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## WELCOME...

To the first issue of the legal newsletter. We hope you had a relaxing Christmas and that you are sticking to your New Years resolutions.

In this issue we touch upon the new Selection Questionnaire, the new Integrated Support and Assurance Process, Sustainability and Transformation Plans, vexatious FOI requests, as well as a number of other important topics.

## PROCUREMENT NEWS

1. With immediate effect the new **Selection Questionnaire (SQ)** is mandated for use by all contracting authorities, in all procurements above the relevant EU thresholds. The SQ is aligned with the European Single Procurement Document (ESPD) and contains some key changes from the original PQQ.

- For example, suppliers can now self-certify that they meet the requirements at the selection stage and the contracting authority can only seek evidence of this from the preferred bidder at the award stage.
- The SQ also no longer contains the additional PQQ modules and instead contains new questions on modern slavery, steel, skills and apprenticeships, which will need to be used on a case by case basis.

SoEPS will be adapting its documents to observe the Selection Questionnaire.

2. A White Paper has been published by Professor Sue Arrowsmith on **Brexit Implications for public and utilities procurement law**.

- The paper states that the Public Contracts Regulations (PCR) 2015 are likely to remain effective

## Feedback

Any feedback or questions about anything featured please contact **Natalia Rojas** Head of Legal and Compliance or **Charlotte Cross** Paralegal:  
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at least until the end of 2019 and possibly for much longer.

- The paper suggests that the UK could negotiate a trade agreement with the EU covering public procurement, which could specify that the UK applies the current EU procurement regime, resulting in no real change to public procurement.
- However, the paper also suggests that the trade agreement could be based on the framework that the EU utilises with other trading partners, which would be more limited, resulting in reduced coverage for the UK procurement regime and reduced access to foreign procurement markets.
- However, the paper proposes that this would allow the UK to use more flexible award procedures and enable national flexibility in the regulation of procurement.

To view the White Paper please click [here](#).

3. A **Protocol on Procedures for Public Procurement Cases** is due to be approved by the Technology & Construction Court, regarding the conduct of procurement claims. This court looks after the majority of claims concerning breaches of the Regulations.

The Protocol will not be mandatory, but if it is not followed it could result in cost penalties. The Protocol in particular focuses on the parties' pre-action conduct, promoting the resolution of disputes before the need for litigation.

The Protocol is in an early stage of development so watch this space.

4. The Competition & Markets Authority (CMA) recently published an open letter to public sector procurement officials with **advice on how to spot bid rigging**.

- The letter highlights three main types of bid rigging; bid rotation, cover pricing and bid suppression.
- Any bidder involved in bid rigging could be excluded from competition under the PCR 2015 or subject to other serious financial penalties for breach of competition law. The letter serves as a reminder to procurers to be alert to bid rigging and to take appropriate action when it arises.

To view the open letter please click [here](#)

5. A new Crown Commercial Service Procurement Policy Note has been published regarding contracting authority obligations to place contract opportunities and awards on the Contracts Finder website. The Policy Note serves as a reminder to authorities to comply with their **Contracts Finder obligations**.

For more information please contact us.

To view policy note please click [here](#)

6. A new **Integrated Support and Assurance Process** (ISAP) has been published by NHS England, which aims to assist commissioners and providers with the tendering of large and complex contracts.

- The initial guidance on the ISAP briefly covers the lessons learnt from past complex contracts, such as the Cambridge UnitingCare Contract which collapsed.
- The initial guidance also outlines

when the ISAP is applicable, the stages of the ISAP, next steps, key risk management questions and feedback.

- Full guidance providing more information on the submissions and evidence required at each procurement stage is expected to be published at a later date.

A SoEPS briefing note on the ISAP is in the process of being developed.

To view initial guidance please click [here](#)

7. A new guidance note called 'The Public Contracts Regulations 2015 and NHS Commissioners' has been published by the Department of Health, which summarises the key requirements of the PCR 2015 **Light Touch Regime (LTR)**.

The main points which commissioners should be aware of are:

- Any new healthcare service procurement process starting on or after 18 April 2016 needs to comply with LTR requirements.
- The LTR is applicable where the contract value exceeds £589K Euros.
- Under the LTR, provided the PCR principles of equal treatment and transparency are satisfied, Commissioners can freely determine the procurement process they wish to use.
- Where the LTR applies, there is an additional requirement to advertise by a contract notice or a prior information notice (PIN) in the OJEU, except where the negotiated procedure without prior publication is being used.

