



New year, new  
procurement regime for  
health services in England

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# The Provider Selection Regime

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## **New year, new procurement regime for health services in England – the Provider Selection Regime**

The 1<sup>st</sup> January 2024 saw The Health Care Services (Provider Selection Regime) Regulations 2023 (the "**PSR Regulations**") come into force. The PSR Regulations remove the procurement of health care services by relevant authorities in England from the scope of the Public Contracts Regulations 2015 and provide those relevant authorities with more flexible processes to select providers to provide health care services in England via the Provider Selection Regime. Whilst competitive tendering is still available to relevant authorities, it also allows for other routes that may be more proportionate.

The PSR Regulations can be found [here](#) and NHS England's statutory guidance (the "**Guidance**") can be found [here](#). NHS England have also prepared a toolkit – including slide decks, Find a Tender supplementary guidance, end-to-end process maps and flowcharts – which can be found [here](#).

This document explores how the PSR Regulations apply in practice and a high-level overview of the requirements that relevant authorities will need to comply with.

### **When do the PSR Regulations apply**

The PSR Regulations will apply from 1<sup>st</sup> January 2024:

- to relevant authorities;
- who are procuring relevant health care services; and
- for the purposes of the health service in England.

The PSR Regulations will not apply to any contract award procedure commenced before 1<sup>st</sup> January 2024. They will, however, apply to modifications to any contract for relevant health services whether or not that contract was awarded under the PSR Regulations or not or before or after the 1<sup>st</sup> January 2024.

### **To whom do the PSR Regulations apply?**

The PSR Regulations apply only to "relevant authorities" who are procuring relevant health care services. "Relevant authority" is defined in section 12ZB of the National Health Service Act 2006 and includes the following organisations:

- NHS England
- Integrated care boards (ICBs)
- NHS trusts
- NHS foundation trusts
- Local authorities in England
- Combined authorities

Authorities that do not fall within the above – including, for example, DHSC or its executive agencies, UKSHA or other ministerial departments – cannot benefit from the PSR Regulations and will need to continue complying with the Public Contracts Regulations 2015 where applicable.

Note that the PSR Regulations apply to the health service in England only. The Welsh Government have recently passed enabling legislation which would allow them to introduce a similar system and there is a current consultation on-going. As such, it is likely that a similar regime will be introduced in Wales in the near future.

### **To what services do the PSR Regulations apply?**

The PSR Regulations only apply to the procurement of "relevant health care services" by relevant authorities for the purpose of the health service in England. Schedule 1 of the PSR Regulations list the services which fall within the scope of relevant health care services. A full list can be found [here, but in broad terms the PSR Regulations apply to clinical services delivered to patients](#).

Services which fall outside the scope of the PSR services cannot be procured via the PSR Regulations. The PSR Regulations do not apply to goods and non-health care services (for example medicines, medical equipment, cleaning, catering, business consultancy services, social care) unless those goods or services are procured alongside relevant health care services where those relevant health care services are the main subject-matter of the contract and those additional goods or services could not reasonably be supplied under a separate contract (i.e. a "mixed procurement").

### **Is there a financial threshold which determines when the PSR Regulations apply?**

No, there is no financial threshold for health care services. The PSR Regulations apply to the arranging of all health care services regardless of their anticipated value. However, the Guidance states that relevant authorities are expected to take a proportionate approach to ensure their approach to implementing the PSR Regulations does not create disproportionate burdens relative to the benefits that will be achieved.

### **Overarching principles**

When procuring relevant health care services pursuant to the PSR Regulations, relevant authorities must act in accordance with the procurement principles set out in regulation 4.

The principles include acting with a view to:

- securing the needs of the people who use the services;
- improving the quality of the services; and
- improving efficiency in the provision of the services.

In seeking to comply with the above, relevant authorities may also consider the value of providing services in an integrated way.

The principles also require relevant authorities to act transparently, fairly and proportionately in applying the PSR Regulations.

Relevant authorities will be best able to demonstrate that they have complied with the overarching principles by referring to how they have been considered within documents created and maintained as part of the procurement process.

