Risky business
Alex Fairweather examines the risks and mitigations for AI adoption

Consultant numbers
PHIN data reveals changes in the consultant gender balance

Talking action
Dr Susan Alexander on her priorities as she takes over as president of the IDrF

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Investing in healthcare in an uncertain world

Following major reforms, independent healthcare providers are navigating a new and evolving public procurement landscape. **Shailee Howard** and **Claire Crawford**, procurement partners at law firm Mills & Reeve, examine how the PSR is working in practice and what providers need to know when seeking review

The Provider Selection Regime emerging themes

It has been a busy time for public procurement. The Provider Selection Regime (the PSR) for the procurement of NHS healthcare services came into force in January 2024. This was followed in February of this year by the Procurement Act 2023 (the Act), applicable to non-NHS healthcare procurement of goods, services and works.

Following this whirlwind of legislative activity, there's now a breathing space where we might take stock and look at how the PSR has been working in practice in these early days.

Updated regulations and statutory guidance

The PSR regulations[1] and statutory guidance[2] have both recently been updated – if you refer to these you will want to make sure you are looking at the latest versions. New provisions are introduced to harmonise the PSR approach with that in the Act around not accepting excluded suppliers and assessment of sub-contractors to see if they are excluded suppliers.

No rush of representations to the Independent Panel (yet!)

The PSR does not contain a formal court challenge regime along the lines of that in the Act. However, providers who are unhappy with the way a commissioner has run a procurement may make representations to the Independent Panel,[3] which may then make recommendations to the commissioner following review. These are not binding on the commissioner, but the optics of disregarding them would certainly be awkward (and could push a provider into pursuing judicial review in the courts as a remedy of last resort).

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Given that the making of Panel representations is a much less risky and costly route for providers to take than a formal court challenge, we might have expected the Panel to have been bombarded with representations from all sides.

However, this does not seem to have happened – at the time of writing (April 2025) the Panel has accepted ten cases for review[4] – which, over the course of the 15 months since the PSR came into force in January 2024, is not a huge number.

Whether this reflects a lack of appetite among providers to seek review at all, or instead just an initial unfamiliarity with the route to review, remains to be seen.

How can providers best frame their representations?

The Panel does not accept every request for review by a provider (and we do not have the stats on how many requests have been declined).

We know that the Panel will not look at cases where the standstill has expired or where there was no requirement to hold a standstill period at all (i.e. Direct Award processes A and B).

The Panel has also advised providers not to make representations before the commissioner has had the opportunity to revert to the provider itself – as the Panel will not interfere to pre-empt the commissioner's own initial review.

Finally, in a recent round up post,[5] the chair of the Panel has noted that cases are more likely to be accepted for review where the representations made are focussed clearly on a particular key issue or issues, rather than just a long 'shopping list' of complaints.

This is a helpful steer for providers seeking review, where the temptation might otherwise be to make as many

representations as possible, in the belief that this makes the case more persuasive.

Taking soundings from Panel reviews

Seven case reports[6] are available at the time of writing and, taken together with the statutory guidance, they are an emerging body of interpretation adding colour to the black letter of the law as set out in the PSR regulations.

A key theme is around the appropriate use of the Most Suitable Provider (MSP) process and the importance of the commissioner undertaking due diligence to really understand the provider landscape. The MSP should not be used by commissioners simply to avoid having to run a competitive process. In his latest update, the chair of the Panel has suggested that MSP is likely to be most useful for services which are either very limited or very broad in scope. This is because in both cases, the number of potential providers is likely to be small and identifiable by the commissioner.

Otherwise, the PSR regulations and the Panel decisions do respect the discretion of commissioners to make a judgment around how they wish to procure and evaluate. For example, it may be possible for a commissioner to award to an existing provider via Direct Award Process C. However, it is not required to do so and could use the MSP or competitive processes instead, and an existing provider cannot force the issue.

Also, providers who are considering making representations around evaluation issues should note that the Panel will not 'second guess' the commissioner's choice or application of evaluation criteria or decisions around relative importance of key criteria – unless these choices/decisions are made in breach of the procurement principles set out in the PSR regulations around fair treatment, transparency and proportionality.

Finally, when assessing whether it is the PSR or alternatively the Act that applies to a procurement, the Panel has shown itself willing to take a purposive approach to the definition of 'healthcare services'. While CQC registration indicates that the service is a healthcare service, the converse is not necessarily definitive and the lack of CQC registration requirements does not automatically mean that the PSR does not apply. This is a key point for any provider considering making a challenge to a procurement, as the deadlines and available remedies are very different depending on whether it is the Act or the PSR that applies to the procurement.

NOTES

1 https://www.legislation.gov.uk/uksi/2023/1348/contents
2 https://www.england.nhs.uk/publication/the-provider-selection-regime-statutory-guidance/
3 https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/
4 https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/panel-reports/
5 https://www.linkedin.com/pulse/independent-patient-choice-procurement-panel-recent-cases-taylor-hpepe/?trackingId=YcEjyUU4RmOjkXNmndHRwA%3D%3D
6 https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/panel-reports/