- When running and designing their procurement procedures, commissioners can use award criteria which are specifically relevant to patient care.

To view the guidance note click [here](#)

## CASE LAW

### 1. **EnergySolutions EU Ltd v Nuclear Decommissioning Authority**

- The High Court concluded the Nuclear Decommissioning Authority's evaluation process failed to meet the PCR principles of transparency and equal treatment.
- As a result, the Court found that the contract was wrongly awarded and the winning bidder should have been disqualified.

SoEPS has prepared a briefing note available on request.

### 2. **Newlyn Plc v London Borough of Waltham Forest**

- The claim brought by an unsuccessful bidder was struck out by the High Court on the basis that the PCR 2015 did not apply.
- The contract in question was for enforcement agency services and the Judge concluded that this was a services concession contract and thus the PCR was not applicable.
- As a result, the Contractor tried to bring a claim for judicial review, suggesting that they had a legitimate expectation that the PCR would be applicable.

- The Court refused to allow the judicial review claim despite the contractor's arguments. The Judge concluded that even if the judicial review claim was successful, the PCR would still not be applicable to the contract and thus the contractor would have nothing to gain from making the judicial review claim.

To read the full case, please click [here](#)

### 3. Kent Community Health NHS Foundation Trust v NHS Swale CCG and NHS Dartford, Gravesham and Swanley CCG

- An automatic suspension which had arisen in proceedings challenging the award of a contract was set aside by the High Court, who concluded damages were adequate.
- The CCG's argued that as the contract in question had already expired, they should be free to contract with another bidder, which the Court agreed with and thus the suspension was lifted.

To read the full case, please click [here](#)

## HEALTHCARE NEWS

1. 44 **Sustainability and Transformation Plans (STPs)** are due to be published soon and they will contain a variety of proposals, some of which are likely to be controversial.
  - Courts have made it clear that public bodies have the right to develop formal proposals, but there are statutory obligations, as well as NHS England guidance (such as [Engaging local people – A guide for local areas developing Sustainability and Transformation Plans](#)), which make it clear that patients and the public

should be engaged in the proposal development.

- Engagement is an ongoing process and it is more than just consulting the public when proposals have already been drawn up. If patients and the public are not sufficiently engaged in the development of proposals, then the public bodies could be subject to a judicial review challenge.

When developing proposals public bodies should:

- Publicise how patients will be involved in each stage of the commissioning process.
- As soon as discussions about a proposal begin, an engagement strategy should be planned.
- Provide patients with enough information about the proposal for example, clearly set out the proposal, what is being planned, the reasons for it and how it will effect patients and the public.
- Be open minded, listen to public feedback and be prepared to make changes to proposals.
- Wait for public responses and feedback before making final decisions on proposals.
- Understand that consultation is not where the public and patients vote and decide on proposals. Unpopular decisions may be made, but the public bodies should provide sufficient reasons for their decisions.
- Involve the local authority early on in the process.
- Ensure they follow relevant law and NHS England Guidance.

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2. The risk of a **conflict of interest** in the NHS has increased due to increased collaboration between the NHS, the public and independent sectors and there has been concern that conflicts are not being consistently managed across the NHS. As a result, NHS England has developed some proposals regarding conflict management.

These proposals include:

- Ensuring all NHS staff understand what a conflict of interest is and the situations when a conflict can arise.
- Outlining what is acceptable for certain types of interest (for example, obtaining approval from an NHS employer for outside employment).
- Setting out how interests are to be identified and managed (such as completing a declaration of interest form every year).
- Publishing certain information regarding the interests of NHS staff.
- Having a specific process in place to appropriately manage breaches of conflict of interest policy.

We are currently waiting on NHS England to publish the latest statutory guidance on conflicts of interest which was consulted on in September 2016.

## IT AND TECHNOLOGY

1. The UK, as part of its Brexit talks with the EU, is looking to seek **mutual recognition for its certification of medical devices**.

- To obtain mutual recognition, the UK would have to mirror future EU reforms for regulation of devices. If the UK regulates its medical devices significantly differently from the EU

then manufacturers of the devices could prioritise other markets, which would have a negative impact on the UK industry and ultimately the patients.

