# The Provider Selection Regime (PSR) statutory guidance

NHS England (NHSE) has published the statutory guidance and associated toolkits setting out how the Provider Selection Regime (PSR) - the new rules for arranging healthcare services in England – will be applied. Subject to parliamentary scrutiny and approval, the PSR regulations will come into force on 1 January 2024. This briefing summarises the content of the guidance and includes NHS Providers' view. If you have any reflections, feedback or questions about the guidance, please contact Sandy Cook (sandy.cook@nhsproviders.org).

## Purpose of the guidance

The NHS Long Term Plan set out the ambition for the NHS to work more collaboratively. The establishment of integrated care systems (ICSs) represented a significant step forward in this direction with the facilitation of greater joint-working between health and care organisations. The current procurement legislation sets the expectation that competitive tendering is regularly used to arrange healthcare services, a process which government now considers as a barrier to more collaboration and the integration of services.

The Provider Selection Regime (PSR) will replace the existing procurement framework for arranging healthcare services in England, whether via the NHS or local government. The aim of the PSR is to promote integration and enhance collaboration by providing a more flexible and proportionate process for commissioning healthcare services. The PSR will give commissioners the ability to follow a variety of award processes to select providers to ensure that all decisions are made in the best interests of the local population. The new regime will make it more straightforward to continue with existing service provision where arrangements are already working well, while also ensuring there is a clear and transparent process for decision-making.

## Scope of the regime

The new procurement regime will apply to the following organisations, described as 'relevant authorities', when arranging healthcare services in England:

- Integrated care boards (ICBs);
- NHS England;
- Local authorities or combined authorities, when arranging relevant healthcare services as part of their public health function or in partnership arrangements with NHS bodies;
- NHS trusts and foundation trusts when subcontracting the provision of healthcare services to other providers.

'Healthcare services' is defined under the regime to only include those services that provide healthcare (e.g. treatment, diagnosis or prevention of physical or mental health conditions) to patients or service users. Annex A of the statutory guidance sets out the common procurement vocabulary (CPV) codes setting out the healthcare services covered under the regime.

Goods and services that are not part of the PSR will be arranged under the existing rules governing wider public procurement (unless part of a mixed procurement). Examples of such procurements are:

- Goods (e.g. medicines, medical equipment);
- Social care services;
- Essential and advanced pharmaceutical services arranged under the terms of the Community Pharmacy Contract Framework;
- Non-healthcare services or health-adjacent services (e.g. catering, administrative services, capital works).

## Mixed procurements

The guidance sets out the process for 'mixed procurements', where contracts partly deliver relevant healthcare services which fall under the scope of the PSR, but also include services which, if procured alone, would fall within the scope of the wider public procurement regulations.

When a proposed contract contains both in-scope and out-of-scope services, relevant authorities may only use the PSR to arrange those services when the following requirements apply:

- The main subject matter of the contract is in-scope health care services;
- The relevant authority determines that the other goods or services could not be reasonably supplied under a separate contract

The main subject matter of the contract is determined with reference to the estimated lifetime value of each service. If the estimated lifetime value of in-scope services is higher than out-of-scope service then this test would be met.

Where both tests are met, a mixed procurement under the PSR can be undertaken. If either test is not met, then the regime would not apply and the procurement must be undertaken according to wider public procurement rules.

## Application of the PSR

The guidance sets out general principles which relevant authorities are expected to follow when applying the regime:

- Relevant authorities must act transparently, fairly and proportionately.
- Relevant authorities are expected to make decisions in the best interests of people who use the service by securing their needs, whilst also improving the quality and efficiency of that service.

The new regime sets out three separate provider selection processes by which commissioners can award contracts for relevant healthcare services. NHS England has also published a flowchart to support relevant authorities in determining which provider selection process is most appropriate relevant to their particular circumstances, as well as a variety of end-to-end process maps describing each provider selection process in detail.

## 1. Continuation of existing arrangements – the direct award processes

The direct award process should be used when relevant authorities see little or no reason to seek a change in the current provider of a service. There are three circumstances in which a direct award process would be applicable, listed as direct award processes A-C in the statutory guidance.