### **Selecting the applicable procurement processes**

The PSR Regulations set out five possible processes that relevant authorities must follow in certain circumstances. Where a relevant authority wishes to procure relevant health care services to which the

PSR Regulations apply, the first step that a relevant authority is to identify the applicable process or processes set out in the PSR Regulations. Relevant authorities are expected to identify the appropriate process(es) in advance of an existing contract coming to an end. The fact that a particular process was used to select a provider in the past does not mean the same approach must or should be used in the future.

The PSR Regulations set out which process must or may be followed in certain circumstances and they can be summarised as follows:

Process	When that process may or must be used
<b>Direct Award Process A</b>	<p>Allows a contract to be awarded to a provider where there is limited or no reason to seek a change from an existing provider or to assess providers against one another because the existing provider is the only one that can deliver the health care services.</p> <p>Where all of the following conditions apply, the relevant authority <u>must</u> follow Direct Award Process A:</p> <ul style="list-style-type: none"> <li>• there is an existing provider of the relevant health care services;</li> <li>• the relevant authority is satisfied that the relevant health care services are capable of being provided only by the existing provider due to the nature of those services; and</li> <li>• the procurement is not to conclude a framework agreement.</li> </ul>
<b>Direct Award Process B</b>	<p>Allows a contract to be awarded to providers where there is limited or no reason to seek a change from an existing provider or to assess providers against one another because patients have a choice of providers.</p> <p>Where all of the following conditions apply, the relevant authority <u>must</u> follow Direct Award Process B:</p> <ul style="list-style-type: none"> <li>• the proposed arrangements relate to relevant health care services in respect of which a patient is offered a choice of provider;</li> <li>• the number of providers is not restricted by the relevant authority;</li> <li>• the relevant authority will offer contracts to all providers to whom an award can be made because they meet all requirements in relation to the provisions of the relevant services to patients;</li> <li>• the relevant authority has arrangements in place to enable providers to express an interest in providing the relevant services; and</li> <li>• the procurement is not to conclude a framework agreement</li> </ul>

	<p>NB This process applies where a provider has been successfully assessed for an NHS Standard Contract under Regulation 42B of the NHS Standing Rules Regulations 2012.</p>
<p><b>Direct Award Process C, Most Suitable Provider Process or Competitive Process</b></p>	<p>Allows a contract to be awarded to a provider where there is limited or no reason to seek a change from an existing provider or to assess providers against one another because the existing provider is satisfying its existing contract and will likely satisfy a new contract.</p> <p>Where all of the following conditions apply, the relevant authority <u>must</u> follow either (i) Direct Award Process C (ii) Most suitable Provider Process or (iii) the Competitive Process:</p> <ul style="list-style-type: none"> <li>• the relevant authority is not required to follow Direct Award Process A or B;</li> <li>• the term of an existing contract is due to expire;</li> <li>• the relevant authority proposed a new contract to replace the existing contract at the end of its term;</li> <li>• the "considerable change threshold" is not met. The considerable change threshold will be met if (i) the proposed contract is not materially different to the existing contract (when it was entered into) (ii) there are no changes in the relevant health care services which are attributable to the decision of the relevant authority (iii) the lifetime value of the proposed contract is no more than £500,000 higher than the lifetime value of the existing contract (when it was entered into) and (iv) the lifetime value of the proposed contract is no more than 25% higher than the lifetime value of the existing contract (when it was entered into). Note there are exemption where there is a change in identity of provider due to corporate changes (such as merger or acquisition or insolvency) or where changes in services or value are in response to external factors beyond the relevant authority's control (such as change in user volume or changes in price determined in accordance with a formula provided in contract documents);</li> <li>• the relevant authority is of the view that the existing provider is satisfying the existing contract and will likely satisfy the proposed contract to a "sufficient standard"; and</li> <li>• the procurement is not to conclude a framework agreement.</li> </ul>
<p><b>Most Suitable Provider Process or Competitive Process</b></p>	<p>Allows a contract to be awarded to a provider without a competition because the relevant authority can identify the most suitable provider.</p> <p>Where all of the following conditions apply, the relevant authority <u>must</u> follow either (i) the Most suitable Provider Process or (ii) the Competitive Process:</p>

