



POLICY AND RESOURCES SCRUTINY COMMITTEE – 8TH NOVEMBER 2022

SUBJECT: UPDATE ON THE PROCUREMENT REFORM AGENDA AND TO EXTEND THE COUNCIL'S PROGRAMME FOR PROCUREMENT (STRATEGY) FOR A PERIOD OF UP TO EIGHTEEN (18) MONTHS

REPORT BY: CORPORATE DIRECTOR FOR EDUCATION AND CORPORATE SERVICES

1. PURPOSE OF REPORT

- 1.1 To provide Scrutiny Members with an update on the UK Central Government and Welsh Government Procurement reform agenda via The Procurement Bill and the Social Partnership and Public Procurement (Wales) Bill.
- 1.2 To inform Scrutiny Members on the recommendation to extend the Council's Programme for Procurement ('Strategy'), **Appendix A** for a period of up to eighteen (18) months prior to presenting to Cabinet on 30 November 2022. This will allow the future Strategy to incorporate the requirements of The Procurement Bill and Social Partnership and Public Procurement (Wales) Bill.

2. SUMMARY

UK PROCUREMENT BILL

- 2.1 On 11 May 2022, The Procurement Bill ('the Bill') was introduced in the House of Lords. The Bill is the next step in the Government's plan to reform procurement policy in the UK following Brexit. The Bill aims to establish a single legal framework for the award of public contracts, utilities contracts, concession contracts, and defence and security contracts by contracting authorities such as the Council. Many of the features of the new rules will be substantially the same as the current rules, but a number of significant changes are proposed.
- 2.2 It is anticipated there will be broader transparency obligations under the new rules, which should mean that it will be easier to find out information about planned and completed procurements. There will be enhanced powers to exclude suppliers from procurements with key changes including: the introduction of a central list of debarred suppliers and broader rights to exclude suppliers for prior poor performance (including failure to meet KPIs) and fewer, more flexible award procedures.
- 2.3 The Bill still needs to pass through the Houses of Parliament and the Government has indicated that there will be a period of at least six months between the Bill becoming law and the new rules entering into force, which is likely to be during 2024 at the earliest. Since the introduction in the House of Lords in excess of 540

amendments to the Bill have been tabled.

SOCIAL PARTNERSHIP AND PUBLIC PROCUREMENT (WALES) BILL

- 2.4 On 7 June 2022 the Social Partnership and Public Procurement (Wales) Bill ('SPPP Bill') was introduced before the Senedd Cymru. The aim of the SPPP Bill is to establish a statutory Social Partnership Council, creates new social partnership duties on specified public bodies in Wales such as the Council, promotes fair work and creates a duty for socially responsible public procurement. Also, to improve the economic, environmental, social, and cultural well-being of Wales (including by improving public services) by embedding the principle of social partnership in the operation of public bodies in Wales.
- 2.5 A socially responsible procurement duty will apply to certain public bodies such as the Council, who will be required to seek to improve economic, environmental, social, and cultural well-being when carrying out procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy. Public bodies will also be expected to carry out contract management duties to ensure that socially responsible outcomes are pursued through supply chains.
- 2.6 The socially responsible public procurement duties cover the full procurement cycle i.e. planning, procurement, contract management, review and compliance. Public bodies and Welsh Government will have reporting duties in relation to the social partnership duties and procurement duty. It is anticipated that the SPPP Bill will follow similar timings of The Procurement Bill becoming law and the new rules entering into force, which is likely to be during 2024 at the earliest.

PROGRAMME FOR PROCUREMENT ('STRATEGY') 2018-2023

- 2.7 The Council's Programme for Procurement ('Strategy') 2018-2023 was endorsed and implemented following a Cabinet meeting on 16 May 2018. The Council has been committed to ensuring that we achieve value for money from our third-party procurement expenditure. Having recognised the value of using procurement to support our wider cultural, social, economic and environmental objectives in a way that offers real long-term benefits to the Community we serve and the people of Wales whilst balancing the issues of Value for Money.
- 2.8 A living Strategy, which has evolved since 2018 in order to adapt to our ever-changing environment and the developing procurement landscape as a result of Brexit, procurement reform, best practice and Welsh Government's continuous reviews of procurement. Importantly the Strategy is fit for purpose in the current climate and continues to be relevant across a number of cultural, social, economic and environmental objectives.

