



CORPORATE AND REGENERATION SCRUTINY COMMITTEE – 14TH MAY 2024

SUBJECT: PROCUREMENT REFORM

REPORT BY: CORPORATE DIRECTOR EDUCATION AND CORPORATE SERVICES

1. PURPOSE OF REPORT

- 1.1 To provide members of the Scrutiny Committee with an update in relation to the UK Central Government and Welsh Government procurement reform agendas.
- 1.2 To provide an overview of three new separate legislative requirements coming into force that supports the agendas, namely:
 - Procurement Act 2023;
 - Social Partnership and Public Procurement (Wales) Act 2023;
 - Health Service Procurement (Wales) Act 2024.
- 1.3 To provide an update on the Council's approach and position in readiness for the formal implementation of the above-mentioned Acts.

2. SUMMARY

- 2.1 The rules governing public procurement in Wales are changing, this is due to three new separate legislative requirements, as summarised below:

Procurement Act 2023

- 2.2 The Procurement Act aims to improve the way procurement is regulated to:
 - Create a simpler and more flexible commercial system that better meets the country's needs while remaining compliant with our international obligations.
 - Open up public procurement to new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts.
 - Taking tougher action on underperforming suppliers and excluding suppliers who pose unacceptable risks.
 - Embed transparency throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.
- 2.3 The Procurement Act, which will reform the existing procurement rules, received Royal Assent in October 2023 and is expected to 'go live' in October 2024. The existing legislation will apply until the new regime goes live and will also continue to apply to procurements started under the existing procurement rules. The Procurement Act 2023 is included within **Appendix 1 to this report.**

Social Partnership and Public Procurement (Wales) Act 2023

2.4 The Social Partnership and Public Procurement (Wales) Act 2023 ('SPPP Act') provides a framework to promote the well-being of the people of Wales by enhancing sustainable development (including by improving public services) through social partnership working, promoting fair work and socially responsible procurement. The SPPP Act includes provisions for:

- The establishment of a Social Partnership Council.
- Improving 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.
- Setting objectives in relation to well-being goals, and to publish a procurement strategy.
- Carrying out contract management duties to ensure that socially responsible outcomes are pursued through supply chains.
- Covering 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.
- A statutory duty on certain public bodies to seek consensus or compromise with their recognised trade unions (or where there is no recognised trade union) other representatives of their staff, when setting their well-being objectives and delivering on those objectives.

2.5 The SPPP Act, will work alongside the Procurement Act 2023 and received Royal Assent in May 2023 and is expected to 'go live' in October 2024. The SPPP Act is included within **Appendix 2 to this report.**

Health Service Procurement (Wales) Act 2024

2.6 The Health Service Procurement (Wales) Act 2024 ('HSP Act') allows Welsh Ministers to disapply provisions within the Procurement Act 2023 in relation to services provided as part of Health Care Services in Wales. The HSP Act also amends the National Health Service (Wales) Act 2006 to enable Welsh Ministers to make specific (alternative) provision in relation to procuring services provided as part of Health and certain Social Care requirements.

2.7 Welsh Government recently consulted on the proposed changes to the way that Health and certain Social Care Services, provided as part of the NHS and Councils, are procured in Wales. The future regulations and accompanying statutory guidance to support the HSP Act will set out the operational details of the proposed new Health Service procurement regime in Wales.

2.8 The consultation was an important opportunity for stakeholders to comment on the operational principles of the proposed regime; and whether it should align with, or diverge from, proposals detailed in the UK government's Department of Health and Social Care's Provider Selection Regime. The Council participated in a collaborative response to the consultation led by the Welsh Local Government Association. The consultation period was November 2023 to February 2024 and Welsh Government released a summary of responses in April 2024.

2.9 Next steps for Welsh Government will be to review and analyse the responses to the consultation process and this will inform the development of the policy and the regulations that will underpin the proposed new Health Service procurement regime in Wales.

- 2.10 The HSP Act will work alongside the Procurement Act 2023 and received Royal Assent on 5 February 2024, it is anticipated this will 'go live' in October 2024. The HSP Act is included within **Appendix 3 to this report**.

Caerphilly CBC ('Council') Approach and Implementation

- 2.11 The Council is in a good position in readiness for the new procurement regime. However, it is important to have an action plan established to hopefully ensure a smooth transition in preparation for October 2024. The 'Getting Ready' Action Plan developed follows UK and Welsh Governments advice and guidance and considers four key areas, namely, people, processes and policies, systems and transitions.
- 2.12 The current 'Getting Ready' Action Plan for the Council is included within **Appendix 4 to this report**.

