

INTRODUCTION

- 1. The Welsh Local Government Association (WLGA) represents the 22 local authorities in Wales, and the three national park authorities, the three fire and rescue authorities, and four police authorities are associate members.
- 2. It seeks to provide representation to local authorities within an emerging policy framework that satisfies the key priorities of our members and delivers a broad range of services that add value to Welsh Local Government and the communities they serve.
- 3. WLGA welcomes this opportunity to comment on the Department for Transport's consultation on the use of section 19 and 22 permits for road passenger transport in Great Britain.
- 4. Rather than responding to all the questions in the consultation document since, for example, WLGA as an organisation is not directly impacted by the exemptions our comments are of a more general nature. We also focus on the first exemption, relating to community transport operations that are exclusively for non-commercial purposes. Finally, we express intertest in exploring the third exemption, relating to operations with a minor impact because of the distance involved.

GENERAL COMMENTS

- 5. WLGA recognises the valuable contribution the community transport (CT) sector makes to the quality of life for many residents, including some isolated and vulnerable users who depend heavily on the services provided. We understand the need to review current arrangements to ensure compliance with EU law. However, we are concerned that the changes proposed will increase costs for local authorities (LAs) at a time when their budgets are already under severe pressure. These increased **costs** will arise in all cases where it is determined that current CT providers have to adapt to the new circumstances or where LAs have to find alternative provision. The **benefits**, on the other hand, appear marginal to non-existent for those using the services.
- 6. LAs in many cases have worked with the CT sector to ensure operators meet their contract terms and conditions and provide a high standard of customer care. That includes checking both that the vehicles and the drivers meet required standards. CT operators are an important source of wheelchair accessible vehicles for LAs. However,

it would appear that some operators could be caught by the provisions even where there are no alternative providers – e.g. if their main business is CT and/or some of their services are provided on a commercial basis.

- 7. At present, in line with DfT advice, LAs are continuing to run existing contracts but not letting new ones. If the proposed changes are introduced then, over time, new and compliant services will need to be secured. Where LAs have an obligation to provide transport (e.g. in relation to schools and social services) these services will need to be of equivalent quality in terms of access etc. This could substantially increase costs. Moreover, if CT operators are forced into the PSV operator licensing regime, many will not have the financial standing nor be willing for their trustees to act as guarantors. If they cannot make the changes deemed necessary for them to tender for these contracts it could result in them reducing or terminating *other* services they currently provide in the community. This could affect a range of 'non-essential' but socially beneficial journeys.
- 8. This is problematic for Welsh LAs who have to operate in accordance with the Wellbeing of Future Generations Act 2015. That Act requires them to take decisions in a holistic way, considering long-term economic, social, environmental and cultural implications. A decision with the potential to undermine efforts to develop a healthier, more equal Wales, with cohesive communities (three of the seven goals of the Act) would conflict with this legislation. The consultation document refers to the Public Services (Social Value) Act 2012 which introduced similar considerations in England in relation to procurement activity. However, the document makes it clear that the EU regulation takes precedence and it is not possible at present to take such domestic legislation into account. There may be opportunities in the future to review the requirements of the EU regulation, once the UK is no longer a member of the EU. There is a risk, though, of undermining the sector's viability in the meantime and, once done, that could be hard or impossible to reverse.

'EXCLUSIVELY FOR NON-COMMERCIAL PURPOSES' EXEMPTION

9. The box at para 3.14 of the consultation sets out the conditions under which services will be considered as 'exclusively for non-commercial purposes'. The proposals do not appear to deal adequately with a situation where a commercial operator bids for the work but at a price that is substantially in excess of what a CT operator would charge. The fact that a commercial operator has bid would mean the CT operator would not be

able to argue the service is non-commercial. As it would be unable to claim the exemption, it would be unable to bid on the basis of operating under a permit. This could create a perverse incentive for commercial operators to bid (with high costs) on routes they would otherwise consider non-viable in order to drive out CT competition – affecting not only the service in question but potentially others too.

- 10. One possibility would be to enable LAs to give an indicative figure for the contract value and for bids from commercial operators a certain percentage higher than this to be ruled out as unaffordable (thereby providing evidence there is no *effective* competition). However, the clear risk of such an approach is that it would simply set a ceiling for bids and commercial operators would pitch their bids accordingly. (A converse argument might be that LAs could make their indicative figures unrealistically low to deter commercial operators).
- 11. The comments in paras 9 and 10 relate solely to differences in price/cost. With public contracts the concept of the 'most economically advantageous tender' (MEAT) is well-established and can extend beyond price alone. MEAT enables the contracting authority to take account of criteria that reflect qualitative, technical and sustainable aspects of the tender submission as well as price when reaching an award decision. Under latest guidance, contractors can consider the Best Price-Quality Ratio (BPQR) which takes account of price or cost *and other criteria*. According to Regulation 67(2) of the 2015 Public Contracts Regulations, such 'other criteria' can include qualitative, environmental and/or social aspects, linked to the subject matter of the contract¹.
- 12. Could that provide grounds for LAs to invite bids of a different nature and assess them sequentially? first from commercial operator(s) using a PSV licence and then, if these are unacceptable, from CT body(ies) operating under a permit. The wider social benefits of bids could be taken into account in this way in reaching a decision. These could include factors such as, for example, providing a pathway to employment for volunteers, supporting personal independence, supporting the ability to live at home, overcoming isolation and loneliness. On this basis, a CT permit—based bid *could* come into consideration using the exemption *if* the wider benefits of commercial operator(s) have fallen below a threshold set in the invitation to tender (i.e. demonstrating there is no *effective* competition from commercial operators).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560263/Guidance_on_Awarding_Contracts_-Oct_16.pdf

- 13. The 'lack of a market for a service' can relate to failure on the supply and /or demand side of the market. If an LA's demand is for a service with wider social benefits and the commercial operator cannot supply these requirements then, arguably, this should be regarded as a lack of market. The consultation document states clearly that: "a lack of market for a service should enable a not-for-profit permit-holder to perform that service.." (p.14).
- 14. There would still be issues of subjectivity in assessing the extent to which wider social benefits have been met by bids but the broad idea may be worthy of further investigation.

EXEMPTIONS FOR OPERATIONS WITH A MINOR IMPACT BECAUSE OF THE DISTANCE INVOLVED

15. WLGA believes there is merit in exploring this proposed exemption further. Many of the LAs in Wales would be completely covered using a radius of 15 to 20 miles. The need to demonstrate that the impact of an operation would be minor could be met by setting a threshold percentage related to the CT operator's share of contracts – or passengers – within a local authority area (or specified radius).

CONCLUDING COMMENTS

- 16. The consultation document makes clear that the UK government wants to reassure the CT operators of its ongoing commitment to the sector and to minimise costs that will be incurred. It suggests that many CT operators might be unaffected. It also argues that some operators may discover new opportunities if they obtain PSV licences.
- 17. This gives the impression that the impact could be minimal. However, there are concerns amongst LAs in Wales if CT operators are no longer able to tender for contracts it will lead to significant cost increases and potentially undermine the CT sector. Given these risks it is important that all possible avenues are explored to avert such a situation.
- 18. This response provides some suggestions that may or may not be workable but it is important that all ideas generated by this consultation exercise are examined. When it appears that rigid adherence to legal requirements is destined to result in less favourable outcomes especially for vulnerable and isolated individuals it is imperative either to find acceptable ways of complying or to press for legislative review.

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