3. RECOMMENDATIONS

- 3.1 That Scrutiny Members notes the current status of The Procurement Bill and the Social Partnership and Public Procurement (Wales) Bill.
- 3.2 That Scrutiny Members supports the recommendation to Cabinet to extend the Council's existing Procurement Strategy for a period of up to eighteen (18) months.

4. REASONS FOR THE RECOMMENDATIONS

- 4.1 To inform Scrutiny Members of the significant changes to the procurement rules over the next twelve (12) to eighteen months (18), which will impact the Council's

approach to its third party spend across all Directorates.

- 4.2 To ensure the Council has a current and fit for purpose Strategy post May 2023 that will continue to support the Council's Wellbeing Objectives and Corporate plan.
- 4.3 To ensure the Council fully considers the requirements of The Procurement Bill and Social Partnership and Public Procurement (Wales) Bill in the next iteration of the Procurement Strategy.

5. THE REPORT

UK PROCUREMENT BILL

- 5.1 In December 2020 the UK Government set out proposals for shaping the future of public procurement with the publication of "Green Paper: Transforming Public Procurement", following Brexit. The UK Government believed the current procurement rules, which were derived from a patchwork of EU Directives were too restrictive and complex and this was an opportunity to overhaul the rules.
- 5.2 The UK Government is therefore aiming to create a regulatory framework which simplifies procurement processes, places value for money at the heart, and generates social value.

The reforms have also been shaped by:

 - the UK's obligations as a member of the World Trade Organisation's Agreement on Government Procurement;
 - the UK's commitments under bilateral trade agreements, including the EU/UK Trade and Cooperation Agreement; and
 - feedback from over 500 stakeholders (Including Welsh representatives).
- 5.3 The Bill aims to establish a single legal framework for the award of public contracts, utilities contracts, concession contracts, and defence and security contracts by contracting authorities such as the Council. Many of the features of the new rules will be substantially the same as the current rules, but a number of significant changes are proposed.
- 5.4 EU public procurement rules are based upon general principles derived from the Treaty on the Functioning of the European Union: transparency, equal treatment, non-discrimination and proportionality. The UK Government has chosen to maintain the principles of transparency, equal treatment and non-discrimination in the new rules. However, contracting authorities will also be required to have regard to a number of ambitious objectives when awarding public contracts, including value for money, maximising public benefit and integrity.
- 5.5 To enable procuring authorities to take these new objectives into account during procurements, the Bill introduces subtle changes to terminology and existing concepts. For example, the Bill requires contracts to be awarded to the Most Advantageous Tender, rather than the Most Economically Advantageous Tender. In addition, the Bill provides Ministers (Welsh Government) with the ability to publish a statement setting out the Government's strategic priorities in relation to procurement, to which contracting authorities must have regard.
- 5.6 It is anticipated there will be broader transparency obligations under the new rules, which should mean that it will be easier to find out information about planned and completed procurements. There will be enhanced powers to exclude suppliers from

procurements with key changes including: the introduction of a central list of debarred suppliers and broader rights to exclude suppliers for prior poor performance (including failure to meet KPIs).

- 5.7 There will be fewer, more flexible award procedures. The current regime provides procuring authorities with a choice of five procedures to carry out competitive procurement exercises. This can cause confusion as different rules apply under each of those procedures with respect to matters such as minimum time limits, the structuring of the award phase, and the extent to which discussions and negotiations with bidders are permitted.

The Bill provides for two types of competitive tendering procedure:

- a single stage tendering procedure without a restriction on who can submit tenders; or
- such other competitive flexible procedure as the contracting authority considers appropriate, which may involve limiting the number of participants across multiple stages.

