Browne Jacobson

Provider Selection Regime - how will it work in practice?

24 April 2024

The Provider Selection Regime (PSR) came into force on 1 January 2024. Two months into the regime going live we take a look at some of the key elements of the PSR and how this is being rolled out in practice.

Procurement Act

The Procurement Act has now received Royal Assent and is also due to be implemented in October 2024.

It is important to note that the Procurement Act does not relate to healthcare services which would be arranged under the PSR. The PSR will cover the procurement of healthcare services which are delivered to patients and service users, and only when they are arranged by relevant healthcare authorities including NHS bodies and local authorities. From a practical point, this means that authorities have two sets of new legislation to get to grips with and ensure that their internal processes and documents are updated to reflect these changes. Whilst authorities have a transition window for the Procurement Act, this is not the case for the PSR which is now live so they need to ensure their policies and working practices are updated now to reflect this regime change.

Application of the PSR

The PSR sets out the framework which 'relevant authorities' must follow when procuring healthcare services in England. Relevant authorities are:

- NHS England;
- Integrated Care Boards (ICBs);
- NHS Trusts and NHS Foundation Trusts; and
- Local Authorities and Combined Authorities.

All relevant authorities should be aware that the PSR will not apply to procurement of goods or non-healthcare services (unless it forms part of a mixed procurement).

Options for contracting

The PSR has introduced three provider selection processes that relevant authorities can follow to award contracts for healthcare services.

1. Continuation of an existing arrangement (direct award processes A, B and C)

- Direct award process A – the incumbent provider is the only provider that can deliver the service;
- Direct award process B - patients have a choice of providers and the number of providers is not restricted by the relevant authority; or
- Direct award process C – the incumbent provider is deemed to be satisfying the requirements of the existing contract, is likely to satisfy the new contract to a sufficient standard, and the contract is not changing considerably.

2. Most suitable provider process

This involves a relevant authority awarding a contract to a provider, without running a competitive tender process, because the relevant authority can identify the most suitable provider.

3. Competitive process

Where a relevant authority is unable to identify a provider that would be most suited to deliver the service(s), a competitive process must be undertaken to award the contract.

Challenge

When awarding a contract under direct award process C, a notice of intention to make an award must be published and a standstill period must be observed (which must last for a minimum of eight working days). Providers must specify any representations challenging a decision during the standstill period which must be received before midnight on the eighth working day. If representations are received within the standstill period, the relevant authority must extend the standstill period until it has made its decision.

There is not a mechanism under the PSR to challenge contract award decisions made under direct award process A or B; however, there may be occasions where decisions could be subject to a judicial review.

Within their responses to the PSR: supplementary consultation on the detail of proposal for regulations, the DHSC announced that a new independent panel will be established to oversee the PSR, and this has now been confirmed as the PSR review panel. The PSR review panel will provide expert advice to relevant authorities relating to any PSR decisions made during the standstill period.

Where the PSR review panel accepts a representation for review, it will consider and share a summary of its advice to the provider and the relevant authority within 25 working days.

Contract modification

The new regime has allowed for permitted modifications to be made during their term without following a new provider selection process. However, relevant authorities will need to ensure they are transparent with their decision-making and may be required to publish transparency notices.

The assessment of whether a material change will take place is still a test that relevant authorities will need to apply when considering any proposed contract modification. Clearer guidance has also been provided on modifications which are not permitted, including with the introduction of an objective test when reviewing the value of the original contract or framework agreement.

Relevant authorities can also apply contract modifications in urgent situations. As is the case under the current regime, a good audit trail of the decision-making processes will be essential.

Transitional arrangements

Healthcare services procured by relevant authorities have now been removed from the scope of the Public Contracts Regulations (PCR). Furthermore, the Procurement, Patient Choice and Competition Regulations 2013 (PPCCR) has been revoked as set out in the Health and Care Act 2022.

The PSR must now be followed for any in-scope healthcare services. The PSR does not have any retrospective effect on contracts entered into prior to 1 January 2024. In addition, any procurements which have not been completed prior to 1 January 2024 will not be affected by the PSR and can be awarded under the relevant process of the PCR.

Relevant authorities will need to review their existing contracts and the expiry dates so that planning for contract renewals can be carried out well in advance.

We have recently held a webinar where we discussed the PSR in more detail:

PSR – change is coming, what does it mean for you? →

Please contact us with any queries you have about the Provider Selection Regime.

Contact

Viney Jhalley

Associate

viney.jhalley@brownejacobson.com

+44 (0)330 0452540

Related expertise

Health procurement

Public contracts, projects and funding

Public procurement