

EU procurement rules for the public sector in Wales

Consultation Response:
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1. Introduction.

This paper has been produced as a response to the National Assembly's Enterprise and Business Committee's consultation on EU procurement rules for the public sector in Wales. I wish to focus less on EU rules themselves and more on how they have been interpreted and implemented within Wales. Clearly it is not possible to ignore EU requirements, but factors like an effective dialogue with Welsh suppliers, and a strong commitment to nurture a more robust supplier base, require localised action within this wider framework.

The paper has taken particular note of the Committee's interest in matters like

- i. The involvement of more small and medium-sized enterprises (SMEs), including social enterprises, in public procurement;
- The use of public procurement to advance other policy objectives, such as social and environmental policies;
- Complexity and flexibility within the public procurement system.¹

The views expressed are my own, and no links to any other individual or organisation should be assumed or inferred. I also appreciate that there are various initiatives to address some of the points I make, and do apologise if any points have been overtaken by recent events.

My comments have been made on the basis of a number of research projects addressing procurement or supply chain topics carried out for various clients², and experience as a director of a Welsh SME where, over a period of time, the 'hit rate' of tenders winning business from the Welsh Public Sector decreased from around 1:3 to around 1:10 – with a serious impact on business margins. This was one reason why the business closed in 2010 and highly skilled and highly paid jobs were lost to Wales.

I also recognise many circumstances where current procurement arrangements work well, the importance of a range of Value Wales initiatives (notably to improve procurement officers'

¹ From <http://www.assemblywales.org/newhome/new-news-fourth-assembly.htm?act=dis&id=222315&ds=9/2011>

² E.g. 'Evaluation of Local Supplier Development Programme' for Welsh Government; 'Community Benefits Pathfinder Review' for Value Wales

skills and ‘open doors’ for SMEs) and the capability and commitment of staff in Value Wales and elsewhere. In my view, however, performance is uneven and there are several areas where it should be a good deal better.

2. Current Arrangements

Care is needed when commenting on a ‘Welsh approach to procurement’ because, in practice, arrangements vary, as do the results and unintended consequences they achieve. As a broad generalisation, we can summarise current procurement exercises as comprising:

- A ‘need’ for externally-supplied goods or services being identified within a public sector organisation (‘the client’). Client staff work with in-house procurement specialists to develop a specification for what is required, normally in the form of an ITT, ITQ or EOI³ request.
- The specification is published (notably through Sell2Wales). In principle, any individual or organisation within the EU can respond. If queries are raised, both questions and relevant responses are circulated to all potential bidders to avoid information becoming available to some bidders only
- ‘Bidders’ provide written responses to the specification in the form required; there may be more than one step, notably if the use of EOIs reduces the number of ITQs issued
- Clients make procurement decisions based on written submissions (perhaps augmented with interviews), scored against criteria agreed as part of the specification

A key feature is the active promotion of extensive, open competition. This is so widely embedded it is easy to take for granted assertions and expectations that “*Healthy competition ... ensures (or at least increases the likelihood of) efficiency, fairness and innovation...⁴*” or “*Competition avoids any suggestion of favouritism, discourages monopolies and demonstrates that value for money has been sought⁵.*”

Other procurement models with higher levels of collaboration are available, however⁶; equally, public sector bodies are expected to work with each other using quite different assumptions which include the view that “*the best outcomes in Wales will be delivered through collaboration and co-ordination, not competition. This fits with the nature of Wales as a small country and the people of Wales’s strong sense of ownership of their public services*”⁷.

Some of these wider views are reflected in formal Welsh Government policies like those in Box 1:

³ Invitation to Tender; Invitation to Quote; Expression of Interest

⁴ http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/cave/publications/compet_procure.pdf

⁵ <http://www.cps.gov.uk/publications/finance/procuremansguide.html#a8>

⁶ See, e.g. ‘The Machine That Changed the World’ Womack, Roos, Jones; Free Press, New York, 23007 edition in relation to Toyota’s supply chain

⁷ ‘Making the Connections Consultation Document’ Welsh Assembly Government 2004

Box 1: Extracts from ‘Welsh Government Procurement Policies’⁸

‘In carrying out procurement activity Welsh Government will:

