

# **An update in the changes to procurement legislation for council and NHS staff**

with a focus on the learning disability and autistic  
people sector

**13th December 2023 10 to 11.30am**

The **Local Government Association** and **Association of Directors of Adult Social Services** are **Partners in Care and Health** (PCH) working with well-respected organisations.

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# Webinar housekeeping

- **Please post questions, we will take questions at the end in a panel session**
- **The slides will be circulated after the event**
- **This webinar is being recorded**



# Programme

<b>Chair's introduction</b>	<b>Steve Ede</b> Head of Procurement at Essex County Council and Chair of the South East Procurement National Advisory Group
<b>The Procurement Act 2023</b>	<b>Greg Povey</b> LGA Associate
<b>NHSE update – the Provider Selection Regime</b>	<b>Csenge Gal</b> Senior Policy Manager, Central Policy Group, Chief Strategy Officer's Directorate, NHS England
<b>What is possible?</b>	<b>Julian Blake</b> LGA Associate and Partner <a href="#">Stone King</a>
<b>Question &amp; Answer Session</b>	Panel question and answer. Chaired by <b>Steve Ede</b>
<b>Close and thanks</b>	Rachel Carter Partners in Health and Care

# Chair's introduction

**Steve Ede**

Head of Procurement at Essex County Council

and Chair of the South East Procurement National Advisory Group



# The Procurement Act 2023

**Greg Povey**

LGA Associate and Procurement & Contract Management  
Category Lead People West Sussex County Council



# The Procurement Act - key changes and what this could mean theoretically for procurement staff and commissioners supporting autistic people and people with learning disabilities.



## Procurement Act 2023

UK Public General Acts > 2023 c. 54 > Whole Act

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### What Version

Latest available (Revised)

Original (As enacted)

### Advanced Features

Show Explanatory Notes for Sections

#### Status:

This is the original version (as it was originally enacted). This item of legislation is currently only available in its original format.



See <https://www.legislation.gov.uk/ukpga/2023/54/enacted>

## Introduction and caveat

- This presentation is intended as a helpful summary of information available from Cabinet Office, it contains information from the Cabinet Office Knowledge drops which started in November 2023, the legislation itself and the official Explanatory Notes which explain what each part of the act will mean in practice.
- For a complete understanding of the Procurement Act 2023 Contracting Authorities will need to have regard to secondary legislation that is not available yet but is planned to be available from the start of February 2024. (See next slide).
- You can obtain copies of these documents for yourselves and familiarise yourself in detail with their contents.

You can register with the Cabinet Office Transforming Procurement website in order to keep yourself informed of the latest developments :  
<https://www.gov.uk/government/publications/the-procurement-bill-summary-guide-to-the-provisions> [follow link at the bottom of the page]

Other useful links:

<https://www.gov.uk/government/collections/transforming-public-procurement>  
<https://www.gov.uk/guidance/the-official-transforming-public-procurement-knowledge-drops>  
<https://www.gov.uk/government/publications/update-on-the-official-learning-and-development-offer-for-contracting-authorities>  
<https://assets.publishing.service.gov.uk/media/65569fcae1104cf000dfa73bd/20231127-factsheet-light-touch.pdf>

In 15 minutes, it will not be possible to cover all the information you need to know about the Procurement Act 2023, to understand what you need to know about the Procurement Act 2023 you should refer to official Cabinet Office guidance and sign up to the official Cabinet Office Learning and Development offer.

### Caveats:

**The presentation is produced with the intent of stimulating discussion at today's event and directing you to cabinet office guidance.**

**2. Contracting Authorities (CA) should note that the presentation is intended to provide guidance only. Nothing in the presentation is intended to be a substitute for formal legal advice and should not be relied upon as such. You should take appropriate steps to verify independently the accuracy of any information and take any legal and/or procurement advice as you consider necessary.**

**3. We have made every effort to ensure that the information is accurate and up-to-date. However, we do not give any express or implied warranty as to the quality, accuracy, timeliness or completeness of the information or accept liability for any errors, omissions or inaccurate information.**

**The presentation contains links to third-party websites for convenience but we take no responsibility for any failure of those links.**

Available Now



## EXPLANATORY NOTES

Procurement Act 2023  
Chapter 54

## Further Govt. Guidance sources

### What these notes do

These Explanatory Notes relate to the Procurement Act 2023 which received Royal Assent on 26 October 2023 (c. 54).

