



**A Brief How
to Guide for
procuring Social
Care services**

CCPS
COALITION OF CARE
AND SUPPORT PROVIDERS
IN SCOTLAND

A BRIEF HOW TO GUIDE FOR PROCURING SOCIAL CARE SERVICES

This Brief How to Guide (Guide) is aimed at those who procure social care services on a regular basis. It provides guidance on the **current flexibility available under procurement laws** when procuring social care services including those which help with day to day living due, for example, to illness, physical disability, learning disability, mental health, older age, fragility or dementia. Social care also includes all forms of personal and practical support for children, young people and adults who need extra support as well as other types of help such as care homes and supporting unpaid carers to help them continue in their caring role.

Procurement is the process by which ‘services’ are purchased by a contracting authority. **Commissioning** is generally thought of as being broader than procurement, seeking to bring together intelligence about what is needed as well as the resource required to deliver. Commissioning therefore encompasses all purchase and expenditure activity.

Commissioning can be undertaken by way of a **grant**. The procurement rules do not apply to grants¹. Care needs to be taken to ensure the grant is *bona fide* as opposed to being a procured service:

- under a ‘grant funded activity’, the contracting authority provides funding to an organisation to support activities which the organisation itself is running, whereas,
- under a ‘procured service’, an organisation provides a specified service to a contracting authority.

While grants do not raise procurement points, approaches to their use do need to be considered against Best Value/VfM and in terms of budgetary constraints and subsidy control where they concern social care provision within economic markets.

In addition to what is set out in this Guide, there are other areas of the law which impact on social care procurement, for example, data protection, information sharing and TUPE.

This Guide is limited to considering the **flexibility offered by procurement laws** to social care procurement.

The **key components of the legal framework** relevant to the procurement of social care are contained in Annex B.

¹ Recital (4) of EU Directive 2014/24/EU incorporated into Scots law by the Public Contracts (Scotland) Regulations 2015 as amended by the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020

SHAPING GOOD PROCUREMENT STRATEGIES

The best social care procurements are those where providers and service users have had extensive input in their design and where the resultant structure enables service users, public bodies and providers to work closely together on a collaborative basis in the delivery of the services so that services improve over time. Collaboration promotes a “how can we do this better” discussion during service provision by contrast to a more, some say “traditional” some say “hierarchical” relationship of simply “do the service – get paid”.

From a provider’s perspective, a good process is also one which is not administratively burdensome and one in which the act of competition or form of contract will not place their eventual delivery in a precarious or uncertain financial position.

From a contracting authority’s perspective, a good process also has reduced administration costs and a longevity which removes the need to continue to carry out detailed tender evaluation processes on a regular and repeat basis. This also reduces the risk of tender challenge.

However, to get a good resultant system the contracting authority needs to get the contract documentation into the right shape. This requires resource that is not always there. It involves coordinating inputs from, just within the contracting authority: social work teams on content, finance teams on budget and spend considerations and legal teams to ensure the essentials and risks are covered off. This investment creates a consistent approach to contract award as well as making the process more efficient.

From a service user’s perspective, a good process is one which includes ease of engagement, respect for continuity of service, promotes choice of provider and meets the needs of the service user.

Bad practice is fear of procurement risk and/or subsidy control risk which results in social care services being purchased the same way as standard services, which they are not, and of inappropriate contracts or processes being used that don’t meet other legislative requirements or the needs of service users.

Before we consider the flexibility which procurement laws offer when purchasing social care services, in the first place, it is worth considering related procurement obligations as well as available tools which can help to shape procurement strategies and achieve a good process for contracting authorities, providers and service users.

Transparency in 'Procurement Strategies'

Each contracting authority with \geq £5m procurement spend needs to set out a publicly available procurement strategy.

Helpful because: contracting authorities **need to think about their practices and how well these are working**. Publication is a tool which enables other contracting authorities to **benchmark** what they are doing and enables organisations involved in the provision of services to understand and engage with contracting authorities on what they are seeking to achieve².

