

Procurement Act: the even lighter touch regime

📅 29 November 2023 👤 Michael Mousdale

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When the government first introduced its proposals for the reform of the procurement regime in its Green Paper, Transforming Public Procurement in 2020 (the Green Paper), it made it clear that it would not continue with a separate Light Touch regime, which had first been introduced in the Public Contracts Regulations 2015 (the PCR) (implementing Directive 2014/24/EU). There was a very good reason for this. In proposing a Competitive Flexible Procedure, it was in effect treating all services as Light Touch, by moving away from the more prescriptive EU rules governing most services and passing the discretion to contracting authorities to decide for themselves how to conduct a procurement.

The response to the Green Paper, however, convinced the government to retain a Light Touch regime, but with improvements to its scope and application. Yet the Bill faithfully introduced the proposed Competitive Flexible Procedure as one of the two available procurement procedures (Open being the other), which the Green Paper noted would be similar to the Light Touch regime. So what does the retained Light Touch regime in the Procurement Act 2023 (the Act) actually mean and how has the government “improved its scope and application”? In this article we aim to unravel the “new” Light Touch regime, where it applies and what it means for contracting authorities.

The explanation needs to begin with what the Act does not provide. There are no specific sections dealing with Light Touch in the way that the PCR does in Regulations 74-76. Yes, section 9 is headed “Light touch contracts”, but this does no more than set out the basis by which particular services can be designated as “Light Touch”. From that, therefore, we can conclude that it is not a procedure as such. This is reinforced by the Draft Procurement (Transparency) Regulations which were published in July 2023, which provided the contents of all the relevant notices required under the Act. There is no specific form for a Light Touch procurement, unlike the position under the PCR.

If it is not a different procedure, then what does Light Touch mean? The starting point is to look at which services are counted as Light Touch. The draft Procurement Act 2023 (Miscellaneous Provisions) Regulations 2024 contain an extensive list of services falling into this category. It mostly covers services falling within the categories of health, welfare, education and care, as was the case in the PCR, but is much more extensive. However, it still contains oddities such as blacksmith services and tyre remoulding services!

So without a separate procedure, must it be assumed that one applies either of the standard procedures for the procurement of Light Touch services? Well, yes and no. This is because certain Light Touch services may be the subject of a direct award, if they are for “user choice services” (i.e. provided for the benefit of a particular individual and where the contracting authority is statutorily obliged in awarding a contract to take into account the views of the individual or someone who cares for that individual), and both a preference is expressed by the individual or carer as to who should provide the services and the authority considers that it is not in the best interests of the individual to award the contract following normal procedures.

User choice contracts aside, however, whilst there might not be a separate Light Touch procedure, the Act specifically makes quite different provision for Light Touch services in a number of instances, in each case permitting indeed a “lighter touch”. We have picked out four key areas where such different provision is made.

Award criteria

Section 23 retains the well-established principles that award criteria must relate to the subject matter of the contract and are sufficiently clear, measurable and specific. This concept is extended for Light Touch contracts by specifically providing that the reference to the subject matter of the contract includes a reference to three additional elements:

(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.

By qualifying the requirement to have regard to the subject matter of the contract, these additional factors are therefore mandatory. They have not been added as a list of permissible criteria which an authority may take into account should it so wish.

The first of these is similar to the user choice contracts described above, but where the authority is nevertheless conducting a procedure, rather than making a direct award. Contracting authorities will need to ensure that they have in place systems which can take into account the views of those receiving services (or those caring for those receiving services). A number of questions arise from this. How much weight should be given to these views? How much knowledge do the users need of the procurement process, the qualities of the bidders and the costs? Does this need to survey all users or will there be a selection made of user representatives? It is important to note that this is more than giving the users a seat at the evaluation table. It obliges the authority to require their views on who to choose (which may include their prejudices and irrational or irrelevant points of view) to be part of the subject matter of the contract itself. These are difficult issues and it is hoped that the issue of Guidance in due course may provide some answers.

The second of these additional considerations looks less difficult to deal with and it should be possible to adequately cover this off with well drafted specifications and procurement documents.

The third also takes procurers into potentially new territory. Without this specific reference, then most authorities should be comfortable with criteria which rewarded a proposal where proximity to the place of delivery was a legitimate factor (addressing issues such as responsiveness, assisting carbon reduction, short supply chains, freshness of produce, social value considerations). So why the specific reference to proximity for Light Touch services? This might suggest that for Light Touch services, being local for local's sake is a legitimate factor to take into account?

Frameworks

Although much of the commentary on the Act has focused on the introduction of a new concept of Open Frameworks, the provisions regarding (closed) Frameworks remain very similar to those set out in the PCR, but with one very clear difference. For all intents and purposes, Light Touch contracts need not follow any rules governing the call-off from frameworks. This means that contracting authorities are free to simply choose any contractor from a framework, without following a further competitive selection process. Whilst this is possible for non-Light Touch contracts (as is the case under the PCR) where it is either a single supplier framework or the framework itself sets out all the core terms of the contract and an objective mechanism for choosing a supplier from it, there are no such restrictions for Light Touch contracts.

Standstill

Some commentators currently take the view that the standstill rules under the PCR do not apply to Light Touch contracts, although we would say that the better view is that they do (and most authorities do follow the standstill rules in any event).

However, under the Act, there is a clear exemption from the requirement to issue a standstill notice for a Light Touch contract. This does not mean that the contracting authority does not need to justify its decision to the unsuccessful bidders. There is no exemption from the requirement to provide an assessment summary or to issue a contract award notice (now to be issued prior to award). However, unless the authority has chosen to apply a voluntary standstill period, it may enter into the contract without standstill. This is an important change, limiting the rights of bidders who might wish to challenge a decision.

Modification of contracts

Perhaps the most far-reaching of the relaxations for Light Touch services is in relation to contract modification. Under the PCR, Regulation 72 makes no distinction. However, a fundamental change is included in section 74(2) of the Act, making it completely clear that a contracting authority may modify a Light Touch contract without any of the justifications applying to other contracts needing to apply. Furthermore, there is no requirement to publish a contract change notice.

Conclusion

The combination of the broad scope of the Light Touch regime and a number of relaxations from the usual rules mean that a large degree of procurement activity will benefit from additional flexibility in the award and management of contracts. Under the PCR, many contracting authorities chose not to depart from the familiar procedures, treating the Light Touch services no differently to any other services. In the new Competitive Flexible Procedure we now have the old Light Touch regime applied universally but we have a number of new features exclusively available for our new Light Touch regime. The new regime also throws up some new challenging requirements. It is not all a question of choice. Time will tell if contracting authorities are ready for this and whether they will begin to take advantage of these new freedoms.

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