

# **Utilising the New EU Procurement Rules to Benefit our Communities**

## **A Guide for Councillors and Senior Managers**



## **A Guide for Councillors and Senior Managers - Contents**

- 1. Why this guide?**
- 2. How are we collaborating on procurement?**
- 3. What improvements can we make to the way we buy?**
- 4. What are our options for major projects?**
- 5. How should we use technology?**
- 6. How do we maximise community benefits?**

Annex: The EU rules in a nutshell

## 1. Why this guide?

**Councils in Wales are facing an unprecedented set of challenges and leadership by councillors and senior managers has never been more important than now.**

The drive to provide better outcomes for citizens in key public services and to promote local economic growth must continue at the same time as realising savings on a very large scale.

As a consequence, public services are being 'rewired' and innovative new models of service delivery are being developed. This includes further integration of services across health and social care and beyond and, increasingly, the creation of vehicles for trading and income generation. It is taking place against the backdrop of pending local government reorganisation.

This guide provides a briefing for councillors and senior managers on some recent changes to the public procurement rules (the 'EU rules') which will help councils and their partners respond boldly to the challenges which lie ahead.

The guide has been produced to support implementation by councils of the *Wales Procurement Policy Statement 2015* including, in particular, principles 3-9 on economic, social and environmental impact, community benefits, open, accessible competition, simplified standardised processes, collaboration, supplier engagement an innovation and policy development and implementation (which includes use of the Welsh Government's new powers to make procurement regulations specifically for Wales).

The EU procurement rules were reformed in 2014 and the changes have been implemented in this country in the Public Contracts Regulations 2015 ('PCR 2015'). The reform was carried out with a number of objectives in mind:

- Simplify the rules for bidders and contracting authorities and make them more flexible
- Enable 'strategic' use of public procurement (delivering social and environmental objectives, supporting SMEs, stimulating innovation)
- Incorporate European case law (exclusion of 'in house' contracts between public bodies, limits on changes to contracts)
- Introduce stronger measures on conflicts of interest, procurement fraud and corruption etc

New options and flexibilities are now available which councils can exploit to their advantage. These are outlined in the guide.

The guide is in the form of a checklist that councillors and senior managers can use to check whether their own council is taking full advantage of the new rules to secure better outcomes and savings and to promote local economic growth.

An annex explaining the EU rules 'in a nutshell' has been included for those less familiar with the procurement rules.

A toolkit is being launched in parallel with the guide to provide more in-depth coverage of the topics. Its audience is those in service delivery, programme and project management roles who need to be familiar with procurement routes as well as procurement and commissioning professionals.

Councillors and senior managers who would like to explore the new possibilities in further depth can access the 'PCR 2015 – Local Government Toolkit' [here](#).

However, the EU rules are complex and the first point of contact for councillors and seniors managers should be the council's own procurement team.

More general guidance for councillors on good practice in local government procurement can be found in the [Member's Guide to Procurement](#) (WLGA 2012).

**Note that the information provided here is intended to be only a general guide to opportunities presented by the PCR 2015. It is not legal advice. Councils should take their own legal advice.**

## **2. How are we collaborating on procurement?**

### **What is the challenge?**

**Councils need to consider whether they are making use of the best available models for collaboration on procurement.**

By collaborating on procurement and on contract and supplier management councils and their public sector partners can make best use of commercial skills, benefit from economies of scale, achieve efficiencies in the use of resources and realise savings.

A lot has been achieved already. But councils need to review their use of collaborative procurement models including:

- Professional buying organisations (PBOs) like the National Procurement Service (NPS)
- Shared management and shared services models for procurement
- Occasional joint procurement projects e.g. for waste management

In any model, the keys to success are joint planning (across council departments and across authorities and other public sector organisations including those represented on Public Service Boards), including early stakeholder and user involvement, and a joint approach to market engagement. This then can then inform a joint procurement strategy as part of the business case for the procurement.

Traditionally, much collaborative activity has been focused on the buying of 'commodities' (common and repetitive spend). The challenge for the future is for councils and others to work together to a greater extent on strategic requirements including infrastructure projects, back office functions and social care.

The continuing integration of services (including integration of health and social care in the context of the Social Services and Well-being (Wales) Act 2014) provides an opportunity to consider new models for procurement across different public services.

