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What does 2024 hold for procurement law – What do board members need to know?

Speaker

Andrew Daly, Partner and Head of Procurement, Hempsons

The Provider Selection Regime and other procurement law updates

Andrew Daly, partner and head of procurement

15 November 2023

“Justifiably top of the tree.”

”

All change in 2024

Procurement law is changing in 2024

1. Procurement Act 2023

- replacing the Public Contracts Regulations 2015 (PCR)
- expected to come into force in October 2024

2. Provider Selection Regime (PSR)

- Bespoke regime for the procurement of relevant health care services by relevant authorities
- Subject to Parliamentary approval, will come into force on 1 January 2024

3. Thresholds for the PCR change

- Change on 1 January 2024
- No change to the Light Touch Regime threshold

The Provider Selection Regime

DRAFT STATUTORY INSTRUMENTS

2023 No.

HEALTH SERVICES, ENGLAND

PUBLIC PROCUREMENT, ENGLAND

The Health Care Services (Provider Selection Regime) Regulations 2023

Made

Coming into force

1st January 2024

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 12ZB(1), (2) and (3) and 272(7) and (8) of the National Health Service Act 2006⁽¹⁾ and section 182 of the Health and Care Act 2022⁽²⁾.

A draft of these Regulations was laid before Parliament in accordance with section 272(6)(zze)⁽³⁾ of the National Health Service Act 2006 and was approved by a resolution of each House of Parliament.

Key documents

Regulations – subject to
Parliamentary scrutiny

Guidance and toolkits published in
draft



The Health Care Services (Provider Selection Regime) Regulations 2023

29 regs

16 schedules (13 of which
deal with transparency)



Statutory Guidance

Main body

Annexes



Implementation toolkit

FAQs

Process maps

Flowcharts

Slides

FTS guide

Our involvement

- The Health Care Services (Provider Selection Regime) Regulations 2023
 - DHSC led – NHSE inputted into
- Statutory Guidance
 - NHSE led – to reflect the Regulations
- Implementation toolkit
 - NHSE led – to reflect the Regulations

What will happen?

- Once PSR Regulations come into force:
 - the procurement of health care services, when procured by relevant authorities under the PSR, will be removed from the scope of the Public Contracts Regulations 2015 (the PCR)
 - replace the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (the PPCCR)

Who does the PSR apply to?

- 'Relevant authorities' are required to follow the PSR when procuring relevant healthcare services
- Relevant authorities are:
 - NHS England
 - Integrated Care Boards
 - NHS trusts and foundation trusts
 - Local authorities or combined authorities

When does the PSR apply?

- When procuring relevant health care services
- Means:
 - health care services (as defined in section 150 of the Health and Social Care Act 2012)
 - “Health care” means all forms of health care provided for individuals, whether relating to physical or mental health
 - which fall within one or more of the CPV codes specified in schedule 1
- No financial threshold – PSR applies irrespective of value

When does the PSR not apply?

- Goods and services that are not health care services in scope of the regime must be arranged under the rules governing wider public procurement, unless they fall within the definition of a mixed procurement set out in the regime
- Examples of procurements not in scope of this regime 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-health care services or health-adjacent services (e.g., capital works, business consultancy, catering, hospital administrative services, hospital bedding services or public health marketing campaigns) that do not provide health care to an individual

Procurement principles

Reg 4

- When procuring relevant health care services, a relevant authority must act with a view to:
 - securing the needs of the people who use the services
 - improving the quality of the services
 - improving efficiency in the provision of the services
- Relevant authorities must also act transparently, fairly, and proportionately when procuring health care services
- The relevant authority may consider the value of providing services in an integrated way

