

Resisting privatisation in the NHS

A branch guide to dealing with procurement in the NHS in England



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Introduction

Privatisation is a growing threat in the NHS.

The coalition government's Health and Social Care Act 2012 means that services – and staff – are increasingly being transferred out of the NHS to private companies or other organisations outside the public sector.

UNISON believes the NHS should be publicly provided and should remain out of the hands of profit-making organisations.

The union works hard to ensure that we follow our members when they are transferred out of the NHS so they can retain all the benefits of UNISON membership even after privatisation.

But pay, terms and conditions are generally better in the NHS, so the union fights hard to defend our health members from privatisation.

Get vocal, get active, get visible!

This document aims to give activists some of the technical detail necessary to fight privatisation plans.

However, there is no substitute for active campaigning.

Many of the victories that UNISON has won in recent years in overturning privatisation plans have been because members turned out at demonstrations, engaged the public in campaigns, and made sure the media heard about any harmful plans.

When confronted with a potential privatisation exercise, you should contact your regional officer as a first step. They may opt to refer you to colleagues at the UNISON Centre. UNISON also works with procurement experts who may be able to undertake targeted work in particular areas.

UNISON's [Fighting Cuts](#) pack includes many different sections on how to campaign and mobilise resources in defence of the NHS.

In addition, UNISON's [Influencing Guide](#) is designed to help members and the public get their voices heard in the new structures of the NHS.

About this guide

Procurement processes are complicated. This guide is not meant to be exhaustive but attempts to provide a broad outline of the procurement process and some campaigning tips for branches fighting privatisation.

This should be seen as a working document that will need to be adapted as the NHS is exposed to new governments, new legislation and new reforms.

The guide breaks down into four main areas:

1. how to avoid commissioners using competition in the first place;
2. being prepared and finding out information about services going out to tender;
3. what to expect and what to ask for when procurement is used; and
4. what tactics can be used if commissioners do opt for competition.

1. How to avoid commissioners using competition in the first place

The best way of preventing services leaving the NHS is to stop competition being used in the first place. So it is essential to get involved in decision-making processes early on.

A clinical commissioning group (CCG) that is considering putting services out to competition should first undertake some sort of engagement with their local population and local providers.

There have been circumstances already where commissioners have stated that they had no choice but to put services out to tender. This is unlikely to be the case, despite the legislation being stacked in favour of further competition.

What are we up against?

The most controversial elements of the Health and Social Care Act 2012 were put into practice the following year by the so-called Section 75 regulations (or, to give them their full name, the NHS Procurement, Patient Choice and Competition Regulations 2013). The regulator Monitor then produced guidance for commissioners on how these regulations should be interpreted.

The government indicated that further guidance from NHS England would be issued to update the Department of Health's previous [procurement guide](#) and that, along with Monitor's guidance, this would form a "Choice and Competition Framework". However, neither the NHS England guidance nor the Framework has been produced.

As a result, the system for choice and competition in the NHS lacks clarity, with many commissioners seeking legal advice on if, when and how they should be putting services out to tender. The government's interpretation of the latest EU directive on public procurement looks set to muddy the waters further.

There have been some occasions where commissioners, fearing complaints from private providers and ultimately sanctions from Monitor, have put services out to tender just to be on the safe side and to avoid a legal challenge. Equally, however, the lack of clarity in the guidance provides some opportunities for campaigners to ensure that commissioners do not need to use competition.

How can competition guidance be used to our advantage?

Much of [Monitor's guidance](#) is focused on prohibiting commissioners from engaging in "anti-competitive behaviour" and is heavily weighted in favour of producing greater competition.

However, there are a number of areas where there is flexibility and outlined below are six clear messages from Monitor's guidance (with relevant quotes and page references) that indicate that commissioners do not need to use competition in the first place.

a. There should be no default assumption of using competitive tendering for services

"There is no requirement... for commissioners to publish a notice inviting offers from prospective providers to supply NHS health care services... before awarding a contract to provide those services" [page 35]

"the... regulations do not establish a competitive tender process as the default mechanism that commissioners should use to buy services" [page 36]

b. Commissioners remain ultimately responsible for deciding whether to use competition or not

"It is for commissioners to decide what services to procure and how best to secure them in the interests of patients" [page 6]

"It is for commissioners to decide how to secure the needs of the health care service users for whom they are responsible" [page 19]

"It is for commissioners to determine ways of improving the quality and efficiency of NHS health care services" [page 30]

"Local circumstances vary, so the decision of how to go about procuring services (including, for example, whether to publish a contract notice) is a matter for commissioners" [page 37]

c. The extension of "patient choice" is not always necessary

"the... Regulations do not require commissioners to extend patient choice beyond patients' rights to choice set out in the NHS Constitution, or to promote competition by increasing the number of providers of a service in an area" [page 30]

"if a particular service (such as a community dementia service) is provided by a single provider in a local area, there is no requirement on the commissioner to introduce patient choice under the regulations" [page 31]

There are cases where "extending choice may be impracticable or inappropriate" [page 31]

d. Commissioners can continue to contract with a single provider

"publishing a contract notice may be unnecessary where, for example, only one provider is capable of providing the services in question" [page 35]

"commissioners can award a new contract to a single provider without publishing an intention to seek offers from providers where they are satisfied that the services are capable of being provided by only that provider" [page 35]

e. There are circumstances where patients will benefit from a lack of competition

"There will be circumstances where a decision to procure services without publishing a contract notice and/or running a competitive tendering process will be appropriate".

