



Provider Selection Regime

February 2023

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Joining the dots across health and care

Background and context

- **Principles and ambition**

NHS England will replace the current rules for procuring NHS healthcare services with a set of more flexible arrangements that better support the NHS ambition for greater integration and collaboration between NHS organisations and their partners, while reducing administrative bureaucracy.

- **How and when will this happen?**

The Government will repeal Section 75 of the Health & Social Care Act 2012 and Statutory Instrument 'Procurement, Patient Choice and Competitions Regulations 2013' and replace these with the 'Provider Selection Regime'. It was targeted to start from the 1st April 2022 in line with the wider NHS system changes but this has been extended and will not come into force in time for the contracting round for 2023.

- **Who will it affect?**

The Regime will apply to all bodies responsible for arranging healthcare services. This includes NHSE, ICSs, CCGs, any further delegated bodies and Local Authorities (where they commission healthcare services such as sexual health and public health services)

- **What is healthcare in this context?**

The term 'healthcare services' means services involving the provision of all forms of healthcare provided for individuals, whether relating to physical or mental health.

- **What is not included?**

It is not intended to include: social care services, public health services not arranged by NHS Bodies or local authorities (such as test and trace) other non-clinical services, goods or medicines or community pharmacy services. Although where there is a mix of services certain rules can be applied to test whether the service is in or out of scope.

Application of the new regime

There are three decision circumstances described within the consultation:

- **Continuation of existing arrangements (decision circumstance 1a,b,c)**

There will be situations where the incumbent provider is the only viable provider due to the nature of the service in question, and a change of provider is not feasible or necessary. There will be other situations where the incumbent provider/group of providers is doing a good job and the service is not changing, and there is no value in seeking another provider. In these situations, it needs to be straightforward to continue with the existing arrangements. There is consideration as to how to manage changes to these contracts during their life

- **Identifying the most suitable provider for new/substantially changed arrangements. (decision circumstance 2)**

There will be situations where existing arrangements need to change – for example, when a service is changing considerably; when a new service is being established; when the incumbent is no longer able/no longer wants to provide the service; or when the decision-making body wants to use a different provider. In these situations, the decision-making body should consider a set of key criteria and other local providers who may be able to provide the service. If after having done so they have reasonable grounds for believing that one provider/group of providers is the most suitable provider (which may or may not be the incumbent), they may award the contract to that provider without conducting a tendering process. This must be done in a way that is fully transparent and auditable.

- **Competitive procurement (decision circumstance 3)**

Can be used where the decision-making body wants to use a competitive process to test the market, or where the decision-making body cannot identify a single provider/group of providers that is most suitable without running a competitive process,

Continuation of Existing Arrangements – Decision Circumstances 1(a,b,c)

- **Decision circumstance 1A**

This circumstance can be used when the type of service means there is no realistic alternative to the current provider: such as 999 ambulance, type 1 & 2 urgent and emergency services and commissioner requested/essential services.

- **Decision circumstance 1B**

This circumstance can be used when alternative providers are already available to patients through exercise of patient choice: such as elective consultant led services, other Any Qualified Provider services and core primary care services where patients can choose a GP surgery.

- **Decision circumstance 1C**

This circumstance can be used when the incumbent provider/group of providers is judged by the decision-making body to be doing a sufficiently good job (in relation to the key criteria) and the service requirement is not changing considerably.

The decision making body must establish whether a service is not changing considerably by assessment against a range of situations. (see consultation issues)

The decision making body must also establish that the incumbent is doing a good job. To do this they must assess the incumbent against weighted key criteria

Assessment of services (required under 1c, 2 & 3)

- **Quality (safety, effectiveness and experience) and innovation**

ensuring that decision-making bodies consider the fundamental utility and performance of the service and the quality of the provider generally and seek to maximise these. Ensuring decision-making bodies seek to innovate and improve services delivered by either existing or new providers, proactively developing services that are fit for the future.

- **Value**

ensuring that decision-making bodies seek to maximise the value offered by a service. This is not about choosing the 'cheapest' option, but instead selecting the option with the best combination of benefits to individuals in terms of outcomes and to the community in terms of improved health and wellbeing; and value to taxpayers by reducing the burden of ill health over the lifetime of the arrangement and the cost.

- **Integration and collaboration**

ensuring that decision-making bodies seek to maximise the integration of services for patients to improve outcomes, and that their decisions are consistent with local and national NHS plans around integrating care and joining up services for patients (recognising that integrating services does not mean services have to be delivered by the same provider).

- **Access, inequalities and choice**

ensuring that patient choice is promoted and protected, and that the services patients need are available and accessible to all groups, with a particular focus on tackling inequalities.

