



Gofal Cymdeithasol **Cymru**
Social Care **Wales**



Modern, outcome based collaborative procurement:

A practical legal guide for commissioners and
procurement officers.

February 2019



Leading Social Services
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Contact details

by Léonie Cowen
of Léonie Cowen & Associates
30 Kingswood Avenue
Queens Park
London NW6 2DP
T. 020 7604 5870
E. admin@lcowen.co.uk

Social Care Wales
South Gate House
Wood Street
Cardiff
CF10 1EW
Tel: 0300 3033 444
Minicom: 029 2078 0680
Email: info@socialcare.wales
socialcare.wales



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Introduction and purpose of legal guidance

This guidance sets out a legal overview and good practice guide for the public procurement regime for social care services. It is intended to be value to commissioners, procurement officers and others involved in procuring of all types of social care in Wales, whether they are new to the topic or have some experience. It should be of use to officers in local government or health boards.

This guidance is based on the law as it applies in Wales and England and where there is a conflict between the two jurisdictions, the law of Wales has precedence.

Used properly the flexibilities in the PCR (see Definitions) for ‘light touch’ services (see Definitions) support the achievement of modern, person focussed outcomes based and more innovative procurement. This guidance explores and explains the opportunities to deliver these by using the opportunities for flexibility and innovation in the PCR.

Whilst the focus of this guidance is the promotion and development of effective procurement practice it is important to emphasise that commissioning drives procurement. Service development and the majority of the innovation should take place at the commissioning stage as commissioners should work with stakeholders to design appropriate service solutions to respond to the needs and achieve the required outcomes for people in need of care and support. Once the commissioners have clarified these and their service requirements they should work with their procurement, legal and other colleagues to design the most effective procurement process to secure these identified services. It is hoped that this guidance will inform the design of the most effective procurement arrangements and enable commissioners to make maximum use of the flexibilities introduced by the public procurement regulations 2015, which are still relatively new.

The objective is to provide accessible guidance which commissioners and their colleagues can either dip into or read from beginning to end. In view of this there is some repetition to assist a reader who does not read the guidance from beginning. The guidance is intended to describe the technical law and issues in a manner which is comprehensible for lay readers and to “debunk” the myth that the law is obstructive, inflexible and unhelpful to practitioners (commissioners and procurement officers) in achieving their objectives.

The guidance is split into a number of parts, sections and subsections (see the Contents). It starts with an Executive Summary and Key Points. The first part is generic guidance on ‘light touch’ (see **Definitions**). This part describes the current law and how to use it in a flexible, modern, collaborative way. The second part is more specific to home care, although it should be of use more generically. Finally, there is a list of Definitions which identifies and explains the technical terms which are used.

The guidance is also intended to be read as a legal appendix to the Home Care Toolkit (see **Definitions**). There are specific sections in this guidance which explain how to achieve a modern person-centred approach to home care. These are sector specialist sections although much of the guidance will be relevant for commissioners of other services for adults and children.

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a free and unrestricted licence (at no cost) to use such documents or parts of documents for the purposes of considering the information contained in the toolkit only. It is up-to-date as at 31st May 2018.

The views expressed are my own and no-one else's, they do not reflect the opinions of the WLGA or Commissioning Board.

Léonie Cowen

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Foreword

This guidance sets out a legal overview and good practice guide for the public procurement regime for social care services and can be equally applied to NHS services. It has been commissioned by the National Commissioning Board (Wales) in partnership with Care Inspectorate Wales.

The motivation for commissioning this guidance is driven by the need to ensure that procurement practice supports the delivery of services in line with the intentions of Welsh Government policy and legislation relating to health and social care services. The way services are commissioned and the procurement process that entails, needs to change. Understanding how a more flexible, effective and affordable service might be delivered is key to realising the central ambition and expectation of recent legislation.

The Social Services & Well-being (Wales) Act 2014 aims to improve people's well-being and imposes duties on local authorities, health boards and Welsh Ministers that require them to work to promote the well-being of those who need care and support, or carers who need support. Well-being is a broad concept that relates to all areas of a person's life, and many services will help people who need care and support and carers who need support to secure well-being. Social Service Departments respond to the wellbeing agenda in many ways and a personal outcome identified by an individual must be linked to the reason underpinning any intervention.

Care and support services across Wales will focus on the well-being outcomes that people who need care and support and carers who need support want to achieve, and on people's rights and responsibilities. Local authorities and Health Boards must consider people's personal well-being outcomes and co-produce solutions with people themselves. The assessment of need will focus on what matters to a person and a person's individual circumstances. Focusing on people's well-being outcomes will drive better experiences and better services for people who need care and support and carers who need care and support.

The Act introduced a national outcomes framework to set the national direction to promote the well-being of people who need care and support and carers who need support in Wales. It will provide greater transparency on whether services are improving well-being outcomes for people who need care and support and carers who need support in Wales using consistent and comparable indicators.

The contribution of services to the achievement of personal well-being outcomes will be an important element of the commissioning and procurement processes in terms of service evaluation. The evaluation of the achievement of personal well-being outcomes will also be related to the achievement of national well-being outcomes. The well-being of people who need care and support and carers who need support will be measured at a national level by the national outcomes framework for social services.

In the past some procurement practices have (unintentionally) undermined our ability to deliver personalised, outcomes focussed services provided through a good quality and sustainable workforce. The repeated use of short term contracts, for example, can result in discontinuity of service provision; cause stress to those reliant on services together with their carers; generate added stress and bureaucracy for providers who should be focusing on delivering quality services; create workforce instability and add significant costs for commissioners. A modern person centred outcomes approach will require a longer-term contract period and a different approach to contract drafting to support co-production and delivery. Rather than a task and time approach incapable of responding flexibly to the changing day to day needs of individuals; we want to move to an approach where the staff of the commissioner work with individuals and carers to identify the

required outcomes and enable providers to exercise greater autonomy to work with them to decide how these outcomes can be achieved.

In the future we want commissioners to work with procurement and legal colleagues to design the most effective procurement arrangements that can secure personalised services capable of delivering the required well-being outcomes of the individual. The procurement process itself will be evaluated against this outcome.

The investment in a more co-productive approach to procurement through the engagement of stakeholders should contribute to both the effective management of risk and more effective services.

This guidance can be read in conjunction with the Home Care Toolkit developed by the National Commissioning Board and can also be read as separate guidance. The toolkit is designed to help commissioners and providers to move from a task and time to a more outcomes focussed approach offering more personalised services. These include some procurement tools but they address a broad range of challenges.

This guidance makes an important contribution in explaining how the 'light touch regime' and procurement regulations can be used creatively to provide solutions rather than barriers to the effective procurement of personalised outcomes focussed services. The task is to create an appropriate framework to support this approach.

National Commissioning Board
Care Inspectorate Wales

Executive summary and key points

This guidance is in two parts and each part has a number of sub-parts, a general explanation of the public procurement law and practice for social care in force from February 2015 and some specific guidance on how to procure home care.

Part 1

In this first part of the guidance I identify the current law for the procurement of 'light touch' services. Since 26th February 2015 all new contracts for social care, education, health, which are known colloquially as 'light touch' (see **Definitions**) with a value above the statutory threshold (see **Definitions**) (currently £615,278) can only be entered into after a compliant Europe wide advertisement because of the PCR (see **Definitions**). This is a substantial change to the law as whilst a competitive open advertisement process for larger procurements was common place before 26th February, this was not a universal approach or a legal requirement. The new law requires commissioners and procurement officers to understand the impact of the changes on their current and future practice and vary their approach in view of the new legal landscape.

Part 2

This part of the guidance focusses on describing and analysing the specific issues which arise in relation to delivering an effective 'light touch' (see **Definitions**) procedure for regulated domiciliary care. Typical historical and current procurement risks and difficulties in procuring this service, the alternative approaches by drawing on earlier sections of the guidance are set out. The risks and benefits of the various approaches and recommend best practice are described using my own practical experience and anecdotal feed-back from commissioners and procurement officers on their experience.

Part 1

Overview of the current
procurement law which applies
to social care and health

Introduction and key points

1. Since 26th February 2015 all new contracts for social care, education, health ('light touch' (see **Definitions**)) with a value above the statutory threshold (see **Definitions**) (currently £615,278) can only be entered into after a compliant Europe wide advertisement because of the PCR (see **Definitions**). This is a substantial change to the law as whilst a competitive open advertisement process for larger procurements was common place before 26th February, this was not a universal approach or a legal requirement. The new law requires commissioners and procurement officers to understand the impact of the changes on their current and future practice and vary their approach in view of the new legal landscape.
2. The PCR (see **Definitions**) provides that contracts should be valued using the total value of all of the contracts entered into with the Provider (see **Definitions**). This is intended to stop authorities (see **Definitions**) seeking to avoid the PCR by artificially splitting contracts and means that the PCR will apply to most or even all of their social care contracts and the pre-2015 practice of using spot (see **Definitions**) or individual purchases of packages where there is no framework or DPS (see **Definitions**) may well be illegal.
3. Pre-2015 existing contracts, which were properly procured and entered into, can continue until they end. Any post February 2015 variation or extensions will be interpreted under the current law. Most of these contracts will end shortly (even allowing for any extension provisions) or have ended so an understanding of the PCR has become essential for commissioners and procurement officers.

1.1 What is procurement and a comparison with grants?

What is Procurement – Definitions and the Difference between Contracting and Giving Grants?

Procurement is defined colloquially as a process of obtaining or buying goods and services. In Welsh (and English) common law a contract can be entered into either in writing or orally,

Procurement under the PCR (see **Definitions**) is defined as the acquisition by a public contract of works, supplies or services by one or more authorities (see **Definitions**) from providers (see **Definitions**) chosen by the authority for a public purpose. It has to be a contract for money to be a public contract.

The PCR says such a contract must be in writing and carried out under the PCR processes if it is above the relevant threshold (see **Definitions**). Services delivered in-house, contracts between an authority and its controlled company (see **Definitions**) and services delivered via grants are outside the requirements of the PCR.

It should be noted, for completeness, that there is another type of procurement. This is for concession contracts. These are contracts where the provider takes a service risk because the authority only pays part of the cost of delivering the service, a social care example would be where an authority transfers its own in-house residential care home to a provider and only contracts to purchase some of the places. To make the home viable, the provider must develop business from independent purchasers of care. Concession contracts are governed by the Concession Contracts Regulations 2016 (SI 2016 273). There are significant differences in valuation and other provisions from the provisions in the PCR. These contracts are outside the scope of this guidance.

What is a Grant and the Differences Between a Grant and a Contract?

The key characteristics of a grant is that the money is offered as a gift, there is no commitment to make future grants; there is not necessarily any consideration (i.e. payment for services offered in return for the grant); because of this the grant can be withdrawn at will by the person or organisation giving it (donor) and there is no obligation on the donee (person or organisation receiving the grant) to continue to deliver the service or activity after the initial grant. A grant could be an annual revenue payment which is paid in installments or paid as a one-off, a single sum which may be a capital grant or paid by installments. There is no procurement process for a grant.

Historically, grants between authorities and providers have been used more extensively than they are now, even to secure the delivery of statutory services. In practice, grants have been phased out for some years and replaced by contracts for provision of services. In practice, the line between a contract and a grant may be very blurred, and it is not always easy to see whether the relationship is that of grant or contract. By way of example, some authorities give grants supported by service level agreements and on a rolling basis and it is often unclear if these are truly grants or if challenged would be held by the court to be contracts. direct awards (see **Definitions**). If it is a contract it may be a direct award (see **Definitions**) in breach of the PCR or may even be illegal State Aid (see **Definitions**). Another difficulty with a grant is that it is a fundamental principal of procurement that authorities should treat all providers equally and not discriminate in favour of any individual or group of providers. If a grant is given to a particular provider and that gives the provider a commercial

advantage, for example by enable the provider to buy specialist skill to assist in bidding, the provider may be disqualified from bidding in any subsequent procurement.

It is therefore unsafe to use or continue to use a grant as an alternative to a procurement and/or a way round the PCR.

Much government money is paid to authorities as a grant. The authority may use the money by entering into contracts with providers. If so, these contracts are subject to the PCR and the authority needs to be careful to build into its own procurement process the applicable terms and conditions from the government grant including allowing their own contract to be modified or terminated if the grant is reduced or ended.

1.2 Current public procurement law

Introduction and Overview - public procurement of social care

The current law is the Public Contract Regulations 2015 (PCR) (see **Definitions**). These came into force on the 26 February 2015 with transitional arrangements for procurements commenced before that date.

The PCR (see **Definitions**) were made under the 2014 European Directive on Public Procurement (2014/24). Wales, England and Northern Ireland have the same PCR (see **Definitions**). The regulations are slightly different in Scotland.

The special approach in the PCR (see **Definitions**) for procuring social care, education, health (and some other services), known as 'light touch' (see **Definitions**) is new. It was introduced by the PCR. It replaced the previous process for procuring social care, health and a number of other services set out in the public contracts regulations 2006 (known colloquially 'Part B' (see **Definitions**)). Unlike Part B 'light touch' services above the threshold (see **Definitions**) now have to be procured (see **Definitions**) by an OJEU notice (see **Definitions**) and carried out in accordance with the process for 'light touch' in the PCR.

This means that such a contract is only legally sound if a PCR compliant process has been entered into, started by a European wide advertisement.

There are different thresholds for different types of procurements. The thresholds under the Directive are in Euros and are translated into sterling. They change in line with inflation every two years. The thresholds for 'light touch' (see **Definitions**) are higher than for other services and there is a more relaxed process for awarding contracts.

For procurements started between 1st January 2018 and 31st December 2019 the thresholds are as follows:-

- 'light touch'; £615,278;
- other services and supplies; £181,302; and
- works, £4,551,413

If the UK leaves the single market on 29th March 2019, does not become a member of the European Free Trade Association or enter into a special arrangement with the EU the UK can repeal all of the public procurement regime. The government has said (so far) that it will keep the current law in place whatever happens and it is very likely that the status quo will stay during any year transitional period. However, currently the PCR is a devolved function to the Welsh Government, although this is currently a power which the Government is proposing to take away from the devolved administration. Whilst it is possible that Welsh and English law will diverge, at present, the post 29th March 2019 position is entirely unclear.

European Law and Public Contracts Regulations Important Principles

European and UK law requires EU member states to demonstrate fair, transparent and competitive behaviour in their procurement processes. These principles are enshrined in the PCR (see **Definitions**). Anti-competitive behaviour (i.e. behaviour which distorts competition) is prohibited.

Principles of fairness, transparency, equal treatment and non-discrimination apply and are included in the PCR (see **Definitions**) (see regulation. 18). A further objective is to deliver savings in public expenditure due to more competitive purchasing across the EU so seeking value for money is important.

The legislation should be interpreted in a purposive manner (i.e. there should be a presumption that it applies rather than one that it does not apply).

If a direct award (see **Definitions**) is made in breach of the PCR it can be challenged within the timescale for challenge in the PCR or may be void (i.e. can be challenged at any time).

‘Light touch’ applies to selection and award (see **Definitions**) for social care, health and other specific services. Apart from the selection and award process, in my opinion all other provisions of the PCR apply to ‘light touch’. These include remedies (see **Definitions**) or challenges to the procurement (see **Definitions**) process.

