

# THE NEW PROCUREMENT REGULATIONS AND THE DUTY TO TENDER

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The Procurement, Patient Choice and Competition Regulations 2013 have been published ([www.legislation.gov.uk/uksi/2013/257/contents/made](http://www.legislation.gov.uk/uksi/2013/257/contents/made)). They regulate the “market” for NHS services and relations between the NHS CB, CCGs and providers. They are still subject to the negative resolution procedure, ie they come into force unless annulled by a resolution of either House of Parliament within the next few weeks. If you fear this reduces the NHS to a franchise which licenses private interests to dominate the NHS, this is unlikely, but not impossible.

**A**ssuming they survive, do the regulations impose a duty on commissioners to tender for every contract? The short, legal answer is No, because competition is not always in patients’ interests.

But, in practical terms, tendering will become the norm.

**When the Health and Social Care Bill was being debated in Parliament**, it was feared Monitor would be required to promote competition for its own sake in all cases.

**The 2012 Act now clarifies that:**

“Monitor must exercise its functions with a view to preventing anti-competitive behaviour... which is against the interests of people who use [the NHS]” (s 62(3)). Much reassurance was given in Parliament about this.

**Clearly, then, some anti-competitive behaviour may serve public interests.**

As the DH says in its consultation response: “competition is not an end in itself, but one of the tools that can be used by commissioners to drive up standards...

there are circumstances where commissioners might legitimately seek to restrict competition where this would be in patients’ overall best interests, for example, where this is necessary to ensure that individual providers achieve minimum volumes of surgical procedures to ensure patient safety”

([www.wp.dh.gov.uk/publications/files/2013/02/securing-the-best-value-for-patients-consultation-response.pdf](http://www.wp.dh.gov.uk/publications/files/2013/02/securing-the-best-value-for-patients-consultation-response.pdf)).

**What do the regulations require?** Commissioners must secure patients’ needs, and improve the quality and efficiency of services.

Their dealings must be transparent and treat providers equally, irrespective of their ownership.

**Commissioners must procure on the basis of best value for money.**

They “must consider... enabling providers to compete to provide services” (reg 3(4)(b)).

**High value contracts will normally be subject to tender** but some contracts need not be advertised. Reg 5 explains when

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contracts need not be advertised and includes “*technical reasons*.”

**This generates more questions than answers.** How flexible are “*technical reasons*”? Is this consistent with s 62(3) above (permitting some anti-competitive behaviour)?

- Is it “against the interests of people” if tendering incurs disproportionate costs?
- Will complex integrated services make tendering impracticable?
- How do commissioners treat providers “equally”?

Private companies complain about Corporation Tax not charged to public bodies.

But the NHS responds it has higher training costs and pensions to pay.

**What factors are relevant and how should we measure them?** This should be clarified in the guidance expected before April.

**Monitor has powers to investigate complaints and declare ineffective contracts which fail to comply with the regulations.**

This exposes CCGs to risk of damages for breaching contracts.

There will be complaints from private providers seeking NHS business and about CCG conflicts of interest with their providers.

**Let’s hope Monitor has plenty of extra staff to manage it all.**

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