- These Explanatory Notes have been prepared by the Cabinet Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

- Even though the Act is now done, we still have secondary legislation to lay which will cover elements such as transparency notices.
- A 2-part consultation was ran over 10 weeks and we received excellent feedback - a total of 336 responses over both - thank you to those who responded to technical requirements.
- We have taken on board some recommendations and will be capturing this in a response and subsequent drafting of the Statutory Instrument.
- This will be laid in Parliament next year- expected to be March but the date is to be finalised- we will update everyone via the stakeholder update.
- In parallel, we are preparing formal policy guidance which will be published starting from February 2024.
- This will include guidance on transition and how to navigate - more to follow for contracting authorities in the new year.

Government Commercial Function

Transforming Public Procurement

Procurement Act 2023 Knowledge Drop for contracting authorities

Light touch

Accompanying guidance for light touch contracts designed to be reviewed alongside the 6 parts of the Procurement Act 2023 Knowledge Drop for contracting authorities.

The guidance is intended to highlight some of the exemptions or differences to the main rules of the act for light touch contracts. You should ensure that the exemptions detailed in the Knowledge Drop apply to your cases stated within the guidance.

LTR Exemptions and differences explained

Cabinet Office  
secondary legislation/  
or statutory guidance  
ETA February 2024

Cabinet Office

Transforming Public Procurement

Part 1 Consultation on draft regulations to implement the Procurement Bill

June 2023

CP 302

# The Procurement Act 2023

## Background

- “The UK joined the World Trade Organisations Agreement on Government Procurement (GPA) on 1 January 2021.
- In designing the new regulatory framework, the Government is committed to compliance with the GPA and its principles of fairness, impartiality, transparency and non-discrimination.
- The legislation embeds a number of key “principles of public procurement” set out in the Green Paper: value for money, public good [maximising public benefit], transparency [sharing information], acting with integrity, equal treatment and non-discrimination [prohibiting discrimination against treaty state suppliers, and treating suppliers the same].
- Integrity must sit at the heart of the process. It means there must be good management, prevention of misconduct, and control in order to prevent fraud and corruption.
- The Act includes a duty on contracting authorities to have regard to the particular barriers facing SMEs, and to consider what can be done to overcome them.
- Part five of the Act sets out the particular requirements on contracting authorities to identify and manage conflicts of interest

## Key aims

- Creating a simpler and more flexible, commercial system that better meets our country’s needs while remaining compliant with our international obligations.
- Opening up public procurement to new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts.
- Taking tougher action on underperforming suppliers and excluding suppliers who pose unacceptable risks.
- Embedding transparency throughout the commercial lifecycle so that the spending of taxpayers’ money can be properly scrutinised.”

In summary- key milestones to go-live are on track but we still have some time to prepare

Delivery of programme to support implementation



## Government says - Key changes

- Streamlined new procedures are intended to save time for public bodies and suppliers and mean better commercial outcomes that deliver more value for money for taxpayers. The legislation allows for more negotiation with suppliers to deliver innovative solutions. This means moving from the 7 procedures in Public Contract Regulations 2015 to just 3.
  - Competitive flexible: any competitive procedure which the CA considers appropriate for the purpose of awarding the public contract, designed by the CA around what would work best for the specific procurement, in accordance with the provisions of the legislation.
  - Open procedures
  - Direct awards (including under urgency) – (clause 41).
- 19 (1) provides that in a competitive tendering procedure, a contracting authority may only award a contract to the supplier that submits the most advantageous tender (MAT), this is a move away from Most Economically Advantageous Tender (MEAT) reflecting the new requirements for CA to deliver value for money and maximise the public benefit from the contract.
- A duty for CA to have regard to reducing and removing barriers to SME participation in procurement and removing unnecessary obstacles relating to audited accounts and insurance in the conditions of participation.
- The legislation integrates the previous “Light Touch Regime” for social, health, education and certain other services into the broader provisions but with a series of exceptions to recognise that “Light Touch Contracts” may require different treatment.

## Government says - Key changes 2

- The legislation introduces new arrangements for how procurement should be conducted in an emergency such as the Covid-19 pandemic. This new power (Section 42: Direct award to protect life, etc.) allows Ministers to make provision in Regulations allowing the direct award of contracts when necessary to protect life so that contracting authorities can procure at pace.
- The legislation aims to make it easier for buyers to take account of previous poor performance by suppliers. There are clearer and broader grounds to allow for the exclusion of suppliers who pose unacceptable performance risks. The legislation provides for a centralised debarment list of suppliers which the Government considers must or may be excluded from procurements.
- The Find a Tender (FTS) platform will become the “Central Digital Platform” and the single place to publish Notices, where suppliers can find and access public sector procurement opportunities, CA can access commercial data from tools and registers and the Public can access data about public procurement excluding sensitive data,
- Procurement Review Unit will continue to investigate procurement complaints but also provide a compliance service reviewing and reporting on procurement landscape “systematic” and “institutional” performance of CA under the new regime, as well as, manage debarment investigations and manage the debarment register.