- Look for the best overall outcomes from our procurement activities ...
- Define 'value for money' as ' the optimum combination of whole-life costs and quality to meet the user's requirement' and thereby use appropriate criteria to consider value for money in the widest sense.
- Conduct our procurement activity in an ethical, fair and transparent manner....
- Uphold the Welsh Government's principles of equality and diversity in all aspects of its operation, and we expect our suppliers and contractors to adopt a similar approach to this issue.
- Continue to embrace all the principles in the 'Opening Doors' the Charter for Small and Medium sized Enterprises (SME's) and therefore:
- Consider the potential impact of procurement strategies ... identify and remove barriers to business with SMEs...providing useful tender de-briefing to help suppliers improve; ensure our processes create a level playing field for all suppliers'; make it easier for suppliers to talk to us, including publishing guidance, providing briefings and contact information; where appropriate packaging large contracts into separate elements or using regional lots, or encouraging larger first tier suppliers to provide opportunities for SMEs to deliver elements of our contracts'; becoming more familiar with Small and Medium Sized Enterprises in Wales (SMEs) and the services provided;
- Embrace Sustainable Development principles to influence all aspects of procurement to ensure that environmental, social and economic factors are considered within the framework of value for money, and to encourage all our suppliers to adopt a similar approach.....
- Work in partnership with the business community, developing good channels of communication to improve our understanding of the market and managing our contracts effectively.

Aligning with widely accepted theories and good practice, this all seems thorough, thoughtful and relevant, so can any problems still arise with public sector procurement in Wales?

I am going to suggest that areas for concern certainly **can and do** arise; they can be both substantial and important but they are **not** general, nor the result of incompetence or malice. They arise in some sectors and some contracts rather than others – perhaps because of particular characteristics of the ‘Welsh model’, perhaps because some of the policies in Box 1 have not been implemented appropriately, and sometimes because of the law of unintended consequences.

⁸ Extracted from:

<http://wales.gov.uk/topics/improvingservices/bettervfm/wob/wagpolicy/?jsessionid=LjFdTQXRhdrXV67sjCf3GSyttvN2QQ6Q22jkLn6tKnphvR4hFyd!-1666378451?lang=en>

3. Areas for concern.

In those areas where concerns arise (for example professional services) I believe six important areas need to be addressed.

i) Inadequate levels of information sharing between clients and suppliers

Despite points made in Box 1, I find it difficult to think of routes through which a genuine dialogue between Welsh suppliers and the Welsh public sector can take place. Consultations, briefings and ‘Meet the Buyer’ events are fine, but they do not constitute partnership nor engagement, leading to sub-optimal outcomes for both clients and suppliers.

When suppliers become **actively** involved with work to develop elements of policies, programmes and tender specifications, they can contribute ideas about what they have seen working elsewhere, and what may be the most cost-effective solutions. In turn, they can start to build up a clearer understanding of the context for particular procurement exercises, including political and policy-orientated factors, which may enhance their chances of winning future tender competitions.

With relationship-building largely precluded by current arrangements, there are few obvious routes through which the Welsh public sector can build an understanding of supplier operations and priorities, and Welsh public servants may inadvertently put barriers in tenders because they don’t know how suppliers operate and think. At least until recently, the Audit Commission, DWP and others had regular discussions with suppliers predicated by ‘we want this relationship to work for suppliers too – what can we do to help?’ On a personal level, I have been invited to take part in several policy review and development exercises with Whitehall departments and in other parts of the UK, not in Wales. The (Welsh) company I used to work for had periodic secondments, ‘getting to know you’ visits, and other forms of genuine dialogue with Whitehall Departments and others – not from Wales.

ii) Inadequate attention to developing a Welsh supplier base.

There is plenty of evidence that the Welsh Government **aspires** to help Welsh suppliers win more of its business, much less evidence of definite, targeted commitments to make this happen.

If this really is an important policy objective, who is responsible for its delivery? To whom are they answerable if results fail to appear? What are the targets?

If there really is an interest in developing a stronger Welsh supplier base, it is difficult to identify any serious thinking about some key details: is the Welsh public sector willing to support the emergence of relatively small numbers of relatively large suppliers in key areas – construction, say, or employment support, or IT services? They could have the

best chance of developing ‘exportable’ capabilities which would win business outside Wales, but might develop a degree of ‘market power’. Evidence so far seems to suggest a preference for smaller units, maintaining high levels of competition, with no one organisation winning large volumes of business. But implications could include lost opportunities to build up ‘critical mass’ levels of expertise – potentially a valuable resource for the Welsh public sector to draw on, and a source of additional Welsh jobs.

There have been initiatives to improve this position for some time⁹ – but overall results have been disappointing. Indeed the position may be worse than currently admitted, for there must be some scepticism about data about the levels of business currently won by Welsh suppliers – understood to be based on the address to which payments are sent, rather than any assessment of where key employment and investments are located.