### Direct award process A

A contract may be awarded to the existing provider where there is no realistic alternative to the current provider due to the nature of the service provided. Examples of such services include, but are not limited to:

- Type 1 and 2 urgent and emergency services and associated emergency inpatient services;
- 999 emergency ambulance services;

- NHS urgent mental health crisis services;
- Services established as a commissioner requested services (CRS); and
- Services provided by NHS trusts designated as 'essential services' in their NHS standard contract.

## Direct award process B

This award process may only be used to award contracts to providers where service users are offered a choice between providers and where the number of providers is not restricted by the relevant authority. Examples of such services include:

- Elective services led by a consultant or mental healthcare professional where patients have a legal right to choice;
- Other elective services where relevant authorities have voluntarily offered patients a choice of providers (e.g. mandatory eye health services, NHS continuing healthcare services, public health services).

## Direct award process C

A new contract may be given to the existing provider to replace an existing contract that is coming to an end, if the existing provider is likely to be able to satisfy the new contract to a sufficient standard and the nature of the service provided is not changing considerably. For direct award process C to apply, the following tests must be met:

- The relevant authority is not required to follow direct award processes A or B;
- The relevant authority has outlined a new contract to replace the existing contract at the end of its term;
- The service is not changing considerably (see guidance for further details);
- The relevant authority is of the view that the existing provider is satisfying the existing contract to a sufficient standard;
- The relevant authority has no reason to believe that the existing provider will not be able to satisfy the new contract to a sufficient standard.

However, relevant authorities are not compelled to use direct award process C should the above tests be met. They may instead determine the most suitable provider process or the competitive process to be more suitable.

## 2. The most suitable provider process

This award process allows relevant authorities to make a judgement as to which provider is most suitable - based on a consideration of key criteria set out in Annex D of the guidance - without running a competitive process. Relevant authorities are advised to only use this award process when they can be confident that they are able to identify all likely providers both capable of delivering the services and that meet the key criteria.

Relevant authorities must be able to demonstrate that they have reviewed the range of alternative providers and reached a reasonable decision when selecting the most suitable provider. Detailed records of these considerations must be maintained and the rationale for their decision must be prepared should an alternative provider request sight of the reasoning.

## 3. The competitive process

This award process must be used when all of the following apply:

- The relevant authority is not required to follow direct award processes A or B;
- The relevant authority cannot or does not wish to follow direct award process C or the most suitable provider process

When following a competitive process, the guidance recommends relevant authorities consider the following steps:

- Relevant authorities should develop a service specification setting out the requirements for the service;
- The contract or framework award criteria should be determined;
- The opportunity should be formally advertised to invite providers to bid for the contract;
- Bids received should be assessed against the award criteria in a fair way across all bids;
- Relevant authorities should inform the successful providers of its intention to award the contract as well as informing unsuccessful providers that their bids were unsuccessful;
- Relevant authorities should publish notice of the intention to award the contract to the chosen provider and observe the standstill period;
- Once the standstill period has passed, the relevant authority should publish a final notice confirming the award of the contract.

Detailed records of the procedure to select a provider, including how each bid performed against the award criteria and the rationale for selecting the successful provider, should be kept by the relevant authorities

## Framework agreements

'Framework agreements' set out terms and conditions upon which providers will enter into one or more contracts over the period the framework agreement is in place (no more than four years).

Relevant authorities must use the approach for a competitive process to select providers to be party to any framework agreement. Once an agreement has been established, relevant authorities may award contracts to providers that are party to the same framework agreement. Contracts may be awarded either without competition (via a direct award) or by following a competitive process.

# Process for reviewing/appealing decisions

## The standstill period

For all award decisions made under direct award process C (the most suitable provider process or the competitive process) the standstill period must be observed. The standstill period immediately follows the decision to select a provider, lasting for a minimum of eight working days and must end before the contract can be awarded. During the standstill period, representations can be made to the relevant authority by any alternative provider who does is seeking a review of the decision to determine whether the regime has been applied correctly.

If a representation is received during the standstill period, then the standstill period will remain open until the relevant authority has completed their review of the process and communicated their findings.

If the representation does have merit, the relevant authority could choose to either go back to an earlier stage in the selection process, abandon the process altogether or continue with the award of the contract as intended. In any case, the relevant authority must communicate its decision to the provider who made the representation and the provider intended to award the contract to. The standstill period can only close once the relevant authority has shared its conclusion and following a period of five working days after the decision has been communicated.

