

SL(6)493 – The Procurement (Wales) Regulations 2024

Background and Purpose

The Procurement Act 2023 (“the Act”) repeals the current EU procurement regulations and lays out new rules and procedures for Welsh contracting authorities when selecting suppliers and awarding contracts with a value above and below certain thresholds. The Act will also provide for the UK to meet its international obligations on public procurement. The Act will regulate the procurement process and will have enhanced transparency requirements under a new noticing regime which will span the full lifecycle of procurement.

These Regulations provide additional detail and requirements which are necessary to ensure the functioning of the Act. The intention of the Regulations is to:

- specify the services which can be supplied under a light touch contract, including reservable light touch services;
- define “central government authority” and “works” for the purposes of the thresholds in Schedule 1 of the Act;
- set out rules on using the central digital platform and the Welsh digital platform for the publishing of procurement notices;
- provide for the form and content of various procurement-related notices and assessment summaries;
- make consequential provisions;
- deal with below threshold procurement; and
- disapply section 17 of the Act (preliminary market engagement notices) for private utilities.

Procedure

Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following eleven points are identified for reporting under Standing Order 21.2 in respect of this instrument.

- 1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements**

In regulations 1 and 2, the full title of the Procurement Act 2023 is used on each occasion when referring to that Act. However, it has been defined as “the 2023 Act” in regulation 3 for the whole set of Regulations. The defined term “the 2023 Act” should have been used when referring to the Procurement Act 2023 in regulations 1 and 2.

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 4, in the defined term “CA 2006”, in the English text, the corresponding language definition that appears in italics and brackets afterwards is incorrect. It states “Deddf 2006”, but “DC 2006” is the corresponding defined term that has been used in the Welsh text.

3. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 4, the term “significant control” has been defined for Part 2 of these Regulations. However, the term is only used in regulation 12. Therefore, it should have been included with the terms that are found in regulation 12(9) which have been defined for that regulation alone – see Writing Laws for Wales, paragraph 4.14(1).

4. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 12(17) uses the phrase “significant influence”, but this phrase is not defined for the purpose of the Regulations. Clarification is requested as to why the meaning of this phrase is not set out in the Regulations.

5. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 13(8) uses the phrase “concerted practice”, but this phrase is not defined for the purpose of the Regulations. Clarification is requested as to why the meaning of this phrase is not set out in the Regulations.

6. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 13(8)(a), there appears to be a conjunction missing between paragraphs (i) and (ii) to show the relationship between them and whether they are intended to operate cumulatively or as alternatives.

7. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 28(2)(e)(vi), the term “associated person” is defined in parentheses after the term is used in paragraph (vi). In legislation, words in parentheses are usually inert material to aid the reader. Therefore, it is incorrect to include operative material such as this definition within parentheses. It should have been included in a separate interpretation provision in regulation

28 as has been done for the definitions of “ceased lot information” and “secured information” in paragraphs (3) and (5) of this regulation. In addition, it is not necessary to include the corresponding Welsh definition in italics and brackets afterwards as there is only a single definition rather than a list of several definitions.

We also note regulation 41(3), which does not appear to consist of operative material yet is included in the Regulations as a standalone paragraph. This information should have been included in a footnote.

8. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 46(2), there is a difference between the English and Welsh text. In the new words that replace the existing text it states, “an estimated value equal to or greater than £2,000,000” but the meaning of the Welsh text is “an estimated value of, or greater than, £2,000,000”. Therefore, there is no word that corresponds to “equal to” in the Welsh text.

9. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 46(3)(b) and (c), there is a difference between the English and Welsh text. In the English text, the corresponding language definitions are included in italics and brackets when identifying the definition for amendment. But in the Welsh text, the corresponding language definitions are not included in italics and brackets when identifying the definition for amendment.

In this regard, the Welsh text is following the usual pattern found in the Welsh SIs where the corresponding language definition is not usually noted as well when identifying a definition for amendment.

The same difference between the English and Welsh text occurs in regulation 49 where the English text has included the corresponding language definition when identifying the definition for amendment, unlike the Welsh text.

10. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

In Schedule 2 to the Regulations, the final “related body” to the Welsh Ministers in the table refers to “Welsh NHS Bodies”. This is preceded by an entry which refers to the Welsh National Health Service Trusts and Local Health Boards”. “Welsh NHS Bodies” is not defined and no information is provided as to how they are distinct from the preceding entry. Further explanation would be welcomed in this regard as to what constitutes a Welsh NHS Body for the purpose of Schedule 2.

11. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In the list of central government bodies set out in Schedule 2 to the Regulations, reference is made to the National Assembly for Wales Commission. The Senedd and Elections (Wales) Act 2020 amended section 27 of the Government of Wales Act 2006, so that this Commission is now known as the Senedd Commission. Similarly, reference is made to the Care Council for Wales. Under section 67 of the Regulation and Inspection of Social Care (Wales) Act 2016, this Council is now known as Social Care Wales.