Apart from ‘light touch’ each main procurement procedure requires an advertisement, selection and award process which all have to be carried out in accordance with the identified prescriptive procedure in the PCR. For a ‘light touch’ process there are no specific requirements in the PCR between the advertisement and the post award notification to OJEU (see **Definitions**) each of which are required.

1.3 Chapter 3, 2015 regulations - particular procurement regimes, 'light touch' - the detail (regulations. 74-77)

Introduction

1. This section of the guidance is a detailed analysis of how to achieve a 'light touch' process. This is intended to be a generic analysis of 'light touch' and cross refers to other paragraphs of this guidance which consider how to achieve a modern co-produced home care procurement in more detail.
2. Chapter 3 PCR sets out the regulatory regime for the award of 'light touch' (see **Definitions**) services. The flexibility applies only to the selection and award procedure not to other provisions of the PCR.
3. As identified, the PCR (see **Definitions**) fundamentally changes the legal arrangements for purchasing 'light touch' (see **Definitions**). The expression 'light touch' is not used in the PCR, it is widely used colloquially and in Government guidance. see Crown Commercial Office, Guidance on the new 'light touch' regime for health, social, education and certain other service contracts:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560272/Guidance_on_Light_Touch_Regime_-_Oct_16.pdf.
4. The PCR requires commissioners and procurement officers to adopt a major change in their approach to procurement, particularly to the purchase of individual services, via spot contracts (see **Definitions**). The historic pattern of purchase which includes an above threshold value (taking into account the aggregation provisions in the PCR) of purchasing via individual or spot contracts outside any framework or DPS (see **Definitions**) is no longer legally sound because the purchases would be illegal direct awards.
5. The regulations governing award do not apply to 'light touch' (see **Definitions**). All other regulations do apply. Commissioners and procurement officers may choose to adopt some or all of the standard procedures and processes, which are set out in this guidance in brief).
6. Authorities may therefore design their own procedure. It is essential that authorities take care to ensure that the proposed approach is clear to potential or existing providers (see **Definitions**) and not overly complicated as the objective is to encourage the market-place to bid (see **Definitions**). Keeping the approach clear, transparent and simple as possible is essential especially if an innovative approach is used, which is different to one of the standard procedures as the market-place may not be familiar with this. There are some recent examples of very complicated processes with hundreds of pages of supporting documents. Providers do not want to spend many hours trying to understand the process and documents, their focus is on service delivery.

What are 'Light Touch' Services

1. The definition of 'light touch' only applies to services identified as such in Schedule 3 of the PCR by reference to the identified CPV codes (see **Definitions**). This is a change in the law. Part B (see **Definitions**) applied on a residual basis to anything not otherwise classified, anything not expressly identified as 'light touch' is subject to the full rigour of the PCR. The definition ought to be sufficiently wide to include all social care, education and health care services. It is the services which are defined as 'light touch' not the department or service which is procuring them. By way of example, a contract for IT services is **not** classified as 'light touch' even though it is for a social service.

Pre-procurement process, Preliminary Market Consultation

Introduction and General

1. Regulation 76 (8) sets out considerations which may be taken into account when awarding contracts (see below). These should be built into the procurement criteria, processes and methodology so that they can be considered at the early stages, throughout the procurement process including at award (see **Definitions**).
2. The regulation which deals with preliminary market consultation before the procurement commences (regulation 40), is not a requirement for 'light touch' though it sets out a sensible and recommended approach for this process. The consultation should take place when the procurement is being considered, before it starts. It is to be carried out 'with a view to preparing the procurement and informing' providers of their procurement plans and requirements (regulations 40 (1)).
3. Case law says that consultation is a process carried out at a formative stage in your process i.e. before the shape and content of the approach, procedure, process and documents are completed.
4. Authorities 'may, for example, seek or accept advice from independent experts' or asking the market-place including all stakeholders to respond and assist. Advice may be used in the planning and conduct of the procurement procedures only if it does not distort competition or violate 'the principles of non-discrimination and transparency' (regulations. 40 (2) and (3)).
5. Authorities can either consult on one option or preferably on more than one option to avoid limiting the outcome of the consultation.
6. Whilst there is no right or wrong approach, issues which commonly arise are and need to be considered are:-
 - Who should be consulted? There are many options ranging from just existing providers at one extreme (which I have seen but consider flawed) to an open public consultation process allowing individual providers, users, their families, other statutory organisations and indeed anyone who responds to respond. This latter is the recommended approach.
 - identifying what the authority is actually consulting on, limiting the consultation to a manageable number of options and then setting evaluation criteria which are easily understood and will enable a fair evaluation to take place;

- the extent of the consultation and how far the authority should consult on the detailed options for the procurement shape including heads of terms of the procurement pack and all of the legal documents or just the main points?
 - the resource and time implications required to carry out an effective consultation as it may take up to 3 months or even more
 - who will evaluate the responses, will it be the authority's own staff or will it be carried out with the assistance of an independent company to avoid an argument over whether the evaluation is unbiased?
 - tension and potential conflict between required financial outcomes and what consultees want to achieve.
7. Once the responses are received, a detailed evaluation should take place and a report produced for senior officers and/or members (depending on who is delegated to consider the outcome of the evaluation). This should balance conflicting responses and identify the preferred option(s). It is not essential that the authority agrees with the consultees, it is essential that the consultees' views are given careful open-minded consideration and any disagreement with their views explained and recorded with reasons for the disagreement to avoid a successful or indeed any challenge. Even an unsuccessful challenge is a time consuming and expensive process to respond to and can seriously delay a procurement.
 8. An important issue for consideration is the requirement to carry out this process without distorting competition and therefore not to give any particular provider(s) or user(s) an opportunity of preferential treatment in shaping the procurement.

Consultation rewards as well as risks

1. Typical rewards of a genuine consultation process are likely to be:-
 - A greater engagement with the market and other stakeholders and a real opportunity to listen to stakeholders and shape the procurement accordingly so that it meets the needs of users;
 - An increase in provider interest as they consider that the authority listens and is one that they want to work with;
 - detailed market intelligence enabling the authority to plan for and carry out an effective procurement and potentially shape to achieve the best outcomes for people in need of care and support whilst maximising its own knowledge to allow for commissioning and procurement which is more resource effective and efficient.
2. The likely risks are:-
 - The time, cost, complexity, potential ineffectiveness of the process (the outcome is not always informative or helpful and consultees' views may be contradictory);
 - the risk of challenge which can delay the process. It is possible to challenge the process via judicial review as flawed; and
 - the risk of running out of time. If an existing contract is ending in the near future and/or the authority is concerned that existing contracts may not all be consistent with the PCR (see **Expressions Use**) the re-procurement may be urgent.

The Procurement Process and Requirements for the 'Light Touch' Regime

Introduction and General

1. Regulation 76 (1) and (2) identifies that providing authorities (see **Definitions**) comply with the principles of transparency and equal treatment there are no other restrictions on the procurement process other than the requirement to advertise via an OJEU (see **Definitions**) notice and award notice (see **Definitions**). Authorities shall determine the procedures to be used and that includes the time scales for each stage.
2. This gives authorities extensive flexibility to create their procurement process. They may choose to adopt parts of the standard PCR (see **Definitions**) procedures such as frameworks or DPS (see **Definitions**) or design a combination of each procedure. As an example, unlike a standard DPS and authority can choose to open up the DPS at regular intervals (e.g. commonly 6 or 12 monthly) whereas a standard DPS must be open at any time. They may choose not to require a mini-competition (see **Definitions**), for example if there is only one suitable provider with a vacancy. A flexible approach to opening up a DPS is sensible, so that if there is no suitable provider already accredited for a particular award it can be opened up and new providers invited to participate. I recommend that the full procedure including, for example, the method and criteria for opening up a DPS to be specified in the supporting documents to the contract notice (see **Definitions**). My recommendation is the legally safest approach although not always followed. It is unclear whether not specifying when a DPS may be opened up would be considered to be legally sound because there is no case law on this.
3. Compliance with transparency and equal treatment are the essential requirements. These considerations and the complexity of procurement law and practice suggests it would be prudent for authorities to use some elements of existing procedures as to design a process would be a time-consuming, expensive and risky process. There are an increasing number of procurements which use some of the characteristics of a framework and a dynamic purchasing system, calling the approach a flexible purchasing system (see **Definitions**).

The Procurement Process

1. There are two alternative ways of starting a procurement process, a **PIN** (see **Definitions**) or straight into a **contract notice** (see **Definitions**). Each is started by an open advertisement. Regulation 75 (1) applies to 'light touch' (and regulations 48 and 49 for non-'light touch').
2. The PIN procedure allows contracting authorities to publish on a selling website (by a profile) or OJEU notice (see **Definitions**). It tells the market-place in advance, of the proposed advertisements for works, goods or services for the next 12 months and allows authorities to take advantage thereafter of shorter time limits when they start publish the individual procurement. This is useful, where for example, an existing contract is shortly to end and it is known that there will be a re-procurement. In theory it ought to be possible to issue a PIN for all planned procurements because the authority should know in advance what it is procuring during the following 12 months. As detailed information must be included this is not always practicable especially if a market shaping or commissioning process is underway as these may affect the procurement.

3. The alternative process is to go straight to the contract notice (see **Definitions**) is a specific advertisement for a specific procurement. This sets out a description of the required procurement, full details of likely values, process for application and the details of all of the goods, works and/or services which are or could be required.
4. Regulation 75 (1) sets out the precise OJEU advertisement process required for 'light touch' services procurements. This must be read in conjunction with Annex V to the Directive (see **Definitions**). The information required in a contract notice or a PIN for 'light touch' is set out in Parts H and I respectively of Annex V to the Directive and although much lighter than for non-'light touch' services are still detailed and relatively complex.
5. This is what is required for a contract notice:-
 - who is the authority (see **Definitions**) i.e. the name, address and email address including if more than one both, place of delivery or performance of the services;
 - brief description of the contract including the CPV codes (see **Definitions**);
 - conditions for participation including whether restricted to sheltered workshops or the framework for a protected job programmes or reserved by law to a particular profession;
 - the time limit for contacting the authority to participate; and
 - a brief description of the main features of the award procedures.
6. For a PIN additional information is required
 - the estimated total value of the contract;
 - as far as known, the main location of the work, time-frame for delivery or performance and duration of the contract;
 - a reference to the requirement for providers to advise the authority of their interest in the contract or contracts and time limits and address for receipt of expressions of interest.
7. The time scale requirements set out for non-'light touch' procurements do not apply to 'light touch'. All time scales within the procurement must be 'reasonable and proportionate'. They should depend on the complexity of the procedure and any change in the process (see below).

Changes to the procedure after the publication of a notice

1. Regulation 76 (3) states that 'in particular', the procurement should be carried out in accordance with the contract notice (see **Definitions**) about:-
 - 'conditions for participation';
 - time limits for contacting the authority; or
 - the award procedure to be applied except in the limited circumstances as set out in regulation 76 (4).
2. The requirement process constrains the way contracting authorities can behave as only certain limited changes to the process are possible after the issue of the OJEU notice (see **Definitions**).

3. Regulation 76 (4) sets out:-

- the limited changes which are possible after the issue of the contract notice (see **Definitions**). If more extensive changes are needed a new or amended contract notice with extended time scales may be required. If a PIN (see **Definitions**) process has been used and the subsequent contract notice is significantly different, the contract notice ought to allow longer for response so the changes can be taken into account by bidders; and
- the conditions which must be met to achieve a compliant modification (see **Definitions**) (or variation) of the procurement process as follows:-
 - There is no breach of principles of transparency and equal treatment of providers (regulation 76 (4) (a));
 - The authority has considered this issue before proceeding and given due consideration to the matter, concluded there is no breach of regulation 76 (4) (a), documented that conclusion and its reasons in accordance with regulation 84 (7) and informs participants who have responded to the notice of the respects which they intend to proceed in a way not in conformity with the notice (see regulation 76 (4) (b)).

4. The requirement in paragraph 56.2 is in similar but not identical language to regulation 18 (1) which sets out the principles of procurement. In my view, regulation 18, which states that ‘contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner’ applies to light touch and regulation 76 (2) just restates this in slightly different language.
5. The requirement to document any changes in writing are consistent with other provisions in the regulations which require contracting authorities to document communications (see regulation 22 (8)). Oral communications may only be used provided the content is later documented.
6. The limitation on post contract notice (see **Definitions**) changes are particularly relevant to complex procurements (see **Definitions**) for example multi-service and longer service contracts such as a dynamic purchasing system (see **Definitions**) or a framework (see **Definitions**) where there are call-off arrangements (see **Definitions**) and where it may become apparent via the clarification process during the procurement that the original documents require amendment because of responses to clarification questions.
7. Where there is a requirement for change in service during the contract period the ability to make changes will depend on the terms of the contractual modification (see **Definitions**) provisions in the contract not the provisions of the procurement
8. The evaluation and award criteria may take into account a number of criteria (see regulation 76 (8)):-
- the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of services;
 - specific needs of different categories of users;
 - involvement and empowerment of users; and
 - innovation.

9. One issue which is of significance to commissioners and procurement officers and is regularly identified as an issue is the extent to which a provider's past performance may be taken into account. The PCR (see **Definitions**) does not specifically deal with this. It is intrinsic in regulation 76 and in particular regulation 76 (8) that these are relevant considerations. If past performance is to be used, the information and how it be used must be identified in the published evaluation or award procedure. Methods must be included to validate the accuracy of the assumptions and ensure that the process and approach complies with the requirements for equal treatment of all bidders. This will include giving bidders an opportunity of responding to comments about past performance and using this information to validate other information, for example how the service is to be delivered, not as a primary criterion. Analysing past performance is likely to be subjective (unless it is based on objective performance standards). Demonstrating fairness may also be difficult to achieve as an authority almost inevitably has more available information about an existing provider. The evaluation and award procedure should be carried out independently of the client side officer for the existing contract if possible, as an allegation of positive or negative bias in favour or against an existing provider is a relatively common allegation by aggrieved bidders. If this is not possible there must be some independent evaluation/award overview. If an allegation of bias is made the safest approach is to exclude the relevant officer from all further involvement in the process.
10. Regulation 76 (8) is not obligatory but is used by most authorities to shape the procurement process and documents. As identified above, to achieve these, authorities will need to consider and take these into account prior to the start of the procurement as the criteria are important as part of the strategic and procurement shaping process. The principles and provisions of regulation 40, preliminary market consultation (see paragraphs below on this) may be useful as a guide to drafting an effective process although the 'light touch' procedure does not need to be compliant with its rules. However, the overarching obligations of fairness, transparency and equal treatment apply throughout. I have discussed processes, evaluation procedures and involving users and their families elsewhere in this guidance.
11. A co-produced collaborative approach which takes into account the provisions of and spirit of regulation 76 (8) would suggest an open partnership approach, allowing users and their families, providers and other statutory authorities to comment and participate in co-producing key parts of the procurement pack. An alternative view is that if there has been effective and wide ranging market shaping and commissioning considerations and consultation at the earlier stages of the process this is not necessary and a more limited consultation process is appropriate and may have legal risks, for example if it appears that any particular provider's views are given an unfair advantage. This may be a particular risk if there has been a pilot with the participation of a limited number of providers. In my view, it ought to be possible to balance the risks and construct a fair procedure which allows all relevant stakeholders to express their views.
12. As set out above, regulation 76 (6) says all time limits within a procurement shall be reasonable and proportionate. This is not further defined as it must depend on the nature and complexity of the procurement so that for example, if the documents are lengthy and complex (as they often are) this must be taken into account when setting time limits especially as the objective must be to obtain a wide range of bidders (see **Definitions**) to ensure that the procurement is successful. This is particularly relevant in a market-place where there are typically a limited

number of providers (see **Definitions**). These providers may be small, focussed on delivering services and/or very busy because there may be a number of procurement processes in progress either regionally or nationally. Limited time to respond to a procurement may limit the number of bidders and the outcome of the procurement (see **Definitions**).