Pre-market-engagement with provider organisations and service users

Since 2016, procurement rules have made express reference to the ability of contracting authorities to **engage in pre-procurement discussions with provider organisations (provided base fairness and equal treatment rules are observed)**.

Helpful because: this pre-engagement means those involved in delivering services and users of those services can be involved in the commissioning design process which can be used to shape more appropriate procurement strategies and processes³.

We are now seeing contracting authorities advertising meet the buyer events and provider fairs to give care managers, service users and their families the opportunity to meet. Focus groups can also be used to improve upon the services being delivered.

Sustainable Procurement

Each contracting authority needs to consider how it can: **improve the economic, social and environmental wellbeing of the area; involve small businesses, third sector bodies and supported business and promote innovation in connection with service contracts valued at over £50,000.**

Helpful because: contracting authorities need to at least 'consider' the above aspects, including social wellbeing and scope for innovation to improve their approach. Considering the community and end-users ought to shape more appropriate procurement processes⁴.

² Section 15 of the Procurement Reform (Scotland) Act 2014

³ Regulation 42 of The Public Contracts (Scotland) Regulations 2015

⁴ Section 9 of the Procurement Reform (Scotland) Act 2014

FLEXIBILITY OFFERED BY PROCUREMENT LAWS WHEN PROCURING SOCIAL CARE SERVICES

Flexibility when awarding Contracts above the Light Touch Regime threshold⁵

Light Touch Regime⁶

So, what's the same and what's different under the Light Touch Regime. The diagram on the following page sets out the flexibilities offered at a glance.

The mandatory requirements under a Light Touch Regime process are that it is still commenced either by publishing a CN or a PIN. Transparency and equal treatment still apply at all times. The procurement must still be conducted in a fair manner and in line with published documents. Awards must still be made based on the best price quality ratio. Within 30 days of the award of a contract or framework you must still submit a contract award notice for publication in Find a Tender. This is done through PCS. Other than these basic requirements there is complete freedom to shape the procurement.

The flexibility offered by the Light Touch Regime includes **flexibility in the procedure, timescales, selection and award and the duration.**

Flexibility in Procedure: Many public bodies are still using the main procedures set out in the 2015 Regulations. However, under the Light Touch Regime, provided the basic mandatory requirements are met, a flexible procedure can be used.

Flexibility in timescales: Again, time limits set out in the main procedures under the 2015 Regulations don't need to be used. The only requirement is that time limits must be reasonable and proportionate having regard to the nature of the requirement and the needs of service users.

Flexibility in Selection process: Legally it is possible to base selection solely on the application of mandatory exclusion grounds, that's how much flexibility is offered by the Light Touch Regime. However, it is good practice to carry out additional baseline checks drawn from accreditation/certification, insurance, financials, policies, capacity, general approach to delivery, minimum quality standards, base price, specialisms, acceptance of standard terms and health checks on health and safety and data protection. Under the Light Touch Regime there is scope to create a lighter touch SPD which covers desired baseline checks proportionate to the procurement.

Flexibility in evaluation criteria: The Light Touch Regime reflects 'value' drivers relevant to social care as can be seen from the non-exhaustive list of matters set out in the Light Touch Regime which can be taken into account -