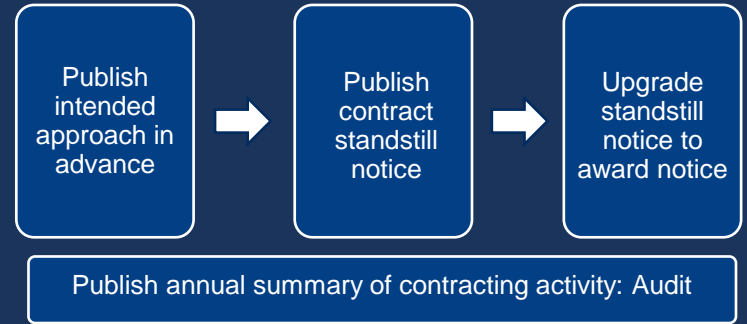
- **Service sustainability and social value**

ensuring that decision-making bodies give due consideration to how their decisions may affect the current stability and wider sustainability of services over time and/or in the wider locality; and seek to maximise the social value created by the arrangements, recognising the vital role the NHS plays in local communities and its leadership role in achieving net zero emissions.

Transparency and Record Keeping

• Publication of Notices

- Regardless of the decision circumstance chosen the decision making body will be required to publish their activity on up to three occasions.
- A table for which publication for which decision circumstance is shown on the table on the next slide.



• Record Keeping

- The Decision Making Body (DMB) must record and retain their assessment process and follow transparency and scrutiny arrangements. DMBs will need to establish how best to follow the Regime within their wider structural and governance arrangements
- As the decision to award contracts could potentially be challenged it will be imperative that appropriate, compliant and accurate records are kept for audit and where required must be published.
- There may also be requirement to provide full disclosure of all decision making documents in the event of any representation being made to the decision making body.

Transparency Responsibilities (under review)

Process	1A	1B	1C	2	3
Making your intentions clear in advance					
Publishing the intended approach in advance				X	
Publishing the notice for competitive tender					X
Making a decision and keeping records					
Recording internally the decision making process and rationale	X	X	X	X	X
Communication of the decision					
Responding to unsuccessful bidders					X
Publishing the intention to award			X	X	
Standstill and resolution period			X	X	X
Confirmation of the decision					
Publishing the contract award notice	X	X	X	X	X
Contract Modification					
Modification notice	X	X	X	X	X

Transparency and Scrutiny Details

- If the decision-making body decides to use the Most Suitable Provider approach, they must publish their intended approach using the Find a Tender Service. The notice must include:
 - a brief, clear summary of location and service
 - details of who will make the award decision
- Decision-makers must make and keep clear records detailing the decision making process and rationale, including:
 - Name of the provider to whom the contract will be awarded and the address of its registered office or principal place of business
 - Any agreed balance of criteria (e.g. weighting, hierarchy or more informal description of importance) against which provider(s) were evaluated and the rationale for the balance of criteria
 - The approach taken to select a provider and the process followed
 - The rationale for decision with reference to criteria and any additional considerations
 - Details of the committee/group/officer who made the decision
 - Declared conflicts of interests (COIs) for individuals involved in decision making and how COIs managed
- For Decision Circumstance 2 you must also
 - Keep records demonstrating that other potential providers who have the capability to meet the needs of patients within the relevant geographical footprint have been considered
- After the decision-making body has selected a provider, the decision-making body must communicate their intention to award a contract. The intention to award must be published using FTS as a Contract Award Notice, which must include:
 - A statement that this is an intention to award
 - Contract title/reference
 - Name of the provider to whom the contract is intended to be awarded and the address of its registered office or principal place of business
 - Description of the services intended to be provided
 - Approach taken to select provider (e.g. 1C).
 - Statement explaining the balancing of key criteria which the decision-making body used to make a decision
 - Statement explaining the decision-making bodies' rationale for choosing the successful provider
 - Existing service
 - Incumbent provider
 - Contract value (the total amount to be paid under the contract, or where the total amount is not known, the basis of payments to be made to the provider)
 - Dates between which the services are intended be provided
 - Which committee/group/officer made the decision
 - Declared COIs by the committee/group/officer (not including individual names) and how COIs managed
 - Date by which any representations must be made (i.e. 10 days following publication of notice)

Contract Modifications (under consultation)

Permitted modifications

Modifications are permitted under the PSR only in the following instances (transparency notice required if over £500,000):