13. The identified procedures (including contract length, value, evaluation and award criteria) cannot therefore be amended without risk. These constraints make it essential that there is sufficient preliminary work before the procurement is commenced in order to properly structure the procurement and draft the documents before the process is started. As identified, if there is a requirement for a significant change during the process, it may be necessary to abort and re-commence this process which could discourage bidders (see **Definitions**), or even result in financial claims from bidders who will have spent time on the previous process and/or make it difficult or impossible for authorities to make legally sound placements if the existing contract has expired before the new process has been completed.

Letting contracts in exceptional circumstances

Introduction

There are some very limited exceptions to the requirement to issue an OJEU notice (see **Definitions**). These include extreme and unforeseen urgency. If this is caused by a failure by the authority the courts do not consider this falls within the exception so a requirement to make an urgent placement, where an authority regularly has to make such placements would not be considered an emergency. A dynamic purchasing system or framework (see **Definitions**) should be in place which includes provisions for emergencies.

Guidance

As identified above, guidance was issued on 'light touch' by the Crown Commercial Service on 5 March 2015. See:-

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560272/Guidance_on_Light_Touch_Regime_-_Oct_16.pdf

Applying the authority's internal procedures and avoiding challenges

1. Many authorities (see **Definitions**) have standing orders or contract regulations which mimic the public procurement regulations and do not take into account 'light touch' (see **Definitions**). It is recommended that authorities should consider putting in place specific internal processes which are for 'light touch' and deal with the differences between 'light touch' and other procurements. A waiver for specific procurement is not sufficient.
2. The reason for this recommendation is that authorities are public bodies and they are open to challenge on the basis that they have not followed their own internal procedures. There is a legal principle, known as legitimate expectation which suggests that not following the internal or identified procedure, for example the procedure set out in the contract notice (see **Definitions**) makes it easier to mount a successful challenge via a court process.

3. There are a number of examples of challenges where there have been extensive freedom of information (see **Definitions**) requests as part of a challenge or complaints process. These can be both embarrassing and costly. Authorities should therefore keep careful records of their decisions, for example decisions to make changes to the documents or approach and notes of evaluation meetings and their reasons for rejecting a particular bidder (see **Definitions**) to avoid the risks of giving a challenger grounds for challenge.
4. There are a number of high court cases on challenges and most of them are about challenging the evaluation process, arguing that the criteria were applied improperly and unfairly and/or the authority's in-house processes were not followed. Where the authority does not follow its advertised process or follows a process which mimics or partly mimics a non-'light touch' process, the authority may be successfully challenged. Each case will be considered by the court on its merits. The objective must always be to achieve a sound process with a full evidence trail as challenges usually result in delay and sometimes worse.

Reserved Contracts (Regulation 77)

1. This regulation sets out specific procedures allowing authorities to reserve procurements for certain of the 'light touch' services for no more than 3 years for certain qualifying organisations.
2. The Qualifying organisations and their structures are precisely defined (Regulation 77)). Broadly, these are employee owned or certain types of social enterprises for an organisation with a public service mission linked to the delivery of its services and where profits are reinvested with a view to achieving the organisation's objectives or distributed on participatory considerations. The bidding organisation must not have been awarded a contract within the preceding 3 years.
3. These contracts are reserved for specific particular CPV codes (see **Definitions**). The list of qualifying CPV codes is narrower than the CPV codes which qualify as 'light touch services' (see **Definitions**). It applies to the majority of but not all health, social and cultural services, excluding especially certain health care services. Care must therefore be used when using this provision.
4. This is not a well-used provision because any organisation which qualifies must be allowed to bid so in practice there is no guarantee that small, local organisations will win and the contract period (see **Definitions**) is too short to be an effective approach for many procurements. It is unclear how many authorities have used this exception but it is certainly not well used. It is included for completeness.

1.4 General procurement principles and detail which may or may not apply to 'light touch'

Introduction

1. This section sets out a brief guide to the provisions of the PCR (see **Definitions**) which either apply to all procurements or do not apply to 'light touch' (see **Definitions**). As far as possible, the comments explain whether the provisions apply to 'light touch' although it should be understood that not even the Crown Commercial Service is wholly clear about the extent to which the general provisions apply to 'light touch' (see Crown Commercial Services, *Procurement Policy Note: Standard Selection Questionnaire (SQ)* Action Note 8/16 and comments on this below). Unfortunately, the PCR (see **Definitions**) do not make it wholly clear which provisions of the PCR do not apply to 'light touch' and by implication which do apply so there is some inevitable uncertainty.
2. This section is required as the general provisions of the PCR are usually used as a baseline approach even for 'light touch' and many of the approaches and methodologies provide a useful starting point for the development of a specific 'light touch' process. As they are complex and many are too process driven for outcome focussed 'light touch' focussed services they must be properly adapted and simplified.

General Principles (Section 2, Regulations 18 - 24)

1. General principles of equality, transparency and non-discrimination apply to non-'light touch' in regulation 18 in slightly different language to the approach for 'light touch' but as identified above, in my view the meaning is similar.
2. Regulation 21 sets out provisions relating to keeping contractor's information confidential during a procurement. This is limited in scope and it does not apply to any documents created thereafter (for example as part of normal contract management). The contract conditions ought therefore to include confidentiality provisions. There is another gap in regulation 21. It does not expressly refer to the implications of confidentiality within procurements by consortia. I consider that information provided to one authority in a consortium is probably disclosable to all authorities in the consortium.
3. There are requirements for authorities to have processes to protect bidders against being prejudiced because staff have internal or external conflicts of interests e.g. staff members with a financial interest in a contract (regulation 24).
4. Regulation 23 says that the language in which the procurement is described (nomenclature) is the CPV (see **Definitions**).
5. In my view, the previous three paragraphs of this guidance will or certainly should be applied to 'light touch'.

6. There are also a number of other general provisions e.g. relating to electronic communication which are not required for 'light touch' and if adopted may provide an inappropriately rigid process.

The Conduct of the Procedure - Advertisement Process and Choice of Procedures (Sub-Section 3 of Chapter 2)

Introduction and General

1. As openness, competition and transparency across the EU are the basic requirements under the Treaty (see **Definitions**), the core starting point is that each procurement process should start with an advertisement or contract notice (see **Definitions**). However, if this is a 'light touch' procurement this is all that is required until the award (see **Definitions**) and the specific requirements of this part of the PCR (see **Definitions**) do not apply to 'light touch'.
2. The advertisement either offers the market a specific opportunity or relates to future opportunities. The former is a contract notice (see **Definitions**) and the latter a PIN notice (see **Definitions**). In either instance, the advertisement sets out the process and procedure to be followed. The form and content of advertisements are prescribed in the Directive (see **Definitions**) and differ for 'light touch' (see **Definitions**) and non-light touch services.
3. Notices have to be placed in OJEU (see **Definitions**).
4. The advertisement, specification and other documentation should describe in an accurate manner precisely what is required by the authority and what providers need to do to bid. Underpinning the PCR are the European principle of treating all economic operators equally, without discrimination and transparently and proportionately.
5. Key information for 'light touch' OJEU notices are much simplified compared to other procurements as follows (see Part H of Annex V of the Directive). It is outside the terms of reference of this analysis to detail the procedure for non-'light touch' procurements.

Calculating the Estimated Value of a Procurement (Regulation 6)

1. This applies to 'light touch' although the threshold levels are higher than for other service procurements. The estimated value of a procurement is based on the total amount payable to provider(s) under the future contract(s) and with no artificial sub division of services to avoid the impact of the legislation. Where work is lotted, account may be taken of the total estimated value of all lots (i.e. packages of work) as it is a breach of the PCR (see **Definitions**) to subdivide future contracts to avoid having to follow the PCR. A framework or dynamic purchasing system (see **Definitions**) when no guarantee of contracts is offered ought to set out the estimated value of the overall procurement.
2. If an authority awards a contract in breach of this regulation it is a direct award, subject to challenge under Part 3, PCR in the courts and may be illegal.

Local authority controlled (or Teckal) Company (Regulation 12) and Administrative Arrangements

1. The PCR does not apply to controlled or *Teckal* companies. *Teckal* is the shorthand name for the European case which identified this exception.
2. However, the company must be controlled by one or a group of authorities (not necessarily only local authorities as it could include health bodies) who own the company between them, in a similar manner to the level of control which they exercise over their own departments.
3. There are complex rules relating to whether a company is *Teckal* controlled or not (for example, more than 80% of its activities have to be with the parent local authority or authorities).
4. The other exception to the obligation to procure (apart from in-house delivery) is where authorities work together in an administrative arrangement (i.e. not a procurement) e.g. an agency or joint committee under sections 100 and 101 Local Government Act 1972. This is complex and based on European case law.

The Procedures for Non-light Touch (Regulations 27 - 39)

1. Whilst compliance with the precise procedures is not required for “light touch” and an authority may create its own procedure provided it complies with principles of transparency and equal treatment of providers, most authorities will broadly adopt one of the identified procedures with variations to take into account the characteristics of ‘light touch’ services. This is a pragmatic approach but it is essential that the characteristics of ‘light touch’ and legislative flexibilities are properly taken into account and there is not a rigid application of these procedures.
2. The main procedures or routes are open (a one stage process where all procurement documents are issued at the same time as the advertisement is issued) (see **Definitions**), restricted (a two stage process of short listing followed by an invitation to tender) (see **Definitions**), competitive dialogue (a multi-stage process suitable for very large procurements) (see **Definitions**), competitive with negotiation (a modified form of competitive dialogue) (see **Definitions**), framework (see **Definitions**) or a dynamic purchasing system (see **Definitions**) and an innovation partnership (research and development partnerships) (see **Definitions**). There are other procedures and processes which are less common and are not referred to in this guidance.
3. As identified, authorities are likely to use some of the principles of the main routes in designing a ‘light touch’ (see **Definitions**) process so, the main routes which are likely to be used are described in more detail below by way of guidance.

Open Procedure (Regulation 27)

1. This is substantially unchanged from the previous regulations so is a well-known process.
2. It is a single stage open advertisement process. The procurement documents (see **Definitions**) must be available to be sent out to all who respond to the contract notice (see **Definitions**). Authorities must therefore be ready with all documents before they publish the contract notice.

3. All who respond must be given an opportunity of tendering, but it can be a two stage evaluation process based on excluding those who do not meet the basic criteria (financial, and commercial and quality thresholds i.e. based on assessing historic information) and thereafter considering only those who pass this stage (the award stage i.e. based on an analysis of their future capability to meet the tender requirements). It can be a bureaucratic nightmare for authorities who may receive a vast number of tenders all of which have to be evaluated and for providers who have to complete all of the documents in order to be considered. It is not a route providers tend to like. So, whilst in theory, this is the quickest route because it is a one stage approach if there are a large number of bids, it can take a long time to evaluate the tenders and award (see **Definitions**).
4. The current time scales for response are generally a minimum of 35 days and in some circumstances 22 days (Regulation 27 (2)). Where there is a PIN (see **Definitions**) the minimum number of days to respond can be shortened to 15.
5. Selection is made according to regulation 58. All that the authority can do is ask for further information (i.e. clarification of those matters set out in these regulations). No negotiation is possible so it is inflexible.

Restricted Procedure (Regulation 28)

1. This is a two stage process. It is also substantially unchanged from the previous legislative regime.
2. The authority must allow a minimum of 30 days from the advertisement, reduced to 10 if a PIN (see **Definitions**) is issued.
3. All of those who respond to the SQ (see **Definitions**) must be evaluated (see **Definitions**). The PCR allow a limit on the number to be short-listed. The minimum is 5. All must be short listed if there are fewer than 5 who meet the evaluation criteria. The procurement can continue if there are less than 5 only if there are sufficient responses to ensure genuine competition. If more meet the criteria, provided there is a process for choosing those who score highest the number can be reduced to the number identified in the contract notice (see **Definitions**) or all can go through to the next stage at the choice of the authority (regulation 65).
4. The authority may exclude providers (see **Definitions**) in accordance with the PCR, for example if they do not satisfy minimum levels of economic and financial standing or technical or professional ability. The specific exclusion criteria must be identified in the contract notice and must be related in a proportionate manner to the subject matter of the contract.
5. Selection is made according to regulation 58. Like the open route, all that the authority can do when they get the bids is ask for further information (i.e. clarification of those matters set out in these regulations). No negotiation is allowed so it is inflexible.

Framework Agreements (Regulation 33)

1. The procurement proceeds as one of the open, restricted, negotiated, or competitive dialogue procedures (see **Definitions**). The advertisement must make it clear that a framework agreement is being set up.
2. One or more than one provider may be appointed. Individual purchases of service can then be called-off (see **Definitions**) or purchased under the framework agreement either

without further process using the award criteria for awards or, if there may need to be a mini-competition (see **Definitions**) based on the selection methodology in the framework; with all relevant bidders (see **Definitions**) being given a chance to bid.

3. Unless there are exceptional circumstances the maximum period of a framework agreement is 4 years.
4. The main problem with a framework is its inflexibility as no-one can be added during its life. In practice, the market-place may change within the framework period with some providers ceasing business and others being taken over by another framework provider. Any new market entrants cannot be added. In practice towards the end of the framework there may be insufficient providers on the framework especially in a market where providers may cease to be in business and/or where there are a limited number of providers from the beginning of the framework.

Dynamic Purchasing Systems (Regulation 34)

1. This is a wholly electronic purchasing for commonly-used purchasing and for services where a framework is not sufficiently flexible and the nature of the market requires the system to be open for new entrants. Its strengths are that it is very flexible allowing new entrants into the market at any time. Its weakness is that it is time consuming and complex to manage, requires significant and continuing resource to do so.
2. There are time limits for a set of requests to participate, namely 30 days from the date on which the contract notice (see **Definitions**) is sent or the PIN (see **Definitions**) is used. The call for competition (colloquially the advertisement) must make it clear that a dynamic purchasing system is involved, and include by way of a minimum the nature and estimated quantity of purchases and any division into categories of products, works or services and their characteristics.
3. The essence of this route is that it is open throughout its life time for new providers to join if they meet the identified criteria. The dynamic purchasing system must have a fixed contract length but this can be as long as the authority chooses and advertises. In practice it functions in a broadly similar way as an approved list and should managed with call-off arrangements or mini-competitions for each award.

