

# Challenges under the Provider Selection Regime: How should commissioners handle representations?

24 July 2024

The Health Care Services (Provider Selection Regime) Regulations 2023 (“**PSR**”) apply where a “relevant authority” procures health care services for the purpose of the health service in England. Relevant authorities include NHS England, Integrated Care Boards, NHS Trusts and Foundation Trusts, and local authorities or combined authorities who are responsible for health care services.

When a relevant authority (“**commissioner**”) makes a provider selection decision and intends to award a contract or conclude a framework agreement, the route to challenge such decisions differs from that under the Public Contracts Regulations 2015. Rather than a formal procurement challenge, the PSR provides that an aggrieved provider who believes there has been a failure to comply with the PSR may make a written representation to the commissioner to seek a review of the decision made and determine if the PSR was complied with. If the provider remains unhappy after the commissioner’s further decision, this can be escalated to the new Independent Patient Choice and Procurement Panel (the “**Panel**”). We consider this process in more detail below.

## Making a representation

Representations may only be made within the first eight working days following the start of the standstill period, i.e., eight working days starting with the first working day after the day of publication of the notice of intention to award a contract to the chosen provider or conclude a framework agreement. Providers cannot submit a written representation after that period, even if there is an extension to the standstill period due to another representation from another provider having been received by the commissioner.

Representations must be in writing (which includes electronically) and must come from a provider who might otherwise have been a provider of the services.

## Responding to representations

On receipt of a valid representation, the commissioner should let the provider who made the representation (**representation provider**) and the provider to whom the commissioner wishes to award the contract or conclude a framework agreement (**proposed provider**) know when the further decision is likely to be made.

The commissioner may wish to inform their information rights team and senior officers that a representation has been received to ensure there is a central point of contact for any communications with providers.

The commissioner must ensure that the representation provider is afforded an opportunity to explain or clarify the representations made. The commissioner must promptly provide any information requested by the representation provider that the commissioner is required to keep under regulation 24 (Information Requirements) of the PSR, except where this:

- would prejudice the legitimate commercial interests of any person, including the commissioner;
- might prejudice fair competition between providers; or
- would otherwise be contrary to the public interest.

In addition to the response to the representation provider, the commissioner must give the same information to the proposed provider.

The commissioner must then review the original decision made (and the evidence and information used to make it) taking into account the representation made and consider if the representation has merit. The commissioner should consider if the procurement process was correctly followed or if information brought to light by the representation has a bearing on the decision reached.

The commissioner must then make a further decision as to whether to:

- enter into the contract or conclude the framework agreement as intended after the standstill period has ended;
- go back to an earlier step in the selection process and repeat that step and subsequent steps in accordance with the relevant procedure; or
- abandon the procurement.

The standstill period will not come to an end until five working days following the day on which the further decision was sent to the providers. During this period, the representation provider can consider whether the response given is suitable, seek any further clarifications from the commissioner and consider whether it would like to request a further review by the Panel.

Any further decision made (including any subsequent further decision made after and replacing an initial further decision), should be communicated promptly in writing with reasons to each representation provider and each proposed provider.

## Independent Patient Choice and Procurement Panel

If the representation provider remains unsatisfied by the further decision, it may request that the Panel consider if the PSR was complied with. The Panel may provide the commissioner with advice, with which the commissioner should make a further decision about how to proceed with the procurement.

A representation provider must submit the request to the Panel via its website within five working days of the commissioner's further decision. If the Panel accepts a request for review, it will endeavour to provide advice to the commissioner within 25 working days (this is an indicative timeframe).

The standstill period remains open while the Panel reviews the circumstances, and the commissioner is only able to make a further decision about how to proceed with the procurement once it has considered the advice it receives from the Panel.

It is for the commissioner to make a further decision in the light of the Panel's advice. While it is for the commissioner to decide if it follows the Panel's advice or not, the representation provider could seek judicial review of a decision not to follow that advice. This was noted in the Panel's first review of a proposed contract award PSR Panel Decision Case Report 15.05.2024 on Online ADHD Assessment, Diagnostic and Management Services for North Cumbria.

## Monitoring by commissioners

Any requests made to the Panel by any providers would have to be published online by a commissioner in its annual monitoring and reporting obligations.

Commissioners must on an annual basis publish a summary of applications of the PSR online. The summary published must include the number and details of any written representations received, and a summary of the outcomes of all representations received.

Further, commissioners would have to publish details of any of the reviews carried out by the Panel and specifically the number of requests for consideration made to the Panel, the number of requests accepted and rejected by the Panel for consideration, and the number of times where the Panel advised the commissioner to re-run or go back to an earlier step in a provider selection process under the PSR, and the number of times the advice was followed.

Commissioners must monitor and publish details of their compliance with the PSR online on an annual basis. If there are instances of non-compliance, the commissioner must put in place actions to address this and improve compliance with the PSR.

As a matter of good practice, commissioners should maintain a clear audit trail of all discussions, decisions and steps taken in relation to any procurements to ensure there is a clear record as to what has been decided that can be justified on the evidence.

## Key contacts



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