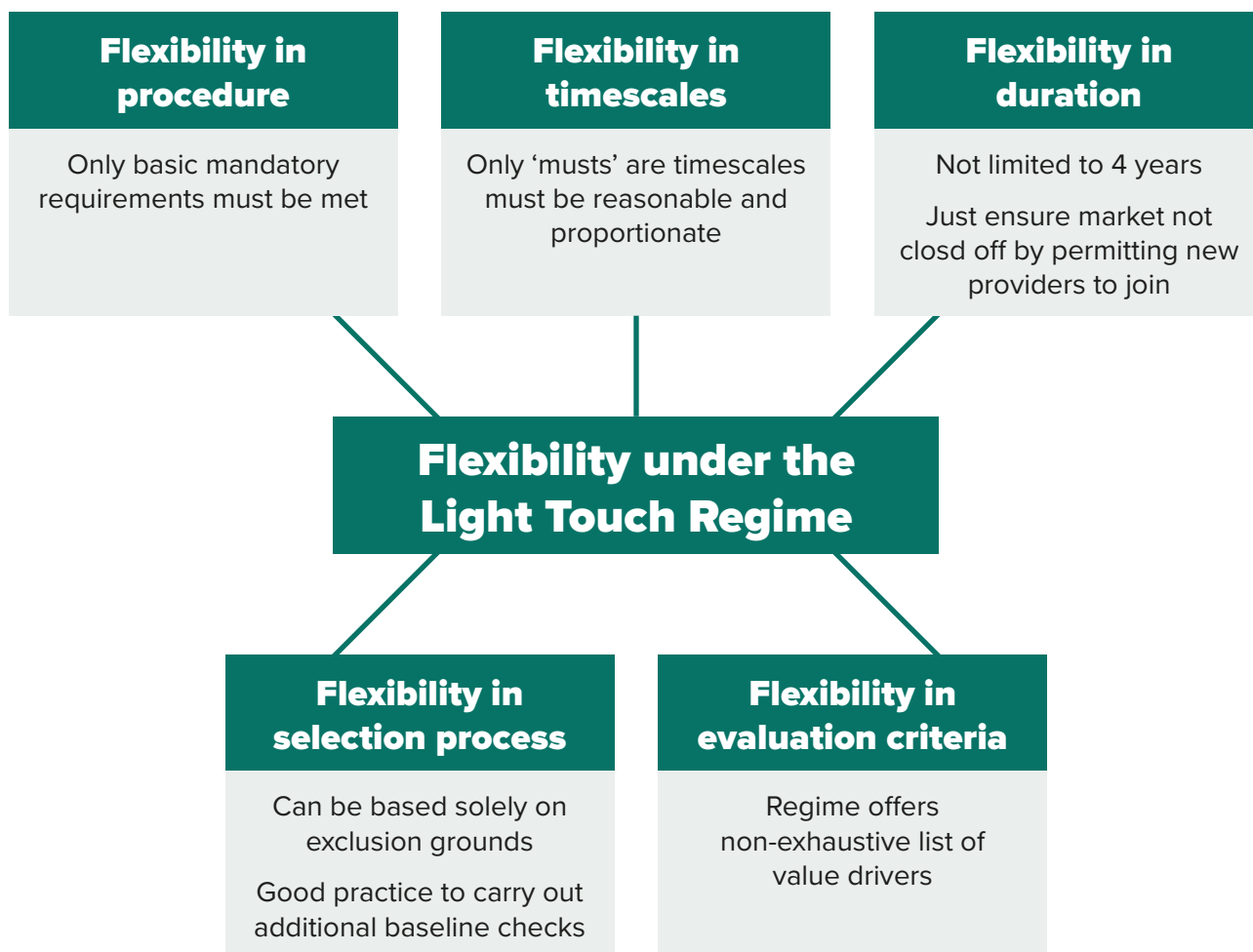
- the quality, continuity, affordability and accessibility of the service;
- the availability and comprehensiveness of the service;
- the needs of people who use the service and their carers;
- the involvement of people who use the service and their carers;
- innovation.

Flexibility in duration: There is no requirement under the Light Touch Regime to limit the period of any framework to a maximum period of 4 years as is the case for procedures which fall under the main procurement regime. A contracting authority may decide to award contracts of a longer duration, where necessary, to ensure continuity of service for people who use the services. The most important factors are to ensure that the duration of the framework does not distort or close the market for providers. Provided it is possible to add providers during the lifetime of the framework and to provide for a regulator refresh of base information, it is possible to have frameworks of longer duration.