Competitive Procedure with Negotiation (Regulation 29)

1. This is a new procedure which is intended to ameliorate the constraints of competitive dialogue. See also regulation 65 (4) which states that the minimum number of candidates who are invited to tender is 3, but this is subject to there being sufficient candidates to ensure genuine competition (regulation 65) (5)). I cannot see this being used for these services in its entirety but some elements may be usable.

Competitive Dialogue Procedure (Regulation 30)

1. This is a half-way house between the open and restricted procedures and the negotiated procedure and is intended for more complex procedures only. It allows for discussion, clarification or confirmation of a tenderer's bid but not for substantial modification of it. This is disliked by the market because of its complexity and cost. I cannot see this being used for these services in its entirety but again aspects may be adopted.

Innovation Partnership (Regulation 31)

1. This relates only to innovative products, services or works that cannot be met by purchasing products, services or works already available on the market. It is unlikely to be relevant as the definition is very limited, (although the extent of the limitations is not always appreciated).

The Negotiated Procedure without Prior Publication (Regulation 32)

1. This is an exceptional procedure and its uses are very limited. There are several uses of the negotiated procedure, without prior publication of a contract notice or PIN (see **Definitions**). The most commonly used of these are (in brief) as follows:-
 - where an authority has a failed procurement because of irregularities in the tenders (see **Definitions**), unacceptable tenders (see **Definitions**) (e.g. there are not enough or all of them or virtually all fail) where there has been an open or restricted route and the original terms offered in the discontinued procedure must not be substantially altered in the new procedure. It is unclear what does 'not substantially altered' means; or
 - for technical or artistic reasons there is only one particular economic operator;
 - if there is extreme urgency. The definition excludes circumstances attributable to the authority, for example because the authority has forgotten to go to the market or been otherwise inefficient; or
 - the protection of exclusive rights including intellectual property rights.
2. These are exceptional processes and there are technical rules governing their use. It is recommended that legal advice is taken before this exclusion is used. Whilst the technical requirements of this regulation do not apply to 'light touch' the general requirements of transparency and equal treatment of bidders do apply.

The Procurement Process

Introduction and General

1. In this part of the guidance I describe the procurement process.

What have to be issued to the market and what are the Procurement (formerly Contract) Documents? (Regulation. 2)

1. These are everything which is used to describe or decide elements of the procurement or procedure. They include the documents set out below:-
 - the descriptive document (if any), a document identifying the proposed procurement opportunity and conditions of contract;
 - the specifications or description of the goods, services, works and the materials to be used, if relevant.
2. This regulation does not apply to 'light touch' in this language although similar principles apply.

Technical Specifications in the Contract Documents

1. See definitions in regulations 2 and 42 (2) - (7)) for the meaning of this. These regulations do not apply to 'light touch' but in order to comply with requirements for transparency and equal treatment of providers something similar is required setting out the technical requirements.

Preliminary Market Consultation and Prior Involvement of Candidates in Tenders (Regulations. 40 - 41)

1. Regulations 40 and 41 identify a process allowing authorities to carry out preliminary market consultation and includes provisions for prior involvement of candidates or tenderers.
2. Preliminary market consultation is defined in regulation 40 as a process which starts before commencing a procurement and is 'market consultation with a view to preparing the procurement and informing the market of their procurement plans and requirements'. It is therefore a process which starts only once the authority has decided that a procurement is in contemplation not a wider consultative and strategic process. The market is defined in this context as providers and therefore potential tenderers. Tenderers or providers are expressly identified in the Directive and PCR because it is recognised that they have knowledge and value which ought to be taken into account by authorities. Whether or not providers respond to earlier consultation processes, they should be consulted at this stage. They may be a source of solutions as they will often have considerable experience of and expertise in of providing similar services, although they may be unwilling to assist if they are in competition for work. They may help to identify new ways of achieving outcomes and make better use of resources. Pilots may be a useful approach (where there is time for this) to trial new approaches. Providing that no providers are inappropriately advantaged pre-market consultation can be extremely helpful to commissioners and procurement officers in contributing to the design of innovative or indeed all service solutions.
3. There is an overarching requirement in regulation 41 that the authority should take appropriate measures to ensure that competition is not distorted by such participation. Whilst these regulations do not apply to 'light touch' (see **Definitions**) there is an equivalent in regulation 76. The principles are very useful and can easily be adapted for 'light touch'.

Standard Selection Questionnaire (Regulation 59)

1. This was introduced as mandatory from 8th September 2016 (see Crown Commercial Services, *Procurement Policy Note: Standard Selection Questionnaire (SQ)* Action Note 8/16 in substitution for the pre-qualification questionnaire (PQQ) process. Its purpose is to set out the questions used to evaluate the providers at this first stage, the evaluation stage which seeks information from bidders on their status including their financial and technical status. The position in Wales is slightly different. In May 2018, the Welsh Government issued a procurement advice note for use when authorities are using the online ESPD (European Single Procurement Documents) on Sell2Wales to create their own document. This is said to be mandatory from October and refers to the Wales Procurement Policy Statement (dated 2014 i.e. before the PCR) which sets out the principles expected of Welsh authorities.
2. However, none of this addresses the issue of how to apply its requirements to 'light touch' procurement. According to the guidance on 'light touch' issued by the Crown Commercial Office it applies to 'light touch' but this does not make sense because the requirements which must be included do not apply to 'light touch' so it is unclear if it applies!

3. Pages 3 - 4 of Annex D, FAQs to the Procurement Policy Note are the first reference to 'light touch'. The comments are apparently recommendations and this guidance is not specific about whether it applies. The FAQ say that a selection of questions from Part 3 of the SQ should be used i.e. the questions regarding economic and financial standing and also recommend use of Parts 1 and 2.
4. Both Welsh and English approaches and documents are supposed to be simpler as only the winning provider(s) would have to prove their status but limit the information which can generally be sought, places the burden of self-certification that there is compliance onto the provider and if a winning provider cannot prove that it meets the pre-qualification status, they will be rejected at a very late stage after they have carried out all of the work to get approved. Whether this is good practice for 'light touch' procurements is unclear as it may be preferable for authorities and providers to have a standard pre-qualification process, rejecting providers who do not meet the criteria at an early stage so that they know if they have qualified.

Criteria for the Rejection of a Provider (Regulation 57) and Selection Criteria Information as to Economic or Financial Standing (Regulations. 58 and 60)

1. These provisions set out detailed provisions relating to mandatory and discretionary criteria for excluding bidders and selection criteria i.e. the commercial history in general and relevant commercial history. Required information must be related and proportionate to the contract. A selection process looks backwards to establish basic suitability of bidders. The regulations do not apply to 'light touch'. However, it is necessary for authorities to establish answers to this information and as part of this, set out selection criteria which are fair, transparent and support equal treatment. It is good practice and I suggest it should be broadly followed:-
 - basic requirements such as name, status, governance, insurance, confirmation that none of the mandatory or discretionary grounds for exclusion apply and confirmation of registration. This is standard and should not be controversial;
 - demonstrating economic and financial standing. This is more subjective and requires an understanding of the meaning of the available financial information for different legal structures. Regulation 58 supported by regulation 60(6) for proof sets out suggested information. The issue is how to establish this in a market-place where many providers are small and may not be commercially strong. Evaluation of financial strength, liquidity, likelihood of becoming insolvent and therefore analysis of accounts can be technical and requires relevant skills and understanding of private sector accounting;
 - technical and professional ability. This third limb is also subjective and it raises questions about whether in a regulated market it is sufficient that a supplier is registered, does not have relevant recent prosecutions or is being investigated for breaches and has the required insurance? How far does the authority need to know about historic contracts, health and safety, development of apprenticeships and how far the authority can enquired and take into account the provider's approach to social, environmental and workforce matters are all complex issues. Compliance with relevant legislation can be required. The authority's ability to take these into account within the evaluation (and thereafter as part of the contract management) is in general limited by the Directive and PCR (see **Definitions**) to the extent these are relevant to the performance of the contract and do not give local providers an advantage.

Criteria for Award, Life-cycle Costing and Abnormally Low Tenders (Regulations. 67 - 69)

1. Regulation 67 identifies the criteria for the award of a contract to economic operators. The award stage is the second stage of the procurement process. It is intended to evaluate whether a bidder (see **Definitions**) has met the requirements of the invitation to tender (see **Definitions**) in their bid (see **Definitions**). These regulations do not apply to 'light touch' (see **Definitions**) but like so many of the regulations for non-'light touch' adopting the principles of these regulations are good practice to ensure that a fair and transparent process is carried out.
2. The award process sets out the criteria against which each bid (see **Definitions**) is evaluated before the preferred bidder or, in the case of a framework or dynamic purchasing system (see **Definitions**) those bidders who meet the threshold will be awarded a contract. An award must now be based on the most economically advantageous offer (MEAT) from the perspective of the authority. These regulations set out the methodology for establishing whether the bids show that the bidder can meet the specific requirements of the procurement i.e. seeks to predict future skill and capacity measured by reference to the requirements of the invitation to tender (see **Definitions**).
3. There is also a procedure for rejecting an abnormally low tender. An abnormally low tender is one which the authority believes is well below the actual cost of delivering the service.
4. There is extensive case law on evaluation and award processes and their failure to comply with the law. It is probably the most litigated part of the PCR and some of this case law applies to 'light touch'.

Remedies (Part 3 Regulations. 85 - 104)

1. There are prescriptive time scales and compliance procedures for notification of awards requiring unsuccessful tenderers to be given detailed reasons why they are unsuccessful and challenging a rejection. Challenge processes and time scales are technical and are not likely to be of relevance to commissioners or procurement officers on a day-to-day basis so they are not included in this guidance. The majority of these processes will apply to 'light touch', although there are some doubts about whether all apply.

Modifications Contract Performance (Section 6, Regulations. 70 -73) and how this applies to Part B (see Definitions and 'Light Touch')

1. This part of the PCR (see **Definitions**) applies to 'light touch' (see **Definitions**). There is nothing in this regulation which excludes 'light touch' contracts from the requirement to comply with this regulation and the 'light touch' exclusions only apply to the award procedures.
2. Regulation 70 provides that special conditions relating to the performance of a contract may be included, provided they are linked to the subject matter of the contract as defined in regulation 67 (5), which I do not consider applies to 'light touch' (see **Definitions**) and are indicated in the OJEU (see **Definitions**) advertisement or procurement documents (see **Definitions**). These may relate to economic, innovation related, environmental, social or employment related conditions.

3. Regulation 71 provides for details of sub-contractors to be included in the providers' tender.
4. Regulation 72 makes provision for modification) or variation) see (**Definitions**) of existing contracts during their contract period. It is complicated and not easy to interpret. Modification is the expression used in the PCR for variations or changes to the contract. A commissioner or procurement officer may require legal advice to interpret how regulation 72 applies to a particular contract.
5. Contracts including frameworks and DPSs (see **Definitions**) may be modified)or varied(without a new procurement provided regulation 72 is complied with. Regulation 72 is long and detailed I have only set out the key points. If there is no suitable and compliant modification in the contract, the contract cannot be modified and a new procurement may be needed.
6. There are a number of identified alternative circumstances allowing modifications. These are that:-
 - the modification is provided for in the initial procurement documents)see **Definitions**(in 'clear, precise and unequivocal review clauses', the scope and nature of the modification must be stated including 'the conditions under which they may be used' and the modification must not alter the overall nature of the contract or framework)see **Definitions**(. It is unclear how this applies to a DPS (see **Definitions**) regulation 72 (1) (a) (i));
 - additional works, services or supplies by the provider 'have become necessary', but were not included in the original procurement and there cannot be a change of contractor 'for economic or technical reasons'. The examples given relate to difficulties with equipment, services or supplies and where there would be 'significant inconvenience or substantial duplication of costs'. The difficulty with this provision is that it only applies to an increase in price of '50% or less of the value of the original contract' in any year (regulation 72 (1) (b)). There are some technical difficulties with this provision. Many frameworks and DPSs (see **Definitions**) do not offer providers any guaranteed work and so the value of the 'original contract' may be defined as nil. If this is the correct interpretation this provision becomes irrelevant for many frameworks and DPSs. There are other possible interpretations and there is no case law so it is not clear how this provision would be interpreted by the court. This is an example of the extreme difficulty in interpreting this regulation. Fortunately if this provision is relevant it is not cumulative so each year is treated as a new year for calculating the value of the original contract value. This is useful if, for example, there is a short term variation in one year;
 - there is a need for the modification because of an unforeseen change of circumstances. This too has the 50% constraint. Sequential modifications should not be 'aimed at circumventing' the regulations. See above for contracts with no guarantee of work;
 - the modifications are not considered substantial as defined in regulations 72 (5) and (8). The top percentage increase in value to allow this change for a services contract is 10%. However, the same initial problem applies as above if there is no contractual commitment to offer any work;
 - there may be a modification without a re-tendering in certain circumstances if this has been provided for in the original procurement for matters such as insolvency, corporate restructuring or takeover and merger etc. (regulation 72 (1) (d)).

7. The power of an authority to modify a contract, entered into under the Public Contracts Regulations 2006 and modified after the PCR became law was considered by the Supreme Court in a recent case. The Court confirmed that any modification clauses must be 'clear, precise and unequivocal'. This is required to comply with the principle of transparency (or fairness). General variation or modification clauses are not sufficient. They also said that a material (i.e. significant) modification which does not comply with regulation 72 is interpreted as the award of a new contract i.e. potentially an illegal direct award (see **Definitions**) as the modification provisions of the PCR apply to pre-PCR contracts.
8. There are some matters which are not clear, for example, suppose the parties do not follow the time tables or do not precisely follow other requirements in modification provision, can these be varied by consent? The purpose of the PCR is to ensure free trade and fairness of opportunity throughout Europe so parties need to be very careful about interpreting their contract flexibly. If modification changes the nature of the contract the courts would probably not consider this legally sound. A modification in breach of the regulations may well be interpreted as an illegal direct award (see **Definitions**).
9. Regulation 73 requires every contract to include provisions enabling termination if the contract has been substantially modified.
10. Except if a contract is modified under the examples given above the authority must serve an OJEU (see **Definitions**) notice of modification as set out in Part G of Annex V of the Directive (see **Definitions**).
11. The interpretative difficulty with this complex regulation mean that it would be prudent to take legal or expert procurement advice before varying contracts or entering into new contracts for services with existing providers whether under an existing framework or an individual award (see **Definitions**).

Impact of the Changes in the PCR on Existing and New Contracts

1. The changes in the PCR are applicable to pre-2015, Part B (see **Definitions**) contracts as well as new contracts.
2. Any modification or award (see **Definitions**) of an above threshold (see **Definitions**) contract in breach of these provisions is a direct award and therefore challengeable under the regulations or possibly more widely. Authorities should remember to take into account the requirements in regulation 6, methods for calculating the estimated value of procurement including the anti-avoidance provisions relating to aggregation and not splitting contracts.

Below Threshold Procurement and Authorities' own Contract Procedure Rules

1. Regulations 106 - 112) deal with below-threshold procurements (see **Definitions**). This is new. Broadly, below-threshold procurements of above £10,000 estimated value for central government and £25,000 estimated value for local government must be advertised by publishing information on Contracts Finder (the government publication for advertisements and in Wales, the National Procurement Website Sell2Wales and the award published. This does not apply to health procurements.
2. This is not a European requirement and there is no penalty for breach.