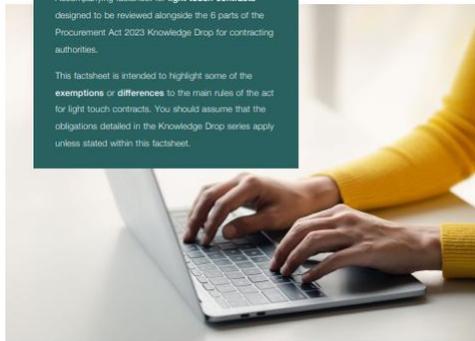


Procurement Act 2023 Knowledge Drop  
for contracting authorities

## Light touch

Accompanying factsheet for light touch contracts designed to be reviewed alongside the 6 parts of the Procurement Act 2023 Knowledge Drop for contracting authorities.

This factsheet is intended to highlight some of the exemptions or differences to the main rules of the act for light touch contracts. You should assume that the obligations detailed in the Knowledge Drop series apply unless stated within this factsheet.



<https://assets.publishing.service.gov.uk/media/6569fcae1104cf000dfa73bd/20231127-factsheet-light-touch.pdf>

# Light Touch Regime key changes

## Differences

- Light touch contracts have different thresholds.
- Light touch contracts may also include the needs of the end user in the award criteria often referred to as 'user choice'.
- Minimum timescales for light touch contracts are not mandated.
- There is no maximum term specified for a framework that is a light touch contract.
- Light touch contracts also have the benefit of undertaking a direct award on the basis of user choice.
- The contract details notice must be published within 120 days, rather than 30 days.
- There are increased flexibilities for modifications made to light touch contracts during their term, which may be substantial or above threshold or outside the scope of permitted modifications.

## Exemptions

- Light touch contracts are defined by CPV codes and are exempted from certain parts of the act.
- The requirement to publish the transparency notice does not apply to direct awards for user choice contracts.
- The requirement to observe a standstill period does not apply to light touch contracts though you may choose to have a voluntary one.
- Setting, assessing and publishing KPIs does not apply for light touch contracts.
- The requirement to publish contract performance notices for poor performance or breaches of contract does not apply to light touch contracts.
- The requirement to publish a contract change notice (or a copy of the amended contract) does not apply to light touch contracts.

# Key changes

## 20 Competitive tendering procedures

- (1) Before awarding a public contract under section 19, a contracting authority must carry out a competitive tendering procedure in accordance with a tender notice and any associated tender documents.
- (2) A “competitive tendering procedure” is—
  - (a) a single-stage tendering procedure without a restriction on who can submit tenders (an “open procedure”), or
  - (b) such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract (a “competitive flexible procedure”).
- (3) A contracting authority must ensure that the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract.
- (4) A competitive flexible procedure—
  - (a) may limit the number of participating suppliers, generally or in respect of particular tendering rounds or other selection processes;
  - (b) may provide for the refinement of award criteria in accordance with section 24;
  - (c) may not permit the participation of suppliers that did not submit a tender in the first round of tendering or that were excluded following an earlier round.
- (5) A competitive flexible procedure may provide for the exclusion of suppliers—
  - (a) by reference to conditions of participation (see section 22);
  - (b) by reference to an intermediate assessment of tenders;
  - (c) that are not United Kingdom suppliers or treaty state suppliers;
  - (d) that intend to sub-contract the performance of all or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier.

## 24 Refining award criteria

- (1) A contracting authority may refine an award criterion as part of a competitive flexible procedure if—
  - (a) the tender notice or associated tender documents provide for the refinement of the criterion, and
  - (b) the authority is yet to invite suppliers to submit tenders to be assessed under section 19 (award following competitive tendering procedure).
- (2) A contracting authority may, in consequence of refining an award criterion under subsection (1), refine the indication of the relative importance of the award criteria under section 23(3)(b).
- (3) A contracting authority may not make a refinement under this section if it would result in award criteria that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so.
- (4) A contracting authority must modify and republish or provide again the tender notice and any associated tender documents affected by refinements under this section.

- Subsection (4)(b) identifies that award criteria can be refined in the course of the procedure, within the parameters set out in section 24.
- Subsection (4)(c) prohibits contracting authorities from allowing participation of suppliers not previously involved and/or suppliers excluded in an earlier stage.