Local government reorganisation and wider local government reforms provide further opportunities to consider which functions can be shared.

The WLGA has also set out the case for 'devolution beyond Cardiff Bay' and for Welsh councils to have powers to set up combined authorities for the regions. If created, combined authorities could provide a platform for the joint clienting of major projects in the region. In the meantime this work can be taken forward by city region boards where they have been established **(see Section 4: What are our options for major projects?)**

### **How can we exploit the new EU Rules?**

#### **Choose the best models for cooperation on procurement**

The PCR 2015 are clear about the importance of public authorities working together on procurement and they enable the full range of models for joint working to be used.

Councils and other contracting authorities can:

- buy goods and services directly from a 'central purchasing body' (CPB), and/or
- buy goods, works and services through contracts, framework agreements and 'dynamic purchasing systems' **(see Section 5: How should we use technology?)** set up by a CPB. CPBs are contracting authorities that carry out centralised purchasing on a permanent basis. The PCR 2015 also clarify roles and responsibilities where authorities undertake 'occasional joint procurement' and where authorities in different countries work together on international procurement

### **3. What improvements can we make to the way we buy?**

#### **What is the challenge?**

**Councils need to be sure that they are focusing their efforts in the right places and keeping the procurement process itself as simple as possible.**

In the public sector the importance of 'procurement' in the narrow sense (the stage between the contract notice and contract award) has often been overstated.

Overall, the real keys to commercial success (striking a good deal and making sure it is delivered) are pre- procurement planning (including being clear about the outcomes you want), good contract design and specification, effective market engagement and robust contract and supplier management.

The main objective in the procurement phase should be to minimise the time, cost and effort to procure for both the authority and bidders including, in particular, SME bidders.

The pre-procurement focus should be on:

- signalling of future requirements to the marketplace
- market shaping (including 'market facilitation' in the context of the Social Services and Well-being (Wales) Act 2014) to stimulate activity where there are gaps
- two-way engagement with potential suppliers ('market engagement')
- getting the contract design, specification and other procurement documents right

All the benefits of this planning will be lost without effective contract and supplier relationship management once the contract has been awarded. This includes performance management, continuous improvement and cost control (**see: [LGA: Making Savings from Contract Management](#)**).

As mentioned above, all of this activity can be undertaken by authorities working together. Among other things, a joint approach enables councils to take a more strategic approach to the management of key suppliers to the local government sector.

Finally, councils need to have confidence that they have appropriate strategies and internal controls in place to manage the risk of fraud and corruption in both procurement and contract management as the losses in this area can be significant not to mention damage to the council's reputation (**see: [LGA/CIPFA: Managing the Risk of Procurement Fraud](#)**).

### **How can we exploit the new EU rules?**

#### **Focus on market engagement**

The PCR 2015 now expressly allow market engagement ('preliminary market consultations') as part of pre-procurement planning and describe appropriate measures to be taken to prevent competition being distorted.

This affirms the value-adding role of market engagement and provides reassurance that it does not conflict with the EU rules.

#### **Use a PIN instead of a contract notice**

There are new options for the notices used to advertise contracts in Europe ('OJEU notices'). Under PCR 2015 councils can now choose to publish a prior information notice (PIN) to advertise requirements (a contract or group of contracts) and invite interested suppliers to confirm their interest in bidding for specific contracts at a later date. This does away with the need for individual contract notices.

This use of a PIN is allowed when the council is using the restricted procedure or the competitive procedure with negotiation to award the contract (**see section on [new procurement routes](#)**).

A PIN can also be used to advertise requirements for Light Touch Regime services (**see heading: Design appropriate procedures for social care**).

Normally, a PIN used in this way is valid for up to 12 months but when used for Light Touch Regime services it can cover a longer period.

The period between publication of the PIN and the invitation to confirm interest is an opportunity to carry out a type of market engagement before deciding on the final approach to the market.



This can be particularly helpful in social care and health with all the complex changes that are taking place.

### **Speed up procurement**

Minimum time limits for procurement procedures have been reduced by approximately one third in most cases.

As the procurement phase is now short, effort can be focused on the value-adding parts of the process:

- market engagement and getting the contract design and specification right.
- effective contract and supplier management. An EU procurement no longer 'takes ages' so there is no need to avoid it or try to find a way around it!

