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The Purchasing of former Local Enhanced Services by Local Authorities

Huge changes are afoot with regard to who provides which services in many areas of health and medical care. These changes were set out clearly in a document published by the NHS Commissioning Board in July 2012[1]. In particular this explains which "public health" services are to become the responsibility of Local Authorities from 1st April 2013. As this date rapidly approaches a number of questions are being asked as to how the Authorities will secure services which, until the changeover date, have fallen under the title of "Local Enhanced Services" (LES), when transition arrangements with PCTs end. It should be noted that the NHS Commissioning Board will retain the ability to purchase these services, but in a Fact Sheet also published on 12th July 2012; the Board says that "it is unlikely to use this function".

Services being handed to Local Authority Control
The NHS Commissioning Board documents are explicit with regard to the division of responsibility for the former LES:
Services to be commissioned by the NHS Commissioning Board

- Public health services for children from pregnancy to age 5 (Healthy Child Programme 0 -
- 5), including health visiting, family nurse partnership, responsibility for Child Health Information Systems;
- (Responsibility for children's public health 0-5 due to transfer to Local Authorities in 2015);
- Immunisation programmes;
- National Screening Programmes;
- Public healthcare for people in prison and places of detention;
- Sexual assault referral service

Services to be commissioned by Local Authorities:

- Healthy child programme for schools age children including school nursing;
- Contraception over and above the GP contract, texting and treatment of sexually transmitted diseases, sexual health advice;
- Mental health promotion, mental illness prevention and suicide prevention;
- Programmes to promote physical activity;
- Programmes to prevent and address obesity, National Child Measurement Programme;
- Drug misuse, prevention and treatment/
- Alcohol prevention and treatment;
- Stop smoking services;
- Locally led nutrition initiatives;
- NHS health-check programme;
- Reducing and preventing birth defects;
- Workplace health;
- Dental public health, epidemiology, dental screening;

[1]Commissioning fact sheet for clinical commissioning groups: http://www.commissioningboard.nhs.uk/files/2012/07/fs-ccg-respon.pdf

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- Falls prevention services;
- Seasonal mortality, actions to reduce seasonal deaths;
- Dealing with health protection incidents, outbreaks and emergencies public health aspects of promotion of community safety, violence prevention and response;
- Public health aspects of local initiatives to tackle social exclusion;
- Local initiatives that reduce public health impacts of environmental risks

Procurement by Local Authorities

The procurement of services by local Authorities functions in a highly regulated, legal environment which is multi-layered.This comprises:

- European Treaty Articles 81 and 82 – the "Competition Articles";
- European Directives,;
- The national laws of EU Member States implementing those Directives;
- The governing principles from the EC Treaty; and
- Case law from the European Court of Justice (ECJ) and National Courts.

Public procurement is based on Article 81 of the Treaty of Lisbon which replaced the earlier Article 85 of the Treaty of Maastricht. This requires that "*nothing shall be done which in any way prevents, hinder or distorts competition*".

On 30th April 2004 the EU published the Directive on the "*coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*". This Directive was implemented in UK law in January 2006 in the form of the Public Contracts Regulations (Later amended in 2009 and 2011) sometimes known as the "PCRs". These Regulations form the heart of all purchasing by Central government, local authorities, bodies governed by public law, as well as associations formed by any of these who must comply. These are known collectively as "public bodies". More recently the Courts have ruled that bodies such as Registered Social Landlords including Housing Associations are considered to be bodies governed by public law and are therefore caught by the Regulations. This will mean that the new Clinical Commissioning Groups (CCGs), which will assume full commissioning responsibilities from April 2013, also fall within the scope or the Regulations.

All of these bodies must decide whether or not a particular procurement will be subject to the Regulations and be able to defend their decisions in the courts in the event of a legal challenge. Their decisions will depend on which services are being procured.

Procurement of many of the services which have fallen under the LES heading is not new to local Authorities. During the period from 1st January 2010 and 1st March 2013 the tendering exercises for the following services have been undertaken by Local Authorities:

- Alcohol prevention and treatment 162
- Drug misuse prevention and treatment 119
- Sexually transmitted diseases 76
- NHS Health checks 14
- Substance misuse 160

There is therefore an extensive body of experience in the purchasing of these services using methods which comply with EU and UK Regulation and law. Moreover there is also a body of suppliers of these services which understand the processes and how to tender successfully for contracts in these areas.