# Interesting provisions

## 12 Covered procurement: objectives

- (1) In carrying out a covered procurement, a contracting authority must have regard to the importance of—
  - (a) delivering value for money;
  - (b) maximising public benefit;
  - (c) sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;
  - (d) acting, and being seen to act, with integrity.
- (2) In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.
- (3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.
- (4) In carrying out a covered procurement, a contracting authority must—
  - (a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
  - (b) consider whether such barriers can be removed or reduced.

## Subsections (2) and (3)

## 19 Award of public contracts following a competitive tendering procedure

- (1) A contracting authority may award a public contract to the supplier that submits the most advantageous tender in a competitive tendering procedure.
- (2) The "most advantageous tender" is the tender that the contracting authority considers—
  - (a) satisfies the contracting authority's requirements, and
  - (b) best satisfies the award criteria when assessed by reference to—
    - (i) the assessment methodology under section 23(3)(a), and
    - (ii) if there is more than one criterion, the relative importance of the criteria under section 23(3)(b).
- (3) In assessing tenders for the purposes of this section a contracting authority—
  - (a) must disregard any tender from a supplier that does not satisfy the conditions of participation;
  - (b) may disregard any tender from a supplier that—
    - (i) is not a United Kingdom supplier or treaty state supplier, or
    - (ii) intends to sub-contract the performance of all or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier;
  - (c) may disregard any tender that offers a price that the contracting authority considers to be abnormally low for performance of the contract;
  - (d) may disregard any tender which breaches a procedural requirement set out in the tender notice or associated tender documents.

Subsection (3)(d) gives contracting authorities discretion

## Transparency notices

- While there is already a high level of transparency of UK public procurement, our existing rules and systems have room for improvement. Cabinet Office want to expand the types of information that we report on, improve the usability of this data through common identifiers and create a single platform through which this data can be accessed by all.
- The foundation of our transparency reforms is a new procurement ‘noticing’ regime, covering the full lifecycle of public procurement, from planning through to contract expiry. The new notices are outlined in the Procurement Bill (2022) and further detail on their content will be set out in the secondary legislation to follow.
- Running throughout the Act are requirements to publish notices. These are the foundations for the new standards of transparency which will play such a crucial role in the new regime. Cabinet Office ambitions are high and they want to ensure that procurement information is publicly available not only to support effective competition, but to provide the public with insight into how their money is being spent.
- Part eight of the Act provides for regulations which will require contracting authorities to publish these notices, resulting in more transparency and greater scrutiny.

## 93 Pipeline notices

Notices “Just one example: 17 (1) requires that if a contracting authority carries out preliminary market engagement (defined in section 16) it must publish a preliminary market engagement notice before it publishes a tender notice or, when it does publish a tender notice, explain why it did not publish a preliminary market engagement notice.” Need to be moved back where they were originally which is the final paragraph of Transparency Notice section above.

(1) This section applies in relation to any contracting authority that considers that, in the coming financial year, it will pay more than £100 million under relevant contracts.

(2) A contracting authority must publish a pipeline notice before the end of the period of 56 days beginning with the first day of the financial year referred to in subsection [\(1\)](#).

(3) A “pipeline notice” means a notice setting out specified information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish a tender notice or transparency notice during the reporting period.

## Section 35 Dynamic Markets

### 35 Dynamic markets: establishment

(1) A contracting authority may establish arrangements for the purpose of a contracting authority awarding public contracts by reference to suppliers' participation in the arrangements.

(5) Documents establishing or modifying a dynamic market are not a contract for the purposes of this Act.

35 (5) clarifies that documents establishing or modifying a dynamic market are not public contracts. This is one of the factors distinguishing dynamic markets from frameworks, which are public contracts, and reflects the fact that a dynamic market is essentially a list of pre-qualified suppliers rather than contracts

36(7) A contracting authority may not—

(a) limit the number of suppliers that can be admitted to a dynamic market or part of a market, or

(b) modify the conditions for membership of a dynamic market or part of a market during the term of the market.