### **Choose the best procurement route**

Councils can continue to use the familiar open procedure or restricted procedure for 'off the shelf' requirements.

The restricted procedure is most useful where there is a genuine need to pre-qualify bidders or there are potentially a very large number of bidders in the market (this will be confirmed through market engagement).

Otherwise, the open procedure is fastest and simplest route.

However, there is now greater flexibility to use negotiation for complex or innovative requirements. There are three different routes to choose from:

- competitive procedure with negotiation (CPN)
- competitive dialogue (CD)
- innovation partnership (IP)

For more information on those routes see [What are our options for major projects?](#)

### **Design appropriate procedures for social care**

There is now a requirement to advertise contracts for social care in Europe (meaning competition for the contracts).

However, provided that councils stick to certain general principles (equal treatment, transparency etc.) there is an opportunity to design procurement procedures which are appropriate to these services. There is no obligation to use the main EU procedures for social care.

This is referred to as the Light Touch Regime. It applies to social care procurements above a €750,000 threshold (currently £625,050). It applies in the same way to health, education, cultural and certain other services.

As mentioned above, advertising can take the form of a prior information notice (PIN) which remains valid for a considerable period of time.

### **Tackle poor performance by suppliers**

The PCR 2015 have clarified that references can be taken up to establish whether bidders have the necessary professional and technical ability to perform a contract. In addition, councils have discretion to exclude bidders which have shown 'significant or persistent deficiencies' in performance.

In order to take advantage of these new opportunities it will be important for councils to record supplier performance, including the use of sanctions under contracts, and for councils to be willing and geared up to provide references to others.

### **Improve control of sub-contracting**

Councils have the right to receive information on sub- contractors and can carry out checks on sub- contractor suitability.

This includes the sub-contractor's past performance.

Where necessary, a main contractor can be required to replace a sub-contractor.

### **Control changes to contracts**

A series of European Court cases created uncertainty about the extent to which contracts can be varied without triggering an obligation to go back out to tender. The case law has been incorporated into the PCR 2015.

The new clearer rules on changes to contracts ('modifications') will give councils confidence to make necessary changes to the way services are delivered in order to achieve better outcomes or make savings.

### **Combat procurement fraud and corruption**

The new flexibilities in the rules have been balanced with stronger controls which councils can use to help combat fraud and corruption in procurement.

There are strengthened 'audit trail' requirements including documenting the progress of procurement procedures.

A report must be prepared on every contract recording information such as the reason for using certain procedures (CPN, CD and negotiation without prior advertising) and decisions that have been taken. It must also identify any conflicts of interest and the measures that were taken in response.

Suppliers convicted of offences such as bribery must be excluded from bidding for council contracts and councils have discretion to exclude suppliers where there is a conflict of interest, anti-competitive agreement or the like.

## **4. What are our options for major projects?**

### **What is the challenge?**

**Councils need to choose the best procurement route for high value, high risk projects ('major projects').**

Councils are already responding to local needs and budget pressures by pursuing innovative solutions involving major projects. A broader transformation of Welsh local government has now been mapped out in the *Reforming Local Government: Power to Local People White Paper*.

Projects involve, for example, the transfer of services to social enterprises and mutuals in the spirit of 'Wales as a co-operative country' (*Report of the Welsh Co-operative and Mutuals Commission*). The creation of a more diverse provider base including social enterprises is one of the objectives of the Social Services and Well-being (Wales) Act 2014.

Shared services are a further option. Shared services arrangements can be used to realise economies of scale in a wide variety of functions.

Councils are also making use of innovative funding mechanisms and exploring the use of local authority companies and joint ventures.

When set up to trade, local authority companies and joint ventures can be an important means of generating income to help close the gap in council finances.

Innovative funding mechanisms are being used in the infrastructure area in the context of the *Wales Infrastructure Investment Plan* (WIIP), alongside more conventional construction contracts.

In major projects of this kind the agreement of a business case including a procurement strategy is established best practice.

The procurement strategy needs to be informed by early market engagement to establish the viability of the project and should determine the procurement route for the project taking account of the EU rules as discussed below.

### **How can we exploit the new EU rules?**

**Contract with other public bodies**

The PCR 2015 incorporate rules on contracts between public bodies which were first established in European Court cases (i.e. rules on when contracts count as being 'in house' or 'public-public' and are therefore excluded from the procurement rules).