- 5.8 This means that contracting authorities will have considerable leeway to design procurements in a way that suits their needs, subject to ensuring consistency with the procurement principles and objectives. There will continue to be a special regime for certain social, health and education services, specifically identified by secondary legislation, which may be procured as 'Light Touch Contracts', leaving room for authorities to design procurement procedures that are more appropriate for these types of services. These Light Touch Contracts are still subject to the necessary safeguarding requirements.

- 5.9 Procurement is a dissolved function and Welsh Ministers did have the ability to dis-apply the Bill. Representatives of Welsh Government and stakeholders across Wales have been extensively consulted on the Bill and Welsh policy drivers and initiatives have helped shape the Bill. Subsequently, in August 2021 Welsh Government's Finance Minister issued a written statement confirming that Welsh contracting authorities such as the Council will be covered by the Bill. However, there can be subtle differences with how the Bill is applied in Wales due to legislation and policy drivers such as the Social Partnership and Public Procurement (Wales) Bill and Wales Procurement Policy Statement amongst others.

- 5.10 Further consultation with stakeholders is expected as the UK and Welsh Government develops secondary legislation and guidance to provide the additional detail on how the new rules will operate in practice. The Council as per other contracting authorities will need to consider the Bill carefully, as well as the secondary legislation and guidance when published. The UK Government has confirmed that there will be a period of at least six (6) months following the Bill becoming law and the new rules coming into force.

SOCIAL PARTNERSHIP AND PUBLIC PROCUREMENT (WALES) BILL

- 5.11 The Social Partnership and Public Procurement (Wales) Bill ('SPPP Bill') was introduced to by the Welsh Government before the Senedd, Cymru on 7 June 2022. It is intended to complement other legislation, specifically the Well-being of Future Generations (Wales) Act 2015 (WBFGA 2015) and provides a framework for enhancing the well-being of the Welsh people by improving public services through public partnership, promoting fair work and socially responsible public procurement.

- 5.12 The SPPP Bill establishes a statutory Social Partnership Council (SPC), creating new social partnership duties. The SPC will be made up of members from the Welsh Government, nine (9) representatives of employers and nine (9) representatives of workers in Wales, nominated by the Wales TUC. The SPC's core function will be to provide information and advice to Welsh Ministers on a range of matters included in the SPPP Bill. There is also a requirement to establish a public procurement subgroup that will aid the SPC in providing additional expertise and support about the functions placed on contracting authorities and Welsh Government under the Socially Responsible Procurement duties.
- 5.13 The SPPP Bill further establishes a statutory Social Partnership Duty that will apply to specific public bodies such as the Council, to improve the economic, environmental, social and cultural well-being when carrying out procurement, with both workers and employers involved. It will require public bodies to seek consensus or compromise with their recognised trade unions or other representatives of its staff (where there is no recognised trade union) when setting well-being objectives and making decisions of a strategic nature under the WBGFA 2015. The intention is to promote co-operation, strengthen policy and improve outcomes, through dialogue between social partners.
- 5.14 There are two (2) specific contract management duties set out, to strengthen the link between procurement exercises requirements and due diligence in major construction supply chains and outsourcing contracts. This is in consideration of including social public works clauses and social public workforce clauses, within those specified contracts. The first duty is to strengthen the Workforce (two-tier) Code of Practice. It states that contracting and retendering processes involving staff transferring from public bodies should be carried out to ensure terms and conditions of staff are protected and pensions remain generally similar. It also states new joiners to a transferred-out workforce are employed on terms that are no less favourable.
- 5.15 Welsh Government are under a duty to publish model clauses and are currently running a number of workshops on developing associated clauses. If any relevant bodies decide they do not want to include the socially responsible clauses in outsourcing contracts, the SPPP Bill places a duty on those relevant bodies to notify Welsh Government of that decision well in advance of when the contract is advertised. The exception notices will be reviewed by Welsh Government representatives to assess whether it is reasonable not include the clauses and the SPC may also be consulted to provide external expertise.
- 5.16 The other contract management duty addresses the need for greater due diligence in applying socially responsible contract terms throughout supply chains specifically in the construction sector where there is a risk of poor compliance with social obligations. These include unfair and unlawful employment practices that can be hard to address when dealing with long and complex supply chains. The duty is similar to that referred to in paragraph 5.15 above, in that a relevant body must notify the Welsh Ministers, in advance, if they do not intend to include socially responsible clauses in major contracts.
- 5.17 Major contracts are defined as construction contracts or call-offs from frameworks with an estimated value of £2 million or more (including VAT). Where socially responsible procurement clauses are included in major contracts, these contract clauses must be extended through the supply chain and a process established to ensure it happens. This will give greater assurance to agreed standards, including for workers and the environment. It also gives bidders more confidence that they and their competitors will be held to contractual obligations.

