

Modification of public health contracts and routes to challenge a modification that is not permitted

23 April 2025

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Contracts for healthcare services procured for the purpose of the health service in England by an Integrated Care Board, NHS Trust or Foundation Trust, local authority or combined authority responsible for healthcare services may only be modified in the circumstances set out in the Health Care Services (Provider Selection Regime) Regulations 2023 (PSR).

Unlike non-healthcare contracts which are modified under the Regime under which they were procured (Procurement Act 2023 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2024), healthcare contracts are modified under the PSR whether the contract was entered into before or after the PSR came into force on 1 January 2024.

Unless an authority needs to urgently modify a healthcare contract in unforeseen circumstances not attributable to that authority (which is dealt with under regulation 14), regulation 13 of the PSR provides that a healthcare contract can only be modified during its term without a new procurement process where:

- (a) the contract was awarded under Direct Award Process A (where healthcare services can only be provided by the existing provider) or Direct Award Process B (where there is an unrestricted number of providers for patient choice) and the modification does not render the contract or framework agreement materially different in character;
- (b) the nature and scope of the modification is clearly and unambiguously provided for in the contract or framework agreement documents;
- (c) the modification is solely a change in the identity of the provider due to succession into the position of provider following corporate changes including takeover, merger, acquisition or insolvency and the authority is satisfied that the provider meets the basic selection criteria;
- (d) the modification is made in response to external factors beyond the control of the authority and the provider (such as changes in patient or service user volume, or changes in prices in accordance with a formula provided for in the contract documents) and the modification does not render the contract or framework agreement materially different in character; or
- (e) the modification is attributable to a decision of the authority and does not materially alter the character of the contract or framework agreement, and the cumulative change in the lifetime value of the contract or framework agreement (compared to the original contract value) is under £500,000 or under 25%.

Where the cumulative change in the contract value from the original contract value is £500,000 or more, the authority must publish a notice of contract or framework agreement modification on Find a Tender Service within 30 days.

NHS England has provided a helpful process map and flowchart in the PSR toolkit: [Contract modification end-to-end process map](#) and [Contract modification flowchart](#).

If an authority made a modification that was not permitted, it would in effect be a direct award of a new contract without a procurement process and would breach the PSR. As providers of healthcare services cannot bring a procurement challenge in the courts (as they could for a non healthcare contract under the Procurement Act 2023 or the previous regime if procured earlier), providers could potentially

seek judicial review of the decision to modify the contract or could request the opportunity to make a representation in relation to an effective direct award and then seek the involvement of the Independent Patient Choice and Procurement Panel.

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