⁵ £663,540 for the period 1/1/20 to 31/12/23

⁶ Regulations 74 to 76 and Schedule 3 of The Public Contracts (Scotland) Regulations 2015

Flexibility offered by the Light Touch Regime



Regulation 33 Public Contracts (Scotland) Regulations 2015

Above the Light Touch Regime threshold, it is still possible to make a direct award of a contract in limited circumstances. Regulation 33 of the Public Contracts (Scotland) Regulations 2015 permits a direct award where, for example, a service is required on an **extreme urgency** basis outwith the control of the contracting authority or where **only one provider has the accommodation requirement or skills required to provide the services and so, only one provider can deliver the service for technical reasons**.

For all other contracts above the Light Touch Regime threshold the purchase must be made either from an existing framework, such as a SXL framework, or using or following a tender exercise conducted under the LTR.

Flexibility when awarding Contracts below the Light Touch Regime threshold⁷

At this value procurement laws do not require any form of competition. The only legal requirements are that checks are undertaken to ensure that mandatory exclusion grounds do not apply which would prohibit the contract being awarded to the provider and a contract award notice should be published. **Other than these basic requirements, there is complete freedom to shape the procurement.**

Service requirements can be purchased directly from the provider. This includes self-directed support Option 2 purchases which use the individual budgets of service users and spot purchases.

The benefits of making direct awards include service user choice, particularly for self-directed support Option 2 purchases, there are next to no set up costs and the process is simpler for service users and providers to understand.

Certain documents will need to be prepared to make a direct award. This includes the outcome-based specification, terms and conditions of contract and payment terms as well as any necessary internal approvals which may be required under contract standing orders. Good practice would dictate additional checks are carried out, for example, on historical performance and experience, registration and accreditation, insurance and health and safety and that standard terms, as opposed to ad hoc, terms are used.

There are benefits to making direct awards as detailed above. However, whilst the Light Touch Regime does not apply to purchases at this level of spend, we consider there are benefits to taking this a step further by making direct awards at this level of spend from frameworks which have been set up under the flexibility offered by the Light Touch Regime. Under such frameworks appropriate checks have been carried out and price forms part of the process which may assist in part in satisfying Best Value/VfM requirements. Using such frameworks for direct awards in this way can prevent duplication of checks and create efficiencies.

Direct purchases can also be made from SXL frameworks already constituted under procurement laws provided the framework permits direct call-offs as opposed to there being a need to carry out mini competitions.

Below £50,000, procurement laws do not apply at all and so, direct awards can be made, subject to the terms of contracting authority contract standing orders and financial regulations, particularly those relating to Best Value/VfM requirements.

Example: Please refer to **Annex A** which sets out an example of How to establish a Light Touch Regime Framework for a Care at Home Service and a follow on diagram which provides a comparison of routes to commission and procure social care services and the benefits of the Light Touch Regime and Direct Award processes.

⁷ £663,540 for the period 1/1/20 to 31/12/23

Example establishing a Light Touch Regime Framework for a Care at Home Service

Provided it is clearly set out in the CN or PIN, it is possible to establish one Light Touch Regime Framework for a social care service or services which includes various kinds of **bespoke call-off mechanisms** such as:

1. Service user choice led call-off;
2. Call-off by service user and the contracting authority to provider best placed to meet the needs of the service user;
3. Whatever the contracting authority determines is the appropriate skill set for the service user;
4. Mini competition by the contracting authority.

Selection – Whilst legally selection can be limited to the application of mandatory exclusion grounds, in terms of best practice, additional baseline checks can be drawn from accreditation and minimum grades/registration/certification, insurance, financial checks, meeting minimum quality standards, specialisms, acceptance of standard terms, health checks on health and safety and data protection. Baseline requirements can be contained in a lighter touch SPD and different lots can have different baseline requirements.

Basic Evaluation – a baseline quality/price evaluation can be carried out on, for example, on basic approach to delivery, ability to meet service user's outcome-based needs and base price with, for example, a 80/90% quality ratio and 10/20% price ratio. Maximum rates could be provided. This assists Best Value/VfM requirements.

Lots can still be used, for example, to split provision according to specialism or geographical area. This also promotes SME access.

Any provider with a compliant bid which passes the baseline selection checks/ scores a minimum and passes the baseline evaluation will win a place on the Framework. This **“Minimum Process” Framework** creates a **pool or list of pre-qualified providers** to choose from.