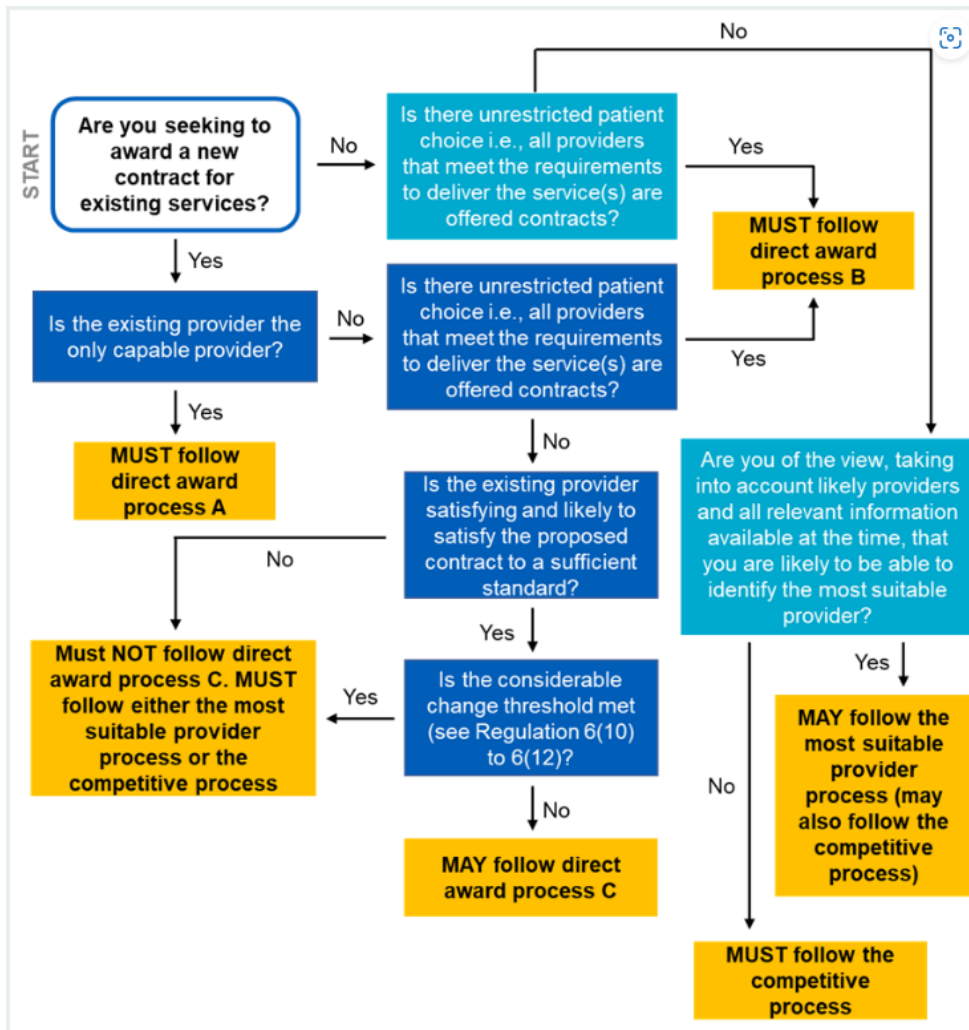
Decision making processes

Reg 6 - 11

- Direct Award processes
 - Direct award process A
 - Direct award process B
 - Direct award process C
- Most suitable provider process
- Competitive process

Flowchart

Toolkit



Key criteria

Reg 5/Annex D

The key criteria are:

- quality and innovation
- value
- integration, collaboration and service sustainability
- improving access, reducing health inequalities and facilitating choice
- social value

Challenge/ Standstill and panel

Reg 12

- Challenge for Direct Award Process A and B is via Judicial Review (no standstill/PSR review panel)
- Standstill applies to Direct Award Process C, MSP and CP (includes call offs from frameworks via mini-comp)
- Similar to the position under PCR
- Cannot award until standstill period ends
- Ends midnight at the end of the 8th working day
- During that time, any provider who is aggrieved and believes there has been a failure to comply with the regulations, can make a written representation to the relevant authority
- If no representation is received, can proceed to award