In the process of incorporating the rules, certain things have been clarified.

This greater certainty should help clarify the choices available and enable councils to be bolder for example when setting up local authority companies and shared services arrangements.

The regulations exempt contracts from procurement in three situations:

- Contracts with a controlled body (e.g. a local authority company)
- Contracts with a jointly controlled body (e.g. jointly controlled company)
- Contracts concerning cooperation between authorities (no separate controlled body) There are limits on trading. In the first two cases, the controlled body can undertake up to 20% external activity (i.e. not with the controlling authority or authorities). In a cooperation arrangement the participating authorities can perform up to 20% of the activities concerned on the open market

### **Reserve contracts for social enterprises and mutual**

Under the new rules, contracts for certain Light Touch Regime services can be 'reserved' for organisations with a public service mission, reinvested profits and a degree of employee or stakeholder participation (provided they have not been awarded a reserved contract for the services in the past three years).

Both social enterprises and mutuals that meet the criteria can qualify for these reserved contracts.

The contracts must be advertised but the council is otherwise free to design the procurement procedure provided that principles such as equal treatment and transparency are observed (**see Section 3: What improvements can be made to the way we buy?**)

The contracts can last for up to three years.

## **Choose the best procurement route for a major project**

The PCR 2015 offer a broad range of procurement routes. For complex or innovative projects, councils can now choose any of the following procedures:

- Competitive dialogue (CD)
- Competitive procedure with negotiation (CPN)
- Innovation partnership (IP)

Councils already have considerable experience of using CD. However, there have been some changes.

There is no longer an obligation to specify minimum requirements at the outset and PCR 2015 now expressly allow negotiations to be carried out with the preferred bidder (within certain limits) in order to confirm financial commitments or other terms before contracts are finalised.

CD continues to be the most suitable procedure for highly complex procurements including those which involve third party finance (PF2 and the like).

Alternatively, in the same circumstances councils can choose to use CPN. A version of this procedure has existed for some time but the PCR 2015 have introduced changes.

CPN allows councils to negotiate on initial tenders, including on price. However, councils can choose to reserve the right to award a contract on the basis of an initial tender without negotiation.

CPN has been made available for use in a much wider set of circumstances than before and is therefore likely to be used more frequently for requirements that are not 'off-the-shelf'. These need not necessarily be major projects.

The IP is completely new. An IP is set up using a modified version of the competitive procedure with negotiation.

The IP enables the council to develop innovative products, works or services where no suitable solution exists in the market (sharing the risk with suppliers) and then to purchase the resulting products, services etc.

An IP could be used to develop new medical or environmental technologies, for example. But it could equally well be used to develop and purchase a new delivery model for a public service.

## **5. How should we use technology?**

### **What is the challenge?**

**Technology plays an important role in reducing the time, cost and effort to procure ('eProcurement') and councils need to have confidence that they have the right solutions in place (see Section 3: What improvements can be made to the way we buy?)**

Welsh councils already make good use of technology. This includes the sourcing tools made available by the Welsh Government eProcurement Service (including Sell2Wales, SQuID and eTender Wales) which enable councils to advertise opportunities, make procurement documents available and receive pre-qualification questionnaires and tenders.

In addition, the National Procurement Service delivers services through the eTrading Wales electronic marketplace.

Electronic tools for tender evaluation and contract and supplier management are available through eTender Wales but are less widely used and electronic invoicing is not widespread at the present time. Electronic invoicing is an important development as it can both help reduce costs and drive compliance.

Councils have made good use of electronic auctions but have found so-called 'dynamic purchasing systems' as defined in the old EU rules too cumbersome to use. The new rules have brought major improvements. As outlined below, the use of dynamic purchasing systems is likely to increase as a consequence.

The new EU rules make electronic communications mandatory for sourcing (including electronic submission of pre-qualification questionnaires and tenders) from 18 October 2018.

There are earlier deadlines for some other new obligations. Most importantly, it is already a requirement that procurement documents are made available on the internet from the date of publication of the contract notice (or PIN).

It will not be mandatory to use electronic tools for tender evaluation or contract management. However, as part of a broader strategy for 'end-to-end eProcurement', it has been agreed at EU level that a new European standard for electronic invoices will be developed and receipt and processing of invoices in this form will become mandatory for public procurement.