3. RECOMMENDATIONS

That Scrutiny Members notes:

- 3.1 The current status of the UK Central Government and Welsh Government procurement reform agendas via the three new separate legislative requirements; and
- 3.2 The Council's approach to implementing the new procurement regime.

4. REASONS FOR THE RECOMMENDATIONS

- 4.1 To inform Scrutiny Members of the significant changes to the procurement rules coming into force from October 2024.
- 4.2 To ensure the Council has a planned and fit for purpose approach for the implementation of the new rules.

5. THE REPORT

Procurement Act 2023 ('The Act')

- 5.1 The Act, which will reform the existing procurement rules, received Royal Assent in October 2023 and is expected to 'go live' in October 2024. The existing legislation will apply until the new regime goes live and will also continue to apply to procurements started under the existing procurement rules.
- 5.2 The Act aims to improve the way procurement is regulated to:
- Create a simpler and more flexible commercial system that better meets the country's needs while remaining compliant with our international obligations.
 - Open up public procurement to new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts.
 - Taking tougher action on underperforming suppliers and excluding suppliers who pose unacceptable risks.
 - Embed transparency throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.

Structure and Objectives of the Act

- 5.3 The Act signifies fundamental structural changes to the current procurement landscape, by combining the overarching regimes which currently regulate procurement. Contracts

awarded under the separate procurement regimes governing the award of general public contracts, utilities contracts, concession contracts and defence and security contracts will all sit under the umbrella of the new Act.

- 5.4 Procurement objectives have also changed under the Act. Previous drivers required the Council to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner: requirements flown down from European Directives. Under the Act, key considerations and objectives for the Council will include delivering value for money, maximising public benefit and acting and being seen to act with integrity.
- 5.5 The Council will also be required to have regard to national procurement policy statements for Wales reflecting the UK centric nature of the Act. In terms of treatment, the Council must treat suppliers the same unless a difference between the suppliers justifies different treatment that does not put a supplier at an unfair advantage or disadvantage. This subtle change reflects one of the motivations behind the Act and a theme which runs throughout: that is, achieving greater flexibility in the procurement process.

Flexibility

- 5.6 The Act allows greater flexibility, for example, rather than setting prescriptive procurement procedures, it is up to the Council to decide whether to use an open procedure or another kind of competitive procedure of their choice (***please refer to sections 5.8 to 5.10 below for further detail***). Similarly, the Council will be able to make changes to the terms of a procurement even after it has been started but before certain key deadlines, such as prior to the deadline for submitting tenders in an open procedure, provided timelines are flexed to account for the changes.
- 5.7 There is flexibility in selecting award criteria (which itself will change with contracts being awarded based on the new "most advantageous tender" rather than the "most economically advantageous tender"). The Council will be entitled to refine award criterion during a competitive procedure provided they have catered for that in the tender notice or tender documents and the refinement would not have allowed previously excluded suppliers to progress in the procurement process.

Procurement Procedures

- 5.8 The Council may award contracts to the bidder who submitted the 'most advantageous' tender, being the tender which best meets the award criteria in light of the assessment methodology. This is awarded based on a competitive tendering procedure, which is either:
- a single-stage procedure without a restriction on who can submit tenders (like the current open procedure); or
 - such other competitive procedure that the Council considers appropriate (this is a procedure which can be designed by the Council).
- 5.9 A competitive procedure other than an open procedure gives scope for greater flexibility. While the Council will have greater flexibility to design their own procedures, it will be interesting in the short term to see whether we can continue to conduct procurements following similar procedures to the current regime for expediency.
- 5.10 There are increased abilities to directly award contracts in certain circumstances if considered necessary to "protect human, animal or plant life or health, or protect public order or safety", which appears to have arisen following lessons learned during the COVID-19 pandemic.

Transparency and Notices

- 5.11 The Act introduces several new requirements for publishing notices throughout the procurement lifecycle from planning through to contract expiry. This is with a view to increasing transparency, but this may make aspects of the overall process more

administratively burdensome particularly during the life of a contract. Examples include:

- planned procurement notices and preliminary market engagement notices (replacing PIN notices under the current regime);
- pipeline notices;
- transparency notices on the direct award of a contract;
- mandatory contract change notices; and
- termination notices on the termination of a public contract.

