



The “Light Touch Regime” in public procurement: options, tips and tricks for designing a compliant LTR procurement process

In this article we look at the so-called “Light Touch Regime”, or “LTR”; the procurement rules applicable to the procurement of health, social and other services listed at Schedule 3 of the Public Contracts Regulations 2015.

The LTR has been a feature of the public procurement rules since 26 February 2015; however, from 18 April 2016, it also regulates the procurement by CCGs and NHS England of health services for the purposes of the NHS. We look at the practicalities of designing a compliant LTR process and offer some tips and tricks for procurement practitioners faced with running procurements under it for the first time. Some of the points we make are specifically relevant to those procuring health services for the NHS (we flag these); others apply to LTR procurement generally. For detail of the legislative background and the statutory regime underpinning the LTR, please see our other article [here](#).

How does one know whether the LTR applies to a procurement?

The first thing for procurers to check is that the services to be procured do indeed classify as LTR services. This means that procurers should first check Schedule 3 of the PCR and make sure that the LTR applies, allowing the flexibilities it affords. **NHS commissioners** will probably find that the health and health-related services which they procure for their patient populations will almost always come within the LTR – but they should still make absolutely sure by checking Schedule 3.

Is the LTR a flexible process?

Beside the mandatory aspects of an LTR procurement, procurers enjoy considerable discretion in a number of areas. These include:

- o The ability to talk about the procurement before the procurement – by engaging with the market and relevant stakeholders.
- o The ability to be creative with award criteria (but linking them to subject-matter of the contract). For example, the empowerment of service users, and taking into account their needs, are ostensibly encouraged in that the ability of procurers to do so is specifically referred to.
- o Awarding contracts in lots, and limiting the number of lots which a single supplier can bid for – or even win.

- o Potentially, the ability to go beyond the “traditional” lists of mandatory and discretionary exclusion criteria – and to introduce others (as long, of course, as they are relevant, reasonable and proportionate and do not breach equal treatment and transparency).

We look further at these in the following paragraphs.

Talking about the procurement before the procurement

The current procurement rules acknowledge the ability of procurers to take soundings from market participants and others prior to advertising the procurement. There is no reason why this should not be taken advantage of in the LTR context too. Procurers can seek advice from independent consultants and market participants, and can use this information to help plan the procurement provided they take appropriate measures to avoid distortions of competition, discrimination or lack of transparency. Some LTR procurements concern services provided directly to the individual; in those instances, there is no reason why soundings need not be taken from service users; this may help inform award criteria, specifications, and even the contract itself. Wider consultation obligations applying to NHS procurers may mean, in certain instances, that they are required to consult with service users, as opposed to merely having the freedom to do so.

Gearing up: advertising and transparency

Regulation 53 of the PCR requires procurers to provide unrestricted and full direct access, free of charge, by means of the internet to the “procurement documents” from the date of the publication in the OJEU of a notice sent for publication at EU level. This applies equally to LTR procurements and means that, inevitably, efforts to produce as much procurement documentation as possible will front-load their workstream. Interestingly, the Government has gone further than the Directive required in applying Regulation 53 to the LTR: the Directive itself did not provide for it to apply to this sort of procurement. That said, when this work is done, it is done; it ought also to help make the running of the procurement more transparent, and may speed it up.

Using “Contracts Finder”

Where a contract notice is sent to the OJEU for publication, Chapter 7 of the PCR requires a procurer to follow it within 24 hours (of becoming entitled to publish at national level) with an advertisement on “Contracts Finder”. This rule applies to LTR procurement as it does to fully-regulated procurement. Following the procurement, information about an awarded contract is required when (i) a Contract Award Notice is sent to OJEU or (ii) a call-off contract from a framework is awarded. These are aspects of the so-called “Lord Young” reforms, aimed at making procurement opportunities more accessible to small business.

Under Chapter 7, there is no absolute obligation to advertise sub-threshold contracts on Contracts Finder. However, procurers must do so if they choose to advertise the same contract opportunity in another medium. A contract-value threshold for this applies: it must be done where the value is at least £25k. This requirement also applies to NHS Trusts.

Importantly, the “Lord Young” regime (Chapter 7) does not apply to procurements by NHS commissioners falling within the 2013 NHS Regulations. However, those Regulations require any advertised contract within the NHS Regulations (no threshold applies) to be advertised on Contracts Finder too. All roads, therefore, lead to Rome.