This will not happen before 2018 and the UK Government has discretion to postpone it for another year for councils.

### **How can we exploit the new EU rules?**

#### **Open up markets and get better prices with 'dynamic purchasing systems'**

In the old rules, the 'dynamic purchasing system' (DPS) was too cumbersome to use and take up was minimal. The rules have been greatly simplified and councils are likely to find many new uses for the DPS.

Essentially, the DPS is an electronic database of pre-qualified suppliers that can be invited to tender for goods, works or services contracts.

It differs from a framework agreement in that new suppliers can be admitted at any time. It is not the same as an approved list because all suppliers on the system (or all suppliers in the relevant category) must be invited to tender every time.

The DPS is an efficient way of meeting EU advertising obligations while sustaining competition at the local level. Applications could include minor works, facilities management and agency staff.

An important feature of the DPS is that it enables new entrants to challenge dominant suppliers.

Modified versions of the DPS are already being used for social care placements. Social care now comes under the Light Touch Regime meaning that modified versions of the DPS can still be used as appropriate **(see section on designing appropriate procedures for social care)**.

#### **Speed up procurement**

It is possible to reduce further the time taken to procure if electronic submission of tenders is requested or allowed (shorter time limits are permitted in the open procedure and restricted procedure).

#### **Ensure specifications are ready for inclusion in the procurement documents**

The legal obligation to make specifications available electronically as part of the procurement documents from the time the contract notice (or PIN) is published reflects good practice and is a good discipline on specifiers.

Gone are the days when specifications were still being written after the procurement process had started.

## 6. How do we maximise community benefits?

### What is the challenge?

**Councils want to maximise the value of every pound they spend including in terms of promoting jobs, skills and supply chain opportunities in the local community. (see, for example, [Value Wales: Community Benefits Guidance – Delivering Maximum Value for the Welsh Pound](#))**

This is established practice in regeneration projects and construction and infrastructure projects more generally. It is being extended to other services.

The new Well-being of Future Generations (Wales) Act 2015 provides a general framework for considering how social, economic, environmental and cultural well-being can be improved. This includes the application of the principles of integration, collaboration, long-term thinking, involvement and prevention to procurement and the need to demonstrate how the principles have been applied.

The new Act sits alongside:

- the public sector equality duty in the Equality Act 2010 and the Welsh 'specific duty' to consider equality matters in procurement
- the Opening Doors policy aimed at increasing the flow of public contracts to SMEs and guidance on Procurement and the Third Sector and Supported Businesses in Wales
- the Sustainability Risk Assessment Tool

The old EU rules have sometimes hampered implementation of community benefits policy. One of the main objectives of the new EU rules is to enable authorities to use procurement more 'strategically'. Social and environmental issues can now be taken into account at many points in a procurement procedure. For short, this is referred to as a 'cross-cutting social clause'.

This stops short of allowing preferential treatment of UK nationals or UK suppliers (including 'local' suppliers within the authority's boundary) but it represents an important change to the rules.

The new opportunities to deliver community benefits, including SME-friendly procurement and contracts with businesses employing disabled and disadvantaged people, are outlined below. See also [What are our options for major projects?](#) on procurement from social enterprises.

Note that in August 2015 the Welsh Government acquired new powers to make regulations governing procurement and has indicated that community benefits will be one of the first topics to be addressed.

### **How can we exploit the new EU rules?**

#### **Take a cross-cutting approach to community benefits**

Under PCR 2015 social and environmental considerations can now be addressed in many different parts of the procurement procedure (a 'cross-cutting social clause') including:

- Specifications, including specification of production processes and social and environmental labels, and special contract performance conditions
- Selection criteria, including references and environmental management systems, and exclusion grounds (which also apply to sub-contractors)
- Contract award criteria including lifecycle costing and rejection of abnormally low tenders This provides an extensive opportunity to implement plans developed using the Well-being of Future Generations (Wales) Act framework

#### **Make contract packaging SME-friendly**

The new rules challenge councils to consider whether requirements should be divided into lots.

This can be used as an opportunity to stimulate thinking on innovative procurement models including those which increase the flow of contracts to SMEs where this provides value for money.