Excluding Suppliers

- 5.12 The Act contains provisions on excluded and excludable suppliers and how they should be dealt with by the Council. The list of grounds for mandatory exclusion of suppliers is broadly similar to the current regime, with the addition of new offences such as theft, corporate manslaughter and competition law infringement. In relation to discretionary exclusion grounds, the current regime provides that prior poor performance should be considered where there has been a breach of contract which resulted in a serious repercussion such as termination or damages. This is extended in the Act to cover poor performance and where the supplier has not improved their performance despite being given the opportunity to do so.
- 5.13 Another point of difference is that suppliers can be excluded by reference to the status of their associated suppliers and subcontractors, not just their own performance.
- 5.14 The Act also introduces a central debarment list, where the name of a supplier who is an excluded or excludable supplier will be held; which, as above, may be based on previous poor performance. Suppliers on the list will be debarred from applying for public contracts for a specified period but may apply for their removal from the list if there has been a material change in circumstances.

Key Performance Indicators

- 5.15 There is a new requirement to publish key performance indicators ('KPIs') where the Council must set and publish at least three KPIs (unless the Council considers that the supplier's performance could not appropriately be assessed by reference to KPIs). There is a value threshold to this requirement (currently £5 million, however this value threshold may reduce overtime) and there are some other exceptions, including for framework agreements. Where KPIs are published, at least once every twelve months, the Council has obligations to assess the supplier's performance against these KPIs, and to publish information relating to that assessment.

Standstill Period

- 5.16 Under the current regime, the Council may not enter into a contract until 10 days after the issue of a compliant award decision notice to all suppliers. The Act provides that the standstill period should be 8 working days from the day on which a contract award notice is published. The standstill does not apply in certain cases, for example where there has been a direct award because of 'extreme or unavoidable' urgency, or where a contract is awarded in accordance with a framework.

Remedies

- 5.17 Many of the remedies under the current procurement regime are replicated in the Act, however, changes have been made including to the language used. For example, declarations of ineffectiveness are no longer referred to as such although the equivalent remedy remains as "set aside" proceedings. Another example is the introduction of a new test for consideration when making interim orders such as to lift automatic suspensions in relation to the entry into or modification of contracts.

Termination of Contracts

- 5.18 The Act extends the implied rights that the Council has to terminate public contracts. The grounds now include where:
- the contract was awarded or modified in material breach of the Act which could reasonably result in a successful legal challenge;
 - a supplier has become an excluded or excludable supplier; and
 - subject to certain pre-conditions, a sub-contractor of the supplier is an excluded or excludable supplier.

Social Partnership and Public Procurement (Wales) Act 2023 ('The SPPP Act')

5.19 The SPPP Act, will work alongside the Procurement Act 2023 and received Royal Assent in May 2023 and is expected to 'go live' in October 2024. The SPPP Act is aligned with the Well-being of Future Generations (Wales) Act 2015 ('WFGA 2015').

5.20 In summary the SPPP Act provides a framework to promote the well-being of the people of Wales by enhancing sustainable development (including by improving public services) through social partnership working, promoting fair work and socially responsible procurement. The SPPP Act includes provisions for:

- The establishment of a Social Partnership Council.
- Improving 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.
- Setting objectives in relation to well-being goals, and to publish a procurement strategy.
- Carrying out contract management duties to ensure that socially responsible outcomes are pursued through supply chains.
- Covering 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.
- A statutory duty on certain public bodies to seek consensus or compromise with their recognised trade unions (or where there is no recognised trade union) other representatives of their staff, when setting their well-being objectives and delivering on those objectives.

The Social Partnership Council

5.21 The Social Partnership Council is to be established with the mandate to provide information and advice to Welsh Ministers in relation to social partnership duties under the SPPP Act, the pursuit of the "a prosperous Wales" well-being goal by public bodies when carrying out sustainable development under the WFGA 2015 and/or in relation to socially responsible procurement.

5.22 Information or advice can be provided on Social Partnership Council's own accord or when requested. There are specific provisions in the Act as to who its members are, appointments, operational matters and sub-groups. There is also provision for a specific sub-group to be established on public procurement so that it can provide advice and information to the Social Partnership Council about the functions of the Council regarding socially responsible procurement.

Social Partnership and Sustainable Development

5.23 For the purposes of improving economic, environmental, social and cultural well-being (including improving public services), this Part of the Act:

- imposes new social partnership duties as part of the well-being duty in the WFGA 2015; and
- amends the “a prosperous Wales” well-being goal to be pursued by public bodies when carrying out sustainable development under the WFGA 2015 so that securing fair work, rather than the older definition ‘decent’ work is part of the description of the goal.

Socially Responsible Public Procurement

- 5.24 This sets out the socially responsible public procurement duty in respect of major construction contracts, outsourcing services contracts, social public works clauses in contracts and sub-contracts, reporting obligations, public services outsourcing and workforce code, social public workforce clauses in outsourcing services contracts and sub-contracts, putting in place a procurement strategy and reporting and accountability obligations.
- 5.25 In addition, the Welsh Ministers may investigate the Council that carries out public procurement and may make recommendations, publish a report and lay a copy of any report published before the Senedd.