## Section 49 Open Frameworks

- Subsection (1) explains that an open framework is a scheme of successive frameworks that together make up an open framework. Allows new suppliers to be added at set times during its lifetime, as each successive framework in the scheme is entered into. Unlike a closed framework, an open framework is not closed to new suppliers, but it is also not permanently open to new suppliers like a dynamic market. Subsection also makes it clear that the terms of the open framework must be substantially the same throughout.
- Subsection (2) sets out various minimum time periods. Subsection (2)(a) requires that an open framework must be reopened at least once during the first 3 years and at least once every 5 years thereafter. Allows for the open framework to be re-opened on a more frequent basis - e.g. annually - if desired. Subsection 2(b) provides for each framework to expire when the successive framework is awarded (but see subsection (3)). Subsection 2(c) provides that the maximum term of an open framework is 8 years.
- Subsection (3) is a transitional provision that provides that although a framework expires when each successive framework is awarded (see subsection 2(b)), any live procurements (i.e. procurements that have already commenced) may be continued under the expired framework. However, no new procurements may be started once the next framework has been awarded.
- Subsection (4) states how an existing supplier can be re-admitted to the open framework on its re-opening in circumstances where there is no limit on the number of suppliers to be appointed to the new framework. Subsection (4)(a) allows a supplier which is already party to an open framework to remain party without having to either have a tender it previously submitted reassessed or submitting a new tender. Subsection 4(b) allows it to request a previous tender is re-assessed. Subsection 4(c) allows it to submit a new tender.

## Section 49 Open Frameworks

- Subsection (5) states how an existing supplier can be re-admitted to the open framework if there is a limit on the number of suppliers to be appointed to the new framework. This can only be on the basis of the supplier's tender submitted when it was previously appointed or a new tender.
- Subsection (6) states that, if a single supplier is awarded a framework under an open framework, the maximum term of the framework and the open framework is 4 years from the day on which the single supplier was appointed.
- Subsection (7) states that the maximum term of 4 years for a single supplier open framework in subsection (6) applies notwithstanding the fact that in all other cases the maximum term of an open framework is 8 years.
- Subsection (8) defines an "existing supplier" (as referred to in subsections (4) and (5)) as a supplier that is on a framework under an open framework.
- Subsection (9) states that references to award of successive frameworks on substantially the same terms (as referred to in subsection (1)) means that an award could be made without a new tender or transparency notice in line with the provisions for modifications in section 31. If award on substantially different terms is needed, to ensure open competition, a new framework under section 45 (Frameworks) or a new open framework under section 49) must be awarded rather than re-opening the existing open framework.
- Subsection (10) states that a framework under an open framework may never be awarded by direct award under section 41 (Direct award in special cases) or section 43 (switching to direct award).

**What this could mean theoretically for procurement staff and commissioners supporting autistic people and people with learning disabilities.**

1. What do the new regulations say about the Light Touch Regime?

- Light Touch Regime
  - Section 9
- Section 23 Award Criteria

2. Theoretical possibilities

## Section 9 Light Touch Contracts and Section 23 (6) Award Criteria for Light Touch Contracts

### 9 Light touch contracts

- (1) In this Act, “light touch contract” means a contract wholly or mainly for the supply of services of a kind specified in regulations under subsection (2).
- (2) An appropriate authority may by regulations specify services for the purposes of the definition in subsection (1).
- (3) But an appropriate authority may specify services only if, having had regard to the nature of those services, the authority considers that it is appropriate for the award of public contracts for their supply to be exempted from the provisions of this Act that do not apply to light touch contracts.
- (4) In having regard to the nature of services for that purpose, the appropriate authority must, in particular, consider the extent to which—
  - (a) suppliers from outside the United Kingdom are likely to want to compete for contracts for the supply of the services;
  - (b) the services are supplied for the benefit of individuals (for example, health or social care services) or the community generally;
  - (c) proximity between the supplier and the recipient of the services is necessary or expedient for the effective and efficient supply of the services.
- (5) In this Act, a reference to a light touch contract includes a reference to a framework for the future award of contracts wholly or mainly for the supply of services of a kind specified in regulations under subsection (2).

(23) (6) In the case of a light touch contract, the reference to the subject-matter of the contract also includes a reference to—

(a) the views of an individual for whose benefit the services are to be supplied (a “service recipient”), or of a person providing care to a service recipient, in relation to—

- (i) who should supply the services, and
- (ii) how and when they should be supplied;

(b) the different needs of different service recipients;

(c) the importance of proximity between the supplier and service recipients for the effective and efficient supply of the services

- Throughout the legislation the term light touch contracts is used to distinguish contracts which benefit from less regulation and some special rules.
- 23 (6) provides an additional (non-exhaustive) list of what may constitute the “subject matter of a contract” for light touch contracts.
  - This includes the views of an individual or their carer and the varied needs of different service recipients.
  - It may also include where proximity of the supplier and service recipient(s) is important for the effective and efficient supply of the services.
  - This additional flexibility recognises the special nature of these contracts and provides wide discretion to encourage competition wherever possible

## **Theoretically possibilities for procurement staff and commissioners supporting autistic people and people with learning disabilities.**

- Possible Criteria

- 1.Meeting the needs of the customer - how and when the services should be supplied
- 2.Proximity to the customer – carbon reduction and net zero ambitions
- 3.Service user or carer choice
- 4.Lowest price

Q: What is the right order?