3. It is possible to voluntarily apply the PCR to below threshold procurements but now only expressly and this is not recommended as it introduced unnecessary complexity (see **Definitions**).
4. Of potentially equal significance is that every authority will have a constitution which includes contract regulations. These typically provide for tiered processes for procurements depending on size e.g. up to say £10,000 without competitive bids, between £10,000 - £50,000 by obtaining three tenders and above that an open market process. However, many do not specifically address social care procurement or provide specific procedures these and other 'light touch' procurements more suitable for these specialist procurements. As identified this may give rise to an expectation that such procurements ought to be dealt with in accordance with the standard rules.

Miscellaneous Matters

1. Payment of undisputed invoices by local authorities should be paid within 30 days and provisions must be included relating to payment by the contractor to a subcontractor. There is an exception for health care services (and in England, Academy Schools) (regulation 113) which should be taken into account in joint bidding between local government and health boards. Provisions must be included in the contract requiring payment by the contractor to a subcontractor within this timescale.
2. This applies to 'light touch'

1.5 Anomalies - exclusion of land transactions (regulation 10)

1. The PCR do not apply to offers in relation to a contract for the acquisition or rental of land, existing buildings or other immovable property or which concern interest in or rights over them (regulation 10 (1)) but they do apply if the transaction is not a pure land transaction for example many sales to housing associations with associated nomination rights.

Part 2

Developing and delivering an effective 'light touch' procedure for regulated domiciliary care

2.1 Introduction and key points including risks

The Regulatory Background

1. As identified in the Introduction and Key Points, I focus in this part of the guidance on describing and analysing the specific issues which arise in relation to delivering an effective 'light touch' procedure for regulated domiciliary care.
2. Regulated home care in Wales is now governed by the regulatory regime put in place under the Regulation and Inspection of Social Care (Wales) Act 2016 which supports the aims of the Social Services and Well-being (Wales) Act 2014.
3. The regulatory regime, which came into force on 1st April 2018 changes the way that services are registered and inspected. It will now focus on securing improvement in the quality of care and support and the well-being outcomes for people using services. This is a very significant change in approach from the former process driven methodologies.
4. It is outside the terms of reference of this guidance to analyse or comment to any extent on the new regulatory regime or on the role and responsibilities of the regulator, Care Inspectorate Wales. However, the approach set out in this guidance and, in particular, in this section is entirely consistent with legislation set out above and Care Inspectorate Wales' approach to a person centred focus on regulating in a manner which supports and is intended to achieve well-being outcomes for service users. I both share these aspirations and objectives and have taken them into account in drafting this guidance.

The Current and Historic Approach and Current Risks to Effective Service Delivery

1. Currently many services are based on a 'time and task' model with documents which reflect this approach. This model is outmoded as it does not which promote well-being as required by the Social Services and Well-Being (Wales) Act 2014, the Inspection of Social Care (Wales) Act 2016 and the regulations and guidance made under this.
2. A person centred approach requires a significant change in the commissioning and procurement processes and documents.
3. An overview of the current and likely future risks, set out in more detail below, include the following:-
 - there are not enough providers, particularly for specialist services or in rural areas, to meet authorities' purchasing needs;
 - at a time of local government budgetary stringency and scarce resources the changes required to implement the new regulatory regime and timetable for their implementation in view of this and the PCR (see **Definitions**) are significant and therefore difficult for many authorities to resource; and
 - incomplete coverage for all services by a frameworks or a DPS (see **Definitions**), a shortage of providers and authority resource issues results in the risk that some purchases of care packages are not being procured in compliance with the PCR (see **Definitions**) leaving authorities open to the risk of challenge.

4. As identified, the regulatory changes require a very different approach to commissioning and procurement. An approach and documents which are co-produced with users and their families, providers and all stakeholder, which complies with the legislation, encourages new providers into the market place and is focussed on increasing user independence and well-being.

2.2 The procurement of domiciliary support services and the procurement process - an overview and problems

Introduction

1. This section of the guidance is a consideration of the specific procurement issues applicable to home care. Whilst it is written with particular reference to home care much of the content is equally relevant to all types of 'light touch' (see **Definitions**) procurement.
2. Consideration of pre-procurement processes such as market shaping or commissioning are outside the terms of reference of this guidance. These are considered in detail in the Outcomes Based Commissioning Toolkit prepared by the Institute of Public Care at Oxford Brookes University. This guidance assumes that commissioning and pre-commissioning market shaping has been carried out and authorities are ready to commence the procurement process.

What is Domiciliary or Home Care?

1. In Wales, domiciliary care or home care is now regulated under the Inspection of Social Care (Wales) Act 2016. A new regulatory regime became law on 2nd April 2018. As identified, the regulator is the Care Inspectorate Wales. All providers who provide domiciliary support services (and of course other regulated services) as defined in paragraph 8 of Schedule 1 of the Act will need to be registered.
2. For the purposes of this guidance the expression home care is therefore used as defined under Schedule 1 of this 2016 Act to mean the following domiciliary support service:-
"domiciliary care provided to an adult who by reason of vulnerability or need is unable to provide it for him or herself and is provided at the person's home in Wales. It includes making arrangements for or providing services in connection with such provision."
3. There are exclusions in the Act from the requirement to register as a provider of a domiciliary support service. The exclusions include home care provided by an individual who is not running a business and who works wholly under the direction and control of the person receiving the care and support, or if the service is provided in a care home or other residential accommodation or a hospital or by an introductory agency with no other role in delivering the domiciliary support service to individuals or if provided in a micro-co-operative (as defined).
4. A detailed description and explanation of the legislation applicable to home care is outside the terms of reference of this guidance. The above information is provided to give focus to the guidance.

Typical Issues Affecting Procurement of Home Care and Suggested Changes to Historic Approaches to Resolve Risks and Problems

1. In this section of the guidance I identify typical historic and current risks, issues and difficulties in the commissioning, procurement and delivery of home care services. They apply equally to in-house services and providers. These issues undermine the ability of authorities to achieve person centred services.
2. Not all of these issues and problems will be relevant to all or necessarily universal throughout Wales but I understand that typical concerns and risks include (in no particular order) the following:-
 - Overall, there are not enough providers to meet the authorities' purchasing requirements either specialist requirements (e.g. fluent Welsh speaking care staff) or in general. This is a particular problem in rural areas. Insufficient providers is not a problem unique to Wales;
 - as there are a limited number of providers, procurement processes may well simply play "musical chairs", with existing providers changing contracts although with no new providers coming into the market;
 - The current specifications which may be what is known as a 'time and task' specification, (namely an input based model where the provider is obliged to spend a particular amount of time with the client and carry out specific tasks such as wash, dress, feed and assist with medication). This model is inconsistent with the person centred 'needs based' requirements of the Social Services and Well-being (Wales) Act 2014 which changes the focus to outcomes. Providers may not be skilled in delivering a different approach and they and their staff need extensive support, training and assistance with moving to a person-centred approach. This traditional time and task specification within a care package does not allow for a flexible response towards the individual service user and can at times often reduce the need and drive for the user to maximise their own abilities and reduce the extent to which care is required.
 - use of inflexible short length frameworks (see **Definitions**) may mean that there may not be any commercial or other incentive or ability for new entrants to come into the market even if they wished to do so;
 - these are services which require collaborative working between social care authorities and health boards to ensure that clients' needs are met, that there is no hospital 'bed blocking' and whilst the Welsh Government expects statutory authorities to work together to meet the new legislative requirements, this is not always happening and is difficult to achieve, especially at times of financial pressure on the public sector;
 - provider dissatisfaction with lengthy and bureaucratic processes and documents (specification, contract conditions, pricing spreadsheets, inflationary processes) with no guarantee of any work;
 - these are often not viewed as attractive services for staff as this is a low pay industry and the work can be very demanding. There is competition from other industries where the jobs may be better paid with less responsibility. It can also be difficult to provide care packages in sparsely populated rural communities;

- staff may have been transferred from provider to provider several times which is disruptive for everyone, causing clients, staff and providers considerable anxiety, adds to the sense that staff are not valued. This is a further limit to continuity of support for clients;
 - carrying out and bidding for a procurement can be challenging for all where the environment is uncertain as it is an uncertain, expensive and time consuming process for all with no guarantee of any particular outcome for anyone involved in the process;
 - alternatively or in addition to the issues raised in the previous paragraph the pattern of purchase may be based on pre-PCR (see **Definitions**) contracts or individual spot (see **Definitions**) purchasing with no commitment to purchase any services and there is a risk that post the PCR (see **Definitions**) this approach may not comply with the PCR as it may result in direct awards (see **Definitions**) in breach of the PCR. In addition, from the provider's perspective, a spot based approach is an insecure market model making investment and planning difficult or impossible;
 - there is a risk to service sustainability for authorities and commissioners if service users require direct payments (see **Definitions**).
3. The majority of these services are statutory services and where this is the position, authorities are at continuing risk of not being able to deliver their statutory requirements and therefore at risk of challenge.

2.3 A description of an effective domiciliary care procurement

Introduction

1. This will be an approach which meets the requirements of The Social Services and Well-being (Wales) Act 2014 and The Regulation and Inspection of Social Care (Wales) Act 2016.

What do the Acts require to achieve effective procurement in accordance with their principles?

1. It is outside the terms of reference of this guidance to structure and plan an effective service. I suggest that the issues identified above reflect a less than optimal approach. Current and future procurements ought to give consideration to how best to remedy historic and current issues with the existing input based approach and move to an outcome focussed approach
2. I have assumed that it is accepted that a new approach to commissioning and procurement is required, continuing with the historic patterns of procurement will not achieve change. The Social Services and Well-Being (Wales) Act 2014 sets out a number of objectives which commissioners and procurement officers ought to take into effect when planning future arrangements. The following overarching requirements and criteria should be apparent from this, the market shaping (see **Definitions**) and commissioning process. I would suggest that consideration ought to be given to including the following as part of the procurement process (in no particular order):-
 - a process and especially a specification and contract conditions which are outcome focussed and intended to meet the requirements in the Social Services and Well-Being (Wales) Act 2014 and not the current 'time and task' specification;
 - early planning so that there is enough time to carry out an effective procurement process. This may require authorities to improve their record keeping so that they are aware of and can predict when existing contracts expire;
 - specification and payment mechanisms should encourage providers to support clients in becoming less dependent thus requiring less resource perhaps accompanied by use of technology. It is outside the terms of reference of this guidance to consider this in any detail as these issues should have been considered at the commissioning stage and I would envisage that there should have been consultation on what models providers would enable them to offer cost savings and better outcomes;
 - an approach which encourages new providers into the market-place and existing providers to expand, such as offering a carefully designed accreditation or SQ (see **Definitions**) process which allows smaller providers or new entrants into this particular market-place an opportunity of winning work and/or some carefully thought through commitment to buy small and bigger packages of care and not rely on spot (see **Definitions**) purchasing. Pilots could experiment with different approaches. Providers need to be given encouragement to invest and having the security of committed contracts supports this;

- longer length contracts using the dynamic purchasing or flexible purchasing approach (see **Definitions**) allowing new entrants to become accredited during the contract period. These could be, for example 10 years plus an additional 5 years, perhaps with a 'no fault' break allowing each of the authority and provider to end the contract at the end of 5 and 10 years to respond to concerns about inflexibility, reduce risk and with the possibility of moving existing providers onto a replacement procurement solution with limited further work by providers on the basis that they are already accredited;
 - give consideration to offering free training to all providers and their staff, tailored to encourage staff who work shifts to attend in order to upskill staff and financial provisions encouraging providers to pay staff more and reward staff who obtain qualifications and stay with a provider. It is outside the terms of reference to consider this in any detail;
 - collaborative co-produced, holistic procurement and pooled budgets between social care authorities and health boards to ensure that clients needs are met;
 - co-production and a collaborative working with users, their families, providers, other statutory providers and stakeholders to achieving the procurement;
 - a fundamental review and updating of the authority's the procurement process and procurement documents (see **Definitions**) to make full use of the flexibilities within the PCR (see **Definitions**), rather than simply re-producing historic documents with limited changes. This requires upfront resource with the benefits being achieved towards the end of the process and post award (see **Definitions**);
 - modern procurement requires a co-produced collaborative approach, detailed and modern outcome focussed documents including more sophisticated and thought through modification (see **Definitions**) provisions.
3. To conclude on this section of the guidance, for there to be an effective future approach, members, senior staff and procurement staff all require training and upskilling on new legislation to support innovative and modern procurement which meets client needs.
 4. An effective and sound procurement which complies with the 2014 and 2016 Acts and good practice is only possible in full if there is effective market shaping or strategic market-place (see **Definitions**) research, consultation and analysis followed by equally effective commissioning (see **Definitions**) process. If this has not been achieved, the procurement process may well be less effective.

The Preliminary Stages

1. It is assumed that the following will have been considered and decided in outline before the procurement commences, although there may be some consultation on the detail under the PCR:-
 - the impact of the Well-being of Future Generations (Wales) Act 2015 in addition to the Social Services and Well-being (Wales) Act 2014 and The Regulation and Inspection of Social Care (Wales) Act 2016 (and regulatory regime thereunder) on the procurement'
 - what precise services are being procured;
 - that this will be an outcomes focussed procurement;

- the extent to which there will be co-production during the procurement process;
- whether this will be a framework, DPS or flexible purchasing system (see **Definitions**);
- the overall structure of the contractual approach and whether this will follow a patch based (see **Definitions**) approach for contracts or a more conventional model and in any event, the packages of care being offered whether wholly spot purchase (see **Definitions**), some blocks (see **Definitions**) with spots or other model; and
- the quality assurance and payment model and whether there is to be a link for example with a model for payment by results (often shortened to PBR) or other more sophisticated incentivisation and if so, what this is;

The Alternative Approaches to Delivering an Effective 'Light Touch Procurement

Introduction

1. In this part of the guidance I focus on considering the alternative approaches to delivering an effective 'light touch' (see **Definitions**) procedure for regulated domiciliary care by drawing together earlier sections and considering the risks and benefits of each approach.
2. Procurement is an intrinsically risky process and whilst it is possible to reduce risks by understanding the risks, taking steps to mitigate these and effective planning and delivery with the benefit of skilled social care, procurement, legal, financial and all other required resources, some risks will always remain.
3. Some risks may be impossible to avoid when providing services for vulnerable adults and all including elected members and senior officers ought to understand this. However, many of the well understood risks can be reduced by planning and carrying out a structured, timely and thought through market shaping and commissioning process (see Toolkit) followed by a structured procurement. Understanding the market-place, listening to stakeholders (providers, users' families and users, internal and external statutory authorities and others) and introducing modern approaches and innovation are all mechanisms for reducing risk.
4. In particular, and as part of this risk mitigation process pre-procurement consultation and throughout the procurement a co-produced process are essential. If providers do not consider that the approach and process is acceptable they may not bid. Similarly, if users and their families do not consider their needs will be met they may complain or even challenge the outcome.

