EXPLANATORY MEMORANDUM TO

THE HEALTH CARE SERVICES (PROVIDER SELECTION REGIME) REGULATIONS 2023

2023 No. 1348

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ("DHSC") and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to introduce the new Provider Selection Regime ("PSR") which will govern the procurement of health care services for the purpose of the health service in England by relevant authorities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As this instrument is subject to the affirmative procedure, this instrument will be made before sections 79 and 80 of the Health and Care Act 2022 ("the 2022 Act") are commenced. Section 79 will insert a new section 12ZB into the National Health Service Act 2006 ("the NHS Act 2006"), which is the power to make this instrument. Section 80 will revoke certain provisions in legislation that currently set out the regime for the procurement of health care services in England. Sections 79 and 80 will be commenced on the same date that this instrument will come into force. DHSC considers that it is expedient to rely on section 13 of the Interpretation Act 1978 in relation to sections 79 and 80 of the 2022 Act because it considers it more convenient and effective to revoke the old regime at the same time as bringing in the new regime.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England only.

5. European Convention on Human Rights

5.1 Minister of State for Health and Secondary Care, The Rt Hon Andrew Stephenson CBE MP has made the following statement regarding Human Rights:

"In my view the provisions of the Health Care Services (Provider Selection Regime) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 79 of the 2022 Act inserts a new section 12ZB into the NHS Act 2006, which gives powers to make regulations on the processes to be followed and objectives to be pursued by relevant authorities in the procurement of health care services for the

purposes of the health service in England, and other goods or services that are procured together with those services. This instrument makes those provisions.

6.2 Section 80 of the 2022 Act makes consequential amendments including revoking existing legislation on healthcare procurement. This instrument will replace the existing legislation to ensure no gap in the regulation of the procurement of relevant health care services.

7. Policy background

What is being done and why?

7.1 The 2022 Act aimed to transform the delivery of health care, through better health and care integration, leading to more joined-up patient care pathways and better outcomes. The PSR is intended to support this shift towards greater integration by providing relevant authorities with flexibility in how contracts are awarded to a provider of health care services. A relevant authority ("RA") is defined in section 12ZB as a combined authority, an integrated care board, a local authority in England, NHS England, an NHS foundation trust or an NHS trust. The PSR recognises that it would not be an efficient use of resources in certain circumstances for the RA to use competitive tendering but that it continues to be a procurement process that RAs can and should use.

Explanations

What did any law do before the changes made by this instrument?

7.2 The Public Contract Regulations 2015 (S.I. 2015/102) ("PCR 2015") and the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500) ("PPCCR 2013") set out the public procurement rules for health care services in England prior to this instrument.

Why is it being changed?

7.3 Engagement led by NHS England from 2019 identified that the PCR 2015 and PPCCR 2013 are not well suited to arranging NHS health care services in England. This is because they were perceived to necessitate competitive tendering when arranging health care services even in circumstances where there is no overall value in doing so.

7.4 This engagement identified that the current rules could disrupt or prevent the development of stable collaborations between providers and create barriers to integrating care. For example, unnecessary use of competitive tendering can generate continual uncertainty for providers, which may lead to inefficient use of resources, reduced incentive and opportunity for long-term investment, increased staff turnover, and reduced opportunities for innovation through better service integration. These rules also led to a perception that services in the health and care system should be procured on a periodical basis. This can obstruct efforts to build a well-coordinated system by introducing multiple adversarial processes with uncertain outcomes.

What will it now do?

7.5 This instrument intends to give RAs greater flexibility to procure health care services, with the aim of realising benefits for patients and service efficiency through better integration of services. The PSR applies where a RA procures "relevant health care services" for the purposes of the NHS, which must fall within one of the Common Procurement Vocabulary Codes in Schedule 1 of this instrument. This can be a

procurement through a contract, a framework agreement or a call-off based on a framework agreement. It is intended that the PSR applies in all cases where relevant health care services are being procured, recognising the characteristics of the health care market as outlined in paragraph 7.3 and 7.4 above.

7.6 This instrument also covers instances where there is a mixed procurement. Goods and services not normally within scope can be procured under the PSR alongside relevant health care services, provided that the main-subject matter of the procurement is relevant health care services, and that the RA is of the view that it is not reasonable to procure them separately.

Procurement Principles and Key Criteria

7.7 This instrument sets out the overarching procurement principles. These are the aims that RAs must always have in mind when procuring health care services.

