consider, among other relevant factors:

- the nature of the restriction on competition;
- the number of providers of a particular health care service that are affected by the commissioner's conduct and their importance as suppliers of that service;
- the extent to which those providers affected by the conduct are close alternatives. Monitor may consider GP referral patterns, the geographic proximity of the providers and any evidence of patients switching between different providers in the past in making this assessment; and
- the expected duration of the conduct or its effects.

### ***Assessing benefits***

Monitor will also consider whether the behaviour gives rise to any material benefits to users of NHS health care services, such that the behaviour might be considered to be in the interests of health care service users.

Regulation 10(1) of the Procurement, Patient Choice and Competition Regulations includes the following non-exhaustive list of ways in which benefits might arise from anti-competitive behaviour:

- by the services being provided in a more integrated way (including with other health care services, health-related services or social care services); and
- by cooperation between providers in order to improve the quality of services.

Benefits can arise in a number of different ways. In addition to improvements in quality through cooperation and the delivery of care in a more integrated way, benefits may arise as a result of improvements in efficiency that lead to better value for money. Behaviour may result in better value for money for a number of different reasons such as, for example, through a reduction in duplicative patient assessments etc.

Improvements in quality may consist of clinical or non-clinical improvements:

- **clinical benefits** may include a variety of improvements that lead to better patient outcomes (for instance by increasing the number of patients treated by a provider where higher patient volumes result in better outcomes); and
- **non-clinical benefits** may include a range of improvements such as better access, improved surroundings or better amenities.

Monitor will expect commissioners to be able to identify and describe the benefits to health care service users that arise from any anti-competitive conduct and to provide any relevant evidence in support. In deciding what value should be attributed to claimed benefits, Monitor will consider all relevant factors including, for example:

- the materiality of the benefits submitted;
- the period of time over which the benefits will be realised; and
- the robustness of the analysis and evidence that supports the claimed benefits (in considering clinical benefits, Monitor will have particular regard to supporting research and evidence regarding clinical improvements).

Any restrictions on competition must be necessary to achieve the benefits, if those benefits are to be taken into account for the purposes of establishing whether anti-competitive behaviour is in the interests of health care service users.

Monitor will therefore consider the extent to which any benefits claimed could be realised without the restriction on competition.

A restriction on competition may be regarded as necessary to the attainment of the benefits claimed where the benefits can be achieved more quickly or more cost effectively as a result of the restriction on competition. In these circumstances, Monitor will consider the extent to which achieving the benefits more quickly or cost-effectively outweighs the cost resulting from the reduction in competition as part of its cost/benefit analysis (see next section).

### ***Weighing costs and benefits***

Monitor will then consider whether the benefits of the anti-competitive behaviour outweigh the costs.

If the benefits outweigh the costs, and those benefits could not be attained without the restriction on competition, the behaviour will be in the interests of users of health care services. Conversely, if the costs outweigh the benefits, or if the restrictions on competition are not necessary to achieve the benefits, the behaviour will not be in the interests of users of health care services.

This is not a mathematical exercise, but rather a qualitative assessment. Relevant benefits might outweigh costs when, for example, as a result of a commissioner's actions there is a reduction of competition between a small number of providers, but a significant number of other providers of the relevant services remain and the clinical benefits of the initiative are significant and well evidenced.

#### **Chapter 9, Question 1**

The cost/benefit analytical framework is the same as that applied by the Cooperation and Competition Panel when analysing anti-competitive behaviour under the Principles and Rules. Do you think this description is helpful?

In considering whether a commissioner has engaged in anti-competitive behaviour which is not in the interests of NHS health care service users, Monitor may consider, for example, whether, in a market where competition has been introduced (whether as a result of patients' rights to choice under the NHS Constitution or pursuant to a decision by a commissioner to introduce choice locally for a particular service), the commissioner:

- has limited the extent to which providers are able to compete to attract patients to their services, for example, by limiting the total number of patients a provider can treat or the income a provider can earn, or by restricting the providers to whom a provider can refer patients for further treatment, without objective justification;
- has restricted the ability of providers to differentiate themselves to attract patients, such as, for example, by imposing minimum waiting times that providers must adhere to or restricting opening hours without objective justification; and
- has reduced the incentives on providers to compete, such as, for example, by disclosing commercially sensitive information belonging to one provider to a different provider without objective justification.