- 5.18 The focus is currently on the construction industry and on larger contracts in order to test the application of this duty and to make the best use of resources, but Welsh Government may extend this duty to other sectors and commodity areas in the future. Further consultation with stakeholders is expected as Welsh Government develops secondary legislation and guidance to provide the additional detail on how the new rules will operate in practice. The Council as per other contracting authorities will need to consider the Bill carefully, as well as the secondary legislation and guidance when published.

PROGRAMME FOR PROCUREMENT ('STRATEGY') 2018-2023

- 5.19 The Council's Programme for Procurement ('Strategy') 2018-2023 was endorsed and implemented following a Cabinet meeting on 16 May 2018. A living Strategy, which has evolved since 2018 in order to adapt to our ever-changing environment and the developing procurement landscape as a result of Brexit, procurement reform, best practice and Welsh Government's continuous reviews of procurement.
- 5.20 The Strategy details a clear structure for Leadership and Governance and highlights the tools which will facilitate the process with the Council. The Strategy has four (4) strategic themes which supports the Authority's Well Being Objectives and the Wellbeing and Future Generations (Wales) Act 2015:
- Culture
 - Economics
 - Environment
 - Social
- 5.21 A five (5) year timescale had initially has been set for the delivery of the Strategy, however, the key strategic goals were far reaching, and it was envisaged that the Strategy will take the Council beyond 2023 timeline.

Conclusion

- 5.22 There will be significant changes to procurement rules and the Council will need to consider both Bills carefully, together with any secondary legislation and guidance when published. There will be need to plan an approach on implementation and communication within the Council ensuring key constitutional documentation, systems, policies and procedures are updated before the new laws come into force.
- 5.23 The existing Procurement Strategy continues to be fit for purpose and can be extended beyond its current timeline of May 2023. The Strategy continues to demonstrate the Council's commitment in supporting wider cultural, social, economic and environmental objectives in a way that offers real long-term benefits to the Community we serve and the people of Wales whilst balancing the issues of Value for Money.

6. ASSUMPTIONS

- 6.1 All details stated within this report and Strategy are reflective of all issues known as of September 2022.

7. SUMMARY OF INTEGRATED IMPACT ASSESSMENT

- 7.1 The Strategy positively impacts all aspects of the IIA, however a full IIA will be completed in parallel to developing the new Procurement Strategy.

7.2 Procurement is one of the seven corporate areas for change in the Well-being of Future Generations (Wales) Act 2015 ('Act') statutory guidance and must be a key area of focus for public bodies in meeting their obligations under the Act.

8. FINANCIAL IMPLICATIONS

8.1 There are no financial implications.

9. PERSONNEL IMPLICATIONS

9.1 There are no personnel implications.

10. CONSULTATIONS

10.1 This report has been sent to the Consultees listed below and all comments received are reflected within this report.

11. STATUTORY POWER

11.1 The Wellbeing of Future Generations (Wales) Act 2015 and the Social Services and Well-being (Wales) Act 2014.

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Christina Harray, Chief Executive,
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Background Papers:

Appendices:

Appendix A Programme for Procurement ('Strategy') 2018-2024