	<ul style="list-style-type: none"> <li>the relevant authority is not required to follow Direct Award Process A, B or C or the Most Suitable Provider Process or Competitive Process for the reasons set out in the immediately above row;</li> <li>the relevant authority is of the view, taking into account likely providers and all information available to the relevant authority at the time, that it is likely to be able to identify the most suitable provider; and</li> <li>the procurement is not to conclude a framework agreement.</li> </ul>
<b>Competitive Process</b>	<p>A competitive process to award a contract.</p> <p>Where the following condition applies, the relevant authority <u>must</u> follow the Competitive Process:</p> <ul style="list-style-type: none"> <li>the relevant authority is not required to follow Direct Award Process A, B or C or the Most Suitable Provider Process or Competitive Process for the reasons set out in the two rows immediately above.</li> </ul>
<b>Framework agreement – competitive procedure</b>	<p>Where the procurement is to conclude a framework agreement, the relevant authority <u>must</u> follow the competitive process.</p>
<b>Urgent award</b>	<p>In limited circumstances, relevant authorities may need to act rapidly to address immediate risks to patient or public safety.</p> <p>Where a relevant authority considers that an award:</p> <ul style="list-style-type: none"> <li>must be made urgently;</li> <li>for a reason(s) that was not foreseeable by the relevant authority and not attributable to the relevant authority; and</li> <li>delaying the award to follow the relevant process would likely pose a risk to patient or public safety.</li> </ul> <p>Then they may award a contract without following the relevant process.</p>

### Following the relevant process

Once the relevant authority has determined the appropriate process, it must then follow that process. The requirements of each process can be summarised as follows:

Process	Requirements
<b>Direct Award Process A</b>	<ul style="list-style-type: none"> <li>award a contract without a competition; and</li> </ul>

	<ul style="list-style-type: none"> <li>publish notice of award to Find a Tender within 30 days of award.</li> </ul>
<b>Direct Award Process B</b>	<ul style="list-style-type: none"> <li>award a contract without a competition; and</li> <li>publish notice of award to Find a Tender within 30 days of award.</li> </ul>
<b>Direct Award Process C</b>	<ul style="list-style-type: none"> <li>decide, taking into account the key criteria and applying the basic selection criteria, whether it is content that the existing provider is (i) satisfying the original contract and (ii) will likely satisfy the proposed contract to a sufficient standard;</li> <li>if so, it may publish a notice of intention to make an award to existing provider to Find a Tender and observe a standstill period of eight clear working days (see below for further details on calculating this period);</li> <li>If no challenge is received during that period, the relevant authority may enter into the contract following expiry of the standstill period; and</li> <li>publish notice of award to Find a Tender within 30 days of award.</li> </ul>
<b>Most Suitable Provider process</b>	<ul style="list-style-type: none"> <li>submit a notice of intention to follow the Most Suitable Provider Process to Find a Tender;</li> <li>not sooner than 14 days after the publication of that notice, identify potential providers who may be the most suitable provider (with reference to the key criteria and the basic selection criteria);</li> <li>assess the potential providers identified and choose, taking into account the key criteria and applying the basic selection criteria, the most suitable provider to whom to make an award;</li> <li>publish a notice of intention to make an award to existing provider to Find a Tender and observe a standstill period of eight clear working days;</li> <li>If no challenge is received during that period, the relevant authority may enter into the contract following expiry of the standstill period; and</li> <li>publish notice of award to Find a Tender within 30 days of award.</li> </ul>
<b>Competitive Process</b>	<ul style="list-style-type: none"> <li>determine the award criteria, taking into account they key criteria and applying the basic selection criteria;</li> </ul>

	<ul style="list-style-type: none"> <li>• publish a notice to Find a Tender inviting offers to provide the relevant health care services;</li> <li>• assess any offers received in accordance with the award criteria and decide the successful provider;</li> <li>• promptly inform both successful and unsuccessful providers about decision (including reasons why unsuccessful providers were unsuccessful and successful provider was successful);</li> <li>• publish a notice of intention to make an award on Find a Tender and observe a standstill period of eight clear working days;</li> <li>• If no challenge is received during that period, the relevant authority may enter into the contract following expiry of the standstill period; and</li> <li>• publish notice of award to Find a Tender within 30 days of award.</li> </ul>
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### Key criteria

Note that the Direct Award Process C, Most Suitable Provider and Competitive Processes require relevant authorities to take into account the key criteria.

