

Monitor

Making the health sector
work for patients

**Commissioning of
radiosurgery
services: guidance
following case
closure**
Case CCD 01/13

NHS

About Monitor

Monitor is the sector regulator for health services in England. Our job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit.

For example, we make sure foundation trust hospitals, ambulance trusts and mental health and community care organisations are well led and are run efficiently, so they can continue delivering good quality services for patients in the future. To do this, we work particularly closely with the Care Quality Commission, the quality and safety regulator. When it establishes that a foundation trust is failing to provide good quality care, we take remedial action to ensure the problem is fixed.

We also set prices for NHS-funded services, tackle anti-competitive practices that are against the interests of patients, help commissioners ensure essential local services continue if providers get into serious difficulty, and enable better integration of care so services are less fragmented and easier to access.

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1. Introduction

On 26 February 2014 we published a [case closure decision](#), setting out our reasons for closing our investigation into the commissioning of radiosurgery services in Sheffield. In this document we use learning from that case to offer guidance to commissioners facing similar circumstances in the future.

Please note: we have not made any findings in relation to the matters that we were investigating in this case. In particular, we have not determined whether or not NHS England or its predecessor commissioning organisation complied with the applicable rules.

2. Background to the case

We [opened an investigation](#) into the commissioning of radiosurgery services after receiving a complaint from Thornbury Radiosurgery Centre Limited (Thornbury), a provider of gamma knife radiosurgery services (gamma knife services). The complaint related to the conduct and procurement practices of the North of England Specialised Commissioning Group and of its successor from 1 April 2013, NHS England.¹

The conduct and procurement practices that Thornbury complained about took place either side of a change in the relevant rules and legal framework. Conduct occurring before 1 April 2013 was subject to the Principles and Rules for Co-operation and Competition,² while conduct occurring since 1 April 2013 is subject to the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (the Regulations).³ On 30 August 2013, we decided to focus our investigation on NHS England's conduct after 1 April 2013 and its compliance with the Regulations.⁴ This guidance relates to conduct that occurred after 1 April 2013 and is subject to the Regulations.

3. Our guidance

Commissioners must decide, acting within the framework of the Regulations, which services to procure and how best to do so in the interests of patients. This guidance

¹ The NHS Commissioning Board.

² See the [Principles and Rules for Co-operation and Competition](#)

³ The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500).

⁴ Our decision is detailed in our [statement of issues](#).

draws on information from documents published during the course of our investigation^{5,6} and covers the following areas:

- prioritisation and commissioning
- using evidence in decision-making
- acting transparently
- publishing details of all contracts awarded.

This guidance seeks to assist commissioners facing similar circumstances to those in this case to ensure they secure high quality and efficient services that work well for patients.

Prioritisation and commissioning

Commissioners may sometimes decide, in the face of competing priorities, that it is not practical to undertake a comprehensive commissioning exercise to choose their providers; they may instead adopt an interim position using a simple, expedient process. However, in these circumstances, commissioners must still act within the framework of the Regulations.

For example, it may appear to be a reasonable commissioning decision to only procure services from providers that held an NHS standard contract in the previous commissioning year. However, under the Regulations, commissioners must treat all providers equally, not favouring one provider (or type of provider) over another. Differential treatment between providers requires objective justification.⁷ In this example, if the commissioner's decision had the effect of excluding some existing providers from being able to provide a service (because they had provided direct services to NHS patients under other arrangements than an NHS standard contract), commissioners would need an objective justification for this. The objective justification would need to be well reasoned and based on evidence. If commissioners did not have a well reasoned objective justification based on evidence, we would normally expect them to also procure services from the other existing providers (those that had provided services under other arrangements than an NHS standard contract), under their interim commissioning position.

Additionally, commissioners need to remain flexible and open to the possibility of reviewing their interim commissioning decisions if circumstances change. For example, changing patient circumstances might be leading to an increase in waiting times; or developments in the provision of the service might mean that other

⁵ All relevant documents are available on the Monitor website [here](#).

⁶ This guidance should be read alongside our statutory guidance '[Substantive Guidance on the Procurement, Patient Choice and Competition Regulations](#)' (substantive guidance).

⁷ Regulation 3(2). For further guidance on this Regulation, see Section 2.3 of our substantive guidance.

providers are able to deliver the service in an innovative way. In either of these situations, commissioners should be prepared to review their interim commissioning decisions or strategy. They may want to consider whether there is anything they should do in response to the changing patient circumstances, or if the developments and innovation in service delivery can be used to benefit patients. A commissioner should be prepared to be more flexible and open to changing circumstances the longer any interim position they have adopted continues or is likely to continue.

Using evidence in decision-making

Under the Regulations, a commissioner must procure services from providers most capable of delivering its objectives and that provide best value for money.⁸ Commissioners should ensure that they evaluate objectively the ability of different potential providers to deliver the service specification and to improve quality and efficiency. Not doing so may mean that commissioners do not contract with the providers best placed to deliver high quality and efficient healthcare services. It may also mean commissioners do not create incentives for the selected providers to invest in improving quality and efficiency.⁹

When deciding whether or not to procure services from a provider, commissioners must make use of readily obtainable evidence, such as reported information on waiting times from providers (as required under NHS standard contracts). Commissioners must also consider the quality of the evidence on which they rely and put more weight on information which is objective and reliable. If the only information available to a commissioner is based on its internal views on the service being considered, the commissioner may want to consider obtaining more objective additional evidence. For example, a commissioner might engage with stakeholders including referring consultants, patients' groups, charities and other service providers. This kind of engagement may also assist commissioners in testing the robustness of their proposed decisions. A commissioner should take into account the value, complexity and clinical risk associated with the provision of services in question when deciding how much additional resource to commit to obtaining additional evidence.

Acting transparently

Commissioners must ensure that they conduct all their procurement activities openly, in a way that allows their behaviour to be scrutinised. Transparency is necessary for proper accountability. It should also mean that providers better understand how commissioners make decisions, and ultimately benefit patients by creating a more stable commissioning environment.

⁸ Regulation 3(3). For further guidance on compliance with this Regulation, see Section 2.3.2 of our substantive guidance.

⁹For example, as we observed in this case by a provider making investments in the quality of their assets and in additional capacity (either in-house or subcontracted).

Commissioners should inform those affected by their decisions what their decision is and the reasons for it. The appropriate level of detail that commissioners should give will depend on the specific situation, taking into account the impact that their decision has on the value, complexity and clinical risk of the services in question. To conform with the requirement to act transparently, commissioners should maintain records of the important decisions they have taken, including the reasons for them.¹⁰

Publishing details of all contracts awarded

Commissioners are required to publish details of all the contracts they award. This helps make sure commissioners are accountable for the decisions they take. It also gives providers who may not have been successful in obtaining a contract an understanding of the basis on which a contract was awarded.¹¹

¹⁰ Regulation 3(2). For further information on the requirement to act transparently, see Section 2.3 of our substantive guidance.

¹¹ Regulation 9(1). For further guidance on compliance with this Regulation, see Section 5.2 of our substantive guidance.



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