Examples of where this may apply are cases where: "there is only one provider that is capable of providing the services in question"; "a commissioner carries out a detailed review of the provision of particular services in its local area... and identifies the most capable provider or providers of those services" or "the benefits of publishing a contract notice would be outweighed by the costs of doing so" [pages 38-39]

f. Benefits can even arise from so-called "anti-competitive behaviour"

"Regulation 10(1)... includes the following non-exhaustive list of ways in which benefits might arise from anticompetitive behaviour: by the services being provided in an integrated way (including with other health care services, health-related services or social care services); and by co-operation between providers in order to improve the quality of services." [page 63] NB: improved quality is later defined as clinical benefits, better patient experience or better access for patients.

"In addition... 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, for example, through a reduction in duplicated patient assessments, etc." [page 63]

"A restriction on competition may be 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." [page 64]

2. Being prepared

How to find out information about services going out to tender

As mentioned above, early engagement is important. Meetings with the management of NHS trusts or CCGs should provide much of what you need to know.

A CCG has to publish its plans and any intention to tender out a service should also be shown in their board minutes. Keep checking their website for any announcements and to access minutes and agendas.

If commissioners commence competitive tendering this is announced by placing a formal notice in the public domain and activists should regularly check to see what is being advertised.

The government's [Contracts Finder](#) website lets you search for information about contracts worth more than £10,000. You can search for both "Early Engagement" and "Future Opportunity" tendering exercises.

UNISON's own contract alerts system enables the union to receive information about forthcoming procurement activity and to alert the relevant regional staff. It also confirms contract awards and stores information on all contracts issued in a database.

Engage and mobilise staff

Do not assume that just because UNISON nationally or at branch level opposes a move to outsource services that there will automatically be opposition to the plans from the wider workforce.

To start with, it is quite possible that many staff will not be aware of what is planned.

It is also possible that commissioners will have attempted to sell their plans in a way that obscures the privatisation element – for example, by emphasising their need to integrate health and social care services rather than their desire to do so by using competition.

It is important, therefore, to communicate plans to members (and non-members) at an early stage and where necessary to provide rebuttals to commissioner plans that aim to placate staff but without any solid reassurances in terms of the future of the service.

Using local media can also be an important way of doing this, and can have the additional benefit of getting members of the public onside.

3. What to expect and what to ask for if procurement is used

NHS bodies, especially CCGs, tend to be poor at following tendering processes properly and many fall foul – and may be challenged – over technicalities. This can be a good way to slow down or even halt a tendering process.

Commissioners are supposed to plan well ahead and would be expected to show in their plans any intention to review a service they had concerns over or where they intended to make changes for any other reason. They would be expected to have sensible discussion with any existing service providers if there were issues.

Once they decide they may need to make changes either to which organisation(s) provide services or to the nature of the services required, then they have to engage with the public and the users of the current services and explain what their intentions are.

If they decide after this engagement that change is needed they have to consider the options of simply modifying existing contracts or offering a contract (after suitable negotiations) to the only possible provider(s). Alternatively, they may opt for competitive tendering.

Most procurement processes are progressed by setting up some kind of project, which should have proper governance arrangements with necessary plans, registers and logs in place.

The typical stages of a procurement process can be summarised as follows:

- **Pre-procurement:** Commissioners set out their strategy for improving services or changing the way they are delivered.
- **Moves towards procurement:** Commissioners assess the performance of the current service; identify the costs and risks of procurement; decide whether to retain the current provider(s) or initiate a procurement process; produce an impact assessment; and make an appraisal of the various options available.
- **Active procurement:** Commissioners select their options once the legal and technical process of procurement has begun, usually with defined stages and timescales from advertising the service for tender, through to the awarding of the contract.
- **Post procurement:** The details of the contract award are put into place, such as any transfers of staff that may need to take place.

(NHS England's diagram summarising the procurement decision making process is attached as an annex to this guide.)