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Considerations when purchasing services

a) A compliant procurement process must be undertaken by a public body if there is a "market" for the service to be purchased. In general terms this means that if a service has previously been purchased under the Regulations by any other public body then a market is considered to exist. In their decision making, public bodies must also consider whether or not there is likely to be "cross border interest" in the services being procured. If they decide that this is the case, then they will advertise in the Official Journal of the European Union (OJEU). Currently around 18% of tenders for health, medical and social care services are advertised in the OJEU.

b) Can a competition take place? This requires a public body to assure itself that there are a sufficient number of "undertakings" active in the market to ensure fair competition. There is a considerable body of literature, and a number of court cases have taken place on the subject of defining an "undertaking". The generally accepted definition is "any entity carrying out activities of a commercial nature regardless of the type of entity". The definition is by function rather than by type. Therefore a registered charity and a sole trader can be undertaking s whilst a public body cannot be an undertaking.

c) The type of service to be purchased is an important consideration. All services are classified under one of two headings. These are known as Part A and Part B. The Part B classification includes, amongst others, Health, Education and Social Care services. If a service falls under the Part B classification, then all of the PCRs do not apply, the procurement may proceed under a "light touch" regime. However, Part B procurement does require that tenders are advertised; there is a technical specification for the required service; and that providers receive feedback at the end of the process.

So, a public body may decide that there is a market; there are sufficient undertakings to ensure that there will be competition for the contract, but the service falls into the Part B category. It therefore can do what it likes. Well unfortunately this is not the case.

Under the Regulations all public bodies have a general duty to ensure that services are procured using proceedings which are fair, transparent and apply equal treatment to all which have submitted a tender. The result of this general duty is that most public bodies conclude that the best way to demonstrate that they have complied with their duties is to operate a tendering process which, in general terms, complies with the PCRs. As a result, the vast majority of Part B services purchased by public bodies, and Local Authorities in particular, comply with the processes set out in the PCRs.

Local Authorities have a range of other statutory duties which are relevant to their purchasing processes. The most significant of these is to ensure that they acquire "best value" under the local Government Act 1999. This does not mean that they must buy the cheapest service offered, but as with the procurement rules, they are required to balance the quality of the service offered with the price quoted.

Legal Challenges

Public bodies must also be aware that the EU Remedies Directive of 2009 gave rights to dis-satisfied tenderers. They must be able to show, if necessary in a court of law, that they have complied with all of the rules as well as their general statutory duties. If they fail in any way, they lay themselves open to legal challenge by potential providers. TfC alone dealt with 38 legal challenges in the calendar year 2012. None got as far as court, all being resolved at an earlier stage; some needed the help of a specialist procurement solicitor to resolve the matter. One happy provider recently wrote that they were grateful for help with the challenge.

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Following the challenge the local Authority concerned had subsequently re-tendered and as a result the provider had been awarded a contract worth £240,000 per year.

Conclusion
There is no reason why CCGs or Local Authorities charged with providing services as public bodies should not comply in full with EU and UK law as far as the procurement of health services is concerned. Indeed, there is every reason to suppose that failure to comply will in many cases result in legal action by providers who could have been party to a contract to deliver the services. So it will be the courts who will decide many of the issues currently being raised about the purchasing of health services. Public sector procurement is a complex area, but is one in which Local Authorities have gained considerable experience over the past seven years.

Consider: There are claims that a culture of "targets setting" has damaged health services. In the context of procurement it is the specification allied to the contractual terms which rule. So perhaps the targets are just one dimension of service delivery which has been pursued to the exclusion of all else.

In a procurement/contracting culture there is no reason which targets cannot remain, but allied with a series of quality outputs and defined outcomes for service users and patients. Targets are not necessarily bad, but rather contribute to a rounded service which providers are contractually bound to deliver. It is said that this is a "privatisation" of health services. But just because some services are delivered by private companies this does not mean that the entire services have been privatised. The contract is king and that is held by the public body. The real challenges for both CCGs generally and local Authorities in taking over the Local Enhanced Services, lie in the quality of the service specifications they produce and the effectiveness of the management of the contracts which they let. Contractors which perform badly and fail to comply with the contractual terms should have their contracts terminated. So there is an argument which says that this approach can only benefit the ultimate service users and patients. Procurement should not be feared as, at its best, it is a powerful tool for change which uses competition to drive up quality.

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