As explained above, Regulation 10(2) clarifies that that an arrangement for the provision of NHS health care services must not include any term or condition restricting competition that is not necessary for the attainment of relevant benefits. Any term or condition restricting competition that is not necessary – for example because it goes beyond what is necessary to achieve benefits (such as a restriction that has a longer duration than is necessary or applies to a wider range of services than is necessary) – will breach Regulation 10(2).

### **Chapter 9, Question 2**

Do you agree with the examples of the considerations that Monitor may take into account in assessing whether a commissioner has engaged in anti-competitive conduct that is not in the interests of patients?

Do you think there are other examples that we should highlight?

## **10. Patient choice**

### **10.1 Introduction**

This chapter provides guidance on the requirements that commissioners must comply with relating to patient choice.

Commissioners are required to comply with a number of requirements relating to patient choice under the Procurement, Patient Choice and Competition Regulations. The Procurement, Patient Choice and Competition Regulations also give Monitor the power to take enforcement action to prevent and/or remedy breaches by commissioners of certain requirements relating to patient choice in the Responsibilities and Standing Rules Regulations. They include:

- a requirement to consider appropriate means of improving services, including through allowing patients a choice of provider (Regulation 3(4) of the Procurement, Patient Choice and Competition Regulations);
- a prohibition on NHS England from placing certain restrictions on the ability of a person to choose their primary health care provider (Regulation 11 of the Procurement, Patient Choice and Competition Regulations);
- a requirement to put in place arrangements to ensure that patients are offered certain choices when they require elective care (Regulations 39 and 43 of the Responsibilities and Standing Rules Regulations);
- a requirement to put in place arrangements to ensure that patients are offered a choice of alternative providers in certain circumstances where they will not receive treatment within maximum waiting times (Regulation 12 of the Procurement, Patient Choice and Competition Regulations); and
- a requirement to put in place arrangements to publicise and promote certain information about choice (Regulation 42 of the Responsibilities and Standing Rules Regulations).

The rest of this chapter considers these requirements in more detail (Chapter 3 includes further detail on compliance with the requirement in Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations).

#### **Chapter 10, Question 1**

Do you agree that we should include a description of the requirements relating to patient choice in the Responsibilities and Standing Rules Regulations that Monitor has the power to enforce under the Procurement, Patient Choice and Competition Regulations?

## **10.2 Patient choice and primary care**

Under the NHS Constitution, health care service users have the right to choose their GP practice and to be registered by that practice unless there are reasonable grounds for refusal. They also have the right under the NHS Constitution to express a preference for using a particular doctor within their GP practice and for the practice to try to comply.

Regulation 11 of the Procurement, Patient Choice and Competition Regulations is designed to protect these rights of choice by prohibiting NHS England from restricting the ability of a person:

- to apply for inclusion on the list of patients of a primary care provider of that person's choice; and
- to express a preference to receive treatment from a particular medical practitioner (or class of medical practitioner) at the primary care provider either generally or in relation to any particular condition.

This requirement does not prevent NHS England from including in its contracts with primary care providers provisions that allow providers to refuse to add a person to the primary care provider's patient list or to refuse a request to receive treatment from a particular practitioner at the practice in accordance with Part 2 of Schedule 6 to the National Health Service (General Medical Services Contracts) Regulations 2004; Part 2 of Schedule 5 to the National Health Service (Personal Medical Services Agreements) Regulations 2004 or arrangements made under section 83(2) of the National Health Service Act 2006.

## **10.3 Patient choice and elective care**

### **10.3.1 Elective care - first outpatient appointment**

Under the NHS Constitution, patients have the right to choose the organisation that provides their treatment when they are referred for a first outpatient appointment for a service led by a consultant, subject to certain exceptions.

Regulation 39 of the Responsibilities and Standing Rules Regulations is designed to protect this right of choice by requiring commissioners to make arrangements to ensure that patients are offered the following choices:

- where a patient requires an elective referral, for a first outpatient appointment with a consultant or a member of a consultant's team, the choice of:
  - any clinically appropriate provider that has a contract with a commissioner; and
  - any clinically appropriate named consultant-led team employed or engaged by that provider; and

- where a patient requires an elective referral for mental health services, for a first outpatient appointment with a health care professional or member of a health care professional's team, the choice of any clinically appropriate named health care professional-led team that is employed or engaged by the provider to which the patient is referred.

These requirements do not apply to certain categories of services or to certain categories of patients:

- Excluded services: the obligation to offer choice does not apply to cancer services subject to a 2 week maximum waiting time, maternity services or any service where it is necessary to provide urgent care.
- Excluded patients: the obligation to offer choice does not apply to any person detained under the Mental Health Act 1983, detained or on temporary release from prison or serving as a member of the armed forces.