Starting the procurement, the procurement plan

1. Ideally, all projects require a project or procurement team responsible for delivering a plan which identifies the resources and skills, needed to deliver the procurement and the required time scales and steps. This ought to be rigorous and detailed answering questions such as:-
 - who will be on the project team, who will be responsible at more senior level for 'owning' and achieving the procurement, who will be responsible for drafting and keeping the plan updated and ensuring tasks are delivered?
 - what skills are needed and how will the project be managed at top and less strategic level e.g. a project board and a project team?
 - does the authority have all required skills and resources in-house, if not, where are they, will they need to be procured and if so, how; do your colleagues have the time and resource to deliver what is required for the procurement?
 - if this is a joint procurement e.g. with health, is there a formal agreement with health and if so is it sufficient to cover this procurement and its costs plus the arrangements thereafter? How will tasks be split between the various partners e.g. local authority and health, whose constitution and methodologies will be used? Does this cause any constitutional issues for either body?
 - if this is a consortium procurement, who is responsible for each part of the procurement. There is a risk in drafting by committee and if different people are responsible for individual aspects;
 - whether the current governance structure for procurement is optimum or should the authority or its consortium consider an alternative governance approach such as a specifically formed controlled company (see **Definitions**)?
 - how can the approach be adapted and/or scaled up for future procurements to benefit from the skills and experience acquired and develop additional value and benefits?
 - does the authority's constitution, contract standing orders and procurement rules create any particular issues and if so, how can they be resolved?
 - what member and/or board processes, formal and informal are required and what do they do to the timescale?
 - is there enough time to achieve the procurement? Everything always seems to be longer and more complex than anticipated and if time is short, what mitigating actions can be taken e.g. by adding more resource or shortening some of the governance or other processes?

A suggested typical good practice process

Introduction

1. In this section of the guidance I set out a typical process which will be explained in more detail in the next following sections.

Stages

1. The following are the likely stages in a procurement but it should be understood that each procurement will vary and so, to an extent, will the detailed process. Being pragmatic I do not anticipate that it will be possible to carry out each of these stages and in particular, I anticipate that there will be more limited consultation at the various stages of the procurement and some stages (especially from stage 14 onwards) may be different depending on the procurement approach which is adopted. These are the suggested stages:-
 - finalise the project team, its terms of reference and obtaining senior level buy-in;
 - agreement to and draft the outline project plan;
 - discuss and agree the proposed approach to the procurement and draft outline supporting documents;
 - preliminary market consultation/soft market testing and considering the responses;
 - vary the approach and documents as a consequence of this; prepare OJEU Notice together with all supporting procurement documents in draft. The extent to which the invitation to tender (including the evaluation matrix), specification, contract, pricing spreadsheets will need to be drafted will depend on whether a one or two stage process has been agreed;
 - consult stakeholders on draft OJEU Notice together with all supporting procurement documents?
 - vary the approach and documents as a consequence of the consultation, prepare OJEU Notice together with all supporting procurement documents in draft. Publish OJEU Notice together with all supporting procurement documents;
 - clarification process for this stage;
 - respond to clarification questions and issue any amended procurement documents;
 - receive and consider the selection questionnaires ("SQ") (see **Definitions**), evaluate, clarify and notify unsuccessful and successful tenderers. The assumption is that there will be a full evaluation of the questionnaires and that the outcome of this process will be a accreditation and list of providers approved as having passed this first stage;
 - standstill. I have assumed that even if this does not technically apply to 'light touch' (which is arguable), this process is likely to be followed to ensure that there cannot be a later challenge. The outcome of any repeated accreditation process and how standstill will be managed if this is to be a DPS or flexible purchasing system (see **Definitions**) will require careful consideration;
 - publish list providers who have passed this stage;
 - consult (in parallel with earlier processes) on the remaining draft procurement documents (see **Definitions**);
 - receive the outcome of the consultation and finalise the remaining procurement documents;
 - issue the invitation to tender for the next stage;
 - clarification process for this stage;
 - respond to clarification questions and issue any amended procurement documents;

- receive and consider the tenders, evaluate, clarify and notify unsuccessful and successful tenderers that they are on the panel;
- carry out individual awards whether by mini competitions or otherwise;
- manage list of accredited providers and open list to additional providers (if this is the approach).

The detailed process - the procurement stages

1. In this part of the guidance I focus on considering the implementation of the procurement for a 'light touch' (see **Definitions**) procedure for regulated domiciliary care by drawing together earlier sections and considering the risks and benefits of each approach. As identified above, procurement is an intrinsically risky process and whilst it is possible to reduce risks by understanding the risks, taking steps to mitigate these and effective planning and delivery with the benefit of skilled social care, procurement, legal, financial and all other required resources, some risks will always remain.
2. Some risks may be impossible to avoid when providing services for vulnerable adults and all including elected members and senior officers ought to understand this. However, many of the well understood risks can be reduced by planning and carrying out a structured, timely and thought through market shaping and commissioning process (see Toolkit) followed by a structured procurement. Understanding the market-place, listening to stakeholders (providers, users' families and users, internal and external statutory authorities and others) and introducing modern approaches and innovation are all mechanisms for reducing risk.
3. I have mapped a DPS process for a multi-provider service with a list of approved providers and the opportunity for mini-competitions and some DPS development. I have therefore assumed this will be a relatively long contract period. The expression stages is used by reference to the sub-paragraphs in 187.

Stages 1 - 3 (see paragraph 187)

1. These stages are the big picture planning for the procurement and when carrying out the overview and strategic planning plus authority and partner 'buy-in' the actual stages should be discussed and agreed.
2. Overview and strategic planning are essential. By the end of these stages the authority ought to agree what will be procured and (in general) how this will be procured, the time scale and its impact on the authority's process. All of these requirements and all required documents must be identified and agreed. Agreeing the funding for delivering the project, who will draft the documents and when within the programme are also essential. An effective project manager is therefore also essential to manage the process. If not everyone on the project board and team have sufficient skills and some of them need training and other upskilling this must be established so this training can be provided early in the project.
3. The alternative models, a framework or a dynamic purchasing system (see **Definitions**) and approaches to creating a 'light touch' system have been identified in outline. In this section I draw together all of the options for consideration and briefly analyse them focussing on the risks and benefits of each approach.
4. It is my assumption that the authority will create its own 'light touch' (see **Definitions**)

procedure and approach using the flexibilities in the PCR (see **Definitions**) rather than using all of any of the systems for non-‘light touch’ services. Government’s guidance (see the guidance identified in paragraph 68), which I support, is that whilst they should sensibly be based on one or more of these procedures they must be customised. As identified, the non-‘light touch’ procedures/systems are inflexible and not designed for ‘light touch’ so it is inappropriate to use any approach without making some changes for the reasons identified above. However, in view of the complexity and risks of creating a procedure from new, which will not be familiar to the market, the fact that the existing processes can readily be adopted and resource limitations, adapting an existing procedure which the market-place will be familiar with and adapting it is the recommended approach.

5. It is also assumed that this will not be a procurement for a single provider but a panel will be required.
6. This part of the guidance is intended to support a home care procurement for a population in an area(s). If this were a different procurement example, for example an individual or limited number of residential care homes externalisation the approach may be different but for home care a selection of providers will be required and this is the assumption underpinning the Toolkit and all other discussions.

A one or two stage process?

1. Traditionally many authorities use a one stage process i.e. an open process. Providers have to complete an SQ or pre-qualification questionnaire (see **Definitions**) and then the tender (see **Definitions**) at the same time.
2. The advantages of this are:-
 - it is quicker for the authority. This is often the main factor as authorities are required to achieve a legally sound outcome as their timescale dictates this to avoid illegal direct awards (see **Definitions**);
 - all documents are received at the same time and can be evaluated together so it is administratively simpler.
3. The disadvantages of this are:-
 - all procurement documents (see **Definitions**) must be ready at the same time as the contract notice (see **Definitions**) rather than being able to develop the specification, contract and award process at a later date. A two stage process means award documents do not have to be issued until the short listing stage;
 - it is disliked by many providers as they have to complete all of the procurement documents before they know if they pass the SQ/PQQ stage. It is therefore much more work, especially for smaller providers who may be unsure if they will pass the SQ/PQQ stage;
 - any saving of time and effort may be illusory. It requires authorities either to carry out the evaluation of the SQ/PQQ and tender (see **Definitions**) stages together or the SQ/PQQ stage first and then the tender stage, which loses time;
 - it is less flexible. It is more difficult to have a standard accreditation approach for providers, allowing providers to be on a framework or DPS (see **Definitions**) platform for a range of services with a standard accreditation for financial, economic, governance and basic skills

and variables for each service in this approach with a passporting process; and

- it is less consistent with the approach being followed under the Inspection of Social Care (Wales) 2016. its regulations and guidance. This will be a more generic registration rather than individual service registrations and so, an accreditation approach followed by achieving a place on individual frameworks/DPSs is consistent with this.
4. A two stage process is recommended with a future and separate partial award stage, if there is time to do this. It is more flexible and fairer for providers, who only need to complete detailed documents if they are selected as suitable and more consistent with using a modified DPS. There may be exceptions to this approach, for example, a one stage approach for emergency placements. It therefore encourages the market-place to respond including smaller providers who may be put off by having to complete very complex documents. However, as the procurement process is complex it is suggested that authorities must obtain detailed procurement and legal advice.

Stages 6, 13 and 14 (see paragraph 187)

1. These stages include the two stages of preliminary market consultation, before the SQ/PQQ (see **Definitions**) and at invitation to tender (see **Definitions**). If a one stage procurement is used, these stages will have to be done at the same time. This is difficult as there is a logical sequencing and it is difficult (impossible) to consult on the invitation to tender stage before completing the earlier stage as this earlier stage will assist in shaping the second stage.
2. In addition to actual consultation, these stages can be used to publish information to providers and/or the market-place in general, if any, to advise them of the proposals and try to ensure (if you can) that their staff who may be TUPE transferred know what is going on?
3. Preliminary market consultation is implicitly recommended in regulations 76 and 40 PCR (see **Definitions**) but are not mandatory and not always done so I have identified the advantages and disadvantages below.
4. The advantages of this are:-
 - it is consistent with the requirements of regulation 76 and in particular 76 (8), the well-being legislation and duties and a truly co-produced process; It is difficult to see how an authority can properly take into account the requirements of regulation 76 (8) or deliver co-production without at least one full stage of preliminary market consultation;
 - authorities are able to understand and structure their procurements taking into account the view of all stakeholders. This should support more effective procurements where all stakeholders (users and their families and providers in particular) are valued, allowing them to advise the authority before the procurement commences if there are any flaws in the approach; and
 - it ought to make it less risky, easier and speedier to carry out the procurement and avoid the risk of hundreds of clarification questions, in some instances pointing out flaws in the process which have to be remedied during the procurement with a risk of the contract notice (see **Definitions**) and procurement documents (see **Definitions**) being amended, time scales extended and stakeholders feeling excluded and not positive about the process.

5. The disadvantages of such consultation are:-
- it is time consuming, potentially expensive and a considerable amount of work especially if a two stage consultation is adopted and it is necessary to allow enough time for this and for the subsequent evaluation of the outcome of the consultation and carry out any re-drafting of documents;
 - it may be difficult to do this without either distorting or appearing to distort competition if the approach recommended by a particular provider(s) is adopted. so it is essential to have a skilled project team to do this properly; and
 - the consultation issues, evaluation matrix will need to be drafted with knowledge of the preferred procurement outcomes, but at the same time ensuring that they are fair and even handed. Thereafter the responses may be inconsistent. The team which drafts these and the evaluators will need to carry out a careful process with all of the responses noted and careful records kept to avoid the risk that this process gives ground for and results in a challenge.

Stages 7 - 10 and 15 - 18 (see paragraph 187)

1. As identified earlier in this guidance, the PCR (see **Definitions**) requires an open market PIN followed by a contract notice (see **Definitions**) or just a contract notice, each of which has to comply with the statutory notice requirements. It is essential to design the procurement process before this can be drafted so that the notice and supporting procurement documents (see **Definitions**) describe the procurement to the market in outline with all material provisions such as services being procured, contract length, value, award procedure etc. being set out.
2. There are a number of options for the procedure to be used. As the authority designs its own procedure for 'light touch' (see **Definitions**) it is essential to decide on whether there is to be a one or two stage process (see above) and within this overall shape, what approach will be adopted. The options identified in the PCR (see **Definitions**) are an open, restricted, framework, dynamic purchasing system (see **Definitions**) or a non PCR specified approach can be used, a combination of a dynamic purchasing system, for example, a flexible purchasing system (see **Definitions**). With the exception of the flexible purchasing system each of these are recognised procedures. They are described above together with brief comments on their characteristics and should be adapted to add the flexibilities which 'light touch' allows and supports.
3. Modern ICT could support a more innovative approach. Historically, the outcome of most procurements is a fixed framework for a particular tranche of services. Authorities are now beginning to experiment with alternatives. A typical historical approach is compared below to an innovative solution.
4. A typical historic approach is that each service is separately procured with authorities and providers repeating each step and document with variants for different procurements. There is considerable repeated work and effort for all and the risk that there will be a series of different approaches and documents without any added value so that managing the arrangements are complex.
5. An innovative approach would be to set up an accreditation platform. This is consistent with the new approach to registration under the Inspection of Social Care (Wales) 2016 its regulations and guidance, that providers do not have a series of separate registrations but

a more general registration. The first procurement under the new approach would have to set up the basic structure and requirements. The contract notice (see **Definitions**) would make it clear that some of the providers' information would be put onto the generic platform and shorten their procurement process for future opportunities as they will not need to repeat information already held on file and will only need to provide updated information each year and if there are relevant provider changes, such as a company re-structure or sale. Each provider would be given a unique registration number and the platform terms would identify the triggers for re-registration with a computerised notification system to all authorities within the consortium of any such changes. The SQ/PQQ (see **Definitions**) would be split into parts. The basic information common to all procurements, such as name, legal/governance status, insurance, registration information and policies. The second part of the SQ/PQQ would include information which may be general such as financial (turnover and profit margins) and insurance information but may become variable if a more sophisticated approach to letting packages of service is adopted in the future enabling micro and mini providers to bid for smaller packages of care to encourage the market. There may therefore be a separate category for smaller providers. The third part would be specific to each individual procurement.