The five "key criteria" which relevant authorities must consider are set out in regulation 5:

- **quality and innovation:** the need to ensure good quality services and the need to support the potential for the development and implementation of new or significantly improved services or processes that will improve the delivery of health care or health outcomes;
- **value:** the need to strive to achieve good value in terms of the balance of costs, overall benefits and the financial implications of a proposed contracting arrangement;
- **integration, collaboration and service sustainability:** the extent to which services can be provided in (i) an integrated way (including with other health care services, health-related services or social care services), (ii) a collaborative way (including with providers and with persons providing health-related services or social care services) and (iii) a sustainable way (which includes the stability of good quality health care services or service continuity of health care services), so as to improve health outcomes;
- **improving access, reducing health inequalities and facilitating choice:** ensuring accessibility to services and treatments for all eligible patients, improving health inequalities and ensuring that patients have choice in respect of their health care; and
- **social value:** whether what is proposed might improve economic, social and environmental well-being in the geographical area relevant to a proposed contracting arrangement.

The relative importance of each of those key criteria is not prescribed in the PSR Regulations and it is for the relevant authority to determine the relative importance of each criterion based on the proposed contracting arrangements.



## **The basic selection criteria**

Except when following Direct Award Process A, Direct Award Process B or awarding a contract under a framework agreement, the relevant authority must apply the "basic selection criteria" in accordance with Schedule 16. The basic selection criteria are generally similar to the familiar selection criteria set out in the Public Contracts Regulations 2015 and may only relate to a provider's:

- suitability to pursue a particular activity;
- economic and financial standing; and
- technical and professional ability.

A relevant authority must limit any requirements to those that are appropriate to ensure that a provider has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded and all requirements must be related and proportionate to the subject-matter of the contract or framework agreement.

## **Exclusions**

A relevant authority must not award a contract to a provider and may exclude a provider from a process where that relevant authority would be obliged to exclude that provider from participation in a procurement procedure under regulation 57 of the Public Contract Regulations 2015. These criteria relate to criminal offences, professional honesty, insolvency, reliability and non-payment of taxes or social security contributions.

## **Standstill periods and aggrieved providers**

Where Direct Award Process C, Most Suitable Provider Process or Competitive Process is used, the relevant authority must not enter into the relevant contract or framework before the end of the standstill period, being a period of eight clear working days after the publication of the notice of intention to award. That eight working day period commences on the day after the notice of intention to award is published and ends eight clear working days *after* that (so, in essence, the standstill period is a total period of one day (working or not) plus eight working days) – see the Guidance for worked examples.

Any provider who is aggrieved by the decision and believes there has been a failure to comply with the PSR Regulations may make written representations to the relevant authority before the end of the standstill period.

Where a relevant authority receives such written representation, it must:

- ensure each provider who made representations is afforded such further opportunity to explain or clarify the representations made as the relevant authority considers appropriate;
- provide promptly any information requested by an aggrieved provider (where the relevant authority has a duty to record that information under regulation 24 – see below) unless provision of that information (a) would prejudice the legitimate commercial interests of any person, including those of the relevant authority (b) might prejudice fair competition between providers, or (c) would otherwise be contrary to the public interest;
- review the decision to award the contract or conclude the framework agreement, taking into account the representations made; and

- make a further decision whether to (i) enter into the contract or conclude the framework agreement as intended after the standstill period has ended (ii) go back to an earlier step in the selection process and repeat that step and subsequent steps in accordance with the relevant procedure or (iii) abandon the procurement (in accordance with regulation 15). The further decision must be communicated promptly to (a) each provider from which the relevant authority received representations and (b) each provider to whom the relevant authority intended at the beginning of the standstill period to award the contract or to conclude the framework agreement.

NHS England has established the PSR review panel to provide independent expert advice to relevant authorities with respect to the review of PSR decisions during the standstill period. Aggrieved providers may also seek involvement of the PSR review panel.