Direct discrimination in favour of local suppliers is clearly illegal, unlikely to deliver cost-effective solutions nor generate the innovation and drive needed if Welsh suppliers are to win business elsewhere. Simply assuming that this is a generic business development issue, to be handed to business support agencies so that procurement staff can ignore any responsibility, throws away a key opportunity to help suppliers identify and win business through careful and forward-looking feedback, joint sharing of plans, and wider nurturing and encouragement.

iii) Suppliers have to write large numbers of tenders to win business from the Welsh public sector.

Apparently, some entries on Sell2Wales are attracting 50 or more responses. Assessing them all must represent a considerable client resource, which could be used more productively elsewhere. From a supplier perspective, however, this ‘lottery’ simply wastes large volumes of resources and discourages SMEs from submitting tenders at all.

From the perspective of Welsh supplier development, having to submit very large numbers of tenders to win any business reduces opportunities for developing expertise in particular topics – which might help suppliers win non-Welsh business later, and potentially reduce prices to the Welsh public sector.

iv) Programmes to help suppliers win more Welsh public sector business may not be improving matters.

The problems suppliers can face with when seeking to win orders from the Welsh public sector have been recognised by the Welsh Government and others, and various support measures put in place to help SMEs in particular overcome these problems.

It may be said that if – even if large numbers of responses are inevitable - provided Welsh suppliers are helped to increase their tender-writing skills (e.g. through Bangor

⁹ e.g. ‘Source Wales’

University's 'Wining in Tendering' Programme) they will improve their individual 'hit rates;' if response-writing is made simpler (e.g. through Value Wales' SQUID initiative) the level of resources both suppliers and clients need to commit will be reduced; and if suppliers are alerted to likely future requirements (e.g. through Meet the Buyer events) they can start planning to offer 'winning' solutions.

Unfortunately, there are various counter arguments. First, the fundamental fact of there being only one winner remains: if 50 responses are received, there can still be only one winner and 49 will represent wasted resources. If public sector initiatives have encouraged better standards of submission generally, suppliers will respond by seeking yet further ways of differentiating their offer, stressing (perhaps over-stressing) their strengths and minimising evidence of weakness. Little is achieved in terms of supplier development, or longer-term improvements to the supplier base. Similarly considerable efforts are still going to be required if clients are to consider seriously large numbers of responses.

v) There can be doubts that current arrangements really do achieve appropriate value for money.

Supplier responses to support measures described in iv) are an example of more general 'gaming' behaviour – suppliers will look at the 'rules' for winning specific procurement exercises and adopt the strategy which seems to maximise their chances of being successful. With all buyer attention focused on specific current bids there is little scope for considering previous work or reputation; no systems for recording poor work and taking it into account. The best business model for suppliers is probably 'write the killer tender and hang on' and – with more attention going into business winning rather than delivery - value for money can be impaired through poorer quality delivery than should be the case.

Further, whilst in the short-term more competition may reduce prices paid, if potential suppliers are driven from the market altogether, this may not be true over the longer-term, and if these firms are Welsh, there are going to be implications for wider employment and sustainability aspirations. For personal needs (hiring a builder, choosing a hairdresser) I think few people would go down that route; again, various non-Welsh buyers have a broader approach.

vi) Welsh arrangements make it relatively easy for non-Welsh firms to win Welsh business; it's much harder for Welsh organisations to win non-Welsh tenders.

This point is easy to dismiss as 'they would say that, wouldn't they' but it does have to be said that Sell2Wales makes the Welsh market more transparent than others.

Clearly, discrimination against non-local suppliers is both illegal and inappropriate in terms of getting the best value-for-money for clients. Nevertheless tendering for non-Welsh business has provided me with feedback which includes ‘needed more evidence of an in-depth understanding of the Scottish context’ and ‘to meet periodic requirements for ad hoc meetings, we believe it necessary for key contractor staff to be based within half an hour’s drive of our offices (in the North East of England).

Welsh openness and generosity are commendable, but not always reciprocated.

4. Reasons for Uneven Procurement Performance.

I am going to suggest ways of improving matters in Section 5, but wish to avoid dangers of addressing just symptoms, not underlying causes. Briefly, I suggest current arrangements have characteristics at three levels which may, in some cases, lead to the sorts of issues raised in Section 3,

i. Inherent assumptions

I suggested earlier that current Welsh procurement arrangements are underpinned by a set of assumptions drawn essentially from classical economics, including the assumptions of perfect knowledge and perfect competition between large numbers of suppliers for any one requirement. I do not wish to suggest that the Welsh approach is always wrong, just that these underpinning assumptions are more valid in some circumstances than others. Key assumptions may be taken as including¹⁰:

- **Product/ service homogeneity** (i.e. probably better with diesel oil and rail tickets rather than accountancy services or graphic design)
- **Perfect knowledge** amongst potential buyers and suppliers (there is considerable evidence that many Welsh SMEs never identify appropriate tendering opportunities through S2W because of problems managing their S2W ‘profile,’ or have given up responding altogether because of the time wasted in unsuccessful tender-writing). Also assumes accuracy in information provided by suppliers, or at least the certainty of detection if inaccuracy is presented. (The current business model based on ‘writing the killer tender’ can lead to significant over-claiming, with few penalties).
- **Zero entry and exit barriers:** It seems to be assumed **that** potential benefits to clients from experience or specialist knowledge do not apply. No ‘practice’ or ‘learning’ effects apply, so denying opportunities for a contractor building up expertise in a particular area, so capable of delivering lower-cost solutions in the future from learning key ‘tricks of the trade’ or by utilising data captured in earlier assignments.
- **Zero transaction costs:** ignores the resources required to write (large numbers of) tenders in the Welsh model, and the erosion of margins this represents
- **No ‘externalities’** e.g. opportunities for making contributions towards other desired outcomes like WG aspirations for jobs, sustainability.

¹⁰ see, e.g. Microeconomic Theory: A Mathematical Approach’ Henderson & Quandt, McGraw Hill, New York

ii) Lack of resources.

Anyone who has worked on developing a tender specification, then scoring and judging responses knows it takes time and skill. Some of the concerns identified in section 3 (e.g. the need to address over-claiming and gaming behaviour by suppliers) are likely to be skirted around (at best) if key staff are under pressure to get tenders let as quickly as possible.

Clearly extra resources are very unlikely to be made available, so developing a 'smarter' system, and continuing with programmes to up-skill procurement staff seem essential.

iii) Leadership, Paradigms, Defaults

Section 3 suggests that a generalised wish to see Welsh organisations win more Welsh public sector business is clear, but that this seems not to have been translated into a detailed series of commitments, with quantified targets and allocated responsibilities. Equally, there is some doubt about 'what success might look like' in terms of a successful supplier base.

In this context, a relatively 'safe', perhaps overly rule-bound response from public sector officials is unsurprising.

5. What can be done?

This paper suggests the need for a range of changes, but not necessarily fundamental reform. Most of the issues are fairly subtle, and rely on behavior and attitude changes rather than yet more procedures. It may also be argued that there is little point in developing different approaches when planning the procurement of 'commodity' items (which is probably true) or that there is already a good deal of 'consultation' and 'briefing' (but **not** an effective dialogue; potential suppliers are **told** about things they are not expected to influence.)

I believe action is called for in four areas.

i) Despite points made in Box 1, there does seem to be a need for upgraded policy statements to include at least the following:

- The Welsh public sector must demonstrate the highest standards of transparency and probity in all procurement exercises and fully meet relevant EU directives.
- Notwithstanding this overarching commitment, the Welsh Government is committed to helping suppliers who are either based in Wales, or make a significant contribution to the Welsh economy win more business from the Welsh public sector.

- Over a period of time, the Welsh Government is committed to supporting the development of Welsh suppliers strong enough to win business outside Wales.
- Targets, responsibilities and reporting channels to be defined.

ii) It will be worth acting selectively, probably on a sectoral basis and leaving well alone areas where current arrangements work well (e.g. reasonable numbers of responses to specifications, acceptable proportions of business won by Welsh suppliers)

iii) Achieving practical change requires action at an operational level. In ‘targeted’ areas outside those identified in ii), after appropriate training and briefing, relevant public servants’ annual reviews should include two new questions:

1. What have you done to understand how Welsh suppliers do business so that procurement processes may allow them to win more contracts?
 - ‘Good’ answers: visits to suppliers; secondments; sitting in on tender writing
 - ‘OK’ answers: asking for genuine feedback, outside bodies sit as observers on panels
 - ‘Poor’ answers: instructed tenderers about what they are doing wrong; yet more guidance; yet more consultation.
2. What have you done to develop the supplier base in Wales to achieve a) lower costs and better service for the Assembly Government and b) community benefits?
 - ‘Good’ answers: amended specifications to reduce the number of tenders written (and monitored responses to demonstrate this has been achieved); joint planning/ plan sharing events with suppliers; visits to suppliers: discussions to assess ‘how can we help you do better?’
 - ‘OK’ answers: ‘meet the buyer;’ offer training, workshops; identify needs (e.g. prompt responses) which might legitimately require local suppliers
 - ‘Poor’ answers: yet more guidance; yet more consultation
 - ‘Wrong’ answers: discrimination in favour of Welsh suppliers