

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

A Welsh Government response is required to each of the reporting points.

Legal Advisers

Legislation, Justice and Constitution Committee

18 June 2024