6. The advantages of this approach are that future tendering processes would be streamlined, quicker and less work for all. If a flexible or dynamic purchasing system is adopted (as recommended) it would make the second stage, the award stage (see **Definitions**) much simpler and support easier award for specialist services where there is no existing provider. In due course standard contract terms and conditions applicable for all services (such as freedom of information, basic contract management, registration requirements) could be added and the features on the system platform could be added to incrementally and gradually as more services are tendered.
7. The disadvantages are that to be fully effective, there will need to be more initial development work and the procurement documents (see **Definitions**) drafted with care to ensure that they are split between standard and variable information. The ICT platform will need to be sufficiently sophisticated and resourced to support this approach. For consortium commissioning there will also need to be agreement on what is standard. There is a risk that further or amended basic accreditation information will be needed either if there are legal changes but this can be accommodated by the platform's advertised terms and conditions which allow the lead authority to seek this.
8. The above paragraphs identify the recommended outline procedure for the SQ/PQQ stages. In addition, to this, it will be necessary to consider the substance of each of the procurement documents. Some of these will require to be fully drafted and attached to the contract notice, most obviously the notice itself, SQ/PQQ and evaluation process but the requirements of the PCR (see **Definitions**) mean that even if a two stage approach is adopted the key provisions of the whole procurement approach and documents must also be agreed. In my view the following would be required to support a fully functional approach:-
 - the procedure and structure of the procurement process will need to be published;
 - what services are being procured at this initial stage? Whilst it is good practice to identify future procurement stages if these are to be advertised via a future contract notice (see **Definitions**), this is not essential;

- if a framework, how many providers will be admitted at the beginning, is it limited or open to all who qualify, will it be fully closed or potentially opened from time to time and if so will it be called a flexible purchasing system to ensure the market-place understands the approach; the timing, process and criteria for opening the system to new providers when will the system be opened for new joiners and what happens in between a general opportunity to get onto the system if there are emergency placements?
 - the estimate of the overall value of the procurement throughout its contract period?
 - what information is being sought from providers firstly for the accreditation process and secondly for awards (see **Definitions**)?
 - the criteria for accreditation and awards, the evaluation and award process. The criteria must now be based on the most economically advantageous offer (MEAT) so it will be necessary to agree the price : quality percentages and the specific methodology used to evaluate at each stage. There are a number of alternative approaches and these will need to be considered in detail. As identified above when considering evaluation criteria, inclusion social, environmental and workforce matters are all complex issues and too complex to include within this guidance;
 - pricing structures and key fee provisions;
 - how will the services be structured thereafter? Will the authority shape its approach on a geographic patch (see **Definitions**), continue to purchase spot contracts (see **Definitions**) alone or offer another basis, for example, some blocks (see **Definitions**) perhaps with cost : volume contracts i.e. where the fee levels depend on the level of purchase or what?
 - how will the individual packages of care be purchased under this procurement? Will there be direct awards, mini-competitions (see **Definitions**) or what and what will the award procedure be for each?
 - main provisions of the contract and specification including the contract length, main modifications procedure and other key information such as pricing structures, quality assurance and performance management.
9. The next part of the procurement is the actual tendering process including the preparation of the invitation to tender (see **Definitions**), finalising the specification, contract award financial offer required from providers and the process from accreditation to award (see **Definitions**).
 10. By this stage, the authority will have structured the majority or all of the documents at strategic level and will have a significant amount of information about the bidders, who they are, their historic expertise, whether there are likely to be sufficient bidders and therefore whether the procurement is likely to meet the authority's requirements and expectations (see below for the providers' perspective).
 11. The project team, including technical officers (legal, financial and any others) should have produced drafts of their documents which only require finalising. As identified, whatever approach is followed this will be the least which is necessary to produce the contract notice (see **Definitions**) and supporting documents as the possibility of making material changes to the approach is very restricted by the overarching requirement to comply with the principles of transparency and equal treatment of bidders.
 12. It is a useful practical rule of thumb when considering whether changes to the approach

and documents would breach these principles to consider whether if the change had been made at an earlier stage other providers would have expressed an interest and whether if the authority's officers were considering this from the perspective of a provider they would have thought this unfair.

13. If this is a two stage approach, the invitation to tender (see **Definitions**) will have attached to it all of the remaining procurement documents (see **Definitions**) including the detailed documents where there has been an outline only, for example the specification and contract conditions to include the evaluation of tenders, pricing and award criteria. It will also include the set out the specific conditions for tenders, such as the dates for clarification questions, return date and time for tenders and provisions relating to the circumstances in which tenderers may indicate the their documents are to be kept confidential. It is usually a detailed and often relatively lengthy document. If this is a one stage process the invitation to tender and all supporting documents will have been sent or available on a web based platform for all who respond to the contract notice (see **Definitions**).
14. It will be appreciated from the above that procurement is a very complex process and analysing all of the alternative approaches is outside the scope of this guidance. There are choices to be made at each stage. In my experience early preparation is essential and authorities typically underestimate the time, complexity and resource required to achieve a successful procurement. The main risks and ways of mitigating these are:-
 - under-resourcing and expecting staff to add a procurement process onto their day jobs. Senior staff and politicians ought to be informed of the true time scales and risks of not resourcing properly (see below);
 - running out of time so that there is no legally sound way of making awards (see **Definitions**). This cannot be mitigated in a legally sound manner. Although in practice the Auditor General and providers may be reluctant to challenge illegal practices if the authority is doing its best to carry out a legally sound procurement, but challenge cannot be ruled out;
 - splitting the procurement process by carrying out a two stage procedure not an open procedure (see **Definitions**) as identified above;
 - not seeking to be too ambitious in the initial procurement and acknowledging that there will be further procurements for additional services; and
 - most important of all, a proper market shaping, commissioning and pre market consultation processes so all the main strategic issues have been resolved.

Stages 11 - 13 and 19 - 20 (see paragraph 187)

1. This section, is brief. Firstly, I understand that in practice, problems relating to standstill and challenge are not commonplace for Welsh authorities and secondly, to the extent that individual awards and mini-competitions are within the terms of reference for this guidance they are considered below.

Evaluation and Award Matrix For SQ and Mini Competitions

General

1. As identified, there is no requirement to follow the provisions of regulations 57 - 69, headed the Choice of participants and award of contracts, for 'light touch' but there is a requirement to achieve transparency and equal treatment. Authorities can create their own procedure. In practice, most authorities will use the approach for non-'light touch' procurement in the PCR to some extent as it is easier to do so than create an entirely new approach, see regulation 76 (7).
2. Evaluation and award are separate processes, evaluation considers past expertise and basic economic factors and award (see **Definitions**) considers the future, how would the provider deliver this contract so evaluation takes place once the SQ/PQQs (see **Definitions**) are received and award (see **Definitions**) once the tenders are received or mini-competitions carried out. The expressions are sometimes used without discrimination, for example to evaluate the tenders so authorities need to be careful to understand how the expressions are being used.
3. Even where the adopted procedure is an open procedure (see **Definitions**) it is advisable to evaluate providers in two stages and to provide for this as part of the published evaluation methodology.
4. As most challenges are about the evaluation and award approach and process e.g. the award criteria have been misapplied and a bidder is wrongly disqualified or rejected, it is important to ensure that the procedure followed is sound.

Evaluation

1. The SQ (see **Definitions**) its introduction and use are described in elsewhere in this guidance. I analyse their use for 'light touch' in this section as follows:-
 - demonstrating economic and financial standing. This is subjective and requires an understanding of the meaning of the available financial information for different legal structures. Regulation 58 supported by regulation 60(6) (proving economic and financial standing) proof sets out suggested information which should be produced. One issue is how to establish this in a market-place where many providers are small and may not be commercially strong. Evaluation of financial strength, liquidity, likelihood of becoming insolvent and therefore analysis of accounts can be technically difficult and requires relevant skills and understanding of private sector accounting to avoid the risk of inappropriately including or excluding a provider who may appear weak but is nevertheless sufficiently viable for this market and has a sound track record;
 - technical and professional ability. This is also subjective and it raises questions about whether in a regulated market it is sufficient that a supplier is registered, does not have relevant recent prosecutions (or is being investigated), and has the required insurance? It is unclear how far authorities ought to separately consider and evaluate the same factors as those which will have been considered before a regulated provider is registered. This is a matter for consideration by authorities in view of the regulatory requirements in force under the Inspection of Social Care (Wales) 2016, its regulations and guidance from April 2018.

2. If an overarching accreditation process has been adopted for a framework, dynamic purchasing system or flexible purchasing system (see **Definitions**) the authority will have to consider which of the above information is common to all providers who should be accredited and which will be specific to an individual procurement.
3. Authorities will also need to consider whether to have self-accreditation and how to refresh the information provided. As identified earlier in this guidance, I have suggested that self-accreditation may not be the most sensible approach in this market-place as many providers are small and will not want to get to the end of a procurement process only to discover that they have been rejected. Once providers are on a list for a framework, dynamic purchasing system or flexible purchasing system (see **Definitions**) there will need to be a regular refresh process requiring providers to send copies of updated standard documents, such as insurances, registration information to prove that they are still able and suitable to provide regulated services.
4. As previously identified, authorities will need to decide whether to have an open approval where any bidder which qualifies is invited to tender, to have a list which limits the number of tenderers invited to bid or a combination of the two, whereby for some procurements such as a patch (see **Definitions**) approach the invitation to tender list will be limited and say an open list for individual and/or specialist services. Whatever is adopted the methodology and criteria for choosing the bidders invited to participate in the tender stage will need to be set out in full.

Award - the Criteria and Information to be Provided for the Award Stage

1. This second phase is far more complex than the SQ/PQQ (see **Definitions**) stage and it is the stage where there are the greater risks of challenge. These challenges include challenges to awards to a framework (see **Definitions**). The risk is potentially less if an open dynamic purchasing system or flexible purchasing system (see **Definitions**) is preferred as unsuccessful bidders are less likely to challenge if they are given a further opportunity to win a place.
2. Where there is a patch (see **Definitions**) or block (see **Definitions**) approach there will be an award of a specific contract to a specific provider. There will be one or a limited number of preferred providers who will be chosen and given a contract. This means there may well be aggrieved providers who have failed to achieve a contract.
3. Where there is to be an approved list of accredited providers, against which individual purchases are called off (see **Definitions**) against the list from time to time the award process will depend on the approach followed and whether there will be a series of different accreditation categories, such as standard home care within a particular part of the authority's area or a general list of accredited providers. In either approach, all who are approved may be appointed on a rotational basis, against a pre-appointed catalogue or may be chosen via a mini-competition (see **Definitions**), if there is more than one provider which is on the relevant part of the list. An approach where there is either a mini competition or a detailed process of matching may mean that the award stage includes a detailed matching and process of choosing an individual provider for a particular package of care. It will be seen from this paragraph that there are many complexities at this stage of the process and analysing these are outside the terms of reference of this guidance.

4. Whatever approach is adopted, complete and clear award criteria are required for the award stage. As identified, these must now be based on MEAT (most economically advantageous tender). The criteria will balance price and quality, taking into account the statutory duties of the authority, purpose of the service and individual client requirements. A cost effective approach, taking into account fiduciary duties is also necessary. The award criteria must be carried out fairly and, as far as possible, objectively and records kept of how this is done as the process is susceptible to a freedom of information request and challenge.
5. All of the evaluation/award approach including any weightings and sub-criteria must be included in the published procurement documents.
6. A typical evaluation model in this sector is that 60 % of the marks are given to quality and 40% to price or even 70% quality and 30% price.
7. These expressions require some explanation. Theoretically, price ought to be relatively easy to evaluate although I do not believe this is the position in practice. If the contract is for a patch or fixed block (see **Definitions**) where the contract has few inflationary or other price variables this may be true. Where there is a variable block the variables may make this more difficult and in addition, there are a number of different market-place pricing models. Most commonly used is to score the cheapest with 100% of the available marks and score all others less by reference to the percentage that they are more expensive. Where there is a more subjective award for complex individual packages, establishing the importance of price and balancing this against an individual's need may be more complex.
8. There will also need to be a published award process to establish quality. Examples of a typical approach are specific detailed criteria with responses required via method statements and which may include a transformation process to move the service from task and finish to a more modern outcome based approach, although the usual approach is a 1 - 5 or 1-10 scoring system ranging from a 0 for no response to an individual question to 5 or 10 if the answer exceeds expectations.
9. In practice, the complexity of the award process may have to depend on the number of providers in the market as it is pointless to have a sophisticated and detailed approach if there are so few suitable or accredited providers who are available that there can be no meaningful competition.

2.4 The legal documents

Introduction

1. In this part of the guidance I set out a high level overview of the contract, specification and individual purchase agreement which are required for an effective home care procurement.

The Contract

1. The contract is the legal 'wrapper' for the agreement between the authority and provider and will usually consist of the following individual elements:-
 - general terms and conditions which include insurance, regulator requirements, end of contract provisions;
 - specification (see **Definitions**);
 - quality assurance and performance frameworks (see **Definitions**);
 - pricing arrangements;
 - individual purchase agreement (IPA) if this is the adopted model of purchase;
 - modification or variation (see **Definitions**) provisions;
 - definitions and expressions used.
2. There are a number of different approaches to contract drafting. A modern approach which I consider sensible for longer and complex procurements is to have the majority of information in separate schedules. This approach supports a dynamic approach based on accreditation as the basic contract conditions can be kept the same for all service types and different schedules used for different services, based on a standard template if possible. In addition if the procurement documents include a refresh process updated schedules can be substituted for out of date schedules for example for quality assurance and/or regulatory requirements. This is important if the contract is to be for a longer period.
3. It is essential to consider and draft the provisions of the contract taking into account the outcomes which are to be achieved rather than simply to use an existing contract precedent which may have been prepared for a different approach, such as a 'time and task' model. An innovative approach to service delivery requires an equally innovative approach to drafting the contract. Authorities should also ensure that the contract and specification and all other procurement documents are drafted in parallel and are a functional suite of documents with proper cross referencing, limited overlap, a consistent approach and language, for example via common definitions across all documents.
4. It is outside the terms of reference of this high level section to consider the terms of the contract in detail.

Specification and Individual Purchase Agreement ("IPA")

Specification

1. A specification (see **Definitions**) is required for every service. Section 8 of the Social Services and Well-being (Wales) Act 2014 and the regulatory requirements in force under the Inspection of Social Care (Wales) 2016, regulations and guidance from April 2018 are consistent in requiring an outcomes based approach. The guidance on the 2014 Act identifies outcomes in terms of the physical and mental health and emotional well-being, safeguarding

etc and the 2016 Act follows on from this. The Welsh Government expects authorities to procure using outcomes based specifications and this is the model included in the Toolkit (see **Definitions**). Historically, as identified, most approaches including the supporting specifications are either input (see **Definitions**) or a mixture of inputs, outputs and outcomes (see **Definitions**) with the focus on task and finish i.e. an input approach (see above).

2. Achieving a fully outcome based approach will require innovation and thought to ensure that delivery can be evaluated in accordance with the quality assurance and performance frameworks (see **Definitions**). The specification ought therefore to dovetail with these and the performance requirements in the contract and must be drafted taking into account the requirements of the 2014 and 2016 Acts as set out above.
3. Key issues to be considered before the specification is drafted are:-
 - what is the philosophy and approach to the specification;
 - what outcomes are required and how will achievement of these be measured; and
 - how will the specification and the award (see **Definitions**) model be drafted to ensure that they are consistent and bidders evaluated at award stage to ensure that their bids comply with this model and with the quality assurance and performance frameworks? These should include identification of measurable indicators and performance targets for these.
4. In practice this will require authorities to understand what they are seeking to achieve and how these will be achievable by providers as part of the pre-procurement commissioning process. It is also important to establish the cost of delivering the specification, the extent to which it requires service transformation and a transitional delivery programme. In reality a more sophisticated model of specifying home care may take time and a series of pilots to achieve effective delivery against such a different model may be prudent.

The IPA

1. Whether there is an IPA (see **Definitions**) will depend on the procurement model. It may not be needed, for example if the model is a patch (see **Definitions**) model. In most instances it is likely to be necessary.
2. The IPA ought to be a simple document which does not repeat the contract conditions and focusses on outcomes for an individual service user.