Review process

Direct Award Process C

Most Suitable Provider process

Competitive Process

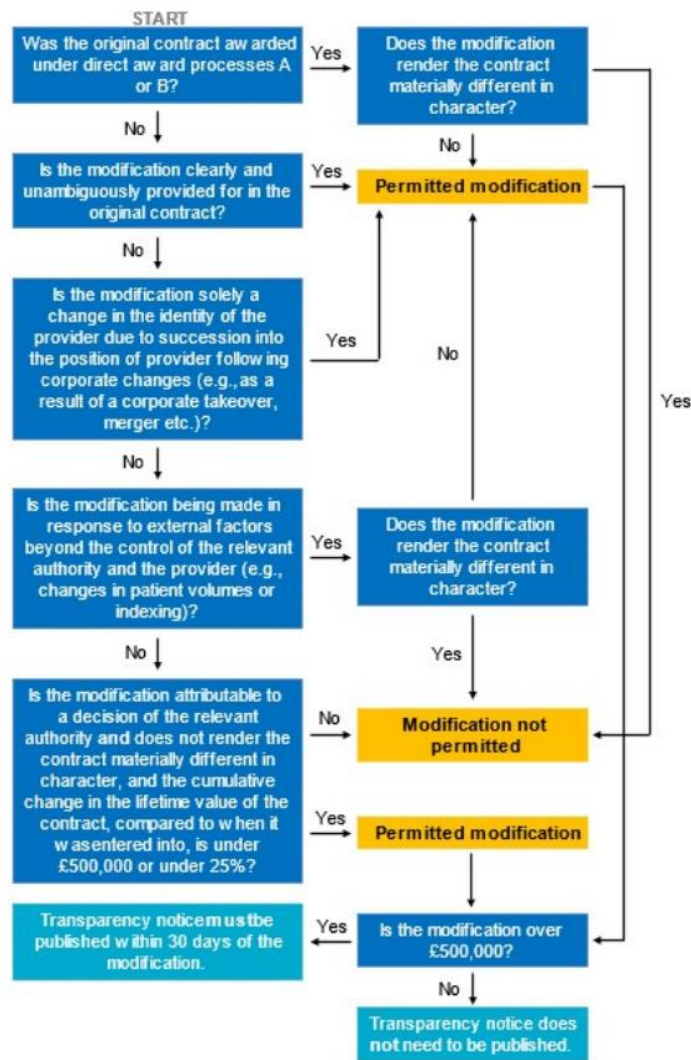
- Relevant Authority reviews its decision
 - Continue, rewind, abandon
 - 5 working days
- Referral to PSR review panel
 - Panel gives advice
 - Relevant authority makes new decision
 - Continue, rewind, abandon
 - 5 working days
- Judicial Review

Transitional provisions and amendments to other legislation

Reg 27 - 29

- When health care services in scope of the regime are arranged on or after 1 January 2024, then the PSR must be followed.
- The PSR does not have any retrospective effect on contracts or framework agreements that were entered into prior to the 1 January 2024
- However, from 1 January 2024 onwards any changes to these contracts or framework agreements (those awarded or established before the 1 January 2024) where the services are in scope of the regime, must be carried out in accordance with the Contract modifications section of the PSR

Contract modifications



The Statutory Guidance

Date published: 18 October, 2023
Date last updated: 19 October, 2023

The Provider Selection Regime: draft statutory guidance

[Publication](#) [\(/publication\)](#)

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This is the draft statutory guidance for the new Provider Selection Regime (PSR). The [PSR regulations](https://www.legislation.gov.uk/ukdsi/2023/9780348252613/contents) (<https://www.legislation.gov.uk/ukdsi/2023/9780348252613/contents>) have been introduced into Parliament by the Department of Health and Social Care and they are still subject to scrutiny by Parliament. Therefore, the draft statutory guidance is not final until Parliament has agreed the PSR regulations.