- Currently all medical devices used in the EU must have CE marking, to confirm that they meet EU Regulations. The British Standards Institution (BSI) is currently an authorised body which undertakes CE marking. When the UK leaves the EU, it is proposed that a mutual recognition agreement be made with the EU, so that BSI can continue to undertake CE marking.

## DATA PROTECTION AND FOI

1. The case of Parker v Information Commissioner provides some useful guidance on **when an FOI request can be regarded as vexatious** under s.14 of the Freedom of Information Act (FOIA). The case also provides guidance on how documentation should be prepared to prove that a request is vexatious.

- The requestor in the case was a volunteer for a Research Ethic Committee (governed by the Health Research Authority (HRA)) whose appointment came to an end.
- When the requestor was not reappointed, he was aggrieved and so made a number of FOI requests.
- The requestor's most recent request was deemed to be materially similar to a previous request and so the HRA proposed that the request was vexatious.
- The requestor rejected the finding and despite complaining to the

Information Commissioner (IC), appealing to the First Tier Tribunal and Upper Tribunal, the vexatious exemption was upheld.

Some key points to take from the case are:

- An FOI request is likely to be vexatious if the requestor has made a significant number of similar FOI requests previously.
- If the requestor's previous requests have not been dealt with sufficiently, then it may be difficult to argue that the current request is vexatious.
- Where the request is for vengeance purposes and is persistent and distressing, the request will not automatically be regarded as vexatious.
- If the request is genuinely in the public interest, the vexatious exemption may not be applicable. Whether the request is in the public interest should always be considered before applying the vexatious exemption.
- It is essential that a clear chronological record is kept of all FOI requests, including the content and context of requests as well as the adequacy of responses, to ensure that the Authority has sufficient evidence to prove the requests are repetitive and similar in nature and are therefore vexatious.

To see the full case please click [here](#)

2. A **Digital Economy Bill**, which is currently being considered by Parliament, proposes to increase data sharing in the public sector.

- According to the Cabinet Office, the purpose of the new Bill is to combat fraud, aid research and improve welfare.
  - Upon reviewing the Bill, the Information Commissioner suggested that greater transparency is required, for example she said that the public should "understand the purpose of and how their data will be shared, and they should have the ability to challenge that."
  - The Information Commissioner also suggested that the codes of practice, which govern the new data sharing provisions, need to be more transparent and there needs to be more consistency.
3. Both the UK Culture Secretary and Information Commissioner have suggested that the **General Data Protection Regulation** (GDPR), which is due to come into effect on 25 May 2018, is likely to apply in the UK before it leaves the EU.
- If this is the case, the GDPR is expected to be implemented into UK law, as a result of the Great Repeal Bill (proposed to be implemented once Brexit has taken effect and will enshrine EU laws into UK law).
  - If the GDPR does not apply prior to Brexit or the UK implements its own rules, the Information Commissioner has suggested that these alternative rules would "still need to be deemed adequate or essentially equivalent" to the GDPR.
  - The GDPR will bring in a variety of changes including giving consumers control over their data, mandatory data breach reporting and higher fines when breaches are made.

- In anticipation of the GDPR or similar rules being implemented, organisations should begin preparing, so that they are ready to apply the new rules when they come into effect.
- The Information Commissioners Office (ICO) has already published 12 steps, which prepares organisations for the GDPR and the ICO aims to publish more detailed guidance in the near future.

To view the steps please click [here](#)

4. Recently there have been a number of **cyber attacks on healthcare providers** and it is predicted that these attacks will become more sophisticated.

- Healthcare providers need to sufficiently protect their IT systems and appropriately manage attacks or there could be serious consequences, such as criminal investigations, civil liability claims, health and safety investigations, inquests and CQC investigations.
- There has been a cyber security programme developed by NHS Digital which healthcare providers can use to assist them with improving their cyber security.
- Healthcare providers should also follow the ten data security standards developed by the National Data Guardian.

To see the standards please click [here](#)

## OTHER NEWS...

1. **Government Commercial Operating Standards** (Iteration ii) have been published by the Government Commercial Function. They set out how government departments should operate commercially and they aim to promote practices and procedures that will ensure strong commercial behaviours and obtain value for money.

To view the Operating Standards please click [here](#)