

Decisions of the Independent Patient Choice and Procurement Panel

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Is the Provider Selection Regime a Trojan Horse for commissioners of health care services?

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

As set out in our previous article [Challenges under the Provider Selection Regime | Health law | Procurement \(brownejacobson.com\)](https://www.brownejacobson.com) when a 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. Providers of health care services no longer have the right to bring a procurement challenge, as they would under the Public Contracts Regulations 2015 (“**PCR**”) or (when it goes live in February 2025) the Procurement Act 2023 (“**PA2023**”).

While providers could potentially seek judicial review of a decision under the PSR if they had grounds to demonstrate it was not made fairly, rationally and in accordance with law, the statutory duties under the PSR (including to act transparently, fairly and proportionately – Regulation 4(1)(b)) are not enforceable. The only PSR route open to aggrieved providers who remain unsatisfied about the further decision by a commissioner following a provider representation, is to seek the involvement of the Independent Patient Choice and Procurement Panel (“**Panel**”) during the standstill period. This is not set out in the PSR itself (save for the provision of independent expert advice under Regulation 23) but in the Statutory Guidance to the PSR to which relevant authorities must have regard under Section 12ZB of the National Health Service Act 2006.

At the time of writing, all three decisions of the Panel have found that the relevant authority breached the PSR:

- Review of a proposed contract award: Online ADHD Assessment, Diagnostic and Management Services for North Cumbria, Case Reference: CR0001-24 (15 May 2024) in which the Panel found that the Integrated Care Board had breached the PSR in its application of Direct Award Process C (rather than Direct Award Process B).
- Review of a proposed contract award: Same Day Urgent Care Unit Services at Aintree Hospital Site Care Reference: CR003-24 (6 September 2024), in which the Panel found that the NHS Foundation Trust had breached the PSR in its Competitive Process and had breached its obligations to act fairly and transparently; and
- Review of a proposed contract award: All Age Continuing Care (AACC) Service for Staffordshire and Stoke-on-Trent, Case Reference: CR0004-24 (9 September 2024) in which the Panel found that (noting the Panel's doubts whether the PSR was even applicable to the service) the Integrated Care Board had breached the PSR in its Most Suitable Provider process and had breached its obligations to act fairly, transparently and proportionately.

Necessary avenue for providers who have lost an enforceable remedy

Subject to meeting the Panel's case acceptance criteria (and, at such point as the Panel is approaching full capacity, the Panel's prioritisation criteria), there is no barrier to approaching the Panel. Unlike a PCR challenge, there are no Court fees, no need for legal and counsel fees and no risk of paying the commissioner's costs if the proceedings are unsuccessful.

From a provider perspective, a huge amount of resource goes into the submission of tenders with many hours of subject matter expert time spent designing the solution, commercial work on the costs and then the writing of submissions by bid writers. There is no co-ordination between commissioners, so there may be many tenders due at the same time with short deadlines and potentially requiring completion in the holiday period. Tens (or even hundreds) of thousands of pounds may be spent on a bid. This is demonstrated in the Panel's decision on All Age Continuing Care by the fact that the aggrieved provider had spent two full-time equivalent months completing the answers to the 60 questions put to providers by the commissioner. Accordingly, providers need an avenue in which to air their grievance when they consider a commissioner has failed to comply with the PSR.

From a provider's perspective, the Panel may appear toothless, as it has no powers to set aside the decision of the relevant commissioner, to award damages, or to declare any contract entered into as ineffective. All the Panel can do is advise the relevant authority, which must then consider that advice and make a further decision in the standstill period (unless there were exceptional circumstances to proceed to award). The Panel could advise that the commissioner breached the PSR and advise the commissioner to go back a step or abandon the procurement, but in theory, the commissioner could decide to enter into the contract as originally intended notwithstanding that advice.

The challenge for commissioners

From a commissioner's perspective, the review process following a representation by an aggrieved provider during the standstill period is resource intensive.

The Statutory Guidance provides that "*relevant authorities should, where possible, ensure that decisions are reviewed by individuals not involved in the original decision. Where this is not possible, relevant authorities should ensure that at least one individual not involved in the original decision is included in the review process.*" "Where only one reviewer was not involved in the original decision, the Panel may ask commissioners why the reviewers were not all fresh individuals. Capacity, leave, and the limit of subject matter experts in an organisation can all make it difficult to find more than one fresh reviewer. The commissioner must then afford the provider an opportunity to explain or clarify the representation where it is unclear, and 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.