The CN or PIN can also confirm that providers meeting these base requirements can be added to the framework thus **avoiding closed frameworks and maximising service user choice**.

Helpful because – Submission requirements to get on the Framework are substantially reduced and there is a pool of pre-qualified providers to choose from.

Further evaluation – The documents set out a more detailed evaluation for cases where the contracting authority wishes to carry out a mini competition. The evaluation criteria and weightings do not require to be the same as those used in the basic evaluation and can include additional criteria such as community benefits, numbers of staff and levels of experience, fair work practices, price competition, monitoring, reporting, innovation, policies and capacity provided this is detailed in the CN/PIN.

Purchase of a £29,000 care package

For levels of spend below £663,540, subject to any necessary internal approval requirements, direct call-offs can be made from the framework. Mandatory and desirable baseline checks have already been carried out and the provider has already agreed to terms. Proforma service purchase forms can be populated setting out the required service outputs and price calculation. This process is proportionate to the level of spend.

Helpful because - There is a simple and standard approach here that ensures proportionate baseline requirements are covered off but **provides flexibility and service user choice** with standard templates, including a simple set of terms, being available to make the direct call-off process simple and consistent.

If this route is used for self-directed support Option 2 and there is any ambiguity that the purchase is being made by the contracting authority rather than the service user, there has been a baseline evaluation of price and quality and so is compliant with the Light Touch Regime requirements and further, the contracting authority should not fall foul of the accumulation rules.

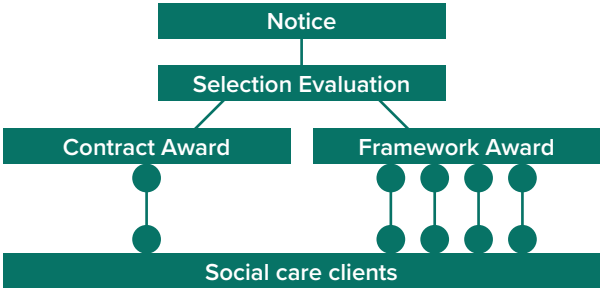
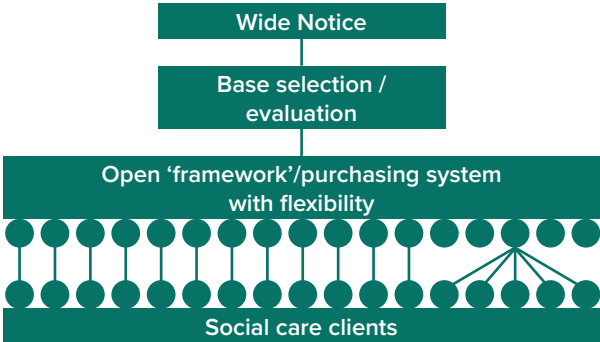

Purchase of a £750,000 care package

Based on the baseline framework which has been established and subject to any necessary internal approval requirements, at this level of spend a contracting authority may wish to effect option 4 and go into further depth on the quality of the service provision and price evaluation through a mini competition.

Under the Light Touch Regime there is no requirement to follow the same price quality elements and ratio as that used in the setup of the framework. Award criteria should still be relevant and proportionate to the requirement and may, for example, include methodology for service delivery and meeting outputs, staffing structures and levels of experience, community benefits, fair work practices, capacity, policies, innovation and service improvement and further price competition. This is possible provided the process for evaluating a mini competition is detailed in the CN/PIN.

More detailed terms can be used for mini competitions to ensure the contracting authority has covered off its legal obligations and there is appropriate monitoring, reporting and evaluation of the service.