Q: What influence does your budget have on the priority of the criteria?

- A Dynamic Market “essentially a list of pre-qualified suppliers” or an Open Framework?

Q: How would you choose between the two processes to source your packages of care?

# Signposting to Cabinet Office Learning & Development offer

## Learning & Development

### New L&D brochure published

- **Knowledge drops:** a range of short broadcast presentations providing a high-level overview of the changes to the procurement regulations.  
• AVAILABLE: December 2023
- **Self-guided e-learning:** comprising 10 x 1 hour or all commercial and procurement staff in Contracting Authorities (with the award of a Practitioner Certificate).  
• AVAILABLE: March/April 2024
- **Deep dive webinars:** a three-day intensive course for a smaller group who will have completed the e-learning modules - those advanced commercial practitioners who need to become experts in operating within the new regime.  
• AVAILABLE: May 2024 (and running until May 2025- need to consider when ppl should attend)
- The formal learning and development will be supported by **Communities of Practice** where practitioners can support each other - sharing, discussing and reflecting on best practice, challenges, and opportunities within the new regime.
- LAUNCHING officially May 2024- though superuser events and work has already commenced in earnest.



#### NOV - DEC '23

- Communications and briefing for stakeholders- all live on gov.uk
- Our Innovation Ambition launched
- Further guidance for preparation (coming soon)
- Knowledge Drop L&D package launched
- Ongoing engagement with superusers

#### JAN - MAR '24

- Service desk live for all queries
- E-learning ready to launch
- Secondary legislation finalised
- Guidance and sessions on how to navigate transition
- Support to conferences and events for buyers and suppliers

#### APR - OCT '24

- L&D Deep Dives launched
- Further guidance as required
- User testing and feedback for platform integration (with E-senders and procurement teams)
- Communities of Practice established

More to come- all communicated via our regular updates- sign up if you haven't!

<https://www.gov.uk/government/publications/update-on-the-official-learning-and-development-offer-for-contracting-authorities>

# NHS update

**Csenge Gal**

Senior Policy Manager, Central Policy Group, Chief Strategy Officer's Directorate, NHS England



# The Provider Selection Regime

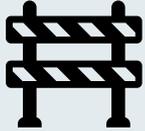
## Draft Overview

This slide deck introduces the new Provider Selection Regime (PSR).

It is designed to provide a high-level summary of the PSR and the main points that all those involved in arranging health care services should be aware of. It is not intended to be exhaustive or to be used as guidance. More detailed information and resources are available on the NHS England [PSR website](#).

Organisations required to apply the PSR when arranging in-scope health care services must follow the associated regulations and statutory guidance.

# Changes to health care services commissioning



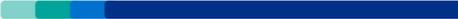
Current legislation governing the commissioning and procurement of health care services sets the expectation that competitive tendering is used to award health care contracts. This may create barriers to integrating care and disrupt the development of stable collaborations.



Since 2019 NHS England has iteratively co-created a new set of proposals with ICBs, NHS trusts and foundation trusts, commissioning support units, local authorities, government departments and key membership bodies, to introduce a new provider selection regime that supports the wider integration agenda.



We've heard how the health care provided to patients would benefit from increased flexibility in commissioning decisions, where competitive tendering is a tool that the NHS can choose to use from a wider set of options where it is appropriate to secure services that meet the needs of the people.



# Context for the new legislation

The **Health and Care Act 2022** (the 2022 Act) codified the move towards more integrated working across the health and care systems, so that all decisions taken by commissioners and providers are in the best interest of patients and service users.

As part of the necessary reforms to achieve its aim, the 2022 Act introduced a new regime for selecting providers of health care services in England: the **Provider Selection Regime (the 'PSR')**. The Health Care Services (Provider Selection Regime) Regulations 2023 sets out the detail of the PSR. Relevant authorities must also have regard to the associated [statutory guidance](#) set out the detail of the PSR.

The PSR will come into force on the 1 January 2024 and will replace the:

- Public Contracts Regulations 2015, when procuring health care services
- National Health Service (Procurement, Patient Choice and Competition) Regulations 2013.