If the commissioner decides to enter into the contract or conclude the framework agreement as intended after the standstill period has ended, the provider then has a completely free mechanism to challenge the decision. Potentially, a provider who would not have incurred the time and cost of a formal Court challenge had the procurement been under the PCR might simply fill in the pro forma request to the Panel. While the Panel will put questions to the commissioner and meet with them (and separately with the provider) to discuss the case under the Panel's standard operating procedure, the Panel's final report and advice is published without first sharing the advice and findings with the commissioner. If an error or non-compliance became apparent during the Panel review process, there is no mechanism in the Statutory Guidance, Panel terms of reference, or standard operating procedure for the commissioner to make a further decision before and instead of receiving the published advice.

While in theory a commissioner could proceed to award a contract despite Panel advice that the provider selection process breached the PSR, there would need to be compelling reasons to do so, given that the Panel was established by NHS England under Regulation 23 of the PSR to provide relevant authorities with independent expert advice in relation to the review of PSR decisions during the standstill period. Where that independent expert advice was to the effect that the commissioner had breached the PSR with a material effect upon its choice of provider, one would expect there to be exceptional circumstances needed to justify not following that advice. Further, a decision to proceed despite that advice could be judicially reviewed.

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

Commissioners 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, commissioners must put in place actions to address this, and improve compliance with the PSR. In addition to the reputational impact of reporting findings of non-compliance, it is possible that future grants or funding may include conditions relating to PSR compliance.

From a commissioner's perspective, an aggrieved provider who might never have incurred the cost of a Court challenge has a free means by which to upend a provider selection process. The PSR was expected to make things easier for relevant authorities as it was designed to introduce a flexible and proportionate process for selecting providers of health care services, and to reduce the bureaucracy and cost associated with the PCR. The impact of the review and Panel process on a relevant authority's capacity and the impact of a finding by the Panel of non-compliance may make the PSR something of a Trojan Horse for commissioners.

What can commissioners do to protect themselves?

In making a provider selection decision under the PSR, commissioners should:

- Keep good internal records of the decision-making process, including:
 - discussions and justifications for the decision as to the requirement for the services and the contract, including contract duration;
 - with regards to the design of the provider selection process, i.e., which route(s) under the provider selection regime (i.e., Direct Award Process A, Direct Award Process B, Direct Award Process C, The Most Suitable Provider Process or The Competitive Process) are available to the commissioner based on the particular procurement and why they are suitable, including justification for the reasoning behind why a particular route is chosen;
 - with regards to the design of the procurement, the reasoning behind the timescales involved in the tender process;
 - how the clarification process will be designed and managed;
 - the records required by the information requirements in Regulation 24 – the name and registered office or principal place of business of the successful provider, the decision-making process followed (including details of procedure used for a competitive process), reasons for these decisions, details of the individuals making the decision, any declared or potential conflicts of interest and how these were managed, and date of any abandonment (if relevant) of a procurement;
 - for Direct Award Process C or the Most Suitable Provider process, records of how
 - the key criteria (weighting, hierarchy, or other description of importance) were taken into account, and how the basic selection criteria were assessed.
 - for a Competitive Process, how the key criteria were taken into account, the basic selection criteria were assessed, and contract or framework award criteria were evaluated when making a decision including the relative importance of the key criteria;
 - the rationale for choosing the provider with reference to the key criteria.
 - records of clarifications requested and the responses to them, any demonstrations, presentations or site visits including any documentation or material provided as part of the demonstrations, presentations or site visits; and
 - notes of the evaluators explaining why a score was given and the notes of any consensus or moderated scoring process.
- Have a policy with governance arrangements for the review of provider selection regime decisions during the standstill period (if a representation is received), or reserve at least one (where possible more than one) individual with the necessary procurement and/or subject matter expertise and preferably with greater seniority within the organisation out of the initial provider selection regime process in order to be fresh for the representation review.
- Ensure that a sufficient pool of officers receive training on evaluation and provider selection processes.
- Treat the representation review process during the standstill period as the opportunity to do a thorough, open-minded and objective internal review to get everything right before the decision is referred to Panel.
- Keep records of how the representation review process was conducted.
- Make sure senior officers or key stakeholders are aware that a decision is being reviewed by the Panel and the indicated timeframe for a decision.

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