



## High Court hears first case considering NHS Procurement Regulations

The High Court has upheld the decision of NHS England (“NHSE”) not to award an interim contract for the provision of gamma knife treatment (“GKT”) services to an independent provider, QSRC Limited.

The case will be of particular interest to suppliers in the healthcare sector as it is the first case where the High Court considered the healthcare specific NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 (the “NHS Procurement Regulations”). These regulations apply to health care services commissioned by NHS England and Clinical Commissioning Groups.

Also significant in the case is the reliance on, and interpretation of, guidance issued by Monitor.

### The facts

GKT involves the use of precisely focussed beams of radiation to treat tumours or lesions within the brain. QSRC had established a GKT facility in partnership with University College London Hospital at the National Hospital for Neurology and Neurosurgery.

Before the establishment of NHSE on 1 April 2013, QSRC provided GKT treatment to 42 NHS patients. QSRC was not one of the holders of an NHS Standard Contract for the provision of GKT services so each of the patients was referred through Individual Funding Requests (“IFRs”). Only two standard contracts were held in London – one by St Bart’s Hospital and the other by the BUPA Cromwell Hospital.

From 1 April 2013, NHSE was tasked with carrying out a spending review which included the provision of ‘specialised services’. There was therefore a transitional period whilst this review took place, after which it was intended that a more formal procurement process could be used to determine who would provide GKT services.

During this time NHSE determined that it would no longer authorise the referral of patients to QSRC’s facility through the use of IFRs. Instead it would only refer patients to the private hospitals with which NHS Standard Contracts were in place. This effectively stemmed the flow of NHS patients to be treated by QSRC.

QSRC informed NHSE that it viewed this decision as unfairly favouring the holders of NHS Standard Contracts (in alleged breach of the NHS Procurement Regulations). QSRC asked NHSE to enter into an interim contract until the upcoming national procurement process for GKT services was concluded.

NHSE said that it was justified in not awarding an interim contract. It stated that an interim award would exacerbate the problem of oversupply of services in London; undermine the viability of the two commissioned providers; and that it would be inappropriate to put in place an interim contract whilst there was an upcoming national procurement for the services.

QSRC also referred the matter to Monitor who investigated but elected not to make a determination. QSRC launched judicial review proceedings against NHSE’s decision.

### The decision

The Court rejected QSRC’s claim and found in favour of NHSE. In reaching its decision, the Court relied on the April 2014 guidance from Monitor. The Monitor guidance stated that, “commissioners must treat all providers equally, not favouring one provider (or type of provider) over another. Differential treatment between providers requires objective justification. 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.”



NHSE had argued that QSRC was not an existing provider, because it did not hold an NHS Standard Contract (unlike St Bart's and the BUPA Cromwell Hospital). The Court rejected this approach, which meant that NHSE had to show that its decision not to award the interim contract and referring work to its two commissioned providers was objectively justified.

The Court found that NHSE's reasons were objectively justifiable. NHSE reasoned that to award an interim contract to QSRC would unfairly favour QSRC over other parties, of which there were at least nine, who were capable of providing GKT services – an approach which itself would be in breach of Regulation 3(2)(b) of the NHS Procurement Regulations. NHSE also raised the aforementioned issues of oversupply and that a future national procurement was planned.

### **Comment: what does this mean for suppliers?**

#### **Monitor's guidance was relied upon by the Court**

Whilst the ability of a purchaser to treat bidders differently where there is an objective justification is an established principle of procurement law, this decision is interesting because of the extent to which the Court relied upon guidance issued by Monitor.

The Court acknowledged that Monitor's guidance was guidance only and does not have legal force, but the interpretation of that guidance was considered almost authoritative in this case. It is possible that the Court could take a similar approach in other cases, meaning that Monitor's guidance and approach could have added relevance and significance.

#### **Objective justification is relevant to the NHS Procurement Regulations**

The NHS Procurement Regulations (in a similar vein to the Public Contracts Regulations, in other sectors) require that a procurement exercise must be fair, transparent and must not discriminate between bidders. However, Commissioners have discretion not to treat bidders equally where there is an objective justification for doing so – an argument put forward by NHSE and upheld by the Court.

In healthcare, due to the nature of the services and the important role that they play in society, the scope for Commissioners to find objective reasons to treat bidders unequally is arguably broader than in other sectors. Suppliers should be aware that Commissioners may seek to objectively justify unequal treatment in procurement processes and should be prepared to closely analyse whether the stated reasons are valid. This may involve looking closely at competition issues and published conflicts of interest policies in parallel.

#### **Healthcare procurement cases – more to come?**

The NHS Procurement Regulations came into force on 1 April 2013, but it has taken two and a half years for the first High Court case considering the Regulations to be heard. Since their introduction, there has been much debate over the interpretation of certain aspects of the Regulations so judicial clarity is welcomed.

Burges Salmon advise suppliers on procurement issues in the healthcare sector.

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