## The PSR review panel

Should an alternative provider remain unsatisfied about the response of a relevant authority on a representation it has made, then the provider may consider applying to the independent PSR review panel to consider whether the relevant authority applied the regime correctly.

The PSR panel will be overseen and operated by NHS England. However, the panel chair will be independent of NHS England and oversee both the PSR panel and the Choice Provider Qualification Complaints panel. All panellists will be independent experts (with relevant expertise, qualifications or experience) made available by, or endorsed by, either NHS England or the Secretary of State. Panellists must be able to offer an impartial and unbiased opinion and must not have any conflicts of interest in the provider selection process in question.

The PSR panel may set out acceptance criteria to assess whether a case should be reviewed and prioritise cases based on the urgency of a particular case. If the case is accepted by the PSR review panel, it will endeavour to review the provider selection process undertaken by the relevant authority and publish its findings within 25 working days. The relevant authority must then respond to the provider that raised the representation of its decision either to proceed as intended, go back to an earlier stage of the selection process, or abandon the process. Its response must include a full and transparent justification of their decision, including whether their original decision was changed as a result of the PSR panel review.

# Annex B: Transparency requirements

Annex B sets out the various transparency requirements that relevant authorities must follow during the provider selection process.  Relevant authorities must retain appropriate evidence that they have exercised their responsibilities and ensure ensuring there is proper accountability for decisions. Regardless of the selection process used, relevant authorities must keep internal records of their decision-making process and rationale for decisions.

# Annex D: Key criteria

Annex D sets out five key criteria which must be considered when relevant authorities are applying direct award process C, the most suitable provider process or the competitive process under the regime. The five key criteria are as follows:

- Quality and innovation – the need to ensure good quality services and support processes that will improve the delivery of healthcare or health outcomes;
- Value – the need to strive for good value in terms of the balance of costs, benefits and the financial implications of an arrangement;
- Integration, collaboration and service sustainability – the extent to which services can be provided in an integrated and collaborative way and in a sustainable way (e.g. stable delivery or service continuity);
- Improving access, reducing health inequalities and facilitating choice – ensuring all eligible patients have access to services, respecting patient choice and improving health inequalities;
- Social value – improvement to economic, social and environmental well-being for a local geographic area.

## NHS Providers' view

This guidance provides welcome clarity on how the Provider Selection Regime (PSR) will offer both commissioners and providers greater flexibility in their procurement processes with the aim of moving towards an approach which fosters greater collaboration between organisations, as intended by the Health and Care Act (2022) and system working.

NHS Providers has supported the development of the PSR over recent years with direct input from trust leaders and through our engagement with NHS England and Department of Health and Social Care (DHSC). We have consistently raised concerns about the impact of the current procurement framework which can be burdensome and hinder integration, often placing additional burdens on community and mental health providers in particular, where services have been much more likely to be subject to expensive and disruptive competitive tendering processes.

We therefore welcome the aim of the PSR to align with the spirit of collaboration within health and care systems, and to offer commissioners and providers a clear and transparent process by which procurement decisions can be made.

We are pleased that the PSR offers a consistent model for both NHS and local government bodies to follow with regard to health services and hope that this will aid local relationships and decision making, and integrated care.

It is however important that national bodies engage with all organisations who will be subject to the new regime in an effort to smooth the transition to a new procurement framework. NHS Providers is

also hoping to work with those of our commercial partners with legal expertise in this area to offer webinars on the changes to support trusts.

We would also welcome a commitment from NHS England and DHSC to review the application of the PSR over the course of the next year to ensure that real-time feedback on the operation of the regime can be evaluated and acted upon as swiftly as possible.  For example, once the new regime is launched, we will be keen to capture your feedback on whether any difficulties arise for commissioning bodies in selecting which procurement process is most appropriate across various different scenarios and circumstances – and whether any challenges arise for providers in their application of the approach.

NHS Providers has worked with membership bodies for providers in the independent and voluntary sectors, and DHSC and NHS England to make the case for the new regime to include a challenge function for decisions made by commissioning bodies to be reviewed and scrutinised if appropriate (below the bar of a judicial review which remains the ultimate opportunity for challenging a decision). The PSR panel, does not have legally binding powers, but should hopefully give providers some opportunity to challenge the application of the regime and raise legitimate concerns where appropriate.

We would welcome your feedback on these developments and look forward to working with trust leaders and with colleagues in NHS England and DHSC to keep the new approach under review.