Regulation 43 of the Responsibilities and Standing Rules Regulations makes transitional provisions for patients who require an elective referral before 1 April 2013, but who have not received treatment and have not been offered a choice of provider by that date.

These transitional provisions require commissioners to ensure that such patients are offered a choice of any clinically appropriate provider for their first outpatient appointment with a consultant or a member of a consultant's team in accordance with the Primary Care Trusts (Choice of Secondary Care Provider) Directions 2009 (Directions). The Directions formed the legal basis for the right to choice in the NHS Constitution in respect of a first outpatient appointment before being replaced by the Standing Rules and Responsibilities Regulations.

### **10.3.2 Elective care – maximum waiting times**

Under the NHS Constitution, patients have the right to access services within maximum waiting times and for the NHS to take all reasonable steps to offer a range of suitable alternative providers if this is not possible. Regulation 12 of the Procurement, Patient Choice and Competition Regulations is designed to protect this right of choice where maximum waiting times are not going to be met.

Regulation 12 requires commissioners to offer patients choice in accordance with Regulation 48(4) of the Standing Rules and Responsibilities Regulations.

Regulation 48 applies where a patient that has been referred for elective care will not have commenced treatment within 18 weeks of a referral being received by the provider to whom the patient is referred. Under Regulation 48 of the Standing Rules and Responsibilities Regulations commissioners are required to take all reasonable steps to ensure that the patient is offered an appointment with a clinically appropriate alternative provider with whom a commissioner has a contract to commence treatment earlier.

If there is more than one suitable alternative provider for these purposes, Regulation 48(4) of the Standing Rules and Responsibilities Regulations requires the commissioner to take all reasonable steps to ensure that the patient is offered a choice of appointment with more than one provider.

There are a number of exceptions to the duty to offer a patient an appointment with an alternative provider and to offer a choice of alternative providers where more than one suitable provider exists. These apply where:

- the patient did not attend their appointment with the provider in circumstances where the date for the appointment was reasonable, the patient was aware of the consequences of missing the appointment and the patient had not sought to rearrange the appointment;
- the patient did not attend a rearranged appointment with the provider in circumstances where the patient had rearranged the appointment, the original date for the appointment was reasonable and the patient was aware of the consequences of missing the appointment;
- the patient has chosen to delay starting treatment until after the maximum 18 week waiting period has expired in circumstances where the patient was offered a reasonable appointment date within the 18 week period and decided that they did not want an appointment within that period;
- the patient has decided not to start treatment;
- the patient is not able to start treatment for reasons unrelated to the provider or the commissioner and in circumstances where the patient was offered a reasonable appointment date within the maximum 18 week waiting period and was unable to make any appointment dates within that period;
- a consultant, a member of a consultant's team or a person providing interface services has determined that it is in the best clinical interests of the patient not to start treatment within the maximum 18 week waiting period, that the patient does not need treatment, or that the patient should be referred back to a primary care provider before any treatment is started;
- a consultant, a member of a consultant's team or a person providing interface services has determined that the patient requires a period of monitoring;
- the patient is placed on the national transplant waiting list; or
- the patient is referred for maternity services.

### **10.3.3 Elective care - duty to promote information about choice**

Under the NHS Constitution patients have the right to information to support their rights of choice.

Regulation 42 of the Responsibilities and Standing Rules Regulations is designed to safeguard this right by requiring commissioners to make arrangements to ensure that the availability of choice is publicised and promoted to patients.

This includes a requirement to make arrangements for publicising and promoting awareness of information about health care providers, consultant-led teams and teams led by health care professionals providing mental health services in order to enable patients to exercise their rights to choice under Regulation 39 of the Responsibilities and Standing Rules Regulations in a meaningful way.

Commissioners are also required to make arrangements for publicising details and promoting awareness of where that information may be found under the Regulation.

### **10.3.4 Patient choice in practice**

In considering whether a commissioner has complied with the various obligations enforceable by the Procurement, Patient Choice and Competition Regulations relating to patient choice, Monitor will consider all relevant factors which may include:

- whether commissioners have appropriately specified the services to be provided to ensure that the relevant rights are protected;
- whether the contracts entered into by commissioners with providers responsible for making elective referrals impose positive obligations on providers to offer patients the relevant choices safeguarded by these regulations;
- what arrangements commissioners have put in place to ensure that health care users are aware of their rights of choice;
- what arrangements commissioners have put in place to ensure that patients have information about providers, consultant-led teams and mental health professional-led teams and to ensure that this information is helpful and not misleading so that patients are able to exercise choice meaningfully where it is protected under the regulations; and
- what steps commissioners have taken to respond to any evidence (whether as a result of complaints or otherwise) that patients for whom they are responsible are not being offered the choices that are protected by these regulations.