Social Partnership Duty

- 5.26 In carrying out sustainable development, the Council must, in so far as is reasonable seek consensus or compromise with recognised trade unions or other representatives of its staff on:
- the well-being objectives to be set under section 3(2)(a) of the WFGA 2015; and
 - decisions of a strategic nature to be made about the reasonable steps the body has taken (in exercising its functions) to meet those objectives.
- 5.27 The Act sets out how the Council is to demonstrate that it has sought consensus or compromise and for the purpose of what is reasonable, it must take into account guidance published by Welsh Ministers.

Social Partnership Report

- 5.28 The Council is required to prepare for each financial year, a report to demonstrate what has done to comply with the social partnership duty overall and not just the procurement aspects.

Socially Responsible Procurement Duty

- 5.29 This duty requires the Council to seek to improve the economic, social, environmental and cultural well-being of its area by carrying out public procurement in a socially responsible way. The Council does this by taking action in accordance with the sustainable development principle aimed at contributing to the achievement of the well-being goals listed in section 4 of the WFGA 2015. The Council is required to set and publish objectives referred to as “socially responsible procurement objectives”, which are to be revised and reviewed.
- 5.30 In order to contribute to the achievement of the socially responsible procurement objectives, the Council must:
- take all reasonable steps to meet its objectives when carrying out public procurement in respect of prescribed contracts; and
 - take prescribed actions when procuring major construction contracts or outsourcing services contracts.
- 5.31 However, importantly the Council is not required to include provisions in a prescribed contract that:
- are not proportionate (taking into account the estimated value of the contract); and
 - would conflict with any other enactment or rule of law relating to public procurement.

Major Construction Contracts

5.32 In respect of major construction contract, it is important to note that the threshold is low as it relates to any contract with a value of £2 million or more that is a public works contract, works contract or a works concession contract. However, even so the obligation is for the Council to:

- have regard to model social public works clauses published by Welsh Ministers;
- as part of the procurement process to consider whether the contract is to include social public works clauses;
- in negotiating and awarding contracts, to take all reasonable steps to include social public works clauses and ensure the clauses included can be implemented; and
- in managing the contract to take all reasonable steps to ensure such clauses are implemented.

5.33 Welsh Ministers are to publish model clauses for major construction contracts within specified categories which are: payments, employment, compliance, training, sub-contracting and environment. Officers within the Council are actively participating in this process.

Outsourcing Services Contracts

5.34 A similar approach applies to outsourcing services contract in relation to which the Council is required to:

- have regard to the public services outsourcing and workforce code published by Welsh Ministers;
- as part of a procurement process to consider whether the contract should include social public workforce clauses;
- in negotiating and awarding the contract, take all reasonable steps to include relevant social public workforce clauses and ensure the clauses can be implemented; and
- in managing the contract take all reasonable steps such clauses are implemented.

5.35 The Welsh Ministers are to publish the public services outsourcing and workforce code, which is to include model contract clauses, although the SPPP Act does provide some guidance as to what they should cover with the focus being on protecting terms and conditions of staff that are transferred or employed.

Sub-Contracts – Major Construction Contracts and Outsourcing Services Contracts

5.36 The Council is also required to take all reasonable steps to ensure that obligations in the social public works clauses/social public workforce clauses are implemented where the contractor enters into a sub-contract with any other economic operator. The SPPP Act provides examples as to how the Council can demonstrate that they have taken reasonable steps.

Reporting Obligations (Social Public Works Clauses/Social Public Workforce Clauses)

5.37 The Council is under an obligation to notify Welsh Ministers where:

- the Council does not intend to include the applicable clauses;
- the applicable clauses are not included in the relevant contract;
- there is no process to ensure that obligations in the applicable clauses are implemented; and
- there is no process in place for ensuring that obligations in the applicable clauses are implemented when sub-contracted. Welsh Ministers then have certain obligations when dealing with such notifications including the ability to give a direction to the Council.

Procurement Strategy

- 5.38 The Council is required to prepare a procurement strategy setting out how the Council intends to carry out public procurement. The strategy must state:
- how the Council intends to ensure that it will carry out public procurement in a socially responsible way;
 - meet its socially responsible procurement objectives;
 - state how the Council intends to make payments promptly.
- 5.39 The procurement strategy is to be reviewed in each financial year and revised as appropriate.