7.8 This instrument also sets out the "key criteria" which RAs must take into account when selecting a provider using Direct Award Process C, the Most Suitable Provider Process or the Competitive Process (see below). The purpose of the key criteria is to promote decision-making by RAs which best supports the health service, patients, the wider population, and the taxpayer. The criteria do not apply to Direct Award Process A or Direct Award Process B (see below) because the RA is not selecting between providers in those processes.

Procurement Processes

7.9 The instrument sets out the procurement processes that a RA must use when procuring health care services:

7.10 *Direct Award Process A and B* – these processes give RAs greater flexibility by being able to direct award to providers (i.e., not through a competitive process) in certain circumstances. Direct Award Process A must be used when there is an existing provider, and the RA is satisfied that due to the nature of the service, it can only be provided by the existing provider. There can be a direct award as there is no realistic alternative provider due to the nature of the service, such as types of emergency services. Direct Award Process B must be used where the contract relates to services for which a patient is offered a choice of provider, the number of providers is not restricted by the RA, the RA will offer contracts to all providers to whom an award can be made because they meet the requirements in relation to the provision of the services, and providers are able to express an interest in providing such services. This allows for a direct award for these services since competition is already achieved when a patient chooses their provider.

7.11 *Direct Award Process C* – this process may be used if the existing contract is due to expire, the RA proposes a new contract with the existing provider and is of the view that it is satisfying the existing contract and will likely satisfy the proposed contract to a sufficient standard, and the "considerable change threshold" as set out in the regulations has not been met. This process gives RAs flexibility to award a contract without competition where there is unlikely to be overall value in selecting a new provider.

7.12 *Most Suitable Provider Process* - this process may be used when the RA is of the view, taking into account likely providers and all relevant information available to the RA at the time, that it is likely to be able to identify the most suitable provider. This process intends to give RAs flexibility to award a contract without competition because the circumstances and context for the services to which the contract relates mean there is

an identifiable most suitable provider. This may for example be because there is only one suitable provider who can play the pivotal role in a wider integrated system of health care delivery.

7.13 *Competitive Process* – Section 12ZB(2) of the NHS Act 2006 provides that regulations made under section 12ZB(1) must include provision specifying steps to be taken when following a competitive tendering process. The Competitive Process sets this out. Framework agreements can only be concluded under the Competitive Process. The Competitive Process must be used where the other processes cannot be used.

Advice

7.14 This instrument sets out that a RA may seek or otherwise receive independent expert advice relating to the procurement of relevant health care services from experts made available, or endorsed by, NHS England or DHSC. RAs may share information with such experts for this purpose. DHSC and NHS England intend to set up an independently chaired panel of experts which RAs can go to for advice about a procurement decision where an aggrieved provider is not content with the outcome of the representation process in the standstill period (see paragraph 7.15 below) and refers the procurement decision to the panel. The panel may then provide recommendations to the RA. The intention is that this review will take place during the standstill period wherever possible. The RA can extend the standstill period to accommodate such review and may revise its earlier decision in light of any recommendations made by the panel. The intention is that the independent expert advice will help RAs verify their compliance with these regulations and promote fairness in decision-making and transparency.

The Standstill Period

7.15 Where the RA follows Direct Award Process C, the Most Suitable Provider Process or the Competitive Process, it must not enter into the contract or conclude the framework agreement before the end of a standstill period. The standstill period gives an opportunity for a potential provider for the proposed contract, who is aggrieved by the decision and believes that there has been a failure to comply with the PSR to make written representations to the RA. The RA must afford each provider that made representations further opportunity to explain or clarify their representations and provide any requested information which the RA has a duty to record to such provider. Once the RA has considered the representations it must then make a further decision either to award the contract as intended, repeat steps in the procurement process, or abandon the procurement (see below). The PSR states that five working days must elapse before the standstill period can close and the RA can take action on its decision.

7.16 This is so that, if the aggrieved provider still believes that there was a failure to comply with the PSR, it may request a review of the procurement decision from the panel so that the RA can seek or otherwise receive independent expert advice, if appropriate (see above). The panel's review process and acceptance criteria will be published online. Whilst the panel will operate outside of the PSR, these regulations have been designed to accommodate the panel and the possibility that an RA can, prior to deciding to end the standstill period, consider such independent expert advice (if any). The RA may then make a subsequent further decision, replacing its previous decision. Five working days must elapse between the communication of a further decision and the standstill closing, as a cooling off period before the RA can take action to carry out that decision.

Modification of contracts and framework agreements during their term

7.17 Contracts and framework agreements can be modified during their term in certain circumstances, which gives RAs flexibility as they do not have to follow a new procurement process to do so. A notice must be published where it is a permitted modification under this instrument that is attributable to a decision of the RA and the cumulative change in the lifetime value of the contract since it was entered into, or framework agreement since it was concluded, is £500,000 or more.