# Key points of the PSR

## In line with the provisions in the Health and Care Act 2022, the PSR:

- introduces a flexible and proportionate process for deciding who should provide health care services
- provides a framework that allows collaboration across systems
- ensures that all decisions are made in the best interest of patients and service users.

## The PSR requires organisations to:

- act transparently, fairly, and proportionately
- act with a view to
  - secure the needs of the people who use the services
  - improve the quality of the services
  - improve the efficiency of the services

- including through integrated service delivery.



# Scope of the new legislation

Organisations (termed '**relevant authorities**') required to follow the PSR when procuring health care services are:

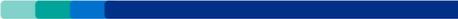
- NHS England
- Integrated Care Boards
- NHS trusts and foundation trusts
- Local authorities or combined authorities

## In scope are:

- **health care services** arranged by the NHS e.g., hospital, community, mental health, primary health care services
- **public health services** arranged by local authorities e.g., substance use, sexual and reproductive health, and health visitors

## Out of scope are:

- **goods** e.g., medicines, medical equipment
- **social care** services
- **Non-health care services** or health-adjacent services e.g., capital works, business consultancy



# Scope of the new legislation - mixed procurements

The PSR allows relevant authorities to arrange a contract comprising of a mixture of in-scope health care services and out of scope services or goods when both of the below statements are true:

- **The main subject matter of the procurement is relevant health care services in England.**
- **The relevant authority is of the view that the other goods or services could not reasonably be supplied under a separate contract.**



# Overview of the provider selection processes

Relevant authorities can follow the below provider selection processes to award contracts for health care services:

- **Direct award process A** where there is an existing provider for the services and that provider is the only capable provider.
- **Direct award process B** where people have a choice of providers, and the number of providers is not restricted by the relevant authority.
- **Direct award process C** where there is an existing provider for the services and that existing provider is satisfying the original contract and will likely satisfy the proposed new contract, and the services are not changing considerably.
- **Most suitable provider process** where the relevant authority is able to identify the most suitable provider without running a competitive process.
- **Competitive process** where the relevant authority wishes to run a competitive exercise, or if they wish to conclude a framework agreement.



# Key criteria

There are five **key criteria** that must be considered when assessing providers under direct award process C, the most suitable provider process, or the competitive process. These are:

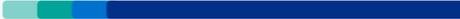
- Quality and innovation
- Value
- Integration, collaboration, and service sustainability
- Improving access, reducing health inequalities, and facilitating choice
- Social Value

# Transparency and reviewing decisions during the standstill period

The PSR provides for greater flexibility in deciding how best to arrange local health care services and allows relevant authorities to award contracts without using a competitive process, where appropriate.

Other checks and balances are therefore in place to ensure that the PSR is complied with and that the flexibilities are used appropriately and in the best interest of patients and service users. These include:

- specific transparency and record-keeping requirements
- a standstill period within certain provider selection processes – that is, a minimum period between publishing an intention to award a contract notice and awarding a contract where provider selection decisions can be reviewed
- an independent PSR review panel – providers will be able to make representations to the PSR review panel if they believe that a relevant authority has not followed processes/met the requirements of the PSR when awarding a contract.



# Reviewing decisions during the standstill period

The standstill period applies where relevant authorities followed direct award process C, the most suitable provider process, or the competitive process. The standstill period does not apply to direct award processes A and B.

During the standstill period:

- providers can bring representations against provider selection decisions
- relevant authorities have to review representations and have to make a further decision about whether to proceed with the award of the contract, return to an earlier step in the process, or abandon the process
- where the provider remains unsatisfied with the response of the relevant authority, they may seek a review by the independent PSR review panel
- the panel may accept to review a representations and offer advice to the relevant authority; the relevant authority will take a further decision based on that advice about whether to proceed with the award of the contract, return to an earlier step in the process or abandon the process.



# Transitional provisions

The PSR will come into force on **1 January 2024**. Until it comes into force, relevant authorities must follow the current rules.

This means:

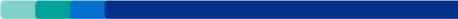
- contract award procedures started before the PSR commencement date must conclude under the current rules.
- contract modifications before the PSR commencement date must be carried out under the current rules.



# Contract award procedures started before commencement

A contract award process is considered to have started under the Public Contracts Regulations 2015 if any of the following occur before the PSR comes into forces:

- a contract notice has been submitted to the UK e-notification service for publication in accordance with Regulation 51(1) of the Public Contracts Regulations 2015
- the relevant authority has contacted any provider to seek expressions of interest or offers in respect of a proposed contract
- the relevant authority has contacted any provider to respond to an unsolicited expression of interest or offer received from that provider in relation to a proposed contract.