It appears that a “Contracts Finder” advertisement is not required where an above-threshold LTR procurement is commenced by way of a Prior Information Notice (as opposed to a contract notice). But few would say that it would not be good practice to use Contracts Finder in these circumstances in any event.

Issues around pre-qualification

Chapter 8 of the PCR (again part of the “Lord Young” rules) contains certain requirements which prohibit the use of separate PQQs (and therefore a PQQ stage) in certain below-threshold procurements. This does not rule out the ability to assess suitability, however, by asking appropriate suitability questions.

Somewhat confusingly, an LTR contract will only be “below threshold” for this particular purpose if its value falls below the lower services threshold in the main rules (ie, £106,047 for central government and £164,176 for sub-central contracting authorities). This is despite the fact that the EU threshold for LTR contracts is (as we know) higher, at £589,148.

In above-threshold procurements, pre-qualification stages can be used, but procurers must have regard to Government guidance – and use the recommended standard PQQ questions. This guidance should be adhered to wherever an LTR procurement includes a pre-qualification stage.

Again, these requirements do not apply to procurements by NHS commissioners falling within the 2013 NHS Regulations. However, the 2013 NHS Regulations impose a general requirement to act in a transparent and proportionate way: what is proportionate will depend on the particular procurement but there may be instances where burdensome qualification gateways would be disproportionate to the outcomes sought.

Procedural flexibilities

As long as equal treatment and transparency are not compromised, the LTR allows free choice of any procurement procedure. Some will be more suitable than others, depending on the procurement. Many procurers using the LTR consider it safest (and simplest) to adopt one of the procedures ordained for fully regulated procurements – the open, restricted and competitive dialogue procedures (and their newer companions, the competitive procedure with negotiation or even the innovation partnership procedure). After all, the standard procedures are (for the most part) well understood by the market and are firmly part of the procurement “vernacular”. However, procurers using them in the LTR are not beholden to follow the detailed rules set out for each in the PCR: they may tailor and adapt them where necessary, as long as they adhere to the main rules governing the LTR described above.

Selection criteria

In the fully regulated regime, there are specified mandatory and discretionary grounds for rejection of a candidate (as an initial step). In the LTR, use of these grounds is not a legal requirement, but they can be used – they are also part of the procurement “vernacular” and there is probably little reason not to (the Crown Commercial Service recommends doing so). Indeed, in most cases it might be odd if they were not used. Additional grounds might also be suitable, if proportionate and relevant to the subject-matter of the procurement: for example, a requirement that a candidate be CQC-registered in a health or care services procurement. In any event, all exclusion grounds used should be clearly listed and articulated, from the outset, in the procurement documents to avoid room for doubt.

Award criteria

The LTR provides significant flexibilities around award criteria, and how they can be formulated.

As with any award criteria in public procurement, they should still be linked to the subject-matter of the contract. The flexibility resides in the fact that they can be framed with reference to “any relevant considerations”, including (non-exhaustively):

- The need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services.
- Service user need, including disadvantaged/vulnerable groups, and the involvement/empowerment of users (this is encouraged).

- o Innovation.

In addition, certain LTR contracts (referenced by CPV code) can be “reserved” for certain supplier/provider categories – for example, social enterprises or public service mutuals – subject to a maximum contract duration of three years.

Despite these considerable flexibilities around which award criteria are used, procurers should be aware of (and heed):

- o Any Government policy relevant to the procurement in question.
- o Any other law (notably, for commissioners, the 2013 NHS Regulations – which specifically require procurement from providers who are most capable of delivering the objective of those Regulations and who provide best value for money in doing so (this will basically preclude a “lowest price only” criterion from being applied in that type of procurement).

Procurers can (and should) also consider whether they might wish to take advantage of the flexibilities around financial award criteria, including the (non-exhaustive) examples given in the PCR, such as whole-life costing.

Lots of lots?

Procurers can choose to award in lots, or not, as appropriate.

The main rules encourage division into lots (to facilitate SME access) by requiring procurers to justify non-division into lots. This rule does not strictly apply to LTR procurements, but there is no reason why the same approach need not be adopted for LTR procurements. Procurers may do well to think about which structure (to lot or not to lot) is most appropriate in a given case: some contracts may lend themselves to be “packaged” as a series of lots by virtue of their subject-matter; a procurer may prefer to spread risk of supplier failure by dividing a requirement into multiple lots; or there may be a particular opportunity to facilitate SME involvement. A large SME market for a particular service may also help inform the decision, for example.

