

Procurement Task and Finish Group

Meeting Venue: **Committee Room 1 - Senedd**

Meeting date: **Thursday, 2 February 2012**

Meeting time: **09:32 - 12:15**

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



Concise Minutes:

Assembly Members:

Julie James (Chair)
Eluned Parrott
David Rees
Leanne Wood

Witnesses:

Mark Roscrow, Assistant Director Procurement Services, NHS Wales Shared Services Partnership
Nic Cowley, Procurement Services, NHS Wales Shared Services
Vince Hanly, Service Director for Procurement, Rhondda Cynon Taf
Rob Jones, Procurement Manager, Welsh Purchasing Consortium
Paul Charkiw, Head of Efficiency and Procurement, Welsh Local Government Association
Sally Collier, Executive Director of Efficiency and Reform Group, Cabinet Office
Martin Leverington, Procurement Policy Advisor, Cabinet Office
Liz Lucas, Head of Procurement, Caerphilly County Borough Council

Committee Staff:

Lara Date (Clerk)
Sarah Bartlett (Deputy Clerk)

1. Introductions, apologies and substitutions

1.1 The Chair welcomed the Members. Apologies were received from Byron Davies, there were no substitutions.

2. Inquiry into Influencing the modernisation of EU Procurement

Policy: Evidence Session (09.30 - 10.15)

The Chair welcomed Mark Roscrow and Nic Cowley from the NHS Wales Shared Services Partnership.

NHS Wales said efforts to clarify and simplify the EU rules were helpful. The rules had become more complex and more about compliance than innovation and bringing in SME's.

The Remedies Directive has made it easier for companies to challenge outcomes and in the current economic climate they were now much more prepared to do this. Procurement staff felt an increasing need to invest in legal advice as a result. A number of challenges had been made in Wales in the past six months, but very few go to court. In Northern Ireland there had been a more significant impact in terms of legal cases. The Remedies Directive does not require providers to go to court, a form can be submitted which stops the procurement process in its tracks, which can have implications for clinical safety when procuring NHS goods and services. Some parts of the marketplace appear to be particularly litigious, e.g. pathology services. The approach to addressing this challenge is to challenge back, and only to roll back the process to where the problem started, before moving on with the process again. It is not clear whether all procurement officers take this approach, rather than going right back to the start of the procurement process as a result of legal challenge. The time taken to resolve issues can vary from one day to several weeks, depending on the complexity of the challenge. The proposal for creating an 'ombudsman' regulatory role was described as a 'bureaucratic nightmare waiting to happen' if suppliers could use it as a stalling tactic.

The importance of being an 'intelligent client' was discussed. It was critical to plan and manage the procurement process correctly and have the right procurement strategy in each case. Inadequate planning is more the issue than problems with the specification changing, although there could be problems where clinicians without procurement expertise get involved in the process. There can also be time pressure to spend funds coming available towards the end of the year without understanding the timescales involved in running a compliant procurement exercise.

Training and development on procurement rules must be constant to avoid procurement expertise becoming diluted due to staff turnover within contracting authorities. Sharing best practice is also very important but it should be on a case-by-case basis as what is right for the NHS may not be right elsewhere. There was concern that the people responsible for supporting SMEs and informing them about procurement rules are not employed in the procurement sector and may not have access to the most up-to-date information – there should be more interaction between practitioners on the ground and the civil servants and advisers tasked with giving advice and guidance to the SME sector.

Procurement procedures: - the competitive dialogue process is more complex and can take longer, but does give the opportunity of flexibility to ensure the requirement is met by bidders, for example it is often used as a default procedure for procurement of IT systems. The real issue with competitive dialogue (CD) and negotiation is the investment of time needed by SME's – there may be several rounds of discussion in procuring 'big ticket' items, but the restricted procedure is the one most often used.

Improving opportunities for SME's and making them more aware of the regulations: The tension between the relentless drive for efficiency savings and supporting economic benefit to the local economy was acknowledged. NHS Wales does have a mechanism to track the value of business going to Welsh SME's, but access by Welsh companies will depend on the market for a particular product or service. Work has been done with the Welsh Government on increasing awareness of Welsh SME's in areas such as food procurement for example.