Executive summary

The [NHS Long Term Plan](https://www.england.nhs.uk/long-term-plan/) (<https://www.england.nhs.uk/long-term-plan/>) set out the need to transform health and care services to meet increasing demand, deliver better care and outcomes and ensure the health and care system is financially sustainable.

To meet these goals, as well as recover service delivery following the COVID-19 pandemic, the health and care landscape in England is changing. NHS bodies, local authorities and their partner organisations are increasingly working together to plan and deliver more integrated care and improve health outcomes for local people and communities.

The Health and Care Act 2022 (the 2022 Act) amended the National Health Service Act 2006 (the 2006 Act) to put in place legislative changes that support this, including the creation of integrated care systems. The legislation sets an expectation that all those involved in planning, purchasing, and delivering health and care services work together to agree and address shared objectives, and makes it easier for them to do so.

The Guidance

<https://www.england.nhs.uk/publication/the-provider-selection-regime-statutory-guidance/>

- Must have regard to the guidance
- Key for the PSR review panel
- Annex A – CPV codes
- Annex B - transparency
- Annex C – primary care
- Annex D – key criteria
- Annex E – contract management
- Annex F – transitional arrangements

Transparency

| decision-making processes | | | | | framework agreements | | | |
|--|------------------------|---|---|------------------------------------|-------------------------|------------------------------------|--|--|
| process | direct award processes | | | the most suitable provider process | the competitive process | establishing a framework agreement | contracts based on a framework agreement without competition | contracts based on a framework agreement following competition |
| | A | B | C | | | | | |
| Making intentions clear in advance | | | | | | | | |
| Publishing the intended approach in advance | | | | ✓ | | | | |
| Publishing a notice for a competitive tender | | | | | ✓ | | | |
| Communication of the decision | | | | | | | | |
| Publishing the intention to award notice | | | ✓ | ✓ | ✓ | ✓ | | ✓ |
| Confirmation of the decision | | | | | | | | |
| Publishing a confirmation of award notice | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Contract modification | | | | | | | | |
| Publishing a notice for contract modifications | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

Toolkits

<https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/provider-selection-regime-frequently-asked-questions/>

<https://www.england.nhs.uk/publication/provider-selection-regime-toolkit-products/>

- FAQs
- Process maps
- Flowcharts
- Slides
- FTS guide

PSR takeaways

- Ensure awareness internally
- Embed new requirements into decision making processes
- Consider the most appropriate decision-making process
- Apply the Procurement Principles
- Apply the Key Criteria
- Maintain audit trail
- Update governance requirements for compliance/review

New thresholds from 1/1/24

| Type of contracting authority | Type of contact | Current threshold (inclusive of VAT) | Threshold that will apply from 1 January 2024 (inclusive of VAT) |
|--------------------------------|--|--------------------------------------|--|
| Central Government Authorities | Service Contracts | | |
| | Supply of Goods Contracts | £138,760 | £139,688 |
| Sub-Central Authorities | Service Contracts | | |
| | Supply of Goods Contracts | £213,477 | £214,904 |
| All | Works (including subsidised works contracts) | £5,336,937 | £5,372,609 |
| All | Light touch Regime | £663,540 | £663,540 |
| All | The Concession Contracts Regulations | | |
| | Concession contracts | £5,336,937 | £5,372,609 |
| All | The Utilities Contracts Regulations | | |
| | Supplies and Services | £426,955 | £429,809 |
| | Works | £5,336,937 | £5,372,609 |

Questions/ discussion



Disclaimer: These slides are made available on the basis that no liability is accepted for any errors of fact or opinion they may contain. The slides and presentation should not be regarded as a comprehensive statement of the law and practice in this area. Professional advice should be obtained before applying the information to particular circumstances



Andrew Daly
Partner and head
of procurement

t: 01423 724015

m: 07748 982 185

e: a.daly@hempsons.co.uk

@A_Daly_Hempsons

@hempsonslegal



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