2.5 The provider perspective

– encouraging and developing the market-place

Introduction

1. Whilst this guidance is primarily for procurement officers, it is not possible to design a sound process without understanding the provider perspective. This section of the guidance therefore considers key issues for providers when considering whether to bid and/or their approach to the procurement.
2. A successful procurement requires pre-procurement and procurement co-production with stakeholders. Providers are an essential stakeholder and without a sufficiently large or varied provider market-place to meet the commissioning and procurement needs, authorities will never be able to achieve successful outcomes.
3. Whilst providers and authorities share many issues and the impact of matters such as shortage of recruits and difficulties in retaining staff providers are also subject to issues which do not directly affect authorities (see below).
4. As is clear from an understanding of the PCR (see **Definitions**) and this guidance it is authorities who drive the procurement process. Where there is a co-produced and therefore collaborative approach providers will have a significant impact on structuring and shaping the procurement it is still the authority's procurement process.

What Concerns Providers?

1. Authorities ought to keep the provider's statutory and best practice requirements in mind throughout the procurement process.
2. These include:-
 - solvency and cash flow so pricing structures, inflators and payment mechanisms are likely to be important and if the authority can offer guarantee of work and payment provisions which improve the providers' financial position the authority may achieve a price benefit.
 - the length and complexity of the documents. Providers' focus is delivering services. Many of the home care providers in Wales are small, they do not have access to specialist accountants or lawyers and do not have the time or money to spend on complex procurement processes. So, keeping the process and documents simple will encourage them to bid;
 - shape of the offer to the market and quality assurance. Most providers care about services. Whilst some may fear a move from the old fashioned task and finish model, others may value a more person-focussed approach but all may want guidance and training on new approaches. The authority should consider how it can offer all providers an opportunity of support;

- staffing issues and regulation. Recruiting and retaining staff is a significant issue and the implication of regulation on staffing issues is important. Whilst authorities cannot resolve the demographic issues they can work with providers to offer free training, for staff and on regulation requirements; and
- Understanding how contractual and any other outcomes will be measured. Providers will want to be clear about their obligations under the contract and in particular what outcomes their services are required to deliver and designed to impact positively upon, how these will be measured and evaluated during the procurement process and thereafter. They will want to price these requirements. There may be other outputs or outcomes required for service users outside the direct scope of their service for example by the authority and these also must be identified together with information about how the authority will resource the measurement of these and measure them.

2.6 End of contract issues and preparing for next procurement

Introduction

1. When putting together the procurement documents (see **Definitions**) it is essential to consider the end of the contract issues. It is too late to do so at the end of the contract. The end of contract provisions and arrangements must be included within the contract to ensure that they are a contractual requirement and can therefore be enforced.
2. These are important whether the contract ends through effluxion of time, i.e. it reaches its natural end, it is terminated for poor performance or for other reasons, such as insolvency. It is recommended that the contract conditions should have a schedule dealing with end of contract issues.

Issues which are typically relevant

1. Typically the following issues are relevant:-
 - Continuity of care for existing users at the end of contracts e.g. will all services and service users transfer or could the existing users stay with existing providers and only new service users transfer and what are the service, commercial and operational issues of either option for each party? Whilst staying with existing providers may be an attractive option for users and their families and reduce risk of discontinuity in service provision it may not be consistent with the achievement of a revised or new approach to service delivery, such as a patch (see **Definitions**) approach or be economically viable for either the provider or authority. Therefore, the recommended approach is to include this as an option and discuss it with the provider towards the end of the contract period;
 - transfer of information and who owns the information about service users monitoring information, software and IP issues. It is essential to include intellectual property and information ownership transfer provisions in contracts. There will always be some records to transfer and without this neither the provider nor the new provider will have the required information to deliver safe future services. Whilst most providers will co-operate this is not necessarily the position on an insolvency or an adversarial end of a contract relationship;
 - staffing, TUPE and pensions (where relevant) information. The Transfer of Undertakings (Protection of Employment) Regulations 2006 does not provide sufficiently long lead-in periods for information to be provided by an existing provider to a new provider to achieve effective re-procurement and nor does it oblige the existing provider to pass information to the authority so that the authority can prepare its procurement documents so contractual provisions are required to allow tenderers to submit fully priced bids;
 - lead in arrangements between existing and new provider. In practice and in most instances there will be co-operation but this cannot be presumed.

Part 3

Definitions

Introduction and Explanation of Approach

Not every expression used in this guidance is defined. Where an expression is not used in many places within the guidance it is described when used and not separately defined. The definitions are taken from the PCR and from expressions in general use. I have simplified the often complex expressions in the PCR and elsewhere because this is general guidance.

The definitions are in alphabetical order and are therefore unnumbered.

Definitions

Authority

Short hand for a contracting authority as defined in the PCR. Contracting authorities are bodies bound by the PCR. They are (to put it simply) central government departments, local government, health boards and authorities and a number of quangos plus controlled companies, many housing associations and non profit distributing organisations. These will be contracting authorities if they meet certain criteria. They have to be 'organisations not having an industrial or commercial character, which are financed wholly or mainly by another contracting authority, subject to management supervision by another contracting authority or where more than half the Board of Directors or members are appointed by another contracting authority' are also contracting authorities (see regulation 2).

Authorities are obliged to comply with the regulations before entering into third party contracts with anyone except a controlled company that the contracting authority controls. This includes contracts with other contracting authorities but does not include this if these arrangements are non-commercial but administrative. This is very technically complex law.

Award and award notice

The process of appointing an organisation as a contractor. This is a formal process under the PCR. The expression may also be used for direct awards (see **Definitions**). There is a formal process for making an award under Part 3 of the PCR.

Bidder or tenderer

A person or organisation which is bidding to be a supplier of services under a procurement.

Block contract

A contract for a fixed number/units or amount of purchase. Typically, there is a price advantage in this type of purchase. There may be a variant of this, for example offering a provider a minimum level of commitment with a varying price above that minimum level or if the level of purchase falls below this level. These latter models are sometimes known as ceiling or floor models. Issues requiring consideration are the commercial implications of the commitment, what happen to any unit of purchase not needed (e.g. can it be sold on to framework or consortium partners) or whether the block is purchased by one organisation or a consortium and if so, the governance arrangements.

CPV codes

CPV means common procurement vocabulary. It is a single classification system developed by the EU to standardise the description of contract types.

Call off

A process leading to the award of a contract under the PCR or otherwise usually where there is a framework or a DPS (see **Definitions**).

Commissioning

There are many definitions of commissioning. It is used in this guidance to mean a pre-procurement process of planning, usually in preparation for procurement.

Contracting authority

See under authority.

Contract notice

This is a notice commencing an OJEU advertisement for a specific procurement. It sets out a description of the required procurement, full details of likely values, process for application and the details of all of the goods, works and/or services which are or could be required.

Controlled company (Regulation 12)

This is a body controlled by an authority or several contracting authorities. A “parent” authority may make a direct award of a contract to its controlled company without a PCR procurement process. It is sometimes called a *Teckal* company because of the relevant European case. There are detailed complex technical requirements all of which have to be followed to achieve controlled company status. Contracts between a controlled company and other authorities or by controlled companies must comply with the PCR.

Direct award

This is a contract awarded without a competitive process. It is either a new contract or is a significant variation or modification of an existing contract. In either instance, if a direct award has a value (as defined in the PCR) above the threshold which triggers a requirement to carry out a procurement under the PCR it is likely to be an award in breach of the PCR. If its value is below the threshold, taking into account the anti-avoidance provisions in the PCR intended to stop procurements being artificially broken down into or awarded in small packages to avoid the PCR it may be legally sound to have a direct award. This expression is not defined in the PCR but is in common use.

Direct payments

Funding by authorities of individuals to allow them to buy their own packages of care.

Directive

The 2014 European Directive on Public Procurement 2014 (2014/24).

Dynamic Purchasing System (“DPS”)

An open list of providers which new providers can join during its term. Regulation 34 sets out complex provisions for non-‘light touch’ DPSs. There is a two stage process, separating out the accreditation (or selection) stage from the award stage. This approach is not required for ‘light touch’. In designing a ‘light touch’ DPS, a more flexible approach is possible. This could allow for example, for accredited providers to provide information which can be used to part approve them,

shortening the second part of the award process to reflect the requirement for speedy placements. It may even be appropriate to carry out the full award process for some types of placements, such as emergencies and create a 'catalogue' of approved providers.

Economic operator

This is the term defined in the regulations for a person who offers to enter into a public contract. Instead of an economic operator I have described such a person or organisation as a provider in this guidance.

Framework

A fixed list of provider(s) where an authority can "call off" or buy individual purchases of service against a list or one or more providers. Regulation 33 sets out specific provisions for all frameworks except for those created under 'light touch' when an authority is not required to comply with these provisions.

Flexible purchasing system

A procurement system for 'light touch' procurement which combines some of the characteristics of a framework with those of a DPS but is not as flexible as a DPS. It is not a defined expression but is increasingly used by social care commissioners.

Freedom of information

Created by the Freedom of Information Act 2000 it is the public right to information held by authorities. This right is subject to a number of exemptions for example for commercially sensitive or personal information.

Home Care Toolkit

A home care toolkit developed by the Institute of Public Care, Oxford Brookes University for the National Commissioning Board for Wales.

IPA

The individual purchase agreement setting out the specific terms applicable to a package of care for a service user. It will usually have the care plan attached. The exact structure and content of the IPA will depend on the terms of each procurement.

Input/output/outcome as used for services and specifications

Input: a precise description of the services to be provided by reference to time and task e.g. how to wash, feed, how long to stay etc.

Output: a description of the outputs required e.g. to leave the user is clean, well fed and happy at the end of the visit.

Outcome: what the service should achieve for the user or wider, for example the user's needs have been met and he/she is happy or the service enables the number of repeat hospital admissions to be reduced (see Social Services and Well-being (Wales) Act 2014 and other relevant legislation).

Invitation to tender

A formal process inviting tenders. This may be part of an open advertisement process as defined under the PCR or a more restricted process inviting a limited number of providers to bid.

'Light touch'

The specific requirements and approach in the PCR for procuring social care, education, health (and some other services) set out in regulations 74 -77. 'Light touch' allows authorities to design their own award process within a less restrictive structure than the standard processes. 'Light touch' is a colloquial expression not included in the PCR. 'Light touch' replace the previous process for procuring social care, health and a number of other services set out in the public contracts regulations 2006 (known colloquially 'Part B'). Unlike Part B 'light touch' services above the threshold now have to be procured by an OJEU notice and carried out in accordance with the process for 'light touch' in the PCR.

Mini competition

A process of making an award (see **Definitions**) under a framework, DPS or flexible procurement by asking more than one provider to bid before being awarded a specific contract for services.

Modification

The expression used in the PCR for a contract variation.

OJEU

The Official Journal of the European Union ('OJEU') which must be used to start a procurement process. It is European-wide journal.

Outcome

This term is not defined in any of the relevant legislation although it is used extensively in legislation and guidance. It has not therefore been defined in this guidance. Tool 12, Understanding inputs, outputs and outcomes and how they relate to each other sets out a very useful and transparent description.

PCR

Public Contracts Regulations 2015 (SI 2015 No.102)

Part B

Part B of Schedule 1 of the Public Contracts Regulations 2006. This applied to services recognised as services which were unlikely to have any cross-border interest and listed in Schedule 1. Social care and health are examples of these services. There were very limited obligations to comply with the public procurement regime and in most instances, an open market advertisement was not required under the 2006 regulations nor was there a requirement to follow any particular procurement procedure.

Patch contracts

An output or outcome contract where the provider is responsible for providing a particular type of services or provision to a group of people in a particular area often with an agreed overall purchase

price for a service e.g. provide supported people services for all of the people living in certain accommodation. It is sometimes used even more widely as part of system procurement such as the Vanguard method. Preferably there ought to be a main and at least one reserve contractor to reduce the risk if there is market-place failure.

PIN notice

Prior information notice. This is a notice which allows authorities to publish on a selling website (by a profile) or OJEU notice in advance the advertisements for works, goods or services for the next 12 months and allows contracting authorities to advertise and take advantage thereafter of shorter time limits for the actual procurement.

Procurement

Acquisition via a purchase of a service/goods/supplies ranges from an individual purchase to a formal tendering process resulting in a public contract.

Procurement documents

These are all of the suite of documents which 'describe or determine' elements of the procurement or procedure they include the contract notice, technical specification, any descriptive document, contract conditions, terms on which the market should bid, evaluation and award documents setting out the procedure i.e. everything used to deliver this procurement (see Regulation 2, Interpretation, for details of what these are). Ideally, you need to describe existing services, what you procuring and people or TUPE issues, your budget information and anything else relevant to a provider who is considering bidding. If this is a two stage procurement, for example as described, an accreditation process followed by a process for choosing the provider against a list of approved providers the terms on which this process whether a mini-competition or otherwise is required to be included as this is part of the award procedure.

Provider

An "economic operator", contractor or other person who offers to provide a public contract or service. The term provider is used in this guidance as it is the industry standard expression.

Public contract

Any contract for "pecuniary interest" (i.e. money) in writing between a provider and a contracting authority for the supply of products or services.

SQ (known as SQulD in Wales)

Selection questionnaire. This is a European Single Procurement Document and replaces the pre-qualification questionnaire or PQQ (see the Crown Commercial Service's Procurement Policy Note: Standard Selection Questionnaire (SQ) Action Note 8/16 of 9th September 2016). It provides that the first stage evidence of compliance with standard requirements (such as not being excluded for mandatory exclusions and meeting the relevant evaluation criteria) is based on self-certification and evidence to be supplied as a pre-condition before award. The majority of the questions are not mandatory for non-'light touch' in accordance with regulation 59 and it is unclear how much of this is mandatory for 'light touch'. In any event, it is good practice to follow the standard approach in part, although early submission of evidence rather than at the award stage is recommended as safer practice in this particular market-place, although the Action Note states that it does apply in Wales.

The Welsh Government issued a Procurement Advice Not (PAN) in May 2018 which they say will be mandatory from October. It does not refer to 'light touch' procurement.

Selection and selection criteria

The formal criteria as set out in the regulations 58 (which does not apply to 'light touch' but is usually used as guidance) and regulations 74 - 77, for 'light touch', for a first stage consideration of a provider's suitability (not to be confused with the second or award stage).

Specification

This is a description of the services required by the authority. It can be an input, output or outcome document (see above).

Spot contract

A purchase of an individual unit of service e.g. one home care or residential care place with no commitment on either party either to buy or sell any more. There may be a spot within a framework or DPS or as a direct award. All volume risk is retained by the provider if a true spot approach is used.

Threshold

The trigger financial value for a procurement to be required in accordance with the requirements of the PCR. The thresholds are in Euros, translated into sterling for the United Kingdom. There are different thresholds for different types of procurements. The threshold for 'light touch' are higher than for other services. It is £615,278 for procurements started between 1st January 2018 and 31st December 2019.

Treaty

The current treaty relating to the UK's membership of the European Union. The principal Treaty is now known as the Treaty on the Functioning of European Union ('TFEU') and was renamed after the Treaty of Lisbon changes signed on 13th December 2007.