Urgent awards and modifications, and abandonment of or repetition of steps in a procurement

7.18 An urgent award or modification can be made under certain circumstances, giving RAs flexibility to act quickly where delay would likely pose risks to patient or public safety in response to unforeseeable events, and where the reason for the urgency is not attributable to the RA. Additionally, if a RA considers that the term of the existing contract may expire before the end of the standstill period and it is considering independent expert advice during the standstill period, then it can modify the existing contract if it considers the modification is essential or expedient to ensure continuity between the existing contract and the award of a new contract.

7.19 RAs can abandon or repeat steps in a procurement process at any time before an award is made or a framework agreement concluded. This means RAs can, for example, rectify errors by going back and repeating steps in the process or abandon the procurement if the chosen process turns out to be unsuitable for the services in question, or to change approach to respond to events. However, where such a decision is made in the standstill period, the RA may only abandon the procurement or repeat those steps after the standstill period has ended.

Basic Selection Criteria, exclusions and termination

7.20 The Basic Selection Criteria must be applied by RAs when using Direct Award Process C, the Most Suitable Provider Process or the Competitive Process. This ensures that suitable providers are chosen with appropriate capabilities. This instrument also sets out circumstances where providers must be or can be excluded from procurement processes and ensures that, when awarding a contract, a RA includes provisions to enable them to terminate that contract in certain circumstances.

Transparency, conflicts of interest and verification of compliance

7.21 To ensure transparency, a sequence of notices must be published under each of the procurement processes. This ensures that information on how procurements are processed and how decisions are made is publicly available. Measures must be in place to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement processes. There are also requirements on a RA to record certain information (such as any conflicts of interest and how they were managed) and monitor its compliance with this instrument. It must also publish online an annual summary of its contracting activity. These provisions on transparency, recording of information, management of conflicts of interest and the Standstill Period (see above) work together to encourage verification of compliance with these regulations.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This instrument does not consolidate any other instrument.

10. Consultation outcome

10.1 There is no statutory duty to consult on the policy underpinning this instrument. Nonetheless, engagement exercises and consultations have been undertaken.

10.2 NHS England and NHS Improvement carried out a public consultation on proposals for the PSR, which ran from 11th February to 7th April 2021. 420 responses were received from NHS national, representative bodies and individuals. 70% of respondents agreed or strongly agreed with the detailed proposals set out in the consultation. The consultation and consultation response are available here[1].

10.3 DHSC also consulted on the policy which underpins this instrument from 21 February 2022 to 28 March 2022. In total, it received 124 responses. The consultation and consultation response are available here[2].

11. Guidance

11.1 NHS England will publish statutory guidance (required by section 12ZB(4) of the 2022 Act) on the PSR in draft at the time of the laying of this instrument and will be published as final when this instrument is made. The draft and final statutory guidance is available here[3].

12. Impact

12.1 There is no, or no significant, direct impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is an estimated saving of around £230m (range of -£15.2m to £750m). These figures anticipate that savings are driven by a reduction in the use of competitive procurement procedures and associated administrative costs. The large range reflects uncertainty on how the PSR will influence the number of direct awards.

12.3 A full Impact Assessment was submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause because section 28(3)(b) of the Small Business, Enterprise and Employment Act 2015 exempts, from regulatory review, powers or duties which when exercised make or amend provision in connection with procurement. However, DHSC will evaluate this regime after implementation.

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[1] https://www.england.nhs.uk/wp-content/uploads/2021/02/B0706-NHS-Provider-Selection-regime-response-to-consultation.pdf

[2] https://www.gov.uk/government/consultations/provider-selection-regime-supplementary-consultation-on-the-detail-of-proposals-for-regulations/outcome/provider-selection-regime-supplementary-consultation-on-the-detail-of-proposals-for-regulations-government-response#annex-responses-to-the-further-questions

[3] https://www.england.nhs.uk/publication/the-provider-selection-regime-statutory-guidance/

15. Contact

15.1 Richard Corbett at DHSC. Telephone: 07596 889 415 or email: Richard.corbett@dhsc.gov.uk can be contacted with any queries.

15.2 Sam Boyd, Deputy Director for Health Reform and Strategy, at DHSC can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister of State for Health and Secondary Care, Rt Hon Andrew Stephenson CBE MP at DHSC can confirm that this Explanatory Memorandum meets the required standard.