Where written representations are received, the standstill period ends on such day as:

- where the relevant authority decides it is to conclude the contract or framework agreement, (i) the relevant authority has decided that it is ready to enter into the contract or conclude the framework agreement (ii) the relevant authority has carried out the requirements set out above (iii) the relevant authority has informed providers of its further decision (iv) the relevant authority does not intend to make any, or any more, subsequent further decisions in accordance with paragraph and (v) there have been no fewer than five working days since the relevant authority informed providers of its further decision; or
- where the relevant authority decides it is to abandon the procurement or go back to an earlier step (i) the relevant authority has decided to abandon the procurement or to go back to an earlier step in the selection process and repeat that step and subsequent steps in accordance with the relevant procedure (ii) the relevant authority has carried out the requirements set out above (iii) the relevant authority has informed providers of its further decision (iv) the relevant authority does not intend to make any, or any more, subsequent further decisions and (v) there have been no fewer than five working days since the relevant authority informed providers of its last further decision.

### **Advice**

Where a relevant authority makes decisions pursuant to the PSR Regulations relevant authorities may seek and receive independent expert advice.

In particular, NHS England has established the PSR review panel to provide independent expert advice to relevant authorities with respect to the review of PSR decisions during the standstill period. This includes the PSR review panel and the Choice Provider Qualification Complaints Panel.

### **Framework agreement**

The Competitive Process must be used to conclude a framework agreement.

When concluded, the framework agreement must identify the relevant authorities that may award contracts based on the framework agreement and only those relevant authorities identified may award contracts pursuant to the framework. The framework may also set out how new relevant authorities can be added to the framework at a later date.

The duration of framework agreements must be set out in the framework agreement and may not exceed a maximum of four years (other than in exceptional circumstance which justifies a longer term).

Relevant authorities may select further providers to become parties to a framework agreement during its term. To do so, the relevant authority must follow the Competitive Process. If relevant authorities wish to do so, they should set out how and when this may be done in the terms and conditions of the original framework agreement and are advised to use the same award criteria used when setting up the original framework agreement.

The framework agreement should also set out how the framework will operate and how the call-off procedures will operate.

Where a framework agreement is concluded with a single provider then, for obvious reasons, a relevant authority can award a call-off contract without competition. Where a framework agreement is concluded with more than one provider, a relevant authority may awarded a contract either without competition or by following the Competitive Process – the relevant authority has the discretion to choose either option subject to complying with the terms of the framework agreement. Where a call-off is awarded without competition, then the relevant authority must publish a notice of award to Find a Tender within 30 days of the award. Where the relevant authority follows the Competitive Process, it must invite all providers who are a party to the framework to submit an offer and observe the standstill periods.

The duration of individual call-off contracts may exceed the length of the framework. The total value of all call-off contracts awarded under a framework agreement should not exceed the total value of the framework agreement (as originally advertised).

## **Modifications**

A contract or framework for relevant health care services may be modified during its term without the need for a new procurement process only where:

- the modification is clearly and unambiguously provided for in the contract or framework agreement documents;
- the modification is solely a change in the identity of the provider due to succession into the position of provider following corporate changes including takeover, merger, acquisition or insolvency and the relevant authority is satisfied that the provider meets the basic selection criteria;
- the modification is made in response to external factors beyond the control of the relevant authority and the provider including, but not limited to (i) changes in patient or service user volume, or (ii) changes in prices in accordance with a formula provided for in the contract documents, and in either case the modification does not render the contract or framework agreement materially different in character; or
- the modification is attributable to a decision of the relevant authority and (a) the modification does not render the contract or framework agreement materially different in character and (b) the cumulative change in the lifetime value of the contract or framework agreement since it was entered into or concluded is (i) below £500,000; or (ii) less than 25% of the lifetime value of the original contract or framework agreement when it was entered into or concluded.

Additionally, where Direct Award Process A or B was followed for original award of a contract, the contract may be modified where the modification does not render the contract materially different.

Where a contract or framework is modified due to a decision of the relevant authority and the cumulative change in lifetime value of contract since it was entered into is £500,000 or more then the relevant authority must submit a notice of modification to Find a Tender within 30 days of the modification.