Helpful because – Baseline checks and selection have already been completed on a pool of providers and so, the contracting authority need only carry out the call-off.

| Approach | Comment relevant to achieving good practice for social care | | | | |
|--|---|--|--|--|------------------------------------|
| <i>Standard Procurement</i> | | | | | |
|  | <ul style="list-style-type: none"> • Often a burdensome process for provider participants • Price usually a significant factor • Limited flexibility (contract and processes) to adapt to care user needs • ‘Closed’ result limiting choice • Winner takes all / race to the bottom • Generally results in clear but ineffective system | | | | |
| <i>Light Touch Regime</i> | | | | | |
|  | <ul style="list-style-type: none"> • Proportionate processes for provider participants • Focus on quality / user needs • Quality can be determining factor • Open system maximising choice • Ability to further ‘open’ through refresh • Can result in wide flexibility in contracting within • Generally results in clear and flexible system • System not winner takes all / race to the bottom | | | | |
| <i>Direct Award</i> | | | | | |
|  | <ul style="list-style-type: none"> • Limited to £663k upper value • System still needed for best value / quality benchmarking • Can focus on quality • Can result in a clear system if the local authority sets it out, otherwise can be unclear; not available for contracts above £663k • Can accommodate user needs / choice • Can be used as a useful addition to other options or as a system for widened social care contracting (subject to contract limits) | | | | |
| <p>Comment: This how-to guide notes that successful social care procurement involves:</p> <table border="1" data-bbox="172 1787 1414 1971"> <tr> <td data-bbox="172 1787 475 1971">Focus on quality</td> <td data-bbox="481 1787 785 1971">Systems that meet local authority needs relevant to budgets and duties</td> <td data-bbox="791 1787 1094 1971">Systems that meet provider needs of proportionate, non-overly burdensome processes in which quality can be maximised</td> <td data-bbox="1101 1787 1414 1971">Local Authority system leading to:</td> </tr> </table> <p>The above should demonstrate that each of the existing LTR and direct award abilities can be used to create clear yet flexible systems meeting these needs.</p> | | Focus on quality | Systems that meet local authority needs relevant to budgets and duties | Systems that meet provider needs of proportionate, non-overly burdensome processes in which quality can be maximised | Local Authority system leading to: |
| Focus on quality | Systems that meet local authority needs relevant to budgets and duties | Systems that meet provider needs of proportionate, non-overly burdensome processes in which quality can be maximised | Local Authority system leading to: | | |

ANNEX B: THE LEGAL FRAMEWORK

The key components of the legal framework relevant to the procurement of social care are set out below:

| Procurement law framework | Social care procurement/commissioning |
|---|---|
| <p>Public Contracts (Scotland) Regulations 2015 Role: sets out a set of light touch rules for procuring services valued at over £663,540*.</p> | <p>Social Work (Scotland) Act 1968 Role: key underlying legislation relevant to social care.</p> |
| <p>Procurement Reform (Scotland) Act 2014 Role: sets out rules for procuring services valued at between £50,000 and £663,540*.</p> | <p>Social Work (Scotland) Act 1968 Role: key underlying legislation relevant to social care.</p> |
| <p>Procurement (Scotland) Regulations 2016 Role: set out rules for procuring services valued at between £50,000 and £663,540*.</p> | <p>Regulation of Care (Scotland) Act 2001 Role: to improve the standards of social care services.</p> |
| <p>Procurement Reform (Scotland) Act 2014 Role: sets out rules for procuring services valued at between £50,000 and £663,540*.</p> | <p>Community Care and Health (Scotland) Act 2002 Role: introduces free personal care for older people and rights for unpaid carers.</p> |
| | <p>Mental Health (Care and Treatment) (Scotland) Act 2003 Role: to develop community -based mental health services and involve service users in decisions.</p> |
| | <p>Adult Support and Protection (Scotland) Act 2007 Role: gives greater protection to adults at risk of harm or neglect.</p> |
| | <p>Social Care (Self Directed Support) (Scotland) Act 2013 Role: key legislation relevant to self-directed Support.</p> |
| | <p>Community Justice (Scotland) Act 2016 Role: to improve community justice outcomes.</p> |
| | <p>Carers (Scotland) Act 2016 Role: to improve support for all carers.</p> |
| | <p>Local Government in (Scotland) Act 2003 Role: key legislation relevant to local authorities achieving best value in all that they do.</p> |



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