

Rebecca Evans MS
Cabinet Secretary for Finance, Constitution and Cabinet Office

24 June 2024

Dear Rebecca

The Procurement (Wales) Regulations 2024

At our meeting today, on Monday 24 June 2024, we considered the draft Procurement (Wales) Regulations 2024, and the Welsh Government response to the points raised in our draft report. Our final report has now been laid before the Senedd.

The Committee agreed to write to you with some urgency in advance of the scheduled debate on the draft Regulations to seek clarification from you regarding the response we have received.

When we considered the legislative consent memoranda for the Procurement Bill, a previous Chair of the Committee wrote to you jointly with the Chair of the Public Accounts and Public Administration Committee, in your previous capacity as Minister for Finance and Local Government. In a letter of response on 1 September 2022 you stated:

"My officials are currently developing a project plan which will inform the approach to the development and implementation of the secondary legislation in Wales. Officials will continue to work closely with UK government on the development of the secondary legislation to ensure consistency and coherence in the implementation of the provisions of the Bill, where appropriate. A pragmatic approach will be adopted to ensure that the Bill meets the requirements of Welsh Contracting Authorities and suppliers."

It should be acknowledged and welcomed that the Welsh Government is taking responsibility for making its own regulations for Wales under the *Procurement Act 2023*. Broadly, however, we have some concern that it would appear the Welsh Government has deferred to, and is acting in

accordance with, advice and direction from the UK Government when exercising powers in the *Procurement Act 2023* even though the Welsh Government is aware there are issues with that advice.

Our technical reporting points 10 and 11 state:

"10. 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. 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."

In response, we have been told:

*"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. **(Emphasis added.)***

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

We are unclear as to the appropriateness of what appears to be the UK Government giving direction to the Welsh Ministers on what they may or may not make provision for in a Welsh-made statutory instrument. We would welcome confirmation of our understanding that the Welsh Government has agreed to wait to see if the UK Government decides to correct known issues in the Procurement Regulations 2024 before you then take action to make changes to the regulations you are making.

We also ask that you share with us the advice provided by UK Government on these matters, particularly in relation to the name of the Senedd Commission.

In addition, we do not consider that the issues we have raised in reporting point 10 have been satisfactorily addressed and we would welcome the further explanation requested in our report as to the distinction between “Welsh National Health Service Trusts and Local Health Boards” and “Welsh NHS Bodies”.

We would also welcome further clarity as regards our technical reporting points 4 and 5, which state:

"4. 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. 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."

In response, we have been told:

"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."

Again, we would welcome further detail and clarity as to involvement the Welsh Government had in the drafting adopted by the UK Government in its Procurement Regulations 2024 and whether the Welsh Government agrees with that approach, given the comments in the response to our reporting points that these were “deliberate drafting and policy decision[s]”. Please can you also further explain what you mean by “inadvertently narrowing their scope” and clarify how “significant” will be determined given that its assessment may be subjective.

We would welcome a full and detailed written response to the matters raised above as soon as possible. If you are unable to provide clarity in writing by 12 noon on Friday 28 June, we hope you will address these matters during your contribution to the Plenary debate on the Regulations, which we understand will take place on Tuesday 2 July. Once received, we will consider your detailed written response at our next available Committee meeting.

Finally, we note that to address four problematic matters we have identified as part of our scrutiny (see reporting points 2, 6, 7, and 9) you intend on using a further statutory instrument to be made in the Autumn to correct the errors we have identified. While you have clarified the Welsh Government’s intent to resolve these issues, it appears that the Senedd will nonetheless be asked to approve known

defective legislation, and you will appreciate that this is a serious matter. We trust that you will also make this clear to Members of the Senedd during the debate. As per the practice the Welsh Government has agreed to adopt to improve the transparency and accessibility of the making of subordinate legislation, we welcome the fact that reference to these Regulations and our consideration of them will be referenced in the Explanatory Memorandum to this future statutory instrument.

Yours sincerely,

A handwritten signature in black ink that reads "Mike Hedges". The signature is written in a cursive style and is underlined with a single horizontal line.

Mike Hedges

Chair