## **Record keeping, annual summaries and monitoring**

Relevant authorities are required keep a record of the following:

- the name of any provider to whom it awards a contract;
- the name of any provider who is a party to a framework agreement;
- the address of the registered office or principal place of business of each provider to whom a contract or framework is awarded;
- the decision-making process followed, including the identity of individuals making decisions;
- where Direct Award Process C or the Most Suitable Provider Process was followed, a description of the way in which the key criteria were taken into account and the basic selection criteria were assessed when making a decision;
- where the Competitive Process was followed, a description of the way in which the key criteria were taken into account, the basic selection criteria were assessed and contract or framework award criteria were evaluated when making a decision;
- the reasons for decisions made under the PSR Regulations;
- declared conflicts or potential conflicts of interest;
- how any conflicts or potential conflicts of interest were managed for each decision; and
- where a procurement is abandoned, the date on which it is abandoned.

Relevant authorities are also required to publicly publish online an annual summary of its contracting activity for the provision of relevant health care services, including:

- the number of contracts awarded in the year where each of the selection processes was followed;
- the number of framework agreements concluded in the year;
- the number of contracts awarded based on a framework agreement in the year;
- the number of contracts awarded and modifications made in reliance on regulation 14 (urgent award or modification) in the year;
- the number of new providers to whom a contract was awarded in the year;
- the number of providers who held a contract in the previous year but no longer hold any contracts in the year; and
- the number of written representations made and received during standstill periods which ended in the year and a summary of the nature and impact of those representations.

Relevant authorities are also required to monitor their compliance with the PSR Regulations and publish online an annual report of the results of that monitoring (including information as to how any non-compliance will be addressed).

## Commentary

The PSR Regulations offer commissioners of health services in England a range of flexible and streamlined processes for procuring services.

The key criteria in particular are framed in broad terms, allowing commissioners significant latitude so long as the criteria are applied consistently where there are multiple potential providers.

### *Most Suitable Provider Process*

The most contentious decisions under the new regime are likely to be those where a commissioner has the option of using the Most Suitable Provider Process, either because:

- it is of the view that the existing provider is satisfying the existing contract and will likely satisfy the proposed contract to a sufficient standard (Regulation 6(5)(d)); or
- it is of the view that, taking into account likely providers and all relevant information available to the commissioner at the time, it is likely to be able to identify the most suitable provider (Regulation 6(6)(d)).

Although in both cases the choice of process is at the commissioner's discretion, as with all discretion in the exercise of statutory functions this must be exercised reasonably. A commissioner will therefore have to consider what factors are relevant, or irrelevant, to its choice of process.

The concept of an existing provider delivering services to a "sufficient standard", such that they should continue to provide services under a new contract, is also likely to be an area of focus. The Guidance does not elaborate on what this means, other than to note that the key criteria and basic selection criteria should be borne in mind when making such an assessment. There is scope for debate as to whether "sufficient standard" should be judged in objective terms, by reference to a defined standard of care, or be determined by reference to the standard achieved by other potential providers of those services in the commissioner's area. Data about contractual performance and a provider's standing with the CQC will presumably provide a starting point for any analysis.

### *Interaction with patient choice*

Alongside the PSR Regulations, amendments to the NHS Standing Rules introduce a requirement for commissioners to assess a prospective provider's suitability to provide services subject to patient choice. If a provider meets prescribed criteria, and agrees to local terms and conditions relevant to delivery of the services, it must be offered an NHS Standard Contract. In awarding that contract, commissioners will also be required to follow Direct Award Process B under the PSR Regulations.

### *The Independent Patient Choice and Procurement Panel and Judicial Review*

The Guidance describes the Panel which has been established to review PSR decisions where local resolution of any concerns has not been possible. The Panel's role is advisory and as such we will have to see whether aggrieved providers avail of its advice or whether they will seek to challenge any perceived failings by means of judicial review.

The PSR Regulations are framed in terms which give commissioners a good degree of discretion when deciding which process to follow and the details of how a process will operate in any particular case. On this basis, we would expect a court in a judicial review to be slow to interfere with commissioners' conclusions on matters such as how the key criteria should be applied, so long as commissioners adopt a coherent approach which is consistent with the procurement principles.

## Advice and support

Blake Morgan's healthcare commissioning experts can support you with all aspects of health services provider and delivery, whether you act as a commissioner or provider.

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