From the Rt Hon The Earl Howe P.C.
Parliamentary Under Secretary of State for Quality (Lords)

Department of Health

Richmond House
79 Whitehall
London
SW1A 2NS

Tel: 020 7210 4850

28 FEB 2013

Dear Colleague,

I am writing to you about the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013.

A perception has gained currency that the regulations would in practice force commissioners to open all services up to competition through tendering and contradict assurances that I gave to Parliament during the passage of the Health and Social Care Act 2012. Let me state categorically that this is neither intention nor the practical effect of the regulations.

I am determined to allay these concerns. I will start by explaining the intended effect of these regulations.

The requirements of the regulations continue the approach put in place by the previous administration which established a sector-specific framework known as *The Principles and Rules for Cooperation and Competition.*

I can assure you the procurement requirements go no further than existing UK procurement law (the Public Contract Regulations 2006). This law already applies to Primary Care Trusts and this has been reflected in procurement guidance since 2008.

Contrary to arguments from some commentators, I am absolutely clear that the regulations do not force commissioners to create new markets. Under Regulation 5, commissioners would not be obliged to advertise or competitively tender where no market exists and there is only one provider capable of delivering their requirements. This situation is likely to be true for 'technical reasons' as envisaged by the criteria under Regulation 5 (Paragraph 2(a)). In practice, this criterion will be broad in its application. For example, this may be the case where the requirement is for provision of acute hospital services accessible on single sites; a range of integrated services to be delivered in the community; or where clinical volumes need to be maintained to protect patient safety. It also likely to be the case for provision of services in more rural or remote areas of the country.

Furthermore, the regulations would not oblige commissioners to create the conditions for new markets to develop where they considered this unnecessary. For example, commissioners would not be obliged to fragment services to enable providers to compete or stimulate market entry where this would not be in patients' interests.

Importantly, the regulations enshrine the principle that it is commissioners – rather than Monitor – who are best placed to determine requirements for improving services and to decide which provider or providers are best able to deliver those requirements.

The regulations make clear that commissioning decisions must be in the best interests of patients. The overarching objective for procurement under the regulations is therefore that commissioners must act to secure provision of services that meet patients' needs and improve quality and efficiency.

The regulations protect patients' rights to choice under the NHS Constitution. They make commissioning processes much more transparent and put in place safeguards to protect patients from conflicts of interest, discrimination and anticompetitive conduct.

The regulations recognise the important role of Monitor in overseeing these requirements as an expert health-sector regulator with an overarching statutory duty to protect and promote patients' interests. This is far preferable to a situation where there is unmanaged competition and the only means of redress for poor procurement practice is through the Courts.

The Health and Social Care Act 2012 (section 76) foresees that Monitor would enforce the regulations. However, it is important to note that, during the passage of the Health and Social Care Bill, the Government removed provisions for these regulations to give Monitor power to direct commissioners to put services out to competitive tender. We did this in response to the NHS Future Forum's recommendations that Monitor's role should not be to promote competition.

As a last resort, Monitor would have power to declare a contract ineffective as a result of it having been awarded in breach of the regulations. However, Monitor would not have power to go further and direct a commissioner as to when and how to put services out to tender. It would therefore be a matter for the commissioner to reconsider its options for how best to meet their patients' needs.

Finally, we have made clear that we expect Monitor and the NHS Commissioning Board to support commissioners through advice and guidance. I welcome the commitment of these organisations to doing this jointly. This will include guidance to help commissioners make decisions on the circumstances in which competitive tendering would be likely to be effective and where this would not be appropriate. In addition, Monitor

will be required to publish guidance explaining how it will use its investigative and enforcement powers under the regulations. This will reduce uncertainty for commissioners and give them greater confidence that decisions in patients' best interests should not lead to regulatory intervention. Monitor is required to consult on this guidance, including any subsequent revisions, and the guidance must be approved by the Secretary of State.

I hope that the clarifications I have set out in this letter will help to address any concerns that you may have. But, given the importance of these matters, I am fully committed to exploring the nature of your concerns about the regulations and to consider the options for addressing these. I would like to assure you that I take the concerns raised seriously, and intend to approach these discussions with an open mind as to how to address them.

Yours sincerely,

Earl Howe

EARL HOWE