- a) the modification is clearly and unambiguously provided for in the original contract (i.e. that the scope and nature of the potential change has been described); OR
- b) the modification is solely a change in the identity of the provider (for example resulting from a corporate takeover, merger, acquisition or insolvency), where this does not affect the ability of the (new) provider to deliver the service; OR
- c) modification made in response to an external cause beyond the control of the decision-making body, including but not limited to the following:
 - modification in contract value driven by changes in patient volume
 - modification in contract value related to uplifts in prices published in the National Tariff, or in accordance with a formula (e.g. index linking) provided for in the original contract; OR
- d) Modification which meet or are below the threshold conditions
- e) Modifications to contracts awarded originally under circumstance 1A which do not render the service materially different in character such that the modification undermines the original basis of award
- f) Modifications to contracts awarded originally under the basis that the number of providers is not being limited by the decision-making body and the choice between providers is exercised by patients (circumstance 1B) which do not render the contracts materially different in character such that they undermine the original basis of award

Permitted modifications that require transparency

Modifications that meet all of the following conditions:

- i. Does not fall under one of the permitted modifications in the previous section
- ii. Is made at the discretion of the decision-making body
- iii. the modification does not render the service materially different in character
- iv. the cumulative change in the lifetime value of the contract (taking into account all of the modifications made to it since it was let) is **greater than £500k**
- v. the cumulative change in the lifetime value of the contract (taking into account all of the modifications made to it since it was let) is **less than 25%** of the original lifetime value

Emergency Circumstances

There are a small, limited number occasions where decision-making bodies may need to act rapidly in an emergency and award or modify contracts in an emergency to address immediate risks to safety and quality of care. These emergency circumstances include where:

- a new service needs to be arranged rapidly in an unforeseen emergency, or local, regional or national crisis; for example, to deal with a pandemic
- there are urgent quality/safety concerns that pose risks to patients, and necessitate rapid changes
- an incumbent is suddenly unable to operate and a new provider needs to be found; for example, a provider becoming insolvent, or experiencing a sudden lack of critical workforce

What happens if there are 'Representations'

- **What is a representation?**

A 'representation' is the term used when an organisation makes an approach to the decision making body (DMB) to challenge a contract decision. A representation becomes credible if the organisation can demonstrate they are impacted by the decision and have reasonable ground to believe the DMB has potentially failed to apply the regime correctly.

- **When can a representation be made?**

Following the publication of a decision notice the DMB must allow a standstill period, which is set at 30 days (unless extended) and any organisation must make their representation within 10 days of the standstill notice publication. After 10 days with no representation the DMB may proceed to award the contract.

- **How would a representation be handled?**

DMBs must ensure that appropriate internal governance mechanisms are in place to deal with representations which should be completed within the 30 days standstill period (but can be extended). The DMB must consider whether the representation has merit through serious consideration of the evidence, provide any information kept under the regime which details the decision (with full disclosure – save commercially sensitive information) and discuss the issue with the provider.

- **Feedback and future escalation route?**

Following considerations and dialogue the DMB must either: agree not to proceed, return to an earlier step in the process or conclude that the regime has been followed correctly. This must be within the 30 days (or later if mutually agreed). The closing of the standstill is independent of whether the challenger is satisfied.

The guidance documentation is currently silent on further escalation, however, the traditional route for challenge to DMB failure of duty is through a Judicial Review.

Before and after (at a glance)

Both the Provider Selection Regime and the existing regulatory framework must be applied on a case by case basis, but the following table provides a generic comparison of the two sets of rules:

	Public Contracts Regulations and Procurement, Patient Choice and Competition	Provider Selection Regime
Mandatory Use	Yes for all healthcare service contracts over the financial threshold	Yes for all healthcare services as defined, for all decision circumstances
Direct Award Contracts	Yes but only under strict set of circumstances and still open to challenge	Yes, under decision circumstance 1 – with detailed record keeping required for when a provider is doing a sufficiently good job
Financial Thresholds	The Light Touch Regime threshold is £663,540	No threshold has been published as yet
Record Keeping and disclosure	Thorough record keeping of all procurements and disclosure requirements, often informed by case law	Thorough record keeping of all decision circumstances with full disclosure to be provided to the challenging party
Transparency – Publication of Notices	Yes, at the outset and on award for all procurements, or on award when direct awarding	Yes, at the outset, on award decision and in confirmation of the award decision, for circumstances 2 and 3 and on award for 1a & 1b & 1c
Challenge or Representation	Standstill for 10 days and then through courts	Standstill for 30 days – possibility of Judicial Review if the provider wishes
Conflict of Interest (COI)	Clear COI recording, management & mitigation	Clear COI recording, management & mitigation

Any questions or for a further conversation

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