**Chapter 10, Question 2**

Do you agree with the examples of relevant factors that Monitor may take into account in deciding whether commissioners have complied with their duties relating to patient choice?

Are there other relevant factors that you consider we should highlight?

See also Chapter 3, which describes some of the factors that Monitor may consider when assessing whether a commissioner has complied with its obligation to consider appropriate means of improving services, including by allowing patients a choice of provider.

## Chapter Questions

### **Chapter 3, Question 1**

Do you agree with the examples of factors that Monitor may consider when deciding whether commissioners have complied with their duty to act transparently, proportionately and in a non-discriminatory way?

Are there other factors that you think we should highlight?

### **Chapter 3, Question 2**

Do you agree with the examples of factors that Monitor may consider when deciding whether commissioners have complied with their duty to procure services from the providers most capable of delivering commissioners' objective and that provide best value for money?

Are there other factors that you consider we should highlight?

### **Chapter 3, Question 3**

Do you think that the description of integrated care, choice and competition is helpful?

### **Chapter 3, Question 4**

Do you agree with the examples of the factors that Monitor may take into account in deciding whether commissioners have complied with their general duty to consider appropriate means of improving quality and efficiency, including through services being delivered in an integrated way, patient choice and competition?

Are there other factors that you consider we should highlight?

### **Chapter 4, Question 1**

Do you think the description of the considerations that commissioners should take into account when deciding whether or not to publish a contract opportunity is helpful?

Do you think there are other considerations that we should list?

### **Chapter 4, Question 2**

Do you think that the examples of situations where it may be appropriate for a commissioner to award a contract without publishing a contract notice and running a competitive tendering process are helpful?

### **Chapter 4, Question 3**

Do you think that the description of the circumstances in which a contract will be treated as a new contract is helpful?

Are there other situations where a contract may amount to a new contract that you think we should highlight?

### **Chapter 5, Question 1**

Do you agree with the examples of the factors that Monitor might take into account in deciding whether commissioners have complied with their duty to apply and establish transparent, proportionate and non-discriminatory qualification criteria?

Are there other factors that you consider we should highlight?

### **Chapter 6, Question 1**

Do you agree with the suggestions of the types of information that may be relevant for the purposes of compiling an adequate record of a contract award decision to demonstrate that commissioners have complied with their relevant duties under the National Health Service Act 2006?

Are there other types of information that may be relevant that you consider we should highlight?

### **Chapter 7, Question 1**

Do you agree with the examples of the factors that Monitor might take into account in deciding whether commissioners have complied with their duty to ensure that any person providing commissioning support or assistance acts in accordance with the relevant requirements of the Procurement, Patient Choice and Competition Regulations?

Are there other factors that you consider we should highlight?

### **Chapter 8, Question 1**

Do you agree with the examples of interests in the provision of services that may give rise to a conflict with the interests in commissioning them?

Are there other examples that you consider we should highlight?

### **Chapter 8, Question 2**

Do you agree with the examples of factors that Monitor may take into account when deciding whether a conflict affects or appears to affect the integrity of a contract award?

Are there other factors that may be relevant that you consider we should highlight?

### **Chapter 8, Question 3**

Do you agree with the suggestions of the types of information that may be relevant for the purposes of compiling an adequate record to demonstrate that a conflict of interest has been appropriately managed?

Are there other types of information that may be relevant that you consider we should highlight?

### **Chapter 9, Question 1**

The cost/benefit analytical framework is the same as that applied by the Cooperation and Competition Panel when analysing anti-competitive behaviour under the Principles and Rules. Do you think this description is helpful?

### **Chapter 9, Question 2**

Do you agree with the examples of the considerations that Monitor may take into account in assessing whether a commissioner has engaged in anti-competitive conduct that is not in the interests of patients?

Do you think there are other examples that we should highlight?

### **Chapter 10, Question 1**

Do you agree that we should include a description of the requirements relating to patient choice in the Responsibilities and Standing Rules Regulations that Monitor has the power to enforce under the Procurement, Patient Choice and Competition Regulations?

### **Chapter 10, Question 2**

Do you agree with the examples of relevant factors that Monitor may take into account in deciding whether commissioners have complied with their duties relating to patient choice?

Are there other relevant factors that you consider we should highlight?

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