Meeting social objectives through procurement: A lighter, more flexible set of procurement regulations with which to apply criteria such as sustainability, environmental and community benefits would be helpful. Sustainable Development measures around recycling, packaging, food miles are commonly built into NHS procurement planning and a weighting needs to be given to environmental issues within the procurement process (e.g. reducing the number of vans delivering to an NHS site by using consolidation stores). It was thought that the new regulations could give more flexibility, e.g. to allow a carbon footprint clause to be built into the evaluation criteria for contracts. Increasing e-Procurement practices, such as e-invoicing was important.

Benefits of the EU proposals:- The view of NHS Procurement specialists was that shorter timescales for procurement exercises would help them as a contracting authority because longer timescales add costs. The flexibility to aggregate demand to make financial savings, but also to be able to divide contracts into lots and support SMEs, as appropriate to the market in each case, was helpful.

The thresholds at which the EU rules apply were too low and it would be better if they were raised - £250,000 was suggested - and also unified as often it was difficult in NHS Procurement to differentiate between goods and services. It also does not make sense that the thresholds applying to the NHS and Local Authorities are different in the context of taking All-Wales collaborative procurement approach.

Standing Financial Instructions and regulations had been standardised across NHS Wales Local Health Boards and act as a good practice guide as to how to procure in each case and whether or not to apply the full EU rules to contracts below threshold

Procurement of services and removal of the distinction between Part A and Part B services:- in reality the full procurement rules and due process were usually applied to both types of services in NHS Procurement to ensure rigour and control of the process, although there were some 'grey areas' within procurement of health services where greater clarity would be better.

3. Inquiry into Influencing the modernisation of EU Procurement Policy: Evidence Session (10.15 - 11.00)

The Chair welcomed Vince Hanly the Service Director for Procurement at Rhondda Cynon Taf, Rob Jones the Procurement Manager at the Welsh Purchasing Consortium, Liz Lucas, Head of Procurement at Caerphilly County Borough Council and Paul Charkiw the Head of Efficiency and Procurement at the WLGA.

Although the EU proposals contained simplification measures, e.g. clarifying selection and award procedures and reducing process burdens, there were other aspects that could add tiers of bureaucracy, such as the oversight body proposal. It was recognised that procurement practice is not as advanced in some Member States as in the UK, and

the way rules are interpreted can differ, but it would be important to understand the implications of these oversight proposals for Wales – ‘the devil is in the detail’.

However the legislative proposals would give more flexibility to have dialogue with the supply base which is fundamental in getting more innovation into projects.

There is also a variety of maturity in procurement practice and approaches to risk management between the 22 local authorities in Wales, and it was important to create a level playing field. More guidance and the sharing of good practices across local authorities would be welcome, particularly guidance around the below-threshold procurement.

The witnesses advised the group on developments with standardising the contract Standing Orders on procurement rules within each local authority. They talked about a fit-for-purpose infrastructure in terms of e-procurement that is available to the market, local authorities and the Welsh public.

Witnesses discussed the different systems that are used for tendering and also noted issues with the Xchange Wales e-procurement programme. Uncertainty about the future of the programme was holding back progress in some local authorities. There was evidence of e-procurement being very successful in certain parts of the market in Wales, but the e-procurement strategy for Wales must be fit for purpose and SME's needed adequate support to implement it.

Use of social clauses:- this has increased over the last 12 months - the new road build in Church village was noted as a best practice example.

In general there is a risk averse culture in the UK and the Remedies Directive has made officers take a step back and be more risk averse. This Directive doesn't help develop procurement and doesn't promote innovation. In-house legal advice could tend to err on the side of caution, and a skills gap and/or lack of status of procurement professionals within the local authority could lean towards a more risk averse approach.

Lotting within contracts was welcomed. It suits local authorities in terms of working collaboratively. It was questionable whether the wording of the EU proposals on 'shared services' and 'inter-authority transactions' was supportive of the Welsh model of collaboration. The proposals refer to 'reciprocal rights and obligations', which might not be appropriate to Welsh local authorities of different sizes and with different resource bases working in partnership to administer services across the piece, rather than as a competitive exercise.