Standardised procurement models

In LTR procurements, it is perfectly possible for procurers to use:

- o Frameworks
- o Dynamic purchasing systems

Just as is the case for fully regulated procurement, where the subject-matter of the procurement makes these models suitable. These can again be used in a way analogous to the fully-regulated regime, or with adaptations – subject, as ever, to the procurer complying with equal treatment, transparency and proportionality requirements.

Using standstills

The law is not particularly clear on whether the standstill requirements apply to LTR procurements. However, the Crown Commercial Service recommends it, to avoid the risks associated with a procurement challenge. In most LTR procurements it will generally be prudent to observe a standstill period by applying the same rules as would apply if the procurement were fully regulated.

The LTR: some do's and don'ts

We set out below some of the essential things which procurers should do, and avoid doing, when running a procurement within the LTR.

DO:

- Retain the contract, and keep a Regulation 84 report showing that the procurement rules have been carefully considered – this needs to contain certain mandatory information, including information which will need to be produced to the Cabinet Office and/or the European Commission for monitoring purposes if demanded. It should document all decisions taken in the course of a procurement, including, we suggest, decisions preceding a procurement. These might include:
 - How the estimated value of the contract has been established.
 - How the LTR has been identified as being the correct process to use.
 - In the case of a procurement containing mixed elements, how it has come to be classified as a contract which can be procured using the LTR.
- Talk about the procurement before the procurement. As we have seen, this needs to be done in a fair way, but its potential benefit may be considerable.
- Treat supplier/providers, and would-be suppliers/providers, equally and in a non-discriminatory way; and act transparently – before, during and after the procurement.
- Have all of the procurement documents ready in advance of advertising, as far as at all possible.
- Start the Regulation 84 report prior to doing anything else.
- Allow enough time for the process end-to-end.
- Take the procurement seriously, and allocate proper people-resource throughout.
- Be really clear about award criteria, so that everyone will interpret them in the same way. Formulate them before the procurement starts, and set them out in the procurement documents at the outset. This goes not just for the criteria themselves but also for their relative weightings and scoring methodologies. Include worked evaluation examples, where these would be useful.
- Observe a minimum ten-day standstill, and do so as though the procurement were a fully regulated one (the CCS recommends this in any event, given the unclear legal position). This helps ensure equal treatment and keeps the process transparent (which are LTR obligations anyway).
- Include clear, sensible, intelligible feedback to allow an unsuccessful supplier/provider to know why it is unsuccessful (respecting confidentiality, of course).
- Give full reasons to any supplier/provider eliminated at any stage.
- Make clear provision, from the outset, for any expected need to make any modification to a contract once in force. Where necessary, build in clear, precise and unequivocal review clauses.

- Be especially careful when considering relying on any potential exemption from the need to run a competitive process to which the LTR applies.

DON'T:

- Over-enthusiastically exclude candidates from taking part in a procurement – for example, on the basis of a conflict of interests.
- Depart from the scope of what was advertised: stick to it.
- Change the selection criteria or award criteria mid-process.
- Change the stated award procedure.
- Change the time limits stated (unless the ability to do so was clearly provided for).
- Modify contract terms (either during the procurement or post-award) unless there are clear, precise and unequivocal provisions allowing it, and without taking legal advice first.
- Split a contract artificially to avoid the contract value exceeding the LTR threshold (and don't confuse this with the ability to divide into lots – the two concepts are distinct).

Finally, remember that the system of remedies set out in the PCR applies equally to procurements governed by the LTR. Get it wrong, and aggrieved suppliers may have recourse to a number of possible forms of redress which can be accessed through the courts – including:

- The automatic suspension of a procurement procedure where a claim form is issued following the notification of the contract award decision.
- Orders to suspend a process, set aside decisions or to amend any document.
- Damages.
- In more limited situations, the potential for contract ineffectiveness, contract-shortening orders, and fines.



Christopher Brennan
Consultant
for Mills & Reeve LLP
+44(0)121 456 8341
Christopher.Brennan@mills-reeve.com

www.mills-reeve.com T +44(0)344 880 2666

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