Merits Scrutiny

The following two points are identified for reporting under Standing Order 21.3 in respect of this instrument.

12. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

The majority of the Regulations come into force at the same time that section 11 of the Act comes into force. Section 11 of the Act comes into force on such date as a Minister of the Crown shall appoint. The Explanatory Memorandum notes that this approach:

mirrors the approach adopted by the UK Government (UKG) and will avoid any potential risk around a lack of legal certainty associated with coming into force on different dates of these and the equivalent English regulations.

Further information is requested as to whether any discussions have taken place with the UK Government regarding when section 11 of the Act will be brought into force.

13. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note that Schedule 1 to the Regulations specifies various health services as light touch services.

We would be grateful if the Welsh Government could clarify how the specifying of those services will interact with regulations made in relation to the procurement of health services under the Health Service Procurement (Wales) Act 2024.

Welsh Government response

Technical Scrutiny point 1: The Government notes the reporting point but believes that this does not materially affect the operation of the provisions, and in each instance precedes the definition of “the 2023 Act”.

Technical Scrutiny point 2: The Government agrees with the point raised and we will amend this via a statutory instrument that is intended to be made in the Autumn ahead of this regulation coming into force.

Technical Scrutiny point 3: The Government notes the reporting point but does not believe this materially affects the operation of the regulations.

Technical Scrutiny point 4 and 5: The Government notes the reporting points, however these were a deliberate drafting and policy decision. Attempting to define these terms may have the effect of inadvertently narrowing their scope. Also, this would be a variation with the equivalent provision in the Procurement Regulations 2024 and potentially create issues as to legal certainty between England and Wales.

Technical Scrutiny point 6: The Government notes the reporting point and whilst we think the intended meaning is clear here, we will look to amend this by adding 'or' via a statutory instrument that is intended to be made in the Autumn ahead of this regulation coming into force, this amendment will be included in that instrument.

Technical Scrutiny point 7: The Government agrees with the reporting point on regulation 28(2)(e)(vi), we will look to amend this via a further statutory instrument intended to be made in the Autumn ahead of this regulation coming into force.

Regulation 41(3) signposts the reader to the provision which requires contracting authorities to publish contracts as modified or modifications in certain cases.

Technical Scrutiny point 8: The Government notes the reporting point but we believe that the Welsh text can remain as it is. The existing translation reads "that is a works contract with an estimated value of £2,000,000 or more", this is unambiguous. We would argue that adding "sy'n hafal i" ("is equal to") would not make the meaning any more or any less clear.

Technical Scrutiny point 9: The Government agrees the reporting point in respect of regulation 46(3)(b) and (c) and regulation 49, we will look to amend this via a further statutory instrument intended to be made in the Autumn ahead of these regulations coming into force and these amendments will be included within that instrument.

Technical Scrutiny point 10: The Government notes the reporting point. We are aware that some of the references to organisations are not current and were advised by UK Government (UKG) that names could not be changed. However, as successor bodies were covered, we adopted a similar approach to previous regulations. UKG have changed this advice and therefore, if UKG decide to amend their list to reflect machinery of government changes, Welsh Government officials will look to amend these discrepancies in future regulations. This would then also provide the opportunity to consider changes required as Higher Education Funding Council Wales (HEFCW) will cease to exist in the summer and be replaced by the Commission for Tertiary Education and Research.

Technical Scrutiny point 11: The Government notes the reporting point. Please see the response to reporting point 10. Please also note the effect of regulation 44(2).

Merits Scrutiny point 12: The Government notes the reporting point, officials have been in dialogue with their counterparts in the UKG. Given the scale of changes to the procurement regimes in both England and Wales, including:

- the need for legal certainty,
- the need to ensure that stakeholders have ample time to familiarise themselves with the new legislation, and accompanying materials and training,
- the need to ensure a level playing field for buyers and suppliers on both sides of the border,

it is intended that section 11 will be brought into force on the 28 October. This has been confirmed in [The Procurement Act 2023 \(Commencement No. 3 and Transitional and Saving Provisions\) Regulations 2024](#), which were made on 22 May 2024.

Merits Scrutiny point 13: The Government notes the reporting point, and there may be procurement of health services which do not fall within the definition of regulated health service procurement, most likely because the contracting authority is not a relevant authority within the meaning given by section 10A of the National Health Service (Wales) Act 2006.

The proposed regulations for the new health services procurement regime will only regulate certain bodies (i.e. those defined in the regulations as “relevant authorities”). Other contracting authorities will still be regulated by the Procurement Act when buying such health services. The list included at Schedule 1 therefore provides a list of all relevant light touch services covered by the Procurement Act, whereas the health services procurement regulations will contain a shorter list of health services that will only be in scope of the proposed regulations (and consequently disappplied from the scope of the Procurement Act) when certain criteria are met.

Committee Consideration

The Committee considered the instrument and Welsh Government response at its meeting on 24 June 2024 and reports to the Senedd in line with the reporting points above.