



RCN Policy Unit

Policy Briefing 07/2010

Competition in the NHS in England

April 2010

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Introduction

The Department of Health (DH) in the NHS of England has provided new guidance on competition in the NHS. This br

Role and extent of competition to be locally determined by commissioners

The latest guidance replaces previous guidance including *Necessity not Nicety – a new commercial operating model for the NHS* and the previous *Principles and Rules for Cooperation and Competition*.

The policy and guidance stress the local decisions that will need to be taken by commissioners must include appropriate engagement with staff and Trade Unions, and respecting the policy and legal frameworks.

Key points from the latest guidance are set out below.

Commercial Skills for the NHS⁷

This guidance sets out the approach to improving services for patients and achieving Value for Money (VfM). These will be aided by supporting staff locally to develop appropriate commercial skills and facilitating access to specialist commercial expertise and infrastructure at both regional and national level.

In essence, the Department of Health (DH) is providing guidance which should help commissioners do a better job of commissioning and delivering services. This should benefit patients and the public more generally as tax payers who are ultimately funders of the NHS. However, the aim of delivering better quality must take place in a tightening financial environment. This means in basic terms doing a lot more, from less.

The DH highlight the need to:

- **Maximise efficiencies in backroom functions**
- **The need for more commercial style approaches** (although not necessarily meaning the use of commercial providers) in the light of the separation of commissioners and providers including ‘good’ contract management for those already providing services, and ‘good’ procurement if new/different services are required (and this could be delivered by the NHS or other providers)
- **The common sense approach of working with existing providers to improve services**, including providing 2 opportunities to improve
- **The importance of staff engagement** in any scenario of needing to improve or procure services. DH state that *“Early and substantial engagement of staff and their trade union representatives, where applicable, is required and is principally the responsibility of employers”* (p8). In addition, the DH state that *“NHS providers and their staff can*

⁷ Department of Health, Commercial Skills for the NHS, 2010, http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114573.pdf

expect to be engaged constructively by their commissioner(s) to work in partnership with them in addressing concerns about the performance of services and required service improvements, giving them fair and reasonable opportunities to improve and lead change.”(p10) Proposals for social enterprise under the Right to Request policy needs to include “appropriate and sufficient engagement with the staff affected.” (p10)

- **Where there are procurements that there will be opportunities for NHS, independent and third sector organisations to bid on a fair and equal basis.**
- **Cooperation between commissioners and providers** as part of responding to the financial challenges facing the NHS. This includes benchmarking and contractual approaches to improving performance and practice based commissioning (PBC).
- **Stimulating providers via ‘good’ procurement.** Commissioners will be able to draw upon regional Commercial Support Units and national Procurement Investment and Commercial Division (PICD) and Strategic Commissioning Development Unit (SCDU) within DH. NHS PASA will close.

PCT procurement guide for health services⁸

This guidance sets out a framework to aid commissioners in their decisions about procurement. This can mean a new contract with both an existing, or a new provider. The framework includes important principles including:

- transparency,
- proportionality,
- non-discrimination; and
- equality of treatment.

The guidance makes it clear that it is the responsibility of commissioners, within the legal and policy framework, to decide what to procure and from whom. DH state that *“It remains a matter for PCTs to determine when and how to use procurement as a tool for securing commissioning requirements and the onus is therefore on PCT boards to demonstrate a rationale for their actions and decisions” (p1).* In line with *Commercial Skills for the NHS*, this guidance also stresses the challenges facing the NHS and therefore the need for commissioners to be effective in securing high quality, efficient services.

⁸ Department of Health, PCT procurement guide for health services, 2010, http://www.dh.gov.uk/prod_coement_guide_for_health_services,010,

The guidance outlines the importance of separate activities to be undertaken by commissioners including:

- **Contract management;** in essence to ensure that providers who currently deliver services meet the requirements as set out in their contract with the commissioner.
- **Procurement;** which can occur for different reasons including additional choices for patients; new service models; significant increases in capacity and where existing contracts are due to expire or be terminated (eg where contract management is unable to address underperformance). There are different models for procurement (eg competitive tender through to single action tender) and the appropriate choice depends upon the specific circumstances. All procurement decisions must be underpinned by a rationale including appropriate documentation.

Such activities need to respect the legal framework and also draw upon wider support and guidance as appropriate, including for example support from Commercial Support Units, and guidance on conflicts of interest. It is also important that commissioners engage with staff and their Trade Unions as legally required under the NHS Constitution, and via local and regional Social Partnership Forums (SPF) across a full range of commissioning activities. The guidance includes a specific Annex on this topic. It highlights that *“additional choices for patients; new service models; significant increases in capacity and where existing contracts are due to expire or be terminated (eg where contract management is unable to address underperformance). (p26) and further that “It will be good practice for PCTs to publish policies for engaging staff in the ongoing development and refinement of commissioning strategies and ensuring that providers undertake effective workforce planning.” (p26)*

Principles and rules for cooperation and competition⁹

A revised set of principles and rules for cooperation and competition have been set out. These are the principles and rules that commissioners should meet and the principles and the rules that the Cooperation and Competition Panel (CCP)¹⁰ will assess claims against when they hear cases where there is a complaint.

The 10 principles and rules are set out in full on the following page¹¹:

The rules are not legally enforceable but are expected to be followed by all commissioners and applied across all types of providers (eg NHS, commercial or third sector). The DH provides a rationale and set of expected actions against each principle. In determining whether or not a principle has been breached, the CCP will primarily rely on a Cost Benefit Analysis (CBA) to see whether or not the benefits are outweighed by the costs of action taken by commissioners. This brings economic tools to the heart of policy decisions.

Tell us what you think

This briefing is intended to provide a brief review of the DH guidance and the Policy Unit would like to receive comments/feedback from as many members as possible on this important issue - policycontacts@rcn.org.uk

April 2010