# Implementation

NHS England's draft statutory guidance sets out what relevant authorities must do to comply with the PSR legislation. Relevant authorities must have regard to the statutory guidance.

NHS England has also published a range of tools to help relevant authorities prepare for implementation. These include:

- process maps (one for each decision-making process)
- flow charts
- comprehensive FAQs
- Find A Tender Service (FTS) guide
- a series of webinars and associated slide decks to provide an overview for commissioners and an in-depth look at the PSR for practitioners

These are available on the [PSR website](#).

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# What is possible?

**Julian Blake**

Stone King



## 1. “The Art of the Possible in Public Procurement” (2016): “definitive”; “a major achievement”

- Purposive PCRs 2015; Social Business Initiative; Resonance; LGA Guidance; Civil Society Strategy.
- Provider perspective: Norfolk Travel Training; E3M <https://e3m.org.uk/>; (“Procurement to Partnership Toolkit”).
- Purpose & professionalism v. process & risk aversion; thoughtfulness v. routine; practical v. technical law; complexity & risk; reasonable judgment v. marking schemes; real value immeasurability.
- Subsidy; Direct Award; VEAT/PIN market testing; JV/co-investment; LTR; Innovation Partnership & co-design; consultative specification & dialogue; Alliance Contract; Community Engagement; Development Projects.
- Domestic abuse services; London homelessness; Halton Social Care; IPs - Leicestershire Children’s Services & Oldham Social Prescribing; Acs - Plymouth & Lambeth Health/Social Care.

## 2. Commissioning Transformation: “We can’t do it, because no one has done it”.

- Christopher Bovis; Jane Lynch - Centre for Public Value; Malcolm Harbour CBE (ex MEP) – AoP2 re Procurement Act 2023.
- Public Value/Mission: Mariana Mazzucato “The Value of Everything”; Kate Raworth “Doughnut Economics”; Hilary Cottam “Radical Help”; Social Impact Bonds for outcomes.
- Social Enterprise (E3M “Vitalising Purpose”); Co-operatives (“Preston Model”); Community Engagement (“Wigan Deal”); Community Wealth-building; Human Learning System; Social Value.
- Social Services and Well-being (Wales) Act: voice and control; prevention & early intervention; well-being; co-production; multi-agency.
- CMPASS “Transforming Social Care; a guide to better tendering” <https://cwmpas.coop/what-we-do/policy-publications/transforming-social-care/>.

## 3. Fundamental Correctives to Commissioning Adults Services

- Not market purchasing; wider than procurement (subsidy; investment; facilitation; collaboration); shapes social foundation ecosystem.
- Public Value purpose (consistent with compliance & budget); consultation; outcomes; resources; investment; integration; prevention; consequent savings.
- Value of Public Benefit Sector – expertise; engagement; initiation; innovation; community resource; purpose-alignment.
- Collaboration Theory v. competition ideology; Public Value Imperatives (quality, dedication; engagement; open book).
- Relational, adaptable working partnership agreements v. transactional, commercial-style contracts.

## 4. Practical issues related the Procurement Act 2023

- Flexibility; Transparency; Proportionality; SME/VCSE recognition.
- VfM & “maximising public benefit”; MEAT to MAT; Pre-engagement; LTR.
- Inherent Public v. added Social Value; National Procurement Policy Statement.
- Addressing legalism & challenge.
- Contracts: specification; fair payment; communication; flexibility (variation); duration.

## 5. Key Messages

1. Commissioning of public services distinguished from market purchasing through procurement.
2. Collaboration in public services as an alternative to market competition.
3. Public Value Purpose is the determinant in commissioning.
4. Professional application to complexity, uncertainty, and risk is required.
5. The fundamental procurement principle of proportionality needs highlighting.
6. The purpose alignment of public benefit providers is distinctive.
7. Place-based localism is distinctive.
8. Public Value Imperatives should be the commissioner's essential demand.
9. Credibility assessment should be a key part of procurement.
10. Public/Social Value in public services is inherent, is not just incidental added Social Value.
11. The prospect of challenge requires a robust approach.
12. Public service contracts should be understood as working agreements.

# Question and answer session with the presenter panel



**Close and thank-you!**



# Partners in Care and Health: autistic people and people with a learning disability team

For more information about our sector-led improvement  
offer 2022-2025 go to:

[www.local.gov.uk/pch/autistic-learning-disabilities](http://www.local.gov.uk/pch/autistic-learning-disabilities)