#### **Reserve contracts for social businesses employing disabled/disadvantaged people**

It is now possible to reserve contracts for businesses whose main aim is the integration of disadvantaged people (it was previously only disabled people) or to provide for the contracts to be performed in the context of supported employment programmes. Only 30% of the workforce need qualify as disadvantaged or disabled (it used to be 50%).

'Disadvantaged' is not defined. It could include, for example, the long-term unemployed and minority groups.

### **Annex: The EU rules in a nutshell**

There are three elements to the EU public procurement rules:

- Treaty rules and principles (currently the Treaty on the Functioning of the European Union, TFEU, and the principles derived from it)
- Procurement directives (implemented in the UK through statutory instruments, principally, for councils in Wales, the Public Contracts Regulations 2015 but note that a new directive on concession contracts must also be implemented before April 2016)
- Case law of the Court of Justice of the European Union (and increasingly case law of the UK courts)

The Internal Market (originally the 'Common Market') is founded on the 'four freedoms' which form the core of the Treaty – the free movement of goods, labour and capital and the freedom to provide services/ freedom of establishment.

EU Member States cannot obstruct the operation of the four freedoms (i.e. the Internal Market) by direct or indirect means. The Court of Justice, in its case-law, has derived a number of 'general principles' of EU law from the Treaty which have now been incorporated in the procurement directives. These include:

- Non-discrimination
- Equal treatment

- Transparency
- Proportionality

Procurement directives first began to be introduced in the 1970s. Their purpose is to harmonise procedures in use in the Member States to ensure that Treaty rules and principles are followed when there is likely to be cross-border interest in the contract (i.e. high value contracts in particular markets) and to provide effective remedies for suppliers where they are not (in Wales council decisions can be challenged in the High Court and the remedies include damages and fines).

For Welsh councils the rules are now those set out in the Public Contracts Regulations 2015, the PCR 2015, which implement the 2014 Public Contracts Directive. A further new directive on concession contracts above a €750,000 threshold (currently £625,050) must be implemented before April 2016 (when new rules on utility contracts replacing the existing utilities regime must also be brought into force). The concessions regime is light touch and based largely on the EU general principles.

The EU rules contained in the PCR 2015 apply only to contracts and framework agreements exceeding certain threshold values (currently £172,514 for services and goods and £4.3m for works; note that the sterling values will be revised in January 2016).

For the procurement of certain services (including health and social care) above a specific threshold value (currently £625,050) there is a 'light touch regime' (LTR) which allows councils greater freedom to design an appropriate procurement procedure provided the general principles are followed. In specified circumstances contracts between public bodies are exempt.

The rules allow the use of framework agreements, dynamic purchasing systems (a type of electronic database that new suppliers can join at any time and be invited to tender for contracts as they come up) and electronic auctions.

The main objective of the EU rules is to ensure that above-threshold requirements are advertised in the Official Journal of the European Union (OJEU) so that suppliers from across the EU (and beyond) are aware of the opportunity and can tender for it (transparency principle).

The remainder of the EU rules concern the procedures that can be used to award contracts and framework agreements with the objective that all suppliers should receive equal treatment and face no discrimination on nationality grounds. Time limits and the information which can be sought from suppliers (selection criteria and exclusion grounds) are regulated as are the criteria that can be used to award contracts. In addition, there are rules on specifications and certain other matters.

The main procedures in the PCR 2015 are:

- Open procedure (a single stage procedure: any supplier can tender)
- Restricted procedure (a two-stage procedure: only suppliers selected by the council can tender)
- Competitive procedure with negotiation (for use in complex and innovative procurements and use must be justified: permits negotiation prior to final tenders)
- Competitive dialogue (for use in complex and innovative procurements and use must be justified: permits dialogue before final tenders and negotiation with preferred bidder)
- Innovation partnership (a way to both commission R&D and purchase the resulting services or products)
- Negotiated procedure without prior advertising (an exceptional procedure involving no OJEU notice: for use in tightly controlled circumstances including extreme urgency)

Court of Justice cases have helped clarify many aspects of the procurement rules by applying the Treaty rules and principles. The PCR 2015 'codify' much of this case law including rules on contracts between public bodies and rules on the modification of contracts during their term. However, the Court of Justice of the EU will continue to clarify the rules and in some cases it may create further new rules.

For example, the law on the treatment of development agreements under the EU rules is complex and continues to evolve through decisions of the European and UK courts.