There are various items that you should expect to see and should ask for if they are not forthcoming. Here are some examples of key documents that should be produced:

- Procurement strategy
- Business case
- Procurement governance documents, such as the Project Initiation Document, terms of reference, and register of interests
- Stakeholder engagement strategy – including staff, patients and public
- An explanation of how commissioners will comply with patient involvement law laid out in Section 14Z2 of the amended NHS Act 2006 (see below for more information)
- Impact assessment
- Risk management process and risk register
- Procurement plan and timeline
- Strategy for dealing with potential conflicts of interest
- Strategy for dealing with confidentiality, including compliance with Freedom of Information Act
- Pre-qualification questionnaire documentation
- Memorandum of information to be provided to bidders
- Statements of required benefits and the scoring methodology for assessing bids

- Benefits realisation strategy

It is worth noting that in some recent examples, a simple reminder to commissioners by UNISON that these key documents should be produced has resulted in plans being delayed as commissioners scramble to conform to the law or best practice.

In well-managed projects, such documents should appear online to provide ease of access to the public and staff. UNISON may be given access to documents under conditions of confidentiality and advice should be sought from your region if this is the case. If there is a refusal to release documents, then a formal request can be made under the Freedom of Information Act – again advice should be sought.

Patient involvement

It is important to note that at all stages it is good practice and, in a number of circumstances, a legal requirement for commissioners to seek the views of staff and patients.

There are legal obligations to involve patients set out in the amended NHS Act 2006 – [Section 14Z2](#) applies to CCGs (and Section 242 to trusts and foundation trusts). These include requirements to have arrangements in place to discuss changes before they are made.

NHS Constitution

Similarly, the [NHS Constitution](#) provides a number of rights and commitments that commissioners can be held to.

For patients and the public:

- *“You have the right to be involved, directly or through representatives, in the planning of healthcare services commissioned by NHS bodies, the development and consideration of proposals for changes in the way those services are provided, and in decisions to be made affecting the operation of those services.” [page 9]*
- *The NHS commits “to make decisions in a clear and transparent way, so that patients and the public can understand how services are planned and delivered.” [pages 6-7]*
- *The NHS also commits “to provide you with the information and support you need to influence and scrutinise the planning and delivery of NHS services.” [page 9]*

For NHS staff:

- *“The NHS commits... to engage staff in decisions that affect them and the services they provide, individually, through representative organisations and through local partnership working arrangements.” [page 13]*

Reconfiguration guidance

The government’s [reconfiguration guidance](#) also includes a good practice framework for CCGs when planning and delivering service changes.

Page 8 of the guidance includes a number of key principles to be followed:

- *“Major service changes and reconfigurations must put patients and the public first”*
- *“Change must be clinically-led and underpinned by a clear clinical evidence base.”*
- *“Patients, the public and staff should be engaged throughout the development of proposals from their very early initiation through to implementation. Engagement should seek to build an on-going dialogue with the public, where they have an opportunity to shape and contribute to proposals, in addition to any formal consultation on options.”*
- *“Local authorities are essential stakeholders in the reconfiguration process, both through the local authority health scrutiny functions, but also the joint and integrated working between the NHS and local government through health and wellbeing boards.”*

4. What tactics can be used if commissioners do opt for competition?

It is important to act quickly and to challenge commissioners at the first opportunity after it becomes clear that a procurement process is to take place.

The first thing to do is ensure that commissioners have acted properly.

Are they able to provide staff and their unions with the information listed in the section above? If not, they need to be challenged to produce documents and to engage in meaningful consultation. Are they abiding by the NHS Constitution?

It is also important to get patients and the public onside.

From a public perspective, are commissioners engaging in an open and transparent procurement process that allows the views of local people to be properly reflected? If not, they need to be challenged to expose their plans to public scrutiny.

For patients, commissioners are obliged by Monitor's competition guidance (referred to above) to have considered in advance how they will "avoid any disruption to patient care if a new provider is selected" as a result of a competitive process (page 38). Can they provide evidence of having done this?

Local authorities

The new NHS structures mean there is an expanded role for local authorities in assessing the delivery of healthcare.

Have commissioners' plans been subjected to the scrutiny of councillors through the local health and wellbeing board?

If the plans constitute a significant alteration in the way services are delivered, have they been scrutinised by the council's health overview and scrutiny committee?

In-house bids

If the commissioner chooses to put a service that your NHS organisation is providing out to tender, it is important to insist that there should be an in-house bid. Proper arrangements need to be made to provide resources and expertise to enable a robust in-house bid to be put together.

The incumbent NHS provider should not be frozen out of bidding for that contract just because commissioners have chosen to expose it to competition.

UNISON believes that in most cases the NHS provider will be able to demonstrate that it provides greater stability, a higher quality of service and better value for money.

Late challenges?

Once a contract has been awarded to a non-NHS organisation, there may even be some cases where this can be challenged after the fact via local councils.

The details of the contract may only become known late on in the process. If it can be shown that the contract will or could disrupt or destabilise other NHS services then this could give rise to a potential challenge.

If the council considers that proposals for substantial service change are not in the interests of the local population or that consultation has been inadequate they can refer the plans up to the Secretary of State for Health.

Annex

NHS England's summary of the procurement decision-making process