Reporting

- 5.40 If the Council awards prescribed contracts during a financial year there will be a need to publish an annual report after the end of that year with specific information to be included as set out in the SPPP Act.

Contracts Register

- 5.41 The Council must create, maintain and publish a contract register. This is to include registerable contracts (to be determined by the Welsh Ministers through regulations). The register is to contain prescribed information regarding registerable contracts unless there are legitimate reasons for not including them in the register as set out in the Act relating to: prejudice of commercial interests, competition, impeding law enforcement or contrary to public interest. It is important to highlight that procurement already publishes information in relation to contracts awarded and a contract pipeline, however this will need to be extended across the Council.

Health Service Procurement (Wales) Act 2024

- 5.42 The Health Service Procurement (Wales) Act 2024 ('HSP Act') will work alongside the Procurement Act 2023 and received Royal Assent on 5 February 2024 and is expected to 'go live' in October 2024.
- 5.43 The HSP Act allows Welsh Ministers to disapply provisions within the Procurement Act 2023 in relation to services provided as part of Health Care Services in Wales. The HSP Act also amends the National Health Service (Wales) Act 2006 to enable Welsh Ministers to make specific (alternative) provision in relation to procuring services provided as part of Health and certain Social Care requirements.
- 5.44 Welsh Government recently consulted on the proposed changes to the way that Health and certain Social Care Services, provided as part of the NHS and Councils, are procured in Wales. The future regulations and accompanying statutory guidance to support the HSP Act will set out the operational details of the proposed new Health Service procurement regime in Wales.
- 5.45 The consultation was an important opportunity for stakeholders to comment on the operational principles of the proposed regime; and whether it should align with, or diverge from, proposals detailed in the UK government's Department of Health and Social Care's Provider Selection Regime. The Council participated in a collaborative response to the consultation led by the Welsh Local Government Association. The consultation period was November 2023 to February 2024 and Welsh Government released a summary of responses in April 2024.
- 5.46 Next steps for Welsh Government will be to review and analyse the responses to the consultation process and this will inform the development of the policy and the regulations that will underpin the proposed new Health Service procurement regime in Wales.

Caerphilly CBC Approach and Implementation

- 5.47 The Council is in a good position in readiness for the new procurement regime. However, it is important to have an action plan established to hopefully ensure a smooth transition in preparation for October 2024. The 'Getting Ready' Action Plan developed follows UK and Welsh Governments advice and guidance and considers four key areas, namely, people, processes and policies, systems and transitions.
- 5.48 The current 'Getting Ready' Action Plan for the Council is included within **Appendix 4 to this report.**

Conclusion

- 5.49 The new procurement regime will introduce a major shake-up to the way the Council purchases good, services and works. Whilst the new changes are not due to come into force until October 2024 at the earliest, plans are underway to ensure the Council are ready to take advantage of the increased flexibility and transparency associated with the new rules.

6. ASSUMPTIONS

- 6.1 All details stated within this report are reflective of all issues known as of March 2024.

7. SUMMARY OF INTEGRATED IMPACT ASSESSMENT

- 7.1 The new procurement regime positively impacts all aspects of the IIA, however a full IIA has not been completed.
- 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 Procurement Act 2023, Social Partnership and Public Procurement (Wales) Act 2023 and Health Service Procurement (Wales) Act 2024.
- 11.2 The Wellbeing of Future Generations (Wales) Act 2015 and the Social Services and Well-being (Wales) Act 2014.

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Consultees: Cllr Nigel George, Cabinet Member for Corporate Services Property and Highways,
Dave Street, Deputy Chief Executive,
Richard (Ed) Edmunds, Corporate Director for Education and Corporate Services,
Elizabeth Lucas, Head of Customer and Digital Services,
Rob Tranter, Head of Legal Services and Monitoring Officer,
Stephen Harris, Head of Financial Services and S151 Officer,
Lynne Donovan, Head of People Services,
Natasha Ford, Business and Supply Chain Manager,
Gareth Day, Contract Management Support Services Manager,
Kath Peters, Corporate Policy Manager, Service Improvement and Partnerships.

Background Papers:

Appendices:

Appendix 1 Link to: [Procurement Act 2023 \(legislation.gov.uk\)](https://legislation.gov.uk)
Appendix 2 Link to: [Social Partnership and Public Procurement \(Wales\) Act 2023 \(legislation.gov.uk\)](https://legislation.gov.uk)
Appendix 3 Link to: [Health Service Procurement \(Wales\) Act 2024 \(legislation.gov.uk\)](https://legislation.gov.uk)
Appendix 4 'Getting Ready' Action Plan
Appendix 5 Transparency Briefing Paper