There was still a debate to be had within local government as to whether the proposals to remove the distinction between Part A and B services would be of any benefit to contracting authorities and suppliers. There was an argument for keeping social services in Part B because sometimes decisions on contracts for looked-after children are taken by the child, not necessarily the social workers, and cannot be taken on economic terms. There was scope to develop more guidance for local authorities on how to consistently interpret the current rules on Part B services.

Threshold levels:- Unifying the thresholds for different types of procurement to be subject to the full EU procurement rules would be helpful. There was scope to raise the thresholds for procurement of services, although it was stressed that this should not

lead to avoidance of advertising contracts below the thresholds, as there are many businesses in Wales who want local authority contracts below threshold. On the other hand the threshold for construction contracts (works) was considered too high, as a volume of refurbishment works in Wales fell below the current threshold.

4. Inquiry into Influencing the modernisation of EU Procurement Policy: Evidence Session (11.15 - 12.00 via video conference)

The Chair welcomed Sally Collier, the Executive Director of Efficiency and Reform Group, Cabinet Office and Martin Leverington, the Procurement Policy Advisor, Cabinet Office.

The Cabinet Office was generally in favour of the proposed legislative reforms but raised a few concerns. It was considered that the proposal for a single national oversight body was too prescriptive, bordering on assuming quasi-judicial powers. The group noted that evidence from Welsh stakeholders had raised concerns about it introducing an unnecessary layer of bureaucracy.

Level of compliance with the rules across the EU and risk aversion: - Formal investigation by the UK Government had shown that other EU countries do not break the rules more than the UK and the UK has a relatively low number of challenges in domestic courts and infractions, but there is a difference in how the letter of the rules is applied and the UK is certainly more risk-averse in its application and interpretation of the rules. The procurement reform programme underway in the UK is trying to address this issue.

Pre-procurement dialogue:- it was a myth that it was not possible to talk to industry before procurement commences. Pre-procurement dialogue is being encouraged to ensure UK firms know about possible procurement exercises that are up-coming, including publishing 'pipelines' in 31 sectors.

The proposal for a European procurement passport was sensible but the Cabinet Office is pleased that it is not a more far-reaching proposal than requesting provision of standard information.

The pre-qualification threshold questionnaire for below-threshold contracts has been abolished by central government, and that above the threshold it was moving to a presumption that procurement would use the open procedure.

The Cabinet Office was keen to see thresholds increase but this was not achievable because it was linked to the World Trade Organisation agreement and Government Agreement on Procurement. The review of thresholds every 3 years is proposed instead.

Cabinet Office noted concerns with the removal of the distinction between Part A and Part B services, and would like public procurement to be generally subject to a lighter regime.

In relation to the tension between aggregating for efficiency savings and improving SME access to the market, breaking contracts into lots was a welcome proposal. There was also evidence of smaller companies winning contracts in sectors where traditionally business had tended to go to larger companies. A central government travel management contract was cited as an example.

Reserved contracts:- Cabinet Office welcomed the flexibility in the draft directive to favour disadvantaged people, social integration issues, and protection of the environment, extending the old article 19 which is currently quite restrictive in its definition.

Proposals regarding restrictions on turnover requirements:- the Cabinet Office understood the European Commission's decision to specify this in the draft Directive to prevent disproportionate turnover requirements, but also argued that setting a figure 'in stone' could run the risk of the quoted maximum turning into the default position.

New proposed procurement procedures:- The new 'innovation partnership' procedure was welcomed as a big area of potential growth but the wording of this proposal needed to be clarified. Cabinet Office noted that like some other Member States the UK would have liked to have seen a single procedure, but understood that the Commission proposed to give flexibility to Member States on how many of the four proposed procedures are transposed. The UK Government had previously supported competitive dialogue but it had been misused and resulted in lengthy procurement processes. The UK Government did not now favour competitive dialogue and therefore now wanted to see some form of negotiation in the other procedures proposed by the European Commission. It was thought that the majority of Member States were pressing for the negotiated procedure to be opened further but it remained to be seen how negotiations would develop. The rules would require the transposition of the open and restricted procedures, but Member States could decide how many of the other procedures to transpose.